

1990

H. Glenn Olson v. Park-Craig-Olson, Inc. and J. Samuel Park : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

900545-CA

IN THE UTAH SUPREME COURT

H. GLENN OLSON,

Plaintiff-Appellee,

vs.

PARK-CRAIG-OLSON, INC. and
J. SAMUEL PARK,

Defendants-Appellants,
and
ELLIS EDWARD CRAIG,

Defendant.

900545-CA

Case No. 900056

Priority No. 16

APPELLANTS' REPLY BRIEF

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT
COURT, SALT LAKE COUNTY, UTAH
HONORABLE RICHARD H. MOFFAT

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FILED

OCT 22 1990

Mary T. Noonan
Clerk of the Court

FILED

OCT 10 1990

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Clerk, Supreme Court, Utah

IN THE UTAH SUPREME COURT

H. GLENN OLSON,)	
)	
Plaintiff,)	AFFIDAVIT OF
)	JEFFREY WESTON SHIELDS
vs.)	
)	
PARK-CRAIG-OLSON, INC., J.)	
SAMUEL PARK, and ELLIS)	Case No. 900056
EDWARD CRAIG,)	
)	
Defendants.)	

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

JEFFREY WESTON SHIELDS, being first duly sworn, deposes
and states as follows:

1. I am an attorney with the law firm of Switter
Axland Armstrong & Hanson, counsel for Park-Craig-Olson, Inc.,
and J. Samuel Park, defendants in this action, and have personal
knowledge of the matters set forth herein.

2. I represented defendants Park-Craig-Olson, Inc.
and Park at the hearing on the plaintiff's renewed motion for
partial summary judgment, which was held in Judge Moffat's

chambers on August 29, 1989, and at which an active dialogue concerning the full range of issues before the court was conducted between Judge Moffat and counsel to the parties. No court reporter was present at the hearing.

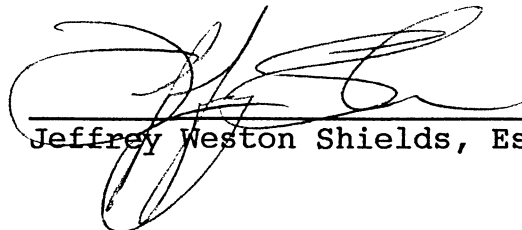
3. Although the bulk of the hearing was directed to the plaintiff's motion to dismiss Park's counterclaim, the parties also addressed the plaintiff's renewed motion for partial summary judgment.

4. At the hearing, and in accordance with paragraphs 19 and 20 of our Answer wherein we denied plaintiff's allegations of apportioning co-guarantor liability by percentage of stock in the obligor corporation, I argued that the court, in the event it was inclined to grant plaintiff's Motion to Dismiss our Counterclaim, should require each of the three co-guarantors--Park, Craig and Olson--to pay one-third of the corporation's obligations rather than apportioning liability according to their respective ownership interests in Park-Craig-Olson, Inc.

FURTHER AFFIANT SAITH NOT.

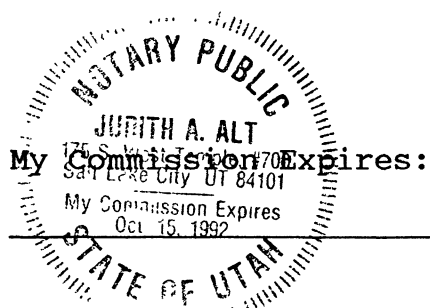
DATED this 10 day of October, 1990.

SUITTER AXLAND ARMSTRONG & HANSON



Jeffrey Weston Shields, Esq.

SUBSCRIBED AND SWORN TO BEFORE ME this 10th day of
October, 1990.



Judith A. Alt
NOTARY PUBLIC
Residing at: Salt Lake County

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the fore-
going Affidavit of Jeffrey Weston Shields was mailed, postage
prepaid thereon, this 10th day of October, 1990, to the
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Paul M. Simmons

IN THE UTAH SUPREME COURT

H. GLENN OLSON,)	
)	
Plaintiff-Appellee,)	
)	
vs.)	Case No. 900056
)	
PARK-CRAIG-OLSON, INC. and)	Priority No. 16
J. SAMUEL PARK,)	
)	
Defendants-Appellants,)	
and)	
)	
ELLIS EDWARD CRAIG,)	
)	
Defendant.)	

