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Supreme Court of Texas.
First Commerce Bank, f/k/a Brazosport Bank of Texas, Petitioner,
v.
Christine Palmer, Individually, and Christine Palmer and Frederick A. Palmer
III, Independent Co-Executors of the Estate of Frederick A. Palmer, Jr.,
Respondents.
No. 05-0686.

November 14, 2006

Appearances:
R. Hayden Burns, Liskow & Lewis, P.C., Houston TX, for petitioner.
Katrina D. Packard, Schulenburg, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Don R. Willett, Harriet O'Neill, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, Scott A. Brister

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JUSTICE WILLETT: The Court is ready to hear argument in 05-0686, First Commercial Bank versus Christine Palmer.
JUSTICE O'NEILL: May it please the Court. Mr Burns, to give his argument to the petitioner. The petitioner has-- his your target in this case.

ORAL ARGUMENT OF R. HAYDEN BURNS ON BEHALF OF THE PETITIONER

MR. BURNS: Thank you, your Honors. This case should have been resolved in favor of the petitioner on the authority of this Court's deci-- decision, 30 years ago in Universal Medals and Machinery against Bohart. In the Bohart case, the Court enforced to guaranty, signed to the guaranty of payment for machinery that was to be delivered to the debtor. Enforced to guaranty even though what was signed suing up after the delivery. The Court also ruled in the Bohart case that because the guaranty was an unconditional guaranty, that way, then any requirements that the creditor proceed first against the debtor that the guaranty would be enforced even though the night will denote signature was hold. The guaranty-- the guarantors and Bohart owned an interest in the debtor company. That's a same situation that we have in this case. The

guarantors by virtue was the ownership interest that the Palmer state owned an interest in the borrower JV3. The Court noted in the Bohart case that the credit transaction, it issued on that case was premise on an agreement by the guarantors to sign the guaranty agreement. The evidence here is the same. The testimony from the Bank president, Mr. Truck, that he insisted the guaranty's be signed before the 1983 note and was renewed in 1988. It's in the letter to the guarantor's telling them that the personal kit-- return in that financial information would have to be provided-- there was a loan modification agreement signed by the guarantors.

CHIEF JUSTICE JEFFERSON: Was there, was there additional consideration provided or is that significant here? Was there additional consideration provided at the beginning or signed the second time?

MR. BURNS: The additional consideration was the extension of renewal of the original credit. That was the benefit to the guarantors and the benefit to the borrower because they have chose in 19'0-- no, March 30, 1988 to 1983 noted into. It was then-- the borrower and guarantor said, "[inaudible]," and the Bank gave them a benefit by extending note and deferring their right, the Bank's right just to the guarantor with $700,000 plus in the status, status consideration.

JUSTICE O'NEILL: I understand this didn't happen in this case but if-- is, is the guaranty only as good as the original amount. I understand why this drawn down and renewed for lesser amount but if it, if it, if a new loan or the restructured loan were greater than the original amount. Could the guarantor's liability be limited under continuing guaranty only to the original amount?

MR. BURNS: Well, the guaranty that's an issue in this case is the 1988 guaranty, not the 1983 guaranty. That 1983 guaranty would have-- would have covered additional draw bounds of money and more than the original million dollars but this guaranty expressly covered the modified loan. So, so this guaranty signed the 1988 a new guaranty after the 1983 guaranty was signed and after the loan modification.

JUSTICE O'NEILL: Now I understand that the loan was, was for a lesser amount.

MR. BURNS: Well, the the cost are been paid on the original million-dollar loan.

JUSTICE O'NEILL: Right.

MR. BURNS: And then some-- the bank felt insecure and this-- it was -

JUSTICE O'NEILL: I understand. But, but, but the-- represent to be hypothetically, that, that, that the loan amount, the renewed amount was higher than the amount originally guarantied.

