THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

The Honorable Thomas W. Cooper, Jr.
Special Referee

Trial Court Case No: 2011CP2600873

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 RESPONDENTS

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STATEMENT OF THE CASE

This case involves a claim for contribution among co-guarantors. The Appellants and Respondents all personally guaranteed a commercial development loan. Respondents filed this contribution action asserting they paid $2,729,465.88 to satisfy the loan in full and Appellants should pay their fair share of the guaranteed debt. [Complaint]. Appellants answered denying liability, and counterclaimed alleging equitable estoppel, indemnification and set-off, to which Respondents replied with a denial. [Respondents' Answer; Appellant's Reply]. Appellants' also filed a third party complaint against C&P Partners, LLC, which they dismissed prior to trial. [Respondents' Answer; Order of Dismissal; Tr.Trans.I, p.6, lines 11-25].

On February 20, 2013, a non-jury trial was held before the Honorable Thomas W. Cooper, Jr., serving as Special Referee. By Order dated August 4, 2014, Judge Cooper concluded the Respondents are entitled to contribution from the Appellants under both the U.C.C. and common law for their pro-rata share of the amount paid by Respondents to satisfy the loan. [8/5/2014 Order]. Specifically, Judge Cooper granted Respondents judgment against (i) Appellant Rajendra V. Patel for $545,893.18 plus prejudgment interest from October 31, 2010, (ii) Appellant Bhupendra Patel for $545,893.18 plus prejudgment interest from October 31, 2010, and (iii) Appellant Pankaj Patel for $545,893.18 plus prejudgment interest from October 31, 2010. [Id.]. Appellants filed a motion for reconsideration, which Judge Cooper denied by Order dated May 25, 2018. [5/30/2018 Order]. This appeal follows.

FACTS

While the Myrtle Beach real estate market was booming in the early 2000s, Respondents I.D. Jeram and his son Mayur Jeram decided to build a new oceanfront condominium tower with a parking garage called Bayview Resort ("Bayview I"). [Tr.Trans.I, p.26, lines 11-25]. To do so, they formed Jeram Tej, LLC ("Jeram Tej"), which father and son own 50/50. [Tr.Trans.I, p.27, lines 1-11]. By early 2005, construction of Bayview I was underway. [Tr.Trans.I, p.27, line 12 – p.28, line 1].

Bhupendra "Bhupi" Patel (unrelated to Appellants) is an active Myrtle Beach oceanfront condominium developer and he posed the idea of building a second condominium project: Bayview Resort II, to be located next to Bayview I. [Tr.Trans.I, p.28, lines 3-25; p.30, lines 1-4, p.125, lines 16-23; Bhupi Depo Transcript, p.5, line 21 – p.8, line 22; p.9, line 20 – p.12, line 18]. This idea interested the Respondents and Bhupi Patel set to recruiting additional investors for Bayview Resort II. [Id.].

Appellants are real estate developers in North Carolina and Georgia, having built numerous hotels and subdivisions. [Tr.Trans.I, p.29, lines1-8; Tr.Trans.II, p.49, line 4 – p.50, line 1, p. 97, lines 4-14, p.115, line 16 – p. 116, line 13, p. 139, lines 16-24, p.146, lines 10-21]. They too saw an opportunity to make money in Myrtle Beach's hot real estate market after Bhupi approached them about partnering in Bayview Resort II. [Tr.Trans.I, p.28, line 14-25, line 14 – p.25; Tr.Trans.II, p.50, line 9 – p.51, line 4]. Bhupi, Appellants, and Respondents were all optimistic that Bayview Resort II would be a success and profitable, and everyone moved forward with the new project. [Tr.Trans.I, p.32, lines 20-24; Tr.Trans.II, p.100, lines 9-19; Bhupi Depo Trans., p.27, lines 5-20].

At the end of 2005, the parties formed Bayview Resort II, LLC ("Bayview II"). [Trial Exhibit 1-Bayview II Articles of Organization; Trial Exhibit 2-Bayview II Operating Agreement; Tr.Trans.I, p.34 lines 3-10]. Initially, ownership of Bayview II was as follows:

- One-third by BRP Properties, LLC ("BRP"), a company owned by the three Appellants;
- One-third by C&P Partnership, LLC, owned by Bhupi Patel and his brother; and
- One-third by Respondents I.D. Jeram and Mayur Jeram.

[Trial Exhibit 2, Bayview II Op. Agreement; Tr.Trans.I, p.33, line 19 – p.34 line 2].

During their due diligence, Appellants and Respondents met with the banker and learned that developing Bayview Resort II would be a "matter of time" and the project would have to follow a certain process that included securing an acquisition loan to purchase the land, obtaining architect drawings and renderings, securing "pre-sale" contracts, obtaining another loan for the construction of the condominium tower, and then, finally, selling the units to buyers. [Tr.Trans II, p. 52, lines 11 - p 59, line 10].

Bayview II's first step was to acquire property for its new project. On January 16, 2006, NBSC loaned $11,425,000 to Bayview II to purchase several oceanfront lots for the new condominium tower and third-row land to construct a parking garage ("Acquisition Loan"). [Trial Exhibit 4 - Acquisition Loan Note; Tr.Trans.I, p.37, line 11- p.38, line 20].[1]

Several months later, Bayview II's contractor suggested a way to save money: rather than building a new parking garage on the recently acquired raw land, it would be cheaper for Bayview II to add three more levels on top of Bayview I's existing parking garage, upon the land owned by Jeram Tej. [Tr.Trans.I, p.43, line 1 – p.43; Tr.Trans.II, p.157, lines 6-21; Bhupi Depo Trans., p.14, lines 1- 20, p.28, line 17 – p.29, line 13]. By doing so, it would save Bayview II between $500,000 and $1,000,000. [Tr.Trans.I, p.43, line 13 – 24; Trial Tr.II, p.60, line 24 – p.61, line 25; Bhupi

[1] Each Appellant and each Respondent personally guaranteed the Acquisition Loan, but these personal guaranties are not at issue in this case. [Tr. Exhibit 4 – Acquisition Note and Guarantees]

Depo Trans., p.14, lines 1- 20; p.28 line 17 – p.30, line 3]. The members of Bayview II all agreed to proceed with this cost-saving measure. [Id.].