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INTRODUCTION

The plaintiff, H. Glenn Olson, brought this action seeking contribution from defendant J. Samuel Park and indemnity from defendant Park-Craig-Olson, Inc. ("PCO") for amounts he paid to First Security Bank (the "Bank") on a debt of PCO's that he and Park had guaranteed. The debt that Olson paid was only a small part of PCO's obligations, most of which had been jointly guaranteed by Park, Olson and defendant Ellis Edward Craig. When it became apparent that PCO was in dire financial straits, Park spent many hours of his own time and his own money in obtaining releases of the jointly guaranteed obligations and in negotiating a sale of PCO's assets in order to save the individuals' investment in PCO. He did so without contribution from Olson or Craig. When Olson sought contribution from Park for the relatively small amount Olson had been required to pay, Park asserted that he had a set-off, which he pled as a counterclaim for unjust enrichment. The trial court dismissed the counterclaim and granted Olson summary judgment against all defendants. Park and PCO have filed this appeal.

REPLY TO PLAINTIFF'S STATEMENT OF FACTS

Park and PCO do not dispute most of Olson's Statement of Facts. However, they do dispute Olson's assertion that Park's actions in negotiating and obtaining each of the releases directly

or indirectly benefited Park.¹ Park obtained Olson's release as a guarantor on the lease of the West Valley City store without being released himself. Park also negotiated the cancellation of the sublease on the Arcadia store even though he had not guaranteed that sublease and thus was not personally liable for it. There is no evidence that either of these actions benefited Park in any way.

Park also disputes Olson's assertion that he was reimbursed by PCO. See Record ("R.") at 86 ¶ 12. He was reimbursed by Marie Callender Ventures, Inc. as part of the sale of PCO's assets. See R. at 141-42 ¶ 3 & 182.

¹ Although Park and PCO do not dispute certain other allegations, they are at a loss to understand their significance. For example, Olson alleges that, when he filed his complaint, the Bank had released its claims as against Park, Craig and PCO. This fact would appear to be significant only in that it would bar any subrogation claim Olson might have against the defendants. If the Bank had no claim against the defendants, because it had released all its claims, then Olson could acquire no such claim when he stepped into the Bank's shoes.

Park also disputes the significance of the fact that his counterclaim sought contribution from Olson for 16.67 percent (not one-third) of Park's expenditures in trying to save PCO. Park was only trying to give Olson the benefit of any doubt as to the proper apportionment. Park was not so much interested in obtaining a money judgment as he was in showing that he had paid far more toward satisfying PCO's obligations than Olson had, and 16.67 percent of Park's expenditures would virtually offset Olson's claim for contribution.

SUMMARY OF ARGUMENT

Olson first argued that this court should not consider some of the defendants' arguments because they were not raised below. Not only were some of those arguments in fact raised below, but, on the facts of this case, the court should exercise its discretion to reach all of the defendants' arguments (point I).

Contrary to Olson's assertion, Park's counterclaim stated a claim for relief for unjust enrichment (point II).

Olson was not entitled to recover his attorney fees from PCO because the only basis for a fee award that he has alleged, Utah Code Ann. § 70A-3-415, does not apply to this case (point III).

Finally, Olson was not entitled to summary judgment against Park because Park had paid more than his share of the jointly guaranteed debt and Olson had paid less than his share (point IV).

ARGUMENT

I.

THE COURT CAN CONSIDER ALL OF THE APPELLANTS' ARGUMENTS.

Olson argues that certain of the defendants' arguments should not be considered because they were raised for the first time on appeal. Specifically, Olson argues that the court should not consider the defendants' arguments (1) that Park was not

liable for contribution because he had paid more than his share of the debt, (2) that Olson was not entitled to contribution because he had not paid more than his share, his share being one-third of the total debt, (3) that the court erred in calculating the amount of contribution, and (4) that Olson was not entitled to attorney fees incurred in the Bank's action because he had not shown that he became a guarantor with the consent or through the fault of PCO.

The defendants recognize that appellate courts generally will not consider issues raised for the first time on appeal. E.g., Busch Corp. v. State Farm Fire & Casualty Co., 743 P.2d 1217, 1219 (Utah 1987). Contrary to Olson's assertion, however, some of the issues were raised below. The first issue (regarding Park's reimbursement) was raised below. See R. at 86, 100, 197-98 & 218-19. The second issue (regarding Olson's share of the debt) was also raised below. In answer to Olson's complaint, Park specifically averred that no right of contribution in proportion to the individual shareholders' percentage interests in PCO existed. R. at 88-89 ¶¶ 19 & 20. At oral argument on Olson's renewed motion for summary judgment, counsel for Park argued that the three co-guarantors should each be liable for one-third of the total obligation rather than having their liability for contribution determined according to their respective interests in PCO. See Affidavit of Jeffrey Weston Shields ¶ 4

(filed herewith).² Thus, the trial court had an opportunity to consider the issue of Olson's share of the jointly guaranteed obligation,³ and this court should consider the issue on appeal.

