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 and Third-Party Plaintiff Below, Respondent,

BRIEF OF RESPONDENT SCOTT S. SEGAL

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INTRODUCTION

In the matter for this Court's consideration, a charitable trust that posted collateral for and guaranteed an ***entire*** multi-million dollar debt established an alter ego, had the alter ego purchase the debt and the loan documents (including the other partial guaranties), released all of the collateral back to itself, and then — evidencing a decided lack of charity — sued the remaining guarantors for the ***entire*** debt plus attorney fees under the loan agreement. The trust performed those legal gymnastics, rather than simply pay off the debt and sue for contribution, because it could not otherwise hope to secure an award of attorney fees. Most uncharitably, the trust did all that notwithstanding its prior assurances to the others that they would be taken care of and shielded from liability in the event of default.

Ironically oblivious to its manifest deceit, the trust had the temerity in its lawsuit to accuse its co-guarantors of fraud in their own right by having credulously elected to rely on the protective assurances they had previously been afforded. The circuit court was having none of the trust's baseless allegations, however, and it summarily rejected the fraud claims, along with another claim for breach of contract. The circuit court's rationale in support of its judgment was clearly correct in both instances. As such, the challenges thereto should be rejected on appeal.

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

In 2001, scientists and researchers affiliated with West Virginia University founded Protea Biosciences, Inc., a Morgantown-based company using mass spectrometry in the identification of biomolecules to analyze associated biological processes. Joint Appendix ("JA") 15. It was hoped that Protea's research would lend insight to combat certain diseases and perhaps even lead to a cure for cancer. *Id.* at 1296. Throughout the ensuing decade, the technology startup attracted interest and investment from several prominent West Virginians and other area notables. *Id.* In

2006, Stanley Hostler, an attorney serving on the governing body of the WVU Foundation, became an officer and director of Protea. *Id.* at 235, 237. Two years later, the company elected attorney Scott Segal as a director. *Id*. Hostler and Segal joined, among others, Maryland systems engineer and consultant Leonard Harris, who had been a member of the Protea Board since 2003. *Id.* Apart from their service as directors, Hostler, Segal, and Harris each invested significant sums in Protea through stock purchases and otherwise. *Id.* at 92, 400.

As Protea's business developed, its principals sought to attract more investment. Not long after Hostler was named to the Board, he convinced his friend — entrepreneur and philanthropist Milan Puskar — to join him as a director and to invest $100,000 in Protea. JA 92. By 2009, the company had grown and required additional capital. Puskar was on the board at Centra Bank, with which he kept his personal accounts and coordinated millions of dollars' worth of financial transactions for a number of his business entities. *Id.* at 1303-06. On August 27, 2009, Centra issued Protea a $3 million revolving line of credit, evidenced by a Loan Agreement and a Promissory Note. *Id.* at 231-32, 1005. Segal, Harris, Hostler, and Puskar executed individual guaranties for $1 million each to obtain the loan. *Id.* at 127-28, 131-32, 135-36, 2611. Protea drew down the entire amount.

Notwithstanding that the $3 million loan was more than adequately anchored by the $4 million of individual guaranties, Puskar, as sole trustee of the Milan Puskar Revocable Trust, executed a new guaranty on July 30, 2010 (the "Umbrella Guaranty") whereby the Trust agreed to cover the ***entire liability*** in case Protea defaulted. JA 248-49. Puskar knew that he was dying, *id.* at 1180, 1874, and he told Hostler that the purpose of the new guaranty was to afford the bank primary recourse against the Trust in the event of Protea's default, obviating the need to collect on the individual guaranties, *id.* at 1174-75, 1185-86. Specifically, Hostler stated under oath:

> In early 2011 I became aware that Mike was terminally ill because of prostate cancer. He and I continued to discuss WVU, politics, and the activities of Protea. About two weeks prior to his death, he and I met to discuss the financial affairs of Protea as well as my limited resources. At the end of the meeting he stated that in the event Protea did not make it, he had taken steps to see I did not get hurt. His last words to me were, "I'll see you at church," as he gave me a hug. I represented this conversation to [Protea] CEO [Stephen] Turner within a few days.

Id. at 1180. Hostler recounted his conversation with Puskar in a sworn affidavit dated August 31, 2012. *Id.* at 1890. Puskar also enjoyed close friendships with Harris and Segal, and he informed them as well that the Trust guaranty was intended to satisfy any Protea default without rendering them liable on their individual guaranties. *Id.* at 382. Puskar pointedly told Harris that he was happy to ensure that his co-guarantors' obligations "would be taken care of." *Id.* at 382, 2608.

