IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

BLUE WATER BAY AT CENTER HILL, LLC and EDMOND R. QUEEN,	)	
Appellees,	)	
v.	)	
LARRY J. HASTY,	)	**No. M2016-02382-COA-R3-CV**
Appellant,	)	**Chancery Court for Williamson County, Tennessee**
v.	)	
GREYHAWK DEVELOPMENT CORPORATION,	)	
Appellee.	)	

REPLY BRIEF

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ORAL ARGUMENT REQUESTED

INTRODUCTION

The Appellant, Larry J. Hasty ("Mr. Hasty"), submits this Reply Brief pursuant to Tenn. R. App. P. 27(c), and this Court's Order entered on May 11, 2017. (5/11/17 Order) (extending the deadline for filing and allowing Mr. Hasty a Reply Brief not to exceed 30 pages). Appellee Blue Water Bay at Center Hill, LLC, will be referred to as "BWB." Appellee Edmond R. Queen will be referred to as "Mr. Queen." Appellee Greyhawk Development Corporation will be referred to as "Greyhawk." Collectively, BWB, Mr. Queen, and Greyhawk, will be referred to as "Appellees."

Due to the nature of this Reply Brief, it is impossible for Mr. Hasty to address each and every deficiency contained within the Appellees' briefing. Instead, Mr. Hasty will attempt to address those issues most pertinent to this appeal and rely upon his Brief of the Appellant for his case in chief. For clarity and consistency, Mr. Hasty will continue his use of the abbreviations for citation of the Technical Record and Exhibits.

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I. The Appellees' Waiver Argument is Utterly Without Merit.

Incredibly, the Appellees have devoted over 20 pages of their respective briefs to a bizarre attack on the mere form of Mr. Hasty's brief, rather than its substance.[1] (BWB Br. pp. 1-25; Greyhawk Br. p. iii (adopting and incorporating BWB's waiver arguments)). This is telling. In their lengthy and meandering arguments regarding Mr. Hasty's compliance with the applicable Rules of Appellate Procedure and Rules of the Court of Appeals, ***the Appellees have ironically violated the very same Rules!***

For example, the Appellees have ostensibly deemed Mr. Hasty's issues presented for review unsatisfactory – while at the same time they have not set forth their own issues presented for review, as required by the Rule 27. Tenn. R. App. P. 27(b). Moreover, BWB's so-called "Issues Presented for Review" – which essentially criticizes Mr. Hasty's briefing – is 26 pages consisting entirely of argument. (BWB Br. pp. 1-26.) When combined with the remaining 33 pages under the heading "Legal Argument", BWB's brief, and Greyhawk's by adoption, clearly violate the page limitations of Tenn. R. App. P. 27(i). *See Freiden v. Alabaster*, 1990 WL 14562, at *1 (Tenn. Ct. App. Feb. 21, 1990) (Appellant's "Statement of Facts" was interlaced with arguments, which is clearly "in contravention to both the letter and the spirit of the provisions of Rule 27[.]").

This Court has previously responded to a litigant's blatant refusal to comply with the Rules of Appellate Procedure by disregarding the offending sections of a brief completely – ***even where an appeal involves a pro se litigant, which is not the case here*** – because "[j]udges are

[1] To quote from the classic movie *Alice in Wonderland*, it appears that "if [the Appellees] had a world of [their] own, everything would be nonsense. Nothing would be what it is, because everything would be what it isn't. And contrary wise, what is, it wouldn't be. And what it wouldn't be, it would. You see?" *Alice in Wonderland* (Walt Disney Productions 1951). Perhaps truer words have never been spoken.

not like pigs, hunting for truffles buried in briefs." *Coleman v. Coleman*, 2015 WL 479830, at *9 (Tenn. Ct. App. Feb. 4, 2015) (quoting *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)); *Bowman v. Bank of Am.*, 2014 WL 890934, at *4 n. 5 (Tenn. Ct. App. Mar. 5, 2014). This criticism certainly applies to the Appellees' briefs in this appeal. Accordingly, this Court should refuse to step into the rabbit hole the Appellees have incorporated directly from the pages of *Alice in Wonderland* based on their willful indifference to comply with briefing requirements and intentional confusion/obfuscation of the issues in this *bona fide* appeal.

Notwithstanding, an appellant is clearly required to provide "a statement of the issues presented for review" and such issues should be "framed specifically as the nature of the error will permit in order to avoid any potential risk of waiver." *Hodge v. Craig*, 382 S.W.3d 325, 335 (Tenn. 2012) (citations omitted); Tenn. R. App. P. 27(a)(4); Tenn. R. App. P. 13(b). Cases where an issue has been deemed waived involve an issue statement that is so broad in scope that the court must necessarily "research or construct a litigant's case," be "so general as to be meaningless," or "require a degree of clairvoyance." *Sneed v. Board of Prof'l Resp. of Sup. Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010); *State v. Dykes*, 803 S.W.2d 250, 255 (Tenn. Ct. Crim. App. 1990) (citing *Tortorich v. Erickson*, 675 S.W.2d 190, 191 (Tenn. Ct. App. 1984)); H. Wiehofen, Legal Writing Style, 2nd Ed. (1980).

