

NOTICE

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2013 IL App (5th) 120483-U
NO. 5-12-0483
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

PAUL KOSCO,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Williamson County.
)	
v.)	No. 12-MR-48
)	
CYNTHIA J. GIACONE,)	Honorable
)	Brad K. Bleyer,
Defendant-Appellant.)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Goldenhersh and Wexstten concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court's determination that the plaintiff was entitled to the return of an engagement ring was not against the manifest weight of the evidence where there was sufficient evidence to support a finding that the defendant broke the engagement and wrongfully detained the ring.
- ¶ 2 The plaintiff, Paul Kosco, filed an action in replevin against the defendant, Cynthia Giacone, seeking the return of a diamond engagement ring. Cynthia filed an answer with affirmative defenses alleging that Paul broke the engagement and that the ring was a gift. Following a bench trial on the merits, the circuit court found that the ring was an engagement ring and that Cynthia broke the engagement in March 2011 or the parties mutually ended the engagement. The circuit court ordered Cynthia to return the diamond ring. Cynthia filed a motion to reconsider. Following a hearing, the court denied her motion. She filed a timely notice of appeal. We affirm.

¶ 3

BACKGROUND

¶ 4 Cynthia testified that she and Paul began dating on Labor Day 2005. Paul testified that he and Cynthia became engaged on December 24, 2010. He stated that they had shopped for rings for two to three months and Cynthia assisted in selecting the diamond. Cynthia testified that they had talked about getting married and had looked at rings. Cynthia testified that on Christmas Eve, Paul gave her a bag from a jewelry store and inside the bag was a box wrapped in silver Christmas paper. As she was unwrapping it, Paul took the box from her, got down on one knee, and asked her to marry him. After she said yes, he handed her a picture frame with the date on it. Cynthia stated that she was touched by this sentimental gesture.

¶ 5 Cynthia testified that the ring was "dual purpose." She stated that it was both an engagement ring and a Christmas gift. She stated that the ring and a small silk picture frame were the only gifts she received from Paul for Christmas. Cynthia's mother, Minnie Reams, testified that Paul told her that Cynthia's ring was "partly for her birthday and Christmas because [he] didn't get her much for her birthday." Paul denied telling Minnie this, denied that the gift was a dual gift, and stated that it was intended as an engagement ring.

¶ 6 Cynthia testified that in January 2011, she and Paul went to the jewelry store to change the band on the engagement ring. The original band was plain and they had the diamond remounted in a band containing three fourths of a carat of diamonds. Paul testified that the diamond engagement ring cost approximately \$48,000.

¶ 7 While the diamond was being remounted, Paul and Cynthia walked around the mall. Cynthia testified that there was a pearlized white Cadillac on display in the mall. She said that Paul asked her if she liked the car and asked if she would like to have the car rather than the ring. She replied that she wanted to keep the ring. Cynthia testified that Paul "kind of chuckled a little bit and said it would save him a little bit of money if I took the car." Paul

denied asking Cynthia if she would rather have a Cadillac than the ring. He stated that he purchased the ring as an engagement ring in contemplation of marriage.

¶ 8 Both parties acknowledge that they informed people that they were engaged. Jill Smilanich testified that she had known Paul since 1991 and that she had worked for him since that time. She stated that she learned of Paul and Cynthia's engagement after Paul asked her to download photos from his digital camera. When she did so she saw photos of a hand with a ring that looked like an engagement ring on it. She asked Paul if it was an engagement ring and he told her it was.

¶ 9 Vicki Anderson testified that she had known Paul for 24 years and that he and her husband worked for the same company. She stated that in January 2011, she was out with Paul and Cynthia and Paul told Cynthia to show her the ring. Vicki said Cynthia stated it was an engagement ring.

¶ 10 Paul testified that he wanted to have an engagement photo taken and put in the newspaper, but Cynthia refused because a date for the wedding had not been set. Cynthia stated that she did not refuse to have an engagement photo taken with Paul, but rather wanted to wait to submit a photo to the newspaper until the wedding plans had been made.

¶ 11 Paul testified that Cynthia never agreed to a date for their wedding. He suggested that they get married in Las Vegas, but she refused. Cynthia admitted that she refused to get married in Las Vegas. Minnie testified that to her knowledge Cynthia and Paul never set a wedding date.

¶ 12 Paul testified that one evening in the middle of March, Cynthia came to his house, told him that their relationship was not going to work, said she did not want the ring, and returned the ring to him. Paul put the ring in his safe where it remained until the end of March. At that time Cynthia came to his house and asked for the ring back. She went to the safe and took the ring. He admitted that he did not try to stop her from retrieving the ring. Paul

testified that at the time, his mother was on her deathbed so his focus was on his mother. His mother died on April 1, 2011.