Even if the first two issues were not raised below in the terms in which they have been stated on appeal, broadly speaking, they were raised below. The whole theme of Park's defense in the trial court was that the court should consider the total picture, which showed that Park had expended far more than his share in time and money in rescuing PCO and saving the investment of PCO's shareholders. Therefore, Park argued, in equity he should not be liable for contribution to Olson, who had refused to contribute to Park's efforts yet who readily accepted the benefits of Park's services. Thus, the first two issues were raised below, at least in general terms.

² This court has recognized that an argument may be preserved for appeal if raised orally in a hearing on a motion for summary judgment. Busch Corp. v. State Farm Fire & Cas. Co., 743 P.2d 1217, 1219 (Utah 1987). In Busch the parties did not contend that the omitted arguments were raised below, nor was there anything in the record to support that possibility. Id. Mr. Shields' affidavit distinguishes this case from Busch.

³ The trial court granted Olson's renewed motion for summary judgment based on the grounds found in Olson's original motion. R. at 483. In his initial motion, Olson argued that he was entitled to contribution from the co-guarantors according to their respective interests in the corporation. Id. at 100. Thus, at a minimum the trial court implicitly considered the issue of the co-guarantors' proportionate shares of liability and adopted Olson's position on that issue.

Even if the first two issues were not raised below, the court should reach them for another reason. The general rule that an appellate court will not consider issues raised for the first time on appeal is subject to certain exceptions. Specifically, the rule does not apply when the issue concerns a party's right to maintain the action. See, e.g., Blodgett v. Zions First Nat'l Bank, 752 P.2d 901, 904 (Utah Ct. App. 1988) (either party or the court on its own may properly raise standing for the first time on appeal); In re A.H. Robins Co., 681 P.2d 540, 542 (Colo. Ct. App. 1984) (accord); Mitchell v. Doe, 41 Wash. App. 846, 706 P.2d 1100, 1102 (1985) (the insufficiency of the facts to support standing may be raised for the first time on appeal). A guarantor's right to maintain an action for contribution against a co-guarantor depends on whether or not the plaintiff has paid more than his proportionate share of the debt and on whether the defendant has paid less than his share. See, e.g., Gardner v. Bean, 677 P.2d 1116, 1118 (Utah 1984); Restatement of Security § 149 (1941); Restatement of Restitution § 85 & comment e (1936). The first two issues--whether Park had paid his share of PCO's debt and whether Olson had paid more than his share--go directly to Olson's right to maintain this action and therefore can be raised for the first time on appeal.

The fourth issue (Olson's entitlement to attorney fees incurred in the Bank's action against the guarantors) was also

raised below. The defendants argued that Olson had asserted no basis for an award of attorney fees, R. at 533, although admittedly they did not make the specific argument that no attorney fees could be awarded because there was no evidence that Olson became a surety with the consent or because of the fault of PCO. But then Olson did not argue that he was entitled to attorney fees because he had become a surety through PCO's consent or fault. In fact, he did not allege any basis for an award of his attorney fees except Utah Code Ann. § 70A-3-415, which, at best, entitles him to fees incurred in this action, not the Bank's action. As the party moving for a fee award, he had the burden of establishing the basis for such an award. Because he has asserted no basis either below or on appeal for his fees incurred in the Bank's action, this court can reverse that fee award without reaching the specific argument the defendants have made. The defendants raised the argument on appeal only to show that the only possible basis for a fee award, though not argued below, was in fact not supported by the record.

The court should also consider the third issue, namely, the proper computation of the judgment against Park. The issue merely requires a mathematical calculation, assuming all the facts and law in Olson's favor. Where, as here, a request for or objection to a finding as to the amount of the judgment is not required, see Utah R. Civ. P. 52, and the appellate court

can determine that an error has been made from the trial court's computation in the record, the court can correct the error, even if it was not raised below. See Clarke's Trucking Co. v. Land Mgt. Servs., Inc., 278 Or. 153, 562 P.2d 976, 978 (1977).

