

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Master in Equity for York County

Appellate Case No. 2016-000451

RECEIVED
AUG 15 2016
SC Court of Appeals

William G. Tucker,

Respondent,

v.

Connie Lynn Batey,

Appellant.

REPLY TO MOTION TO DISMISS APPEAL

Pursuant to Rules 240(e), S.C.A.C.R., the Appellant, by her counsel herein, makes her reply to the Respondent's Motion to Dismiss, on the grounds stated below:

1. As stated in the records of this appeal, the Transcript of Record was requested timely, contemporaneously with the Notice of Appeal filed herein, and was dated March 3rd, 2016.
2. The Hearing requested was recorded by equipment maintained by the Master in Equity for York County. The letter requesting the Transcript was sent to Ms. Shirley Dallas, the Court Reporter usually contacted to transcribe such a recording.
3. After the letter was sent, Ms. Dallas informed counsel for the Appellant she was unable to retrieve the record by reason of technical difficulties.
4. After receipt of the Clerk's letter dated June 29th, 2016, counsel again contacted Ms. Dallas to learn if any alternative method existed to recover the Transcript. He was informed that the technical difficulties were such as to render the record unrecoverable, and that this condition had effected his hearing and one other before the Master in Equity.
5. Counsel for Appellant has stated his opinion, based on review of the records in this matter, that this appeal may be adequately presented without a transcript, To that end, he is prepared

to submit Appellant's Initial Brief and Designation of Matter upon the grant of a brief initial period of preparation can be granted.

6. The Respondent as movant does not question the fact that the Transcript is, literally, unrecoverable. He does not attribute this lack to the Appellant. He does not question the time or methods used by counsel for Appellant to recover the same or to confirm the loss of the Transcript. He argues that a Transcript must be had to effect an appeal.
7. In *Woodson v. DLI Props., LLC*, 406 S.C. 517, 753 S.E.2d 428 (2014), our Supreme Court dealt with a decision by the Court of Appeals affirming a grant of summary judgment entered by a Form 4 order. *Woodson v. DLI Properties LLC*, Unpublished Opinion No. 2011-UP-291 (Ct.App. 2011) The Court of Appeals held that the Appellants failed to provide a sufficient record. In its ruling, the Supreme Court stated, in relevant part:

Nevertheless, here, the circuit court's reasoning is clear from the order, as it plainly referenced the evidence the circuit court considered in making its decision. *See Porter*, 372 S.C. at 568, 643 S.E.2d at 100 (stating that “not all situations require a detailed order, and the circuit court's form order may be sufficient if the appellate court can ascertain the basis for the circuit court's ruling from the record on appeal”).

...

Additionally, what the circuit court “might” have stated during the hearing on the motion for summary judgment is irrelevant, as a written order constitutes a final order and final judgment of the lower court. *See Ford v. State Ethics Comm'n*, 344 S.C. 642, 645–646, 545 S.E.2d 821, 823 (2001) (citing Rule 58, SCRCPP) (stating “the written order is the trial judge's final order and as such constitutes the final judgment of the court”); *see also Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (citing S.C.Code Ann. § 14–3–330(1) (1976); Rule 72, SCRCPP; Rule 201(a), SCACR; *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993)) (“An appeal ordinarily may be pursued only after a party has obtained a final judgment.”).

[*Id.*, 753 S.E.2d 433-434.]

8. The Appellant acknowledges that *Woodson* dealt with a grant of summary judgment, but contends the application of the language quoted is clear. The Respondent urges that there is no basis by which this Court can consider the credibility of witnesses or the evidence presented (Para. 10,. Motion to Dismiss), or what issues were preserved or waived (*Id.*, Para.

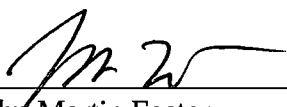
11.) Without conceding these arguments, the Appellant can remove these concerns. The Appellant, by its Rule 59 Motion (a copy of which is attached hereto and incorporated herein) raised those issues on which she bases her appeal. In short, those issues are a) the question of what remedies are available to a court of equity under what are, essentially, agreed facts, and b) the legal effect of S.C. Code 29-3-310 *et seq.* These are legal questions which are unaffected by the presence or lack of a transcript of the hearing.

9. The Appellant makes this reply and requests that this Court allow her appeal to go forward.

The basis of this Reply is the within-cited Rules, the records of this appeal, and any attached affidavit or stipulation of the undersigned, which items are hereby incorporated in this Motion.