MR. BURNS: If they did happened under the terms of the new guaranty if they would be guarantying the new loan for the additional amount. Is that it that and this for the example the bank had said or the borrower had said, "Well, we know we owe you seven hundred plus thousand but we need another hundred thousand on top of that." Then the bank would have vote to $700,000 packed on March 30, on the personal contoured and then vote in additional draw down the money reflecting the additional hundred thousand dollars. The Trial Court and the Court of Appeals ignored the Bohart decision, several other decisions and concluded that there is no consideration for guaranty signed after the note. Let's simply not to loan in Texas but stating out that position both the Trial Court and Court of Appeals ignored a lot of case law about what is consideration for guaranty. For years at Dallas Courts of Appeal on the Poland against First National Bank case in the latest

case, took the position that a written recital of consideration would be sufficient to provide consideration for guaranty withdrawn. The San Antonio called realistic similar position in the Beltran case and the respect on the contract takes that position both with restrict option contract in guaranties as for-- for noted that in the Jobbers case and strongly suggested to the written side of your consideration would be enough with respect to the guaranty of contract. But if, if-- it's-- you have to have more than the written recital of consideration that more is something other than the chronological order in which this credit instrument were signed. If you look at the decision in Bohart, the decision from the Dallas Courts of Appeals, the decision of Beaumont Court of Appeals in the Lyndon against Calatim case. The decision of the entire the Court of Appeals in Walter versus Missouri City. You see, you put that more is, is whether the guarantors had a connection to the transaction and whether there was a benefit that extended either to the borrower or and or to the guarantors. And as I've indicated,this guarantors had a connection to the transaction and they the benefit and the borrower received the benefit when this loan was renewed and extended. So under that series of case law, there was certainly consideration for this transaction. But if you take the Court of Appeals viewed at the law is being correct that is the, the chronological order in which this thing be sign this was determining, determinative. The-- there is no legally sufficient evidence in this record that would suggest that the note was signed four months before this guaranty agreement was signed. Mr. Truck testified that note would not have been signed until such time as a Loan Modification Agreement and a Guaranty Agreement were in place. The Loan Modification agreement which has a the same effect to the date of the note is March 30 and of course it was because that's when the first note mature. The Loan Modification Agreement was signed of August 8,9 to 10th, August 9th and 10th by these guarantors the same date that their guarantor-- guaranty was signed.

JUSTICE WILLET: Excuse me. Is, is the fa-- if for example the guarantors failed to produce the new, the new bond-- the new guaranty agreements that had been something trigger the acceleration on the note required.

MR. BURNS: We-- first, the 1983 noted already been accelerated. The State's guarantors and the other two guarantors did not sign the new guaranty agreement. That 1983 note would not have been extended in the bank would have enforced that and save for the total mount agreement.

JUSTICE WIILETT: So that the guaranty whereas require to renew the note.

MR. BURNS: Mr. Truck testified unequivocally that the note would not been removed until the Guaranty Agreement were signed. Guaranty Agreement was signed in Aug-- August that should be long same time was a Loan Modification Agreement was signed in further support from Mr. Truck's testimony came from a plaintiffs exhibit forth, plaintiffs exhibit 16 series of memorandum that reflect that the note is being rolled each month into such time is the record of paper work is in place in the liaison memorandum was on August 8.

JUSTICE WILLETT: They would have rolled that note before fail as obligated ...

MR. BURNS: Also, plaintiff's exhibit 14 is a loan setup she which Mr. Truck testified which prepare immediately after the promissory note was signed and that's set up she-- was dated in August as well. [inaudible] as we look at the Court of Appeal opinion, you can say

