IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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No. 22-ICA-4

PITA, LLC, AND MILAN PUSKAR REVOCABLE TRUST RESTATED 9/28/11,
Plaintiffs Below, Petitioners

v.

SCOTT S. SEGAL,
Defendant Below, Respondent.

and

No. 22-ICA-46

SCOTT S. SEGAL,
Defendant Below, Petitioner

v.

PITA, LLC, AND MILAN PUSKAR REVOCABLE TRUST RESTATED 9/28/11,
Plaintiffs Below, Respondents

and

UNITED BANK,
Third-Party Defendant Below, Respondent

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I. INTRODUCTION

This is a response by the Respondents, PITA, LLC ("PITA") and the Milan Puskar Revocable Trust Restated 9/28/11 ("Trust") (collectively, "Respondents") to an appeal by the Petitioner, Scott S. Segal ("Petitioner" or "Segal"), from a judgment of $1,291,518.83 against Segal in favor of the Trust, but against PITA relative to its claims against Segal for breach of contract, and PITA and the Trust relative to their fraud claims against Segal.

Segal has abandoned his claims against United Bank ("United") and many frivolous claims and defenses against PITA and the Trust.[1] Segal has also abandoned his defense to the Trust's contribution claim except to the extent that he has been allocated one-half of the redistributed share of the debt obligation of Protea Biosciences, Inc. ("Protea") after the settlements with two of his coguarantors, arguing that he should only be responsible for one-sixth of that obligation despite black-letter law and his own conduct to the contrary. In other words, Segal concedes that a judgment should be entered against him in favor of the Trust on its contribution claim after he spent nearly four years contesting the Trust's contribution claim.

On appeal, Segal raises (1) two new issues not raised below relative to PITA's breach of contract claim on which PITA did not prevail,[2] i.e., the doctrine of discharge of supervening

[1] Throughout this Brief, the Court will note approximately a dozen legal arguments asserted below that Segal has now abandoned.

[2] In that regard, Segal's appeal is a bit confusing. His first assignment of error argues that his contractual obligation was discharged [Petitioner's Brief at 10] but the Trust never sued Segal for breach of contract. His second assignment of error is the only one directed at the Trust's contribution claim and argues not that Segal is not liable to the Trust for contribution, but only that he should be liable for one-sixth. Petitioner's Brief at 17. His final assignment of error, likewise, is not directed at the Trust's contribution claim, but argues that he should be able to present a breach of contract claim against the Trust – an issue he never briefed or argued relative to the parties' cross-motions for summary judgment – based on the Trust's alleged breach of some oral contract. Accordingly, at the end of the day, Segal does not contest the Trust's entitlement to judgment against him for contribution.

frustration and the rule of discharge by alteration;[3] (2) one issue raised below, i.e., he should only be liable for one-sixth, instead of one-half, of the remaining balance of the promissory note;[4] and (3) one issue he abandoned by not briefing or arguing below, i.e., that he is entitled to a jury trial on his counterclaim for breach of contract against the Trust.[5] As none of Segal's three assignments of error has any merit, the Respondents request that this Court reverse the Circuit Court's judgment and remand with directions to enter judgment in PITA's favor against Segal for breach of contract and for a jury trial on PITA's and the Trust's claims of fraud against Segal.

II. PROCEDURAL HISTORY

After Segal refused to honor his personal guaranty obligations on a loan by United to Protea sold to PITA, PITA and the Trust filed suit against Segal and the other two personal coguarantors.[6] Segal and the other personal coguarantors[7] then filed a motion to dismiss and a motion for a more definite statement,[8] which were denied.[9] After that, Segal and the other coguarantors filed a third-party complaint against United, acknowledging that they had personally guaranteed the United loan to Protea but arguing that United had (1) misled them – when two of them were attorneys – about the contents of written contracts they had executed;[10] (2) promised, despite the clear language of the written guaranties they signed and later affirmed, that United

[3] *Id.* at 2.

[4] *Id.*

[5] *Id.*

[6] App. 14.

[7] The other two coguarantors were Leonard P. Harris and Stanley M. Hostler, each of whom died either before or during the litigation. App. 30-31 and 32-33.

[8] App. 56.

[9] App. 79.

[10] Segal has abandoned this argument.

would resort to collateral before enforcing their personal guaranties;[11] and (3) impaired the loan collateral "[b]y not utilizing the pledged collateral for the Note," ignoring that it was PITA who held the Note at the time of Protea's default.[12]

Thereafter, PITA and the Trust filed an amended complaint against Segal and the other coguarantors, further articulating their claims.[13] Specifically, related to their fraud claims against Segal and the other coguarantors, PITA and the Trust asserted that, now that Segal and the other coguarantors were claiming some oral side agreements outside their 2017 written affirmations of their 2009 personal guaranties even though each of them disclaimed any such side oral agreements when they reaffirmed them in 2017, PITA, the Trust, and United had been fraudulently induced to reaffirm their respective obligations vis-à-vis the Protea Note in 2017 when Segal and the other coguarantors had no intention of honoring theirs.[14]

Segal and the other coguarantors moved to dismiss the amended complaint (1) reiterating their arguments, previously rejected, relative to the fraud claims; (2) arguing that the Trust – as a coguarantor – had no right to seek contribution even though it fully funded the acquisition of the defaulted Protea Note by PITA from United;[15] and (3) contending that a party cannot sue for both

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[11] Segal has abandoned this argument. Of course, the whole "impairment of collateral" argument was absurd from the outset. United held the collateral to secure payment of the Protea Note and released the collateral after it sold the Note to PITA.

[12] App. 81-87. Segal has abandoned this argument. Throughout the litigation, Segal repeatedly alleged that the "collateral" for the Protea Note pledged by the Trust was "approximately $18M." App. 315; see also App. 369, 689, or "$20 million," App. 481, 1945, 1957, but now in his brief, has cut that figure in half to "more than $9 million." Petitioner's Brief at 4. Moreover, the record is clear that the collateral referenced secured multiple notes, not just the Protea Note. App. 1716-1717.

[13] App. 89.

[14] App. 99-102.

[15] Segal has abandoned this argument.

breach of contract and fraudulent inducement.[16] On December 2, 2019, the Circuit Court denied the motion to dismiss the amended complaint.[17] After that, Segal and the coguarantors asserted counterclaims against the Trust, which substantiate PITA's and the Trust's claims against Segal for fraud in the inducement.[18] Specifically, although Segal and the other coguarantors signed a 2017 agreement reaffirming their 2009 guaranties, they alleged in these counterclaims against the Trust that, before he died in 2011 (six years before they reaffirmed their personal guaranties in 2017), "Mr. Puskar told the Bank that he wanted to be a 100% guarantor for the note."[19] Moreover, they alleged that the Trust was part of a civil conspiracy involving PITA and United to "sue [the] alleged guarantors for the full balance of the note [which] is illegal under state law."[20] In their response to a motion to dismiss their counterclaims, Segal and the other coguarantors further argued that (1) PITA and the Trust somehow owed them fiduciary duties[21] and (2) neither the holder of a note nor a coguarantor can sue other coguarantors of the note for breach of contract or contribution because to do so somehow violates the Uniform Commercial Code.[22]

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[16] App. 137.

[17] App. 155.

[18] App. 186.

[19] App. 187. United's representative testified that it was the bank which requested execution of a guaranty by the Trust. App. 2517. Moreover, the absurdity of Segal's argument is apparent on its face. Why would Mr. Puskar create a charitable trust in his name to benefit West Virginia 501(c)(3) organizations to provide health, training, and educational benefits to improve the quality of life for West Virginians; to provide care for the homeless; to provide prevention, treatment, counseling and care services for those struggling with addiction; and to support efforts to improve the current lives and future outlook for West Virginia youth, https://puskarfoundation.org/grantmaking/guidelines/, but then divert the Trust's resources to satisfy the three $1 million guaranty agreements executed by Harris, Hostler, and Segal? Moreover, Segal never found any document whereby the Trust, which has a separate existence from Mr. Puskar, ever entered into such agreement, because none exist.

[20] App. 189. Segal has abandoned this argument relative to United.

[21] App. 205-206. Segal has abandoned this argument.

[22] App. 206-207. Segal has abandoned this argument.

On November 6, 2020, United filed its summary judgment motion relative to the third-party complaint.[23] First, it noted that the coguarantors expressly waived any claims against United as Protea's lender.[24] Second, it observed that any rights or duties it may have had vis-à-vis the coguarantors had been assumed by PITA, as a matter of law, when United assigned the Protea Note to PITA.[25] Finally, United noted that it was inconsistent for the coguarantors to file bankruptcy claims against the defaulted borrower, Protea, at the same time contending that those coguarantors had no rights or obligations relative to the Protea Note.[26]

On April 15, 2021, PITA and the Trust filed a motion for partial summary judgment against Segal and the other coguarantors. First, like United, PITA noted that Segal had waived any claims against the "Lender" and, as PITA had been assigned the Protea Note, it now stood in the shoes of the "Lender."[27] Second, again like United, PITA argued that the coguarantors were estopped from denying their contractual obligations while, at the same time, making bankruptcy claims predicated on those contractual obligations.[28]

On June 3, 2021, Segal responded to United's summary judgment motion, arguing that (1) the coguarantors did not knowingly waive their claims against United as "Lender" because United's conduct forming the basis of their claims occurred after they signed and reaffirmed their guaranties;[29] (2) United somehow impaired the collateral by selling the Protea Note for face value

[23] App. 214.

[24] App. 225-226.

[25] App. 226-227.

[26] App. 228-229.

[27] App. 300-302.

[28] App. 303-304.