For example, in *Leeson v. Chemau*, 734 S.W.2d 634 (Tenn. Ct. App. 1987), this Court held that an appellant's single issue presented for review of "[d]id the Trial Court err in dismissing the plaintiffs' action prior to trial" was too broad under Tenn. R. App. P. 27 when the underlying complaint was "a bewildering conglomeration of 55 charges." *Lesson*, 734 S.W.2d at 635. Notwithstanding, this Court nevertheless reached the substance of the appeal in *Lesson*. *Id.* Other cases evaluating the requirements of Rule 27 have reached similar conclusions, and ultimately stand for the proposition that an appellant cannot simply assign vague error, and

demand that this Court search for the principal issues on appeal. *See, e.g.*, *Villers v. State*, 833 S.W.2d 98, 99 n. 1 (Tenn. Ct. Crim. App. 1991) (where the only issue presented for review was "[w]hether the [trial court] erred in setting aside the defendant's guilty plea" and was too broad); *State v. Matthews*, 805 S.W.2d 776, 778 (Tenn. Ct. Crim App. 1990) ("the evidence was insufficient to sustain the verdict of the jury" held to be too broad in scope); *Dykes*, 803 S.W.2d at 255 ("[t]he Court erred in overruling his Motion to Dismiss" held to be too broad in scope); *Leeson v. Chemau*, 734 S.W.2d 634 (Tenn. Ct. App. 1987) ("[d]id the Trial Court err in dismissing the plaintiffs' action prior to trial" held too broad); *Tortorich*, 675 S.W.2d at 191 ("[w]ere the factors the Judge considered in his decision for a change of custody proper").

Here, the Appellees ultimately contend that Mr. Hasty was somehow required to list each and every sub-issue that could possibly play any role in his challenge to the trial court's determination to stay all claims of all parties in this case.[2] (BWB Br. pp. 1-6.) If the Appellees' contentions were correct, this Court would be presented with appellants listing an innumerable amount of technical sub-issues that would ultimately eviscerate the entire point of Rule 27's briefing requirements: to succinctly state issues for review specifically, but without being argumentative or repetitious. *State v. Williams*, 914 S.W.2d 940 (Tenn. Ct. Crim. App. 1995); Tenn. R. App. P. 27(a)(4).

Regardless, even where an appellant's brief is wholly devoid of any explicit statement of the issues, this Court should consider an issue that is apparent from reading the pages of the brief and the refusal to do so is "an impermissible subordination of substance to form." *Ramirez v.*

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[2] Notably, one case heavily relied on by BWB has very similar issues presented for review to those Mr. Hasty presents in his principal Brief of the Appellant. *See Raleigh Commons, Inc. v. SHW, LLC*, 2013 WL 3329016, at *8 (Tenn. Ct. App. June 19, 2013) ("Whether the trial court erred in granting Dr. Weinstein's motion for summary judgment on his indemnification claims, . . . Whether the trial court erred in granting Dr. Weinstein's motion for summary judgment on Dr. Himmelstein's affirmative defenses . . .")

Bridgestone/Firestone, Inc., 414 S.W.3d 707, 715 (Tenn. Ct. App. 2013). Indeed, this Court has wide latitude to discern the exact nature of the issues raised. *Lance v. York*, 359 S.W.3d 197, 206 (Tenn. Ct. App. 2011). Specifically, this Court may adopt an appellant's statement of the issues verbatim or may modify the stated issues. *Id.* Alternatively, this Court may adopt an appellee's statement of the issues, or it may draft its own statement of the issues entirely. *Id.* Moreover, this Court clearly has "considerable discretion" to hear an appellant's appeal on the merits. *See* Tenn. R. App. P. 13(b); Tenn. R. App. P. 2; *McLemore ex rel. McLemore v. Elizabethton Medical Investors, Ltd. Partnership*, 389 S.W.3d 764, 792 (Tenn. Ct. App. 2012) perm. app. denied, (Dec. 3, 2012); *State v. Farner*, 66 S.W.3d 188, 206 (Tenn. 2001); *State v. Mixon*, 983 S.W.2d 661, 673 (Tenn. 1999); *Tortorich*, 675 S.W.2d at 191. Accordingly, Mr. Hasty has not violated Rule 27 and has not waived any issues presented to this Court.

Further, the Appellees' contention that Mr. Hasty somehow failed to satisfy Rule 6 of the Rules of the Court of Appeals is equally devoid of merit. Mr. Hasty has submitted a lengthy principal Brief of the Appellant with precise cites to a relatively voluminous record and supporting authorities, unlike all of the appellants in the cases the Appellees cite with regard to Rule 6. (BWB Br. pp. 7-9) (citing, *e.g.*, *Bean v. Bean*, 40 S.W.3d 52, 55 (Tenn. Ct. App. 2000) (where appellant's brief was "woefully deficient"); *Oakes v. Oakes*, 2016 WL 7468198, at *1 (Tenn. Ct. App. Dec. 28, 2016) ("Husband's brief lacks a single citation to the record. Instead, he refers us to numerous "exhibits" attached as an appendix to his brief. These are photocopies of various documents, some of which appear to be copies of documents entered as trial exhibits."); *Duchow v. Whalen*, 872 S.W.2d 692, 693 (Tenn. Ct. App. 1993) ("two days prior to scheduled oral arguments, filed documents styled 'Statement of the Facts', 'Statement of the Case' and 'Statement of the Issues'. The document styled: Statement of Facts does not contain any references to the record as required by the Rule."); *Warmath v. Payne*, 2 [*sic*] S.W.3d 487 (Tenn.