Even if none of the defendants' arguments were raised below, this court can still consider them. The general rule precluding appellate review of issues raised for the first time on appeal is not based on any lack of power in the reviewing court. See, e.g., 5 Am. Jur. 2d Appeal and Error § 545 at 30 (1962). The court, in its discretion, may decide a case on any point that its proper disposition may require, even if it was never raised either in the trial court or on appeal. See, e.g., Hiltsley v. Ryder, 738 P.2d 1024, 1025 (Utah 1987); Acton v. J.B. Deliran, 737 P.2d 996, 999 n.4 (Utah 1987); Romrell v. Zions First National Bank, 611 P.2d 392, 395 (Utah 1980). Accord Falk v. Keene Corp., 113 Wash. 2d 645, 782 P.2d 974, 982 (1989); White v. Fisher, 689 P.2d 102, 105 (Wyo. 1984).

Courts have considered various factors in deciding whether to exercise their discretion to consider issues raised for the first time on appeal. Those factors include the following: whether the issue affects a litigant's substantial rights, Cottrill v. Cottrill Sodding Serv., 229 Mont. 40, 744 P.2d 895, 896 (1987); whether failure to address the issue would propagate plain error, Sea Lion Corp. v. Air Logistics of Alaska, Inc.,

787 P.2d 109, 115 (Alaska 1990); State v. Eldredge, 773 P.2d 29, 35 (Utah), cert. denied, 110 S. Ct. 62 (1989); whether or not the issue is dependent on any new or controverted facts or, on the other hand, whether it presents only a legal question arising on proven or admitted facts, 787 P.2d at 115; Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568, 570 (1973); Taco Bell v. City of Mission, 234 Kan. 879, 678 P.2d 133, 137 (1984); the extent to which the arguments are related to the parties' trial court arguments or could have been gleaned from the pleadings, 787 P.2d at 115; and whether the parties have briefed the issue, Three Rivers Land Co. v. Maddoux, 98 N.M. 690, 652 P.2d 240, 243 (1982), overruled on other grounds, Universal Life Church v. Coxon, 105 N.M. 57, 728 P.2d 467 (1986), cert. denied, 482 U.S. 905 (1987). The defendants submit that these factors justify this court's review of all the issues raised on appeal, even if those issues were not properly raised below.

An issue affects a parties' substantial rights if the error was prejudicial in the sense that there is a reasonable likelihood that in its absence the result would have been different. See, e.g., State v. Eldredge, 773 P.2d at 35; State v. Johnson, 771 P.2d 1071, 1073 (Utah 1989). Cf. Utah R. Civ. P. 61. The first two issues that Olson claims were not raised below clearly affected the defendants' substantial rights because there is a reasonable likelihood that, absent the alleged errors, the

result would have been different. Before a co-guarantor, such as Olson, is entitled to contribution, he must show that he paid more than his share of the debt guaranteed and that the defendant paid less than his share. Neither was the case here. See Brief of Appellants at 9-15. Olson was therefore not entitled to contribution, and but for the errors, the result would have been different--no judgment would have been entered against Park.

Similarly, there is a reasonable likelihood that the result (specifically, the amount of the judgment) would have been different if the court had considered issues 3 and 4. The amount of the judgment against Park should have been some \$25,000 less, see Brief of Appellants at 15-17, and the judgment against PCO should not have included Olson's attorney fees incurred in the Bank's action.

Moreover, the errors raised by the first three issues should have been obvious to the trial court. The court could not say that Olson had paid more than his share of the debt or that Park had not paid his share without knowing what the total debt was. Nowhere in the record did it say what the total debt was. The Bank's complaint asked for judgment in the principal amount of \$226,189.51 plus interest. R. at 17. The record showed that Park had paid the Bank \$235,000. Id. at 248-49. This should have virtually extinguished the debt to the Bank. Thus, Olson should not have been liable to the Bank, and he would have had

no claim for contribution or indemnity. On the record before it, it should have been obvious to the trial court either that Olson was not entitled to contribution because the debt for which he sought contribution had already been paid or that the record was insufficient to establish Olson's right to contribution.⁴ See Brief of Appellant at 10. Similarly, it should have been plain to the trial court that the judgment against Park was too high since the effect of the judgment was to relieve Olson from liability for all but 4 percent of the total amount paid, well below the 16.67 percent Olson claims was his fair share. See id. at 15-17. Not to reach the issues that the defendants have raised would propagate the trial court's plain error and deny the defendants' substantial rights.