first of all, that may fundamental error of law and that it seen that a Guaranty Agreement must be signed or about the same time as you handle that note before to be enforceable. The Court of Appeals in it's legal sufficiency which the-- credited only the date of the note that is March 30 which is the effective date of the notice and the effective date of the Loan Modification Agreement. And I suppose days and credence to the-- looking date of the loan that is the new loan which pro-- retroactively to March 30 because that's when the first loan expired. And you compare let weak circumstantial evidence as to win the promissory note is signed to the evidence about deadline showing that the promissory note was signed after. The guaranty for signing was in under the approach summarize by this Court in the Kelly case is clear. This Court of Appeals got it wrong. They did just to reverse what the Court suggested than should be. They credited evidence that the reasonable jury cannot equipt and disregarded evidence. The reasonable jury would have had this equipt. So not only does the Court of Appeals along in this basic legal assumption about what is consideration for guaranty. It was also wrote when the debt it's legal sufficiency review term there is legal and sufficient evidence a promissory note was signed four months before the guaranty. I think it's important to know that there was not any testimony from Palmer tending the show suggestion that this note was signed four months before the Guaranty Agreements. The only thing that I relied on was the effective date of the note which is the effective date on Modification Agreement and the effective date.

JUSTICE: But we clear, you don't take a matter for four months later enough.

MR. BURNS: No. I don't think money is involve under Bohart and all this at the case. Would not revolve if the dockets suggestion is adoptable because this guaranty says in the first line for bailing receipt that is written inside of the consideration.

JUSTICE: If we, we review on, on that point is the-- what do we do with the cases if the remand for consideration of those other two grounds presented on the direct attorney -

MR. BURNS: No.

JUSTICE: - whether she was a partner or not or whether the collateral was offered.

MR. BURNS: The only-- the other col-- collateral on firm can be an issue on this case because this Guaranty Agreement expressly waives any right to complain about whether the collateral was unfair when the law would plaintiff proceeded against the particular case of collateral. The only other issue is to the amount of all separated to be built. The tricks are all over reflected that there was about 800 and something thousand dollars do on the notes subject to all sets. The only testimony about the all said amount is Mr. Truck who testified that the $129,866 for [inaudible] should be granted. The Palmer's also had no evidence, no alternative evidence about and that's the all such should be. The issue really was whether the plaintiff given enough credit to a royalty interest that took it some-- Mr. Truck said, what he saw that was worth. Mr. Truck had cross-examine the extensively on whether he knew enough to valuate that she also no evidence herself about and you should be offering no evidence till that affirmed since they waive it. She didn't ask for any findings of fact and conclusion of all that affirmative defense. It's purely way-- this is my suggest of distortion render and the banks same votes and-- for the amount there under the note and for contract to the attorney's fees and remand to the Court of Appeals up to the, the interest calculation to see how much-- if they

own the note ...

JUSTICE: Any further question? Thank you Mr. Burns. The Court is now ready to hear arguments from the respondent.

COURT ATTENDANT: May it please the Court. Ms. Packard will present argument for the respondent.

ORAL ARGUMENT OF KATRINA D. PACKARD ON BEHALF OF THE RESPONDENT

MS. PACKARD: Thank you, your Honors, and as to what attorney before me had practiced in about 20 years. I know some of you and I now hail from Schulenburg, Texas and what a pleasure and an honor to stand directly. We all hope that someday but this two can happen to us. Unfortunately, for my client, I am here. But I want to before I get into my argument-- go ahead and counter review again the record as Mr. Burns was presenting. This case is based on a guaranty agreement from my client whose an elderly widow, her son, Mr. Palmer, Third, is here with me today. She was not a partner in the Quail Ridge Farm partnership. She was not a partner at JV3 who was barely entity who worth this million dollar note. This case did not have-- we did not have an opportunity to put on our defense. Another, you know, small wonder in one fact this is the actually, you know, you learn in law school to meaningful direct to verdict don't know who is to expect one. The only person who testified in this case on the Trial Court level was the president of the bank, Mr. Truck. The Court, the Trial Court made it's decision without the-- was proper on the evidence records directly from the bank. The Trial Court reviewed the record. And again, the reason we didn't have an opportunity in the evidence we concluded late one afternoon and the following morning, the court render their verdict. So that is why this record is somewhat limited although there's complaint of the Palmer's didn't do this and the Palmer's didn't do that. The Palmer's didn't have that opportunity to do, to put in that evidence and I want to go back to reflect because there was-- the disagreement here is we have two notes. We don't have one note, your Honors.