WHEREFORE, the Appellant herein moves this Court to deny the Respondent's Motion to Dismiss, pursuant to Rule 240(e), S.C.A.C.R.

August 9, 2016



John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
803 324-8100
Attorney for Appellant

Other Counsel of Record:

cc: Brian S. McCoy
McCoy Law Firm, LLC
378 East Main Street
Rock Hill, S.C. 29730
Attorney for Respondent
(803) 366-2280

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 WILLIAM G. TUCKER,)
 Plaintiff,)
 vs.)
)
 CONNIE LYNN BATEY,)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2015 -CP-46-00950

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

FILED-RECEIVED
 2016 JAN 19 PM 2:43

DAVID M. GILBERT
 C.C.P. CLERK
 YORK COUNTY

Plaintiff's Attorney: <u>Brian S. McCoy</u> , Bar No. Address: <u>378 East Main Street</u> <u>Rock Hill, SC 29730</u> Phone: <u>803 366-2280</u> Fax <u>803 283-3680</u> E-mail: <u>bmccoy@mccoylawfirm.com</u> Other: _____	Defendant's Attorney: <u>John Martin Foster</u> , Bar No. Address: <u>223 East Main St, Suite 520 PO Box 106</u> <u>Rock Hill, SC 29731-6106</u> Phone: <u>803 324-8100</u> Fax <u>803 324-8049</u> E-mail: <u>jmfooster@comporium.net</u> Other: _____
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MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion pursuant to Rule 59(a), SCRPC
 Estimated Time Needed: 20 min. Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

Written motion attached
 Form Motion/Order
 I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Plaintiff / Defendant Date submitted _____

SECTION III: Motion Fee

PAID - AMOUNT: \$ _____
 EXEMPT: (check reason)
 Rule to Show Cause in Child or Spousal Support
 Domestic Abuse or Abuse and Neglect
 Indigent Status State Agency v. Indigent Party
 Sexually Violent Predator Act Post-Conviction Relief
 Motion for Stay in Bankruptcy
 Motion for Publication Motion for Execution (Rule 69, SCRPC)
 Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instructions
 Name of Court Reporter: _____
 Other: _____

JUDGE'S SECTION

Motion Fee to be paid upon filing of the attached order.
 Other: _____ JUDGE CODE _____
 Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
 MOTION FEE COLLECTED: \$ _____
 CONTESTED - AMOUNT DUE: \$ _____

RECEIVED
 JAN 21 2016
 By: _____

STATE OF SOUTH CAROLINA]
]]
COUNTY OF YORK]

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

WILLIAM G. TUCKER,]
]]
Plaintiff,]
vs.]
]]
CONNIE LYNN BATEY,]
]]
Defendant.]

NOTICE and MOTION:

TO ALTER OR AMEND JUDGMENT

Pursuant to:
RULE 59(a), S.C.R.C.P.

C.A. No. 2015-CP-46-00950

To: The Plaintiff and
Brian S. McCoy, Esq.
Attorney for Plaintiff
McCoy Law Firm
378 East Main Street
Rock Hill, SC 29730

FILED-RECEIVED
2016 JAN 19 PM 2:43
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

You or your attorney should appear before this Court to present evidence or argument, if any you have, relating to the Motion herein, as follows:

DATE AND TIME: To be set by the Clerk of the Court, or as soon thereafter as counsel may be heard.

PLACE: Office of the Master in Equity for York County
1 North Congress Street
York, South Carolina 29745,
or at such other place as the Court may designate

Pursuant to Rule 59, S.C.R.C.P., the Defendant moves this Court:

For an Order reopening the Order of this Court dated December 30, 2015 and entered January 4th, 2016, a copy of which was received by the Movant on January 5th, 2016, amending the findings of fact and conclusions of law or making new findings and conclusions, and directing the entry of a new Order; and

For such other and further relief as this Court may deem just and proper, on the grounds that the Order of the Court is contrary to law and on the following bases:

A) The Court's Order states, in relevant part:

RECEIVED
JAN 21 2016
By _____

In March or April of 2009, Plaintiff [WILLIAM G. TUCKER], who was then approximately 75 years old and recently widowed, met the Defendant [CONNIE LYNN BATEY] on an online dating service . . .

[ORDER of December 30, 2015, p.1, Findings of Fact.].

As counsel heard the Plaintiff's testimony, his wife was alive and incapacitated at the time he met the Defendant, and remained so for a period of ca. one year thereafter. Since the Order concerns itself, and deals with, the relative equity between the parties, this fact should be stated accurately.

