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# IN THE SUPREME COURT OF FLORIDA

## CASE NO. SC13-992

LEON KOPEL,

Petitioner,

vs.

L.T. Case No.: 3D11-536

BERNARDO KOPEL and
ENRIQUE KOPEL,

Respondents.

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ON DISCRETIONARY REVIEW OF A DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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## INITIAL BRIEF OF PETITIONER, LEON KOPEL

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# TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE AND FACTS ..... 1

A. Facts Relevant to the Appeal ..... 2

B. Course of Proceedings ..... 6

C. Disposition in the Third DCA ..... 7

D. Standard of Review ..... 8

SUMMARY OF ARGUMENT ..... 9

ARGUMENT ..... 10

I. EVEN THOUGH COUNT II STATED A NEW CAUSE OF ACTION, IT RELATED BACK TO THE DATE OF THE ORIGINAL COMPLAINT BECAUSE IT WAS BASED ON THE SAME CONDUCT ALLEGED IN THAT COMPLAINT ..... 10

II. THE EVIDENCE SUPPORTED LEON'S CLAIM FOR UNJUST ENRICHMENT BECAUSE HE CONFERRED A BENEFIT ON THE DEFENDANTS BY PAYING DEBT THEY OWED TO SCHARJA AND CHANA KOPEL AND BY SUPPLYING FUNDS TO CORPORATIONS ENRIQUE CONTROLLED ..... 16

III. SUBSTANTIAL, COMPETENT EVIDENCE SUPPORTED THE JURY'S VERDICT ON ALL COUNTS IN THE COMPLAINT ..... 19

CONCLUSION ..... 25

CERTIFICATE OF SERVICE ..... 26

CERTIFICATE OF COMPLIANCE ..... 26

## TABLE OF AUTHORITIES

## CASES

*Aills v. Boemi*,
29 So. 3d 1105 (Fla. 2010) ........ 9

*Anderson v. Trade Winds Enters. Corp.*,
241 So. 2d 174 (Fla. 4th DCA 1970) ........ 23

*Armiger v. Associated Outdoor Clubs, Inc.*,
48 So. 3d 864 (Fla. 2d DCA 2010) ........ 12, 14

*Berges v. Infinity Ins. Co.*,
896 So. 2d 665 (Fla. 2004) ........ 9

*BP Prods N. Am. Inc. v. Super Stop No. 701, Inc.*,
No. 08-61301-CIV, 2009 WL 5068599 (S.D. Fla. Dec. 17, 2009) ........ 23

*Caduceus Props., LLC v. Graney*,
137 So. 3d 987 (Fla. 2014) ........ 8, 13, 21

*Canakaris v. Canakaris*,
382 So. 2d 1197 (Fla. 1980) ........ 16

*Christensen v. Bowen*,
140 So. 3d 498 (Fla. 2014) ........ 9, 24

*Cox v. St. Josephs Hosp.,*
71 So. 3d 795 (Fla. 2011) ........ 21

*Daniels v. Weiss*,
385 So. 2d 661 (Fla. 3d DCA 1980) ........ 16

*Dausman v. Hillsborough Area Reg'l Transit*,
898 So. 2d 213 (Fla. 2d DCA 2005) ........ 12

*Fabbiano v. Demings*,
91 So. 3d 893 (Fla. 5th DCA 2012) ........ 12, 14, 15

*Fla. Power Corp. v. City of Winter Park*,
887 So. 2d 1237 (Fla. 2004) ........ 17

*GEICO Gen. Ins. Co. v. Hoy*,
136 So. 3d 647 (Fla. 2d Cir. 2013) .................................................................... 24

*Huntsman Packaging Corp. v. Kerry Packaging Corp.,*
992 F. Supp. 1439 (M.D. Fla. 1998)................................................................... 18

*Janie Doe 1 ex rel. Miranda v. Sinrod,*
117 So. 3d 786 (Fla. 4th DCA 2013)............................................................ 14, 18

*Keel v. Brown*,
162 So. 2d 321 (Fla. 2d DCA 1964)................................................................... 13

*Kopel v. Kopel*,
Adv. Case No. 12-02188-RAM (Bankr. S.D. Fla. Mar. 28, 2013) ....................... 8

*Lasar Mfg. Co. v. Bachanov*,
436 So. 2d 236 (Fla. 3d DCA 1983)................................................................... 16

*Livingston v. Malever*,
137 So. 113 (Fla. 1931) ..................................................................................... 15

*Lopez-Loarca v. Cosme*,
76 So. 3d 5 (Fla. 4th DCA 2011)........................................................................ 12

*Mainlands Constr. Co. v. Wen-Dic Constr. Co.*,
482 So. 2d 1369 (Fla. 1986) ............................................................................... 13

*Peoples Nat'l Bank of Commerce v. First Union Nat'l Bank of Fla. N.A.*,
667 So 2d 876 (Fla. 3d DCA 1996).................................................. 16, 17, 18, 19