JUSTICE: But what if we ask this, if, if she wasn't at the partner of life she signed a loan agreement.

MS. PACKARD: Well, at that time, your Honor, she was led to believe that she had to do that. Her husband died on September 11, 1982. The first note was signed in 1983 and Mr. Staubly.

JUSTICE: So she was somehow defrauded.

MS. PACKARD: She was defrauded which we, you know we even put that evidence on with the bank. The bank president admitted in his testimony, "He never met her, he had no contact with her, he never consulted with her." He solely relied on Mr. Staubly. He was living at the time he would bring the staple work to my client and say, "Christine, you need to sign here." And she did, thinking that she had to do that. And then, before-- after this ...

JUSTICE: Why did the fraud divide the verdict?

MS. PACKARD: Well, I don't know that part, your Honor, because the bank also-- when they made the loan initially the JV3, there was a borrowing entity of the Quail Ridge Grass Partnership introvert as a partnership. Head-- taking this-- that was a fully collateralized note. They had the property what was real property. They had asked for executive life insurance policy is from Mr. Staubly, Mr. Packard, Mr.

Jones and Mrs. Palmer. When we were putting the case on at the Trial Court level and in preparing, I discovered that the Bank in a required specifically the life insurance policy that the premium's be paid by the partnership and that the assignment of those policy is being made at the bank. We discovered that Mr. Jones had taken loans against Mrs. Palmer's policy to himself. Mr. Packard had borrowed approximately 58,000 from his $250,000 policy. The bank testified, they knew all about that.

JUSTICE: I'm assuming that if-- you list to the bank, you're client sue his partner's for steeling all the stuff but that's not's what we're here on today. Question is when the bank, she signs a guaranty. Shouldn't she had to pay to the bank?

MS. PACKARD: Well, she should if she actually got something he had the benefit of the bargain. We go back to old contract law, ensurity law out of the ...

JUSTICE: We don't have to give it personally, of course.

MS. PACKARD: Well, now that she was never -

JUSTICE: [inaudible] if I pay you, if I pay you the college from my daughter to go there. I don't get any benefit.

MS. PACKARD: Yes, you do. Did I call a daughter with a college degree.

JUSTICE: That's not what my daughter thinks.

MS. PACKARD:But I guess, I'm look-- I'm focus on, your Honor, is the fact that she was dote and there was a funding, there was a separate case which the bank would like this Court to believe has no respectful spot in this case, in which she settled with the partnership with JV3 and the Grass Farm Partnership in which she didn't pay 225,000 to say, "I'm done." I am no longer attached to the obligations of JV3. The Quail Ridge Grass Partnership ...

JUSTICE: But the bank didn't sign up on that?

MS. PACKARD: The bank did not, but your Honor, the bank testified, they knew about that litigation and monitored that litigation, Mr. Staubly, Mr. Jones and Mr. Packard were debtors at their bank. We put that evidence on the bank and the other three people; the Jones, [inaudible]

JUSTICE: So you're saying the bank had some obligation to intervene in that settlement.

MS. PACKARD: I think, they had an opportunity too and Mr. Truck testified that they chose not to do that.

JUSTICE: Well, the question was that they had an obligation too. What is the bank here, what arrangements business partners might man of sale.

MS. PACKARD: I don't-- I think you're right Judge Hecht in it there probably is, is none on the banks business but the bank had an opportunity to protect it's investment. At the end of the day the bank back assignments that had, that had originally they had required be made to them a life insurance policies and knowingly knew that Mr. Jones had released-- change of assignments again with Mr. Packard and even changed my client life insurance policy to reflect the assignment to the twelve request partnership and then the bank after knowing that they had lost that part of the collateral in settlement of this case took that back in the near $51,000 and said, "Oh, well, we'll just go after Mrs. Palmer." She has the money and ...

