DEC 22 2011

No. 11-1188

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

RESPONDENTS' BRIEF

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I. INTRODUCTION

Respondents Gary Kent Thompson and Miki Thompson, husband and wife, submit their Brief herein in accordance with the provisions of Rule 10 of the West Virginia Rules of Appellate Procedure.

II. OMISSIONS IN PETITIONER'S BRIEF

Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, Respondents set forth the following relevant omissions in Petitioner's "Statement of the Case":

1. When B&T Services, Inc. commenced business in 1995, Respondents Thompson and Petitioner Beverly, along with his former wife, Katherine Sue Beverly, placed mortgages on their respective homes, securing $50,000 each for the start of the company. Respondents and Petitioner Beverly and his former wife signed notes. (*See* Plaintiffs' Trial Exhibit No. 9)

2. In November, 2009, a second commercial loan in the amount of $42,116.68 was obtained for the business. The guarantors on that loan were Petitioner Beverly and Respondents Thompson. (*See* Plaintiffs' Trial Exhibit No.10)

3. A third commercial loan in the amount of $45,066 was obtained in March, 2001. Petitioner Beverly was again guarantor of that loan. (*See* Plaintiffs' Trial Exhibit No. 11)

4. At trial, Respondent Gary Kent Thompson testified that Petitioner Beverly was a 50 per cent partner in B&T Services and controlled the day-to-day activities of the business. (Appendix at 105; Tr., April 29, 2011, at 83)

5. Respondent Gary Kent Thompson testified that Petitioner Beverly would "be there as a partner both in profits and liabilities." (Appendix at 106; Tr. at 85) Respondent Thompson stated: "If there were profits, they would split 50/50." (Appendix at 113; Tr. at 92)

6. Respondent Thompson further testified: "... Mr. Beverly performed for almost seven years as partner. He received compensation. He was paid. The loans were being paid off by the business. This was my partner. This was a gentleman I trusted." He stated that after the business failed and went into debt, Petitioner Beverly later declared to his family and friends "that he was never a partner, that he'd never owned anything in the business, that he wasn't responsible for anything." (Appendix at 123; Tr. at 104)

III. SUMMARY OF ARGUMENT

In this action for contribution, the Judgment Order by the Mingo County Circuit Court was in accordance with established West Virginia law and must be affirmed. The court properly applied equitable principles in ruling that as a co-guarantor, Petitioner Benjamin Bailey is jointly responsible for payment of the bank loan, and thus is liable for one-half of the amount previously paid in full by Respondents Thompson.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents Thompson concur that oral argument is unnecessary in that 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. *See* Rule 18(a), West Virginia Rules of Appellate Procedure.

V. ARGUMENT

A. STANDARD OF REVIEW

Pursuant to the Syllabus by the Court set forth in *Dobbins v. Cunningham*, 217 W. Va. 580, 618 S.E.2d 589 (2005), the appropriate standard of review herein is as follows:

> "In reviewing challenges to the findings and conclusions of the circuit court made after a **bench trial**, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to *de novo* review." Syllabus Point 1, *Public Citizen, Inc. v. First National Bank of Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996). (Emphasis added)

B. RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR

In accordance with Rule 10(d) of the West Virginia Rules of Appellate Procedure, Respondents Thompson specifically respond herein to Petitioner Beverly's "Assignments of Error," as follows:

Assignment I

Petitioner Beverly asserts that the Circuit Court of Mingo County erred in holding that he was legally responsible for debt incurred by the corporation in that the court "found that Beverly was not a shareholder in the corporation and, therefore, was not liable for the debts of the corporation."

The Judgment Order, entered June 21, 2011, following a bench trial, states:

> . . .[D]efendant Benjamin Beverly was not a shareholder in the corporation and therefore is not liable for any debts of the corporation including any taxes owed to the State of West Virginia. However, defendant Benjamin Beverly signed as a co-guarantor with plaintiffs (100 % each) on a bank loan for the business on or about March 24, 2001 in the principal amount of $45,066.00. Due to the failure of the business, plaintiffs paid on this loan personally in the amount of $48,161.88 including interest. As a co-guarantor, the Court finds that defendant Benjamin Beverly is jointly responsible for the March 24, 2001 bank loan and therefore liable to the plaintiffs for one half of the amount paid by them. Therefore, the Court finds in favor of plaintiffs as to their claim against defendant Benjamin Beverly in the amount of $24,080.94.

