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

William G. Tucker, Respondent,

v.

Connie Lynn Batey, Appellant.

REPLY BRIEF OF APPELLANT

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ARGUMENT:

It is unquestioned that the Respondent signed and faxed to the Appellant a copy of a notarized document stating that her mortgage had been satisfied. By his Brief, the Respondent objects that a) faxing the document copy does not constitute delivery, b) the said document was not recordable and c) the said document was not recorded.[1]

The Appellant would first note that some of the above matter was not plead in defense by the Respondent. [RECORD ON APPEAL, p.49 - 51.] Neither point a) or b) were argued at Trial or cited as a basis for decision by the Trial Court. [RECORD ON APPEAL, p. 169 – 205, *generally*; Orderf of December 30, 2-015, p.1-8.] Given this fact, the Appellant contends that those arguments are here precluded.

NO FURTHER ACTION WAS REQUIRED TO COMPLETE THE GIFT OF THE RESPONDENT.

In the alternative, and in response to Respondent's points a) and c) above, the Appellant would point out the fact that no particular form is necessary to effect delivery of an *inter vivos* gift. 38 AM.JUR.2D *Gifts* § 22 (2002), citing *IN RE Estate of Campbell*, 939 S.W.2d 558 (Mo. Ct.App. S.D. 1997). Such delivery may be actual, constructive, or symbolic. *Id.* The requirement is that evidence exists to show that delivery has occurred. *Id.*, citing *Matter of Estate of Hoyle*, 193 Ok.Civ.App. 183, 866 P.2d 451 (Okla.Ct.App. Div. 1 1993). In this case, there is no evidence to dispute that the Respondent intended his Satisfaction to be final, and to be accepted as such by the Appellant. *See*, the discussion of waiver, *infra*.

It has, further, been held that personal delivery by a donor is not necessary when the donee is already in possession of the property in question and the donor's intention to surrender all rights is fully and clearly manifested. 38 AM.JUR.2D *Gifts* § 24 (2002), citing *Halisey* v. *Howard*, 148 Conn. 466, 172 A.2d 379 (1961); *Cravens* v. *Holliday*, 198 Okla. 264, 177 P.2d 495 (1947); *Sumpter* v. *Sandifer*, 18 Tenn.App. 60, 72 S.W.2d 782 (1933); and *IN RE Detjen's Estate*, 34 Wis.2d 46, 148 N.W.2d 745 (1967). Again, the Respondent's intention was admitted and clear.

1 Counsel for Respondent spends some time on the question of consideration for satisfaction of a debt. Since the Appellant argues that this matter deals with a gift, that law is inapplicable.

THE NOTARIZED DOCUMENT SUPPLIED BY THE RESPONDENT IS RECORDABLE.

The Appellant would make one other point: the Respondent argues that the signed and notarized satisfaction document is not recordable. This is not correct. S.C. Code § 30-5-30 provides, in relevant part:

> Except as otherwise provided by statute, before any deed or other instrument in writing can be recorded in this State, it must be acknowledged or proved by the method described in (A) or (B):
> . . .
> (A)(2) The Uniform Recognition of Acknowledgments Act must be complied with; or . . .[2]

S.C. Code § 26-3-50 of the South Carolina Uniform Recognition of Acknowledgments Act provides, in relevant part:

> The form of a certificate of acknowledgment used by a person whose authority is recognized under Section 26-3-20 shall be accepted in this State if:
> . . .
> (2) The certificate is in a form prescribed by the laws or regulations applicable in the place in which the acknowledgment is taken;

North Carolina General Statutes § 47-46.1 is entitled "Notice of satisfaction of deed of trust, mortgage, or other instrument" and states "[n]o particular phrasing is required for a notice of satisfaction pursuant to G.S. 45-37(a)(5) as it was prior to October 1, 2005". The form accompanying the NC Statute requires no witnesses. Thus, the document, as completed by the Respondent in North Carolina, was proper in that State, and thus acceptable in South Carolina as completed in accordance with the Uniform Recognition of Acknowledgments Act. As such, it was recordable in South Carolina.

THE ACTIONS OF THE RESPONDENT CONSTITUTE A WAIVER.

As a further argument, the Appellant plead waiver as a defense to the Plaintiff's claims. This defense was rejected by the Trial Judge, who stated in his Order:

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2 The text of S.C. Code § 30-5-30 cited is that of the 2011 codification, in effect at the time of the events in this case.