JUSTICE: Is she entitled-- that's what the guaranties ...

MS. PACKARD: But, but my point is, you have two notes and Mrs. Palmer never signed and never had any benefit of this bargain. She has no consideration. She did not get anything -

JUSTICE: She got -

MS. PACKARD: - she going to be into the bank.

JUSTICE: - she got, the argument is that they didn't enforced the guaranty at the which it could have done, which the bank had done. Okay.

MS. PACKARD: Are you-- in terms of the first guaranty? Well, if that is in the-- if you take that one of reasoning if I had enforced first guaranty then they would not admit it to the second guaranty which is my point, you have a separate note, you had a separate guaranty and therefore it should have it's own consideration. The bank had truly funded. I disagree with Mr. Burns statement of the record, beginning on about page 55 of the record. Mr. Truck testified they zero that, that person of genetics separate [inaudible] member. They went to zero they renewed a new number.

JUSTICE: But in 1983, Ms. Palmer agreed to-- unconditionally agreed, Mr. Truck Palmer when due of all indemnifies, obligations, liability for any kind including but not limited to [inaudible], not abstaining or owing or which may here after be executed or incur.

MS. PACKARD: I agree with that, your Honor, and that is all the debt of the JV3 and the partnership of which she was deemed later found to have absolutely no ownership interest -

JUSTICE: What is it just about?

MS. PACKARD: - which is not. Well, if you look at the case law, this Court is rendered at two today, every case in which there has been a guaranty upheld by this Court, it's been because that guarantor had some ownership interest or it actually received something from that guaranty. If you took that one of reasoning, are we going to say after today that a bank can then go and have a note, a guaranty and go get Judge Brister's daughter be the guaranty on it. And she has nothing to do with.

JUSTICE: So you're saying that -

MS. PACKARD: So that's pretty -

JUSTICE: - your saying the 1983 guaranty was invalid also.

MS. PACKARD: Well, if, if the bank believe it was not invalid, why would they've ask Mrs. Palmer to sign a separate guaranty under the 1988 note?

JUSTICE: Well, I'm asking. I understand that. I'm asking you, do you think it's invalid or not?

MS.PACKARD: I think, it's invalid base on the finding that Mrs. Palmer and the estate was no-- was had-- never had ownership interest in the actual borrowing entity.

JUSTICE: When was that finding made and by and she said trial court made that finding ...

MS. PACKARD: That finding was made, your Honor, and let me see, I can tell you the date, it was made on June 19, 1992 by Judge Paul Well in Missouri county. And that was a part of this findings of facts in the Court did but we brought that to the Court's petition, we ask the judicial notice which were allowed to do and the Court took judicial notice of that finding. And ask those questions even at the bank president them self. Again, focusing on, you really had two separate note numbers. You had, you had the bank had zero down, the personal number was 66437 for a million dollars. That bank zero that down to no ballots and had an actual guaranties and then the second note for the 700 something was 290867 and then the bank requested separate guaranties to worth that note. And that is when you have the time to lay difference, they booked that loan on March 30, 1988. The guaranty was not even contemplated by the Palmer's until August 1988. And I

think, that's precludes of what we will be look at is again the bank president testified, he had no contact with the Palmer's all that he would have like to have the Palmer's guaranty this note. The note was well collateralize with the real state with the other three partners with their life-insurance policy. And they were debtor at the bank and that loan was funded and it was made and then after the facts we bootstrap the Palmer's and bring them in. And then with that the trial we discovered that we've lost, I mean that the collateral that was to support the bank's investment in that regard if you will was totally materially altered and the bank was aware.

JUSTICE: The guaranty say that doesn't matter, the guaranty says that doesn't matter.