*Southstar Equity, LLC v. Chau*,
998 So. 2d 625 (Fla. 2d DCA 2008)................................................................... 22

*Spancrete, Inc. v. Rinker Materials Corp.*,
623 So. 2d 760 (Fla. 3d DCA 1993)................................................................... 23

*Thomas v. Wyatt*,
405 So. 2d 1369 (Fla. 4th DCA 1981)........................................................... 22, 23

*Trumbull Ins. Co. v. Wolentarski*,
2 So. 3d 1050 (Fla. 3d DCA 2009)..................................................................... 15

*Van v. Schmidt,*
122 So. 3d 243 (Fla. 2013) ........ 21, 24

**STATUTES AND OTHER AUTHORITY**

11 U.S.C. § 362 ........ 8

**OTHER AUTHORITIES**

Fla. R. Civ. P. 1.190 ........ 11

Fla. R. Civ. P. 1.190(c) ........ 11, 13, 14, 16

# STATEMENT OF THE CASE AND FACTS

In this case, Petitioner, Leon Kopel ("Leon"), brought claims for money lent, breach of an oral promise, and unjust enrichment, arising from a business dispute with his brother, Enrique Kopel ("Enrique") and his nephew, Bernardo Kopel ("Bernardo"). After a jury delivered a verdict in favor of Leon on all three counts, the trial court entered judgment against Enrique and Bernardo for $5 million in damages, as well as about $9 million in prejudgment interest.

The Third DCA, however, reversed the jury verdict and remanded for entry of judgment in Respondents' favor (the "Opinion"). The panel found that Leon's claim for breach of an oral promise to repay money lent of $5 million did not relate back to his original complaint—even though that complaint alleged a claim for money lent in the same amount—and was therefore barred by the statute of limitations. The Third DCA held that, "[t]o relate back, the pleading must not state a new cause of action." The Florida Rules of Civil Procedure, however, *eliminated* that rule; and this Court—and every other district court of appeal—has adopted the modern rule that an amended complaint stating a new claim or legal theory relates back to an earlier complaint if it is based on the same conduct, transaction, or occurrence alleged in the earlier pleading.

The Third DCA also found that "the evidence does not support the claims alleged in any of the three counts." But the Opinion does not explain why the

substantial evidence does not support Leon's claims for money lent and breach of an oral promise to repay it. And the holding that Leon has no unjust enrichment claim because he did not allege a direct benefit to Enrique or Bernardo is incorrect as a matter of law. This Court should reverse the Opinion and remand with instructions to reinstate the jury verdict as modified by the trial court.

### A. Facts Relevant to the Appeal

This action arises out of a business dispute between Petitioner, Leon Kopel, on one side; and Respondents Enrique Kopel (Leon's brother) and Bernardo Kopel (Leon's nephew) on the other (A. 10).[1] After Bernardo graduated from college in 1987, he pursued business opportunities with the assistance of his grandfather, Scharja Kopel, Leon and Enrique's father (A. 11, 44, 84-86, 176, 314). At Scharja's direction, Leon and Enrique borrowed millions of dollars, supported by collateral owned by Scharja and his wife, Chana Kopel, and gave the money to Bernardo to invest (A. 49-50, 53-54, 86-88, 176-78, 333, 336). The money was invested in two corporations: KOP I, which owned a one-half interest in a warehouse in Miami-Dade County, and KOP II, which wholly owned a shopping center in Miami-Dade County (A. 45, 52, 58, 179). It is undisputed that all parties involved in the original business relationship intended that Leon, Enrique and

[1] "A. #" refers to the page number of the appendix submitted with this brief. The record cite for those documents is found in the appendix table of contents.

Bernardo would each own one third of the corporations (A. 45-47, 52, 55, 58, 74, 87-88, 176, 275-77, 314, 342-43). Although Leon and Enrique made substantial financial contributions, Bernardo did not invest in either company (A. 48, 55).

Despite the parties' intent to divide ownership equally among Leon, Enrique and Bernardo, all of the stock of KOP I and KOP II was issued to Bernardo (A. 89-91, 178-80, 277, 342-43). Enrique admitted that Bernardo's ownership of all the stock "was not the way it was supposed to be" (A. 343). Nonetheless, Bernardo represented to the IRS in tax returns—as well as in an IRS audit—that he was the corporations' sole owner (A. 51, 91-92, 118-119, 343). Bernardo admitted that, as a one-third owner, he was entitled only to a one-third share of control, profits and losses, but conceded that he took 100% of the corporations' tax losses on his personal tax returns (A. 116-117).