[29] App. 318-319. Segal has abandoned this argument.

to PITA before Protea's default;[30] (3) this impairment of collateral – which was nothing more than the sale of a note to a third-party – somehow violated the UCC;[31] and (4) filing bankruptcy claims under a note was not inconsistent with alleging its invalidity.[32]

On June 9, 2021, the Circuit Court held a hearing on all summary judgment motions,[33] and held that (1) Segal and the other coguarantors waived any claims against United or its successor-in-interest PITA;[34] (2) the coguarantors affirmed their understanding regarding the validity of the Protea Note by filing claims in the Protea bankruptcy;[35] (3) neither Segal nor the other coguarantors had submitted a Rule 56(f) affidavit and no discovery could overcome the plain language of their guaranties relative to waiver;[36] (4) because United had the legal right to sell the Protea Note to PITA and PITA assumed all of United's rights as "Lender" under the personal guaranties, Segal and the other coguarantors lacked standing to assert any third-party claims against United;[37] and (5) there was no impairment of collateral under the UCC as United had sold the Note to PITA before the default.[38] On August 13, 2021, the Circuit Court entered its order granting PITA's and the Trust's motion for partial summary judgment and United's motion for summary judgment.[39]

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[30] App. 319-320. Segal has abandoned this argument.

[31] App. 320-321. Segal has abandoned this argument.

[32] App. 321-324. Segal and his coguarantors filed a similar response to PITA's and the Trust's motion for partial summary judgment. App. 366-379. Segal has abandoned this argument.

[33] App. 474.

[34] App. 510. Segal has abandoned this argument relative to United.

[35] *Id.* This issue is now moot due to the settlement with Segal's coguarantors.

[36] App. 510-511. Segal has abandoned this argument.

[37] App. 511. Segal has abandoned this argument.

[38] App. 512. Segal has abandoned this argument.

[39] App. 586.

Segal and his coguarantors responded on August 11, 2021, by filing a motion for reconsideration reiterating their arguments that (1) waiver does not apply to claims arising after execution of the waiver;[40] (2) "the Trust, via Milan Puskar, guaranteed the entire amount of the debt;"[41] and (3) the sale of the Protea Note by United to PITA constituted an impairment of collateral in violation of the UCC.[42] Moreover, at a September 2, 2021, hearing conducted on that motion, Segal argued (1) the assignment of the Protea Note by United to PITA was "illegal and unenforceable;"[43] (2) PITA did not exist at the time of the 2009 personal guaranties or their 2017 reaffirmations and, thus, cannot benefit from their waivers;[44] (3) PITA was not approved as a company licensed to do business in West Virginia until a week after the assignment;[45] and (4) PITA is not a registered debt collector and, therefore, cannot sue for breach of the personal guaranties.[46]

At the hearing, the Circuit Court explored the absurdity of these arguments noting that (1) "anybody or any entity could purchase that note," to which Segal made the ridiculous argument that "only a registered debt collector" can purchase a note;[47] (2) "when they [the guarantors] signed the guaranty … they agreed not to make the defense that you're making now," to which Segal argued, "I don't think that waiver can carry forward to PITA and the Trust;"[48] and (3) "So

[40] App. 605-609. Segal has abandoned this argument.

[41] App. 607. Segal has abandoned this argument.

[42] App. 609. Segal has abandoned this argument.

[43] App. 680. Segal has abandoned this argument.

[44] App. 682. Segal has abandoned this argument.

[45] App. 682-683. Segal has abandoned this argument.

[46] App. 684. Segal has abandoned this argument.

[47] App. 686. Segal has abandoned this argument.

[48] *Id.*

then the Trust pays the debt and the guarantors walk? … Well, they did free up the debt," to which Segal responded by reiterating his argument, which was non-responsive to the Circuit Court's questioning, that the assignment was not valid or enforceable.[49] Following the hearing, the Circuit Court entered an order denying Segal's reconsideration motion.[50]

At the close of discovery, PITA and the Trust moved for partial summary judgment on their claims for breach of contract and contribution,[51] and Segal and his coguarantors filed a cross-motion for summary judgment.[52] Relative to new defenses[53] raised by Segal's in his summary judgment motion, PITA and the Trust filed a response noting:

> (1) W. Va. Code § 45-1-1, which gives a guarantor the right to demand that a creditor sue the borrower before proceeding against the guarantor, has no application here where PITA made a bankruptcy claim against Protea;[54]
>
> (2) W. Va. Code § 45-1-2, which requires creditors to file suit against solvent borrowers before pursuing guarantors, has no application where Protea filed for bankruptcy protection because it was insolvent;[55]
>
> (3) PITA was not required to sue the Trust where (a) it was merely a coguarantor on the Protea Note; (b) it funded PITA's $3.3 million acquisition of the Protea Note; and (c) the guaranties expressly permit the Lender to elect its remedies against one or more guarantors;[56]

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[49] App. 689. Segal has abandoned this argument.

[50] App. 713. At that point in the litigation, United Bank was no longer an active party and discovery proceeded on PITA's and the Trust's claims against Segal and the other coguarantors.

[51] App. 984.

[52] App. 717.

[53] Indeed, even though this lawsuit was instituted in 2018, Segal did not make a demand under W. Va. Code § 45-1-1, which has no application to this matter, until October 21, 2021. App. 1664. This is another frivolous defense raised by Segal that he has now abandoned.

[54] App. 1384. Notably, Segal has abandoned this argument.

[55] App. 1384-1385. Segal has abandoned this argument.

[56] App. 1386-1389. Segal has effectively abandoned this argument.

(4) *Segal's banking fraud expert* had eviscerated Segal's claims and defenses by testifying that, notwithstanding Segal's claims to the contrary (a) the Protea Note – always alleged by Segal not to be transferrable to anyone other than a registered debt collector – was saleable and transferable, including to Segal had he wanted to purchase it;[57] (b) once acquired and assigned, the assignee acquired all the rights and remedies held by United;[58] (c) until all the indebtedness was satisfied, the legal obligations of the coguarantors persisted;[59] (d) the owner of the Protea Note, under the terms of the guaranties had the right to elect and compromise among the coguarantors their contractual obligations;[60] (d) the coguarantors had a clear and unambiguous contractual obligation to pay the owner of the Protea Note interest, late charges, and collection costs, including attorney fees, in connection with enforcement of the guaranty agreements;[61] (e) the owner of the Protea Note had the contractual right to pursue the personal guaranties instead of the collateral for the loan;[62] (f) the owner of the Protea Note could elect to sue some but not all guarantors;[63] (g) the waivers contained in the personal guaranties was industry standard language waiving all defenses "Except the defense of payment in full;"[64] (h) Segal should not have signed the 2017 reaffirmation of his 2009 guaranty if he had some alleged unwritten oral agreement with Milan Puskar that impacted Segal's contractual obligations under the 2009 guaranty and 2017 reaffirmation agreements;[65] and (i) United's and the Trust's reliance on Segal's representation in 2017 that he had no unwritten agreements impacting his guaranty obligations when he now contends that an unwritten agreement existed creates a dispute for "the trier of fact to resolve;"[66]

(5) PITA, as assignee of the Protea Note, was entitled to summary judgment on its claim for breach of contract; and

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[57] App. 1387.

[58] App. 1388.

[59] *Id.*

[60] App. 1389.

[61] App. 1389-1390.

[62] App. 1390.

[63] App. 1391.

[64] App. 1391-1392.

[65] App. 1392.

[66] App. 1393.

(6) The Trust was entitled to contribution as it paid more than its share of the Protea Note when it was acquired from United.[67]

On January 13, 2022, the Circuit Court held a hearing on the parties' cross-motions for summary judgment.[68] On the eve of this hearing, PITA and the Trust settled with one of the three coguarantors.[69] At the conclusion of the hearing, the Circuit Court requested both sides to submit proposed orders.[70] Then, on March 7, 2022, the Circuit Court conducted a pretrial conference.[71] On the eve of this conference, PITA and the Trust settled with the second of the three coguarantors,[72] leaving only Segal as the holdout.[73] During this hearing, the Circuit Court ruled:

(1) W. Va. Code § 45-1-1 has no application as PITA filed a claim against Protea in bankruptcy;[74]

(2) W. Va. Code § 45-1-2 has no application as Protea is insolvent;[75]

(3) PITA had no duty to sue the Estate of Milan Puskar as a coguarantor because he died in 2011 and his Estate was closed before Protea's default;[76]

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[67] App. 1399. Segal has abandoned this argument except with regarding to percentages.

[68] App. 1797.

[69] App. 1799. A dismissal of Lorie Morrell as Executrix of the Estate of Leonard P. Harris was entered on January 28, 2022. App. 1845. The amount of the settlement was $537,500. App. 1974.

[70] App. 1841.

[71] App. 1893.

[72] App. 1895. A dismissal of Carl Hostler, as Executor of the Estate of Stanley M. Hostler, was entered on March 10, 2022. App. 1921. The amount of the settlement was $175,000 and 90 percent of asbestos attorney fees received by the Estate, less taxes, and administrative costs, with a cap of $537,500. App. 1968. As of the date of the filing of this brief, no additional payments have been received.

[73] Segal made clear throughout the proceedings that he did not intend to honor his 2009 guaranty or 2017 reaffirmation agreements but would appeal any judgment entered against him. *See, e.g.,* App. 1896 ("MR. RAMEY … But there is no prospect for a settlement unfortunately with Mr. Segal. … MR. RUBY: … I think I'll have to agree with Mr. Ramey. … Mr. Segal's desire to appeal …."). Unlike his coguarantors, this was Segal's position throughout the litigation.

[74] App. 1906-1907. Segal has abandoned this argument.

[75] App. 1907. Segal has abandoned this argument.

[76] *Id.* Segal has abandoned this argument.