On June 20, 2006, Bayview II borrowed $2,707,250 from NBSC to construct its parking garage addition on top of the existing Bayview I garage ("Garage Loan"). [Trial Exhibit 10; Tr.Trans.I, p.41, line 22 – p.42, line 24]. As security for the Garage Loan:

- NBSC required each Appellant and each Respondent to sign Bayview II's $2.7 million promissory note ("Garage Note") as Guarantors. [Trial Exhibit 10-Garage Note and Guaranties; Tr.Trans.I, p.42, lines 1-15, p.44, lines 5-12; Tr.Trans. II, p.64, line 1-16, p107, lines 1-9, p.136, lines 10-24, p.159, lines 1-9].
- NBSC required each Appellant and each Respondent to sign Unconditional Limited Guaranty Agreements, which capped each guarantor's liability at $812,175.00. [Id].
- NBSC required a second mortgage on Bayview I's garage property. [Tr.Trans. p.84, lines 9-18].
- Finally, NBSC required that "all net funds received" from Bayview I condominium sales were to be paid to NBSC after Bayview I's first mortgage was paid in full. [Trial Exhibit 10, Garage Loan Note, page 2].

Respondents agreed to pledge Bayview I's garage property and condominium sales proceeds as security for Bayview II's Garage Loan because the parking addition was a great cost saving benefit to Bayview II, and they, like everyone else, believed the oceanfront development market would stay strong and Bayview II would ultimately repay the loan through its successful development of the new project. [Tr.Trans.I, p.46, line 2 – line 9; p.85, lines 4 – p.87, line 22; Bhupi Patel Depo Trans., p.20, line 1-20, p.33, line 5 – p.34, line 6].

By early 2007, Bayview II's garage addition was complete, but the previously hot real estate market was rapidly cooling, and construction of Bayview II's condominium tower had not

yet begun. [Tr.Trans.p. 46; Tr.Trans.II, p.69, line 22 – p.70, line 7]. The parties hoped, and NBSC told them, that the economic slowdown appeared to be temporary, so in early 2007, Bayview II obtained loan extensions from NBSC with the goal of ultimately securing a construction loan sufficient to pay-off both the Garage Loan and $11 million Acquisition Loan and to build the new condominium tower. [Tr.Trans.II, p.68, lines 15- 24; p.70, line 21 – p.71, line 15, p.103, lines 1-8, p133, lines 10-21; Bhupi Deposition Transcript, p.33, line 5 – p.34, line 3].[2]

Unfortunately, the Great Recession took hold later in 2007, ultimately resulting in the most severe economic recession since the Great Depression of the 1930s. *World Economic Outlook – April 2009: Crisis and Recovery*, International Monetary Fund (April 24, 2009). The Myrtle Beach economy "collapsed" and "everything came to a standstill." [Bhupi Depo Transcript, p.7, line 1-6, p.20, line 21 – p.21, line 3]. The Bayview II condominium project seemed doomed. [Tr.Trans.II, p.74, lines 5-14, p.75, line 22 - p.76, line 2, p.78, lines 4-9, p.102, lines 4-8, p.104 line 19 – p.105, line 3, p133, line 25 – p.134, line 6; Bhupi Deposition Transcript, p.20, line 21 – 25; p.34, lines 4 - 13]. C&P Partnership bailed out of Bayview II in December of 2007 due to its own financial troubles, leaving ownership of Bayview II as 50% BRP and 50% Respondents I.D. and Mayur Jeram. [Tr.Trans.II, p.74, line 20 – p.76, line 2; Trial Exhibit 17, 18 and 19].

Meanwhile, Bayview II had no money and no condominium project. [Tr.Trans.II p.109, lines 2-17; Bhupi Depo Trans., p.34, line 14 – p.35, line 9, p.36, line 19 – p.37, line 3]. Bayview II already owed NBSC over $11 million on the Acquisition Loan, and the company could not pay the Garage Loan either. In fact, all parties agree that Bayview II was broke and could never have paid the Garage Loan. [Id; Tr.Trans.I, p.51, line 20-23; p.61, line 4-7; Bhupi Trans. p.36, line 24 – p.37, line 3; Tr.Trans.II, p.108, line 16 - 15].

[2] The record is murky as to the length of any such extension. The record is more clear that by 1/15/2008, NBSC notified the parties that the Garage Loan had already "matured in full". [Trial Exhibit 35].

Due to this global financial crisis and Bayview II's inability to repay NBSC, all five guarantors were facing significant personal exposure to NBSC on the Garage Loan for as much as $812,175.00 each. [Trial Exhibit 4 - Promissory Note and Guaranties; Tr.Trans. I, p.46, line 23 – p.47, line 10, p.61, line 4-15, p.97, line 20 - p.98, line 1; Tr.Trans.II, p.107 – p.109, line 15, p.110, lines 9-14, p.113, lines 2-11, p.137, line 1-15, p.159, lines 1-24]. Moreover, Bayview I's garage property was still subject to the mortgage and its units still secured the debt. [Trial Exhibit 4, Promissory Note and Guaranties; Tr.Trans. I, p.46, line 23 – p.47, line 10; p.61, line 4-15]. Therefore, beginning in October of 2017, Respondents made payments on the Garage Loan with the expectation they would be repaid either (i) through a new loan obtained by Bayview II, (ii) the profits of Bayview II, or (iii) from the individual Appellants. [Tr.Trans.I, p.52, line 23 – p.53, line 6; p.87, lines 12-22; p.88, lines 12-17; p.106, line 12 – p.108, line 5].

