

STATE OF SOUTH CAROLINA
In the Court of Common Pleas
Fifteenth Judicial Circuit

APPEAL FROM HORRY COUNTY
Circuit Court

The Honorable Thomas W. Cooper, Jr.
Special Referee

Case No.: 2011-CP-26-00873

Appellate Case No.: 2018-001199

I.D. Jeram and Mayur Jeram..... Respondents

v.

Rajendra V. Patel, Bhupendra Patel, and Pankaj Patel Appellants,

INITIAL BRIEF OF APPELLANTS

Benjamin A. Baroody, SC Bar # 72533
BELLAMY, RUTENBERG, COPELAND
EPPS, GRAVELY & BOWERS, P.A.
Post Office Box 357
Myrtle Beach, South Carolina 29578-0357
843-448-2400
Attorneys for Appellants

RECEIVED

NOV 27 2018

SC Court of Appeals

Myrtle Beach, South Carolina

November 26, 2018

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL	1
1. Did the Special Referee err by holding that the five guarantors were all burdened with the same common, mutual \$2,707,250.00 debt obligation?	1
2. Did the Special Referee err by holding that the five guarantors each received the same common, mutual benefit as the result of the satisfaction of the Bayview Resort II, LLC debt?	1
3. Did the Special Referee err by holding that, as a result of the payment of the Garage Note, the Patels received the same benefit received by the Jerams?	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
STANDARD OF REVIEW	11
ARGUMENT	11
I. The Special Referee erred in holding that the five individual guarantors were each burdened with a common, mutual debt obligation.	11
A. The Special Referee erred by holding that the five guarantors jointly and severally guaranteed payment of the \$2,707,250.00 Garage Note.	14
i. The Garage Note	14
ii. The Unconditional Limited Guaranty Agreements	16
B. The Special Referee erred when he construed other language within the Unlimited Guaranty Agreements as a promise to be jointly and severally liable for the performance and payment of the entire Garage Note.	17
C. The Special Referee erred in holding that the Jerams were entitled to contribution from the Patels pursuant to the UCC for the same reason they are not entitled to contribution under the common law- because the Jerams and the Patels were never jointly and severally liable for the full performance and payment of the \$2,707,250.00 Garage Note.	19

II.	The Special Referee erred in holding that Jeram Tej, LLC's principle payments relieved each of the individual guarantors from a common, mutual debt.	20
A.	The Special Referee erred in holding that NBSC was not required to declare a default and demand payment from the guarantors before the Jerams would be permitted to demand contribution from the same guarantors.....	21
B.	The Special Referee erred in permitting the Jerams to seek contribution for a <i>pro rata</i> portion of the first six principle payments because they were mandatory, not gratuitous, payments.	23
C.	The Special Referee erred in holding that the payment of the first five of seven payments relieved the Patels from a burden because those payments were made prior to the maturity of the Garage Loan.....	25
D.	The Special Referee erred in holding that the Jerams, individually, were permitted to seek contribution for payments made by Jeram Tej, LLC.	27
E.	The Special Referee erred in calculating the parties' <i>pro rata</i> share of the debt actually paid on behalf of Bayview Resort II, LLC.	30
III.	The Special Referee erred by holding that, as a result of the payment of the Garage Note, the Patels received the same benefit received by the Jerams.	31
A.	The Special Referee erred by assessing the relative equities of the parties at the time the Jerams demanded contribution in October of 2010 instead of at the time they made the payments, between October of 2007 and April of 2008.	32
B.	The Jerams' demand for contribution from the Patels was an afterthought, made too late, and prejudiced the Patels.....	34
CONCLUSION		36

TABLE OF AUTHORITIES

CASES

<u>Citizens and Southern National Bank of South Carolina v. Lanford,</u> 313 S.C. 540, 544, 443 S.E.2d 549, 551 (1994)	21
<u>Lewis v. Lewis,</u> 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011)	13
<u>Nutt Corp. v. Howell Road, LLC,</u> 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011).....	13
<u>Pinckney v. Warren,</u> 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001)	13
<u>RIM Associates v. Blackwell,</u> 359 S.C. 170, 179, 597 S.E.2d 152, 157 (Ct. App. 2005).....	14
<u>Screven v. Joyner,</u> 1 Hill Eq 252, 10 S.C. Eq. 252 (1833).....	14
<u>Unison Ins. Co. V. Hertz Rental Corp.,</u> 436 SE 2d 182 (1993)	22

STATUTES

S.C. Code Ann. 26-3-116(b)	23
S.C. Code Ann. 36-3-116.....	23
S.C. Code Ann. 36-3-116(a)	23
S.C. Code Ann. 36-3-419(a)	30
S.C. Code Ann. 36-3-419(f).....	31

STATEMENT OF ISSUES ON APPEAL

1. Did the Special Referee err by holding that the five guarantors were all burdened with the same common, mutual \$2,707,250.00 debt obligation?
2. Did the Special Referee err by holding that the five guarantors each received the same common, mutual benefit as the result of the satisfaction of the Bayview Resort II, LLC debt?
3. Did the Special Referee err by holding that, as a result of the payment of the Garage Note, the Patels received the same benefit received by the Jerams?

STATEMENT OF THE CASE

This is an action for equitable contribution amongst personal guarantors of a \$2,707,250.00 Promissory Note made by Bayview Resort II, LLC. Appellants and Respondents each signed separate limited liability agreements, guarantying payment of the Note up to \$812,175.00 each. Respondents' company, a third party, paid the Note in full. Respondents brought this action seeking contribution from Appellants for their *pro rata* share of the debt their company paid. At trial, the Special Referee ruled in favor of Respondents and entered three judgments against the Respondents in the amount of \$545,893.18 each. This appeal followed.

On January 28, 2011, two of those guarantors, I.D. Jeram and Mayur Jeram (collectively "the Jerams"), commenced this action against the remaining three guarantors, Rajendra V. Patel, Bhupendra Patel, and Pankaj Patel (collectively "the Patels"), in the Horry County Court of Common Pleas. The Jerams' Complaint sought one cause of action for equitable contribution.

On April 15, 2011, the Patels filed their answer denying the material allegations in the Complaint and asserting defenses of Statute of Frauds, No Agreement, the Operating Agreement of Bayview Resort II, LLC, Waiver and Estoppel, Unclean Hands, Statute of Limitations, Laches,

Impossibility of Performance, Impracticability of Performance, Assumption of the Risk, and a Motion to Dismiss on the ground that the Patels' entity, BPR Properties, LLC was the proper party defendant. The Patels also filed a Counter-claim for Equitable Estoppel/Indemnification/ and Set-Off.

On July 14, 2011, the Patels filed an Amended Answer, Counterclaim, and Third Party Complaint, naming C&P Partnership, LLC as a third-party defendant. On August 12, 2011, the Jerams filed their Reply to the Patels' Amended Answer and Counterclaims, denying the material allegations therein. On September 9, 2011, C&P Partnership, Inc. filed its Answer to the Patels' Third Party Complaint, denying the material allegations therein. On December 19, 2012, this case was referred to the Honorable Thomas W. Cooper, Special Referee, for handling.

On February 20 and 21, 2013, this case was tried before the Special Referee. In addition to the testimony presented, forty-one (41) documentary exhibits were admitted into the record. On February 25, 2013, Defendant C&P Partnership, Inc. was dismissed by Consent Order. On April 12, 2013, the parties submitted a joint motion to supplement the record at the request of the trial court, answering three specific questions posed by the court, which became a part of the trial record. On the same date, the Jerams and the Patels each submitted a Memorandum of Law in support of their respective claims and counterclaims.

On August 5, 2014, the Special Referee entered a final order on the merits of the case, holding, in sum, that the Jerams were entitled to the equitable contribution from the Patels and denying the relief sought in the Patels' counterclaims against the Jerams. On August 18, 2014, the Patels timely filed their Motion for Reconsideration. On September 23, 2014, the Jerams submitted their Response to Defendants' Motion for Reconsideration. On September 30, 2014,

the trial court held a hearing on the Patels' Motion for Reconsideration. On May 30, 2018, the trial court entered its order denying the Patels' Motion for Reconsideration.

On June 27, 2018, the Patels timely filed their Notice of Appeal of the Special Referee's final order and order denying their Motion for Reconsideration.

STATEMENT OF FACTS

I. Background

I.D. Jeram and Mayur Jeram are the owners and managers of hotels in the Myrtle Beach and Florence areas. (Trial Transcript p. 26). In the 2004 to 2005 timeframe, in the midst of a strong real estate market in Myrtle Beach, the Jerams decided to develop a condominium project on property they owned on the oceanfront in Myrtle Beach. (Trial Transcript pp. 26-27).

To this end, the Jerams organized Jeram Tej, LLC to develop the Bayview Resort, with each Jeram owning a 50% interest therein. (Trial Transcript p. 27). Mayur Jeram was the manager of Jeram Tej, LLC. (Trial Transcript p. 105). After obtaining a construction loan to build the Bayview Resort, the Jerams became interested in developing a second phase on adjacent land. (Trial Transcript pp. 27-28). At this time, the Jerams did not know the Patels. (Trial Transcript p. 28). Prior to meeting the Patels, the Jerams had already found the land for the project, negotiated the price to purchase the land, and met with their lender, NBSC, about a loan to acquire the land and develop a second Phase. (Trial Transcript pp. 30-31, 53-54). However, the Jerams were unable to develop a second phase of the Bayview Resort on their own, so they sought investors to provide additional capital and credit to assist in doing so. (Trial Transcript p. 73-74). Bhupi Patel, a developer of oceanfront condominium projects in the area, then introduced the Jerams to the Patels. (Trial Transcript pp. 28-30). The Patels, similarly, were hoteliers who had been partners

with one another in various hotel projects since the 1980s. (Trial Transcript pp. 49-50, 115-116, 146-147).