MS. PACKARD: Well, but it does matter, your Honor, and I'm just-- I agree with you. That is what the guaranty says that-- but again all of the case law today has been-- if I have an ownership interest and I'm the business owner and I'm going to get my widget as a result of my guaranty on the note. Then I have some real interest. Those are not the facts here. We have a widow who has this paper works stuff under her nose, she's guaranteeing all this, she's not involve ...

JUSTICE: That wasn't, that wasn't done by the bank's lawyer or banks representative. Right?

MS. PACKARD: It was not done by the bank. The bank again has testified that they had absolutely no contact with my client, none whatsoever. But that they were aware of the material alteration of the underlying collateral. And it goes back to alternative law, if you're going to identify I think that a consumer in the-- in this case Mrs. Palmer has a right to believe that at least the bank won't-- well at least will protect that investment.

JUSTICE: Why she had that right and she have said that the guaranty, she doesn't it. That the bank can demeaning they want to be collateral and she stealing the book. If she says that how can she believe that that's not what happen?

MS. PACKARD: Well, I'm not take at the time when she signed it. She believe that she wasn't had an ownership interest in the borrowing entity. However, I go back and were, and were reflecting that some what, your Honor. But you didn't go back and say-- and she has no ownership interest. She is not tied to this at all. Her husband shares were part of the collateral but again, now you have a finding that there should have been under Texas partnership law when Mr. Palmer died for whatever reason provided indifferent there was never an accounting of the partnership. And so at that time she truly believes she had to do that. But the law is and the facts that came out was that she didn't have to do that. So why should she now be penalize again when the bank was fully collateralized on the loan had partners who they had enter into that transaction prior to bootstrap and it be will her for months down the road on the guaranty that wasn't necessary. It has become necessary again because of actions of the partners in JV3 and at the bank in the, the, the disappearance that you would, you will, at the collateral.

JUSTICE: If you are damned because re-filed by the bankers association.

MS. PACKARD: At the age, your Honor.

JUSTICE: What's your response?

MS. PACKARD: Well, and I think that they make a really good point other than-- I don't think that this Court, I would hope, in offering that this Court would not want to make a point that. You could just get a third party to sign off on someone's debt and have absolutely no

connection whatsoever in good manner in different. You know, that they would-- the guarantors within this stock at the end of the day. I think so that this Court were to hold with the bank in terms of that you've got an innocent party at here with no connections to this loan other than a widow, a former owner that, that would put a chilling of that on the bank doing business in Texas.

JUSTICE: Well, that sounds very sympathetic and perhaps of good plea to the jury but the fact remain she signed this documents. Now I get the beyond that when there wasn't a finding of fraud against the bank. There's no finding of coercion against the bank. There's not anything like that in the record.

MS. PACKARD: Well, the record only reflects, your Honor, that the bank knew at the time I go back to Court have been made in that-- the note was fully funded it was made on March 30, 1988 and the guaranties were not signed to four months later on August 9-10, 1988 and you have that right to be change and because you have another guaranty, that guaranty should have a separate to considerations that has been the ruled of the law so far. I don't know, and hopefully this Court won't change that rule and that he had find the guarantor and on-going sign guaranty. I'll go ahead and sound that-- and I will had some consideration in that.

JUSTICE: I'll still don't understanding your answer to the argument of the other side which is, "We're not going to sue you on your guaranty if it was not this guaranty." Now, why isn't that at matter?

MS. PACKARD: I'm sorry, would you repeat that, your Honor.

JUSTICE: The bank says, "We won't sue you on this guaranty if you will sign this guaranry." Why isn't that a benefit?

MS. PACKARD: But the bank did not do that. The bank do you know-- the bank did not -

JUSTICE: But they could have done.

MS. PACKARD: They could have done that but the bank did not ...

JUSTICE: Why isn't not the benefit if they could have done it and they didn't do. That's a benefit to the guarantor.