¶ 13 Cynthia denied that in March 2011, she returned the ring to Paul and that she later went to his house, opened his safe, and took the ring. She stated that she purchased the safe for him and had access to it. She denied ever losing control of the ring.

¶ 14 Jill testified that in March 2011, Paul told her that Cynthia broke up with him. She stated that he probably told her the details, but she could no longer remember the reason.

¶ 15 Vicki testified that at some point Paul called and told her that he and Cynthia had broken up. She stated that she did not know the details. She asked him if he got the ring back, and he told her yes.

¶ 16 Cynthia testified that the ring was a combined birthday and Christmas gift. Paul testified that Cynthia's birthday was in April and the ring was not a combined gift. Paul testified that he had showered Cynthia with jewelry. Paul testified that in the years they dated he gave Cynthia approximately \$90,000 worth of jewelry. He said he never asked for any of it back except the engagement ring because the other jewelry items were gifts. Cynthia admitted that this was true.

¶ 17 Paul testified that, prior to their engagement, they spent a lot of time together, but after their engagement the relationship deteriorated. Paul testified that Cynthia began spending lots of time with her grandson and he was pushed to the side. He stated, "She didn't want to have anything to do with me anymore unless it was a trip or something like that." Paul stated that after Cynthia took back her ring, they still did things together; however, their relationship was worse than before the engagement. He testified, "I had that thought in the back of [my] mind is she going to do this to me again, you know." He admitted that Cynthia wore the ring during the summer of 2011. Paul testified that after the engagement ring was returned to him in March 2011, he never again asked Cynthia to marry him.

¶ 18 Cynthia testified that in April 2011, her relationship with Paul was the same as it had been. She stated that they argued and that "very possibly could have [had an] argument in March at that time because there was a lot of stuff going on." She stated that the death of Paul's mother, his children, and his drinking all caused stress on their relationship. Additionally, she felt stress because her son was deployed three times.

¶ 19 Paul stated that in July 2011, he took Cynthia on a work getaway to Bermuda. Cynthia testified that she wore the ring on the trip. Cynthia testified that while in Bermuda, they discussed getting married in Tahiti and having a reception when they returned. Paul remembered "talking about thatched huts and stuff," but denied discussing getting married in Tahiti. He stated that because he wanted to get married and Cynthia kept putting it off, he would have remembered if they discussed wedding plans.

¶ 20 Tammy Frauenfelder testified that Paul was her landlord and that Cynthia was her best friend. She stated that during the summer of 2011, she had socialized with Paul and Cynthia. She said "they fought off and on, but they were never broke up that I know of." She stated that she remembered Cynthia being mad at Paul in March 2011, but she did not remember her giving back the ring or ever seeing Cynthia without the ring.

¶ 21 Minnie described the couple's relationship as off and on from January 2011 until August 2011. She stated that she kept a diary and read off dates when Paul and Cynthia were together. She testified that Cynthia always wore the engagement ring.

¶ 22 Cynthia testified that in August 2011, she was at Paul's office after hours. His cell phone rang and he turned away to talk. Cynthia stated that she knew then that it was Paul's daughter. She stated that they had decided to use tough love with the daughter and not have contact with her as long as she was using drugs. Cynthia testified that Paul told her he was not having contact with his daughter. Cynthia testified that, while he was talking to his daughter, she got on her phone, which was on Paul's account, and looked at the Verizon

account. The account showed that there were calls from Paul to his daughter and from his daughter to Paul. When Paul finished his telephone call, Cynthia confronted Paul and showed him the account. She testified that he got mad and said: "I'm done. I can't take this shit anymore, and I am out of here. I can't believe you don't trust me." She stated that he picked up his telephone and threw it across the room where it hit a wall and smashed. She said he got up and left. She stated that she thought he was going to the bank to make a deposit.

¶ 23 Cynthia testified that she remained at his office for about one hour then drove by his house to see if he was home. He was not there so she drove by his father's house. He was in the driveway. She asked him what was going on and he told her that he could not take it anymore and wanted to be by himself. She stated that she was crying because he broke up with her. She said that he had purchased a gun for her in the past and she told him she planned to use it. He told her that he had to help his father and that when he was done, he would go to her house to discuss things. She said he never came to her house and never called. Instead Paul called two of her friends and they called her. She said that she talked to her friends on the phone for a long time and eventually was physically and mentally exhausted and hung up and tried to sleep. She stated that Paul never checked on her and since that argument they have not gone on any dates.