Bhupi Patel introduced the Jerams to the Patels in Myrtle Beach. The Jerams showed the Patels renderings of the second phase tower. (Trial Transcript p. 58). The Jerams represented to the Patels that they had pre-sold condominium units at the Bayview Resort, would use the same sales and marketing team to pre-sell units for a second phase, and that the demand for a second phase was present. (Trial Transcript pp. 55-57). The Jerams represented to the Patels they anticipated pre-selling units within a very short amount of time, after which they would qualify for a construction loan to build the second phase tower and additional parking garage. (Trial Transcript pp. 58-59). The Jerams represented that their existing sales team had made substantial efforts to secure pre-sale contracts for condominiums. (Trial Transcript pp. 141-142). Based on this information, the Patels were ready to invest in the project and accompanied the Jerams to NBSC to negotiate the terms of financing. (Trial Transcript p. 58).

II. Organization of Bayview Resort II, LLC

Bayview Resort II, LLC was organized on November 22, 2005 with the South Carolina Secretary of State. (Trial Exhibit 1). On January 16, 2006, the Operating Agreement of Bayview Resort II, LLC was executed by its members: BPR Properties, LLC (33.33%), I.D. Jeram (16.67%), Mayur Jeram (16.67%), and C&P Partnership, LLC (33.33%). (Trial Transcript p. 33; Operating Agreement- Exhibit 2). BPR Properties, LLC was the company through which the Patels had managed various hotel projects since 1987 and was comprised of the three Respondents in equal shares. (Trial Transcript p. 33, 115-116). C&P Partnership, LLC was comprised of two members- Bhupi Patel and his brother, Perdeep Patel. (Trial Transcript p. 34). At the time of the organization of Bayview Resort II, LLC, construction of the Bayview Resort (Phase I) was

ongoing. (Trial Transcript pp. 71-72). In addition to managing Phase I, Mayur Jeram was also the manager of Bayview Resort II, LLC. (Trial Transcript p. 34). The Jerams understood that BPR Properties, LLC was to be a passive investor, for its members resided in North Carolina and Georgia and maintained no experience in the development of condominium projects. (Trial Transcript p. 74, 51). Mr. Jeram testified that the Patels had a right to rely upon him and his father to develop the project. (Trial Transcript p. 75).

Each of the four members- I.D. Jeram, Mayur Jeram, C&P Partnership, LLC, and BPR Properties, LLC made initial contributions to Bayview Resort II, LLC in proportion to their membership interest held. (Trial Transcript pp. 34-35). On or about January 16, 2006, Bayview Resort II, LLC purchased the land upon which the second phase tower and parking garage would be constructed for \$14,500,000.00. (Trial Transcript p. 60). Bayview Resort II, LLC borrowed \$11,452,000.00 from NBSC to fund the acquisition of the two adjacent parcels. (Trial Transcript pp. 37, 38, 60). The balance of the purchase price, approximately \$3,000,000.00, was funded in equal shares by each membership group. (Trial Transcript p. 60).

Bayview Resort II, LLC planned to pre-sell a sufficient number of condominium units to be used as collateral for a construction loan to build the tower and parking garage. (Trial Transcript pp. 38-39). After acquiring the land, however, Mayur Jeram testified they had not yet undertaken to pre-sell condominium units. (Trial Transcript p. 40). In fact, Mr. Jeram testified he did not recall meeting with their real estate agent or entering into an agreement with a real estate agent to pre-sell condominium units for Bayview Resort II, LLC. (Trial Transcript pp. 39-40). Moreover, Mr. Jeram testified he could not recall discussing the need for pre-sale contracts despite knowing that they would be required in order to obtain a construction loan to develop the second phase. (Trial Transcript p. 41). In fact, Mayur Jeram testified that Bayview Resort II, LLC never entered

into a listing agreement with a sales and marketing agency to pre-sell condominium units, nor did it ever pre-sell any units. (Trial Transcript pp .72-73).

III. The Garage Addition

In the next five months, the Jerams informed the Patels that it would be a better idea to add levels to the existing parking garage under construction for the first phase of the Bayview Resort in lieu of building a second parking garage in order to save between \$500,000.00 and \$1,000,000.00 in construction costs for the anticipated second phase. (Trial Transcript pp. 43, 79, 61). BPR Properties, LLC initially objected to the idea on the ground no condominiums had been pre-sold, but ultimately went along with the deal as a minority, silent partner. (Trial Transcript p. 61).

The members of Bayview Resort II, LLC agreed to the concept and agreed to build the addition to the garage for approximately \$4.1 million, of which the members would contribute \$1.4 million in cash capital contributions and the balance through construction financing. (Trial Transcript pp. 45-46). On June 20, 2006, Bayview Resort II, LLC borrowed \$2,707,250.00 from NBSC to construct an addition to the existing Bayview Resort parking garage. (Trial Transcript pp. 41-42, Trial Exhibit 10). Bayview Resort II, LLC signed a promissory note in the amount of \$2,707,250.00. (Trial Exhibit 10). The initial maturity date was January 15, 2007, but it was subsequently renewed and extended until January of 2008. (Trial Transcript p. 91).

As additional security for the loan, NBSC required I.D. Jeram, Mayur Jeram, Bhupendra Patel, Pankaj Patel, and Rajendra V. Patel to each sign a separate Unconditional Limited Guaranty Agreement guarantying NBSC payment up to \$812,175.00 each in the event of Bayview Resort II, LLC's default. (Trial Exhibit 10). Since Bayview Resort II, LLC was requesting a loan to fund the construction of an addition to Jeram Tej, LLC's existing parking garage for Phase I, NBSC

required a second mortgage upon the entire garage, with sales proceeds of Phase I condominium units to be used to pay the garage note. (Trial Transcript p. 47).

During the entire pendency of the garage addition loan- from January of 2006 until it was satisfied in April of 2008, Bayview Resort II, LLC was current on its interest payments for the garage addition loan. (Trial Transcript p. 91). To fund these payments, Mr. Jeram requested *pro rata* capital contributions from the members of Bayview Resort II, LLC, which they made, and then used those contributions to pay NBSC. (Trial Transcript p. 91). No contributions of capital were requested from the Patels, individually; all contributions came from BPR Properties, LLC, its member. (Trial Transcript p. 91).

On January 17, 2007, construction of the Bayview Resort, inclusive of the original phase 1 tower and oversized parking garage was completed, and Jeram Tej, LLC began closing the sale of condominium units it had pre-sold. (Trial Transcript p. 46; Consent Motion to Supplement Record).

On January 30, 2007, Jeram Tej, LLC conveyed the entire parking garage (land and building) to Yana, LLC, an entity organized and owned exclusively by I.D. Jeram and Mayur Jeram. Yana, LLC granted Jeram Tej, LLC a parking easement for use by the Bayview Resort and a lease for Jeram Tej, LLC to use a commercial area for laundry and an office. (Consent Motion to Supplement Record). By contrast, Yana, LLC never conveyed a parking easement to Bayview Resort II, LLC. Bayview Resort II, LLC therefore, owned no part of the garage addition it was paying to build.

By October of 2007, Jeram Tej, LLC had sold enough condominiums at Phase I to satisfy its first mortgage. Thus, each subsequent sale resulted in proceeds used to satisfy the principle amount of NBSC's Garage Note pursuant to its terms. (Trial Transcript p. 74).

In December of 2007, C&P Partnership, LLC, Bhupi Patel's group, exited Bayview Resort II, LLC, resulting in Bayview Resort II, LLC redeeming and redistributing its partnership interest *pro rata*. (Trial Transcript pp. 74-75). Thus, on December 5, 2007, Bayview Resort II, LLC executed an Amended Operating Agreement in which BPR Properties, LLC would own a fifty percent (50%) interest and the Jerams collectively owning the remaining fifty percent (50%) interest. (Trial Transcript pp. 74-75).

IV. Satisfaction of the Garage Note

Ultimately, Jeram Tej, LLC repaid NBSC the principle amount of the \$2,707,250.00 garage addition loan out of the proceeds it received from the sale of condominium units at the Bayview Resort Phase I. (Trial Transcript p. 47, 50-51). Mayur Jeram testified that he and his father expected Jeram Tej, LLC would be repaid either out of the proceeds from a Bayview Resort II, LLC construction loan, from the profits to be made by Bayview Resort II, LLC from the development of the second phase of Bayview Resort. (Trial Transcript pp. 52-53, Deposition of Mayur Jeram pp. 128-129). However, at trial, he also added the Patels, individually, as an additional source of reimbursement (Trial Transcript pp. 52-53), despite not entering into an agreement with them to do so (Trial Transcript p. 53).

The Patels were never aware that Jeram Tej, LLC had been making principle payments toward the garage addition loan at the time the Phase I closings were taking place. (Trial Transcript pp. 83-84). Similarly, Bhupi Patel testified that he was never made aware that the Jerams had been using closing proceeds from sales of condominiums at the Bayview Resort to pay Bayview Resort II, LLC's garage addition loan. (Deposition of Bhupi Patel pp. 45-46).

Prior to Bhupi Patel's company, C&P Partnership, LLC, exiting Bayview Resort II, LLC on December 5, 2007, Jeram Tej, LLC used proceeds from five condominium closings to repay

the garage addition loan on behalf of Bayview Resort II, LLC, which totaled \$1,501,618.23. (Deposition of Bhupendra Patel p. 48). Mr. Patel testified the Jerams never asked Mr. Patel, his brother, or C&P Partnership, LLC that they contribute their *pro rata* share of the debt from which Bayview Resort II, LLC was relieved during that period of time. (Deposition of Bhupendra Patel p. 48).

