IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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No. 22-ICA-46

SCOTT S. SEGAL,

Defendant and Third-Party Plaintiff Below, Petitioner,

v.

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

Plaintiffs Below, Respondents,

—and—

UNITED BANK,

Third-Party Defendant Below.

OPENING BRIEF OF PETITIONER SCOTT S. SEGAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Treatises

INTRODUCTION

A typical course of action for someone who has, unfortunately, guaranteed a bad loan with other parties is to pay off the principal's debt and, if necessary, file an action seeking proportionate contribution from the others. On occasion, a guarantor might purchase the defaulted loan and the other guaranties outright. But that is merely a variation on a theme. The guarantor is nonetheless entitled to no more than his co-guarantors' *pro rata* contribution toward the underlying debt.

The case at bar is anything but typical. Here, a guarantor who had posted collateral for and guaranteed the ***entire*** multi-million dollar debt established an alter ego, had the alter ego purchase the debt and the loan documents (including the other guaranties), released all of the collateral back to the guarantor, and then sued the remaining guarantors for the ***entire*** debt plus attorney fees under the loan agreement. An award of attorney fees is unavailable in an ordinary contribution action. Most distressing and atypical is that the guarantor did all that notwithstanding its assurances to the others that they would be taken care of and shielded from liability in the event of default.

The circuit court saw through the scheme; nonetheless, it ruled one of the co-guarantors liable for the contribution. On appeal, this Court is being asked to reverse the circuit court's judgment by discharging the co-guarantor from all liability. To do that, this Court need not decide that the scheme was illegal. This Court need not pronounce the scheme unethical. All this Court must really determine is whether, had the co-guarantor known that such a scheme was foreseeable when he gave and then reaffirmed his guaranty, he would have proceeded to do so. Manifestly, the answer to that question is a resounding "No."

ASSIGNMENTS OF ERROR

I. The circuit court erred in granting partial summary judgment to the Trust on its claim for contribution, as Segal instead was entitled to judgment through application of the doctrine of discharge by supervening frustration and the rule of discharge by alteration of the principal's duties or obligations.

II. Alternatively, the circuit court erred as a matter of law by adjudging Segal equally liable in contribution with the Trust for the cost of acquiring the Note, where Segal's guaranty was for only ***one-sixth*** of the total guaranties on the Note.

III. The circuit court erred in granting summary judgment to the Trust on Segal's counterclaim for breach of contract, for which he is entitled to a trial.

STATEMENT 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 adequately anchored (and then some) 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.

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 ("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" (collecting cases)). PITA was not nominally a guarantor of the underlying loan, though, 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." JA 232. And to be sure, PITA and the Trust included a demand for attorney fees in their Amended Complaint. *Id.* at 104.

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.[1] 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. *Id.* at 338, 1008-09, 1333. The bank waived over

[1] There appears to be no record evidence concerning the origin of the entity's name, although the online version of the Cambridge Dictionary aptly defines PITA as an "abbreviation for pain in the arse; used, for example, on social media and in text messages, to refer to someone or something that is annoying." *PITA Definition*, DICTIONARY.CAMBRIDGE.ORG, https://dictionary.cambridge.org/dictionary/english/pita (last visited Nov. 17, 2022).

$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. *Id.* at 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.

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 August 22, 2022, Segal timely appealed the circuit court's final order. Segal contends that the court below erroneously enforced his guaranty in entering judgment for the Trust for any sum on the contribution claim. In the alternative and to the extent that Segal must bear any liability for the Note at all, he maintains that the court misallocated the proportionate liability between him and the Trust. Lastly, the circuit court should not have dismissed Segal's counterclaim for breach of contract, in that the Trust was obligated to honor Puskar's agreement to "take care of" him and hold him harmless from liability under his individual guaranty.[2]

SUMMARY OF ARGUMENT

The summary judgment awarded to the Trust on its contribution claim against Segal should be reversed and the cause remanded for entry of judgment for Segal. First, Segal's guaranty is void in accordance with the equitable doctrine of supervening frustration, as the Trust eviscerated Segal's principal purpose in his executing the Change in Terms Agreement and in otherwise remaining associated with Protea. Second, voiding Segal's guaranty is also consistent with the rule of discharge by alteration of the principal's duties or obligations. Simply put, the Trust, by

[2] In his Notice of Appeal, Segal identified the circuit court's grant of summary judgment to United on his third-party claim as a potential assignment of error. JA 2642. On further reflection, Segal elects not to pursue that issue on appeal.

stripping the collateral securing the Note, significantly changed the relationship between Protea and its loan creditor. Even if Segal's guaranty is not discharged, the circuit court's entry of judgment against him for contribution in excess of $975,000 was excessive and in error, as pursuant to the rule of proportional contribution, Segal's $1 million guaranty vis à vis the Trust's guaranty for $3 million means that he cannot be liable for more than approximately $505,000. Finally, the district court erred in awarding summary judgment to the Trust on Segal's counterclaim for breach of contract. Segal's counterclaim should be remanded for trial because a reasonable jury could find all the essential elements of the counterclaim have been met.

