SCV: Submitted on 11-16-2016 16:32:46 EST for filing on 11-16-2016

IN THE

Supreme Court of Virginia

RECORD NO. 160349

CHARLES R. CHAMBERLAIN,

Appellant,

v.

MARSHALL AUTO & TRUCK CENTER, INC.,

Appellee.

REPLY BRIEF OF APPELLANT

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REPLY BRIEF BY CHARLES R. CHAMBERLAIN

I. THE APPELLEE FAILS TO ADDRESS THE APPLICATION OF § 49-27 OF THE VIRGINIA CODE.

Notably, the Brief of Appellee is silent on the application of § 49-27 of the Virginia Code to the facts of this case. In fact, the only mention of § 49-27 of the Code by the Appellee, Marshall Auto & Truck Center, Inc. ("Marshall") is one sentence arguing that "[s]ince 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)." (Appellee's Br. 4). As did the trial court, Marshall continues to ignore the clearly applicable statutory language.

There is no dispute that Charles R. Chamberlain ("Chamberlain") was a guarantor of the Note. There is also no dispute that Chamberlain's funds, held in the CD, were used to pay, in part, Marshall's obligation under the Note to Middleburg Bank ("Middleburg"). Pursuant to § 49-27 of the Code:

> If any person liable as . . . guarantor [Chamberlain] . . . pay, in whole or in part, such note [Note]. . . the person having a right of action for the amount so paid [Chamberlain] may . . . obtain a judgment or decree against any person against whom such right of action exists [Marshall] for the amount so paid, with interest from the time of payment, and five per centum damages on such amount. The person so paying [Chamberlain], in whole or in part . . . any such note . . . shall, <u>by operation of law</u>, in addition to the remedy above provided, be substituted to and become the owner of all of the rights and

> remedies of the creditor [Middleburg] for the enforcement and collection of the amount or amounts so paid, and shall be deemed the assignee thereof.

The trial court erred in ignoring the statute and finding, instead, that a gift was made. Under this statute, Chamberlain became a creditor by operation of law.

II. MARSHALL DID NOT ESTABLISH THE ELEMENTS OF A GIFT.

A. Marshall did not plead that the guarantee was a gift.

Marshall's position regarding what, exactly, constituted the alleged gift has morphed over the course of this litigation. In its Answer, it asserted that "payments, if any, by Chamberlain constituted a gift". (JA 9). In opening statements, though, Marshall forecasted that "the evidence will be that any monies he [Chamberlain] lost as a result of the bank calling on that CD was a gift." (JA 33). In closing argument, it argued that "the entire transaction between Mr. Chamberlain and Marshall was a gift." (JA 75). Marshall's focus before the trial court on the money withdrawn from the CD was undoubtedly based on the fact that those funds were the only property of which Chamberlain was divested.

Now, suspiciously consistent with the trial court's ruling, Marshall argues that "Chamberlain's guarantee of Marshall's loan was a gift." (Appellee's Br. 2, emphasis added). However, Marshall did not plead this

theory in its Answer. (JA 9: "Any and all payments, if any, by Chamberlain constituted a gift to the Defendants.") Although its pleadings alleged that Chamberlain's payments were a gift, it now argues something quite different – that Chamberlain's Guaranty was a gift. Under Virginia law, a court may not base its decision on a claim that has not been pled:

> It is firmly established that no court can base its judgment or decree upon facts not alleged or upon a right which has not been pleaded and claimed. Potts v. Mathieson Alkali Works, 165 Va. 196, 207, 181 S.E. 521, 525 (1935). "Pleadings are as essential as proof, and no relief should be granted that does not substantially accord with the case as made in the pleading." Bank of Giles County v. Mason, 199 Va. 176, 180, 98 S.E.2d 905, 907 (1957); see also, Lee v. Lambert, 200 Va. 799, 802, 108 S.E.2d 356, 358 (1959). This rule is clearly stated in Potts as follows:
>
>> The basis of every right of recovery under our system of jurisprudence is a pleading setting forth facts warranting the granting of the relief sought. It is the sine qua non of every judgment or decree. No court can base its decree upon facts not alleged, nor render its judgment upon a right, however meritorious, which has not been pleaded and claimed. . . . Pleadings are as essential as proof, the one being unavailing without the other. A decree cannot be entered in the absence of pleadings upon which to found the same, **and if so entered it is void**. . . . Every litigant is entitled to be told by his adversary in plain and explicit language what is his ground of complaint or defense. . . . The issues in a case are made by the pleadings, and not by the testimony of witnesses or other evidence.
>
> 165 Va. at 207, 181 S.E. at 525.

Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp., 221 Va. 1139, 1141, 277 S.E.2d 228, 229-230 (1981) (emphasis added).

Marshall claims that Chamberlain is barred from raising the fact that the trial court's ruling was inconsistent with Marshall's pleadings because the issue was not raised in the trial court. (Appellee's Br. 4). This argument is without merit. Marshall never pled or specifically argued that the Guaranty was a gift. It never pled or specifically argued that placing the CD on deposit at Middleburg was a gift. Thus, there was nothing to which to object before the trial court's ruling that "the gift was putting the CD up" (JA 79), to which Chamberlain objected by filing a Motion for Reconsideration. (JA 12-22).

B. The essential elements of a gift are absent.

Even if the issues of whether executing the Guaranty and placing the CD at Middleburg were gifts were properly before the trial court, there was insufficient evidence to establish these acts as gifts. The elements of a gift are well-established:

> [T]he common elements necessary to constitute . . . a gift inter vivos, are: (1) The gift must be of personal property; (2) possession of the property must be delivered at the time of the gift to the donee, or some other for him and the gift must be accepted by the donee; and (3) the title to the property must vest in the donee at the time of the gift.

Thomas v. First Nat'l Bank, 166 Va. 497, 504, 186 S.E. 77, 80 (1936). This Court has explained the third element required to prove a gift—that title vest in the donee at the time of the gift—as follows:

> One of the elements necessary to constitute a gift inter vivos is that title to the property must vest in the donee at the time of the gift. Taylor v. Smith, 199 Va. 871, 874, 102 S.E.2d 160, 162-63 (1958). The gift "must be absolute, irrevocable and without any reference to its taking effect at some future period." Quesenberry v. Funk, 203 Va. 619, 623, 125 S.E.2d 869, 873 (1962).

Zink v. Stafford, 257 Va. 46, 51, 509 S.E.2d 833, 835 (1999). Further, in order for a gift inter vivos to be effective, "'there must be an intention in praesenti on the part of the donor to make the gift and there must be such actual or constructive delivery as divests the donor of all dominion and control over the property and invests it in donee.'" Rust v. Phillips, 208 Va. 573, 578, 159 S.E.2d 628, 631 (1968) (citation omitted). Thus, a promise to transfer an item in the future is not a valid gift.

There was no evidence that Chamberlain was ever divested of possession of or title to any of his property until Middleburg drew down the CD. Further, Chamberlain denied that he transferred any funds from the CD to Asjodi or Marshall, (JA 56-57), and no evidence was presented to the contrary. Therefore, there was no evidence which established a gift at the time the Guaranty was executed or at the time the CD was deposited at

Middleburg, and Marshall does not argue in its Brief that Middleburg drawing down the CD was a gift to Marshall.

As the party claiming a gift, Marshall bore the burden of establishing the elements of a gift by clear and convincing evidence. Rust, 208 Va. at 578, 159 S.E.2d at 631 ("where a donee claims title to personal property by virtue of a gift inter vivos, the burden of proof rests upon him to show every fact and circumstance necessary to constitute a valid gift by clear and convincing evidence"). It failed to do so. However, even if it had, the finding of a gift would be contrary to Chamberlain's statutory status as a creditor pursuant to Code § 49-27. See Payne v. Payne, 219 Va. 12, 245 S.E.2d 133 (1978) (holding accommodation maker of note, i.e. gratuitous guarantor, could recover against one primarily liable for payment of note pursuant to the statute).

CONCLUSION

For these reasons, the trial court's judgment should be reversed, and final judgment should be entered in favor of Chamberlain.

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CERTIFICATE OF SERVICE

On November 16, 2016, the correct number of true and accurate copies of this Reply Brief were filed with the Supreme Court of Virginia, and the correct number of copies have been served upon counsel for the appellee by first class mail: Robin C. Gulick (VSB No. 16715), T. Huntley Thorpe, III (VSB No. 41965) Gulick, Carson & Thorpe, P.C., 70 Main Street, Suite 52, P. O. Box 880, Warrenton, Virginia 20188, Telephone: (540) 347-3022, Facsimile: (540) 347-9711, Email: rgulick@gctlaw.com; hthorpe@gctlaw.com.

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