(4) Once Protea defaulted on the note, the obligations of the four coguarantors, Segal, Hostler, Harris, and the Trust, were triggered;[77]

(5) The fraud claim against Segal could not be sustained because "The loan has been paid off. And so, I don't see how the bank or PITA have been damaged;"[78] and

(6) The Protea Note was properly assigned by United to PITA and Segal breached his guaranty with the only remaining issue the amount of PITA's damages for Segal's breach of contract.[79]

The Circuit Court concluded the proceeding by stating, "I believe that resolves all of the motions for summary judgment. And the only thing left is damages, which does include interest, late fees, administrative fees, and collection costs, including attorney fees."[80]

On March 11, 2022, the Circuit Court entered an order directing briefing on PITA's and the Trust's damages for breach of contract and contribution,[81] and the parties filed their submissions on March 12, 2022,[82] March 28, 2022,[83] and April 4, 2022.[84] Then, on April 29, 2022, the Circuit Court entered an order indicating that it was reconsidering its prior rulings and scheduling a hearing for May 27, 2022.[85] At that hearing, the Circuit Court affirmed its previous rulings, but for its prior ruling on PITA's breach of contract claim, and now holding that because the Trust funded PITA's acquisition of the Protea Note, "PITA and the Trust is the same" and

[77] App. 1908.

[78] *Id.*

[79] App. 1909. Segal has abandoned this argument.

[80] App. 1910.

[81] App. 1923.

[82] App. 1925.

[83] App. 2328.

[84] App. 2337.

[85] App. 2383.

that "This matter is not founded on contract, but on principles of equity and … this is nothing more than a contribution case."[86] Based on these rulings, the Circuit Court entered judgment on July 21, 2022,[87] from which PITA, the Trust, and Segal have appealed. The practical effect is that the Trust has a judgment of $1,291,518.83 against Segal as of July 21, 2022, with post-judgment interest accruing at the statutory rate of four percent, and PITA has been deprived of its contractual right to collection costs, note interest, and late fees.

The "Statement of the Case" in Segal's Brief continues his pattern of raising new obstacles to thwart PITA's enforcement of his guaranty. For the first time, in this case, he describes and misrepresents the Trust's 2010 guaranty as an "Umbrella Guaranty."[88] The Joint Appendix contains no reference to the Trust's co-guaranty as an "Umbrella Guaranty" and the five guaranty agreements have no such language and instead make each of them a coguarantor. The record reference for Segal's statement, "the Trust agreed to cover the entire liability in case Protea defaulted"[89] - "JA 248-49"[90] - is the Trust's 2010 guaranty, which is identical to Segal's guaranty, including the following: "The Guarantor waives any and all defenses, claims and discharges of Borrower, or any other obligor;" "the Guarantor will not assert, plead or enforce against the Lender any defense of waiver, release, estoppel … fraud … which may be available to Borrower or any other person liable in respect of any indebtedness, or any setoff available against the Lender to

[86] App. 2427. Following the hearing, Segal filed a "motion to strike" prejudgment interest, making the curious argument that a suit for a sum certain under a contract is not "special damages" under W. Va. Code § 56-6-31. App. 2440. Segal has abandoned this meritless argument.

[87] App. 2603.

[88] Petitioner's Brief at 3.

[89] *Id.*

[90] *Id.*

Borrower or any such other person;" "The Guarantor expressly agrees that the Guarantor will be liable … for any deficiency;" "Until the obligations of the Borrower to Lender have been paid in full, the Guarantor waive(s) any claim, remedy or other right which the Guarantor may now have or hereafter acquire against Borrower or any other person obligated to pay indebtedness … including, without limitation, any right of subrogation, contribution, reimbursement, indemnification, exoneration or any right to participate in any claim or remedy the Guarantor may have against the Borrower, collateral, or other party obligated for Borrower's debt."[91] There is a good reason Segal does not include this and other pertinent language from these industry-standard personal guaranties of a commercial debt obligation – *it obliterates every one of his legal arguments*.

According to Segal, all his contractual obligations assumed in his 2009 guaranty, *which he affirmed in 2017 after the 2010 Trust guaranty was executed*, were somehow waived – not by United, the party to which Segal had contractually obligated himself in 2009 and 2017 – but by Mr. Puskar, a coguarantor.[92] As the Circuit Court correctly held, whether Mr. Puskar made this promise to another coguarantor is legally irrelevant as (1) Mr. Puskar had no right to waive United's contractual rights vis-à-vis Segal;[93] (2) Segal's 2009 guaranty precluded its modification by oral

[91] App. 249.

[92] Petitioner's Brief at 3.

[93] Although, after he was sued on his guaranty agreement, Segal contended some agreement existed between Mr. Puskar and the coguarantors (which would be unenforceable under the terms of the guaranty and reaffirmation agreements), his contemporaneous behavior indicated to the contrary, not only by executing the 2017 reaffirmation agreement, but by providing his personal financial statements to United through 2018. App. 1889. If, as he now contends, he had no contractual obligations under the 2009 guaranty agreement as of 2010, then why sign the 2017 agreement reaffirming his 2009 guaranty and why continue to provide detailed personal financial information to United through 2018? Moreover, why did Harris and Hostler continue to provide their detailed financial information to United and list their obligations under their guaranty agreements at $750,000 if Hostler had some agreement with Mr. Puskar in 2011? App. 1078, 1183, 1186, 1191, 1193, 1884, 1888, 1889.

agreement; and (3) Segal certified in 2017, in writing, that no such oral agreement existed modifying his contractual obligations under his 2009 guaranty.[94]

It is also essential to understand Segal's sleight-of-hand relative to the alleged statement by Mr. Puskar to Mr. Hostler that Mr. Puskar "had taken steps to see I did not get hurt,"[95] which United's representative testified was never communicated to United by either Mr. Puskar or Mr. Hostler.[96] From this sole alleged conversation as Mr. Puskar was dying, Segal baselessly avers, "The Trust could have honored its commitment, through Puskar, *to the individual guarantors* … the Trust … chose to renege *on its agreement with the individual guarantors*."[97] Again, the record contains no evidence that Mr. Puskar made a statement to anyone other than Mr. Hostler, and certainly no evidence that he allegedly made the ambiguous promise to Segal that he "had taken steps to see I did not get hurt." Now that Segal wants to extricate himself from his 2009 guaranty

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[94] It is also not insignificant that (1) the original of Hostler's affidavit, claiming some alleged oral agreement with Mr. Puskar, was never found; (2) it was allegedly not found until not only well after Hostler's death but after PITA had acquired the Protea Note and made a demand on Hostler's Estate; (3) United's representative never saw Hostler's affidavit three days before his deposition; and (4) when United's representative was asked about the accuracy of Hostler's affidavit relative to his alleged conversation with United's representative, the representative testified that conversation never occurred. App. 1181, 1339-1340. Moreover, Hostler's Estate settled with the Trust and PITA.

[95] *Id.*

[96] United's representative testified he frequently discussed Protea with Mr. Hostler. App. 1336. Indeed, he testified that he first met with Hostler relative to the latter's involvement with Protea. App. 1337. He stated that he had "several discussions" with Hostler regarding the guaranties, including the topic of United releasing the guaranties. App. 1337-1338. Critically, he recalled specific discussions with Hostler regarding the Trust's $3 million guaranty, App. 1338, and specifically denied the contents of Hostler's affidavit claiming that Hostler had some discussion with United's representative regarding Puskar's increasing the Trust's guaranty to $3 million "to protect" the coguarantors, including United's representative, firmly stating "That did not happen" and "I did not have that discussion with Mr. Hostler." App. 1339-1340. United's representative also confirmed that United never released Harris, Hostler, or Segal from their guaranty agreements, nor did United authorize Mr. Puskar to release Harris, Hostler, or Segal from their guaranty agreements. App. 1352-1353, 1355.

[97] Petitioner's Brief at 5 (emphasis supplied).

and 2017 reaffirmation, each of which included the representation that no unwritten, oral agreement existed that modified his obligations under his 2009 guaranty – *which obviously would include this alleged oral agreement between Mr. Puskar and Mr. Hostler* – there suddenly is an "agreement with the individual guarantors."

Segal's "Statement of the Case" also is noteworthy for three omissions. First, there is no reference to "the doctrine of supervening frustration" because he never argued it below. Second, there is no reference to "the rule of discharge by alteration" because he never argued it below. Finally, there is no reference to Segal either opposing summary judgment relative to his contract counterclaim or requesting a jury trial on the same because it never occurred.

III. STATEMENT OF THE CASE

In 2009, Segal, Harris, and Hostler signed contracts personally, absolutely, and unconditionally guaranteeing the repayment obligation of the debtor, Protea, under a $3 million note.[98] In 2017, these three coguarantors signed an agreement reaffirming these obligations and affirmatively representing the non-existence of any alleged oral agreements modifying those personal, absolute, and unconditional guaranties.[99] Eventually, United Bank, which owned the Protea Note, sold it to PITA and assigned its rights, including the guaranties and reaffirmation agreement.[100] After Protea filed for bankruptcy protection and defaulted on the Note, PITA sent a demand letter to the three coguarantors.[101] When the coguarantors refused to honor their

[98] App. 109-114. Milan Puskar also signed a personal guaranty of the Protea Note. App. 1939.

[99] App. 115-116. The Trust also executed the 2017 reaffirmation agreement. App. 35.

[100] App. 117-124.

[101] App. 125-136.

obligations, PITA sued for breach of contract and the Trust,[102] which funded PITA's acquisition of the Protea Note from United, sued for contribution.[103] Moreover, because United and the Trust had relied on the coguarantors' 2017 written statements that no unwritten oral statements existed that would impact their contractual obligations under their 2009 guaranties, PITA and the Trust also sued the three coguarantors for fraud in the inducement.[104] The Circuit Court has correctly ruled that coguarantor Segal's defenses against the Trust's contribution claim have no merit and has entered judgment against him for $1,291,518.83. However, the Circuit Court has incorrectly ruled that (1) PITA's and the Trust's fraud claims present no trialworthy issues; (2) PITA cannot sue Segal for breach of contract because the Trust funded its purchase of the Protea Note from United; and (3) Segal is entitled to a $537,000 setoff of PITA's and the Trust's settlement with the Estate of Hostler even though only $175,000 of that settlement has been or ever may be funded. Segal's frivolous arguments that (1) the doctrine of supervening frustration or the rule of alteration voided his 2009 guaranty and 2017 reaffirmation; (2) he alternatively should be liable for only one-sixth rather than one-half of the remaining debt obligation; and (3) he should be afforded a trial on contract counterclaim, either have been waived or have no merit.