In 1991, Leon learned that, despite the parties' intent, he did not own *any* stock in KOP I or KOP II, and that he could not do so because both KOP I and KOP II were S corporations whose shareholders must be U.S. citizens (Leon is a citizen of the Dominican Republic) (A. 179-80, 274-75, 343, 425-26). Leon, Enrique, and Bernardo then met with a tax attorney, Michael Rosenberg, to discuss restructuring the corporations to recognize Leon and Enrique's ownership interests (A. 180-81, 343). Because Leon was dissatisfied with the options presented, the

parties agreed that Leon's funding of the two corporations would be considered a loan to Bernardo (A. 181, 270-71, 227-31, 343, 427).

At about the same time, Scharja had a disagreement with Bernardo and asked him to return the money he had given him to start the businesses (A. 133, 181-82, 317-18, 344-45). Soon thereafter, Enrique asked Leon to lend Bernardo $5 million, and both Bernardo and Enrique promised to repay him (A. 183-88). Leon no longer trusted Bernardo, and only agreed because of Enrique's promise to repay the loan quickly (A. 183, 429). To repay Scharja and make the loan to Bernardo, Enrique and Leon obtained $15 million in loans from the Royal Bank of Canada; Enrique borrowed $10 million through his solely owned corporation, Beko Corporation, and Leon borrowed $5 million through his solely owned corporation, Lerif International (A. 49-50, 133, 184-87, 235-36, 349).

In late 1991, Leon and Enrique used the $15 million to return money they had borrowed from their parents, to buy a defaulted construction-loan mortgage from Southeast Bank against the warehouse property, and to buy out the warehouse property's co-owner, Harold Chopp (A. 52, 54-55, 132, 134-35, 182, 188, 201, 236, 317-20, 336-37, 344-45, 350). Thus, the loan proceeds enabled Enrique to double his interests in the warehouse property (A. 351).

Despite contributing personal funds to KOP I and KOP II, Leon never received a one-third interest in the companies (A. 188-89). Leon began to ask for

the return of his money, but Enrique responded that he needed additional time because he was trying to secure a new loan (A. 189). In 1992, Leon requested a meeting with Enrique, Bernardo, Scharja, and Chana because he wanted his parents to witness that Enrique had promised to repay the money (A. 189-90, 330). Enrique promised, in his parents' presence, that he and Bernardo would repay Leon (A. 71-72, 74-76, 190-91). The parties agreed that Leon's money would be returned to him within three months, and Leon would release any interest in the corporations (A. 191). Enrique agreed that he would repay Leon's $5 million loan to Bernardo (A. 71-72, 74-76). He admitted that, in April 1992, he promised in front of his parents that he would pay Leon $5 million in return for Leon's interests in the corporations (A. 331, 356-57).

Despite that promise, Enrique never repaid Leon (A. 188, 191-92). Enrique and Bernardo later sold all of the assets of the two companies—which they asserted at trial were still partially owned by Leon—for a combined $19 million (A. 121-22, 197, 353-54). Leon never received stock in KOP I or KOP II; nor did he receive any portion of the proceeds from the sale of the corporations' assets (A. 188-89, 196-97, 342-43, 354, 356). In short, Leon has never been paid the $5 million, plus interest, that he lent to Bernardo and which Enrique promised to repay (A. 197-98, 362).

**B. <u>Course of Proceedings</u>**

Leon filed this action in 1994 (A. 1). His original complaint included Count III for money lent, in which he alleged that he and Enrique borrowed $15 million from the Royal Bank of Canada; that he loaned $5 million of that amount to Bernardo in 1991; and that Bernardo and Enrique refused to repay the loan (A. 8).

After a 2008 trial ended in a mistrial, the trial court ordered the parties to amend their pleadings (A. 454). Leon's amended complaint included Count II for breach of an oral agreement, in which he alleged that, in 1991, he loaned $5 million to Bernardo, and that later Enrique and Bernardo orally promised to repay the loan but never did (A. 12). In Count III, Leon alleged that Enrique and Bernardo were unjustly enriched when they accepted a $5 million benefit Leon conferred on them (A. 12).

On re-trial, the jury found that Leon loaned Bernardo $5 million in 1991, that Enrique and Bernardo breached an oral promise to repay that loan, and that Enrique and Bernardo were unjustly enriched (A. 445-47). The jury awarded Leon $10 million (*id.*). The trial court reduced the award to $5 million and granted prejudgment interest, for a total judgment of over $14 million (A. 448).

Enrique and Bernardo appealed, arguing that the trial court abused its discretion when it allowed Leon to amend his complaint to add Count II (breach of

an oral promise to repay the loan) and that the verdicts were against the manifest weight of the evidence (3d DCA Initial Br. 21-41).

### C. <u>Disposition in the Third DCA</u>

While this case was pending in the Third DCA, Bernardo filed a Chapter 7 petition in the United States Bankruptcy Court for the Southern District of Florida. He listed Leon's judgment as an unsecured non-priority claim.