By letter dated January 15, 2008, NBSC, through its counsel, notified Bayview Resort II, LLC that both the land acquisition loan of \$11,452,000.00 and the garage addition loan of \$2,707,250.00, had matured and sought a meeting. (Trial Transcript pp. 54-55). Mayur Jeram, who was manager of Bayview Resort II, LLC, testified that neither loan had gone into default. (Trial Transcript p. 68).

The last payment in satisfaction of the garage addition loan was made on April 11, 2008 and was in the amount of \$891,720.50. (Trial Transcript p. 101). Mayur Jeram testified this amount was not from profits that Jeram Tej, LLC would have otherwise received from the sale of condominium units at the Bayview Resort; rather, this payment represented proceeds from an additional loan closed by Jeram Tej, LLC in the amount of \$2,600,000.00 with Beach First National Bank (Trial Transcript pp. 101-102). Mr. Jeram testified he never recalled notifying any of the other members of Bayview Resort II, LLC of the loan. (Trial Transcript pp. 101-102).

Between October of 2007 and April of 2008, Jeram Tej, LLC paid off the garage addition loan through proceeds from the sales of condominium units at the Bayview Resort (Phase I), which payments, together with their application to the outstanding debt, are set forth on Trial Exhibit 22-B, as follows:

PROMISSORY NOTE AMOUNT: **\$2,707,250.00**

PAYMENTS: **Balance Remaining**

10/17/2007: **\$251,073.24** **\$2,459,908.10**

10/24/2007: **\$333,047.00** **\$2,130,572.83**

10/24/2007: **\$140,515.94** **\$1,990,056.89**

10/25/2007: **\$442,983.05** **\$1,547,073.84**

10/28/2007: **\$334,000.00** **\$1,213,073.84**

- MATURITY AND EXIT OF C&P PARTNERSHIP, LLC FROM COMPANY -

2/1/2008: **\$336,096.64** **\$878,954.61**

4/14/2008: **\$891,750.01** **\$0.00**

TOTAL: **\$2,729,465.88 (principle and interest) PAID**

(Trial Transcript p. 48).

Despite the best efforts of Bayview Resort II, LLC's members to sell the land and satisfy its loan obligations to NBSC, those efforts proved fruitless. (Trial Transcript p. 62). In March of 2009, the Jerams, by and through their mutual counsel, requested that the parties discuss various options for making their interests in Bayview Resort II, LLC even, to account for the Jerams payment of the Garage Note. (Trial Exhibit 36, pp. 110-111). After the land acquisition loan matured, on November 2, 2009, Bayview Resort II, LLC, as borrower, and all five guarantors of that debt negotiated a settlement with NBSC whereby the oceanfront lot, third row low, and parking garage were deeded to NBSC in lieu of foreclosure (Trial Transcript p. 62-63), subject to Jeram Tej, LLC retaining an easement for parking by Jeram Tej, LLC and its individual condominium owners (Trial Transcript pp. 64, 167). Each guarantor also negotiated the release of his own guaranty obligation directly with NBSC. (Trial Transcript p. 87).

The Jerams soon thereafter brought this action against the Patels seeking contribution of their *pro rata* portion of the debt their company paid to NBSC. (Trial Transcript p. 68).

STANDARD OF REVIEW

This is an action in equity. As such, this Court reviews factual findings and legal conclusions *de novo*. Nutt Corp. v. Howell Road, LLC, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011) (citing Lewis v. Lewis, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011)). A “[d]e novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court’s findings.” Nutt Corp., 396 S.C. at 327, 721 at 449 (quoting Lewis, 392 S.C. at 390, 709 S.E.2d at 654).

ARGUMENT

I. The Special Referee erred in holding that the five individual guarantors were each burdened with a common, mutual debt obligation.

At trial, the Jerams were required to prove that each of the seven payments made by Jeram Tej, LLC to NBSC removed a common burden shared by themselves and the Patels in order to prove they were entitled to full contribution from the Patels – the relief ordered by the Special Referee. An action for equitable contribution under the common law is defined as “the right of one who has discharged **a common liability** to recover of another also liable, the aliquot portion which he ought to pay or bear.” RIM Associates v. Blackwell, 359 S.C. 170, 179, 597 S.E.2d 152, 157 (Ct. App. 2005) (internal quotations omitted) (emphasis added). “To establish the right of contribution, the plaintiff must shew that his payment has removed **a common burthen** from the shoulders of himself and the defendants, and that they are each benefitted by it. This occurs in all cases of **payments** made by one surety **on the debt for which several are bound- a common burthen is removed** and a common benefit received.” Screven v. Joyner, 1 Hill Eq 252, 10 S.C. Eq. 252 (1833) (emphasis added).

In South Carolina, “the guaranty of payment and the promissory note are two separate contracts.” Citizens and Southern National Bank of South Carolina v. Lanford, 313 S.C. 540, 544, 443 S.E.2d 549, 551 (1994). A guaranty agreement “creates a secondary obligation under which the guarantor promises to be responsible for the debt of another. The guarantor is only secondarily liable in the event the debtor does not perform the primary obligation.” 38 Am. Jur. 2d Guaranty Section 2. “Furthermore, because a guaranty contract is collateral to a principle obligation, it binds only those who are parties to the guaranty contract itself.” Id. None of the guarantors were ever “burdened” with any individual obligation to NBSC. Only Bayview Resort II, LLC was burdened with the obligation to repay the \$2,707,250.00 debt. “[A party should not be made to bear a loss that rightfully belongs to another.” Unison Ins. Co. V. Hertz Rental Corp., 436 SE 2d 182 (1993) (in the context of equitable subrogation).

The essential timeline of events is as follows:

LOAN AMOUNT: \$2,707,250.00

	Payments	Balance Paid	Balance Remaining
10/17/2007:	\$251,073.24	\$251,073.24	\$2,459,908.10
10/24/2007:	\$333,047.00	\$584,120.24	\$2,130,572.83
10/24/2007:	\$140,515.94	\$724,636.18	\$1,990,056.89
10/25/2007:	\$442,983.05	\$1,167,619.23	\$1,547,073.84
10/28/2007:	\$334,000.00	\$1,501,619.23	\$1,213,073.84
1/14/2008:	MATURITY OF GARAGE LOAN		
2/1/2008:	\$336,096.64	\$1,837,715.87	\$878,954.61
4/14/2008:	\$891,750.01	\$2,729,465.88	\$0.00
TOTAL:	\$2,729,465.88 (principle and interest) PAID		

(Trial Transcript p. 48; Trial Exhibit 35).

It is undisputed that the foregoing payments were made and that the Garage Note was satisfied as a result. It is axiomatic that these payments relieved Bayview Resort II, LLC- the maker of the Garage Note- from its burden to pay it. The primary issue presented in this appeal is whether those payments also relieved all five individual guarantors from the same burden and, and if so, to what extent – e. g. in full or just in part. That question will turn upon a review of which parties were obligated- or burdened- by the debt at the time the payments were made.

The Special Referee correctly found that the first five payments were made while the Bayview Resort II, LLC Garage Note was current, not yet due, and not in default. The Special Referee also correctly held that the sixth and seventh payments were made prior to NBSC declaring a default or notifying the individual guarantors of a demand for payment.

The Special Referee made an error of law, however, by concluding that each of the seven payments relieved the Jerams and Patels, individually, from the same \$2,707,250.00 burden borne by Bayview Resort II, LLC because the individual guarantors never agreed to guarantee full payment of the Garage Note. Each individual merely agreed to guarantee up to \$812,175.00 pursuant to five separate limited guaranty agreements if and when Bayview Resort II, LLC could not pay the note when due. They neither co-made the note with Bayview Resort II, LLC nor jointly and severally guaranteed its full payment.

Moreover, the Garage Note never matured until January of 2008 – after the first five payments had already been made, while the note was current and prior to any declaration of default by NBSC. In sum, the first five payments relieved Bayview Resort II, LLC from its obligation only, and any right that the Jerams or Jeram Tej, LLC had to seek contribution for making those payments were limited to the benefactor thereof-Bayview Resort II, LLC, not the individual

guarantors whose secondary liability had not been triggered. As to the final two payments, the Special Referee erred by still holding that those payments relieved the individual guarantors from a mutual burden because NBSC had not yet declared a default or demanded payment from the individual guarantors. Because NBSC never sought to enforce the individual guaranty agreements against any of the five individual guarantors, none of the five individual guarantors was ever burdened with the \$2,707,250 Garage Note obligation.

Alternatively, assuming *arguendo*, that the maturity of the note following the payment of the first five payments can be said to have created an inevitable risk of default and, in turn, a likely triggering of the guarantors' liability pursuant to their limited guaranty agreements, the Jerams would have been limited to seeking contribution for a *pro rata* portion of only those two payments, not the first five. Under either scenario, the Special Referee made an error of law by concluding that all seven payments relieved the five guarantors from a common burden of \$2,707,250.00 note made by Bayview Resort II, LLC. As will be explained in more detail below, this analysis is not only right, but also equitable.

A. The Special Referee erred by holding that the five guarantors jointly and severally guaranteed payment of the \$2,707,250.00 Garage Note.