Respondents paid Bayview II's Garage Loan by directing their company, Jeram Tej, as their agent and nominee, to pay Respondents' own personal profits from Bayview I sales to NBSC. [Trial Exhibit 22B; Tr.Trans. p.47, lines 19 – p.52, line 6, p117, lines 4-21]. In this regard, during 2007 and 2008, Respondents made the following payments to NBSC:

Bayview I, Unit #	Date	Amount Paid to NBSC
1706	10/17/2007	$251,073.24
1404	10/24/2007	$333,047.00
1001	10/24/2007	$140,515.94
803	10/25/2007	$442,983.05
1008	10/25/2007	$334,000.00
1507	02/01/2008	$336,096.64
	04/14/2008	$891,750.01
	TOTAL PAID	$2,729,465.88

[Id.].

Richard Jordan is the certified public accountant for Bayview II, Jeram Tej and the Respondents, and he testified at trial that these payments to NBSC consisted of Respondents' personal profits. Specifically, the CPA explained that Jeram Tej, as a limited liability company,

was treated like a partnership and Respondents' personal profits were calculated by subtracting Jeram Tej's business expenses from Jeram Tej's revenue generated by selling units at Bayview I. [Tr.Trans.II, p.38, line 8-23; p.39, lines 15 – p.40, line 14, p.44, lines 2-22]. The CPA further testified that because the payments made to NBSC on the Garage Loan did not involve Jeram Tej, those payments were therefore made "out of the profits of Mayur and I.D." [Id.]. To bring this point home, the CPA testified that Mayur and I.D. Jeram "would have to pay taxes on [those profits] each year." [Id.]. Similarly, Respondents made the final payment to NBSC from Jeram Tej loan proceeds, and Respondents again directed Jeram Tej, as their agent and nominee, to pay their personal profits from ongoing unit sales to satisfy the obligation. [Tr.Trans. p.116, line 19 – 117, line 21].

Prior to satisfaction of the Garage Loan, all five guarantors were personally exposed to liability to NBSC for up to $812,175.00 each, but after the loan was paid-off, they all enjoyed complete relief and release from that liability. [Tr.Trans.I, p.60, line 18 – p. 61, line 15; Tr.Trans.II, p.108, line 2 – p.109, line 25; p.110, line 9 – 14, p.140, lines 11-22; Bhupi Depo Trans., p.35, line 23 – p.36, line 18].[3] In addition to relieving the individual guarantors from their obligations to NBSC, satisfaction of the debt also released Bayview I's garage property from the Garage Loan mortgage; however, that property also secured Bayview II's $11 million Acquisition Loan.

In 2009, Bayview II defaulted on the $11 million Acquisition Loan. [Tr.Trans.I, p.62, line 11-18; Tr.Trans.II, p.108, lines 12-15]. As a result, NBSC obtained all of Bayview II's property by deed in lieu of foreclosure, as well as the entirety of Bayview I's parking garage property, subject only to an easement in favor of Bayview I. [Tr.Trans.I, p.63, lines 4 - p.64, line 7; p.103, lines 11- p.105, line 1].[4]

[3] NBSC did not formally declare the Bayview II in default of the Garage Loan, presumably because Respondents were making payments. [Tr.Trans.I, p. 60, lines 9 – 24; Bhupi Depo., p. 34, line 22 – p. 35, line 9].

[4] For reasons that are not clear in the record, Yana, LLC owned the garage property at the time it was mortgaged to secure the Acquisition Loan, and it was Yana that executed the deed in lieu of foreclosure.

Evidence varies as to when Appellants first learned of Respondents' payments on the Garage Note and their request to be reimbursed by Appellants. [Tr.Trans.I, p.53, line 19 – p.54, line 10, p.60, line 9 – p.61, line 3, p.64, line 23 – p.67, line 10; Trial Trans.II, p.72, line 11-22, p.77, line 20 - p.78, line 3, p.105, line 9 – p.106, line 25, p.110, line 15 – p.111, line 23, p.130, lines 17-25, p.154, line 11-22; Trial Exhibit 10 - Garage Loan Promissory Note; Trial Exhibit 35 – January 2008 letters; Trial Exhibit 36 - 3/11/2009 Email]. There is no dispute, however, that Appellants received a formal demand for contribution from Respondents in October of 2010, to which Appellants did not respond. [Tr.Trans.I, p.64, line 23- p.65, line 6; Tr.Trans.II, p.85, lines 4-13, p.112, lines 4-9, p.132, lines 1-16, p.155, lines 6-13].

STANDARD OF REVIEW

This action involves claims for contribution under two similar but distinct legal theories. First, Respondents seek contribution among co-guarantors under common law, which is an equitable action. *Gourdin v. Trenholm*, 25 S.C. 362 (1886); *Few v. Few*, 239 S.C. 321 (1961); *RIM Associates v. Blackwell*, 359 S.C. 170 (Ct. App. 2004). In an action in equity, the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81 (1976). However, the appellate court is not required "to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses." *Seabrook Island Prop. Owners Ass'n v. Marshland Trust, Inc.*, 358 S.C. 655, 661, 596 S.E.2d 380, 383 (Ct.App.2004).

