In The

Supreme Court of Virginia

RECORD NO. 160349

CHARLES R. CHAMBERLAIN,

Appellant,

v.

MARSHALL AUTO AND TRUCK CENTER, INC.,

Appellee.

BRIEF OF APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 1

CHAMBERLAIN'S ASSIGNMENTS OF ERROR AND
STANDARD OF REVIEW 1

ARGUMENT 1

CONCLUSION 5

CERTIFICATE OF SERVICE 6

TABLE OF AUTHORITIES

Page(s)

CASES

Commonwealth Transportation Commissioner v. Target,
274 Va. 341, 650 S.E.2d 92 (2007) 4

Elam v. Keen,
31 Va. 333 (1833) 3

Price Seating Corp v. Rabideau,
275 Va. 468, 659 S.E.2d 305 (2008) 4

Rust v. Phillips,
208 Va. 573, 159 S.E.2d 628 (1968) 2

STATUTE

Va. Code Ann. § 49-27 ..... 1, 4

RULE

Va. Sup. Ct. R. 5:25 4

STATEMENT OF THE CASE

The Appellee, Marshall Auto & Truck Center, Inc. ("Marshall") accepts the Statement of the Case of Charles R. Chamberlain ("Chamberlain") as set forth in the Brief of Appellant.

STATEMENT OF FACTS

Marshall accepts the Statement of Facts of Chamberlain as set forth in the Brief of Appellant.

CHAMBERLAIN'S ASSIGNMENTS OF ERROR AND STANDARD OF REVIEW

THE TRIAL COURT ERRED IN ORDERING THAT THE PLAINTIFF RECOVER NOTHING AND ENTERING A VERDICT IN FAVOR OF THE DEFENDANT.

a. THE TRIAL COURT ERRED IN FAILING TO APPLY § 49-27 OF THE CODE.

b. THE TRIAL COURT ERRED IN FINDING A GIFT.

Marshall accepts the standards of review set forth in Chamberlain's Brief of Appellant.

ARGUMENT

It is well settled law that the essential elements of a gift are: 1) donative intent of the donor, 2) delivery to the donee and 3) acceptance by the donee.

Rust v. Phillips, 208 Va. 573, 159 S.E.2d 628 (1968). The record contains more than sufficient evidence to support the trial court's conclusion that Chamberlain's guarantee of Marshall's loan was a gift. Chamberlain concedes that gift was accepted. Therefore, the issues are donative intent and delivery.

Most importantly, this was not a personal guarantee of a business debt among business partners but guarantee of a debt to "help out" a romantic partner. Therefore, the donative intent was conclusively established by Chamberlain's admission that he executed the guarantee in order to "help out" Ms. Asjodi, the president and sole stock holder of Marshall. Clearly, this was done out of affection since no consideration changed hands.

Chamberlain argues that the guarantee was for "good and valuable consideration" as recited in the guarantee. However, the guarantee was between Chamberlain and the bank. There was no evidence of Marshall or Ms. Asjodi giving Chamberlain any

consideration to induce him to sign the guarantee other than the affection one had for the other.

The delivery of the guarantee to the bank was sufficient to constitute constructive or symbolic delivery to Marshall.

> There are many things, of which actual, manual tradition cannot be made, either from their nature, or their situation at the time: it is not the intention of the law, to take from the owner the power of giving these: it merely requires that he shall do what, under the circumstances, will in reason, be considered equivalent to an actual delivery.

Elam v. Keen, 31 Va. 333, 335 (1833). Under these facts, Chamberlain did what was reasonable and equivalent to actual delivery by executing the guarantee and delivering it to the bank. In order to be a meaningful gift, the bank was required to receive the original guarantee not Marshall or Ms. Asjodi. Delivery of the guarantee to Marshall or Ms. Asjodi would have been completely ineffective and defeated the purpose of the gift. Therefore, the guarantee was adequately delivered.

Accordingly, the trial court properly found that Mr. Chamberlain's guarantee of Marshall's debt was in fact a gift. The trial court's finding is bolstered by the lapse of time between the bank drawing on Mr. Chamberlain's CD and his bringing this action. Clearly, Mr. Chamberlain sought to renege on his gift when his romantic relationship with Ms. Asjodi ceased.

Since the trial court properly found that the guarantee was a gift, the trial court did not err in application of Va. Code Ann. § 49-27 (1950).

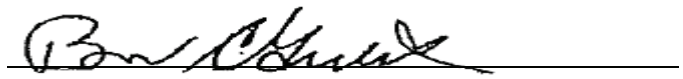
In its Brief, Marshall attempts to argue that Marshall did not properly plead that a gift was made at the time of delivery of the guarantee pledge of the CD. However, this issue was not raised at the trial court and cannot be raised for the first time on appeal. Rule 5:25, Rules of the Supreme Court of Virginia, Commonwealth Transportation Commissioner v. Target, 274 Va. 341, 650 S.E.2d 92 (2007), Price Seating Corp v. Rabideau, 275 Va. 468, 659 S.E.2d 305 (2008). In the final argument, counsel for Marshall argued that

guaranteeing the loan was the gift. Appendix, 76. The court also found that the gift was made when the CD was pledged. Appendix, 79. At no time did Chamberlin object that Marshall's argument or the court's ruling went beyond the scope of Marshall's pleadings. Therefore, under well-established precedent, Chamberlin is barred from raising this issue for the first time on appeal.

CONCLUSION

As there was no error, the ruling of the trial court should be affirmed.

Respectfully submitted,



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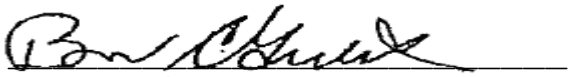
CERTIFICATE OF SERVICE

I hereby certify that that on this 8th day of November, 2016:

1) an electronic copy of the Brief of Appellee was filed, via VACES, and ten copies of this Brief of Appellee were hand-filed with the Clerk of the Supreme Court of Virginia pursuant to Rule 5:26(h), Rules of the Supreme Court; and,

2) an electronic copy of this Brief of Appellee was served by email to Glenn W. Pulley, Esquire, pulley@gentrylocke.com, Monica Taylor Monday, Esquire, Monday@gentrylocke.com, and Amanda M. Morgan, Esquire, morgan@gentrylocke.com, GENTRY LOCKE LLP, P.O. Box 6218, Lynchburg, Virginia 24505, Counsel for Appellant.



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