Ct. App. 1999)[3] (where a *pro se* appellant set forth "numerous 'issues' in his statement of the issues"); *Murray v. Miracle*, 457 S.W.3d 399, 402–03 (Tenn. Ct. App. 2014) (where appellant's "brief contains a section titled 'QUESTION PRESENTED FOR REVIEW,' this section, which spans approximately three-quarters of a page, is composed of generalized questions, fragments, and groups of words ending with a question mark, not a statement of specific issues that would justify appellate review. Plaintiffs' brief also contains a section titled 'STATEMENT OF THE ISSUES,' which covers approximately a page and a quarter and is comprised of run-on sentence fragments typed entirely in capital letters that is difficult to read and mostly unintelligible. Plaintiffs' brief also contains a section titled 'STATEMENT OF THE ISSSUES [*sic*] FOR REVIEW,' which covers a page and a half with run-on sentence fragments, which like the previously discussed two sections is mostly unintelligible. Finally, Plaintiffs' brief contains a section titled 'ARGUMENT FOR REVISED APPEAL,' which begins with several lines typed in bold type and capital letters and which reads very similar to the above mentioned sections. Just about the only thing that is clear from Plaintiffs' brief is that Plaintiffs are unhappy with the outcome of the trial in some way."))

Stated simply, the arguments contained in Appellees' 26 page "Issues Presented For Review" are futile, at best.[4] Accordingly, Mr. Hasty will address the Appellees' remaining arguments presented in the other half of their briefing in turn, *infra*.

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[3] Incorrectly cited by BWB as "2 S.W.3d 487", which is the South Western Reporter citation for a criminal case from the Court of Appeals of Texas, Texarkana. *See Morales v. State*, 2 S.W.3d 487 (Tex. Ct. App. 1999). The correct citation is 3 S.W.3d 487. Ironically, it was the Appellees who took Mr. Hasty to task for allegedly failing to cite or incorrectly citing authorities. (BWB Br. pp. 7-9.)

[4] At worst, the Appellees' position – including their outrageous assertion that Mr. Hasty's *bona fide* appeal is frivolous and warrants an award of damages – is frivolous in and of itself. *See* section III, *infra*.

II. The Appellees Cannot Enforce the Hasty Guaranty.

Upon review of the Appellees' obtuse briefing, the relevance of the various arguments concerning commercial paper becomes lost in the confusion. At this stage of the proceedings, all arguments concerning the existence, if any, of an enforceable instrument result from Mr. Hasty's intent to show that there, indeed, is no existing, enforceable arbitration agreement. Mr. Hasty would show that all instruments and guarantees in this record have been discharged.

Rather, this case concerns only residual equitable claims following satisfaction of an underlying debt. Mr. Hasty's position is well-supported by Tennessee law and other jurisdictions. His efforts to pursue these positions were thwarted by the trial court's decision to prevent him from developing a factual record to support his contentions of law and erroneously referring this matter to arbitration over the strenuous objections of his counsel. It is in this context that it is important to highlight the infirmity of the Appellees' flaccid legal analysis proffered by their collective briefing efforts.

The Appellees admit – because they must – that they are not parties to the Personal Guaranty Mr. Hasty executed on September 18, 2017 ("Hasty Guaranty") to secure the first Promissory Note executed on September 18, 2007 ("2007 Note"), in favor of Cadence Bank, N.A. ("Cadence"), and concede that "absent special circumstances non-signatories to a document with an arbitration provisions [*sic*] cannot compel arbitration under the same." (BWB Br. p. 35 (citing *Safe Step Walk-In Tub Co. v. GreenworksUS*, 2015 WL 2384033, at *2 (M.D. Tenn. May 19, 2015); Greyhawk Br. p. 1.) However, BWB contends that its "status as assignee and holder of the [the underlying debt obligation] qualifies as one of the special circumstances." (*Id.*) Further, Greyhawk essentially posits that Mr. Hasty's indemnity claims are "intertwined" with the Hasty Guaranty, and are therefore, arbitrable. For the reasons described, *infra*, the Appellees are simply incorrect.

A. No Evidence That BWB Was Properly Assigned The Hasty Guaranty.

First, to be clear, the determination of whether BWB has any standing to enforce the Hasty Guaranty's arbitration provision depends, in part, on whether BWB's claims against Mr. Hasty derive from its status as an assignee of the 2011 Note, specifically. In other words, the only way BWB can enforce the Hasty Guaranty's arbitration provision is if it was properly assigned the Hasty Guaranty. Otherwise, the only conceivable claim BWB would have against Mr. Hasty is rooted in equity, which would not implicate the Hasty Guaranty and its arbitration provision. Accordingly, BWB would obviously prefer that Mr. Queen's purported assignment of the 2011 Note and associated collateral be deemed effective, as even BWB concedes. (BWB Br. p. 44) ("The [Hasty] Guaranty contractually gives rise to BWB's claims against Mr. Hasty, ***because without its existence, BWB would not have a claim."***) (emphasis added).

Tellingly however, BWB has not cited a single authority supporting its position that BWB was properly assigned the right to enforce the Hasty Guaranty's arbitration provision through the undocumented game of "hot potato" in which BWB allegedly came to possess that right: namely, by a purported "purchase" of the 2007 Note by a third-party, PDQ, Inc. ("PDQ"); assignment of a second Promissory Note executed on December 27, 2011 ("2011 Note") in favor of PDQ; then assigned from PDQ to another third-party, End Times, Inc. ("End Times"); then assigned from End Times to Mr. Hasty's co-guarantor, Mr. Queen; then assigned from Mr. Queen to BWB.[5] (T.R. Vol. 1 at 6-8.)