Second, Respondents assert contribution from Appellants based on their signatures as guarantors on a promissory note, which is a negotiable instrument under the U.C.C., and subject to interpretation under S.C. Code §36-3-116. This section entitles a guarantor to "contribution in accordance with applicable law." *Id.* Principles of law and equity supplement the U.C.C. unless

specifically displaced by particular provisions. S.C. Code §36-1-103. As noted above, the "applicable law" of contribution is equitable in nature, and therefore the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence, but it is not required to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81 (1976); *Seabrook Island Prop. Owners Ass'n v. Marshland Trust, Inc.*, 358 S.C. 655, 661, 596 S.E.2d 380, 383 (Ct.App.2004).

ARGUMENT

As a result of Respondents' payments to satisfy the Garage Loan, Appellants enjoyed the benefit of being completely relieved of their obligation and liability as co-guarantors. This serves as the foundation for contribution actions recognized by South Carolina for nearly 200 years:

> "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 defendant, and that they are each benefited 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 Ea.252, 10 S.C. Eq. 252 (1833).

Context is important in this case. By late 2007, the economy was nearing catastrophic collapse. Bayview II's condominium project was not going to happen. Bayview II owed NBSC millions of dollars but had no money, no income and absolutely no ability to pay the $2.78 million Garage Note. It was not a matter of "if" NBSC would seek payment from the individual guarantors, but rather "when" that hammer would fall. Indeed, under the written guaranty agreements, each party was *personally* on the hook for as much as $812,750.00. However, after Respondents satisfied the Garage Note, this huge liability exposure to NBSC completely evaporated, and the Appellants enjoyed immediate relief from their burdens as personal guarantors of this debt.

No doubt, this was a benefit to the Appellants, although they claim otherwise. In fact, while each Appellants' exposure to pay $812,750 to NBSC was very real, their ultimate liability via contribution was several hundred thousand dollars *less* per person.

I. The Special Referee Properly Concluded the Five Guarantors Shared a Common Burden and Shared Joint and Several Liability as Guarantors of the Garage Note.

A. Common Law Contribution.

The right to contribution between co-guarantors has remained constant over the years. "Where there are two of more sureties for the same principal debtor, and for the same debt or obligation, whether on the same or on different instruments, and one of them has actually paid or satisfied more than his proportionate share of the debt or obligation, he is entitled to a contribution from each and all of his co-sureties in order to reimburse him for the excess paid over his share, and thus to equalize their common burdens." *Gordon v. Trenholm*, 25 S.C. 362 (1886)(italics and parenthetical omitted). Contribution is further 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. 152, 157 n.3 (Ct. App. 2005); *See also*, 38A *C.J.S. Guaranty* § 166 ("In accordance with the general principles of contribution, as a general rule, where one of several guarantors pays more than his or her proportionate share of the principal's debt, he or she is entitled to contribution from his or her co-guarantors of an amount sufficient to make the payment of all equal); 18 *Am. Jur. 2d Contribution* § 17 (Where a party is entitled to contribution, the general rule is that the measure of recovery should be the amount the claimant has paid in excess of his or her proportionate share).

Here, Bayview II was the borrower on the Garage Loan, and as security for the loan, NBSC required each Appellant and each Respondent to personally guaranty that debt. Thus, each guarantor undertook a common burden for the benefit of Bayview II, as each guarantor became

subject to obligation, exposure, responsibility and liability pursuant to their respective personal guaranties.

This common burden was not meaningless. Indeed, Bayview II could not pay the loan. It was never going to pay the loan, and the five guarantors were personally on the hook with NBSC. This measurable personal exposure continued for as long as Bayview II's Garage Loan remained unpaid, and the parties' obligations as guarantors of that loan were discharged only upon Respondents' payments to NBSC.

The Special Referee properly applied the elements of common law contribution in this case, concluding that all five guarantors shared a common burden and Respondents' satisfaction of the Garage Loan relieved each of them from that burden.

B. Contribution Under the Uniform Commercial Code.

Contribution among co-guarantors is also addressed in South Carolina's Uniform Commercial Code ("UCC") at S.C. Code §36-3-116:

> a) Except as otherwise provided in the instrument, two or more persons who have the same liability on an instrument as makers, drawers, acceptors, indorsers who indorse as joint payees, or anomalous indorsers are jointly and severally liable in the capacity in which they sign.
>
> (b) Except as provided in Section 36-3-419(f) or by agreement of the affected parties, a party having joint and several liability who pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law.[5]

The Special Referee correctly found the Garage Note to be a negotiable instrument governed by the UCC. S.C. Code §36-3-104. While Bayview II signed as borrower, each Appellant and each Respondent signed the Garage Note as Guarantors. By signing as Guarantors, each party is an "indorser" and their signature is deemed an "anomalous indorsement". S.C. §Code 36-3-

[5] Section 36-3-419(f) does not apply, as that subsection precludes an accommodated party (in this case, the borrower Bayview II) from seeking repayment from an accommodation party (a guarantor).

204(b); S.C. Code §36-3-205(d).[6] Moreover, by signing as Guarantors, the parties were acting as an "accommodation party", as their signatures are "accompanied by words indicating the signer is acting as a surety or guarantor with respect to the obligation of another party to the instrument." S.C. Code §36-3-419(c). This is aptly summarized in the last sentence of Official Comment #2 to Section 36-3-116:

> "An anomalous indorsement normally indicates that the indorser signed as an accommodation party. If more than one accommodation party indorses a note as an accommodation to the maker, the indorsers have joint and several liability and subsection (b) applies."

The Special Referee properly applied the UCC's provisions for contribution in this case. Section 36-3-116(a) applies, as each Appellant and each Respondent indorsed and signed the Note as equal Guarantors and accommodation parties. Moreover, Section 36-3-116(b) applies, as Respondents paid the underlying debt and are entitled to contribution in accordance with applicable law.