The Special Referee erred by holding that the individual guarantors jointly and severally guaranteed the payment of the \$2,707,250.00 Garage Note. They did not. An examination of the Note and five identical, Unconditional Limited Guaranty Agreements is the first necessary step to analyzing this holding for error. It is in these documents that one may ascertain precisely what obligations each party undertook when the loan was made.

i. The Garage Note

First, only Bayview Resort II, LLC promised to pay NBSC \$2,707,250.00. The Garage Note provides as follows: "Borrower promises to pay to the order of Bank ... such sums as may

be advanced and outstanding from time to time up to the amount of \$2,707,250.00 with interest....” (Trial Exhibit 10). The “Borrower” is identified as Bayview Resort II, LLC. Neither the Patels nor the Jerams are identified as the “Borrower.” Nowhere in the Garage Note exists a promise by any individual guarantor to pay NBSC \$2,707,250.00. Therefore, only Bayview Resort II, LLC – the maker of the Garage Note- was “burdened” with the promise to repay the \$2,707,250.00 Garage Note.

Second, the only promise made- or obligation incurred- by the five individual guarantors in the Garage Note was their promise to provide updated, accurate financial statements to NBSC upon NBSC’s request for same. On page four of the Garage Note, in the section entitled “Financial and Other Information,” the parties agreed that “Borrower **and Guarantors** shall deliver to Bank such information as Bank may reasonably request from time to time, including without limitation, financial statements and information pertaining to Borrower’s and any **Guarantor’s** financial condition.... Such information shall be true, complete, and accurate.” (Trial Exhibit 10) (Emphasis added).

Third, in the paragraph entitled “Default,” on page three of the Garage Note, the parties agreed that “[i]f any of the following occurs with respect to Borrower, and the same is not cured or corrected within 10 business days after written notice thereof is given by Bank to Borrower, a default (“Default:”) under this Note shall exist.” (Trial Exhibit 10). The primary event of default set forth in the same paragraph is, of course, “nonpayment” or “nonperformance.”

Fourth, while it is true that the five individual guarantors signed the Garage Note, their signatures were simply their written acknowledgements of their agreement to perform those obligations set forth in the Garage Note itself- those explained above. The line preceding the signatures makes this point clear: “In WITNESS WHEREOF, Borrower and Guarantors, on the

day and year first above written, have caused this Note to be executed under seal.” (Trial Exhibit 10, p. 7). By signing the Garage Note, the Guarantors never agreed to guarantee its full performance or payment; they simply acknowledged their obligation to provide NBSC with accurate financial statements.

Therefore, a review of the plain language of the Garage Note reveals that Bayview Resort II, LLC borrowed and promised to repay the \$2,707,250.00 garage loan, and the five individual guarantors merely promised to provide NBSC with accurate financial statements upon request. The Guarantors did not agree- either individually or collectively- to borrow and pay NBSC \$2,707,250.00.

ii. The Unconditional Limited Guaranty Agreements

When each individual guarantor signed his own Unconditional Limited Guaranty Agreement with NBSC, the guarantor only promised to guarantee the payment of any sums due and owing to NBSC that Bayview Resort II, LLC had not paid or could not pay when due and which NBSC had demanded from the individual guarantors, up to \$812,750.00. This fact is confirmed by the following language of the Unconditional Limited Guaranty Agreements themselves:

On page 1: ...the Undersigned hereby unconditionally **guarantees** to Lender, its successors and assigns, the due and punctual **payment when due ... of the principle and interest on all other sums payable**, or stated to be payable, **with respect to the promissory note of the Debtor**, to be executed by Debtor in favor of Lender in the approximate principle amount of \$2,707,250.00 (the “Note”). (Trial Exhibit 11) (emphasis added).

On page 2: **“In case Debtor shall fail to pay all or any part of the Liabilities when due ... the Undersigned, immediately upon the written demand of Lender, will pay to**

Lender the amount due and unpaid by Debtor as aforesaid, in like manner as if such amount constituted the direct and primary obligation of the Undersigned (but limited as further provided herein). (Trial Exhibit 11) (emphasis added).

Thus, the guaranty agreement, itself, establishes the primary liability of the debtor-Bayview Resort II, LLC, and the secondary liability of the five guarantors for any sums still owing to NBSC at the time of maturity or default, e.g. “when due.” They did not promise NBSC to pay \$2,707,250.00, nor did they promise to guarantee payment of \$2,707,250.00- either individually or jointly and severally. They simply promised to pay NBSC all sums still owing it following maturity of the Garage Note or upon default by its borrower, Bayview Resort II, LLC up to \$812,175.00 each.

B. The Special Referee erred when he construed other language within the Unlimited Guaranty Agreements as a promise to be jointly and severally liable for the performance and payment of the entire Garage Note.

The Special Referee circumvented the foregoing plain language by relying upon a definitional term on pages two and three of the Unconditional Limited Guaranty Agreement to hold that the five individual guarantors were actually jointly and severally liable for the full performance and payment of the Garage Note. In its order, the Special Referee cited the definition of the word “Undersigned” in support of this erroneous conclusion:

The term “undersigned” as used in this agreement shall mean the signer or signers of this agreement or other guaranty agreements issued in respect of the Loan; and such signers, if more than one, shall be jointly and severally liable hereunder as follows:

Debtor and Lender intend for the Liabilities to be recourse up to ... \$2,707,250.00.... The Undersigned shall be responsible for a percentage of the

Liabilities, which shall equal \$812,175.00, which is the Undersigned's maximum obligation with respect to the Liabilities. (Trial Exhibit 10).

The foregoing language in each Unconditional Limited Guaranty Agreement was a simple acknowledgement of Bayview Resort II, LLC's promise to pay NBSC \$2,707,250.00 pursuant to the terms of the Garage Note and each individual guarantor's promise to guarantee payment of any sums due pursuant to the Garage Note, up to \$812,750.00, in the event of maturity or default.

The agreement defined "Debtor" as Bayview Resort II, LLC, not the five individual guarantors. Had the language of the agreement read "...and such signers ... shall be jointly and severally liable *for the full performance and payment of \$2,707,250.00 under Borrower's Promissory Note,*" or words to this effect, the Special Referee's conclusion would have been more plausible. But, the agreements do not say as much. Rather, the important language to read is what is contained in the block sub-paragraph after the words "as follows." In that sentence, the parties properly agreed that the "Debtor," defined as Bayview Resort II, LLC- the maker of the Garage Note- "intend for the Liabilities to be recourse up to \$2,707,250.00." Likewise, "the Undersigned"- each individual guarantor- "shall be responsible for a percentage" of the whole \$2,707,250.00- "which shall equal \$812,750.00, which is the Undersigned's maximum obligation with respect to the Liabilities."

The Special Referee's conclusion that this language was an acknowledgement of the five individual guarantors' promise to jointly and severally guarantee the performance and payment of the Garage Note- all \$2,707,250.00- is simply in error. For, to hold that the guarantors did so would render their limited guaranty agreements with NBSC- which clearly was intended to *limit* their individual liability to NBSC- meaningless. The five individual guarantors did not jointly and severally guarantee the full and performance and payment of Bayview Resort II, LLC's

\$2,707,250.00 Garage Note to NBSC; they negotiated a significant limitation upon such a liability to payment of any sums due following either maturity or default, up to \$812,750.00 each.

C. The Special Referee erred in holding that the Jerams were entitled to contribution from the Patels pursuant to the UCC for the same reason they are not entitled to contribution under the common law- because the Jerams and the Patels were never jointly and severally liable for the full performance and payment of the \$2,707,250.00 Garage Note.

In addition to the common law, Section 36-3-116(b) of South Carolina's Uniform Commercial Code also provides for a right to contribution. However, that right is limited only to a party who is jointly and severally liable with the other party on the same debt instrument. S.C. Code Ann. 36-3-116(a) (Code of Laws 1976, as amended). Therefore, the Jerams are barred from an action for contribution against the Patels under the UCC for the same reason they are barred from contribution under the common law- because they did not jointly and severally guarantee the full performance and payment of the Garage Note.

The Special Referee's holding that, "[b]ased on the ... language of the UCC, itself, I find that ... the guarantors are jointly and severally liable for purposes of determining whether or not S.C. Code Ann. 36-3-116 is applicable to this case," was, therefore, in error. Even if the mere signature of a guarantor upon a note could be regarded as undertaking a guaranty obligation, which is vehemently denied, the Special Referee's holding remains erroneous because the UCC specifically says, "[e]xcept as otherwise provided in the instrument, two or more persons who have the same liability on an instrument.... are jointly and severally liable" S.C. Code Ann. 36-3-116(a) (Code of Laws 1976, as amended).

Because the instruments themselves- the Garage Note and the Unconditional Limited Guaranty Agreements, by their own terms as discussed above, do not provide that the five individual guarantors agreed to be jointly and severally liable for the whole \$2,707,250.00 debt,

they cannot be deemed jointly severally liable under the UCC. Because the UCC likewise recognizes the right to contribution only by “a party having joint and several liability who pays the instrument “and only” from any party having the same joint and several liability . . .”, they are likewise barred from contribution under the UCC S.C. Code Ann. 26-3-116(b) (Code of Laws 1976, as amended).

In sum, the Special Referee misconstrued the plain language of Garage Note and the Unconditional Limited Guaranty Agreements, which led to his erroneous holding that the five individuals had jointly and severally guaranteed the full performance and payment of the entire \$2,707,250.00 debt. Bayview Resort II, LLC, the “Borrower” under the Garage Note and the “Debtor” referenced in each Unconditional Limited Guaranty Agreement, agreed to pay NBSC \$2,707,250.00. Each of the “undersigned” individual guarantors agreed to pay NBSC any and all sums when due at maturity or upon default, in an amount up to \$812,750.00 each. The five individual guarantors were not jointly and severally liable for the payment and performance of the entire Garage Note.

II. The Special Referee erred in holding that Jeram Tej, LLC’s principle payments relieved each of the individual guarantors from a common, mutual debt.