Puskar died on October 7, 2011. JA at 1877. Shortly after his death, on November 9, 2011, the Trust (reorganized as the Milan Puskar Revocable Trust Restated 9/28/11), through its successor trustees, pledged 500,000 shares of Mylan Laboratories, Inc., common stock to Centra to secure the Trust's various obligations. *Id.* at 327, 1310-11. At the time, the stock was worth more than $9 million. *Id.* at 2475. The stock was housed in a brokerage account, the entirety of whose assets was pledged on January 12, 2012, as security for the Protea loan and others to which the Trust was bound as borrower or guarantor. *Id.* at 621-24. After Centra was acquired by merger into United Bank, Inc., during 2011-12 (the latter being merged in 2017 into United Bank), the Trust on July 1, 2013, reaffirmed its pledge of the brokerage account as collateral and, after most of the stock was converted to cash over the next several years, moved the bulk of the account assets to a money market account. *Id.* at 329-36, 520, 1325-26.

To secure the money market account as collateral for the Protea loan, the parties executed a Change in Terms Agreement with United on January 26, 2017. JA 1006-07. In so doing, Protea, the Trust, and the individual guarantors each confirmed that they were "still bound by the terms of

the instruments and prior modifications, extensions, and supplements" with respect to the August 27, 2009 Note, "and that those terms will continue to bind the Parties as provided in this Agreement and those instruments." *Id.* at 1006.

Protea made only occasional, token payments on the Note principal during the eight years after taking out the loan, and in 2017 its financial struggles appeared to become more acute. In mid-autumn 2017, Trust officials "heard there were issues with Protea and if things didn't resolve quickly with them that they might be filing bankruptcy." JA 1441. With the cash and stock collateral perceived at risk, the Trust retained counsel and devised a scheme that — if not for being too clever by half — might be described as ingenious.

The Trust could have honored its commitment, through Puskar, to the individual guarantors and simply let United satisfy Protea's $3 million indebtedness by the transfer of the money market account assets. Or, being a co-guarantor of the loan, the Trust could have paid off the $3 million indebtedness commensurate with the full extent of its guaranty, and, if it then chose to renege on its agreement with the individual guarantors, initiated an action for contribution against them to determine the proportionate liability of each. The Trust did neither!

Contribution actions, however — as the circuit court recognized — do not permit the recovery of attorney fees, absent an agreement or statutory provision to the contrary. *See* 38A C.J.S. *Guaranty* § 65 (2022); JA 2612 (citing various cases in support of proposition that "When one guarantor sues another on the basis of the latter's guaranty, the plaintiff guarantor is not entitled to attorneys' fees. This is true even if, as here, the plaintiff guarantor has acquired the underlying note".). Instead, on November 21, 2017, the Trust filed paperwork with the West Virginia Secretary of State to form an entity called PITA, LLC. JA 632-35. PITA was not nominally a guarantor of the underlying loan, and, taking advantage of that, hoped to avail itself

of the assigned loan documents, evidencing Protea's agreement "to pay all expenses of collection, enforcement, and protection of Lender's rights and remedies . . . . includ[ing], but [] not limited to, reasonable attorneys' fees." *Id.* at 232.

On the first day of its existence, PITA paid United $3 million plus $26,904.16 in interest, obtaining assignment of the Note, the Loan Agreement, the collateral, and the guaranties. JA 338, 1008-09, 1333. The bank waived over $17,000 in late charges. *Id.* at 613, 618. The next day, PITA informed United in writing that, as assignee, it was relinquishing its security interest in the brokerage account (including the 23,321 remaining shares of the Mylan stock) and in the money market account, instructing the bank to tender those assets to the Trust. *Id.* at 337. On December 1, 2017, Protea filed for Chapter 11 bankruptcy reorganization. *Id.* at 351-52.

Standing in the shoes of the bank via the assignment, PITA, on December 8, 2017, made demand of Segal, Harris and the estate of Hostler (who died in June of that year) for the full amount of their respective $1 million guaranties in satisfaction of the loan principal, accrued and accruing interest, and late fees. JA 125-26, 129-30, 133-34. In its final order, the circuit court found as a fact that PITA was "wholly financed by the Trust and was created solely to acquire the Note, release the collateral that Protea and guarantors had posted, and pursue a financial recovery on the Trust's behalf from the other guarantors." *Id.* at 2608. At the prefatory hearing, the court stated, "I find that the Trust did pay the note by providing the money to PITA, which is nothing more than the Trust doing business as PITA." *Id.* at 2427.