B) The Order of the Court states its finding that:

While Defendant's imposition upon Plaintiff may not rise to the legal standard of undue influence or duress, it is clear from all the circumstances that Plaintiff's execution of the Statement [satisfying the debt] was the culmination of his attempts to preserve his relationship with the Defendant.

[ORDER of December 30, 2015, p.3, E. Equity; *emphasis and matter in brackets added*].

The Court has made no finding of wrongdoing or inequitable behavior on the part of the Defendant. The Court has, further, made no finding of any imposition upon, or failure in cognitive ability on the part of, the Plaintiff. The Court's Order finds enforcement of the Statement satisfying the debt to be inequitable. *Id.*

The commentators of AMERICAN JURISPRUDENCE 2D speak clearly to such a situation. To cite several sections referencing these points:

Where the complainant seeks equitable relief from a harmful or prejudicial situation, contending that it was not entered intentionally or voluntarily, the action of the court in granting or withholding an appropriate remedy depends primarily on whether the complaining party could have foreseen and averted the situation complained of. 15 If the issue as to knowledge or foreseeability is determined against the complainant, equitable relief will be denied. 16 Thus, the complainant will be barred by negligence or carelessness. 17

[27 AM.JUR.2D *Equity* § 47 (2002); *footnotes omitted*]

Generally speaking, a court of equity may not assume power to administer justice because of the hardship of a case or the failure of the party's remedy at law. Equity also does not relieve parties from bargains merely because they are hard, burdensome, harsh, unwise, improvident,²⁴ oppressive,²⁵ or unprofitable.

[27 AM.JUR.2D *Equity* § 48 (2002); *footnotes omitted other than those cited below.*]

Generally, by resort to a court of equity, relief may be had where a contract is shown to have been defectively executed, where it does not express the agreement of the parties, or where a party did not enter into it intentionally or willingly. Unless fraud, mistake, or the like is set up, however, a court of equity will not disturb contract rights as evidenced by a writing which purports to express the intention or will of the parties to the agreement.

Equity cannot make new contracts for the parties. It is not the province of equity to rewrite or abrogate contracts to protect parties from the consequences which are attendant on their voluntary abandonment of the contract and which consequences were reasonably foreseeable when the contractual obligations were assumed. Equity is not available to reinstate rights and privileges which were voluntarily contracted away, simply because the plaintiff has come to regret the bargain he or she made, and equitable relief may not be claimed because a contract is improvident, unprofitable, or harsh, or because it produces hardship.

[27 AM.JUR.2D *Equity* § 65 (2002); *footnotes omitted*]

[W]here one of two parties, both guiltless of intentional wrong, must suffer a loss, the one whose conduct, act, or omission causes the loss must stand the consequences.

[27 AM.JUR.2D *Equity* § 65 (2002); *footnotes omitted*]

24 *Crabill v Montgomery Ward & Co.* (App, Clark Co) 73 Ohio L Abs 80, 136 NE2d 332; *Cox v Freeman*, 204 Okla 138, 227 P2d 670, 28 ALR2d 1230 (stating that the general rule is that a court of equity must, when its jurisdiction is properly invoked, give full force and effect to a contract which has been voluntarily, understandingly, and fairly entered into, and which is free from fraud, accident, mistake, or other circumstance recognized as a ground for equitable relief, although the contract is harsh, unwise, or improvident).

25 *Manufacturers' Finance Co. v McKey*, 294 US 442, 79 L Ed 982, 55 S Ct 444 (holding that the court may not modify or ignore the terms of the contract or refuse to enforce them because it considers them harsh, oppressive, or unreasonable).

The rule stated above has been repeatedly invoked by our Appellate Courts, usually in the context (absent here) of a deed by a weak-minded person. Thus, in *Zeigler v. Shuler*, 87 S.C. 1, 68 S.E. 817 (1910), the Supreme Court held:

While a court of equity is not intended to protect those who make improvident or even reckless contracts, it will always interpose to shield a helpless and weak-minded person from his half-brother, such as Govan A. Shuler is shown to be, who would take his all, and pauperize him for practically nothing.

[*Id.*, 87 S.C. at ___, 68 S.E. at 819; *emphasis added.*]

More closely resembling our case is that of *Pressley v. Kemp*, 16 S.C. 334 (1882), in which an elderly lady caused her lawyer to prepare a deed to a person with whom she lived. The Supreme Court stated:

In the case of gifts *inter vivos* it is considered by the courts of equity that the natural influence which such relations as those in question¹ involve, exerted by those who possess it, to obtain a benefit for themselves, is an undue influence. Gifts brought about by it are, therefore, set aside, unless the party benefited by it can show affirmatively that the other party to the transaction was placed 'in such a position as would enable him to form an absolutely free and unfettered judgment.' *Archer v. Hudson*, 7 Beav. 551.["] We think the rule, as here announced, is only applicable where there are well-defined confidential relations, such as those indicated in the cases cited.