¶ 24 Paul testified that when he said he was done, he meant he was done with Cynthia controlling him and with arguing. He also stated that he wanted to remove himself from the situation. Paul testified that both he and Cynthia were upset. He said that when Cynthia came to his father's house she told him she "was going to go home and end it all." He said Cynthia wanted to discuss the situation, but he said there was nothing to talk about and that he was done arguing that night. He stated that he told her he would check on her later and he called two of her friends to check on her.

¶ 25 Tammy testified that in mid to late August 2011, Paul left her a message asking her to check on Cynthia because she was very upset. She called Cynthia and Cynthia told her that Paul broke up with her. Tammy could not remember any specifics about the conversation other than that Cynthia was upset and she was concerned about her.

¶ 26 Minnie testified that in August 2011, about three days after the fight, Cynthia told her that Paul had called off the engagement. Minnie testified that Cynthia said Paul wanted to be alone and that they fought over his children and his drinking.

¶ 27 Paul testified that in the summer of 2011, he and Cynthia still had joint checking accounts. Cynthia testified that during the summer of 2011, they had a savings account together and her name was on all of Paul's credit cards. Cynthia testified that Paul sent her documents to sign to remove her name from his credit cards, but she refused to sign them until he removed his name from her credit card and car title. She stated that he also requested the ring back.

¶ 28 Cynthia testified that in September 2011, Paul left her a voice mail. The voice mail was played to the court. The message was as follows:

"Hi, Cindy. I do want to admit I have lied to you. There is no question about it, and the lies I have told you were just to protect our relationship, and I apologize for it. I—you don't deserve to be treated like that. We need to move on, though. I need to be by myself. I would like to talk to ya, and I'm here to help you make the transition as easy as possible, so it's all my fault. I take full responsibility for it, and I know you laid your heart out there and I broke it, and it was terrible. Lots been going on in my life, so ... I got a few things planned today, but just whenever you want to talk or work that stuff out, give me a call. Bye."

¶ 29 Cynthia testified that on October 27, 2011, she received a text from Paul telling her that he had a surprise for her in his garage. She stated that it was a used white Cadillac. She

said that it was not the same Cadillac as the one in the mall in January. Cynthia testified that Paul offered to trade her the Cadillac for the ring. She stated that he texted her again in December 2011, asking if she would trade the car for the ring.

¶ 30 On July 3, 2012, the circuit court ruled that Paul was entitled to the return of the diamond ring. The court found that the ring was an engagement ring. It further found that "the engagement was either broken by [Cynthia] in March 2011 when she returned the ring, or was mutually broken." In support of the conclusion that the engagement was mutually broken, the court noted that Cynthia refused to allow an engagement notice to be placed in the newspaper, that Cynthia refused to be married in Las Vegas as suggested by Paul, that the parties had an on-again, off-again relationship with numerous arguments, and that they never set a wedding date. The court further noted that in March 2011, Cynthia broke the engagement, returned the ring, and later retrieved the ring, and there was "no evidence of either party showing a serious intent to re-engage." The court found that whether the engagement was broken by Cynthia unilaterally or by both parties mutually, Paul was entitled to the return of the ring. The court ordered Cynthia to return the diamond ring.

¶ 31 Cynthia filed a motion to reconsider. After considering the motion and the arguments of counsel and after reviewing the applicable law, the court denied the motion to reconsider. Cynthia filed a timely notice of appeal.

¶ 32 ANALYSIS

¶ 33 Cynthia argues that the trial court erred when it failed to find that the ring was a gift. In a bench trial, the standard of review is whether the judgment is against the manifest weight of the evidence. *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Limited USA*, 384 Ill. App. 3d 849, 859 (2008). "A reviewing court will not substitute its judgment for that of the trial court in a bench trial unless the judgment is against the manifest weight of the evidence." *Id.* Only when the opposite conclusion is apparent or when findings appear to

be unreasonable, arbitrary, or not based on the evidence is a judgment against the manifest weight of the evidence. *Id.*

¶ 34 Cynthia argues that the ring was a Christmas and birthday gift. In support of this argument she points to Minnie's testimony that Paul told Minnie that the ring was partly for Cynthia's birthday and Christmas. In addition, she notes that Tammy testified as follows: "Well it was a Christmas gift. It's what he got her for Christmas. I remember her showing me that, and it was really a nice ring. And as far as I know, they were engaged from that, yes." Cynthia argues that this testimony indicates that the ring was a dual-purpose gift.

¶ 35 Cynthia further argues that Paul's indifferent attitude toward the ring evidenced that it was a gift. She alleges that Paul's inquiry to her in January 2011 as to whether she would rather have a Cadillac or the ring showed that Paul considered the ring more of a gift that Cynthia could use and trade rather than a significant and emotional item that "follows a true and pure 'engagement ring.'" Cynthia also argues that the fact that Paul allowed her to wear the ring without requesting it back shows an indifference toward the ring indicative of the notion that the ring was a gift.