IV. SUMMARY OF ARGUMENT

The Circuit Court erred in granting summary judgment to Segal on the Respondents' fraud claim; in granting summary judgment to Segal on PITA's contract claim; and in crediting Segal on the contribution claim by the Trust with a partially-funded settlement by the coguarantors.

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[102] The Milan Puskar Foundation is the sole beneficiary of the Trust. App. 741. The Trust formed PITA as a subsidiary to hold the Protea Note as an asset. App. 742. Anything collected by PITA relative to the Protea Note is transferred to the Trust and then to the Foundation for its charitable purposes. App. 743.

[103] App. 13.

[104] *Id.*

V. ARGUMENT

A. BECAUSE SEGAL NEVER RAISED THE DEFENSES OF DISCHARGE BY SUPERVENING FRUSTRATION OR THE RULE OF DISCHARGE BY ALTERATION IN THE CIRCUIT COURT, THEY HAVE BEEN WAIVED.

Segal's primary legal argument on appeal is that his "guaranty should be discharged because his principal purpose in performing the operative contracts was frustrated following his execution of the Change in Terms Agreement."[105] The word "supervening" appears nowhere in the record. The record contains the word "frustration" once in reference to a court opinion: "Pezeshkan sent an email to Kearley expressing his frustrations with Regions."[106] Neither of the cases cited in Segal's Brief for this new defense to enforcing his 2009 guaranty and 2017 reaffirmation – *Waddy v. Riggleman*[107] or *McGinnis v. Cayton*[108] – appears anywhere in the record. Nor did Segal previously cite CORBIN ON CONTRACTS, and the only reference to this publication in the record, is within a court opinion attached to a brief; that reference, to Section 924, affirms that a coguarantor has the right to collect ratably among other coguarantors.[109]

Similarly, the phrase "discharge by alteration" appears nowhere in the record. Segal did cite the 1912 case of *Carr v. Sutton*,[110] but not for the proposition that an alteration by Protea (the principal) had discharged him from his 2009 guaranty and 2017 reaffirmation agreements; rather, Segal falsely claims an alteration by PITA should discharge his guaranties: "PITA … has no

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[105] Petitioner's Brief at 10.

[106] App. 794.

[107] 216 W. Va. 250, 606 S.E.2d 222 (2004).

[108] 173 W. Va. 102, 312 S.E.2d 765 (1984).

[109] App. 947.

[110] 70 W. Va. 417, 74 S.E. 239 (1912).

intention of, holding either the Trust or the Estate of Milan Puskar accountable for their respective obligations under the Note."[111] Remarkably, Segal makes this claim when (a) the Trust funded the more than $3 million acquisition of the Protea Note; (b) Mr. Puskar died years before Protea's default, his Estate had been closed, and the Estate's obligations under the 2009 guaranty had been discharged; and (c) PITA would still be looking to the Trust for its pro rata share of the Protea debt obligation. More remarkably, Segal cites to *Carr* for this claim, when *Carr* turned on a bondsman's defense that he was absolved from liability because the authorities had allowed a prisoner to escape and made no effort to apprehend him as this Court held in Syllabus Point 1: "Where bail, when required by [a] surety on [a] bond of indemnity, [is sought to be forfeited because a jailer] fails to arrest and deliver [the] principal into custody, and allows him to escape, [the] surety on indemnity bond [will be] held discharged." To the question "what this has to do with the present case?" the answer is "nothing."[112] The "principal" on Segal's 2009 guaranty and 2017 reaffirmation agreements was Protea, which filed for bankruptcy protection, and PITA did not allow Protea to escape and then fail to apprehend it. It filed a bankruptcy claim against it and has received nothing.

In Syllabus Point 2 of *Sands v. Security Trust Co.*,[113] this Court held that it "will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Stated another way, "In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the

[111] App. 725.

[112] The only other case cited by Segal below was *Williams v. Carr*, 76 W. Va. 139, 85 S.E. 69 (1915), which arose from similar facts and likewise has no application to this case where PITA filed a bankruptcy claim against Protea.

[113] 143 W. Va. 522, 102 S.E.2d 733 (1958).

appeal has been taken."[114] Moreover, W. Va. R. App. P. 10(c)(7) requires, in relevant part, that "[t]he argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal." Segal's Brief does not "pinpoint when and how" the defense of the doctrine of supervening frustration or rule of discharge by alteration were "presented to the lower tribunal," because they were not. Accordingly, they have been waived.[115]

B. THE DOCTRINE OF SUPERVENING FRUSTRATION HAS NO APPLICATION WHERE (1) THE PRINCIPAL PURPOSE OF SEGAL'S 2009 GUARANTY AND 2017 REAFFIRMATION, WHICH WAS TO SECURE PAYMENT OF PROTEA'S INDEBTEDNESS TO UNITED, WAS NEVER FRUSTRATED BY THE OCCURRENCE OF AN EVENT OR THE NON-OCCURRENCE OF AN EVENT WHICH WAS A BASIC ASSUMPTION WHEN SEGAL SIGNED THE 2009 GUARANTY AND 2017 REAFFIRMATION AND (2) THE DOCTRINE APPLIES ONLY TO CLAIMS OF BREACH OF CONTRACT, NOT TO CLAIMS OF CONTRIBUTION AND FRAUD.

One reason which may explain why Segal never raised the doctrine of supervening frustration below is that it has absolutely no application here. In *Waddy*, the dispute involved the sale of land in which parties to a land contract who wished to extricate themselves from that contract claimed the performance of their contractual obligation should be excused because they were unable to secure certain releases to enable them to transfer clear title to the other party by the closing date with the other party arguing the closing date was not an essential element of the contract.[116] In Syllabus Point 2 of *Waddy*, this Court held:

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[114] Syl. pt. 1, *Mowery v. Hitt*, 155 W. Va. 103, 181 S.E.2d 334 (1971); *see also Evans v. Bayles*, 237 W. Va. 269, 275, 787 S.E.2d 540, 546 (2016); *In re Michael Ray T.*, 206 W. Va. 434, 444, 525 S.E.2d 315, 325 (1999); Syl. pt. 3, *Voelker v. Frederick Bus. Prop. Co.*, 195 W. Va. 246, 465 S.E.2d 246 (1995).

[115] *See Zaleski v. W. Va. Mut. Ins. Co.*, 224 W. Va. 544, 550, 687 S.E.2d 123, 129 (2009) (finding that an argument raised for first time on appeal was waived).

[116] 216 W. Va. at 252-253, 606 S.E.2d at 224-225. *McGinnis v. Cayton*, *supra*, presented a similar fact pattern resolved, not applying the doctrine of supervening frustration, but mutual mistake as the Court held in Syllabus Point 2: "Where a mistake of both parties at the time a contract was made as to a basic

> Under the doctrine of impracticability, a party to a contract who claims that a supervening event has prevented, and thus excused, a promised performance must demonstrate each of the following: (1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without the fault of the party seeking to be excused; and (4) the party has not agreed, either expressly or impliedly, to perform in spite of impracticability that would otherwise justify his nonperformance.

This doctrine has absolutely nothing to do with this case as Segal, a party to 2009 guaranty and 2017 reaffirmation agreements, does not contend that any supervening event has "prevented" him from performing under those agreements, nor does he allege that some supervening event made his performance impracticable, or the non-occurrence of that event was a basic assumption he made when he signed the 2009 and 2017 reaffirmation agreements.

Not only does the doctrine of supervening frustration have no application to this case, but Segal's Brief also tacitly concedes the point by stating, "The Restatement speaks of 'the contract.' In this instance, the contract means not only the operative Change in Terms Agreement … by which Segal reaffirmed his individual guaranty in 2017, *but also the implied contract between Segal and the Trust* …."[117] This begs the question relative to the doctrine of supervening frustration, "which is it?" Were Segal's 2009 guaranty and 2017 reaffirmation agreements "frustrated" by a "supervening" event or was some non-existent "implied contract" between Segal and the Trust based on some alleged promise by Mr. Puskar to Mr. Hostler that Mr. Puskar had "had taken steps to see I did not get hurt"[118] "frustrated" by a "supervening" event. Of course, this is nonsense.

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assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake."

[117] Petitioner's Brief at 11 (emphasis supplied).

[118] *Id.*

PITA's suit against Segal for breach of contract is not based on any "implied contract." It is based on two express contracts – Segal's 2009 guaranty and 2017 reaffirmation agreements. The term "implied contract" used in the record exclusively refers to the Trust's suit against Segal for contribution.[119] Again, nowhere in the record did Segal argue that he had any "implied contract" with the Trust, but instead appears to make that argument for the first time on appeal. Moreover, the "supervening" event identified in Segal's Brief is the Trust's funding of PITA's acquisition of the Protea Note, which he describes as an "elaborate artifice to evade the contribution action that was its sole legitimate recourse."[120] The motivations, Segal claims, were "(1) to shift by far the most significant expense of collection – attorney fees … -- to Segal and the other individual guarantors; and (2) to recover the ***entire*** amount of Protea's defaulted obligation with ***no*** net loss to itself."[121] This, of course, is preposterous.

First, the Trust sued Segal for his pro rata share of the Protea Note, sought no attorney fee award on its contribution claim, and never disclaimed its liability for its pro rata share.[122] Second, the Trust funded the over $3 million required for PITA to purchase the Protea Note from United. Finally, there would have been no collection costs, including attorney fees, if Segal had honored his contractual obligations and not necessitated years of unnecessary litigation. Accordingly, the doctrine of supervening frustration has no application to this case.

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[119] App. 857, 859, 876, 877, 880, 881, 883, 884, 888, 891, 894, 941.

[120] Petitioner's Brief at 11.

[121] *Id.* (emphasis in original)

[122] This renders irrelevant Segal's extensive discussion [Petitioner's Brief at 13-14] of *In re Basil St. Partners, LLC*, No. 9:11-BK-19510-FMD, 2012 WL 6101914 at *17 (Bankr. M.D. Fla. Dec. 7, 2012), which stands for the proposition that a guarantor cannot avoid "his percentage of liability … at the expense of his coguarantors" by acquiring the underlying debt instrument as the Trust has never sought to avoid its guaranty agreement liability and fully funded PITA's acquisition of the Protea Note for over $3 million.