In fact, BWB does not cite a single Tennessee case analyzing an assignment of a guaranty. (BWB Br. pp. 27-28) (citing *Spirit Broadband, LLC v. Armes*, 2017 WL 384248, at

[5] Although the underlying debt obligation purportedly exchanged hands many times, these third-parties are all related to Mr. Queen. For example, Mr. Queen was the sole shareholder of PDQ, the entity which allegedly purchased the debt obligations from Cadence. (T.R. Vol. 1 at 3.) (*See* BWB Br. p. xiv n. 1 ("PDQ's sole shareholder was Eddy Queen."))

*7 (Tenn. Ct. App. Jan. 28, 2017) (assignment of operating contracts); *Petry v. Cosmopolitan Spa Int'l, Inc.*, 641 S.W.2d 202, 203 (Tenn. Ct. App. 1982) (assignment of liability release); *Williamson Cty. Broad. Co., Inc. v. Intermedia Partners*, 987 S.W.2d 550, 553 (Tenn. Ct. App. 1998) (assignment of contract related to procurement of television franchise); *Collier v. Greenbrier Developers, LLC*, 358 S.W.3d 195, 202 (Tenn. Ct. App. 2009) (assignment of contract for sale of real property); *Advantage Windows, Inc. v. Zacarias*, 2014 WL 4403106, at *3 (Tenn. Ct. App. Sept. 8, 2014) (regarding enforceability of contract for sale of real property); *Moody Realty Co. v. Huestis*, 237 S.W.3d 666, 674 (Tenn. Ct. App. 2007) (same)).

BWB's elementary discussion on the assignment of contracts oversimplifies the nature of a purported assignment of a guaranty through the assignment of the principal debt obligation it secures. Clearly, a guaranty is a contract that is assignable if its terms permit assignment. *Guarantor Partners v. Huff*, 830 S.W.2d 73, 76 (Tenn. Ct. App. 1992) (citations omitted). However, it is critical to note that the rights and liabilities of the parties are governed by the law of contract ***and guaranty***[.]" *Id.* (emphasis added). In that regard, "an assignee can bring suit on a guarantee only if: 1) the guarantee permits assignment, and 2) ***the guarantee is properly assigned.***" *Anderson v. Nelson*, 1995 WL 495924, at *2 (Tenn. Ct. App. Aug. 21, 1995) (emphasis added) (citations omitted).

Here, although the trial court failed to address the question, the Hasty Guaranty is likely a general guaranty which may be transferred because its terms do not specifically prohibit a transfer.[6] (T.R. Vol. 1 at 13-16.) However, BWB has not cited any evidence in the record – because there is none – indicating it was ever ***properly assigned*** the Hasty Guaranty. For

[6] There are two categories of guaranties: (1) Special guarantees "which are personal in nature and are addressed to a specific party"; and, (2) General guarantees, "which are addressed to the general public." *Anderson v. Nelson*, 1995 WL 495924, at *2 (Tenn. Ct. App. Aug. 21, 1995) (citations omitted). Special guarantees are generally not assignable without the guarantor's consent, while general guarantees may be transferred unless "specifically prohibited by its terms." *Id.* (citing 38 Am.Jur.2d Guaranty § 35 (1968)).

example, the record is devoid of any substantive documentation regarding any purported transfer of the Hasty Guaranty itself from End Times to PDQ and PDQ to Mr. Queen. (*See* T.R. Vol. 1 at 6-8) (generally describing purported transfers). Mr. Hasty submits that this is far short of what this Court has determined to be sufficient evidence of a properly assigned guaranty. *See Anderson*, 1995 WL 495924, at *3 (where the assignment clearly conveyed the intent to transfer personal guaranties, specifically, to the party seeking to enforce the guaranties). *See also Clement v. New York Life Ins. Co.*, 46 S.W. 561, 564 (Tenn. 1898) (a valid assignment of any contract requires that the assignment was made in good faith or illegal). *Cf.* 6 Am. Jur. 2d Assignments § 115 ("[a]n assignment made as collateral security for a debt gives the assignee only a qualified interest in the assigned chose, commensurate with the debt or liability secured; it does not divest the assignor of all right or interest in the thing assigned, and the assignor retains a sufficient right or interest to qualify as a real party in interest in order to maintain a civil action.") (citations omitted).

Accordingly, before even reaching BWB's position regarding whether the "Guaranty was incorporated into the New Note" or the applicability of what it describes as the "Merger Rule", BWB should not be entitled to enforce the Hasty Guaranty's arbitration provision because it has failed to satisfy its burden that it was properly assigned the Hasty Guaranty and any commensurate right to enforce its arbitration provision. *See Webb v. First Tennessee Brokerage, Inc.*, 2013 WL 3941782 (Tenn. Ct. App. June 18, 2013).

B. BWB's Argument Regarding Incorporation of the Guaranty into the New Note is Purposeless.

BWB asserts that simply because the Hasty Guaranty was transferrable the ultimate question is "whether the [Hasty] Guaranty was incorporated into the New Note." (BWB Br. p. 29.) This is not correct. At any rate, BWB suggests that Mr. Hasty has somehow ostensibly

waived this issue. (BWB Br. pp. 29-30.) To be clear, however, this issue neither has any merit nor any relevancy to this appeal. Indeed, the Hasty Guaranty was not "incorporated into the New Note" as a matter of basic guaranty law – not to mention good sense – directing that "a separate continuing guaranty is not a negotiable instrument[,]" it a separate contract between the lender and the guarantor. *Huff*, 830 S.W.2d at 76. The only exception to this rule is when a separate guaranty, like the Hasty Guaranty, is "firmly affixed to a negotiable instrument." *Id.* "Mere descriptive references in a note to a separate guaranty" do not merge the two separate obligations. *Id.*

Here, the Hasty Guaranty was clearly a separate contract and could not be "incorporated into the New Note", as BWB predictably suggests. Rather, the dispositive issue is whether there is evidence indicating that the Hasty Guaranty was properly assigned, which there is not.