Third, the issues that Olson would like this court to ignore do not depend on any new or controverted facts that would require development in the trial court. How much the guarantors paid is undisputed. The first two issues--whether Park paid less than his share and whether Olson paid more--present only legal issues arising out of this undisputed fact. With respect to the defendants' claim that Park paid more than his share,

⁴ In fact, Olson's claims were based on three debts that PCO owed the Bank, not just the two notes that the Bank sued on. Only by aggregating the three debts could the trial court determine the total debt and Park's and Olson's proportionate shares thereof. Nowhere in the record is there any evidence of the third obligation.

the only issue is the relevance of the fact that Park was later reimbursed. With respect to the defendants' claim that Olson paid less than his share, the only issue is whether the co-guarantors' shares should be apportioned equally or in accordance with their percentage of stock ownership in PCO. Similarly, the defendants' argument that the trial court erred in calculating the amount of contribution only requires a mathematical calculation based on undisputed figures.⁵

With respect to the fourth factor that courts consider in exercising their discretion to reach issues not raised below, the first and second issues the defendants have raised could have been gleaned from the pleadings. It appeared from the pleadings that the Bank was owed \$226,189.51 plus interest, R. at 17, and that Park had paid the Bank \$235,000, R. at 248-49. Thus, it appeared from the pleadings that Park had paid more than his share of the debt and that any amounts Olson paid in excess of his share were not owed to the Bank and thus could not provide the basis for any claim for contribution. At the very least, it should have appeared from the pleadings that, if Olson had a claim at all, the record was not sufficient to support his claim. Furthermore, the defendants' claim that the court

⁵ Olson's entitlement to attorney fees incurred in the Bank's collection action also presents only a legal issue--whether there is sufficient evidence in the record to show that Olson became a guarantor with the consent or because of the fault of PCO.

erred in calculating the amount of contribution could also have been gleaned from the pleadings since the calculation was based solely on figures contained in the pleadings. The fourth issue --whether there was sufficient evidence that Olson became a guarantor with the consent or because of the fault of PCO--could also be gleaned from the pleadings because, on the motion for summary judgment, the only evidence before the trial court was that contained in the pleadings.

Finally, Olson has briefed issues 1, 2 and 4 regarding the propriety of summary judgment against Park and the award of attorney fees against PCO. See Brief of Appellee at 14-19. Thus, the court has the benefit of the parties' arguments on those issues, making resolution of those issues appropriate.

II.

PARK'S COUNTERCLAIM STATED A CLAIM FOR RELIEF IN QUANTUM MERUIT.

Park argued, both in the trial court and on appeal, that his counterclaim stated a claim for relief under a theory of quantum meruit, specifically one for unjust enrichment. His counterclaim could be dismissed for failure to state a claim only if it appeared "to a certainty" that he "would be entitled to no relief under any state of facts which could be proved in support of the claim." Christensen v. Lelis Automatic Transmission Serv., Inc., 24 Utah 2d 165, 467 P.2d 605, 607 (1970).

The Utah Court of Appeals has stated the elements of a claim for unjust enrichment as follows: "(1) the defendant received a benefit; (2) an appreciation or knowledge by the defendant of the benefit; (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying for it." Davies v. Olson, 746 P.2d 264, 269 (Utah Ct. App. 1987).

Olson concedes that, at this stage of the proceedings, Park's counterclaim meets the first element. He disputes, however, the second two elements.

With respect to the second element--Olson's knowledge or appreciation of the benefit conferred--Olson concedes that "it may be appropriate to infer" from the facts Park has alleged that Olson knew he was being released from his guaranties, but he claims that it is "an unjustified leap of faith" to conclude that he appreciated that the benefit was being conferred by Park rather than PCO, the principal obligor. Brief of Appellee at 12. O he of little faith. All the allegations of the counterclaim and of Park's affidavit, which the court was required to accept as true and construe in the light most favorable to Park,⁶

⁶ See, e.g., Colman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990); Arrow Indus., Inc. v. Zions First Nat'l Bank, 767 P.2d 935, 936 (Utah 1988); Ellis v. Social Servs. Dep't of the Church of Jesus Christ of Latter-day Saints, 615 P.2d 1250, 1252 n.1 (Utah 1980).

indicate that Park personally set out to save the PCO enterprise,⁷ R. at 404 ¶ 14; 247-48 ¶¶ 11 & 12; that Park (not PCO) negotiated the cancellation of or Olson's release from the guaranteed obligations, id. at 406 ¶ 17 & 408 ¶ 18; that Park (not PCO) sought Olson's help but could not obtain it, id. at 405 ¶ 15; that Olson received the benefit of the releases from Park (not PCO) or through Park's efforts and expenditure of funds, id. at 250 ¶ 15 & 254 ¶ 16; and that Park personally gave Olson consideration far in excess of the amount Olson claimed in contribution, id. at 250 ¶ 15. The only reasonable inference to be drawn from these allegations is that Olson knew or should have known that the benefit was conferred by Park, not PCO. Even if one could reasonably infer that the benefit was conferred by PCO, on Olson's motion to dismiss the court was required to draw all reasonable inferences in Park's favor. Colman, 795 P.2d at 624; Arrow Indus., 767 P.2d at 936; Ellis, 615 P.2d at 1252 n.1.