Having established that the Special Referee erred in identifying the obligations which each party agreed to undertake, let us now turn to an equitable analysis of the payments themselves. It is undisputed that Jeram Tej, LLC, and not the Jerams, made the payments. In total, seven payments were made before NBSC ever declared a default of Bayview Resort II, LLC’s obligations under the Garage Note and before it ever sought to enforce the Unconditional Limited Guaranty Agreements against each individual guarantor. Additionally, the first six payments were made not at the direction of the Jerams to save to the company from an impending default, but at the direction of NBSC pursuant to the plain terms of the Garage Note. Finally, the first five

payments were made prior to the Garage Note ever maturing, when Bayview Resort II, LLC was current on the loan. The Special Referee essentially disregarded each of these undisputed, factual statements as irrelevant, thereby leading to an erroneous, inequitable judgment.

A. The Special Referee erred in holding that NBSC was not required to declare a default and demand payment from the guarantors before the Jerams would be permitted to demand contribution from the same guarantors.

Neither the Jerams nor the Patels were ever individually burdened with any debt obligation because Bayview Resort II, LLC never defaulted under the terms of the Garage Note. When Jeram Tej, LLC and/or the Jerams satisfied the Garage Note, they relieved Bayview Resort II, LLC from its burden; they did not relieve themselves, individually, from any burden. As is discussed above, this is true because the NBSC never declared a default under the Garage Note thereby triggering the secondary liability of the guarantors pursuant to their respective Unconditional Limited Guaranty Agreements.

Pursuant to the terms of the Garage Note and Unconditional Limited Guaranty Agreements, NBSC was required to declare a default, notify the parties of same, and demand payment of all sums due before being able to exercise its rights to collect the remaining sums due against the five individual guarantors. (See Argument Section I.A.ii above). It did not. Not until such a default and demand was made would each of the five individual guarantors become personally liable for the payment of the remaining balance of the Garage Note. In the event of such a default, the members of Bayview Resort II, LLC and these parties would have been given the opportunity to decide, collectively, how to handle the demand. Such notice is the critical issue about which the Patels complained at trial. The Patels testified that, had they been provided with such notice, they would have likely dealt with NBSC in a different manner, e.g. by negotiating the release of their personal guaranties on both the Garage Note and on the land acquisition loan simultaneously to

obtain a better deal. Instead, they were left to negotiate the release of their guaranties of the land acquisition loan first and at a time when they were unaware the Jerams were seeking contribution from them.

Contrary to the reasoning inferred by the Special Referee that such a result may result in an inequitable windfall to the Patels, the Bayview Resort II, LLC Operating Agreement provided for a specific framework within which the Jerams, as members, could seek reimbursement directly from the Company. See Sections 4.2 “Subsequent Contributions” and 4.5 “Advanced by Members,” providing, in sum, that the company could have held a meeting of its members to require subsequent capital contributions to pay its debts and/or that the Jerams could have sought reimbursement of its payments from the company. Doing so would have afforded the members the opportunity to discuss the matter and vote upon action. However, the Jerams, who were in control of the company, never afforded their fellow members this opportunity.

Moreover, if NBSC had no right of action against the individual guarantors, neither should the Jerams have such a right. To provide the Jerams with more rights than NBSC – the party that required the individuals to sign the Unconditional Limited Guaranty Agreements and was intended to benefit from them- is to provide the Jerams with more rights than any party ever bargained for when entering into the transaction.

Therefore, because none of the individual guarantors were ever burdened with the obligation to pay the Garage Note in full, the Jerams’ payments in satisfaction of that Garage Note did not relieve the Patels from a common burden; they relieved Bayview Resort II, LLC from a singular burden. Thus, the Special Referee erred in finding that default was not a prerequisite to contribution, and the Jerams should be barred from obtaining contribution from the Patels for their *pro rata* portion of a debt they, individually, never incurred.

Assuming, *arguendo*, that this Court is nonetheless persuaded that the Patels should not be able to be relieved from a Bayview Resort II, LLC debt without contributing to it, then this Court should limit their liability to that which their Company's Operating Agreement limited it – to one-third of the debt paid in 2007 and one-half the debt paid in 2008. These percentages represent the actual *pro rata* portion of the Company's debt so paid in proportion to their ownership interest therein: one-third (1/3) of \$1,501,619.23 (paid in October of 2007) and one-half (1/2) of \$1,227,846.65 paid in 2008. Since each Appellant owns a one-third interest in BPR Properties, LLC, each individual's *pro rata* share of the Company's debt so paid in total would be \$371,487.69 each, not \$545,893.18 each.

B. The Special Referee erred in permitting the Jerams to seek contribution for a *pro rata* portion of the first six principle payments because they were mandatory, not gratuitous, payments.

When Bayview Resort II, LLC sought to borrow the \$2,707,250.00 in loan proceeds to build the garage addition, the Jerams knew Jeram Tej, LLC was obligated to pay NBSC what would have otherwise been their "personal profits" from the Bayview Resort Phase I project.

Returning to the language of the Garage Note for a moment, in the paragraph entitled "RELEASE PAYMENTS...", the parties agreed and acknowledged the following terms of their agreement with NBSC:

As to Phase I of the Project, all net funds received from the closings of such dispositions shall be paid directly to Bank after the debt to Service Corporation of South Carolina secured by a first mortgage on Phase I of the Project is paid in full. Once Bank is receiving payments from the sale of Phase I of the Project, then Bank shall approve in writing of each such transaction and must, as part of such approval, indicate its approval by executing the HUD statement or bill of sale which reflects each such transaction. (Trial Exhibit 10 page 2).

Thus, all parties acknowledged that NBSC would require Jeram Tej, LLC, the developer of Phase I of the Bayview Resort, to pay it all net sales proceeds received from the closing of the

sale of condominiums at Phase I of the Bayview Resort in satisfaction of the Garage Note. Stated another way, the Jerams knew from the outset that their “personal profits” could or would be used to pay Bayview Resort II, LLC’s Garage Note. The act, then, of using the Jerams’ “personal profits” to pay the Garage Note was neither voluntary nor gratuitous as the Jerams purported to allege and as the Special Referee held. It was a compulsory act made with eyes wide open.

This point is material to an analysis of the equities in this case. The Jerams testified at trial that they anticipated being repaid any such payments either out of a construction loan to build a Phase II condominium tower or out of the closings from sales of condominiums at Phase II. They never intended for the Patels, individually, to reimburse them or Jeram Tej, LLC those payments. As sophisticated parties, the Jerams had ample opportunity to enter into an agreement with the Patels, individually, to determine the terms by which Jeram Tej, LLC or the Jerams would be reimbursed such release payments in the event Bayview Resort II, LLC did not succeed in either obtaining a construction loan or selling Phase II condominiums. They chose not to do so.

When NBSC advanced Bayview Resort II, LLC the \$2,707,250.00 necessary to build the garage addition, and when it signed the Garage Note setting forth the terms by which it would be repaid, the Jerams made the following business decision: either make Phase II a success by obtaining a construction loan and being repaid out of those loan proceeds, or, in the event no such loan could be obtained, seek reimbursement from the benefactor of those payments, Bayview Resort II, LLC, pursuant to the common law and/or the UCC, and in accordance with its Operating Agreement.

Therefore, because each of the six payments were contemplated- and made to relieve Bayview Resort II, LLC from its burden, the Special Referee erred in concluding that the Jerams were entitled to contribution from the Patels for each of those payments. In such an analysis, this

Court could find that only the seventh payment- that of \$891,750.01, was the only truly gratuitous payment made by the Jerams to relieve the parties from an inevitable burden, and the Special Referee's judgment should be vacated and amended to conclude that the Patels are only responsible for their *pro rata* portion of that payment, \$178,350.00 each when measured based upon their respective twenty percent (20%) guaranties, or, collectively, \$445,875.00 when measured based upon their one-half membership interest in Bayview Resort II, LLC at the time, or \$148,625.00 each (one-third of that figure).

C. The Special Referee erred in holding that the payment of the first five of seven payments relieved the Patels from a burden because those payments were made prior to the maturity of the Garage Loan.

It is undisputed that the first five payments made by Jeram Tej, LLC were made while Bayview Resort II, LLC's Garage Note was current and prior to its maturity. These payments, made between October 17, 2007 and October 28, 2007, totaled \$1,501,619.23. These payments, therefore, did not relieve the five individual guarantors from a common burden; rather, they relieved Bayview Resort II, LLC from its burden to repay NBSC the loan proceeds it borrowed.

Stated another way, the first five payments never relieved the five individual guarantors from a mutually shared burden. These payments were not gratuitous payments directed to be made by the Jerams in an effort to save Bayview Resort II, LLC from defaulting upon its obligations, or to save themselves and their fellow guarantors from personal liability. These payments were each deliberately contemplated, planned for, and made at a time when Bayview Resort II, LLC was making its interest payments, current on its loan obligation, and while its members sought out various business opportunities to either make Phase II a reality or find an alternative use for the land.

As is set forth above, Jeram Tej, LLC and/or the Jerams, individually, had a right of recourse directly against Bayview Resort II, LLC for reimbursement as soon as these payments were made, and such would have been the proper means by which Jeram Tej, LLC and/or the Jerams should have sought to recover said payments. Had such a demand been made, the members of Bayview Resort II, LLC could have convened a meeting to deal with the claim in accordance with the terms of its Operating Agreement. As was argued at trial, Section 4.5 of the Operating Agreement, “Advanced by Members” provides that, [i]f the Company does not have sufficient cash to pay its obligations, any Member(s) that may agree to do so with the Manager’s consent may advance all or part of the needed funds to or on behalf of the Company. An advance described in this section constitutes a loan from the Member to the Company, bears interest at the General Interest Rate from the date of the advance until the day of payment, as is not a Capital Contribution.” (Trial Exhibit 2).