C. The "Assignment of the New Note" Has No Effect Because Mr. Queen Could Not Grant BWB the Right to Enforce the Note as an Assignee.

Notwithstanding, BWB could not have been assigned the Hasty Guaranty, specifically, since it was purportedly assigned by Mr. Queen, a co-guarantor.[7] In other words, even if there was evidence showing BWB was otherwise properly assigned the Hasty Guaranty, BWB would not "have full rights to enforce [its] arbitration provision against Mr. Hasty as if they were Cadence Bank" as BWB asserts (BWB Br. p. 29.) This is because any claim BWB could conceivably possess must mirror that which Mr. Queen purportedly possessed at the time of the assignment – BWB can only "stand in the shoes" of the assignor. *Child Bride Music, Inc. v.*

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[7] BWB entirely begs this question by rapidly transitioning to its assertion that the Hasty Guaranty's purported waiver of legal or equitable discharge bars Mr. Hasty's position that Mr. Queen could not have assigned to BWB the right to enforce the Hasty Guaranty's arbitration provision. (BWB Br. pp. 30-31.) Clearly, any such waiver would not be enforceable against Mr. Hasty if Mr. Queen could not have assigned the Hasty Guaranty itself. Regardless, BWB ostensibly suggests that a boilerplate waiver of surety defenses somehow renders Mr. Hasty completely defenseless, which is obviously incorrect. *Cumberland Bank v. G & S Implement Co., Inc.*, 211 S.W.3d 223, 229 (Tenn. Ct. App. 2006) (just because a waiver of surety defenses exists, a purported guarantor "is not left defenseless" and "may still assert the common-law defenses that would otherwise be available to persons seeking to defend a simple contract claim.")

Jackson, 2004 WL 911310, at *4 (Tenn. Ct. App. Apr. 28, 2004) (quoting 6 Am. Jr. 2d Assignments, § 144 (1999)). Thus, BWB must argue that any right originally possessed by Cadence flowed completely intact to BWB after PDQ "purchased" the 2011 Note, and was later "assigned" through, among the plethora of other parties, Mr. Queen.[8]

The next chapter in BWB's fairy tale is ultimately based on its interpretation of what it calls the "Merger Rule." (BWB Br. pp. 31-33.) BWB recites the general effect of this rule as when a co-guarantor "purchases" the note secured by the parties' guaranties, the note is extinguished leaving only a claim for equitable contribution against a co-guarantor. (*Id.* at 31 (citing *Sterling Sav. Bank ex rel. Nw. Lending Partners, LLC v. Emerald Dev. Co*, 338 P.3d 719, 728 (Or. Ct. App. 2014)). BWB claims that Tennessee has not adopted the so-called "Merger Rule" but – at the same time – it fails to cite any direct Tennessee authority on the issue. Indeed, BWB even notes what it views as a split of authority from other jurisdictions on this issue, and cites this Court's holding in *Raleigh Commons, Inc. v. SHW, LLC*, 2013 WL 3329016 (Tenn. Ct. App. June 19, 2013), as an "illustration" of "judicial policy" – whatever that means – congruent with "non-Merger Rule states."[9] (BWB Br. p. 33-32.) As discussed, *infra*, BWB's interpretation of *Raleigh Commons* is incorrect and, to the contrary, there is more persuasive authority in Tennessee on this issue.

The primary issue in *Raleigh Commons* was whether a party can enforce an indemnity contract against potential liability under a completely separate promissory note. There, several physicians formed a limited liability company ("SWH") to develop certain real property in Memphis, Tennessee. *Raleigh Commons*, 2013 WL 3329016, at *1. To that end, the physicians

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[8] *See supra* note 5.

[9] All the while, BWB has the audacity to claim with a straight face that Mr. Hasty's appeal is somehow frivolous and they are entitled to damages.

assumed a promissory note, individually and on behalf of SWH, that was previously executed by the relevant property's former owner in favor of the original developer ("Lender"). *Id.* Effectively, the physicians were personal guarantors for the promissory note. *Id.*

Eventually, one of the physicians ("Dr. Weinstein") withdrew from SWH and the parties executed contract by which SWH and its individual members "agreed to indemnify and hold Dr. Weinstein harmless from any liability arising from SWH's operations" including liability under the promissory note ("Assignment and Agreement"). *Id.* SWH later defaulted and the Lender sued SWH, its individual members, and Dr. Weinstein. *Id.* at *2. Dr. Weinstein subsequently purchased the promissory note from the Lender, and sought to collect against SWH and its individual members. *Id.* Ultimately, the trial court ruled in favor of Dr. Weinstein. *Id.* at *8.

This Court concluded that the appeal ***"centers around the Indemnity Provisions contained in the Assignment and Agreement that the parties executed after Dr. Weinstein withdrew from SWH."*** *Id.* at *10 (emphasis added). In other words, the principal issue ***was not whether Dr. Weinstein had the authority to enforce the relevant promissory note and associated collateral against his co-guarantors.*** *Id.* This Court affirmed the relevant portion of the trial court's ruling based on the fact that the Assignment and Agreement clearly indicated that the parties intended to indemnify Dr. Weinstein from any liability under the relevant promissory note. *Id.* at *11.