Olson next argues that it would not be unjust for him to retain the benefit of Park's services without paying for them because Park was acting for his own advantage and would have furnished the services in any event. The fact that Park may have been motivated in part by his own interests and may have benefited from his actions does not necessarily mean that he is

⁷ When Park first advanced funds to save PCO, in August 1987, he was not even a shareholder of PCO and thus could not have been acting on PCO's behalf. See R. at 400 ¶ 7 & 404 ¶ 14.

not entitled to restitution. See, e.g., Restatement of Restitution §§ 81, 103 & 112 (1937). Section 112 of the Restatement of Restitution states:

A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons.

(Emphasis added.) Contrary to Olson's assertion, Park's claim comes within the exception and not within the rule stated in section 112. Park's actions were necessary to prevent the loss of PCO's assets. Because Park's actions were necessary to protect the interests of Olson and Craig, the other PCO shareholders, as well as his own, it would be unjust for Olson to retain the benefit of Park's services without paying for them.⁸

Olson argues that Park has not stated a claim for unjust enrichment because any benefit to him was "incidental" to services that Park performed for his own advantage. This argument assumes that Olson's release from liability as a guarantor on numerous PCO obligations was simply a by-product of Park's efforts to secure his own release. But Olson's release did not necessarily

⁸ Similarly, under section 103 of the Restatement, a person is entitled to contribution if, in preventing the lawful taking of his things, he discharges the duty of another in whole or in part. In acting to prevent the lawful taking of his own assets by PCO's creditors, Park discharged duties that Olson and Craig owed as co-guarantors of PCO.

follow from Park's release, as the transaction with the Bank shows. When Olson refused to cooperate with Park in resolving the Bank's claims, Park negotiated a settlement with the Bank that released all obligers except Olson. Park could have left Olson exposed to liability on the other jointly guaranteed obligations as well. Thus, Olson's release was not simply a by-product of Park's efforts to secure his own release and to negotiate the sale of PCO.

Moreover, Olson ignores the fact that Park secured Olson's release from contingent liability for two obligations where Park received no corresponding benefit. First, Park secured Olson's release from liability as a guarantor of the lease on the West Valley City store even though the landlord required that Park remain personally liable as guarantor on that lease. Second, Park secured Olson's discharge from liability on his guaranty of the Arcadia store sublease, even though Park was not a co-guarantor of that lease and had no personal liability with respect to that obligation.

Under the circumstances of this case, where Park expended large amounts of his own resources not only to save the shareholders' investment in PCO but also to secure Olson's release from contingent liability on numerous obligations for which Park could have left him personally liable, it would be

unjust to allow Olson to accept the benefits of Park's services, as he has, without paying for them.⁹

III.

OLSON WAS NOT ENTITLED TO RECOVER HIS
ATTORNEY FEES.

Olson was entitled to recover his attorney fees incurred in the Bank's action against him only if he became a guarantor with the consent or because of the fault of PCO. Restatement of Restitution § 80 & comment d. Olson does not dispute this principle. Brief of Appellee at 14. Moreover, he does not dispute that the record contains no direct evidence as to whether or not Olson became a guarantor with the consent or through the fault of PCO. Rather, he argues that, under the facts of this case, "it can hardly be argued that PCO did not know and agree to Olson's becoming a surety." Although this may be a permissible

⁹ Commercial Fixtures and Furnishings, Inc. v. Adams, 564 P.2d 773 (Utah 1977), which Olson relies on, is distinguishable from this case. The court in that case simply held that, where the plaintiff's performance of a contract with a third party confers an incidental benefit on the defendant, who was not a party to the contract, the third party's breach of contract, without more, does not give rise to a claim against the defendant for unjust enrichment. In this case, any benefit to Olson was unrelated to Park's performance of any contract with another and hence not merely incidental within the meaning of Commercial Fixtures. Moreover, the only authority cited for the court's holding in Commercial Fixtures--66 Am. Jur. 2d, Restitution and Implied Contracts § 16 (1973)--appears to support the opposite result in that case, leaving one court to say of the case that "the dissent may well be considered more persuasive and impressive than the views of the majority." Horseshoe Estates v. 2M Co., 713 P.2d 776, 781 (Wyo. 1986).

inference on the facts of this case, on Olson's motion for summary judgment PCO was entitled to have all reasonable inferences drawn in its favor, see, e.g., Payne ex rel. Payne v. Myers, 743 P.2d 186, 188 (Utah 1987), and it is at least reasonable to infer from the absence of evidence that PCO was not responsible for Olson becoming a guarantor.