Segal, Harris, and the Hostler estate each refused PITA's demands to make good on their individual guaranties, relying on the Trust to instead make good on its agreement that they "would be taken care of" by the Umbrella Guaranty and pledge of collateral. On September 12, 2018, PITA and the Trust (collectively, "Plaintiffs") commenced suit in the Circuit Court of Monongalia

County against the individual guarantors (collectively, "Defendants"), JA 14-24, who then filed a Third-Party Complaint against United with respect to the guaranties and for impairment of the loan collateral, *id.* at 81-88. The operative Amended Complaint, submitted on February 25, 2019, *id.* at 89-105, alleges on behalf of PITA in Count I and for the Trust in Count II claims for fraudulent inducement by virtue of Defendants' execution of the guaranties and the Change in Terms Agreement; in Count III a claim by PITA for breach of contract, stemming from Defendants' refusal to honor their assigned guaranties; and in Count IV a claim for contribution to the Trust in the event that it "is forced to maintain a disproportionate share of liability under the Protea Note." *Id.* at 103. And in furtherance of the Trust's plan all along, PITA included a demand for attorney fees. *Id.* at 104.

After the circuit court denied their motion to dismiss the Amended Complaint, Defendants answered on December 12, 2019, JA 162-91, asserting counterclaims against the Trust for breach of the contract made by Puskar, for breach of fiduciary duty, and for illegally conspiring with United and PITA to injure them, *id.* at 186-90. Following a hearing on June 9, 2021, the circuit court entered an order on August 13, 2021, dismissing Defendants' counterclaims and upholding the validity of the individual guaranties; the court also granted summary judgment to United, dismissing Defendants' Third-Party Complaint with prejudice. *Id.* at 586-99. The parties then filed cross-motions for summary judgment, written rulings on which were deferred through the course of a motions hearing on January 13, 2022, and a pretrial hearing on March 7, 2022. Harris died during the pendency of the case, and both his estate and Hostler's settled with Plaintiffs and were dismissed from the proceedings in early 2022. *Id.* at 1967-72 (Hostler), 1973-78 (Harris).

The circuit court conducted one last hearing on May 27, 2022, after which it entered a final order on July 21, 2022. JA 2603-2616. Therein, the court entered judgment for Segal on Plaintiffs'

Count I and Count II fraud claims, and on PITA's Count III claim for breach of contract. The order ruled the latter claim "legally insufficient as a matter of law," elaborating:

> The Court finds that under the facts of this case, PITA is not a non-interested independent third party but is one and the same with the Trust. The Court finds that the Trust provided the funds to pay the Note in full in 2017. In this case equitable principles limit recovery against co-guarantors to their pro rata contributive share through a claim for contribution. Accordingly, PITA's breach of contract claim is dismissed with prejudice.

Id. at 2604. The circuit court granted summary judgment to the Trust on its Count IV claim for contribution. Notwithstanding that Segal's $1 million guaranty was only one-third of the $3 million for which the Trust had rendered itself liable, the court concluded that "Segal and the Trust are equally responsible for the remaining balance on the Note after the settlements of the [Hostler and Harris estates] are deducted from the Note's balance." *Id.* at 2611. With respect to Puskar's individual $1 million guaranty, the court observed that his estate closed in 2015, prior to the 2017 events giving rise to the lawsuit, thus extinguishing any claim. *Id.* at 2614. On July 28, 2022, PITA and the Trust appealed the circuit court's final order insofar as it was adverse to them, that is, the entry of judgment for Segal on Counts I-III and the calculation of Segal's contributive share relating to Count IV. Segal filed his own appeal with respect to Count IV on August 22, 2022, also seeking reinstatement of his counterclaim for breach of contract.

SUMMARY OF ARGUMENT

The summary judgment entered for Segal on the fraud claims and on PITA's claim for breach of contract should be affirmed. As to the former claims, Plaintiffs adduced no proof of fraudulent intent, and they have demonstrated no justifiable reliance on any statement, act, or omission attributable to Segal. Plaintiffs therefore fell woefully short of evidencing each essential element of fraud commensurate with the "clear and convincing" standard required to prevail, with the result that they were correctly deemed unentitled to a trial.