The Third DCA reversed the judgment and remanded for entry of judgment for Bernardo and Enrique (A. 460). The Opinion states that, "for an amended pleading to survive a motion to dismiss after the statute of limitations has passed, an amended complaint must relate back to the original pleading made before the expiration of the statute of limitations," and that, "[t]o relate back, the pleading must not state a new cause of action" (A. 457). Applying that principle, the Opinion held that Count II—for breach of an oral promise to repay the 1991 loan—was barred by the statute of limitations "for its failure to relate back" (A. 458). Although the Opinion acknowledges that, before the 2008 trial, Leon's complaint "sought the same $5 million back as an alleged loan to both Bernardo and Enrique," the panel nevertheless concluded that Count II was time-barred as a "new claim of an oral promise to pay [Leon] $5 million" (A. 453, 458). The Opinion states that, because Count II "was new, different, and distinct from that

which was originally pled," and because it "states a new action, it cannot relate back as a matter of law" (*id.*).

The Third DCA also held that "Bernardo and Enrique are entitled to judgment as a matter of law because the evidence does not support the claims alleged in any of the three counts" (A. 456). The Opinion, however, does not include any explanation of why insufficient evidence supported Counts I (money lent) and II (breach of oral agreement). As to Count III, the Opinion holds that "there was no unjust enrichment because there was no benefit conferred to either Enrique or Bernardo individually" (A. 459).

Eight days after the Opinion, the bankruptcy court permitted Leon to seek review in this Court notwithstanding the automatic stay provisions of 11 U.S.C. § 362. *See Kopel v. Kopel*, Adv. Case No. 12-02188-RAM (Bankr. S.D. Fla. Mar. 28, 2013) (Dkt. 24). Leon invoked this Court's jurisdiction based on a conflict between the Opinion and decisions of this Court and of other district courts of appeal. This Court accepted jurisdiction.

### D. Standard of Review

A district court's application of the relation-back doctrine is reviewed *de novo*. *Caduceus Props., LLC v. Graney*, 137 So. 3d 987, 991 (Fla. 2014). Also reviewed *de novo* is the Opinion's holding that Count III failed as a matter of law "because there was no benefit conferred to Enrique or Bernardo individually" (A.

459). *See Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010) ("Because this is a question of law . . . the standard of review is de novo."). This Court reviews a jury verdict to determine whether it is supported by substantial, competent evidence. *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 675-76 (Fla. 2004) ("an appellate court will not disturb a final judgment if there is competent, substantial evidence to support the verdict on which the judgment rests.") This Court reviews de novo an order entered on a motion for a directed verdict. *Christensen v. Bowen*, 140 So. 3d 498, 501 (Fla. 2014).

## SUMMARY OF ARGUMENT

Contrary to the law of this Court and of every other DCA, the Opinion held that a claim in an amended complaint presenting a new legal theory did not relate back to an earlier complaint because it stated a new cause of action, even though the earlier complaint, involving the same parties, alleged a claim based on precisely the same conduct and in the same amount. That holding—based on an antiquated rule that the Florida Rules of Civil Procedure eliminated—was error.

It also was error to reverse the verdict on the unjust enrichment claim on the basis that Leon did not confer a direct benefit on Enrique or Bernardo. Leon presented evidence, which the jury was entitled to believe, that Leon conferred a benefit on the Defendants by repaying obligations they owed to Scharja and Chana

Kopel and by supplying funds to two corporations Enrique controlled. An indirect benefit to a controlling shareholder *does* support a claim for unjust enrichment.

The Third DCA also erred in overturning the jury verdict for Leon on all three counts. Although the Opinion held that no evidence supported any of the claims, it did not discuss Count I at all, and it ignored the substantial evidence supporting the jury's verdict on Counts II and III. Instead, the court improperly remanded for entry of a judgment in favor of Bernardo and Enrique.

This Court should reverse the Opinion and remand with instructions to reinstate the jury's verdict and the ensuing judgment.

## ARGUMENT

As we show below, (I) Count II relates back to the original complaint because it was based on the same conduct alleged in that complaint; (II) Count III states a claim for unjust enrichment; and (III) substantial, competent evidence supported the jury's verdict on all three Counts.

### I. EVEN THOUGH COUNT II STATED A NEW CAUSE OF ACTION, IT RELATED BACK TO THE DATE OF THE ORIGINAL COMPLAINT BECAUSE IT WAS BASED ON THE SAME CONDUCT ALLEGED IN THAT COMPLAINT

The Opinion states that "to relate back, the pleading must not state a new cause of action" (A. 457). That is not the law. As we discuss below, (A) the plain language of the rule allows a new cause of action to relate back to the original pleading when it arises out of the same conduct, transaction, or occurrence; (B)

both this Court and every DCA except the Third have interpreted the rule just as it reads; and (C) the Third DCA relied on cases that applied the antiquated rule.

### A. The plain language of the rule allows a new cause of action to relate back to the original pleading when it arises out of the same conduct, transaction, or occurrence

The Opinion flatly contradicts the language of the rule itself: "When the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment *shall* relate back to the date of the original pleading." Fla. R. Civ. P. 1.190(c) (emphasis supplied).