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.* In determining the existence of a genuine issue, a reviewing court "must draw any permissible inference from the underlying facts in most favorable light to the party opposing the motion." *Williams v. Precision Coil, Inc.,* 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995) (citations omitted). Moreover, denial of summary judgment is required "even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Id.* (citation omitted). Finally, "[i]n cases of substantial doubt, the safer course of action is to deny the motion and proceed to trial." *Id.*

I. THE CIRCUIT COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT TO THE TRUST ON ITS CLAIM FOR CONTRIBUTION, AS SEGAL INSTEAD WAS ENTITLED TO JUDGMENT THROUGH APPLICATION OF THE DOCTRINE OF DISCHARGE BY SUPERVENING FRUSTRATION AND THE RULE OF DISCHARGE BY ALTERATION OF THE PRINCIPAL'S DUTIES OR OBLIGATIONS.

A. Segal's guaranty should be discharged because his principal purpose in performing the operative contracts was frustrated following his execution of the Change in Terms Agreement.

West Virginia recognizes the doctrine of discharge by supervening frustration, although the Supreme Court of Appeals has had no occasion to apply it. *See Waddy v. Riggleman*, 216 W. Va. 250, 257 n.9, 606 S.E.2d 222, 229 n.9 (2004); *see also McGinnis v. Cayton*, 173 W. Va. 102, 110 n.10, 312 S.E.2d 765, 774 n.10 (1984) (Harshbarger, J., concurring). The doctrine provides:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Waddy, 216 W. Va. at 257 n.9, 606 S.E.2d at 229 n.9 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981)). Professor Corbin notes that

> the cases turn on the degree of hardship caused by the supervening event, the foreseeability of the event, the language of the contract possibly allocating such

> risks, the relative fault of the parties in causing the event or failing to anticipate it, and any other circumstances indicating that one party should suffer the loss rather than the other.

Id. (quoting 14 CORBIN ON CONTRACTS § 74.2, at 15).

The Restatement speaks of "the contract." In this instance, the contract means not only the operative Change in Terms Agreement to secure the money market account by which Segal reaffirmed his individual guaranty in 2017, but also the implied contract between Segal and the Trust as co-guarantors of the Note and the express contract between the same parties associated with Puskar's execution of the Umbrella Guaranty. *See, e.g.*, *Lestorti v. DeLeo*, 4 A.3d 269, 275 (Conn. 2010) (instructing that "the right of contribution between coguarantors is based on the theory of implied contract," that is, the simultaneous entry "into an implied promise on the part of each to contribute his share if necessary to meet the common obligation" (citation and internal quotation marks omitted)).

The supervening "event" triggering operation of the doctrine is, of course, the Trust's elaborate artifice to evade the contribution action that was its sole legitimate recourse, which was designed: (1) to shift by far the most significant expense of collection — attorney fees incurred in anticipation and conduct of litigation — 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. 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).

It makes no difference that the Trust's scheme did not succeed fully, in that it collected less than the maximum $1 million each from Hostler and Harris, and the circuit court did not permit it to shift its attorney fees to Segal. By virtue of the Trust's actions, Segal's principal purpose in entering into and remaining bound by the co-guaranty arrangement, tempered by his side agreement with the Trust, through Puskar, was frustrated. That purpose, succinctly stated, was to keep his guaranty in place to do his part in preventing United from calling the loan and putting Protea out of business, yet confine his liability on the guaranty to the worst-case scenario where the collateral proved insufficient to satisfy the indebtedness (perhaps in the event that it was depleted by other obligations) and the Trust was rendered insolvent. Instead, he has been sued on his guaranty and adjudicated liable for the entire amount, and Protea is defunct.