As to the latter claim, the circuit court found as a fact that PITA and the Trust were "one and the same." Inasmuch as the Trust, being limited to the remedy of contribution, could not maintain an action against Segal for breach of contract, neither may PITA. The court's judgment in that respect was clearly correct.

Finally, Plaintiffs maintain that Segal should not receive credit in contribution for the $362,000 outstanding settlement balance from a co-guarantor. Plaintiffs are mistaken, in that the speculative risk of eventual non-collection from a settling party that was (and still is) solvent, is properly borne solely by Plaintiffs by virtue of their negotiation of and voluntary entry into the settlement with full knowledge and appreciation of its risks.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter is of fundamental public importance and its resolution will involve deciding certain issues of first impression. The questions presented by this appeal are therefore appropriate for oral argument in accordance with Rule 20(a) of the West Virginia Rules of Appellate Procedure. As such, none of the criteria for deciding this appeal without oral argument, set forth in Rule 18(a), are applicable.

ARGUMENT

Standard of Review

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). The trial court may grant a motion for summary judgment only if the pleadings and record evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." W. VA. R. CIV. P. 56(c). "A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law." Syl. pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995). A case

presents a "genuine" issue whenever "there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party." *Id,*

It has been deemed "improper" that a trial court "make findings of fact in connection with granting a summary judgment, as the very nature of summary judgment is that there is no genuine issue of material fact," but the court below was nonetheless required to "make factual findings sufficient to permit meaningful appellate review." *State ex rel. Vanderra Res., LLC v. Hummel*, 242 W. Va. 35, 41, 829 S.E.2d 35, 41 (2019) (citations and internal quotation marks omitted). In harmony with what might superficially be seen as countervailing statements of the law, a circuit court may make contextual findings in aid of appeal that do not bear on a material fact, or find certain material facts to be undisputed, *see* syl. pt. 3, *Fayette Cnty. Nat'l Bank v. Lilly*, 199 W. Va. 349, 484 S.E.2d 232 (1997), or — consistently with the summary judgment standard — make findings of material fact that are not in ***reasonable*** dispute and, as such, fail to present a genuine issue for resolution. As detailed immediately below, the circuit court made the latter sort of finding in entering judgment for Segal on PITA's claim for breach of contract.

I. THE CIRCUIT COURT CORRECTLY ENTERED SUMMARY JUDGMENT FOR SEGAL ON PITA'S COUNT III CLAIM FOR BREACH OF CONTRACT.

Taking Plaintiffs' second assignment of error first, the circuit court found as facts on the record that PITA was "wholly financed by the Trust and was created solely to acquire the Note, release the collateral that Protea and guarantors had posted, and pursue a financial recovery on the Trust's behalf from the other guarantors." JA 2608. At hearing, the court stated, "I find that the Trust did pay the note by providing the money to PITA, ***which is nothing more than the Trust doing business as PITA.***" *Id.* at 2427 (emphasis added). The circuit court memorialized in its final order the findings immediately below:

> The Court finds that under the facts of this case, PITA is not a non-interested independent third party but is one and the same with the Trust. The Court finds that the Trust provided the funds to pay the Note in full in 2017. In this case equitable principles limit recovery against co-guarantors to their pro rata contributive share through a claim for contribution. Accordingly, PITA's breach of contract claim is dismissed with prejudice.

Id. at 2604. PITA's claim for breach of contract in its own right was, according to the circuit court, "legally insufficient as a matter of law." *Id.*

Simply put, the Trust cannot do through an alter ego what it could not do for itself. Left to its own devices, the Trust could only sue the individual guarantors to have each contribute his proportionate share. But the Trust could not recover the attorney fees it would have to expend to prepare and maintain an ordinary contribution action, regardless of whether it paid off the Note or acquired it outright from United. *See* 38A C.J.S. *Guaranty* § 65 (2022); JA 2612, *supra* at 4.