The rule is clear and unequivocal: to relate back, the claims must arise "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." This has been the rule *since 1954*. *See* Fla. R. Civ. P. 1.190 cmt. (1967) (noting that the rule was originally codified as rule 1.150(c) in 1954). The 1967 comment to Rule 1.190 states that "[t]he principle of relation back of amended pleadings existed in prior law, but it was limited to an amendment which did not state a new cause of action." *Id.* The revised rule, which was intended to ameliorate the "harshness" of the old rule, *id.*, changed that condition and requires "only that the amendment arise out of the 'conduct, transaction, or occurrence' set forth in the original pleading," under the established principle that rules governing amendments to pleadings should be liberally construed and applied. *See*, *e.g.*,

*Dausman v. Hillsborough Area Reg'l Transit*, 898 So. 2d 213, 215 (Fla. 2d DCA 2005) (stating that leave to amend "should be freely given, the more so . . . when the amendment is based on the same conduct, transaction and occurrence upon which the original claim was brought").

### B. Both this Court and every DCA except the Third have interpreted the rule just as it reads

The rule's clarity is why every other DCA has rejected the Third DCA's antiquated rule and instead applies the modern rule that an amended pleading asserting a new claim or legal theory based on the same conduct, transaction, or occurrence *does* relate back to an earlier complaint. *See Fabbiano v. Demings*, 91 So. 3d 893, 894-95 (Fla. 5th DCA 2012) (holding that "an amendment to state a new legal theory should relate back" when it is based on the same "conduct, transaction or occurrence as alleged in the original complaint"); *Lopez-Loarca v. Cosme*, 76 So. 3d 5, 9 (Fla. 4th DCA 2011) (finding that the "conduct, transaction or occurrence" test "allows for [a]n amendment which . . . changes the legal theory of the action, [to] relate back even though the statute of limitations has run in the interim") (citation and internal quotation marks omitted); *Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864, 870 (Fla. 2d DCA 2010) ("[T]he proper test of relation back of amendments is not whether the cause of action stated in the amended pleading is identical to that stated in the original . . . but whether the pleading as amended is based upon the same specific conduct, transaction, or

occurrence between the parties upon which the plaintiff tried to enforce his original claim") (citation omitted); *Leavitt Commc'ns, Inc. v. Quality Commc'ns of Am.*, 939 So. 2d 257, 258 (Fla. 1st DCA 2008) ("A cause of action contained in an amendment to a pleading is considered filed on the date of the original complaint if it 'arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading.'") (quoting Fla. R. Civ. P. 1.190(c)).

This Court applies the same test. In *Mainlands Construction Co. v. Wen-Dic Construction Co.*, 482 So. 2d 1369, 1370 (Fla. 1986), the plaintiff moved to dismiss an amended counterclaim, arguing that it was time-barred because not made within 20 days of filing the complaint. This Court disagreed, holding that the "amended counterclaim relates back to the date of the original pleading as it arose out of the conduct, transaction or occurrence set forth in the original pleading." *Id.* And recently, in *Caduceus Properties, LLC v. Graney,* 137 So. 3d 987 (Fla. 2014), this Court stated that "the plaintiff's claims in the amended complaint must arise from the same 'conduct, transaction, or occurrence' set forth in the third-party complaint," *id.* at 989, noting that relation back doctrine is "to be liberally construed and applied." *Id.* at 992. The Court explained that "Florida has a judicial policy of freely permitting amendments to the pleadings so that cases may be resolved on the merits, as long as the amendments do not prejudice or disadvantage the opposing party. Permitting the relation back of pleadings under

rule 1.190(c) when the claims arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the [ ] complaint is consistent with this judicial policy." *Id*. at 991-92 (citation and internal quotation marks omitted).

Courts have rejected attempts to revive the old rule. In *Fabbiano*, for example, the defendant argued against an amendment because "the claim in the amended complaint is based on a different 'cause of action' than that stated in the original pleading." 91 So. 3d at 894. The Fifth DCA disagreed: although the "'cause of action' test [was] embodied in the prior law," the "modern rule" requires only that the new claim "arise out of the 'conduct, transaction, or occurrence'" alleged in the earlier pleading. *Id*. at 895. The modern rule is "grounded in the notion of fair notice. When the original complaint gives fair notice of the factual underpinning for the claim, an amendment to state a new legal theory should relate back." *Id*.; *see also Janie Doe 1 ex rel. Miranda v. Sinrod,* 117 So. 3d 786, 789 (Fla. 4th DCA 2013) (allowing a claim to relate back where the initial complaint gave "fair notice of the general factual situation"); *Armiger*, 48 So. 3d at 870 (Fla. 2d DCA 2010).