Accordingly, *Raleigh Commons* does not stand for the proposition that a guarantor can "purchase" a promissory note and enforce the collateral against co-guarantors. Regardless, it is far from being the premier illustration of Tennessee's acceptance of a policy that a guarantor can purchase a promissory note and enforce the note and its collateral as an assignee, as BWB suggests. To the contrary, *Cumberland Bank v. G & S Implement Co., Inc.*, 211 S.W.3d 223 (Tenn. Ct. App. 2006), supports the position that, in Tennessee, when a note has been discharged

as to the principal grantor, it has been completely discharged, thereby discharging the liability of any guarantor. There, William Dickerson purchased a partial ownership in a company ("G & S") owned by Eddie Kingrey in March of 1996. *Cumberland Bank*, 211 S.W.3d at 225. Thereafter, G & S's lender ("Lender") renewed a promissory note G & S executed in 1995 ("1995 Note"). *Id.* Messrs. Kingrey and Dickerson executed a new note individually and as officers of G & S ("1996 Note"), which was also secured by a personal guaranty executed by Mr. Dickerson ("Dickerson Guaranty"). *Id.*

Eventually, Mr. Dickerson withdrew from G & S after he discovered undisclosed corporate liabilities, and sent the Lender a revocation of the Dickerson Guaranty. *Id.* A little over six months later, Mr. Kingrey filed for Chapter 11 bankruptcy (reorganization). *Id.* at 226. Among the debts involved was the 1996 Note. *Id.* Under the reorganization plan, Mr. Kingrey executed a new promissory note in favor of the Lender ("2000 Note") allegedly "reaffirming" the 1996 Note. *Id.* at 227. Notwithstanding the 2000 Note, the Lender sued Messers. Kingrey and Dickerson under the 1996 Note. *Id.* However, because the bankruptcy stay precluded prosecution against Mr. Kingrey, the Lender proceeded against Mr. Dickerson alone as maker of the 1996 Note and under the Dickerson Guaranty. *Id.* The trial court granted a judgment against Mr. Dickerson. *Id.*

On appeal, this Court reversed. First, this Court noted that although the 1996 Note waived all suretyship defenses, "Mr. Dickerson is not left defenseless" and "may still assert the common-law defenses that would otherwise be available to persons seeking to defend a simple contract claim." *Id.* at 229. Among other defenses, Mr. Dickerson asserted that the execution of the 2000 Note extinguished his obligations under the 1996 Note. *Id.* at 230. The Lender

responded that the 2000 Note simply "reaffirmed" the 1996 Note and did not discharge Mr. Dickerson's obligations thereunder. *Id.*

This Court determined, first, that the facts permit "only one reasonable conclusion – the [Lender] accepted [Mr. Kingrey's] 2000 note in full payment of the 1996 note and thereby discharged Mr. Dickerson's obligations to the [Lender], ***both as a maker and a guarantor of the 1996 note."*** *Id.* (emphasis added). Further, the Lender's inconsistent positions – similar to BWB and Mr. Queen's inconsistent, contradictory positions in this case – ***"caused [this Court] to delve deeper into the facts to determine what was really going on between the parties."*** *Id.* at 231 (emphasis added). Ultimately, this Court concluded that the Lender's insistence on using the term "reaffirm" with regard to the 2000 Note was nothing more than semantics, because the bankruptcy court's order requiring Mr. Kingrey to refinance clearly envisioned that the original debt under the 1996 Note would be replaced by the 2000 Note. *Id.*

As a result, this Court concluded that the 1996 Note had been paid in full thereby discharging Mr. Dickserson as both a maker and a guarantor. *Id.* (citing *Ponderso Paint Mfg., Inc. v. Yack*, 870 P.2d 663, 667-68 (Idaho 1994); *Ulrich v. Ulrich*, 603 So.2d 78, 79 n. 1 (Fla. Ct. App. 1992); *Marble Emporium, Inc. v. Vuksanovic*, 780 N.E.2d 57, 64 (Ill. Ct. App. 2003); Restatement (Third) of Suretyship and Guaranty § 19(a) & cmt. a, at 82 (1996)). *Cumberland Bank* supports Mr. Hasty's position that Cadence's acceptance of payment from PDQ discharges Greyhawk, and Mr. Hasty's liability as guarantor.[10]

Regardless, *Cumberland Bank* certainly supports the proposition that Tennessee does not favor a rule which allows co-guarantors to "purchase" and enforce a note as an assignee, and

[10] It also supports Mr. Hasty's position that the trial court's denial of his request for discovery as to the arbitrability of the claims in this case is reversible error, as the lack of the necessary discovery has prohibited the trial court, and this Court, to "delve deeper" into the undocumented game of "hot potato" by which BWB allegedly came to possess any interest in the Hasty Guaranty.

falls more in-line with those jurisdictions that view such a transaction for what it really is – the satisfaction of a debt:

> Calling it a purchase and hiring a lawyer to draft papers to label the transaction as a purchase does not make it such; the reality is that it is a payment of the debt to [Lender]. No matter how many times a farmer calls his cow a horse, it is still a cow. Regardless of labels, be it purchase or payment, cow or horse, the [guarantors] are still limited in their rights against [coguarator] by the law which operates between coguarantors.

Mandolfo v. Chudy, 564 N.W.2d 266, 272 (Neb. Ct. App. 1997), *aff'd,* 573 N.W.2d 135 (Neb. 1998). Accordingly, BWB cannot enforce the Hasty Guaranty because the underlying debt obligation has been satisfied, and Mr. Hasty has been discharged as its guarantor.