MS. PACKARD: Okay, wait a minute. After it goes back to my head. They did not-- I mean, that if there argument-- well, in first, Mr. Burns also indicated that the guaranty was specifically for this note. I will ask the Justices to go back and look, if you will look at this guaranty and makes no reference to the second note. Neither one of the guaranties make reference to either of the notes. So my position would have been that first guaranty would have still so good for the second note because she was guaranty the obligations and the debt of JV3.

JUSTICE: That's why it seems was ...

MS. PACKARD: That is under Bohart. Again, this is distinguishable from Bohart because in Bohart-- Mr. Bohart own the majority of the stock and again received the direct benefit from the guaranty on the note for his business and again, I go back to the 1992 lawsuit between the partnership in which there was a finding that the partner that Palmer's were not partners they were not part of borrowing entities. So the real true benefit of this note and of this guaranty with to JV3 and the Quail Ridge Grass Partnership, not to my client. So my client should not be a bigger-- making indissoluble strong mend argument if you will, that you know, because she signed it, well, she has the honor, it was a million dollars that we're talking about. And she didn't sign it with the knowledge or the belief that she was the owner of JV3 -

JUSTICE: Counsel, what is, what is your your -

MS.PACKARD: - but [inaudible] preference.

JUSTICE: - What's your response of brief with counter expect with that this law would actually row forward of by month until all the documents were signed by Marus.

MS. PACKARD: Marus-- I did-- I look back in preparing for today. We read the record, that came out at the end that--- I will, I will ask you to go back and look at the record because at the beginning about, Page 50-55 is when that testimony permit the truck as to have the bank actually booked the note, it was not rolled. That note itself was actually the first note had a separate loan number and the note was zero'd out. Then the second note on March 30, 1988 was entered and that transaction was booked as a note. The rate change on the interest was dated that day, not August. So again ...

JUSTICE: According to testimony, according to simply the document what the dates are?

MS. PACKARD: According to both the testimony of Mr. Truck your Honor, and the documents own by with the court.

JUSTICE: Okay. So your position is not was simply not belong, that's not rolled last month until all dockets were completed but actually was renewed and then subsequently they had to [inaudible] guaranty.

MS. PACKARD: That is correct, your Honor, that Mr. Truck testified, they back dated that note to reflect that documentation. In so it's not our position that it was actually held in Limbo until all the paper work was found because I agree with the bankers amicus brief that it would put a chilling effect. If this Court were ruled that, you know, the bankers could not be are, are even corporation did not-- get all the paper would done over a period of time. But that's not what is contemplated here and I think the appellant Court and the Trial Court were both correct in that-- they look at the fact there there was no knowledge at this guaranty by the Palmer. The bank had no connection with the Palmers, they did not speak with the Palmers. They didn't contact the Palmers. It was not contemplated that the Palmers that this guaranty was necessary until four to five months later. And so this note was booked on the strength of the collateral and the shareholders of JV3 which were at time Mr. Presley, Mr. Jones and Mr. Packard. And so-- in that case, this note should be upheld on that way. It's a difficult case and it may very well be a case of first impression before this Court because I can assure you that I-- didn't all over West Law up and under and around and there isn't a lot of lot one on here. But I do have great faith in our justice system that this Court will review this case and we did it's great attention and but we will-- you will render an opinion that will not chill the bank was indicated they are able to make subsequent loans. But in also that a guarantor can sign a guaranty, your Honors, has a right to receive something and that one that has such a different circumstances that this Court will uphold it's former rulings on the back that it has to have separate consideration. And I thank you very much for this opportunity.

JUSTICE: Thank you Counsel.

REBUTTAL ARGUMENT OF R. HAYDEN BURNS ON BEHALF OF PETITIONER

MR. BURNS: The fundamental of law on this type of this argument is that this Quail Ridge Grass Farm, if anything to do with this case. The

borrower on the 1983 note was JV3(d). The borrower on the 1988 note was JV3(e). The Palmer state, own an interest and JV3(e) in 1983 which sided the number of documents in the record that establish at-- they owned an interest in JV3(e) in 1988 again we sided documents about that to look out further then the respondents brief, their appendix includes defendant's exhibit 38 resolution to the JV3 both which shown the Christine Palmers own 25 percent of JV3(e) that the-- stated to those resolutions.