Beyond that conclusion, from even a cursory review of Segal's legal authority, the doctrine of supervening frustration is used to avoid a party's *contractual* obligation when the party is sued for breach after the party failed to perform because such performance has been made impracticable due to the occurrence of unanticipated events or the non-occurrence of events that were critical to the parties' formation of their contractual relationship, but the Trust did not sue Segal for breach of contract. It sued him for equitable contribution and fraud and the doctrine of supervening frustration has no application to those two causes of action.

C. THE RULE OF DISCHARGE BY ALTERATION OF THE PRINCIPAL'S DUTIES OR OBLIGATIONS HAS NO APPLICATION TO THIS CASE WHERE (1) PITA DID NOTHING TO ALTER PROTEA'S DEBT OBLIGATIONS UNDER THE NOTE AND FILED A BANKRUPTCY CLAIM AGAINST IT AND (2) THE RULE OF DISCHARGE BY ALTERATION APPLIES TO CONTRACT CLAIMS, AND THE TRUST'S CLAIMS AGAINST SEGAL ARE FOR CONTRIBUTION AND FRAUD.

The Respondents have already dispensed with Segal's arguments under *Carr v. Sutton* having absolutely no application to this case as it involved a bail bond and circumstances where the principal was allowed to escape by the authorities who made no effort to apprehend him. Here, the principal, Protea, was not allowed to escape, and PITA did everything it could to collect on its debt obligation under the Note which Segal personally, absolutely, and unconditionally guaranteed, by filing a claim in bankruptcy. The Trust also did nothing to alter Protea's Note obligations.

In addition, Segal cites in his Brief for the first time in this case 38A CJS *Guaranty* § 95 and 23 WILLISTON ON CONTRACTS § 61:32,[123] neither of which have any application to this case.

Not only does 38A CJS *Guaranty* § 95 fail to support Segal's efforts to avoid his liability for contribution to the Trust, but it also supports PITA's claim against Segal for breach of contract.

[123] Petitioner's Brief at 15.

First, as with Segal's "doctrine of supervening frustration" argument, the "rule of discharge by alteration" only goes to a guarantor's contractual obligations, not to a coguarantor's obligations of contribution.[124] Second, the Trust was not a party to Segal's 2009 guaranty and 2017 reaffirmation agreements as those involved Segal's contractual promises to United and then PITA as assignee of those agreements. Third, the legal encyclopedia states, "A material departure from the terms of a prior contract between the same parties and which would have released the guarantor is not available as a defense to an action founded on a new and independent contract of guaranty,"[125] and Segal reaffirmed his 2009 guaranty obligations in a 2017 reaffirmation agreement *after* Mr. Puskar had died years earlier[126] and *affirmatively represented* that Segal had no oral agreements with anyone that would negate his contractual obligations under that 2009 guaranty. Finally, the "alteration" involved in this doctrine is not to the guaranty agreements, but to the underlying "original

[124] 38A C.J.S. *Guaranty* § 95. The other authority cited by Segal, 23 WILLISTON ON CONTRACTS § 61:32, likewise makes crystal clear that the doctrine is limited to a material alteration of the underlying or original contract that is supported by either a guaranty or surety agreement: "As a general rule, a surety may assert affirmative defenses to an obligee's claim of breach of contract based on the obligee's noncompliance with the terms of the performance bond or material alterations to the terms *of the underlying contract*. … Consequently, if the terms of *the agreement between the creditor and the principal* are varied, thereby changing the rights and duties of the principal, a surety who has contracted to answer only for the performance of the original contract will be discharged from liability for the principal's failure to perform the altered contract. … The basis for the general rule is that the surety cannot be held according to the terms of the *new contract* because the surety never assented to it. …") (emphasis supplied and footnotes omitted). Even the two cases cited by Segal -- *Vastine v. Bank of Dallas*, 808 S.W.2d 463 (Tex. 1991) (*if creditor and principal debtor vary in any material degree from terms of their contract*, then new contract has been formed and guarantor is not bound to it) and *Becker v. Faber*, 280 N.Y. 146, 19 N.E.2d 997 (1939) (alteration of *principal's contractual obligation* releases the surety, *for the principal is no longer bound* to perform the obligation guaranteed and the surety cannot be held responsible for failure to perform any other obligation) – make clear that the doctrine is strictly limited to circumstances where the creditor, in this case United and PITA, materially alter the underlying obligations of the principal, in this case Protea, which never happened.

[125] *Id.* (footnote omitted).

[126] Mr. Puskar died on October 7, 2011. App. 1877.

contract"[127] and, here, as noted, there was never any alteration of Protea's debt obligations to either United or PITA. Frankly, it is unclear to the Respondents if Segal even read 38A CJS *Guaranty* § 95 before relying on it in his Brief.[128]

Segal not only relies upon a doctrine having no application to the Trust's claims of contribution and fraud, but applying only if United or PITA materially altered Protea's debt obligations under the Note, but Segal also tosses the following word salad: "By stripping the collateral and transferring it to the Trust's possession, Defendants put Protea in the position where, if PITA called the loan and demanded repayment of the assigned Note, Protea would have no choice but to depend on the individual guarantors (to the exclusion of the Trust) to pay in order to stay in business."[129] First, Protea defaulted on the Note by filing bankruptcy. Second, Segal's guaranty agreement, like everyone else's, provided that United and then PITA by assignment could elect among their remedies, including the release of collateral. Finally, Segal's guaranty agreement was with United and then PITA by assignment, not with Protea, which under no circumstances could "stay in business" by suing Segal on his guaranty agreement with United. Not a single aspect of Protea's underlying debt obligation to United and then to PITA by assignment was ever "altered" by anything and, accordingly, Segal's contractual obligations under his 2009 guaranty and 2017 reaffirmation agreements were never impacted by any such non-

[127] *Id.* ("At common law, any alteration *of the original contract*, whether or not of a substantial nature, was considered material and discharged the guarantor. … Where *the main contract* is altered without the consent of the guarantor and in respects so material as to change substantial rights of the parties and in effect to make a new contract, the guarantor is released whether the effect of the alteration is to increase or to lessen the obligation, performance of which is guaranteed …") (emphasis supplied and footnotes omitted).

[128] Petitioner's Brief at 15.

[129] *Id.* at 16.

existent "alteration."[130] Again, the Respondents fail to understand how a rule applicable only to Segal's contractual obligations to PITA is relevant to Segal's equitable contribution obligations to the Trust but, in any event, there was never any alteration of Protea's underlying debt obligations.

D. THE CIRCUIT COURT CORRECTLY HELD THAT ONCE THE OTHER TWO COGUARANTORS SETTLED THE TRUST'S CONTRIBUTION CLAIMS AGAINST THOSE COGUARANTORS, SEGAL IS RESPONSIBLE FOR HIS PRO RATA SHARE, OR ONE-HALF, OF WHAT REMAINS.

PITA and the Trust settled with one of the coguarantors, the Estate of Harris, for $537,500, which was fully-funded and paid by the Estate of Harris.[131] PITA and the Trust settled with one of the other coguarantors, the Estate of Hostler, with only $175,000[132] funded and a cap of $537,500 dependent upon the speculative receipt of a percentage of contingency fees arising from the interest of the Estate of Hostler in certain asbestos cases.[133] Incredibly, although there was no dispute that neither PITA nor the Trust may ever receive more than the $175,000 paid by the Estate of Hostler, Segal argued that he was entitled to full credit for the $537,500: "[W]hat the plaintiffs got was a combination of immediate cash and right to future payments in the amount of $537,500. So it's not that they got nothing. … And so the Court's crediting that amount is appropriate."[134] Just as with the alter ego/veil piercing argument Segal never raised, briefed, or

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[130] Segal's next argument is equally absurd: "United could no doubt have been persuaded to resort to the collateral, which is what Puskar intended by executing the Umbrella Guaranty" [Petitioner's Brief at 16] when his own expert testified that either United or PITA could freely elect among the various remedies provided in the guaranty and reaffirmation agreements. App. 1152-1155.

[131] App. 1826, 1876, 2429.

[132] It is not insignificant that the $712,500 received by PITA and the Trust in the aggregate from the Estates of Harris and Hostler are still less than a single $1 million guaranty from each of the four coguarantors.

[133] App. 2432.

[134] App. 2433.

argued, he offered absolutely no legal authority in support of his argument that he was entitled to a credit for monies never paid to the Trust by one of his coguarantors. Indeed, at the hearing, Segal meekly offered "we can brief that as well"[135] and "we respectfully request the chance to brief it,"[136] which he never did. Again, in the Circuit Court's judgment order, it cites no legal authority in support of its crediting Segal with $362,500 the Estate of Hostler never paid the Trust, but simply states: "The Estate of Hostler and the Estate of Harris each paid (or agreed to pay over time) $537,500 to the Plaintiffs … leaving a principal balance of $1,951,904.16. Dividing the principal balance equally between the Trust and Segal leaves Defendant Segal responsible for $975,952.08."[137] This is simply wrong.

The RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 57 (1996) (emphasis supplied) provides:

> (1) Subject to subsection (2) and to any express or implied agreement between or among the cosureties, a cosurety's contributive share *is the aggregate liability of the cosureties to the obligee divided by the number of cosureties*.
>
> (2) When the terms of a cosurety's secondary obligation limit the cosurety's liability to an amount less than its contributive share determined pursuant to subsection (1), *or the contribution that can be obtained from a cosurety is less than that amount, the contributive shares of the cosureties are reapportioned as follows*:
>
> * * *
>
> (b) *When, because of* insolvency, lack of personal jurisdiction, or *other reasonable circumstances, the contribution obtained from a cosurety after reasonable collection efforts is less than that cosurety's contributive share, the contributive shares of the other cosureties as among themselves are recalculated pursuant to subsection (2)(a) as though the secondary obligation of the former cosurety limited its liability to the contribution obtained from that cosurety*.[138]

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[135] App. 2432.