To circumvent its sole legitimate recourse, the Trust devised an elaborate artifice designed: (1) to shift to Segal and the other individual guarantors its attorney fees incurred in anticipation and conduct of litigation; and (2) to recover the ***entire*** amount of Protea's defaulted obligation with ***no*** net loss to itself. Lest there be any doubt as to the latter proposition, PITA's (and the Trust's) corporate designee, Lori Maynard, confirmed it:

> Q. [W]hat is PITA's belief as to what amount should be paid to it by the trust on its $3 million guarantee?
>
> A. Well, PITA would like to collect from the guarantors with what they are entitled to pay with their guarantee, and then anything remaining, PITA assumes that they will be — or the trust assumes they will be responsible for.
>
> Q. Okay, I don't understand what that means. Can you explain that to me? What do you mean?
>
> A. Meaning that we have these other guarantors who are guarantees on this note and ***we want to collect what's owed per each of them*** and then anything beyond that, the trust would be responsible for, per their guarantee.

Q. So you're not looking for a proportional allocation of damages, you don't believe the trust should have to pay anything?

A. Well, each guarantee says that each guarantor is owed up to $1 million each plus fees, interest, collection costs, so ***we want to collect what each of their guarantees be*** and then beyond that, the trust would be responsible.

Q. So doesn't the trust guarantee say the same thing?

A. It does, but it also —

[OBJECTION BY COUNSEL FOR THE WITNESS]

A. Sorry. It also states that you can select from any one of the guarantors.

JA 1451-52 (emphases added).

Plaintiffs advance *ad nauseum* the uncontroversial notion that co-guarantors are legally entitled to acquire the principal's obligation and debt documents and sue on the remaining guaranties, rather than simply pay the obligation and seek contribution. *See* Pet. Br. 29-31 & nn. 137-39 (collecting cases). And Plaintiffs are certainly right — loans are assigned all the time, often to outside financial interests who believe the loan is profitable, but sometimes to more intimately involved parties such as guarantors. When the latter occurs, though, the purchaser can recover from its co-guarantors only so much as it could have in a direct contribution action. Plaintiffs rely on a string of authorities that explicitly say as much. *See, e.g.*, Pet. Br. 33 n.139 (citing Oregon case for the proposition that "the coguarantor, as assignee of the creditor, can maintain an action to enforce the guaranty agreements against his or her coguarantors; ***however, equitable principles limit the guarantor-assignee's recovery against his or her coguarantors to their pro rata contributive share of what the purchasing-guarantor paid the creditor***" (emphasis added)).

While loans can indeed be assigned and pursued to the hilt by arms-length third parties, the Trust has identified no case countenancing the sort of puppetry it attempted through its creation of

PITA and subsequent machinations. In fact, *In re Basil Street Partners, LLC*, No. 9:11-bk-19510, 2012 WL 6101914 (Bankr. M.D. Fla. Dec. 7, 2012), *see* Pet. Br. 31 n.137, illustrates just the opposite. In *Basil Street*, Antaramian, one of the guarantors of a defaulted $36 million resort development loan purchased it at a steep discount for $8.668 million "through an entity indirectly owned and completely controlled by him." 2012 WL 6101914 at *16. The alter ego, APL, proceeded to sue three of the co-guarantors for the outstanding debt balance, each of whom had executed a personal guaranty for $15 million. *Id.* The court concluded that "a guarantor is precluded from collecting payment from his co-guarantors for the full amount of the debt owed on the note, and thereby avoiding his own percentage of liability." *Id.* (citation omitted). The co-guarantors' liability was thus limited to their proportionate shares of $8.668 million. *Id.* at *17. The bankruptcy court (as did the circuit court in this case) ignored that the alter ego was the nominal party in interest, declaring that it would "not elevate the form of the transaction over its substance, and thereby allow APL to accomplish what Antaramian himself could not." *Id.*

Plaintiffs decry the circuit court's finding that the Trust and PITA "are one and the same," protesting that the court did not first engage in the elaborate, nineteen-factor veil-piercing analysis prescribed in *Laya v. Erin Homes, Inc.*, 177 W. Va. 343, 352 S.E.2d 93 (1986). *See* Pet. Br. 21-28. But courts are not bound in general to ignore what is patently clear, or more particularly to overlook that a shell company has been formed for the express, illegitimate purpose of performing its creator's dirty work. An example of that principle operating in the extreme is illustrated in *Mirabito v. San Francisco Dairy Co.*, 35 P.2d 513 (Cal. 1934) (per curiam).