The Trust advanced before the circuit court 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. And the Trust is 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. The Trust relied on a string of authorities below that explicitly say as much. *See, e.g.*, JA 1927-28 (Plaintiffs' citation of 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), 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." *Id.* 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.*

Consequently, all of the equitable considerations militating in favor of discharge are present here. 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. Moreover, nothing in the law allocates to him the risk of being blindsided. The entire maneuver was wholly orchestrated by the Trust and was entirely avoidable. Sound public policy demands that the Trust be made an example of to discourage others who might try to profit by employing an illegitimate end-around mechanism for the sole purpose of avoiding the legally accepted methodology for paying a guaranty and seeking contribution. Indeed, had the Trust simply paid off the Protea loan from United, it and Segal would have been in precisely the respective positions that Puskar, facing impending death, intended. This Court should do what the Trust would not and discharge Segal from all liability under his personal guaranty.

B. Segal's guaranty should be discharged because Protea's duties and obligations under the Loan Agreement were materially altered without his consent and to his prejudice.

Akin to the general contract doctrine of discharge by supervening frustration is the principle, applicable to guarantors and sureties specifically, of discharge by alteration of the

principal's duties or obligations.[3] This is well-settled law in West Virginia, the concept having originated in *Carr v. Sutton*, 70 W. Va. 417, 74 S.E. 239 (1912). The plaintiff, Carr, was a bail bondsman who posted a bond for Sutton to appear in court on a date certain to answer an anticipated indictment. The defendants were several people signed on as sureties to the bond. After Sutton skipped bail, Carr forfeited the bond and sought indemnification from the sureties. The sureties defended on the ground that Carr had negligently or indifferently performed his legal obligation to ensure Sutton's appearance. The circuit court disagreed and entered judgment for the bondsman. The Supreme Court of Appeals reversed, holding that "where a creditor does any act injurious to the surety, or inconsistent with his rights," or does the same through omission, "the latter will be discharged." *Carr*, 70 W. Va. at ____, 74 S.E. at 241 (citations omitted).

The modern statement of the principle is that "[a] guarantor will be released by any material alteration, made without his or her consent, of the original obligation or duty. Generally, an alteration in the obligation or duty guaranteed will release the guarantor only if it is material and substantial and prejudicial to his or her rights." 38A CJS *Guaranty* § 95 (2022); *see* 23 WILLISTON ON CONTRACTS § 61:32 (4th ed. 2022) ("As a general rule, a surety may assert affirmative defenses to an obligee's claim of breach of contract based on . . . material alterations to the terms of the underlying contract. A surety can be held only to the contract that it has made." (footnotes omitted)); *accord Vastine v. Bank of Dallas*, 808 S.W.2d 463, 464-65 (Tex. 1991) (reinforcing precedent that "sureties are released from liability when there is a material alteration in, and

[3] There is little practical difference between guarantors and sureties, and the terms are often used interchangeably, with the same law applicable to both. "But some authorities distinguish between the two terms, giving *surety* a narrow sense: a *surety* joins in the same promise as the principal and becomes primarily liable, while a *guarantor* makes a separate promise and is only secondarily liable — i.e., liable only if the principal defaults." Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 859 (2d ed. 1995).

deviation from, the terms of the contract without the surety's consent and to its prejudice. The same rule that applies to sureties applies to guarantors." (citations omitted)); *Becker v. Faber*, 19 N.E.2d 997, 280 N.Y. 146, 148-49 (N.Y. 1939) ("Alteration of the contractual obligation of the principal releases the surety, for the principal is no longer bound to perform the obligation guaranteed by the surety and the surety cannot be held responsible for the failure of the principal to perform any other obligation.").

In *Carr*, by way of illustration, the bail bondsman unilaterally changed the terms and conditions under which the defendants agreed to be sureties by performing his task of oversight negligently and indifferently, rather than assiduously as required by law. The bondsman's material misdeeds sought to bind the sureties to a different contract than to which they agreed, with the result that their obligations merited discharge.

Here, Defendants fundamentally altered the terms and conditions under which Protea agreed to comply with the Loan Agreement. By stripping the collateral and transferring it to the Trust's possession, Defendants put Protea in a 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.

Moreover, Protea lost its leverage to negotiate meaningfully with the co-guarantor Trust that the latter surrender sufficient collateral to satisfy all or part of the loan obligation. With all the co-guarantors at the table, United could no doubt have been persuaded to resort to the collateral, which is what Puskar intended by executing the Umbrella Guaranty. Protea's loan arrangement with PITA was therefore very different than it had been with United. Had Segal known, or even remotely suspected, what the Trust would do to attempt to maximize his liability and evade its own, he never would have reaffirmed his guaranty by signing the Change in Terms Agreement

less than a year before. No rational person would have reaffirmed such an agreement. In a nutshell, and as the circuit court literally remarked, "Well, none of this was contemplated when the defendant signed the guaranty." JA 504. Exactly. In light of the unquestioned material alterations in the underlying contract, Segal is entitled to the discharge of any obligations to Protea and to the Trust under his personal guaranty.