C. Joint and Several Liability on the Garage Note.

Contribution under the common law and UCC are similar in that both causes of action seek to reimburse a guarantor who pays the underlying debt to the benefit of his or her co-guarantors, but there are also some notable differences. First, the UCC remedy pertains to only negotiable instruments and requires a more technical analysis, focusing more on the capacity in which each guarantor signs the instrument, while the common law looks more to the equitable principles involved and is not limited to negotiable instruments. Second, only the UCC remedy references "joint and several liability", while the common law right to contribution initially rests on the "common burden" of guaranteeing a loan.

[6] See, Comment #3 to Section 36-3-205("The only effect of an 'anomalous indorsement'...is to make the signer liable on the instrument as an indorser. Such an indorsement is normally made by an accommodation party.")

The Special Referee properly limited his finding of joint and several liability to its application under the Garage Note. As discussed above, Section 36-3-116(a) imposes joint and several liability upon indorsers "in the capacity in which they sign." Here, the capacity in which each Appellant and Respondent signed is as "Guarantors".

Appellants argue they did not sign the Garage Note as guarantors, but instead they signed only to acknowledge certain limited guarantor obligations, such as providing financial statements to the bank. This contradicts Appellants' testimony. [Tr.Trans.II, p.107, lines 1-9, p.136, lines 10-24]. It also ignores Section 36-3-419(c), as their signatures are "accompanied by words indicating the signer is acting as a surety or guarantor". Indeed, the *only* word accompanying their signatures on the note is the word "Guarantors."

IN WITNESS WHEREOF, Borrower and Guarantors, on the day and year first above written, have caused this Note to be executed under seal.

BORROWER:

BAYVIEW RESORT II, LLC

By: _____
MAYUR JERAM, Managing Member

GUARANTORS:

_____
I. D. JERAM

_____
MAYUR JERAM

_____
BHUPENDRA PATEL

-7-

_____
RAJENDRA V. PATEL

_____
PANKAJ PATEL

[Trial Ex.10-Garage Note]

Appellants further argue there is no joint and several liability on the Garage Note because only Bayview II is identified as the borrower and the note does not contain an express promise by the guarantors to pay the debt. In this regard, Appellants contend their liability as guarantors is different than Bayview II"s liability as the borrower. This is true; however, Appellants' argument misses the point of Section 36-3-116(a). This section does not require the guarantors to be jointly

and severally liable with the borrower, instead such liability is imposed among the indorsers "in the capacity which they sign". Therefore, under Section 36-3-116(a), Appellants and Respondents are jointly and severally liable, not as borrowers, but rather in their shared capacity as co-guarantors.

Moreover, signing a negotiable instrument with words of "guaranty" creates a presumption that the signer is an accommodation party, and to rebut this presumption, a party must produce "evidence that the signer was in fact a direct beneficiary of the value given for the instrument." S.C. Code §36-3-419, Official Comment #3. In this case, Bayview II was the direct beneficiary of the loan proceeds, not Appellants, and it defies reason to assert Appellants signed the Garage Note in some capacity other than as a "Guarantor". Because Appellants signed the Garage Note as guarantors, they are deemed to be accommodation parties under Section 36-3-419(c), and therefore they are jointly and severally liable as co-guarantors under Section 36-3-116(a).

Finally, Appellants argue there can be no joint and several liability among the five guarantors for the full $2.7 million Garage Loan because each guarantor's liability to NBSC was capped at $812,750.00 under their separate Unconditional Limited Guaranty Agreements. In this regard, the Appellants confuse the terms of their individual contracts with NBSC with their mutual obligations as co-guarantors under the UCC. By signing the Garage Note, the five guarantors are jointly and severally liable under that negotiable instrument as guarantors pursuant to Section 36-3-116, but they limited their liability to NBSC via separate agreement. This separate agreement with the lender, however, does not affect the nature of a guarantor's liability to co-guarantors for contribution established under the UCC.

The right of contribution "may be controlled or modified by express agreement among the co-sureties or debtors." *Gordon v. Trenholm*, 25 S.C. 362 (1886). In this case, while there are separate agreements with the lender, there is no such agreement between the five guarantors.

Absent an express agreement between the guarantors, the common law provides that where one of several guarantors pays more than his or her proportionate share of the principal's debt, he or she is entitled to contribution from his or her co-guarantors of an amount sufficient to make the payment of all equal. *Id.* As such, Respondents' right to contribution is not limited by their contracts with NBSC, but instead this right is limited only to making the payment of all guarantors equal.

D. Unconditional Limited Guaranty Agreements.

Appellants argue the Special Referee erred by concluding there was joint and several liability under the Unconditional Limited Guaranty Agreements. Appellants misread the Order. While the Special Referee did mention that the agreements reference joint and several liability, this was only discussed in the context of ultimately concluding that the UCC contribution provisions were applicable to the Garage Note. [8/5/2014 Order p. 5]. To be sure, the Unconditional Limited Guaranty Agreements are not negotiable instruments, and therefore the UCC does not apply to them.

As discussed above, the common law right to contribution applies to the guarantor burdens imposed by the Unconditional Limited Guaranty Agreements. The $812,750.00 cap in the written guaranty agreements is immaterial to Respondents' contribution claim because (i) these agreements are with the NBSC, not among the guarantors, and (ii) the proper amount of contribution is $545,893.18 per Appellant, which is well below the $812,750.00 cap.

In sum, the Special Referee property determined the Appellants and Respondents shared a common burden, as they personally guaranteed a loan the borrower could not pay and would never pay. Moreover, the Special Referee properly found the five guarantors were subject to joint and several liability as guarantors of the Garage Note under the UCC and that Respondents were entitled to contribution under Section 36-3-116.