[136] App. 2434.

[137] App. 2634.

[138] The Respondents note with irony Segal's efforts to cite Section 57 of the RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY (Petitioner's Brief at 18-19) when he distances himself from its actual language and implications for this case, which is why it was the Respondents, not the Petitioner, who

relied on it below. App. 990, 1122, 1674, 1806, 2680. Moreover, Segal completely misstates Illustration 5 in his Brief at 18-19 stating:

> Illustration 5 precisely captures the situation presented here. It offers a hypothetical to which three secondary obligors (guarantors or sureties) guarantee a $3,000 loan, with each guaranty being a different amount: S1 guarantees the loan up to $1,500, S2 up to $900, and S3 up to $600. Under the hypothetical, S1 is responsible for 50% of the total amount of the guaranties, S2 is responsible for 30%, and S3 is responsible for 20%. The primary obligor defaults with $100 left on the loan balance, thus S1 owes $50, S2 owes $30, and S3 owes $20.

Here is the actual Illustration 5:

> To induce C to lend D $3,000, S1, S2, and S3 each agree to be secondary obligors with respect to D's obligation. Pursuant to S1's secondary obligation, S1's maximum liability to C is $1,500; pursuant to S2's secondary obligation, S2's maximum liability to C is $900; pursuant to S3's secondary obligation, S3's maximum liability to C is $600. S1, S2, and S3 enter into no express agreement among themselves as to their contributive shares. D defaults, owing $100 to C. The fact finder may find an implied agreement from these circumstances that the cosureties' contributive shares are to be in proportion to their maximum individual liabilities, so that S1's contributive share is $50, S2's contributive share is $30, and S3's contributive share is $20.

This Illustration has nothing to do with any loan guaranties, but secondary loan obligors to whom allocation is made, not because each agreed to "guarantee the loan up to" various amounts, but the order of their secondary obligations. Finally, in practice, an unequal distribution among coguarantors is only warranted where they enjoyed an unequal benefit from the underlying debt obligation. *See, e.g., Green Leaves Rest., Inc. v. 617 H St. Assocs.*, 974 A.2d 222, 239 (D.C. 2009) ("Because Cheah owned half of the company, while Yu and Lee each had only a quarter share, they stood to benefit unequally from their common assumption of Green Leaves's lease obligations: had the enterprise been successful, Cheah's share of the profits would have been twice that of Yu or Lee. Similarly, if Green Leaves had been able to pay its debts itself or indemnify its guarantors, Cheah, Yu and Lee would have borne the loss in proportion to their shareholdings. Considerations of fairness suggest that the guarantors therefore should contribute to the common liability in proportion to their ownership interests, rather than equally."); *Amphibious Partners, LLC v. Redman*, No. 06-CV-031-B, 2007 WL 9697712, at *2 (D. Wyo. Sept. 18, 2007), aff'd, 534 F.3d 1357 (10th Cir. 2008) ("If it can be shown that the co-obligors have by agreement made a different allocation as to their liability inter se or one or more of the co-obligors have received a disproportionate benefit from the transaction, then disproportionate contribution may be allowed."). Here, none of the coguarantors, including the Trust, enjoyed any disproportionate benefit vis-à-vis Protea's debt obligation to United. Moreover, where, as here, the guaranty agreements themselves expressly make no disproportionate allocation based on the amount of the guaranty relative to other guaranty agreements, the debt obligation is allocated based on the number of guarantors. *See, e.g., Kroona v. Dunbar*, 868 N.W.2d 728, 740 (Minn. Ct. App. 2015) ("Contrary to appellants' argument, the express language of the guaranties does not limit contribution rights. … 'The guarantors could have agreed to share the possible burden on some basis other than that of strict proportionate contribution' … Because respondent and appellants were bound for the performance of the same duty by the same principal, the district court correctly ruled that they share a common liability as a matter of law, and we affirm that ruling.") (citation omitted); *Byrd v. Est. of Nelms*, 154 S.W.3d 149, 165

Once the PITA, as successor-in-interest to the guaranty agreement, settled with the Estate of Harris for $537,500, the Protea debt was reduced by that amount and the balance reallocated among the Trust, the Estate of Hostler, and Segal. Once PITA settled with the Estate of Hostler for $175,000, the Protea debt was reduced by that amount and the balance reallocated between the Trust and Segal. PITA has stipulated that, if it receives any additional payments from the Estate of Hostler, the Protea debt will be reduced by that amount upon receipt of those payments, and the balance reallocated between Segal and the Trust. Until such receipt, however, there is nothing to "recalculate" and "reapportion" under Section 57 of the RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY, and the Circuit Court clearly erred in crediting Segal with payments never received by the Trust from the Estate of Hostler and which may never be received,[139] particularly when Segal signed a guaranty in 2009 and reaffirmed it in 2017 promising to pay up to $1 million towards the Protea Note upon default and, in addition, contractual interest, late fees, and collection costs.

Like his other arguments, Segal's claim that he should only be liable for one-sixth of Protea's debt obligation on the Trust's contribution claim has no merit because "When two or more persons have bound themselves as guarantors, *they are generally presumed to be equally liable*

(Tex. App. 2004) ("*Absent an express agreement* among the guarantors to the contrary, the contributive share of the Nelms Partnership is limited to the total amount of liability divided by the number of coguarantors. RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 57 (1996).") (emphasis supplied); *Amphibious Partners, LLC v. Redman*, *supra* (same); *see also* Stearns, SURETYSHIP § 11.21 (5th ed. 1951) ("Sureties may, *by express contract*, fix or determine their relative liabilities among themselves, notwithstanding the obligation for equitable contribution arising from the original contract of suretyship.") (emphasis supplied). Here, there being no express agreement among the coguarantors to the contrary, each is responsible for one-quarter of Protea's debt obligation upon default.

[139] As of the date of this brief, no additional payments have been received by the Trust or PITA from the Estate of Hostler.

for a proportion of liability on the note guaranteed, and *in the event that one of them has paid more than his or her share of the amount owed*, *he or she is entitled to demand contribution from the others*."[140]

As the trial court correctly held[141] and as summarized in *Desrosiers v. Russell*:

> When a person pays more than his share of a common obligation, the law gives him the remedy of contribution to obtain from the other obligors payment of their respective shares of the obligation. 12 Fla.Jur.2d *Contribution, Indemnity and Subrogation* § 1 (1979). Where two or more persons have bound themselves as guarantors, they are generally presumed to be *equally liable for a proportion of the liability on the note guaranteed*. *Curtis v. Cichon*, 462 So.2d 104 (Fla. 2d DCA 1985). In the event that one of the guarantors has paid more than his share of the amount owed, he is entitled to demand contribution from the others. *Fletcher v. Anderson*, 616 So.2d 1201 (Fla. 2d DCA 1993); 38 Am. Jur.2d *Guaranty* § 128 (1968).[142]

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[140] 38A C.J.S. *Guaranty* § 159 (emphasis supplied and footnote omitted).

[141] App. 2632.

[142] 660 So. 2d 396, 398 (Fla. Dist. Ct. App. 1995) (emphasis supplied); *see also Woods-Tucker Leasing Corp. of Georgia v. Kellum*, 641 F.2d 210, 215 n.7 (5th Cir. 1981) ("guarantors who jointly execute an agreement of guaranty are *equally liable* on the agreement") (emphasis supplied); 38 Am. Jur. 2d *Guaranty* § 90 ("If a principal obligation is guaranteed by two or more persons, *each must pay the proportional share of the liability*, and a guarantor who has paid more than his or her share is entitled to contribution from the others and may sue to enforce that right.") (emphasis supplied and footnotes omitted); id. ("coguarantors are equally bound, and *each is required to contribute equally*") (emphasis supplied and footnotes omitted); 38A C.J.S. *Guaranty* § 154 ("In accordance with the general principles of contribution, as a general rule, where one of several guarantors pays more than his or her proportionate part of the principal's debt, that guarantor is entitled to contribution from the coguarantors of an amount sufficient *to make the payment of all equal*.") (emphasis supplied and footnotes omitted); *id.* ("Thus, for example, when one of two guarantors pays the entire outstanding debt, that guarantor is entitled to contribution in the amount of half the payment, and when the guarantor pays three-quarters of the debt, the guarantor may seek contribution for an amount over and above his or her share, namely one-quarter of the debt; however, if the guarantor instead satisfies one-quarter of the debt, the guarantor would not have action for contribution because the guarantor has not paid more than his or her fair share of the common burden.") (footnote omitted); *id*. ("The doctrine is applied to prevent one of two or more guarantors from being obliged to pay more than his or her *fair share of a common burden* or to prevent one guarantor from being unjustly enriched at the expense of another.") (emphasis supplied and footnote omitted); 38A C.J.S. *Guaranty* § 153 ("the law presumes that each coguarantor received equal benefit from the guaranty *and must contribute equally in discharging the common obligation*") (emphasis supplied and footnote omitted); *Spottiswoode v. Levine*, 730 A.2d 166 (Me. 1999) (corporate vice-president who served as coguarantor received an equal benefit and was required to contribute equally even though he received only one share where he received a good salary, had a potential for greater earnings, and had the opportunity to accumulate additional shares). In his Brief, Segal references the case of *State ex rel. Connellsville By-Prod. Coal Co. v. Cont'l Coal Co*., 117 W. Va. 447, 186 S.E. 119 (1936) [Petitioner's Brief at 18] – yet another case never cited to the Circuit Court – but that case was disapproved in *State ex rel. Shenandoah Valley Nat. Bank v. Hiett*, 123 W. Va. 739, 17 S.E.2d 878 (1941), and the holding of that case in Syllabus Point 3 is "When bonds with different penalties and different sureties relate to the

In this case, after Mr. Puskar's death, there were four coguarantors: Harris, Hostler, Segal, and the Trust. Each of them, including Segal himself, listed – *after Mr. Puskar's death* – their liability under their guaranties at $750,000[143] because they understood they were "equally liable for a proportion of the liability on the note guaranteed" as all had equally invested time and money in Protea. As there were four coguarantors – Harris, Hostler, Segal, and the Trust – Protea's Note was for $3 million, and one-quarter of that debt obligation was $750,000.[144] Segal understood this as he listed his share of the $3 million in potential liability at $750,000[145] and his after-the-fact argument to the contrary is preposterous, particularly when the Trust funded over $3 million for PITA to acquire the Note and, as it now stands, has recovered only $712,500, leaving a principal balance of $2,314,404.16, not including post-judgment interest and collection costs. Segal knows the fallacy in his argument that because the Trust's guaranty was $3 million and his was $1 million and there were two other coguarantors with $1 million guaranty agreements, he should only bear a

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same matter, have the same condition, and are cumulative, the bonds may be regarded as one instrument and the several sureties as cosureties, bound, however, only in proportion to the penalties of their respective bonds. Under Code 55-8-7, the obligee of such bonds may join all the sureties in one action." Here, of course, there was never an issue raised about joining all three coguarantors in a single action, which was the issue in *Connellsville*. Moreover, unlike the sureties in *Connellsville*, the guaranty agreements here expressly provided that United and then PITA by assignment could elect among remedies.