Here, there is no question that Bernardo and Enrique had fair notice of the new claim. That claim—for breach of an oral promise—is based on precisely the same facts alleged in Leon's very first complaint. The original complaint, filed in 1994, alleged that in October 1991 Leon and Enrique borrowed $15 million from

the Royal Bank of Canada, that Leon loaned $5 million of that amount to Bernardo, and that Bernardo and Enrique refused to repay the loan (A. 4-5). Count III of the original complaint alleged that "Plaintiff Leon loaned to Defendants $5,000,000" and that "Defendants have failed and refused to pay Plaintiff Leon any of the monies lent" (A. 8). Thus, Count II of the amended complaint—a claim for breach of an oral promise to pay $5 million—is based on precisely the same "general factual situation" that has been alleged from the start, and the Defendants have always had "fair notice" of its factual basis.

### C. <u>The Third DCA relied on cases applying the antiquated rule</u>

In sharp contrast to the "conduct, transaction or occurrence" test followed in this Court and every other DCA, the Third DCA held that, "because the fifth amended complaint states a new action, it cannot relate back as a matter of law" (A. 458). But the cases on which the Opinion relied are either wrong or no longer apply. The Opinion cites *Trumbull Insurance Co. v. Wolentarski*, 2 So. 3d 1050 (Fla. 3d DCA 2009), which in turn relies on *Livingston v. Malever*, 137 So. 113 (Fla. 1931). But *Livingston* was "decided before the modern rule was adopted," *Fabbiano*, 91 So. 3d at 895, and applies the old rule that, "while it may have arisen out of the same transaction," a new claim does not relate back if it "constitutes a new and different ground of liability." 137 So. at 119.

The Opinion cites another Third DCA decision, *Daniels v. Weiss*, 385 So. 2d 661, 663 (Fla. 3d DCA 1980) (A. 457), but *Daniels* similarly applied the antiquated "cause of action" test, failing even to acknowledge the modern rule embodied in rule 1.190(c). The Opinion also cites *Lasar Manufacturing Co. v. Bachanov*, 436 So. 2d 236 (Fla. 3d DCA 1983). But in *Lasar* the Third DCA held that the trial court abused its discretion when it allowed the plaintiffs to amend their complaint *in the middle of trial*—unlike here, where the Fifth Amended Complaint was filed twenty months *before* trial (A. 12). *Id.* at 238. Moreover, *Lasar* held that the plaintiffs "should be given leave to amend their complaint, if they so desire, to include a prayer for punitive damages. Such an amendment will relate back to the date of the filing of the original complaint." *Id.*[2]

For these reasons, this Court should quash the Opinion and hold that Count II related back to the original complaint.

## II. THE EVIDENCE SUPPORTED LEON'S CLAIM FOR UNJUST ENRICHMENT BECAUSE HE CONFERRED A BENEFIT ON THE DEFENDANTS BY PAYING DEBT THEY OWED TO SCHARJA AND CHANA KOPEL AND BY SUPPLYING FUNDS TO CORPORATIONS ENRIQUE CONTROLLED

The Third DCA also held that the evidence did not support a claim for unjust enrichment because "[u]njust enrichment requires that the benefit be direct to the

[2] The Opinion also cites *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980) (A. 456), but that case merely explains the abuse-of-discretion standard.

litigant," (A. 459 (citing *Peoples Nat'l Bank of Commerce v. First Union Nat'l Bank of Fla. N.A.*, 667 So 2d 876 (Fla. 3d DCA 1996))), and that "[h]ere[] there was no unjust enrichment because there was no benefit conferred to either Enrique or Bernardo individually" (A. 459). That is not the law either.

As the Third DCA acknowledged (*id.*), this Court has held that the elements of an unjust enrichment claim are "a benefit conferred upon a defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof." *Fla. Power Corp. v. City of Winter Park*, 887 So. 2d 1237, 1242 n.4 (Fla. 2004). The Third DCA held that there was no evidence that there was any benefit conferred to either Enrique or Bernardo, "only an indirect benefit through a corporation of which Enrique happened to be an owner" (A. 460). But the panel ignored the evidence that Enrique and Bernardo directly benefited from Leon's $5 million when they used that money to repay funds they owed to Enrique's parents, and to buy out the remaining one-half interest in the warehouse co-owned by Harold Chopp and KOP I, which effectively doubled the value of Enrique's interest in the warehouse (A. 181-82, 351).

