IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1188

BENJAMIN BEVERLY,

Defendant Below, Petitioner

v.

GARY KENT THOMPSON AND MIKI THOMPSON, husband and wife,

Plaintiffs Below, Respondents

On Appeal from the Circuit Court of Mingo County, West Virginia

Civil Action No. 09-C-312

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. **The Circuit Court of Mingo County erred in holding that Benjamin Beverly had a legal responsibility for debt incurred by the corporation since the Circuit Court found that Beverly was not a shareholder in the corporation and, therefore, was not liable for the debts of the corporation.**

2. **If the Circuit Court of Mingo County correctly held that Benjamin Beverly should make restitution to the Thompson, then the Circuit Court made a mathematical error in calculating any amount owed to Thompsons by Beverly.**

STATEMENT OF THE CASE

This appeal stems from a verdict following bench trial regarding a dispute as to the debts of a defunct business. In the case below B&T Services, Inc. was a West Virginia business incorporated in 1995 by Respondents (Plaintiffs below) Gery Kent Thompson and his wife Miki Thompson and Defendant below Katherine Sue Beverly.[1] (Certificate of Incorporation and Articles of Incorporation, A.R. 33-36.) It is not disputed that the primary purpose of this corporation was to start a business known as Precision Automotive. In 1997 Katherine Beverly and Petitioner (Defendant below) Benjamin Beverly were granted a divorce. (Final Divorce Decree, A.R.63-66.) As a part of the

[1] The Circuit Court dismissed all claims against Katherine Sue Beverly and she is not a part of this appeal

divorce decree the Court ordered Katherine Beverly to transfer all stock she owned in B&T Services Inc. back to the corporation. (*Id.* at 65, paragraph 13).

On or about March 24, 2001 the Respondents executed a note in the amount of fifty-five thousand dollars ($55,000) for B&T Services, Inc. (Promissory Note, A.R. 16-17). Petitioner's signature appears on a Commercial Guaranty related to that note. (Commercial Guaranty, A.R. 18-20). It is not disputed that the proceeds of this note were used to pay the debts of Precision Automotive. It is also not disputed that on this date neither Petitioner nor Katherine Beverly was a shareholder in B&T Services, Inc.

On or about March 31, 2001, Precision Automotive ceased doing business and when it did so it owed various bills and debts and owned certain assets. It is undisputed that one outstanding debt was to the West Virginia State Tax Department for unpaid sales tax in the amount of one hundred twelve thousand nine hundred thirty-six dollars and thirty-nine cents ($112,936.39) and it is further undisputed that the Respondents settled this debt for sixty-nine thousand nine hundred fifty-nine dollars and eighty-three cents (of $69,959.83) and paid this debt from their personal funds. In addition, it is not disputed that as to the March 24, 2001 note referenced above the Respondents made monthly payments on same until the note was satisfied in April 2009 and the dispute in the case below was Benjamin Beverly's liability, if any for the bank loan. The amount ultimately repaid to the bank by the Respondents was forty-eight thousand one hundred sixty-one dollars and eighty-eight cents ($48,161.88) including interest. (Judgment Order, A.R. 6). Respondents then filed suit seeking contribution from the Petitioner pursuant to his guaranty of the note. (Commercial Guaranty, A.R. 18-20).

On April 29, 2011 the Circuit Court of Mingo County heard this matter in a bench trial. In its Judgment Order dated June 21, 2011 the Circuit Court of Mingo County found that B&T Services, Inc. was a West Virginia Corporation owned by the Thompsons, and there was never a conversion to partnership. (Judgment Order, A.R. 6-8) The Court also found that Benjamin Beverly was never a shareholder in the corporation and, therefore, was not liable for any debts of the corporation, including taxes owed to the state of West Virginia. (*Id.* at 6) However, the Court found that Benjamin Beverly was a co-guarantor to the bank loan and would be required to repay the Thompsons one-half of the amount owed for a total of twenty-four thousand, eighty dollars and ninety-four cents ($24,080.94), along with pre and post-judgment interest. (*Id.* at 7) The Petitioner/Defendant below Benjamin Beverly appeals that Order and the Order of July 20, 2011 denying Beverly's Motion for a New Trial. (Order, A.R. 9)

SUMMARY OF ARGUMENT

It its Judgment Order, the Circuit Court made inconsistent findings when it found that Petitioner was not a shareholder in the corporation and was not liable for the debts of the corporation, then found Petition liable for the debts of the corporation. In the alternative, even if this Court finds that Petitioner is liable for payment of a share of the debts of the corporation, the Circuit Court erred in determining that Petitioner should pay one-half versus one-third of same because there were three co-guarantors to the loan at issue, not two.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Revised Rule of Appellate Procedure 18(a)(4) the Petitioner states that oral argument is not required in this matter as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. Therefore, memorandum decision is appropriate as to this matter.

ARGUMENT

1. **The Circuit Court of Mingo County erred in holding that Benjamin Beverly had a legal responsibility for debt incurred by the corporation since the Circuit Court found that Beverly was not a shareholder in the corporation and, therefore, was not liable for the debts of the corporation.**

The Circuit Court specifically found that Petitioner Benjamin Beverly "was not a shareholder in the corporation and therefore [was] not liable for any debts of the corporation" (Judgment Order, A.R. 6). The Court also found that the business had at no time converted to a partnership or any other type of entity. (*Id.*) As the Court found that Beverly could not be responsible for the debts of the corporation, Beverly cannot then be held responsible to the two corporate shareholders, the Respondents, for monies loaned to

the corporation by a bank. The guaranty signed by the Respondents and Petitioner created a legal right for the bank to seek payment from Petitioner, not the Respondents, and there exists no legal authority for such a legal remedy; it appears that the Circuit Court decided the issue in equity rather than at law, which was improper. Therefore, the Court was in error in its ruling that Beverly could be found responsible for repaying debt to the Thompsons.