When the loan matured, according to the Special Referee on January 14, 2008, NBSC demanded payment of the balance remaining- \$1,235,044.53, from Bayview Resort II, LLC. Bayview Resort II, LLC, vis a vis Jeram Tej, LLC and/or the Jerams, paid \$1,227,846.65 in full satisfaction of the remaining debt in two subsequent payments of the Garage Note. The sixth payment was another agreed-upon release fee paid to NBSC from the closing of the sale of a condominium at Phase I of the project on February 1, 2008, totaling \$336,096.64. The seventh and final payment in the amount of \$891,750.01 was made on February 14, 2008, but it was derived from a third party loan obtained by the Jerams’ designee; it was not a payment contemplated pursuant to the terms of the Garage Note.

According to the expressed language of the Unconditional Limited Guaranty Agreements, the five guarantors would have been subject to collective liability of only this amount, since this

amount was all that was left owing under the Garage Note. Any right to contribution by the Jerams against the Patels must, therefore, be limited to each individual's *pro rata* share of this \$1,227,846.65 burden, perhaps the only potentially common burden remaining following Bayview Resort II, LLC's partial satisfaction of the Garage Loan after its maturity. Each individual guarantor's *pro rata* share of this remaining debt was but \$246,008.91 per guarantor, measured at twenty percent (20%) each.

The Special Referee made an error of law by concluding that the Jerams could seek the recovery of *all* payments made by Jeram Tej, LLC and/or them. In equity, the first five payments were justly and equitably recoverable from Bayview Resort II, LLC, the only party that bore the burden of the debt at the time those payments were made. The remaining two payments, totaling \$1,227,846.65 constituted the only remaining debt due under the Garage Note for which the individual guarantors could possibly be liable under the terms of their Unconditional Limited Guaranty Agreements. Therefore, this Court should vacate the Special Referee's Judgment and enter judgment against each Appellant in the amount of \$246,008.91 each, representing their *pro rata* share of the remaining debt due.

D. The Special Referee erred in holding that the Jerams, individually, were permitted to seek contribution for payments made by Jeram Tej, LLC.

At trial, the Patels argued that the Jerams should be barred from seeking contribution since it was Jeram Tej, LLC, and not them, individually, which made the payments to NBSC in satisfaction of the Garage Note. The Special Referee agreed that Jeram, Tej, LLC was a legal entity distinct from its members, but reasoned that "the Plaintiffs have presented a plethora of evidence to indicate that they directed Jeram Tej, LLC as their agent and nominee to make the payments from Plaintiffs' personal profits realized at the time of sale." (Order p. 11).

The Special Referee's reasoning and its ultimate conclusion of law on this point was in error because the Jerams did not direct Jeram Tej, LLC to do anything of the sort. The Jerams did not direct Jeram Tej, LLC to make presumably gratuitous payments to NBSC in an effort to save Bayview Resort II, LLC from the burden of payment and its guarantors from the risk of default. On the contrary, Jeram Tej, LLC agreed to make those payments when NBSC agreed to advance Bayview Resort II, LLC the garage loan proceeds. The Garage Note provides, in pertinent part:

"RELEASE PAYMENTS....," the parties agreed and acknowledged the following terms of their agreement with NBSC:

As to Phase I of the Project, all net funds received from the closings of such dispositions shall be paid directly to Bank after the debt to Service Corporation of South Carolina secured by a first mortgage on Phase I of the Project is paid in full. Once Bank is receiving payments from the sale of Phase I of the Project, then Bank shall approve in writing of each such transaction and must, as part of such approval, indicate its approval by executing the HUD statement or bill of sale which reflects each such transaction. (Trial Exhibit 10 page 2).

Thus, all parties acknowledged that NBSC would require Jeram Tej, LLC, the developer of Phase I of the Bayview Resort, to pay it all net sales proceeds received from the closing of the sale of condominiums at Phase I of the Bayview Resort in satisfaction of the Garage Note. To characterize these payments as "personal profits" is speculative at best, for the Jerams made a calculated risk that, in the event Bayview Resort II was unable to develop a second phase and obtain a construction loan, they would never realize such profits. In such a case, the proceeds from the sales of condominium units would be the sole and exclusive source by which NBSC would be able to obtain repayment of the Garage Note.

Stated another way, the Jerams knew from the outset that their "personal profits" would be used to pay Bayview Resort II, LLC's Garage Note. The act, then, of using the Jerams' "personal

profits” to pay the Garage Note was neither voluntary nor gratuitous as the Jerams purported to allege and as the Special Referee held. It was a compulsory act made with eyes wide open.

At trial, both Mayur Jeram and I.D. Jeram testified that they, vis a vis Jeram Tej, LLC, expected Bayview Resort II, LLC to reimburse it, either upon the company obtaining a construction loan or upon selling condominium units in Phase II. The Jerams never sought nor demanded reimbursement from the Patels, individually, until after the project failed and circumstances had dramatically changed. Mayur Jeram, manager of Bayview Resort II, LLC, testified at trial that he agreed the monies that were paid by Jeram Tej to NBSC on behalf of Bayview Resort II were, in fact, a loan that Jeram Tej made to Bayview Resort II, LLC for which Jeram Tej, LLC expected Bayview Resort II to pay it back. (Trial Transcript p. 94). Mr. Jeram likewise testified that the purpose behind organizing Bayview Resort II, LLC was to obtain the limited liability protection offered by a limited liability company- to enter into contracts and obligations as a company as opposed to as individuals. (Trial Transcript p. 96). Mr. Jeram testified that it was the parties’ intent that Bayview Resort II, LLC repay the garage loan. (Trial Transcript p 98). Mr. Jeram also testified that, following Jeram Tej, LLC’s satisfaction of Bayview Resort II, LLC’s garage addition loan, Bayview Resort II, LLC remained a viable entity, current on its obligations, with assets. (Trial Transcript p. 120). Mr. Jeram testified that, at that time, Jeram Tej, LLC could have demanded that Bayview Resort II, LLC repay Jeram Tej, LLC, but did not do so. (Trial Transcript p. 120).

Therefore, the Special Referee erred in holding that the Jerams, individually, were not barred from seeking contribution for payments NBSC required Jeram Tej, LLC to make.

E. The Special Referee erred in calculating the parties' *pro rata* share of the debt actually paid on behalf of Bayview Resort II, LLC.

Let us examine the undisputed facts as they stood on June 20, 2006, the date upon which NBSC advanced Bayview Resort II, LLC the \$2,707,250.00 to build the garage addition, Bayview Resort II, LLC signed the Garage Note, and the five individuals each signed their respective Unconditional Limited Guaranty Agreements. At that time, Bayview Resort II, LLC was comprised of the following membership interests: I.D. Jeram, 16.67%, Mayur Jeram, 16.67%, C&P Partnership, LLC, 33.33%, and BPR Properties, LLC, 33.33%.¹ BPR Properties, LLC's *pro rata* share of the Garage Note, then, was but \$902,416.67- the same amount as both the Jerams' collective share and C&P Partnership, LLC's share, or \$300,805.56 per guarantor. By contrast, the Special Referee held the Patel's *pro rata* share of the debt paid totaled \$1,637,679.54, or \$545,893.18 per Appellant.

Even after considering the fact that C&P Partnership, LLC exited the Company in December 2007, the only remaining debt was \$1,235,044.53, of which \$1,227,846.65 was paid to satisfy the loan. The Patels' *pro rata* share of this remaining debt, collectively, was but \$613,923.33, or \$204,641.11 per guarantor.

Therefore, the Special Referee's judgment that each guarantor's *pro rata* amount of the debt was \$545,893.18, analyzed in the scenario, was inequitable, unbargained for, unforeseen, and simply unfair.

Now let us consider the amounts actually paid toward satisfaction of the company's debt. The first five payments were each made prior to C&P's exit, when the Jerams and Patels, collectively, owned a one-third (1/3) membership interest in the company each. Of the

¹ BPR Properties, LLC is comprised of each of the Patels, with each owning a 1/3 interest thereof, or an indirect interest of 11.11% of Bayview Resort II, LLC.

\$1,501,619.23 paid during that time, the *pro rata* share of the debt borne by each member was but \$500,539.74, or \$166,846.58 per Appellant. The remaining two payments were made after C&P's exit, when each owned a one-half (1/2) interest in the company. Of the \$1,227,846.65 paid during that time, the *pro rata* share of the debt borne by each remaining member was but \$613,923.33 or \$204,641.00 per Appellant. Thus, in total, the Patel's collective *pro rata* share of the debt was but \$1,114,463.07, or \$371,487.69 each. Again, when this figure is compared to the Special Referee's determination that the Patel's collective *pro rata* portion of the debt is \$1,637,679.54, or \$545,893.18 each, the Special Referee's determination of what amount truly is *pro rata* becomes all the more inequitable, unfair, and unforeseen.

Moreover, the Jerams' maximum exposure to NBSC totaled \$1,624,350.00, or \$812,175.00 per individual pursuant to each Unconditional Limited Guaranty Agreement. As such, this Court should limit their right to contribution to the Appellants' *pro rata* share of this amount or \$324,870.00 per Appellant.

For these reasons, the Special Referee erred in calculating the *pro rata* amount of the debt actually paid. This Court should, therefore, reverse the Special Referee's judgment and modify it with an amount, if any, truly reflecting the *pro rata* portions of each guarantor's debt relieved.

III. The Special Referee erred by holding that, as a result of the payment of the Garage Note, the Patels received the same benefit received by the Jerams.