Moreover, although the Third DCA found that Leon indirectly supplied a portion of the $5 million to Enrique through two foreign corporations—Eminence

Corporation, N.V. and Nautilus Holding Ltd., BVI—Enrique admitted that he controlled a two-thirds interest in both companies (A. 133-34, 352-53; 3d DCA Initial Br. 2). Enrique also admitted that he did not send Leon any of the money Eminence received when the company's primary asset—the mortgage note on the warehouse—was paid off in 2006 (A. 353). The Opinion cites no authority for the proposition that a controlling shareholder cannot be unjustly enriched by a benefit conferred upon the corporation, and other courts have held that an indirect benefit *does* support an unjust enrichment claim. *See Malamud v. Syprett*, 117 So. 3d 434, 438-39 (Fla. 2d DCA 2013) (finding that the controlling member of a limited liability company "personally was unjustly enriched by a benefit conferred to him" when the plaintiff paid the LLC); *Huntsman Packaging Corp. v. Kerry Packaging Corp.,* 992 F. Supp. 1439, 1446 (M.D. Fla. 1998) (holding that a claim for unjust enrichment existed against the principal of a corporation that received value from the plaintiff, noting that "it would be most inequitable for [the principal] to accept the benefit conferred by plaintiffs without compensating them").

The Opinion relies on only one case, *Peoples National Bank of Commerce v. First Union National Bank of Florida N.A.*, 667 So. 2d 876 (Fla. 3d DCA 1996), for the proposition that "[u]njust enrichment requires that the benefit be direct to the litigant" (A. 459). But *Peoples* does not so hold. In that case, a group of five banks participated in an acquisition and development loan, and one of the banks

sued the others for unjust enrichment, alleging that the loan's *administrator* had overpaid the other banks. *Id.* at 878-79. The court found that "if any benefit was conferred upon each participant lender in the form of overpayments, it could only have been conferred upon them by [the administrator]," not by the plaintiff. *Id.* Thus, *Peoples* does not apply here, where Leon conferred a benefit on Enrique by conferring a benefit on the corporation Enrique controls.

For these reasons, this Court should quash the Opinion's holding that Leon failed to prove his unjust enrichment claim.

## III. SUBSTANTIAL, COMPETENT EVIDENCE SUPPORTED THE JURY'S VERDICT ON ALL COUNTS IN THE COMPLAINT

The Opinion ignores the considerable evidence supporting Leon's claims for money lent, breach of oral promise, and unjust enrichment. Moreover, the panel applied the wrong standard of review when it reversed the trial court's decision to deny Bernardo and Enrique's motion for a directed verdict.

### A. The Third DCA ignored the extensive evidence supporting Leon's three claims

Although the Opinion states that "the evidence does not support the claims alleged in any of the three counts" (A. 456), the Opinion does not address Count I at all, and does not acknowledge the substantial evidence supporting the jury's verdict in Leon's favor on Count I for money lent, or Count II for breach of an oral agreement, or Count III for unjust enrichment.

At trial, Leon presented extensive evidence supporting the jury's specific finding on Count I that "Leon Kopel loan[ed] $5,000,000 to Bernardo Kopel in October of 1991 which was not paid" (A. 445). For example, Leon repeatedly testified that he loaned $5 million to Bernardo in 1991, based on Enrique's promise to pay back that loan, and that Bernardo also promised to repay the loan (A. 181-89, 196-97, 420). Enrique's mother, Chana Kopel, corroborated that testimony (A. 71), as did Michael Rosenberg, the attorney who arranged the transaction (A. 277, 280-81).

Defendants argued to the Third DCA that Leon testified that there was not a loan because, when asked on cross examination, "So now you're saying you didn't loan money in October of 1991 to Benny, is that what you're telling us today?," he answered: "No. Because the money was used to front what they had to comply with" (A. 201-02). That answer, however, is ambiguous on its face—it could mean "no there was no loan" or "no the premise of the question is incorrect." Just a few minutes later, Defendants' counsel asked, "Now, let's talk about this loan in 1991. The loan was in October, correct?" Leon answered "Yes" (A. 204). When Defendants later called Leon as their own witness, he was asked, "Sure, you're telling the [jury] that these two notes you told us . . . are not part of the five million dollars that you're claiming you loaned to Benny in 1991?" to which Leon answered: "The five million that I loaned Benny is one thing" (A. 431).

Thus, Leon never repudiated his testimony that he loaned $5 million to Bernardo. Indeed, Defendants themselves elicited Leon's testimony that he loaned Bernardo $5 million in 1991 (A. 431). Resolving such factual questions is for the jury. As this Court has repeatedly held, jury determinations are entitled to deference, and it is not the appellate court's role to reweigh the evidence. *See*, *e.g.*, *Friedrich v. Fetterman & Assocs., P.A.,* 137 So. 3d 362, 366 (Fla. 2013) ("A review of the district court's opinion and the record demonstrates that the district court impermissibly reweighed the evidence and substituted its own evaluation of the evidence in place of that of the jury."); *Van v. Schmidt,* 122 So. 3d 243, 259 (Fla. 2013) ("[T]he First District was not at liberty to [ ] reweigh the evidence presented in the case to decide whether the jury reached a result supported by the evidence."); *Cox v. St. Josephs Hosp.,* 71 So. 3d 795, 800 (Fla. 2011) ("A review of the district court's opinion and the record demonstrates that the district court impermissibly reweighed the evidence and substituted its own evaluation of the evidence in place of the jury.").