II. ALTERNATIVELY, THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY ADJUDGING SEGAL EQUALLY LIABLE IN CONTRIBUTION WITH THE TRUST FOR THE COST OF ACQUIRING THE NOTE, WHERE SEGAL'S GUARANTY WAS FOR ONLY *ONE-SIXTH* OF THE TOTAL GUARANTIES ON THE NOTE.

The circuit court entered judgment on the Trust's contribution claim against Segal for $975,952.08, plus prejudgment interest of 7% from December 8, 2017 — the date of PITA's demand letters to the individual guarantors — through the July 1, 2022 entry of the judgment order, with 4% interest accruing thereafter. JA 2614-15. In so doing, the court began with the $3,026,904.16 that PITA paid for assignment of the note, then subtracted the Trust's settlements of $537,500 each with the estates of Hostler and Harris, leaving a principal balance of $1,951,904.16, the responsibility for which the court allocated equally between the Trust and Segal. *Id.* To support its reasoning, the circuit court adverted to the general rule from a number of authorities, stated simply as "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." *Desrosiers v. Russell*, 660 So. 2d 396, 398 (Fla. Dist. Ct. App. 1995) (citation omitted); JA 2632. The court erred by conflating "equally liable for ***a*** proportion" with "liability in equal proportions."

When there are multiple guarantors on the same note and their guaranties are for different amounts, as here, it has always been the law that they must contribute in proportion to their

respective guaranties. Again, this is well-settled law in West Virginia. The Supreme Court of Appeals adopted the rule for West Virginia in *State ex rel. Connellsville By-Product Coal Co. v. Continental Coal Co.*, 117 W. Va. 447, 186 S.E. 119, 121 (1936), *overruled on other grounds*, *State ex rel. Shenandoah Nat'l Bank v. Hiett*, 123 W. Va. 739, 17 S.E.2d 878, 878 (1941).

The *Connellsville* case involved multiple sureties who had provided bonds to secure a common obligation. The principal obligor had defaulted. The sureties had been called upon to pay. The Supreme Court of Appeals held that each surety was liable, but only "*in proportion*, however, to the *penalties on their respective bonds*." 117 W. Va. at ____, 186 S.E. at 121 (emphasis added). The Supreme Court of Appeals thus recognized a doctrine that had existed since at least the latter part of the eighteenth century, when Sir James Eyre, Lord Chief Baron of the Exchequer, announced it in *Dering v. Winchelsea*, 1 Cox 318 (1787).

Sir James's pronouncement remains the rule today. A guarantor is liable for contribution ***only in proportion to the amount of its guaranty***. The rule has been reaffirmed in at least three Restatements of the Law, the most recent being the Restatement (Third) of Suretyship and Guaranty (the "Restatement (Third)"). In the Reporter's Note to section 57, Comment c, the Restatement (Third) reviews the history of the rule of proportional contribution, stating it as: "the contributive shares of cosureties are determined by calculating the fraction that each cosurety's maximum liability represents of the total maximum liabilities of all cosureties." RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 57 cmt. C (1996). The Reporter's Note goes on to confirm that the historical rule has been continued to the present, specifically in Illustration 5 to section 57.

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.

Notably, the Restatement (Third) cites our own Supreme Court of Appeals ruling in *Connellsville*, *supra*, as one authority for the rule of proportional contribution. And it traces the rule's lineage back through the Restatement (First) of Security, section 154, Comment f, which in 1941 stated the law as follows: "[I]f two persons are securities upon a debt, one limiting his liability to $10,000 and the other to $5000, and the first pays $7500, which is the total amount of the debt due, he is entitled only to $2500 as reimbursement from the other."

