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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-481

Filed 7 November 2023

Macon County, No. 22-CVD-521

ANDREA WEIR FRANKLIN, Plaintiff,

v.

DAVID GREGORY PALMER, Defendant.

Appeal by defendant from judgment entered 8 November 2022 by Judge Kaleb Wingate in Macon County District Court. Heard in the Court of Appeals 17 October 2023.

*Mark Hayes for plaintiff-appellant.*

*The Law Office of Rich Cassady, P.L.L.C., by Rich Cassady, for defendant-appellee.*

THOMPSON, Judge.

In this singular matter involving the contested ownership of a dog, plaintiff appeals from the judgment of the district court wherein plaintiff's claim for return of property, i.e., the dog, was denied by the trial court. Plaintiff argues, *inter alia*, that the trial court incorrectly placed the burden of proof on plaintiff, the original owner of the dog, to show that no gifting of the animal to defendant occurred. We agree that

the trial court wrongly placed the burden of proof on plaintiff, and accordingly, reverse the judgment entered and remand the matter.

## I. Factual Background and Procedural History

On 18 May 2017, plaintiff purchased a miniature dalmatian, which she named Spike, from a breeder known as Mascot Dalmatians. As part of the purchase, plaintiff signed an "Adoption, Release and Indemnity Agreement" on 12 June 2017. Term #3 of the agreement signed by plaintiff stated: "Ownership of the dog . . . may not be transferred to any other person, firm, corporation or organization for any reason whatsoever without prior written consent of Mascot Dalmatians." Plaintiff also had Spike implanted with an identifying microchip; HomeAgain, the microchip company, provided plaintiff with a card that included a number plaintiff could call to "update your contact information at any time for free."

Plaintiff and defendant began dating near the end of 2017. The couple's on-again, off-again relationship permanently ended in May 2020. Because defendant had become fond of Spike during his association with plaintiff, plaintiff allowed defendant to have the dog stay with him for periods of time after their breakup. On or around 28 May 2022, plaintiff, a resident of Alabama, visited defendant, a resident of North Carolina, at his home and left Spike with defendant. Plaintiff contends that she discussed with defendant that she would return to pick up Spike. Approximately a week later, plaintiff texted defendant to arrange a meeting to pick up the dog. Plaintiff asked defendant to meet her in Tennessee to deliver Spike back to her, but

defendant cited a medical condition that prevented him from being able to travel. Plaintiff became angry with defendant and sent defendant several heated texts which resulted in defendant applying for a domestic violence protective order (DVPO) against plaintiff that accused plaintiff of threatening defendant. On behalf of defendant, the DVPO also requested "I want the care, custody, and control of any animal owned, possessed, kept, or held as a pet by either party."

Plaintiff commenced a small claims action against defendant for the return of the dog. On 4 August 2022, the court granted plaintiff's claim, and defendant appealed the judgment to district court on that same day. At the district court hearing, defendant testified that when plaintiff left Spike in his care on 28 May 2022, she indicated that she was leaving the dog for defendant to keep, a claim which plaintiff vehemently denied. On 8 November 2022, the trial court concluded as a matter of law that "[p]laintiff failed to prove by the greater weight of the evidence that she still owned the animal" and decreed that "[p]laintiff failed to prove by the greater weight of the evidence that she still owned the animal, and therefore she is to recover nothing and this action is dismissed."

On 18 November 2022, plaintiff filed in the district court a motion for new hearing or for reconsideration to which defendant filed his response on 17 January 2023. Plaintiff's response to defendant's answer, filed by plaintiff on 6 February 2023, included a motion for sanctions. Plaintiff's motion for sanctions and motion for new hearing or for reconsideration were denied by the court on 9 February 2023. Plaintiff

timely filed her notice of appeal on 21 February 2023.

## II. Analysis

Plaintiff presents this Court with two arguments on appeal: that the trial court (1) improperly placed the burden on plaintiff, the registered owner of the dog, to show that no gift occurred and (2) erred in finding that plaintiff gifted the dog in the absence of evidence of a transfer of the dog's registration. We agree that the trial court erred in placing the burden of proof on plaintiff in this matter. Because this holding requires that we reverse the judgment of the trial court, we do not consider plaintiff's second argument.

### A. Preservation

As an initial point, in his brief, defendant posits that "[t]he only disputed issue between the parties and which was presented to the trial court was [plaintiff's] intent regarding the dog when she left it with [defendant] on May 28, 2022. . . . [that is, w]as the dog a gift or was it not" but then contends that, until her appeal to this Court, plaintiff never raised "the issue of a donative or inter vivos gift."[1] Accordingly, defendant represents that the arguments presented in plaintiff's brief are not reserved for appellate review. *See State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) ("The Court has long held that where a theory argued on appeal was not raised

[1] Defendant does not explain how the issue of whether the dog was intended as a gift differs from the issues of a "donative gift or *inter vivos* gift," nor does he cite any authority for such a proposition.

before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount' ") (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). Defendant's preservation contentions lack merit. Plaintiff's argument regarding burden-shifting was understandably not presented until she sought a new hearing or reconsideration of the trial court's 8 November 2022 order, as she had no reason to believe the trial court would not apply the burden of proof in accordance with legal precedent, and in any event, defendant himself notes that whether the dog was a gift is the essence of the dispute between the parties at every stage of the case. The issues presented by plaintiff on appeal are directly connected to her trial arguments and thus are appropriate for our review.