II. The Special Referee Properly Found That Respondents' Payments Relieved Each of the Individual Guarantors from a Common Burden.

As discussed above, before Respondents paid the Garage Note, the five guarantors were burdened with the obligation, responsibility and liability of their respective personal guaranties. This was not merely a theoretical exposure, as the economy was crashing, Bayview II had no hope to pay the debt, and it was only a matter of time before NBSC would take action against the guarantors. After the Garage Loan was paid, however, their personal exposure to NBSC disappeared.

A. Neither Default Nor Maturity of the Underlying Debt are Elements of Contribution.

Appellants argue because NBSC did not declare the Garage Note to be in default, there could be no guarantor liability, no common burden, and thus, no right to contribution. As such, Appellants contend the borrower's default is an element of, or condition precedent to, a claim of contribution.

Appellants' argument is without legal basis, and as pointed out by the Special Referee, Respondents have pointed to no law or statute to support such a contention. Under South Carolina's common law, the elements of contribution are very straightforward: "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 defendant, and that they are each benefited 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 Ea.252, 10 S.C. Eq. 252 (1833). In this case, the common burden is each party's obligation, exposure, responsibility and liability as guarantors for that loan, and the common benefit is that each guarantor was completely relieved of those burdens by Respondents' payments to satisfy the Garage Loan.

Likewise, the UCC requires no such condition precedent. Section 36-3-116(b) requires only that "a party having joint and severable liability who pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law."[7]

Appellants seem to confuse NBSC's contractual right to recover under the Unconditional Limited Guaranty Agreements with the well-established elements of contribution under the common law and the UCC. While Appellants focus on bank documents and whether they were directly liable for payment to the bank, the law of contribution looks to the effect of a guarantor's payment and the remedy applies when that payment removes the burdens from those serving as co-guarantors. The Special Referee properly concluded that NBSC's actions or inactions are not determinative to Appellants' cause of action for contribution among co-guarantors.

Along the same lines, Appellants alternatively argue contribution is improper because the Garage Note had not matured until January 14, 2008, and Appellants assert loan maturity is an element of, or condition precedent to, a claim of contribution. Again, Appellants confuse their contractual obligation to pay NBSC with the well-established elements of contribution. Moreover, Appellants ignore that Bayview II was never going to pay the note, and they dismiss as irrelevant their looming exposure as guarantors. As discussed above, the right to contribution under the common law and UCC does not require a bank document to trigger certain bank remedies or require the bank to take some type of formal remedial action; instead, the right of contribution

[7] The Appellants' argument seems to hinge on "liability" to NBSC. While the UCC does not define "liability", the term is commonly understood to be "a broad legal term, of the most comprehensive significance, including most every character of hazard or responsibility, absolute, contingent or likely. It has been defined to mean: all character of debts and obligations; an obligation one is bound in law or justice to perform; an obligation which may or may not ripen into a debt; any kind of debt or liability, either absolute or contingent, express or implied; condition of being actually or potentially subject to an obligation; condition of being responsible for a possible or actual loss, penalty, evil expense or burden; condition which creates a duty to perform an act immediately or in the future; the state of being bound or obliged in law or justice to do, pay or make good something; the state of one who is bound in law and justice to do something which may be enforced by action." Black's Law Dictionary, (5th ed. 1983).

arises when one guarantor pays the underlying debt and relieves his or her co-guarantors of their burdens, responsibility and liability as guarantors.

Finally, Appellants argue that contribution is improper because the Respondents could have instead pursued Bayview II for repayment of a subsequent contribution or loan under Bayview II's Operating Agreement.[8] The Special Referee properly concluded that what Jeram Tej or Respondents could or could not have claimed against Bayview II was not before the court, as neither Bayview II nor Jeram Tej are parties to this proceeding, and the only cause of action under consideration was contribution. "When one set of facts entitles the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both." *Cowart v. Poore,* 337 S.C. 359 (S.C.App. 1999). In other words, Appellants do not get to pick the Respondents' cause of action although they may subsequently assert Plaintiffs are not entitled to a double recovery. *Id.*; *Brown v. Felkeh* 320 S.C. 292 (Ct.App.1995).

B. Respondents Made The Payments to NBSC.

The Special Referee properly concluded the preponderance of evidence shows that Respondents made the payments to NBSC by and through Jeram Tej as their agent and nominee. Most compelling in this regard is the testimony of Respondents' accountant, who unambiguously testified that the payments consisted of Respondents' personal profits. The CPA's testimony is without contradiction. Moreover, Respondents testified that after each closing, they directed Jeram Tej to pay their personal profits to the bank rather than disbursing that money to themselves. Once the Garage Note was paid in full by Respondents' profits, the loan was satisfied and the all parties were relieved of their burdens and exposure as guarantors.

[8] Not only does contradict Appellants' argument that the payments were made by Jeram Tej, not Respondents, it finds no support in the facts. Mayur Jeram's testimony makes clear there was no subsequent contribution under Section 4.2, and the CPA's testimony reveals Bayview II did not owe Jeram Tej or Respondents any money and there were no liabilities other than what was owed to NBSC, thus showing there existed no loan under Section 4.5. [Tr.Trans.I, p.35, line 12 – p.37, line 10; p.52, lines 3-18; Tr.Trans.II, p. 43, line 15 – p. 44, line 1].

Appellants argue the terms of the Garage Note show that NBSC required Jeram Tej, not the Respondents, to make payments, as the Note identifies the net proceeds of Bayview I condominium sales proceeds to serve as security and a source of payment for loan. However, the Appellants' argument misses one important fact: Jeram Tej was not a party to the Garage Note and never signed the Garage Note. To be sure, if NBSC intended Jeram Tej to be responsible to make payments under the terms of the Garage Note, as Appellants contend, then NBSC would have required Jeram Tej to sign the note. Because Jeram Tej was not a party to the Garage Note, it was not mandated or obligated to make any payment under the note, and therefore the Appellants' arguments to the contrary make little sense.