In his Brief, Petitioner erroneously asserts that 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." (Petitioner's Brief, p. 8) (Emphasis added)

To the contrary, in fashioning a remedy pursuant to this action for contribution,[1] it was proper for the Circuit Court to follow equitable principles pursuant to *Central Banking and Security Company v. United States Fidelity and Guaranty Company*, 73 W. Va. 197, 209; 80 S.E. 121, 126 (1913), which provides as follows:

> . . . [t]he doctrine of contribution has its origin in the relation of co-sureties, or other joint promisors in the same degree of obligation. It is not founded upon the contract of suretyship. It is an **equity** which springs up at the time the relation of co-sureties is entered into, and ripens into a cause of action when one surety pays more than his proportion of the debt. From this relation the common law implies a promise to contribute in case of unequal payments by co-sureties. **But equity resorts to no such fiction. It equalizes**

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[1] West Virginia Code § 45-1-6 (Contribution among cosureties and coguarantors) provides: If the principal debtor be insolvent, any surety or guarantor (or his committee, personal representative or heir) against whom a judgment or decree has been rendered on the contract in which he was surety or guarantor, may obtain a judgment or decree by motion, in the court in which such judgment or decree was rendered, against any cosurety or coguarantor (or his committee, personal representative or heir) for his share, in law or equity, of the amount for which the first-mentioned judgment or decree may have been rendered; and if the same has been paid, for such share of the amount so paid, with interest thereon from the time of such payment.

burdens and recognizes and enforces the reasonable expectations of co-sureties because it is just and right in good morals, and not because of any supposed promise between them. . . . (Emphasis added)

Consonant with established West Virginia law, the Circuit Court of Mingo County did not abuse its discretion in finding in favor of Respondents Thompson in their claim against Petitioner Beverly in the amount of $24,080.94. Therefore, pursuant to Petitioner's first assignment of error, the Circuit Court's Judgment Order must be affirmed.

Assignment II

In his second assignment of error, Petitioner Beverly asserts that if the Circuit Court of Mingo County was correct in holding that he "should make restitution to the Thompson (sic), then the Circuit Court made a mathematical error in calculating any amount owed to Thompsons by Beverly." Petitioner's argument that the Circuit Court somehow "made a mathematical error" is nonsensical and misrepresents the Court's decision. The suggestion that the court mistakenly and inadvertently divided the amount of indebtedness by two instead of three is wholly without merit.

Moreover, Petitioner fails to cite any authority supportive of this second assignment of error. Indeed, there appears to be no relevant West Virginia law on point to Petitioner's position.

Clearly, in the case *sub judice*, the Circuit Court of Mingo County fashioned an appropriate equitable remedy, consistent with principles espoused in *Central Banking*, *supra*, which was a proper exercise of discretion based on evidence adduced at the bench trial. (*See* Judgment Order, discussed *supra*)

See also Section II herein of Respondents' Brief, "Omissions in Petitioner's Brief," which details the trial testimony of Respondent Gary Kent Thompson with regard to the parties' partnership agreement

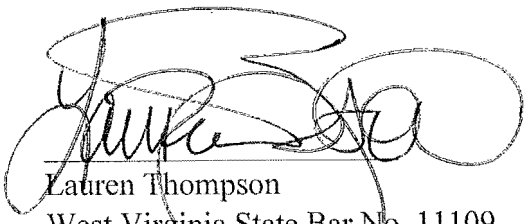
as to profits and liabilities. Further consider the trial testimony of Petitioner's former wife, Katherine Sue Beverly, who confirmed that at the outset, the partners entered into "a venture to go into this equally." According to Ms. Beverly, the profits would be shared between "both the Thompsons" and her and her husband. (Appendix at 68; Tr. at 10)

Thus, with regard to Petitioner's second assignment of error, the Circuit Court's Judgment Order must be affirmed.

VI. CONCLUSION

Therefore, based on the authorities and argument set forth herein, Respondents respectfully request that the Petition for Appeal be denied and that the Judgment Order of the Mingo County Circuit Court be affirmed.

GARY KENT THOMPSON and
MIKI THOMPSON, husband and wife,
Respondents, by Counsel.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondents' Brief was served by U. S. first class mail on this, the 21st day of December, 2011, upon the following:

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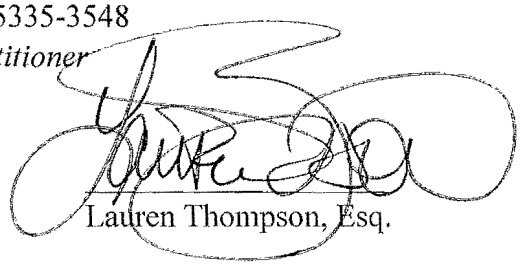

Lauren Thompson, Esq.