The Opinion also overlooks the evidence supporting Count II, for breach of Enrique's and Bernardo's oral agreement to pay $5 million to Leon. As Chana Kopel testified, at a 1992 meeting among Enrique, Leon, and their parents, Enrique promised—and represented that he was speaking on behalf of Bernardo—that he and Bernardo would repay Leon the $5 million (A. 71-72, 74-76, 190-91). Indeed,

Enrique admitted that, at that meeting with his parents, he repeated his 1991 promise to pay Leon the $5 million in return for Leon's interests in certain properties (A. 331, 356-57). The Opinion overlooked that evidence, however, because (as discussed above) it erroneously concluded that Count II did not relate back to the original complaint.

Substantial evidence also supported the jury's specific finding on Count III that Leon unjustly enriched both Enrique and Bernardo (A. 52, 54-55, 132, 134-35, 181-82, 188, 201, 236, 317-20, 336-37, 344-45, 350-51). As shown above, there was both a direct benefit to Enrique—from Leon's money doubling his interest in KOP I—and an indirect benefit through Leon's supply of funds to two corporations Enrique controlled.

Thus, ample evidence supported the verdict on all counts. It matters not that the trial court entered judgment only on Count III. Even if the trial court erred, an appellate court may affirm a judgment if any theory of liability supports it. *See Southstar Equity, LLC v. Chau*, 998 So. 2d 625, 631 (Fla. 2d DCA 2008) ("Where a special verdict supports the same damage claim on two or more theories of liability, if one of the theories of liability is not affected by harmful error, an error with respect to another theory of liability that would be considered harmful if the affected theory of liability were viewed in isolation is rendered harmless because the verdict is independently supported by another theory of liability."); *Thomas v.*

*Wyatt*, 405 So. 2d 1369, 1370 (Fla. 4th DCA 1981) ("Plaintiff proceeded to trial and verdict upon three separate theories and prevailed upon all three. The judgment for compensatory damages is supportable based upon the statutory [] liability theory even if error occurred in some other aspect of the case.").

Moreover, Enrique and Bernardo are jointly and severally liable for the judgment because a person who agrees to repay the debt of a third party assumes joint-and-several liability for that debt. *See Spancrete, Inc. v. Rinker Materials Corp.*, 623 So. 2d 760, 761 (Fla. 3d DCA 1993) (holding that a party who agreed to be "personally responsible for any purchases made by the corporation" was jointly and severally liable for contractual damages); *Anderson v. Trade Winds Enters. Corp.*, 241 So. 2d 174, 178 (Fla. 4th DCA 1970) (rejecting the argument that guarantors were not jointly and severally liable for repayment); *BP Prods N. Am. Inc. v. Super Stop No. 701, Inc.*, No. 08-61301-CIV, 2009 WL 5068599, at *9 (S.D. Fla. Dec. 17, 2009) (holding that a defendant who "personally guarantee[d] the debts" of a third party was jointly and severally liable for the amounts owed).

### B. In remanding for entry of judgment in Defendants' favor, the Opinion applied the wrong standard of review

The Opinion "remand[ed] to the trial court so that judgment can be entered for Bernardo and Enrique" (A. 460). But the issue the panel considered was whether the verdicts were "against the manifest weight of the evidence." When such is the case, the appropriate remedy is *not* judgment in the defendants' favor

but a new trial. *Van*, 122 So. 3d at 252 (noting that a new trial is appropriate where "the jury verdict was contrary to the manifest weight of the evidence"). Rather than order a new trial, the Third DCA directed the trial court to enter judgment in the defendants' favor, effectively reversing the trial court's decision denying the motion for directed verdict (A. 460).

The panel applied the wrong standard of review. When reviewing a trial court's ruling on a motion for directed verdict, "this Court views the evidence and all inferences of fact in the light most favorable to the nonmoving party." *Christensen v. Bowen*, 140 So. 3d 498, 501 (Fla. 2014). A motion for directed verdict should be granted only where "*no* view of the evidence, or inferences made therefrom, could support a verdict for the nonmoving party." *GEICO Gen. Ins. Co. v. Hoy*, 136 So. 3d 647, 651 (Fla. 2d Cir. 2013) (emphasis added). Here, the Opinion gives no clue that it viewed the evidence in the light most favorable to Leon. Rather, as explained above, it simply ignored the evidence supporting the verdict on Counts I and II, and erroneously concluded that Leon did not confer a direct benefit sufficient to support the verdict on Count III. Thus, even if this Court agrees that the verdict was against the manifest weight of the evidence, the proper remedy is a new trial.

## CONCLUSION

For the reasons stated above, this Court should quash the Opinion and reinstate the judgment.

Respectfully submitted,

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I certify that a copy of this brief and appendix was served by e-mail on August 6, 2014, on:

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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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