D. Regardless, the Applicability of the So-Called "Merger Rule" is Not Immediately Relevant to this Case.

First, the applicability of any so-called "Merger Rule," if any, is not immediately relevant because BWB entirely overlooks a crucial facet of this case: BWB ***did not "purchase" the 2011 Note as a co-guarantor***. In other words, even if a guarantor can sue his co-guarantor as an assignee after "purchasing" the underlying debt obligation, BWB is not, and has never been, a co-guarantor and did not personally satisfy the 2011 Note.[11]

An illustration of Mr. Hasty's position in this regard is *Panish v. Rudolph*, 282 A.D.2d 233 (N.Y. App. Div. 2001). There, the plaintiff, "an assignee of a mortgage note and guaranty . . . as well as a co-guarantor" of the note, sought to enforce the guaranty against a co-guarantor. *Panish*, 282 A.D.2d at 233. First, the court stated that the co-guarantor "may only recover against defendant, in his capacity as co-guarantor of the same obligation, by means of a cause of action for contribution[.]" *Id.* (citations omitted). The court held that the plaintiff could not

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[11] BWB ostensibly concedes to this position. (BWB Br. p. 44) ("The [Hasty] Guaranty contractually gives rise to BWB's claims against Mr. Hasty, ***because without its existence, BWB would not have a claim.***") (emphasis added).

prevail on such a claim because she admitted in her complaint that another party personally satisfied the underlying obligation and the plaintiff paid nothing. *Id.*

More importantly, the court held:

> ***There is nothing in the record to indicate that [the party who satisfied the note] assigned his rights of contribution to plaintiff after he paid the note and we perceive no legal support for the proposition advanced by plaintiff, that months after one co-guarantor has paid a debt in full, the payee . . . and not the paying co-guarantor, can assign rights of contribution to a third-party for collection from another co-guarantor.***

Id. (emphasis added). Indeed, *Panish* is very similar to this case, as BWB purports to assert Mr. Queen's claims as a co-guarantor against Mr. Hasty.

To be clear, however, the issue in this case is not the extent, if any, Mr. Hasty is liable to Mr. Queen or BWB. Likewise, Mr. Hasty's position in this specific appeal is not that Mr. Queen and BWB are entirely barred from suing him. ***Rather, the issue is whether BWB and/or Mr. Queen can enforce the Hasty Guaranty's arbitration provision.*** Once again, this issue hinges, in part, on whether BWB's claims against Mr. Hasty derive from its status as an assignee of the 2011 Note, specifically, or originate in equity.

It is clear that to the extent Mr. Queen and BWB by extension have the right to enforce the 2011 Note and associated collateral, such right is entirely derived from equitable principles. *Koeniger v. Lentz*, 462 So. 2d 228 (La. Ct. App. 1984); *Curtis v. Cichon*, 462 So. 2d 104 (Fla. Dist. Ct. App. 1985); *Fidelity & Casualty Ins. Co. v. Sears*, 199 A. 93 (Conn. 1938) ("This doctrine affording reimbursement is based not on contract but upon the equitable principle that those voluntarily assuming a common burden should bear it equally"); 38 Am. Jur. 2d Guaranty § 99, 38A C.J.S. 762, Guaranty § 160; 38A C.J.S. 765, Guaranty § 161. Even *Sterling Bank*, relied on heavily by BWB, supports this proposition. *Sterling Bank*, 338 P.3d at 728 ("[U]nder either approach [regarding the determination of a guarantor's rights against his or her

coguarantors when he or she purchased a note and was assigned the underlying guaranties], equitable principles grounded in the law of suretyship and guaranty operate to limit the recovery of one guarantor against his or her coguarantors to their pro rata share of the obligation.")

Accordingly, because BWB's claims derive from, and are controlled by, equitable principles, it may not rely on contractual obligations not directly relevant to its claims against Mr. Hasty.

E. Mr. Hasty's Indemnity Claims Against Greyhawk Are Not "Intertwined" With the Hasty Guaranty.

Further, Mr. Hasty's indemnity claims against Greyhawk are not arbitrable. First, Greyhawk contends that Mr. Hasty's position that he might have been required to arbitrate any dispute with Cadence is inconsistent with his argument that he is not required to arbitrate his indemnity claims against Greyhawk. (Greyhawk Br. p. 4.) Greyhawk asserts such inconsistency arises from the fact that only Mr. Hasty executed the Hasty Guaranty. (*Id.*) Greyhawk grossly oversimplifies Mr. Hasty's position and proposes an objectively incorrect interpretation of guaranty law. Clearly, a guaranty is a contract between a guarantor, like Mr. Hasty, and a lender, like Cadence. *Huff*, 830 S.W.2d at 76. Obviously, Cadence could have demanded arbitration on certain disputes arising from the Hasty Guaranty because it was a party to the contract.