[143] App. 1186, 1191, 1192-1193, 1194, 1833-1834, 1888-1889, 1929. It is not insignificant that Segal listed his guaranty obligation as $750,000 in a pleading filed in federal court, which the Circuit Court noted, "Mr. Segal in the federal case said the same thing, he's responsible for 750." App. 2409.

[144] The cases cited by Segal in the Circuit Court recognized this principle. See App. 846 ("There are six guarantors; therefore, Byrd's contributive share would be one-sixth of the note"); App. 894 ("Appellees were two of six co-guarantors of a promissory note. … The court reversed and remanded, concluding that appellees' recovery from appellant was his one-sixth share plus interest"); App. 930 ("Here, there were six guarantors: Aziz and Pirani; Gilani, Bahari and Lahani; and HNM. Thus, from each coguarantor, Pirani would be able to recover one-sixth of the amount for which he can make a claim for under 20 note and guaranty").

[145] App. 1193.

one-sixth share of any liability, as the record contains a Security Agreement[146] directly to the contrary.

It is not insignificant in this case that the coguarantors were represented by the same counsel. Two settled not only the Trust's claims for contribution and fraud, but also PITA's claims for breach of contract and fraud. Now, Segal wants this Court to ignore those settlements and give him the benefit of not only a full offset of their settlements against his liability for contribution, but also, in the case of the Hostler settlement, for a settlement amount that has not and never has been fully funded. The Respondents described the absurdity of Segal's accusations of some scheme to shift the Trust's burden under its guaranty to Segal to the Circuit Court as follows:

> Mr. Segal has persisted in the false narrative that United, the Trust, and the Dinsmore firm conspired to shift the Trust's contributive share of the Protea default to its coguarantors. As of April 1, 2022, the balance on the Protea Note, including interest and late fees, will be $4,549,324.70 with Mr. Segal's share, based on his $1 million guaranty, at $1,516,441.57.
>
> The folowing is the calculation of the Protea Note payable as of April 1, 2022:
>
> **PITA, LLC**
> **Loan Balance Receivable Calculation - Protea Biosciences, Inc.**
> **As of April 1, 2022**
> ********Interest Paid through September 27, 2017**
> ********Note purchased from United Bank on November 21, 2017**
>
Regular Interest Rate as of 9/27/17:	**5.87%**
Default Interest Rate as of 12/8/17	**10.87%**
Principal Balance as of 9/27/17:	**3,000,000.00**
Late Fees through Sept. 27, 2017:	**15,531.66**

[146] App. 646 ("WHEREAS, Centra entered into a loan transaction with Protea … WHEREAS, United entered into a loan transaction with Mermaid … WHEREAS, United entered into a loan transaction with Platinum … WHEREAS, pursuant to the various guarantee agreements … the Trust was a guarantor of the obligations of … Protea [and] Mermaid ….''). As United's represented testified, the collateral pledged by the Trust in 2011 after Mr. Puskar's death "was pledged to a number of loans," not just the Protea Note, App. 1323, which varied between $10 million and $20 million at various times, App. 1306.

	Per Guarantor Letter	Per Note Balance Schedule	Based on $1,000,000 Guarantee
Principal	$ 3,000,000.00		$ 1,000,000.00
Interest	34,730.83		11,576.94
Late Fees	17,781.83		5,927.28
		$ 3,048,819.67	
Rounding Difference		(0.24)	
		758.21	
		2,935.02	
As of 12/8/17-Default Date	**$ 3,052,512.66**	$ 3,052,512.66	**$ 1,017,504.22**
Rounding Difference		0.24	0.08
Interest Through 4/1/22		1,426,682.25	475,560.75
Late Fees Through 4/1/22		70,129.55	23,376.52
		4,549,324.70	1,516,441.57
Professional Fees / Collection Costs Through Feb. 28, 2022			
Legal-Dinsmore		140,148.66	
Legal-Steptoe		235,602.06	
Legal-Fergeson Skipper		332.50	
Accounting		8,835.00	
Allocated to Segal Per Schedule			150,397.16
Due at 4/1/22 before Payments		**$ 4,934,242.92**	
			$ 1,666,838.73
			Total Due from Scott Segal
Settlement Payments Received:			
Leo Harris Estate - 1/18/22			
Allocated to Collection Costs	$ 110,024.89		
Allocated to Accrued Interest	427,475.11		
		(537,500.00)	
Stanley Hostler Estate - 3/7/22			
Allocated to Collection Costs	$ 124,496.17		
Allocated to Accrued Interest	50,503.83		
		(175,000.00)	
Total Balance Due on Note		**$ 4,221,742.92**	

Reducing the $4,549,324.70 Protea Note balance as of April 1, 2022, by the $1,137,331.18 allocable to the Trust leaves $3,411,993.52. Of Harris's $537,500 settlement, $427,475.11 is allocable to the Protea Note, leaving $2,984,518.41. Of Hostler's $175,000 settlement, $50,503.83 is allocable to the Protea Note, leaving $2,934,014.58. Applying Mr. Segal's $1,516,441.57 to this $2,934,014.58 leaves a deficit of $1,417,573.01.

Even if one allocates one-half of the Protea Note to the Trust based on Mr. Segal's erroneous argument that he is liable for only one-sixth of the liability still leaves the Trust with a deficit because reducing the $4,549,324.70 by $2,274,662.35 leaves $2,274,662.35. Allocating $427,475.11 of Harris's settlement would reduce this amount to $1,847,187.24. Allocating $50,503.83 of Hostler's settlement leaves $1,796,683.41. Applying Mr. Segal's $1,516,441.57 to this $1,796,683.41 leaves a deficit of $280,241.84 after the Trust has satisifed one-half of the Protea Note.

The liability of the coguarantors, including Mr. Segal, could have been avoided if they had simply honored their contractual obligations upon Protea's default. Instead, they chose to raise spurious defenses all of which this Court has rejected. Fortunately, two of the three guarantors realized the futility of their position and settled for what remained in the estates for an aggregate of $712,500. Unfortunately, this amount only scratches the surface of the principal debt obligation, interest, late fees, and collection costs, and Mr. Segal persists in advancing defenses the other coguarantors have wisely abandoned and blaming others for what is Mr. Segal's rather straightforward contractual obligations to the Plaintiffs' charitable endeavors. [147]

As the Circuit Court correctly held:

> Defendant Segal argues that the Trust's 2010 guaranty of $3 million means that the proportionate values of the guaranties should change the shares, i.e., 50% for the Trust and one-sixth shares for Harris, Hostler, and Segal. This argument is rejected by the Court.
>
> "When two or more persons have bound themselves as guarantors, they are generally presumed to be equally liable for a proportion of liability on the note guarantied, and in the event

[147] App. 1935-1937. Segal never disputed any of the Respondents' calculations of the Protea Note principal, interest, late fees, collection costs, or the allocation of collection costs and accrued interest on the outstanding indebtedness in the Circuit Court. Again, only $427,475.11 of the Harris settlement is allocable to the Protea Note, and only $50,503.83 of the Hostler Settlement is allocable to the Protea Note, for a total of $477,978.94, leaving a deficit of $2,548,925.22 from what the Trust contributed to PITA's acquisition of the Protea Note, which gets reallocated to the Trust and Segal as the remaining coguarantors, with each bearing $1,274,462.61. This principle is also recognized in the cases cited by Segal below. App. 879 ("when one of two guarantors pays three-quarters of the debt, the guarantor may seek contribution for an amount over and above his share, namely one-quarter of the debt").

> that one of them has paid more than his or her share of the amount owed, he or she is entitled to demand contribution from the others." 38A C.J.S. Guaranty § 159 (footnote omitted).[148]

In doing so, it adopted *Desrosiers'* holding of contribution by coguarantors' respective shares, and ruled in favor of coguarantors' proportional liability:

> *See also Woods-Tucker Leasing Corp. of Georgia v. Kellum*, 641 F.2d 210, 215 n.7 (5th Cir. 1981) ("guarantors who jointly execute an agreement of guaranty are equally liable on the agreement"); 38 Am. Jur. 2d Guaranty § 90 ("If a principal obligation is guaranteed by two or more persons, each must pay the proportional share of the liability, and a guarantor who has paid more than his or her share is entitled to contribution from the others and may sue to enforce that right.") (footnotes omitted); *Id.* ("co-guarantors are equally bound, and each is required to contribute equally") (footnotes omitted); 38A C.J.S. Guaranty § 154 ("In accordance with the general principles of contribution, as a general rule, where one of several guarantors pays more than his or her proportionate part of the principal's debt, that guarantor is entitled to contribution.")[149]

E. SEGAL WAIVED ANY ERROR REGARDING HIS BREACH OF CONTRACT COUNTERCLAIM BY NEITHER BRIEFING NOR ARGUING IT AND, EVEN IF NOT WAIVED, IT IS BARRED BY THE STATUTE OF FRAUDS AND, OTHERWISE, PRESENTS NO TRIALWORTHY ISSUE.