JUSTICE: Ms. Packard, it seems indicate that your client at we ask to the settlement was the bank was part of ...

MR. BURNS: The bank was not a part of a case, the bank knew that the case was going on. There is no evidence in the record that suggest that the bank had any grounds to intervene. In fact, there's no evidence in this record at all but that whatever happen to that case at the pre-trial order the court say, "I'm going to take judicial notice," this are the case didn't say what it was going to play judicial notice of-- we objected the-- our objection is noted nothing was also that the trial in this case from they have take. So the note what happen over there other than if you look at parchment were there is attach to the Palmer's response to summary judgment notice. There is a copy of the agreed judgment and if you look at that, that on Page 122 on supplemental footnote. You see that the banks not recorded, there was no evidence presented at the bank was interpreted was any party to that case which is a pre-requisite for giving that agreed judgment in 1992, any preclusive effect against Dubai and if she goes further in those supplemental court's record to look at the underlying full and final mutual release in settlement between the Palmer's and they use their preference in this Quail Ridge partnership is not for. You will say in paragraph (e), that the party expressly reserve the rights against each other with respect to any obligations under the laws of guaranty indemnity in contribution related to JV3(e) which is the borrower to this case.

MR. BURNS: What exactly was the trial court taking judicial notice?

JUSTICE: I don't know because he didn't tell us. Nobody-- nothing was awful if the trial for him to take judicial notice off. He knows when he took judicial notice are. If you read the Court of Appeals base in but great stock in the fact -

MR. BURNS: They could have done certain things ...

JUSTICE - Ms. Palmer was not according to the agreed judgment, a partner in Quail Ridge Grass Farm apparently the Court of Appeals got confused about who is barrower. The borrower JV3 a company or corporation that this guarantors set an interest in and that was the corporation got of the renewalment.

MR. BURNS: Certainly, certainly, the Trial Court can take the judicial notice of the fact that there was a settlement and an underlying lawsuit or maybe-- ...

JUSTICE: Well, to take judicial notice if there was also said with no after we take a judicial notice of.

MR. BURNS: It could also take--it could have take a judicial notice that your client was on a party to that transaction.

JUSTICE: It was not a party. Right. It should have goes not being in previous in any party from that case or no evidence to that are included. You can't be bound by.

MR. BURNS: I take that you agreed on the respondent that the 1983 guaranty covered that renewal law.

JUSTICE: The 1983 guaranty would have covered it and the 1988

guaranty by it's terms-- part of our appendix. It's very clear that it applies to any borrowings here for or hereafter, given to this party. So essentially what the bank did was modify. They got a loan and put to but then asked all the guarantors and the borrower to agreed to a modification of for way any complaints and defenses that they have related to that personal and to sign new guaranty put this on this on blue foot. If you look at findings of exhibit 16 [inaudible] August 8, Mr. Truck told the Note Department, [inaudible] call they the 9188, the loan documents and the renewal would be booked before the end of the month. It had similar memo before that.

JUSTICE: Think you see your time has expired [inaudible] further question [inaudible].

JUSTICE: Chief Justice, I might just one question have one question which hopefully will require a brief in response. Ms. Packard eluded to things about her client being a widow and so forth is not knowing exactly who was presented to her if this document's were signed. What is your response?

JUSTICE: Well, there is nothing in the record to the effect she didn't know about the documents didn't have a confidence to make a decision about whether to sign the documents. [inaudible]

JUSTICE: Thank you Counsel. The file has submitted and we complete all arguments from this morning. And the Marshal now adjourn the court.

JUSTICE: All rise. Oyez, oyez, oyez. The Honorable Supreme Court Texas, now case adjourned.

2006 WL 5918083 (Tex.)