

**COURT OF APPEALS
DECISION
DATED AND FILED**

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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-3303-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JASON CANTWELL,

PLAINTIFF-APPELLANT,

V.

JENNY HAYWARD,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County:
BARBARA A. KLUKA, Judge. *Affirmed.*

SNYDER, P.J. Jason Cantwell appeals from an order dismissing his action seeking to recover the value of an engagement ring he had given to Jenny Hayward in anticipation of their marriage. After the engagement was broken off, Hayward sold the ring, valued at \$4078.13, for \$1500. Cantwell claims that under Wisconsin law an engagement ring is a conditional gift that must be returned to the giver if the condition (the anticipated marriage) fails. He argues

that ***Brown v. Thomas***, 127 Wis.2d 318, 329, 379 N.W.2d 868, 873 (Ct. App. 1985), restricts the court's inquiry to "whether the condition under which the gift was made, i.e. 'in contemplation of marriage' has failed." Therefore, he reasons, the trial court erred when it found that he had failed to show by a preponderance of the evidence that Hayward owed him the value of the disputed ring.

While Cantwell correctly quotes ***Brown***, his analysis does not persuade us. We agree with the trial court that Cantwell failed to show by a preponderance of the evidence that the engagement ring remained a conditional gift. We affirm the trial court.

Cantwell gave Hayward the engagement ring in January 1996 in anticipation of their marriage. The engagement was subsequently terminated and the parties dispute who had control and ownership of the ring when it was sold in August. Cantwell argued at trial that he was entitled to the value of the ring because it was a conditional gift to be kept by Hayward only if marriage occurred. He testified that Hayward refused to return the ring despite his numerous requests for her to do so and that he never had control of the ring after he gave it to Hayward.

Hayward argued at trial that the ring lost its conditional status and became an absolute gift which she could keep. Contrary to Cantwell's testimony, Hayward insisted that she returned the ring to Cantwell on three different occasions. According to her account of the events, on all three occasions Cantwell gave the ring back by placing it in the glove box of her truck. Hayward testified that after the third change of possession, Cantwell stated that he did not want the ring, and as a result Hayward sold it to a friend.

The trial court concluded that it could not find Cantwell's version of the facts any more credible than Hayward's. Aside from their conflicting testimony, neither party presented any corroborating testimony or other supporting evidence. Therefore, the court dismissed Cantwell's complaint, holding that he had failed to meet his burden of proof. Cantwell appeals.

Standard of Review

Pursuant to § 805.17(2), STATS., findings of ultimate fact which are set forth by a trial court will be upheld on appeal unless they are clearly erroneous.¹ This statutory standard of review has been held to codify the common law's "great weight and clear preponderance of the evidence" standard. *See Noll v. Dimiceli's, Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). Employing this standard, trial court findings will not be set aside unless they are against the great weight and clear preponderance of the evidence. *See Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 249, 274 N.W.2d 647, 650 (1979).

In this case, where the trial court is the finder of fact and where there is conflicting testimony, the court is the "ultimate arbiter of the credibility of the witnesses." *Id.* at 250, 274 N.W.2d at 650. Any reasonable inferences drawn from the evidence by the finder of fact must be accepted by the reviewing court. *See id.*

Engagement Ring as a Conditional Gift

Relying upon *Brown*, Cantwell asserts that the engagement ring was a conditional gift which should have been returned after the engagement

¹ Section 805.17(2), STATS., provides in relevant part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

terminated. In response, Hayward argues that because she attempted to return the ring on three occasions, the ring lost its “conditional” status and became an absolute gift.

Wisconsin common law recognizes a distinction between conditional and absolute gifts. A gift which is given under the condition that the donee perform some act is a conditional gift. *See Brown*, 127 Wis.2d at 327, 379 N.W.2d at 872. If the condition is not fulfilled by the donee, the donor is entitled to recover the gift. *See id.* In contrast, an absolute gift is a gift which is given *unconditionally* and with the intent that it be irrevocable. *See id.* at 326-27, 379 N.W.2d at 872.

In *Brown*, the court held that engagement rings are conditional gifts and that recovery can be made on the basis of unjust enrichment.² *See id.* at 327, 379 N.W.2d at 872. Therefore, applying *Brown*, it is clear that the engagement ring given to Hayward in anticipation of marriage was a conditional gift. However, contrary to Cantwell’s assertion, the central issue in this case is whether the engagement ring retained its status as a conditional gift. The *Brown* court did not address the possibility that an engagement ring might subsequently lose its conditional gift status due to events after the termination of the marriage plans.

The trial court heard conflicting testimony from Cantwell and Hayward regarding the events which occurred prior to the ring being sold.

² In *Brown v. Thomas*, 127 Wis.2d 318, 328, 379 N.W.2d 868, 872-73 (Ct. App. 1985), the court listed the following elements necessary to establish a claim for unjust enrichment:

- (1) A benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of the fact of such benefit; and (3) the acceptance or retention by the defendant of such benefit under circumstances such as it would be inequitable to retain the benefit without payment of the value thereof.

Cantwell testified that Hayward would not give the ring back to him despite his numerous requests for her to do so. Hayward testified that she returned the ring to Cantwell on three occasions and that he ultimately told her that he did not want it. If Cantwell did state that he no longer wanted the ring, such a statement could indicate that the gift lost its conditional status.

Regardless, the trial court found that neither account of the events was more credible than the other. As a result, Cantwell's claim was dismissed because he had failed to meet his burden of proof that up to the time the ring was sold, it retained its conditional gift status. Such a decision is not contrary to the great weight and clear preponderance of the evidence given the extent of the conflicting testimony and the mutual lack of corroboration.

In sum, this case turns on the credibility of two opposing witnesses who gave conflicting testimony. Because the credibility of this conflicting evidence is an issue reserved for the finder of fact, the findings made by the trial court will not be disturbed unless they are contrary to the great weight and clear preponderance of the evidence. *See Cogswell*, 87 Wis.2d at 249, 274 N.W.2d at 650. Reversal is not warranted merely because there is some evidence supporting the opposite conclusion. *See id.* Here, the trial court's holding that Cantwell failed to meet his burden of proof is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