On the other hand, Respondents have steadfastly maintained that they made the payments from their personal profits. Importantly, Respondents signed the Garage Note as "Guarantors" only and not as the borrower. Indeed, this shows that Respondents, as Guarantors, made payments using their personal profits derived from Jeram Tej's Bayview I condominium sales. In other words, the Garage Note required the Respondents *as Guarantors* to pay their personal profits to NBSC if Bayview II did not pay the debt. The facts show that when Bayview II did not pay and could never pay, Respondents stepped up and made those payments as Guarantors, which completely relieved Appellants from their exposure and burdens as co-guarantors of that loan.

In further support of their contention that Jeram Tej, not Respondents, made the payments, Appellants point to Mayur Jeram's trial testimony based on a reading of Bayview II's Operating Agreement at Section 4.5. [Trial Trans.I, p. 94, lines 5-19]. This testimony leads Appellants to contend that when the net proceeds of Bayview I closings were paid to NBSC, Jeram Tej, as a member of Bayview II, was making a loan to Bayview II. Admittedly, this testimony makes little sense, particularly because all parties readily admit, and the Bayview II Operating Agreement clearly shows, that Jeram Tej was never a member of Bayview II. The Special Referee properly

identified this argument as nonsensical, and instead relied upon the preponderance of evidence that plainly shows the Plaintiffs directed Jeram Tej, as their agent and nominee, to pay their personal profits to NBSC.

C. The Special Referee Properly Calculated the Pro-Rata Share of Each Guarantor.

Contribution allocates evenly and equally the burdens shared by guarantors. When one guarantor pays more than his or her fair share of the debt or obligation, that guarantor is entitled to a contribution from each of the co-guarantors in amounts that "equalize their common burdens." *Gourdin v. Trenholm*, 25 S.C. 362 (1886). Stated similarly, contribution requires the co-guarantors to pay their "aliquot portion" or "an amount sufficient to make the payment of all equal." *RIM Associates v. Blackwell*, 359 S.C. 170 (Ct. App. 2005); 38A *C.J.S. Guaranty* § 166.

In this case, there are five guarantors – the three Appellants and the two Respondents. Thus, to "equalize" the five guarantors' common burden, 20% is apportioned to each guarantor. The Special Referee properly determined that because Respondents paid $2,729,465.88 to satisfy the Garage Loan and extinguish the Appellants' burdens as co-guarantors, Respondents' right to contribution is limited to 20% of that amount per Appellant. As such, by allocating $545,893.18, each guarantor is responsible for an equal amount of the debt.

Appellants' argument that their prorated share should altered according to ownership percentages of Bayview II or BRP Properties, rather than the parties' equal status as co-guarantors, is simply inconsistent with the law of contribution. Moreover, Appellants' argument that C&P Partnerships' ownership percentage of Bayview II – or its transfer of such ownership – should affect contribution calculations also misses the mark, as neither C&P nor its owners were guarantors. Finally, Appellants' argument that Respondents should each shoulder $812,175.00 of the common burden while the Respondents are each only responsible for $324,870.00 comes

nowhere near the equalizing requirement of the law of contribution. Indeed, the calculation is simple: an equally shared burden of five guarantors is 20% each.

III. The Special Referee Correctly Analyzed the Equities of the Right of Contribution.

Contribution rectifies the inequity of one guarantor paying the debt while co-guarantors reap the reward of being released from their personal responsibility as guarantors. Since Bayview II could not and would not be able to pay the loan, each guarantor was individually exposed to liability up to $812,175, and the common benefit of being relieved from such an onerous obligation is measurable. "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 Ea.252, 10 S.C. Eq. 252 (1833).

Appellants contend contribution is improper because Respondents benefitted more than Appellants. As noted by the Special Referee, the law of contribution does not indicate that parties must equally share all conceivable benefits in order for the paying party to be entitled to contribution. This makes sense, as an individual will always have their own reason(s) to pay an underlying obligation, such as preserving good credit, avoiding litigation or maintaining a relationship with the lender. [8/5/2014 Order]. Indeed, under South Carolina law, the common benefit requirement is satisfied by the fact that payment of the debt relieves the common burden.

Nonetheless, Appellants argue that Respondents' payment of the Garage Note provided Jeram Tej the added or unequal benefit of owning the garage property free and clear of the Garage Note mortgage. This is a clever attempt to suggest Jeram Tej or Respondents received a windfall and perhaps somehow duped the Appellants. The Special Referee wisely noted this argument is flawed. First, Bayview I already had a garage and did not need the Bayview II addition. Nonetheless, Jeram Tej agreed to pledge its property so Bayview II could save up to a million dollars in construction costs. Second, the same property was again pledged to secure an extension

of the Bayview II Acquisition Loan. So, for a parking addition Bayview I did not need, and a loan extension it did not request, the garage property was mortgaged for an *additional* $14 million (this does not include Jeram Tej's initial property acquisition costs or costs to build its portion of the garage). Then, after Bayview II defaulted on the Acquisition Loan, the *entirety* of the parking garage property was lost to NBSC. It is difficult to understand how Appellants contend this great loss is a benefit to Respondents.

As concluded by the Special Referee, this series of unfortunate events did not constitute an unfair benefit to the Respondents or Bayview I. Because Bayview II could not pay either loan, Respondents paid $2.7 million to satisfy the Garage Note and Bayview I still lost the entirety of the garage property.