More importantly, the burden was on Olson, as the moving party, to show his entitlement to attorney fees, and he has offered no basis for an award of his fees incurred in the Bank's action against him.¹⁰

The defendants also argued, below and on appeal, see R. at 533; Brief of Appellants at 28-30, that Olson was not entitled to his attorney fees incurred in this action. Olson argues that section 3-415 of the Uniform Commercial Code, Utah Code Ann. § 70A-3-415, entitles him to recover such fees. It states: "An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party." Utah Code Ann. § 70A-3-415(5). Olson's argument ignores the clear language of the statute, which defines an "accommodation party" as "one who signs the instrument . . . for the purpose of lending his name to another party to

¹⁰ The only basis for a fee award he has alleged is a right of recourse on the Bank's notes, see infra, which provide for an award of fees. But the notes would only entitle Olson to fees incurred in an action to enforce the notes, that is, in Olson's action against PCO, not the Bank's action against Olson.

it." Id. § 70A-3-415(1) (emphasis added). It is undisputed that Olson did not sign the instruments that he claims gave him his right to attorney fees, namely, PCO's notes to the Bank. Thus, he is not an "accommodation party," and is not entitled to attorney fees under the statute.

Olson argues that, because guarantors are sureties, they are also accommodation parties under section 3-415. Brief of Appellee at 15 (citing Kennedy v. Bank of Ephraim, 594 P.2d 881, 884 (Utah 1979), and Murray v. Payne, 437 So.2d 47 (Miss. 1983)). Although an accommodation party is a surety, not every surety or guarantor is an accommodation party. The guarantor must have signed the promissory note, either as a maker or an indorser, to be considered an "accommodation party" under the UCC. See U.C.C. § 3-415 official comment ¶¶ 1-2 & 4. "A separate guaranty agreement does not fall within the ambit of the Uniform Commercial Code." Uniwest Mortgage Co. v. Dadecor Condominiums, Inc., 877 F.2d 431, 434 (5th Cir. 1989). Accord University Bank & Trust Co. v. Dunton, 655 F.2d 23, 24 (1st Cir. 1981). The notes in this case do not incorporate the guaranties,¹¹ and the guaranties make no reference to the notes but guaranty all of

¹¹ Although the notes refer to "sureties" and "guarantors" thereof, see Record at 19 & 22, "a descriptive 'reference' [to a guaranty] is not the equivalent of substantive incorporation" and does not bring the guaranty within the ambit of article 3 of the UCC. 877 F.2d at 434.

PCO's indebtedness, present and future, up to \$550,000, well in excess of the amount of the two notes sued on.

The two cases that Olson relies on admittedly held that guarantors who signed separate guaranty agreements were accommodation parties within the meaning of section 3-415. However, neither court expressly addressed the argument made here. To the extent that these cases hold that a guarantor who does not sign the instrument can still be an accommodation party, they are clearly contrary to the statutory language, to the scope of article 3 and to the clear weight of authority. See Uniwest, 877 F.2d at 434 and cases cited therein.

Because Olson has not cited to any other statute or contract that entitles him to attorney fees, the trial court erred in awarding him his attorney fees.

IV.

THE TRIAL COURT ERRED IN GRANTING OLSON SUMMARY JUDGMENT ON HIS CLAIM FOR CONTRIBUTION.

Olson argues that he was entitled to contribution from Park because Park had not paid his proportionate share of the obligation, despite the fact that Park paid over 73 percent of the total obligation, well over his alleged 54.33 percent share. Olson argues that the court should ignore Park's payment because he was later reimbursed as part of the sale of PCO's assets to

Marie Callender Ventures, Inc.¹² Olson cites no authority for the proposition that Park's substantial payment should be ignored.¹³

The only effect that PCO's reimbursement of Park has on the co-guarantors' respective rights of contribution in this case is to cut off Park's right of contribution from Olson. It does not give Olson any right to contribution from Park. Cf. Restatement of Restitution § 85 & comment c; Restatement of Security § 154(4).