Further, while Defendant need not necessarily have been prejudiced by Plaintiff s decision to enforce his note and mortgage, the presence or absence of prejudice is a proper consideration in the application the equitable doctrine of waiver. *See Rhodes* v. *Benson Chrysler-Plymouih, Inc.,* 374 S.C. 122, 647 S.E.2d 249 (Ct.App. 2007).

In view of the facts of this case, I conclude that the absence of prejudice to Defendant is a proper consideration in determining whether Plaintiff has abandoned his right to collect on the note and mortgage. At trial, Defendant presented no evidence of prejudice or hardship imposed on her by remaining liable for a debt to Plaintiff that she voluntarily incurred. Thus, I conclude that under the facts of this case, the doctrine of waiver is not available as a defense to the debt.

[RECORD ON APPEAL, Order of December 30, 2015, p.6 -7.]

The Appellant would note, first, that the decision in *Rhodes, supra,* was limited to a claim of waiver as it relates to arbitration. To the knowledge of counsel, and given the body of precedent, prejudice is not required to prove the existence of waiver. The commentary of AMERICAN JURISPRUDENCE 2D, in defining estoppel as against waivert, states the rule clearly:

> Waiver and estoppel are closely akin, their legal effect is much the same, and the terms "estoppel" and "waiver" are often loosely used interchangeably. . . . [P]rejudice to the other party is one of the essential elements of an equitable estoppel, whereas a waiver does not necessarily imply that the party asserting it has been misled to his prejudice or into an altered position. Indeed, a waiver may even affect him beneficially. Among other distinctions, waiver involves the act and conduct of only one of the parties—that is, it depends upon what one himself intended to do regardless of the attitude assumed by the other party—but equitable estoppel involves the conduct of both parties, since it is based upon some misleading conduct or language of one person and reliance thereon by another who is misled thereby to his prejudice.
>
> [28 AM.JUR.2D *Estoppel and Waiver* § 29 (2002); footnotes omitted.]

In this regard, the Appellant would note the holding of our Supreme Court in the leading case of *Harvey* v. *Philadelphia Life Ins. Co. of Philadelphia,* 131 S.C. 405, 127 S.E. 836 (1925):

> Although "waiver" and "estoppel" are often loosely used interchangeably in the law of insurance, they are not convertible terms.[3] 27 R. C. L. 905, § 2.[4] A waiver is an intentional relinquishment of a known right, while the essential elements of estoppel are the ignorance of the party who invokes the estoppel, representations, or conduct of the party estopped which mislead, and an innocent and deleterious change of position in reliance on such representations or conduct. 27 R. C. L. 905.
>
> [*Id.*, 131 S.C. at ___, 127 S.E. at 838.]

Given this clarification of the requirements of waiver, the question is accurately stated as whether the Respondent intentionally relinquished his known rights in the mortgaged real property. At trial, and in response to questions by his counsel, the Respondent testified as follows:

> In an attempt to prolong our relationship, I agreed to furnish her with a document that indicated the payment was in full, but in giving this, I believed that we would have a long-term relationship. I might even get to move into the house, which I was - - - had paid for.
>
> [RECORD ON APPEAL, Transcript of Hearing, pg.177, l.13 - 18].

The Respondent further narrated, in response to questioning by his counsel as to the parties' e-mails:

> Q And her reply to that, right above it says, I want notarized paid-in-full soon, or I will get roommates, and you will never see me again. Do you recall that being her response?
>
> A I remember that.
>
> Q And then your response, the last one is, you sure do drive a hard bargain, but this should settle it once and for all. Starting to rain here with thunder and

3 Appellant would argue that loose usage is an accurate characterization of "waiver" in *Rhodes, supra.*

4 Counsel is informed this reference is to the "Restatement of Common Law".

11		lightning. Was that your response?
12	A	Yes, it is.

[RECORD ON APPEAL, Transcript of Hearing, pg.181, l.3 - 12].

If the Respondent's quoted language has any meaning, it indicates a final gift of the house to the Appellant, by way of forgiveness on the mortgage debt. There is no hint, and no claim, of mental debility on the Respondent's part, and every indication that he understood perfectly the binding and final effect of his action in executing and transmitting a satisfaction of the mortgage. Under the doctrine of waiver, he cannot now revoke his gift. Thus, again, the question of "completion" of the gift has no application .

CONCLUSION

All elements of a gift have been satisfied. Under the applicable rules of law and equity, no further action was necessary to "complete" the gift. The Appellant is entitled to the recognition by this Court that the mortgage was satisfied and the gift completed.

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CERTIFICATE OF COUNSEL

The undersigned certifies that the final Briefs of Appellant comply with Rule 211(b), S.C.A.C.R.

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