To this end, Appellants argue the Special Referee erred by considering the totality of circumstances, including facts such as Bayview II's inability to pay its debts, Bayview II's default under the Acquisition Loan, and Bayview I's ultimate loss of the parking garage property. Instead, Appellants contend the Special Referee's analysis should have abruptly stopped as of the date Respondents satisfied the Garage Note. In this regard, Appellants seem to claim equity is best measured by ignoring inconvenient facts. They highlight the release of the garage mortgage as an unfair benefit, but ignore the complete loss of that property. They assert Bayview II still had some hope of survival as of early 2008, but ignore that such hope was futile and Bayview II failed miserably. When looking at "unfair benefits", it is important to keep in mind Appellants did not pay a penny to satisfy the Garage Loan, they did not lose any of their property to NBSC, and they were completely released from their exposure and personal liability as guarantors of the Garage Loan. The Special Referee properly rejected Appellants' arguments that Respondents' unfairly benefited from the Bayview II disaster.

Finally, Appellants argue Respondents waited too long to demand contribution. Presumably, this is a defense of laches, which was also rejected by the Special Referee. "The party seeking to establish laches must show (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice." *King v. James*, 386 S.C. 16 (Ct.App. 2010).

Respondents satisfied the Garage Note upon their final payment of April 14, 2008. It is at this time Respondents' could first pursue contribution. *See*, *Gourdin v. Trenholm*, 25 S.C. 362 (1886)("a surety cannot enforce contribution from his co-surety until the common debt, for which they are both liable, has been fully paid or satisfied in some way").

Appellants imply their first notice of this matter came in 2010, although the preponderance of evidence shows otherwise. In 2008, Appellants learned the Garage Loan was paid in full. [Tr.Trans.II, p.77, lines 20-24, p. 84, lines 6-14]. Obviously, Appellants knew Bayview II did not satisfy the loan because Bayview II had no money and no income. Moreover, Respondents testified they made verbal requests for reimbursement in 2008 or 2009, although Appellants deny any such verbal requests. [Tr.Trans.I, p. 64, line 23 – p. 65, line 17; Tr.Trans.II, p. 84, lines 12-20]. By email dated 3/11/2009, Appellants were notified in writing that the Garage Loan was "paid for in full by Mayur and ID" and Respondents wanted to remedy the situation by making "the liability in the properties equal." [Tr. Exhibit 36; Tr.Trans.II, p.110, line 15 – p. 111, line 23]. Thus, within a year of the note's satisfaction, Appellants were clearly on notice of Respondents' assertion that their payments resulted in an unequal state of affairs and that Respondents sought reimbursement. Thereafter, in 2010, Respondents made a formal written demand for contribution, to which the Appellants did not respond. Most clearly, these facts do not show an unreasonable delay.

As to the element of prejudice, Appellants argue that if they knew of Respondents' contribution claim, they would have somehow negotiated differently with NBSC after Bayview II defaulted on the Acquisition Loan in November of 2009. This argument is problematic for a few

reasons. First, as correctly noted by the Special Referee, the South Carolina law of contribution does not require the paying guarantor give prior notice to a non-paying guarantor, although such notice remains relevant as to when prejudgment interest begins to accrue. [8/5/14 Order, p. 14]. *See, Babcock v. Roth*, 310 S.C. 350 (1993).

Second, as noted by the Special Referee, notice of Respondents' contribution claim would not change the subject matter of Appellants' negotiations with NBSC. Whether or not there was notice, the only relevant negotiations were limited to Appellants' liability as guarantors of the Acquisition Loan, as Respondents' payments had already relieved Appellants of all liability to NBSC under the Garage Loan. Third, Appellants already knew, prior to their 2009 negotiations with NBSC, that Respondents paid the Garage Loan and believed their payment of the Garage Note created unequal burdens. Finally, the Special Referee properly found Appellants' argument is speculative. There is simply no evidence as to how Appellants' negotiations with NBSC would have been any different.

CONCLUSION

The elements of common law contribution are met in this case. The five guarantors were burdened by their personal guarantees of the Garage Loan. The Special Referee correctly determined this common burden was removed and a common benefit was received by each guarantor after Respondents satisfied the loan with their personal profits. Contribution is proper under the UCC as well. Each of the five guarantors signed the Garage Note as "Guarantors" and were therefore jointly and severally liable in that capacity pursuant to Section 36-3-116(a). Thus, the Special Referee properly concluded that Respondents are entitled to contribution under Section 36-3-116(b). Finally, the amount of contribution should be an amount that equalizes the burden and makes the payment of all equal. There are five guarantors and Special Referee properly calculated their pro-rata share to be 20% each, subject to prejudgment interest running from the

date of formal notice. Based on the above, the Special Referee's Order and Order Denying Reconsideration should be affirmed.

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Thomas W. Cooper, Jr.
Special Referee

Trial Court Case No: 2011CP2600873

Appellate Case No.: 2018-001199

I.D. Jeram and Mayur Jeram, Respondents

v.

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

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PROOF OF SERVICE

I certify that I am employed by the law firm of Newby, Sartip & Masel, LLC, and I have served a copy of the **Respondents' Initial Brief** and the **Designation of Matter to Be Included in the Record on Appeal** in the above matter upon counsel for Appellants by depositing a copy of the same in the United States Mail, postage prepaid, on this 25th day of January 2019, addressed as follows:

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January 25, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: I.D. Jeram, et al. v. Rajendra Patel, et al.
Appellate Case No: 2018-001199

Dear Ms. Kitchings:

Enclosed please find the Respondents' Initial Brief, Designation of Matter, and Certificate of Service in the above case. Please file the same and return a clocked-in copy to me in the self-addressed stamped envelope.

Thank you for your assistance in this matter. Please contact my office with any questions.

Very truly yours,

NEWBY, SARTIP & MASEL, LLC

C. Scott Masel

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