There appears to be no legal authority at all to support the circuit court's allocation and calculation — at least none that addresses the scenario presented here: multiple guaranties in ***different*** amounts. In briefing below, Plaintiffs depended on various portions of 38A CJS *Guaranty*, which says nothing about how to allocate contribution among unequal guaranties. In *Desrosiers*, *supra*, one of Plaintiffs' authorities, each guarantor guaranteed the full amount of the loan. In *Curtis v. Cichon*, 462 So. 2d 104 (Fla. Dist. Ct. App. 1985), likewise relied on by Plaintiffs, the opinion says only that each guarantor executed a personal guaranty of the loan, with no indication that the guaranties differed in amount. In *Woods-Tucker Leasing Corp. of Ga. v. Kellum*, 641 F.2d 210, 215 n.7 (5th Cir. 1981), cited by Plaintiffs, two guarantors jointly executed a guaranty that expressly obligated them to pay "all rents" to be paid according to the underlying lease, each guarantor thereby guaranteeing an equal amount. Another secondary source that Plaintiffs mention, 38 Am. Jur. 2d *Guaranty* § 90, includes no discussion of guaranties of unequal amounts. Instead, the annotation simply states that each guarantor must pay its ***proportional*** share

of the liability. And in Plaintiffs' cited example of *Spottiswoode v. Levine*, 730 A.2d 166, 169, 173 (Me. 1999), the opinion recounts that six guarantors jointly entered into a single guaranty, with no mention of any differences in the amounts that any of them guaranteed, but specifically noting that all the defendants' guaranties were unlimited.

It is undisputed that Segal, Hostler, and Harris each executed a guaranty on behalf of Protea for $1 million, and that the Trust executed a similar guaranty for $3 million to secure the entire value of the Note. The guaranties collectively totaled $6 million, of which Segal and the other individual guarantors each accounted for one-sixth, and the Trust one-half. Hence, Segal could never be liable for more than one-sixth of the $3,026,904.16 that PITA paid to acquire the Note. That is, a maximum of $504,484.03. Thus, the Trust is left to pick up the remaining $1,447,420.13, accounting for the settlements, a sum comfortably in line with its one-half proportionate obligation. In light of the established hornbook law and binding West Virginia precedent, the circuit manifestly erred in entering judgment against Segal for $975,952.08.

III. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE TRUST ON SEGAL'S COUNTERCLAIM FOR BREACH OF CONTRACT, FOR WHICH HE IS ENTITLED TO A TRIAL.

In West Virginia, "[a] claim for breach of contract requires proof of the formation of a contract, a breach of the terms of that contract, and resulting damages." *Sneberger v. Morrison*, 235 W. Va. 654, 669, 776 S.E.2d 156, 171 (2015). A reasonable jury could find that the Trust, through Puskar, created an enforceable oral contract to protect Segal and the other individual guarantors, as evidenced by live and affidavit testimony and — importantly — by Puskar having committed the Trust to guarantee the entire amount of the Protea loan. That affirmative act by Puskar permits no other reasonable inferences. A jury could reasonably infer that the individual guarantors accepted by their performance Puskar's offer of protection, continuing to invest their

time and assets in Protea (whose mission they all strongly believed in, as did Puskar), not attempting to divest themselves of their ownership interests or management responsibilities as officers and directors, and, in 2017, reaffirming their commitment to Protea in difficult times by agreeing to execute the Change in Terms Agreement. On that point, it is well to remember that "[c]ourts of law, as a rule, will not enter upon any inquiry as to the adequacy of a consideration in a contract." *Young v. Young*, 240 W. Va. 169, 182, 808 S.E.2d 631, 644 (2017) (Ketchum, J., dissenting) (citation omitted).

And, of course, a jury could find that the Trust breached the contract made by its predecessor trustee, in that Segal was decidedly ***not*** protected. Indeed the jury could readily find that he consequently was injured in a host of ways, including without limitation having to endure the trouble and expense of prolonged litigation, suffering loss of personal and professional reputation, and perhaps even having to pay a judgment — although on that point he hopes that this Court is persuaded by ample case law to the contrary. Based on the foregoing, the circuit court's entry of summary judgment on Segal's counterclaim should be vacated and the cause remanded for trial.

CONCLUSION

For all the reasons set forth above, the judgment entered in favor of the Trust should be reversed and remanded to the circuit court with instructions to enter a defense judgment for Segal. Alternatively, remand is proper with instructions for the circuit court to reduce the amount of the judgment from $975,952.08 to no more than $504,484.03. Finally, the matter should be remanded so that the circuit court's entry of summary judgment against Segal on his counterclaim for breach of contract can be vacated and the issue set for trial.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-46

SCOTT S. SEGAL,

Defendant and Third-Party Plaintiff Below, Petitioner,

v.

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

Plaintiffs Below, Respondents,

—and—

UNITED BANK,

Third-Party Defendant Below.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of November, 2022, the foregoing "Opening Brief of Petitioner 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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