When the Jerams, vis a vis Jeram Tej, LLC satisfied the Garage Note in full on April 14, 2008, they received an immediate, substantial benefit that the Patels did not- a parking garage addition free and clear of all liens which Mayur Jeram testified at trial was worth approximately \$4.1 million. Neither Bayview Resort II, LLC nor the Patels owned any portion of the parking garage. As a result, the Special Referee's holding that the Jeram's payment of the Garage Note in full resulted in a mutual benefit, thereby entitling the Jerams to contribution, was in error.

When Bayview Resort II, LLC borrowed the \$2,707,250.00 to build an addition to the existing parking garage, that parking garage was owned by Jeram Tej, LLC, the developer of the Bayview Resort- Phase I. (Joint Motion to Supplement Record). When construction of the parking garage was completed, inclusive of both the original garage and the Phase II addition, Jeram Tej, LLC owned all of it- the land, Phase I garage, and Phase II addition, in fee simple. (Joint Motion to Supplement Record). Jeram Tej, LLC then conveyed the entire garage to a related entity, Yana, LLC, also owned by Mayur and I.D. Jeram, which entity owned the garage free and clear of all liens. (Joint Motion to Supplement Record). Yana, LLC then conveyed an easement for parking to the Bayview Resort Homeowners Association, Inc. for the requisite number of parking spaces required by law for use by owners of Bayview Resort Phase I condominiums and guests. (Joint Motion to Supplement Record). Yana, LLC never conveyed a parking easement to Bayview Resort II, LLC for use of the additional spaces added to the garage pursuant to the Bayview Resort II, LLC Garage Note. (Joint Motion to Supplement Record). Yana, LLC continued to own the entire garage, including the Phase II addition, free and clear of all liens until it pledged the garage to NBSC on May 20, 2008 as collateral for an extension on the Bayview Resort II, LLC land acquisition loan.

A. The Special Referee erred by assessing the relative equities of the parties at the time the Jerams demanded contribution in October of 2010 instead of at the time they made the payments, between October of 2007 and April of 2008.

The equities of this case were erroneously assessed by the Special Referee in 2010, after the land acquisition loan matured on November 2, 2009, instead of at the time the Jerams actually made the payments. In so waiting, a material change in circumstances occurred. For, by 2010, Bayview Resort II, LLC had defaulted on its land acquisition loan, thereby causing NBSC to demand payment in full from not only Bayview Resort II, LLC, but also the individual guarantors

of that debt. As part of that negotiation, Bayview Resort II, LLC agreed to deed to NBSC all of the land it had acquired to construct the planned Phase II tower and parking garage, and Yana, LLC agreed to deed NBSC the Phase I parking garage it had pledged as collateral for the extension of the land acquisition loan. However, it is important to note that this later conveyance was made subject to the parking easement that Yana, LLC had granted the Bayview Resort Homeowners Association for parking.

Had the Patels succeeded in obtaining an agreement with a third party, for example, to acquire the land, build a hotel, and use the addition to the parking garage, the land acquisition loan would have been paid in full and NBSC's mortgage upon the parking garage extinguished, resulting in Yana, LLC continuing to own the parking garage, subject only to its existing parking easement to the Bayview Resort Homeowners Association and a new easement to Marriott, for which Yana, LLC would have likely been compensated. In such circumstances, one could not argue that the Jerams received more than what they paid for- a \$4.1 million parking garage addition in exchange for payment of \$2,729,465.88.

The critical point to be made in so illustrating this scenario is that the circumstances existing two years following payment should not be analyzed to determine the equities of this or any other case, for those circumstances can and may change, either to the benefit of one party or the other, or to the detriment of one party or the other. The only fair assessment of equities must occur at the time the benefit alleged to have been removed is removed and the benefit alleged to have been received is actually received- not sooner and not later.

The Special Referee erred by waiting approximately two years after the time at which the alleged burden was removed and benefit gained to assess the equities in this case. This Court should, therefore, reverse the decision of the Special Referee and remand the case with instructions

to assess the equities as they existed immediately upon the satisfaction of the Garage Note- in April of 2008.

B. The Jerams' demand for contribution from the Patels was an afterthought, made too late, and prejudiced the Patels.

The Jerams did not make a formal demand for contribution from the Patels until October of 2010. Up until this time, all evidence in the record indicates that the Jerams never intended to request reimbursement from any source other than either Bayview Resort II, LLC or, later, BPR Properties, LLC, their fellow member in Bayview Resort II, LLC.

At trial, Mayur Jeram testified that, during the entire pendency of the garage addition loan- from January of 2006 until it was satisfied in April of 2008, Bayview Resort II, LLC was current on the garage addition loan. (Trial Transcript p. 91). To fund these payments, Mr. Jeram requested *pro rata* capital contributions from the members of Bayview Resort II, LLC, which they made, and then used those contributions to pay NBSC. (Trial Transcript p. 91). No contributions of capital were requested from the Patels, individually; all contributions came from BPR Properties, LLC, its member. (Trial Transcript p. 91).

Mr. Jeram testified there was no written agreement with either the members of Bayview Resort II, LLC or the Patels to repay the funds. (Trial Transcript p. 53). Mayur Jeram, manager of Bayview Resort II, LLC, testified that he agreed the monies that were paid by Jeram Tej to NBSC on behalf of Bayview Resort II, LLC were, in fact, a loan that Jeram Tej made to Bayview Resort II for which Jeram Tej, LLC expected Bayview Resort II to pay it back. (Trial Transcript p. 94). Mr. Jeram likewise testified that the purpose behind organizing Bayview Resort II, LLC was to obtain the limited liability protection offered by a limited liability company- to enter into contracts and obligations as a company as opposed to as individuals. (Trial Transcript p. 96). Mr. Jeram testified that it was the parties' intent that Bayview Resort II, LLC repay the garage loan.

(Trial Transcript p. 98). Mr. Jeram also testified that, following Jeram Tej, LLC's satisfaction of Bayview Resort II, LLC's garage addition loan, Bayview Resort II, LLC remained a viable entity, current on its obligations, with assets. (Trial Transcript p. 120). Mr. Jeram testified that, at that time, Jeram Tej, LLC could have demanded that Bayview Resort II, LLC repay Jeram Tej, LLC, but did not do so. (Trial Transcript p. 120).

By email dated March 11, 2009, counsel for Bayview Resort II, LLC made the first written demand upon the Patels regarding the garage loan. It was made upon BPR Properties, LLC and requested a reorganization of the company's membership interests. Counsel notified Bhupen Patel, on behalf of BPR Properties, LLC, its member, that the Jerams had paid the garage loan in full and "if ID and Mayur are going to continue their partnership with you and your partners then something needs to be done to make the liability in the properties equal. That would require your group delivering to them a promissory note for one half of the costs of the Phase II addition to the garage. Another option would be a buyout or dissolution of the LLC, with the garage being released from the Phase II mortgage and the easement for the Phase II parking being conveyed back to Mayur and ID. As part of that, ID and Mayur would convey their interest in the remaining Phase II property to your group and would be released from the Phase II loan obligations. Of course, this would require NBSC approval. These are issues and options that need to be addressed before the loan matures and before any additional penalties are incurred on the property taxes. We all need to sit down soon and iron this out." (Trial Exhibit 36, Trial Transcript pp. 110-111). Thus, no demand was ever made upon an individual Patel for contribution.

On November 5, 2009, the land acquisition loan matured, despite the best efforts of the Patels to broker a hotel transaction. As set forth above, the maturity of this loan resulted in a

substantial change in circumstances amongst the parties. It was not until after these circumstances changed that the Jerams, individually, sought contribution from the Patels, individually.

In sum, the record reflects that at no time prior to the failure of Bayview Resort II, LLC in November of 2009 did the Jerams seek reimbursement the Patel's individually. The Jerams always anticipated Bayview Resort II, LLC, vis a vis a construction loan from Phase II or sales of condominiums at Phase II, to be the source of repayment. And then the project failed, through no fault of the Patels, and through the myriad of failures of the Jerams to take any action toward making the project a success. The Patels never intended to subject themselves to personal liability with respect to the Jerams.

The Jerams subsequent demand was an afterthought and the Special Referee entered judgment the Patels never agreed to incur nor anticipated when BPR Properties, LLC chose to invest in the venture. Had the Jerams notified the Patels of their intention to seek contribution from them individually at either the onset or at the time the payments were made, the Patels, and the Jerams, would have had an opportunity to react accordingly, resulting in different negotiations with NBSC and their partners in the company. Such was the basis upon which the Patels stated their counterclaim for equitable estoppel and set off at trial.

Because the Special Reference chose to assess the equities after circumstances had materially changed, the Special Referee's judgment should be vacated, with instructions to remand the case for either a new trial or assess the equities at the time the payments were made.

CONCLUSION

In conclusion, Appellants respectfully request this honorable court reverse and vacate the Special Referee's Order, which awarded Respondents three individual judgments against the Appellants in the amount of \$545,893.18 each.

Alternatively, Appellants respectfully request this court reverse the decision of the Special Referee and modify his judgments to amounts representing their *pro rata* share of the debt to a more truly equitable result than that which was reached by the Special Referee, illustrated as follows:

First, this Court could find that the Jerams are only entitled to contribution from the Patels in proportion to their interests in Bayview Resort II, LLC at the time the payments were made.