[*Id.*, 16 S.C. at 346; *footnote added below.*]

The Movant reiterates that there has been no evidence, and no finding that the actions of the Plaintiff were the result of any other than an "absolutely free and unfettered judgment".

In the absence of any wrongdoing or inequitable conduct by the Defendant, and in the absence of any hint of mental incompetence on the part of the Plaintiff, the Court is faced with what is, at most, the Plaintiff's remorse for his actions. All relevant precedent makes it clear that such remorse cannot, by itself, serve as the basis for equitable relief. The Plaintiff effected a gift and must live with the consequences.

1 The *Pressley* Court cites such relations as "parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, and guardian and ward" *Id.*, 16 S.C. at 345. In this case, the Court has specifically ruled out undue influence.

C) The Order of the Court is apparently based on the conclusion that, while the Satisfaction in question was executed and delivered to the Defendant, it lacked effect because no Satisfaction was recorded in the Office of the Clerk of Court.

This conclusion is contrary to the mass of precedent on the subject. To again quote the commentators of AMERICAN JURISPRUDENCE 2D:

It is also a general rule that a release of the debt or other obligation secured by a mortgage operates as a discharge of the mortgage. Indeed, the rule that anything which operates to extinguish the debt necessarily operates to discharge the mortgage is generally regarded as prevailing notwithstanding the absence of a cancellation or release of the mortgage in writing.

[55 AM.JUR.2D *Mortgages* § 410 (2002); *footnotes omitted.*]

The Movant also points out that, were the above not the case, there would be no basis for the remedy allowed by S.C. Code § 29-3-310 *et seq.* Those Statutes recognize the existence of a mortgage satisfaction prior to, and separate from, the recordation of satisfaction proper.

D) To the extent allowed or required under Rule 59, S.C.R.C.P., the Movant restates the position set forth in her Trial Brief.

Our Supreme Court, in the leading case of *Lynch v. Lynch*, 201 S.C. 130, 21 S.E.2d 569 (1942), has held as follows:

The following, which is quoted with approval in the case of *Ott v. Ott*, 182 S.C. 135, 188 S.E. 789, 792, is an accurate statement of the essential elements of a gift *inter vivos*:

" 'A gift *inter vivos* as its name imports, is a gift between the living. It is a contract which takes place by the mutual consent of the giver, who divests himself of the thing given in order to transmit the title of it to the donee gratuitously, and the donee who accepts and acquires the legal title to it. It operates, if at all, in the donor's lifetime, immediately and irrevocably; it is a gift executed; no further action of the parties; no contingency of death, or otherwise, is necessary to give it effect.' 28 C.J. 621, 622."

[*Id.*, 201 S.C. at ____, 21 S.E.2d at 572; *emphasis added.*]

The commentators of AMERICAN JURISPRUDENCE 2D define a gift as follows:

A gift has been judicially defined as a voluntary transfer of property by one to another without any consideration or compensation therefor.

[38 AM.JUR.2D *Gifts* § 1 (2001); *full citations omitted, but citing* 73 A.L.R. 1539.]

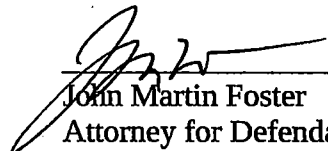
Both parties testified that nothing was promised in order to effect the execution of the document stating the Mortgage debt was paid in full. There is no dispute that the document or notice thereof was delivered to the Defendant. There is no question of the Plaintiff's competence to make such a gift.

All elements of a gift have been satisfied; the Defendant is entitled to a judgment satisfying the Mortgage.

Counsel for the Movant has not consulted with any opposing Counsel or attempted in good faith to resolve the matter contained in this Motion by reason of the dispositive nature thereof.

The basis for this Motion is the applicable law and rules of procedure, the above-cited Rules and Statutes, the records of these civil actions, and any Supporting Memorandum which the Movants may submit herein.