Olson argues that Park's position is nonsensical and unfair because it would permit unfair manipulation of a corporation's finances by a controlling shareholder. Obviously, if a controlling shareholder were to abuse his position, the law would

¹² Olson ignores the fact that the reimbursement came from Marie Callender Ventures and not from PCO.

¹³ Olson quotes comment e to Restatement of Security § 154, which says:

The amount of the proportionate shares for which cosureties are liable among themselves is affected by the extent to which the principal himself performs. This is true whether the principal's partial performance is before or after the surety's performance.

The obvious effect of comment e is to give the cosureties credit for any payment that their principal makes to reduce the debt. Here, the co-guarantors' liability was reduced by PCO's payments to the Bank before it defaulted (just as Olson's liability was reduced by Park's \$235,000 payment). That is the only application that comment e has in this case. After PCO defaulted, it did not "perform" its obligation to the Bank.

not be powerless to protect minority shareholders. But that is not this case.

On the other hand, Olson's position would punish Park for voluntarily paying more than his share of the debt. Because Park paid more than his share, he could have sought contribution from Olson. Instead, he sought reimbursement. Had he not been successful, Olson would not now be entitled to contribution. But because Park was successful, Olson would now have Park pay a second time and seek reimbursement a second time. And presumably, under Olson's theory, if Park were to pay 54.33 percent of Olson's judgment and then be reimbursed again, Olson could sue Park again for 54.33 percent of any amounts for which Olson had still not been reimbursed, ad infinitum. Where is the fairness in this?

If there is any unfairness at all, it is only because Park has been reimbursed and Olson has not. But that is a matter between Olson and PCO, not between Olson and Park. The defendants do not dispute that Olson has a good claim for indemnity against PCO, as did Park. But the fact that Olson has not yet been indemnified should not negate the fact that Park paid more than his share of the debt, precluding Olson's claim for contribution.

Olson also claims that he is entitled to contribution because he has paid more than his share of the debt, his share being based on his percentage of ownership in PCO. The defendants

concede that there is a split of authority on this issue and no Utah precedent. Olson states that "[t]he search is for a legal presumption that will apply in most instances," and that the better presumption is that co-guarantors of a corporate debt have impliedly agreed to share the debt in the proportions of their stock ownership at the time the guarantees are executed." Brief of Appellee at 18 & 19. Apart from the fact that Olson's position appears to be the minority rule, the presumption should not apply in this case for several reasons. First, the court need not imply an agreement to share the debt in proportion to the co-guarantors' stock ownership because the co-guarantors in fact agreed to be equally liable for PCO's debt. Each agreed to be jointly and severally liable for PCO's indebtedness to the Bank up to \$550,000. R. at 124-26. Had they intended to share the debt in proportion to their stock ownership, they would have limited their liability accordingly. The fact that they did not shows that they intended to be equally liable. See, e.g., Curtis v. Cichon, 462 So.2d 104, 106 (Fla. Dist. Ct. App. 1985).

Moreover, a rule of equal contribution is more consistent with the nature of the guarantors' liability. Park, Craig and Olson agreed to be liable for PCO's indebtedness regardless of their status as shareholders in PCO. Their liability arose from the guaranty agreements, not from their ownership of

PCO, and Park in fact remained personally liable on his guaranty even after he sold his stock in PCO in January 1985. From 1985 to September 1987, when he repossessed his shares in PCO, Park received no benefits from PCO or from the obligations he had guaranteed. Thus, even if Olson were correct, on the facts of this case the court should conclude that the presumption of unequal liability has been overcome and that each co-guarantor was equally liable on PCO's notes to the Bank. Absent proof that Park benefited disproportionately from the Bank loans, the co-obligors should be required to contribute equally as among themselves. Harris v. Handmacher, 185 Ill. App. 3d 1023, 542 N.E.2d 77, 80 (1989); 18 Am. Jur. 2d Contribution § 22. Because Olson did not pay more than one-third of the total debt to the Bank, he was not entitled to contribution from Park.

CONCLUSION

The court should reverse the judgment of the trial court except to the extent that it grants Olson judgment against PCO for the amount he paid to the Bank and should remand this case to the district court for further proceedings.

DATED this 10th day of October, 1990.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four true and correct copies of the above and foregoing Appellants Reply Brief was mailed, postage prepaid thereon, this 10th day of October, 1990, to:

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