In *Mirabito*, the en banc Supreme Court of California concluded for the first time ***on appeal*** that although the tortfeasor milk truck driver was technically employed by the nonparty parent (Dairy Delivery Company, Inc.) of the defendant subsidiary (San Francisco Dairy

Company), the evidence was yet sufficient to sustain the jury's verdict against the subsidiary in a *respondeat superior* action where the president of both entities testified with respect to them and another that "all these companies were one." 35 P.2d at 516. The high court in *Mirabito* proclaimed that "the only logical conclusion to be drawn was that appellant San Francisco Dairy Company was merely the alter ego of the Dairy Delivery Company." *Id.* Thereafter, the trial court amended its judgment to include Dairy Delivery Company, an administrative act affirmed on appeal. *See Mirabito v. San Francisco Dairy Co.*, 47 P.2d 530, 532 (Cal. Dist. Ct. App. 1935) (per curiam) (denying Dairy Delivery's jurisdictional and due process challenges and declaring that "The doctrine of corporate entity is not so sacred that a court of equity will hesitate to look through form to the substance of the thing, and it may, in proper cases, ignore it to preserve the rights of persons imposed upon or circumvented by fraud." (citation and internal quotation marks omitted)).

Here, it is undisputed that PITA had no assets other than those provided by the Trust, and that its *raison d'être* was to acquire the Note, secure the collateral's release, and exact the maximum recovery — including its legal fees — from the individual guarantors. Under those circumstances, it is manifestly unreasonable to assert error in the circuit court's finding that PITA was the alter ego of the Trust, the former being powerless as a matter of law to enlarge the rights of the latter. Indeed, any other finding is simply illogical.

II. THE CIRCUIT COURT CORRECTLY ENTERED SUMMARY JUDGMENT FOR SEGAL ON PLAINTIFFS' COUNT I AND COUNT II FRAUD CLAIMS.

In entering summary judgment for Segal on the fraud claims, the circuit court forthrightly followed settled West Virginia law recognizing that "fraud cannot be predicated on a promise not performed. To make it available there must be a false assertion in regard to some existing matter by which a party is induced to part with his money or property." *Gaddy Eng'g Co. v. Bowles Rice*

McDavid Graff & Love, LLP, 231 W. Va. 577, 586, 746 S.E.2d 568, 577 (2013); JA 2609. Put another way, the requisite false representation or omission "must ordinarily relate to a past or existing fact, or to an alleged past or existing fact, and not to future occurrences." *Janssen v. Carolina Lumber Co.*, 137 W. Va. 561, 570, 73 S.E.2d 12, 17 (1952).

Applied to the case at bar, the rule set forth in *Gaddy* and *Janssen* makes plain that the circuit court ruled correctly. In executing the 2017 Change in Terms Agreement, all the principals (including the Trust) reaffirmed their 2009 guarantees and commitments, most importantly their respective guaranties of the Loan Agreement and Note. Plaintiffs contended below that Segal never intended to honor his promise. There is absolutely no evidence of that in the record, however, let alone the "clear and convincing" evidence necessary to prevail on a claim of fraud. *See Tri-State Asphalt Prods. Co. v. McDonough Co.*, 182 W. Va. 757, 762, 391 S.E.2d 907, 912 (1990) (detailing standard of proof). All that Plaintiffs can point to in support of their spurious allegations is the parties' adoption within the 2017 Agreement of a standard disclaimer of oral agreements notwithstanding the unwritten understanding then extant between the individual guarantors and Puskar that the Trust would fully satisfy any default on the Note. From that circumstance, Plaintiffs make the logical leap that Segal must have intended all along to avoid his guaranty in the event of default by invoking the disclaimed oral agreement.

The far more plausible inference, however, is that Segal executed the Change in Terms Agreement to keep his guaranty in place, striving to do his part to prevent United from calling the loan and immediately putting Protea out of business. Rather than intending to avoid his guaranty by relying on the individual guarantors' oral contract with the Trust through Puskar, it can be reasonably inferred that Segal merely sought to confine his liability to the worst-case scenario where the collateral proved insufficient to satisfy the secured indebtedness (perhaps in the event

that it was depleted by other obligations) and the Trust was otherwise rendered insolvent. Nothing in that scenario remotely smacks of fraudulent intent. Segal made a promise to honor his guaranty under a particular confluence of circumstances, and had those circumstances come to pass, he would have fulfilled that promise. Or so a reasonable factfinder could readily find in the absence of affirmative evidence of malintent, which precludes Plaintiffs from prevailing on their fraud claims as a matter of law.