Respectfully submitted,



John Martin Foster
Attorney for Defendant

The Guardian Building
223 East Main Street, Suite 520
Rock Hill, SC 29730

Post Office Box 106
Rock Hill, SC 29731-6109

803 324-8100
803-324-8109: Fax
jmfoster@comporium.net

January 15, 2016

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA]
]
COUNTY OF YORK]

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

WILLIAM G. TUCKER,]
]
Plaintiff,]
vs.]
]
CONNIE LYNN BATEY,]
]
Defendants.]

CERTIFICATE OF SERVICE

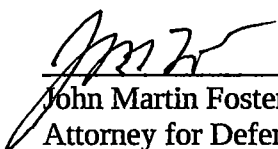
C.A. No. 2015-CP-46-00950

The undersigned, counsel for Defendant in the civil actions above, hereby certifies that on January 15, 2016, he served copies of the following pleadings or documents in the above-captioned and numbered civil action:

Notice and Motion to Alter or Amend Judgment Pursuant to Rule 59(a), S.C.R.C.P.; and This Certificate of Service

the original of which Motion and Certificate were sent to be filed with the Clerk of the Court for the Court named above, by depositing the same with the United States Postal Service on the date above, with sufficient postage affixed and directed to the respective last known address(es) of those attorney(s) and/or persons set out below, as follows:

Brian S. McCoy
Attorney for Plaintiff
McCoy Law Firm
378 East Main Street
Rock Hill, SC 29730



John Martin Foster
Attorney for Defendant

The Guardian Building
223 East Main Street, Suite 520
Rock Hill, SC 29730

Post Office Box 106
Rock Hill, SC 29731-6106

803 324-8100
803 324-8109: Fax
jmfoster@comporium.net

January 15, 2016

Rock Hill, South Carolina

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2016 JAN 19 PM 2:43
DAVID HAMILTON
C.C.P. & S.S.
YORK COUNTY, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Master in Equity for York County

Appellate Case No. 2016-000451

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AUG 15 2016

SC Court of Appeals

William G. Tucker,

Respondent,

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Appellant.

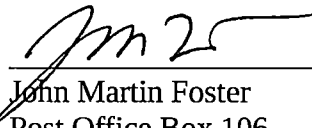
PROOF OF SERVICE

I certify that I have served the Reply to Appellant's Motion to Dismiss Appeal, dated August 9, 2016, on the following counsel or persons of record:

Brian S. McCoy
McCoy Law Firm, LLC
378 East Main Street
Rock Hill, S.C. 29730
Attorney for Respondent

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out above, pursuant to Rule 262, S.C.A.C.R.

August 9, 2016



John Martin Foster
Post Office Box 106
Rock Hill, S. C. 29731-6106
803 324-8100
Attorney for Appellant

JOHN MARTIN FOSTER

Attorney at law

The Guardian Building	PO Box 106	803 324 8100
223 East Main Street Suite 520	Rock Hill SC	803 324 8109 Fax
Rock Hill South Carolina 29730	29731-6106	jmfoster@comporium.net

August 9, 2016

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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AUG 15 2016

SC Court of Appeals

Re: William G. Tucker, Respondent,
v. Connie Lynn Batey, Appellant.

Appellate Case No. 2016-000451

Dear Ms. Kitchings:

In accordance with Rule 240(e), S.C.A.C.R., enclosed herewith please find the original and seven (7) copies of the Appellant's Reply to the Respondent's Motion to Dismiss Appeal, together with the Certificate of Service for the same in the above referenced case.

By copy of this letter, I am serving the attorney for the Respondents with copies of the said Reply, as evidenced by the Certificate of Service.

Please return the extra conformed copy to my office in the enclosed self-addressed, stamped envelope. As always, thank you, and your staff, for your assistance in these matters.

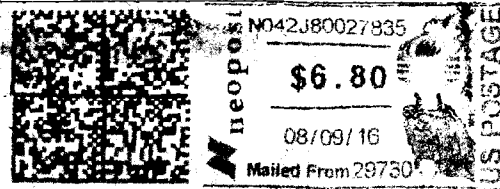
Sincerely yours,


John Martin Foster

jmf/
enclosures

cc: Client File
Brian S. McCoy
McCoy Law Firm, LLC
378 East Main Street
Rock Hill, S.C. 29730
Attorneys for Respondent
(803) 366-2280

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AUG 15 2016
CLERK OF COURT
SOUTH CAROLINA COURT OF APPEALS



RECEIVED

AUG 15 2016

SC Court of Appeals

John Martin Foster Attorney

223 East Main St Suite 520
Post Office Box 106
Rock Hill SC 29731-6106

TO:

The Honorable Jenny Abbott Kitchings
Clerk of the Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211