Greyhawk, however, is clearly not a party to the Hasty Guaranty. Indeed, the principal is not a party to the guaranty, and the guarantor is not a party to the principal obligation, and the responsibilities that are imposed by the guaranty differ from those created by the contract to which the guaranty is collateral. *First Commercial Bank, N.A. v. Walker*, 969 S.W.2d 146 (Ark. 1998); *Lee v. Yano*, 997 P.2d 68 (Haw. Ct. App. 2000); *Twin City Co-op. Credit Union v. Bartlett*, 123 N.W.2d 675 (Minn. 1963); *Boxum v. Munce*, 751 N.W.2d 657 (Neb. 2008); *Miners and Merchants Sav. Bank v. Comer*, 140 N.W.2d 390 (S.D. 1966); *United Sav. & Loan Ass'n v.*

Lake of Ozarks Water Festival, Inc., 805 S.W.2d 350 (Mo. Ct. App. S.D. 1991); *Builders Supply Co., Inc. v. Czerwinski*, 748 N.W.2d 645 (Neb. 2008). Clearly, Mr. Hasty's position that he might be required to arbitrate certain disputes with Cadence is not inconsistent with his position that he is not required to arbitrate his indemnity claims against Greyhawk.

Second, Greyhawk's position as to the cases relied upon by Mr. Hasty is misplaced. For example, in *GreenworksUS*, a non-signatory to an arbitration contract could enforce the agreement where in a principal/agent context. *GreenworksUS*, 2015 WL 2384033, at *2. In other words, the plaintiff's claims almost entirely derived from the contract containing the arbitration provision. For the reasons described at length in Mr. Hasty's principal Brief of the Appellant, his indemnity claims against Greyhawk simply do not derive from the Hasty Guaranty. (*See, e.g.* Hasty Br. p. 35.) Further, in *Benton*, the right to enforce the arbitration agreement derived from plaintiff's status as a third-party beneficiary. *Benton v. Vanderbilt University*, 2003 WL 1627029, *9 (Tenn. Ct. App. Mar. 31, 2003). However, notwithstanding the well-settled principle that a guaranty is a collateral to a principal obligation and only binds those who are parties to the guaranty contract itself, (*see, e.g.*, *Top Line Distributors, Inc. v. Spickler*, 525 A.2d 1039 (Me. 1987), Greyhawk has cited no authority showing that it, as a principal, is a third-party beneficiary to the separate contract between Mr. Hasty and Cadence.

Accordingly for the foregoing reasons, and the reasons discussed at length in Mr. Hasty's Brief of the Appellant, Mr. Hasty's indemnity claims against Greyhawk are not arbitrable.

III. The Appellees' Assertion that Mr. Hasty's Appeal is Frivolous is, Itself, Frivolous and Sanctionable.

Notwithstanding the dearth of applicable authority, Mr. Hasty's meritorious positions outlined *supra* and in his principal Brief of the Appellant, and the Appellees' own admission that many of the issues in this appeal are ostensibly matters of first impression in Tennessee, the

Appellees have incredibly asserted that Mr. Hasty's appeal is somehow frivolous and subject to a damages award. ***In reality, however, the Appellees' outrageous allegations in this regard are completely frivolous, devoid of any factual or legal merit whatsoever, and intended only to break Mr. Hasty's will in this litigation.*** Regrettably, this conduct is not the first such occurrence by the Appellees or their counsel in this litigation.

To be clear, "imposing a penalty for a frivolous appeal is a remedy which is to be used ***only in obvious cases of frivolity and should not be asserted lightly*** or granted unless clearly applicable – ***which is rare."*** *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 342 (Tenn. 2010) (emphasis added) (citations omitted). Moreover, it is important to note that other courts have found ***"[h[air-trigger motions for sanctions by lawyers who do not recognize [the difference between vigorous advocacy and frivolous conduct] are themselves sanctionable."*** *All. to End Repression v. City of Chicago*, 899 F.2d 582, 583 (7th Cir. 1990) (emphasis added) (citing *Foy v. First Nat. Bank of Elkhart*, 868 F.2d 251, 258 (7th Cir. 1989)); *see also Bond v. American Medical Ass'n*, 764 F.Supp. 122 (E.D. Ill. 1991); *Harman v. City of Univ. Park*, 1997 WL 53120, at *3 (N.D. Tex. Feb. 3, 1997).

Rather than imposing damages against Mr. Hasty for the filing of a frivolous appeal, it is respectfully submitted that the Appellees should be sanctioned for making such an outrageous request especially because, among other reasons, the Appellees even admit that many of the issues raised by Mr. Hasty are matters of first impression in Tennessee. In making their strange, unprecedented demand for frivolous appeal damages, the Appellees have moved "through the looking glass" in the words of *Alice in Wonderland*, and their doing so should not be countenanced by this Court.

CONCLUSION

Based upon the foregoing, this Court should reverse the trial court in all respects and hold that it erred in: (1) staying all claims of all parties in favor of arbitration; (2) denying the Appellant's request to take discovery regarding the arbitrability of the claims in this case; and/or, (3) granting BWB's Application for Confirmation of Arbitration Award and denying the Appellant's Motion to Vacate. As discussed *supra*, Mr. Hasty also respectfully requests damages to be awarded against the Appellees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and exact copy of the foregoing has been sent by U.S. Mail, postage pre-paid, to the following on this 3rd day of June, 2017:

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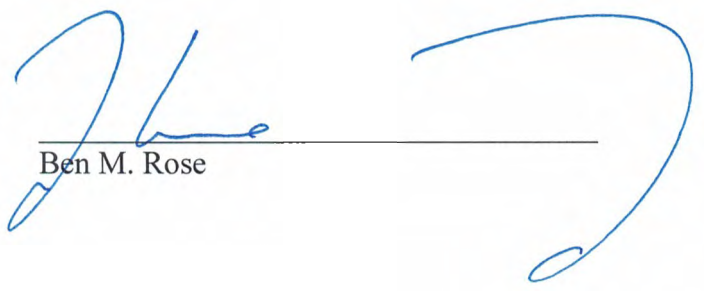

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