Plaintiffs' fraud claims also fail the essential element of justifiable reliance. *See Trafalgar House Const., Inc. v. ZMM, Inc.*, 211 W. Va. 578, 584, 567 S.E.2d 294, 300 (2002) (claim for fraud requires act or omission on defendant's part that is material, false, and justifiably relied on claimant to his detriment). Segal's oral agreement at the heart of Plaintiffs' claims was, through Puskar, with the ***Trust itself***. The Trust cannot contend that it justifiably relied on Segal's disclaimer concerning an oral agreement to which it knew, or reasonably should have known, that it was a party. And because — as the circuit court explicitly found — the Trust is PITA and PITA is the Trust, the same goes for PITA upon acquiring the loan and the Note from United. What United knew, or didn't know, of the oral agreement was rendered legally irrelevant once it transferred the loan documents, as PITA is appropriately charged with the Trust's knowledge and not the bank's. *See* Pet. Br. 15-16. Equally irrelevant, then, is anything that Segal's banking expert (who was not a lawyer) might have opined as to the legal propriety of executing at the ***bank's*** request the Change in Terms Agreement containing the oral agreement disclaimer. *See id.* 16-18.

Finally, it should not escape this Court's notice that, having devised an elaborate, deceitful contrivance to avoid their own obligations and improperly impose liability for their attorney fees on the backs of their co-guarantors, Plaintiffs' unvarnished allegations of fraud on the part of Segal evidence *chutzpah* of the most brazen and breathtaking sort. Insofar as equitable considerations

associated with contribution inexorably undergird the legal disputes herein implicating contract and tort, Plaintiffs' inobservance of their own glass houses by their fusillade of stones hardly demonstrates the clean hands courts ordinarily require as a prerequisite to relief.

III. THE CIRCUIT COURT CORRECTLY PLACED THE RISK ON PLAINTIFFS OF COLLECTING THEIR SETTLEMENT WITH HOSTLER'S ESTATE.

Settlement of litigation is inherently an exercise in managing risk. Plaintiffs elected here to accept a settlement from Hostler's estate totaling $537,000, of which $175,000 was paid immediately. Payment of all or part of the remaining $362,000 depends on how much the estate will ultimately recover as its share of contingency fees in asbestos proceedings. Plaintiffs thereby received all the litigation and other benefits of settlement with the estate, and they were fully cognizant of the uncertainty and associated risks of collection. Exasperatingly consistent with their history of conduct, Plaintiffs are once again attempting to impose liability on Segal for the obligations they voluntarily undertook. Worse in this instance, Segal had no say in the settlement negotiations.

The recalculation specified within the Restatement (Third) of Suretyship & Guaranty, *see* Pet. Br. 36, is, by its plain language, triggered only after payment by a co-guarantor of its full contributive share proves uncollectible. *See* RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 57(2)(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 are recalculated[.]" (emphasis added)). The estate of Hostler is not insolvent. Nor have Plaintiffs advanced any evidence, or even an indication, that they ***will*** not ultimately collect the $362,000 settlement balance. They ***may*** not, but that is the risk they assumed by entering into the settlement in the first place.

In sharp contrast, the $537,000 settlements with the estates of both Hostler and Harris definitively represent the ceiling of their liability. Purely for purposes of illustration (in that Segal contends in his separate appeal that Plaintiffs' conduct has absolved him of all liability under his personal guaranty), to the extent that the estates' settlement amounts are less than the respective $1 million guaranties imputed to them, the resultant shortfalls are properly reallocated as set forth in section II of Segal's opening brief on appeal in No. 22-ICA-46. Conversely, any shortfall speculated to occur in one potential future scenario is not subject to reallocation. Regardless of Segal's ultimate liability for contribution, if indeed there is any, he is entitled to have that amount calculated with certainty at the close of this litigation.

CONCLUSION

For all the reasons set forth above, this Court should affirm the entry of judgment for Segal on Plaintiffs' Count I and Count II claims for fraud, as well as PITA's Count III claim for breach of contract.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-4

PITA, LLC, and **MILAN PUSKAR REVOCABLE TRUST RESTATED 9/28/11**,

Plaintiffs Below, Petitioners,

v.

SCOTT S. SEGAL,

Defendant and Third-Party Plaintiff Below, Respondent,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of January, 2023, the foregoing "Brief of Respondent Scott S. Segal" was served using the electronic File & ServeXpress system, which will send notification of such filing to all counsel of record.

/s/ Raymond S. Franks II
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