Segal falsely asserted a breach of contract counterclaim against the Trust based on the following: (1) "Mr. Puskar told the Bank that he wanted to be a 100% guarantor for the note, which the Bank accepted,"[150] contrary to the sworn testimony of United's representative;[151] (2) "The Bank refused or failed to utilize the security pledge by Mr. Puskar … to satisfy the loan

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[148] App. 2631-2632.

[149] App. 2631-2632.

[150] App. 187.

[151] United's represented testified that, contrary to Segal's theory, the Trust was added as a guarantor to the Protea Note because Mr. Puskar "had formed the Trust … and we had numerous other loans in which" Mr. Puskar "was involved in." App. 1303. He testified that those various loan obligations varied between $10 million and $20 million at various times. App. 1306.

obligation,"[152] although United had sold the Note before Protea's default; (3) "This resulted in an impairment of collateral,"[153] an argument that Segal has now abandoned; (4) "The Trust has failed to honor the contractual agreement with Mr. Puskar to 'take care of' the Note with the money market account he[154] pledged to the Bank for that purpose,"[155] contrary to the testimony of United's representative[156] and now abandoned by Segal; (5) "PITA, LLC did not provide any consideration to the Bank for the purported assignment, which is void as a matter of law,"[157] also now abandoned; and (6) "The Trust has breached its contractual agreement to the Defendants, and to the Bank, to pay the Note,"[158] contrary to the sworn testimony of United's representative relative to the bank[159] and which otherwise has no evidentiary support.

Critically, Segal's counterclaim against the Trust for breach of contract is never referenced in any of the Circuit Court's summary judgment orders because Segal never raised, briefed, or argued this counterclaim. He never raised the issue of his counterclaims (1) when responding to the Respondents' motion for partial summary judgment[160]; (2) during the hearing on United's motion for summary judgment and the Respondents' motion for partial summary judgment[161]; and

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[152] App. 187.

[153] *Id.*

[154] Again, this is factually inaccurate, as it was the Trust, not Mr. Puskar, which pledged collateral to avoid an event of default on Mr. Puskar's death in conjunction with multiple loans. App. 1716-1717.

[155] *Id.*

[156] United's representative was specifically asked, "Did he [Mr. Puskar] ever make a comment to you about protecting the other guarantors?" to which he replied, "He did not." App. 1309.

[157] App. 188.

[158] *Id.*

[159] App. 1284-1380.

[160] App. 366-379.

[161] App. 474-513.

(3) in a subsequent sur-reply to the Respondents' motion for partial summary judgment.[162] Thus, the order granting United's motion for summary judgment and the Respondents' motion for partial summary judgment, does not mention Segal's counterclaims.[163] Likewise, Segal's reconsideration motion never mentioned it[164] and, he conceded that his counterclaims had been rendered "lost" because of the awards of summary judgment to United and partial summary judgment to the Respondents.[165]

After the close of discovery, Segal's summary judgment motion never referenced his counterclaims.[166] Critically, in the Respondents' motion for partial summary judgment after the close of discovery, *they expressly moved for summary judgment on Segal's counterclaims*, which are nothing more than a mirror of his defenses to the Respondents' claims,[167] and when Segal responded to this motion, *he never responded to the motion for summary judgment as to his counterclaims*.[168] From that point forward in the litigation, *after Segal did not oppose summary judgment on his counterclaims*,[169] those counterclaims were waived for purposes of appeal.[170] Does

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[162] App. 514-518.

[163] App. 586-599.

[164] App. 600-612.

[165] App. 701 ("So we've lost three counterclaims against the Trust because of an assignment of the note to PITA.").

[166] App. 717-736.

[167] App. 992-995.

[168] App. 1625-1642.

[169] Indeed, after the Respondents moved for summary judgment on Segal's counterclaims, he never mentioned them again in the record.

[170] *Wolford v. Landmark Am. Ins. Co*., 196 W. Va. 528, 531, 474 S.E.2d 458, 461 (1996) ("It should be noted that W. Va. R. Civ. P. 56(e) provides that a response to a motion for summary judgment 'must set forth specific facts showing that there is a genuine issue for trial.' As this Court recently stated in *Gentry v. Mangum*, 195 W.Va. 512, 519, 466 S.E.2d 171, 178 (1995), the nonmovant, in the face of a showing of entitlement to summary judgment, must point to 'specific facts demonstrating that there is, indeed, a

Segal really believe that this Court should reverse the Circuit Court's failure to permit his breach of contract counterclaim against the Trust when he never opposed the Trust's motion for summary judgment on that counterclaim?

Segal did not oppose the Trust's summary judgment motion regarding his counterclaim for two reasons. First, as he conceded at the reconsideration motion hearing, such counterclaim could not be sustained based on the Circuit Court's awards of summary judgment to United and partial summary judgment to the Trust, as his "contract" theory is negated by the clear and unambiguous language of his 2009 guaranty agreement, which he reaffirmed in 2017 *after* the alleged "unwritten, oral agreement" with Mr. Puskar that *he affirmatively represented to United did not exist*. Second, Segal's breach of contract counterclaim independently has no substantive merit because (1) Mr. Puskar pledged no collateral for the Note during his lifetime, but the collateral was pledged by the Trust after his death; (2) the coguarantors waived any claims among themselves to avoid or reduce their $1 million personal and unconditional (except for a full discharge of the indebtedness) guaranties of Protea's obligations;[171] (3) the coguarantors waived any claims or defenses related to some alleged oral contract,[172] which never occurred; (4) the coguarantors, including Segal, reiterated their agreement that their contractual guarantor obligations could not be orally modified;[173] (5) West Virginia law precludes a cause of action predicated upon an alleged oral

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trialworthy issue.' *Here, the appellant did not resist the motion of McDonough Caperton for summary judgment and now asks this Court to reverse that judgment upon a contention advanced upon appeal for the first time. However, inasmuch as that contention, concerning the overstating of insurance coverage, was never brought to the attention of the circuit court, it is not properly before this Court.*") (emphasis supplied).

[171] App. 993 (referencing guaranty agreements).

[172] *Id.* (emphasis supplied).

[173] *Id.*

promise to answer for the indebtedness of another;[174] and (6) United's representative testified that no such unwritten, oral agreement with Mr. Puskar existed.[175]

VI. CONCLUSION

This case is an excellent example of why commercial loan guaranty agreements contain boilerplate language waiving the very defenses raised by Segal over the past four years and why it is essential to commercial lending in this State that this Court hold him accountable for (1) mispresenting to the lender, United, and his coguarantors, including the Trust, that no unwritten, oral agreements existed that would modify his obligations under his guaranty agreement and (2) then falsely claiming such unwritten, oral agreement existed and falsely accusing United, PITA, the Trust, and the Dinsmore law firm of some grand conspiracy to exonerate the Trust (a charity!) from any liability on its guaranty agreement when it funded PITA's more than $3 million acquisition of the Protea Note and then sought nothing more than the allocation of a pro rata share of Protea's debt obligation to its three coguarantors, including Segal.[176] Like many investors,

[174] W. Va. Code § 55-1-1(d) ("No action shall be brought in any of the following cases … To charge any person upon a promise to answer for the debt, default, or misdoings of another … Unless the offer, promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby or his agent."); *see also FirstMerit Bank, N.A. v. Inks*, 138 Ohio St. 3d 384 (2014) (statute of frauds prohibited guarantors from raising alleged oral release agreement as defense).

[175] "Q. Did he ever make a comment to you about protecting the other guarantors? A. He did not. … Q. Do you recall Mr. Hostler stating to you that Mr. Puskar increased the guarantee to protect its' co-guarantors? … No. Q. You don't recall or that didn't happen? A. *That did not happen*." App. 1309, 1339 (emphasis supplied). It is also not insignificant that Segal produced no evidence that the Trust, which is an entity independent from Mr. Puskar during his lifetime, ever entered into any agreement to exonerate Segal from his obligations under the 2009 guaranty and 2017 reaffirmation agreements.

[176] Segal's attempt to portray himself as the victim of a charity is quite something: "The supervening event has caused Segal grievous hardship in the form of years of unnecessary, expensive litigation, damage to his personal and professional reputations by being compelled to defend against allegations of fraud, with a seven-figure judgment being the final insult. Segal could not have reasonably foreseen that the Trust would acquire his guaranty and then weaponize it against him." Petitioner's Brief

shareholders, corporate officers, and others who execute commercial loan guaranty agreements, Segal has the financial ability to retain a team of lawyers[177] to throw up baseless obstacles, including suing PITA's and the Trust's law firm resulting in its withdrawal from this case,[178] to frivolously attempt to either avoid or minimize his contractual liabilities, or to kick the can as far down the road as possible, and he has done so by asserting a legion of legal arguments that he has abandoned one-by-one.

WHEREFORE, the Respondents respectfully request that this Court reverse the judgment of the Circuit Court of Monongalia County and remand with directions to (1) schedule a jury trial on the fraud claims of the Respondents against Segal; (2) enter judgment in favor of PITA against Segal for breach of contract and for the award of contractual interest, late fees, and collection costs; and (3) enter judgment in favor of the Trust allocating one-half of the actual payment of $175,000 made by the Estate of Hostler towards the Protea debt and one-half of any future payments, rather than with one-half of the $362,500 the Estate of Hostler never paid the Trust.

PITA, LLC, AND THE MILAN PUSKAR REVOCABLE TRUST

By Counsel

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at 14. The record in this case – strewn with Segal's abandoned frivolous claims and defenses – speaks volumes to the contrary.

[177] It is noteworthy that two of the law firms that represented Segal at the trial court level no longer represent him on appeal.

[178] App. 274.

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2023, I served the foregoing **"RESPONDENTS' BRIEF"** upon the following counsel of record using the E-Filing System:

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