The Court's ruling is contrary to West Virginia law and therefore requires a new trial. The Uniform Partnership Act, W.Va. Code § 47B et seq. is inapplicable here as B&T Services, Inc. was never a partnership. There was no evidence to suggest Beverly ever held a single share of stock in the corporation. Plaintiffs failed in proving the business was converted to a partnership. Therefore, Beverly could not be held legally responsible for the debts of the business including the March 24, 2001 loan at issue.

It would appear the Court decided this issue in equity rather than at law. Equitably, Beverly was one of three co-guarantors. Therefore, the Court ruled he should be responsible in contribution for his share of the loan, which was paid by plaintiffs. However, a close study of the guaranty signed by Beverly shows no privity of contract between him and plaintiffs. Put another way, Beverly did not guaranty the loan to plaintiffs; he guaranteed it to the bank. (Commercial Guaranty, A.R. 18-20). The guaranty signed by Beverly created a legal right for the bank to seek payment from Beverly in the event the corporation defaulted. (*Id.*) The document did not create a legal right of action as between the co-guarantors. The Court created this equitable remedy without legal authority. Respondents' theory, both in response to Defendants' Motion for Summary Judgment, and at trial, was that a partnership existed and Beverly was

responsible for business debts as a partner. This theory failed for insufficient proof as determined by the trier of fact as the Circuit Court made clear in its Judgment Order that B&T Services, Inc. was a corporation and never converted to a partnership or any other type of entity. (Judgment Order, A.R. 6). Given an examination of those facts and the Circuit Court's ruling, it is clear that the Court erred in determining that Petitioner was liable to the Respondents for the debt.

2. If the Circuit Court of Mingo County correctly held that Benjamin Beverly should make restitution to the Thompson, then the Circuit Court made a mathematical error in calculating any amount owed to Thompsons by Beverly.

If this Court finds that Benjamin Beverly owed money to reimburse the Thompsons for a bank loan, the Circuit Court erred in ordering Beverly to pay one-half of monies expended, versus one-third. The evidence showed that there were three one hundred percent co-guarantors to the loan in question, Respondent Gary Thompson, Respondent Miki Thompson and Petitioner Benjamin Beverly. (Promissory Note, A.R. 16-17, Commercial Guaranty, A.R. 18-20). Each of the Thompsons signed the note for the loan individually. (Promissory Note, A.R. 16-17). The plaintiffs paid the entire debt out of personal funds totaling forty-eight thousand, one hundred sixty-one dollars and eighty-eight cents ($48,161.88); then brought this lawsuit against Beverly seeking contribution pursuant to his guaranty. The Court agreed with plaintiffs and entered

judgment against Beverly for one half of the loan and interest paid, which totaled twenty-four thousand, eighty dollars and ninety-four cents ($24,080.94).

However, it appears the Court inadvertently overlooked the fact that Gary Thompson, Miki Thompson and Benjamin Beverly each were one hundred percent (100%) co-guarantors on the note. The Court apparently treated the Thompsons jointly as a married couple, but each signed the promissory note individually. Accordingly, equity requires that the judgment be amended to reflect that Beverly was one of three co-guarantors rather than one of two. His equitable interest therefore was one-third or sixteen thousand fifty three dollars and ninety-six cents ($16,053.96) rather than one-half or twenty-four thousand, eighty dollars and ninety-four cents ($24,080.94). Therefore equity requires that the judgment reflect that there were three co-guarantors to the loan, not two as stated by the Court. Therefore any monies owed by Beverly could be no more than one-third of forty-eight thousand, one hundred sixty-eight dollars and eighty-eight cents ($48,168.88), or sixteen thousand, fifty-three dollars and ninety-six cents ($16,053.96), rather than the one-half or twenty-four thousand, eighty dollars and ninety-four cents ($24,080.94) awarded in the Court's Judgment Order.

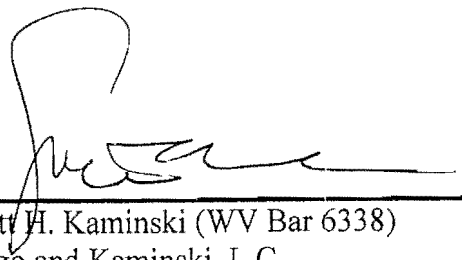
CONCLUSION

The Circuit Court of Mingo County correctly determined that Petitioner was not a partner in B&T Services, Inc. but erred in its decision that Petitioner was liable to the Respondents for debts paid on behalf of the corporation. Therefore, the Petitioner respectfully requests that this Court **REVERSE** the decision of the Circuit Court of Mingo County with regard to same. In the alternative, the Circuit Court of Mingo

County made a mathematical error in determining the amount owed by the Petitioner to the Respondents. Therefore, the Petitioner would respectfully request that this Court **REVERSE** the decision of the Circuit Court of Mingo County such that it awarded the amount of twenty-four thousand, eighty dollars and ninety-four cents ($24,080.94) and instruct the Circuit Court that the proper amount to be awarded is sixteen thousand, fifty-three dollars and ninety-six cents ($16,053.96).

BENJAMIN BEVERLY,

By Counsel,



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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2011, true and accurate copies of the foregoing Petitioner's Brief were deposited in the U.S. Mail contained in postage-paid envelopes to counsel for all other parties to this appeal as follows:

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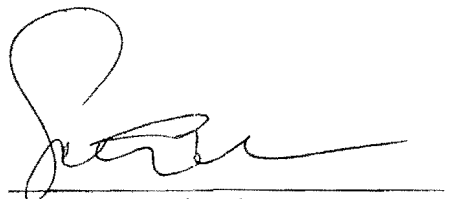

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