This method is illustrated as follows:

\$1,501,619.23 Paid Pre-Maturity (while BPR Properties, LLC owned one-third (1/3) Interest)	\$166,846.58 per Appellant
--	----------------------------

\$1,227,846.65 Paid Post-Maturity (while BPR Properties, LLC owned one-half (1/2) Interest)	\$204,641.11 per Appellant
--	----------------------------

TOTAL <i>PRO RATA</i> SHARE BASED ON INTEREST IN COMPANY:	\$371,487.69 per Appellant
--	----------------------------

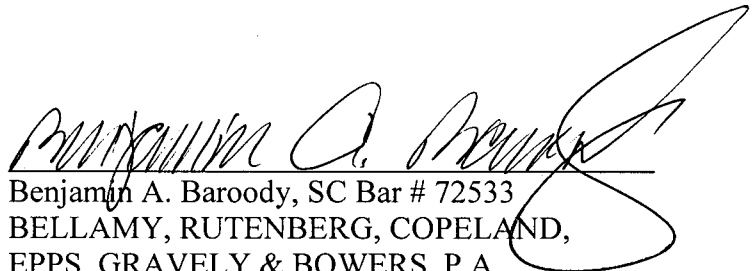
Second, this Court could find that the Jerams are only entitled to contribution for the two payments made *after* the Garage Note matured, which two payments totaled \$1,227,846.65. This Court could determine that *pro rata* share in either of two methods.

If the court determines that each of the five individual guarantors' *pro rata* share of the \$1,227,846.65 should be in proportion to their limited guaranties, as the Special Referee held, then that amount would be twenty-percent (20%) per Appellant, or \$245,569.33 per Appellant.

If the court determines that each of the five individual guarantors' *pro rata* share of the \$1,227,846.65 should be in proportion to their interest in Bayview Resort II, LLC, then that amount would be \$204,641.11 per Appellant, representing each Appellant's one-third interest in BPR Properties, LLC, which owned a one-half interest in Bayview Resort II, LLC at the time those payments were made.

Finally, because the Jerams' maximum total personal liability under their individual Unconditional Limited Guaranty Agreements total \$1,624,350.00 (\$812,175.00 each), this Court could and should limit the judgments to the Patels' *pro rata* share of this amount, or \$324,870.00 per Appellant, as said amount was the Jerams' own maximum personal expense to NBSC thereunder.

Respectfully submitted,



Benjamin A. Baroody, SC Bar # 72533
BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.
Post Office Box 357
Myrtle Beach, South Carolina 29578-0357
843-448-2400
Attorneys for Appellants

STATE OF SOUTH CAROLINA
In the Court of Common Pleas
Fifteenth Judicial Circuit

APPEAL FROM HORRY COUNTY
Circuit Court

The Honorable Thomas W. Cooper, Jr.
Special Referee

RECEIVED

NOV 27 2018

SC Court of Appeals

Case No.: 2011-CP-26-00873

Appellate Case No.: 2018-001199

I.D. Jeram and Mayur Jeram..... Respondents

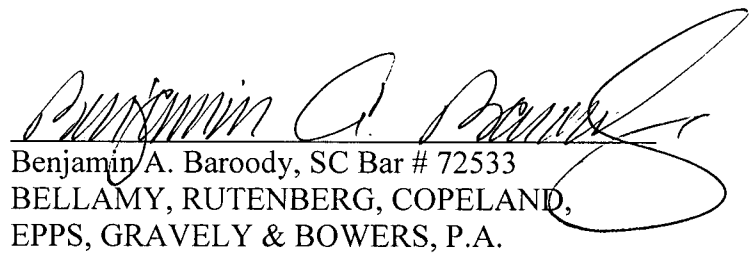
v.

Rajendra V. Patel, Bhupendra Patel, and Pankaj Patel..... Appellants,

PROOF OF SERVICE

The undersigned certifies that he is employed by the law firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., attorneys for the Appellants, Rajendra V. Patel, Bhupendra Patel, and Pankaj Patel, that he has mailed a copy of the Appellant's Initial Brief, Designation of Matter to Be Included in the Record on Appeal, Certificate of Counsel, and Proof of Service to counsel listed below this 26th day of November 2018, with proper postage attached thereto.

Carl Scott Masel, Esquire
Newby Sartip Masel & Casper, LLC
Post Office Box 808
Myrtle Beach, South Carolina 29578
- *Counsel for the Respondents*

A handwritten signature in black ink, appearing to read "Benjamin A. Baroody", is written over a horizontal line.

Benjamin A. Baroody, SC Bar # 72533
BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.

Post Office Box 357

Myrtle Beach, South Carolina 29578-0357

843-448-2400

Counsel for Appellants

Myrtle Beach, South Carolina

November 26, 2018

HOWELL V. BELLAMY, JR.
EDWARD B. BOWERS, JR.*
BRADLEY D. KING
M. EDWIN HINDS, JR.
DAVID J. GUNDLING**
DAVID B. MILLER+
C. WINFIELD JOHNSON, III
DOUGLAS M. ZAYICEK
MARTIN C. DAWSEY*
ROBERT S. SHELTON+
HOWELL V. BELLAMY, III

* LLM TAXATION
** LICENSED IN SC & NC
+ CERTIFIED MEDIATOR
++ CERTIFIED ARBITRATOR



THE BELLAMY LAW FIRM

OFFICES IN MYRTLE BEACH & PAWLEYS ISLAND

WWW.BELLAMYLAW.COM

ASHLEY P. MORRISON
GEORGE W. REDMAN, III + ** ++
BENJAMIN A. BAROODY + **
PHILLIP H. ALBERGOTTI* **
HAYES K. STANTON + **
KARA J. KEITH **
HOLLY M. LUSK
LAUREN BREARLEY BENTON
JON CRAIG HOWELL, JR.
JAMES C. SPEARS, III *

RETIRED:
JOHN K. RUTENBERG (1939-2012)
JOHN E. COPELAND
CLAUDE M. EPPS, JR.
DAVID R. GRAVELY
JILL F. GRIFFITH

1000 29TH AVENUE NORTH • P.O. BOX 357 • MYRTLE BEACH, SC 29578
TELEPHONE (843) 448-2400 • FACSIMILE (843) 448-3022

Writer's Direct Dial: 843-916-7167
Email: BBaroody@BellamyLaw.com

November 26, 2018

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED
NOV 27 2018
SC Court of Appeals

Re: I.D. Jeram and Mayur Jeram, Respondents, v. Rajendra V. Patel, Bhupendra Patel,
and Pankaj Patel, Appellants
Appeal from Horry County Court of Common Pleas
Appellant Case No.: 2018-001199

Dear Ms. Kitchings:

Enclosed herewith please find the originals and one copy of each of the Initial Brief of Appellants, Designation of Matter to Be Included in the Record on Appeal, Certificate of Counsel, and Proof of Service in the above-referenced matter. Please file the original documents and return the clocked copies to me in the self-addressed stamped envelope enclosed for your convenience.

If you have any questions or need additional information, please feel to contact me.

November 26, 2018

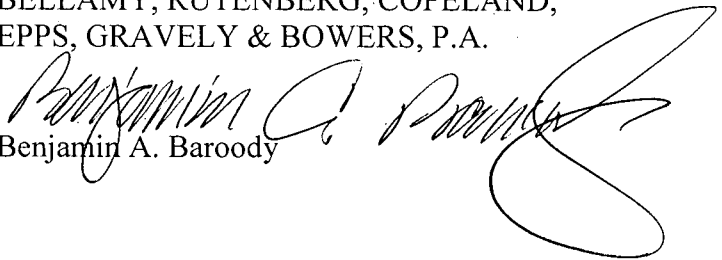
Page 2

With kindest regards, I am

Yours very truly,

BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.

Benjamin A. Baroody

A handwritten signature in black ink, appearing to read "Benjamin A. Baroody", with a large, stylized flourish extending from the end of the signature.

BAB/dg

Enclosures as noted

cc: Client

C. Scott Masel, Esquire

ORIGIN ID: MYRA (843) 282-5378
DEDIE GARREN

1000 - 29TH AVENUE NORTH

MYRTLE BEACH, SC 29577
UNITED STATES US

SHIP DATE: 26NOV18
ACTWGT: 0.50 LB
CAD: 101652692/NET4040

BILL SENDER

TO THE HONORABLE JENNY ABBOTT KITCHING
SC COURT OF APPEAL
1220 SENATE ST

COLUMBIA SC 29201

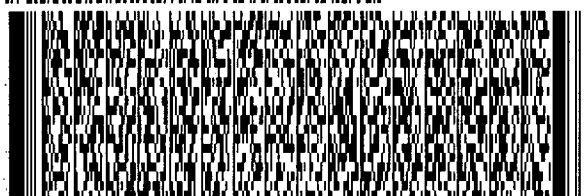
(803) 734-1890

REF: 25749.82908.39

INV:

PO:

DEPT:



552.D/E4F/DC45

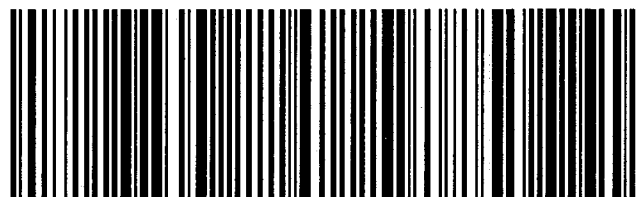
TRK#
0201

7738 0393 5690

TUE - 27 NOV 10:30A
PRIORITY OVERNIGHT

28 USCA

29201
SC-US CAE



RECEIVED

NOV 27 2018

SC Court of Appeals

After printing this label:

1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number. Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com. FedEx will not be responsible for any claim in excess of \$100 per package, whether the result of loss, damage, delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim. Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special is limited to the greater of \$100 or the authorized declared value. Recovery cannot exceed actual documented loss. Maximum for items of extraordinary value is \$1,000, e.g. jewelry, precious metals, negotiable instruments and other items listed in our ServiceGuide. Written claims must be filed within strict time limits, see current FedEx Service Guide.