**B. Standard of review**

When reviewing a judgment entered following a bench trial,

> the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding. Although findings of fact supported by competent, material and substantial evidence in view of the entire record, are conclusive upon a reviewing court, and not within the scope of its reviewing powers, findings not supported by competent evidence are not conclusive and will be set aside on appeal. Facts found under a misapprehension of the law are not binding on this Court and will be set aside, and the cause remanded to the end that the evidence should be considered in its true legal light.

*In re Estate of Skinner*, 370 N.C. 126, 139, 804 S.E.2d 449, 457–58 (2017) (citations, internal quotation marks and brackets omitted). We review legal conclusions and

questions of law de novo. *In re C.H.M.*, 371 N.C. 22, 28, 812 S.E.2d 804, 809 (2018); *State v. Lyons*, 340 N.C. 646, 662–63, 459 S.E.2d 770, 778–79 (1995). The appropriate burden of proof and the party who bears it are questions of law. *See, e.g.*, *Heart of Valley Motel v. Edwards*, 111 N.C. App. 896, 899, 433 S.E.2d 466, 468 (1993), *affirmed*, 336 N.C. 70, 441 S.E.2d 550 (1994).

**C. Applicable burden of proof**

Plaintiff first argues that the trial court improperly shifted the burden of proof in this dispute by requiring plaintiff to establish that she did *not* make a gift of the dog to defendant in order to prevail in this matter. We agree.

Generally, in a civil case, the burden of proof is by the greater weight—or a preponderance—of the evidence. *Taylor v. Abernethy*, 174 N.C. App. 93, 103, 620 S.E.2d 242, 249 (2005), *cert. denied*, 360 N.C. 367, 630 S.E.2d 454 (2006). In a dispute between unmarried persons involving a contested gift, that burden falls on the alleged recipient: "[t]he party claiming a gift must show (1) the intent of the donor to give the gift so as to divest himself immediately of all right title and control therein, and (2) the delivery, actual or constructive, of the chose to the donee, with consequent loss by the donor of dominion over the property given." *Godley v. Godley*, 110 N.C. App. 99, 109, 429 S.E.2d 382, 388 (1993) (citing *Fesmire v. First Union Nat'l Bank of N.C.*, 267 N.C. 589, 591, 148 S.E.2d 589, 592 (1966) (holding that the party claiming to have received a gift bears "[t]he burden of proof . . . to show each element of the gift *inter vivos*")). *See also Meekins v. Box*, 152 N.C. App. 379, 386, 567 S.E.2d 422,

427 (2002) (noting that there is no "presumption of gift" as between unmarried parties); *see also Mims v. Mims*, 305 N.C. 41, 57–58, 286 S.E.2d 779, 790 (1982).

Here, the evidence at trial was uncontested that plaintiff purchased the dog in 2017, as the trial court's Finding of Fact 5 correctly states. Therefore, defendant, as the party claiming that plaintiff made him a gift of the dog, bore the burden to establish by a preponderance of the evidence that when plaintiff left the dog with defendant in May 2022—as the evidence showed and the trial court found she had done multiple times before—plaintiff intended "to divest h[er]self immediately of all right title and control" of the dog. *See Godley*, 110 N.C. App. at 109, 429 S.E.2d at 388.

The trial court, however, concluded as a matter of law that "[p]laintiff failed to prove by the greater weight of the evidence that she still owned the animal," and repeated this statement in the decretal portion of its judgment. While there is no "general requirement that the trial court state in its judgment the burden of proof it used," *Meekins*, 152 N.C. App. at 386, 567 S.E.2d at 427, the trial court here elected to provide that information, and we cannot ignore the court's statement—*twice*—that it erroneously placed the burden upon the plaintiff to refute defendant's claim that the dog was left with him, not for a temporary visit as the trial court found was the past routine of the parties, but rather as a permanent gift from plaintiff to defendant with no intent by plaintiff to maintain her ownership.

Accordingly, we reverse the judgment of the trial court and remand for the court to resolve the proper question before it in this case: whether *defendant* proved by the greater weight of the evidence that plaintiff intended to make a gift of the dog to him. In light of this holding, we need not address plaintiff's additional appellate argument.

REVERSED AND REMANDED.

Judges HAMPSON and CARPENTER concur.

Report per Rule 30(e).