¶ 36 Paul testified that he gave the ring to Cynthia for Christmas, but that it was intended as an engagement ring and not a dual-purpose gift. Both Cynthia and Paul testified that when he presented Cynthia with the ring, Paul got down on one knee and proposed. It is not the occasion on which the ring is given that determines whether the ring is an engagement ring or a gift, it is whether the ring is given in contemplation of marriage. Jill testified that when she saw photos of the ring, she asked Paul if it was an engagement ring and he replied in the affirmative. Vicki testified that Cynthia showed her the ring and told her it was an engagement ring. Both parties admitted that Paul gave Cynthia other jewelry during the course of their relationship and that Paul only requested the return of the engagement ring. The trial court's determination that the ring was an engagement ring is not against the

manifest weight of the evidence.

¶ 37 Cynthia argues that the trial court erred when it found that she broke the engagement in March 2011, because such a finding is against the manifest weight of the evidence. She asserts that Paul did not present any reliable evidence or testimony that she broke the engagement in March 2011. She alleges that the evidence and testimony show that she had possession of the ring since she received it on December 24, 2010, that she never broke up with Paul, and that she never returned the ring. In support of her argument she points out that she wore the ring during the summer of 2011 and that she and Paul continued to do activities together including celebrating birthdays and going on a trip to Bermuda. Cynthia also argues that if she and Paul had broken up in March 2011, Minnie and Tammy would have known about it and both testified that they were not aware of a breakup until August 2011. She alleges that the evidence shows that the engagement was broken by Paul in August 2011 and that the September 17, 2011, voice mail strongly supports this contention.

¶ 38 The trial court found that Cynthia returned the ring to Paul in March 2011. Paul testified that Cynthia broke the engagement and returned the ring to him in March 2011. Jill testified that in March 2011, Paul told her that Cynthia broke up with him. Vicki testified that Paul told her he and Cynthia had broken up. She stated that she asked Paul if he got the ring back and he answered in the affirmative. As the trier of fact, the trial court is in a superior position to judge the credibility of the witnesses and to determine the weight to be given to their testimony. *Chicago's Pizza, Inc.*, 384 Ill. App. 3d at 859. "When contradictory testimony that could support conflicting conclusions is given at a bench trial, an appellate court will not disturb the trial court's factual findings based on that testimony unless a contrary finding is clearly apparent." *Id.* The trial court weighed the testimony and judged the credibility of the witnesses. It found that Cynthia returned the engagement ring in March 2011. A contrary finding is not clearly apparent.

¶ 39 Cynthia argues that the trial court erred when it held that in the alternative, the engagement was mutually broken off by the parties. Because we have determined that the record supports the trial court's determination that Cynthia broke the engagement in March 2011, we need not address this issue.

¶ 40 Cynthia argues that the trial court erred when it ruled that Paul had met all the requirements of the replevin statute. When goods have been wrongfully taken or detained, the person entitled to their possession may bring an action of replevin for the recovery of such goods. 735 ILCS 5/19-101 (West 2012). "The primary purpose of the replevin statute is to test the right of possession of personal property and place the successful party in possession of the property." *Carroll v. Curry*, 392 Ill. App. 3d 511, 514 (2009). Cynthia argues that Paul failed to prove that the ring was wrongfully taken or detained.

¶ 41 Cynthia argues that she obtained possession of the ring on December 24, 2010, and never relinquished it. She disputes Paul's testimony that she returned the ring in March 2011 and then took it back. Additionally, she asserts that Paul did not stop her from taking the ring and did not object to her wearing the ring during the summer of 2011.

¶ 42 In an action for replevin, the term "wrongful" is used in its legal, rather than equitable, sense and simply means that the party seeking replevin of the object has a greater possessory right to it. *Carroll*, 392 Ill. App. 3d at 515-16. "A replevin action for the return of an engagement ring and other gifts made in contemplation of marriage does not seek damages from the breach of the promise to marry but instead requests the return of property to which the other party allegedly no longer has a right." *Vann v. Vehrs*, 260 Ill. App. 3d 648, 651 (1994).

¶ 43 It is undisputed that Paul bought the ring. The trial court found that Cynthia broke the engagement in March 2011 and that she returned the ring to Paul at that time. Both parties admit that Cynthia later had possession of the ring. Gifts given in contemplation of marriage

are conditioned on the marriage of the parties, and the party who fails to perform on the condition of the gift has no right to the gift acquired under such circumstances. *Carroll*, 392 Ill. App. 3d at 514. "The rationale for this rule is that an engagement ring is a gift conditional on the subsequent marriage of the parties, and when the condition is not fulfilled, the donee no longer has any right to the ring." *Vann*, 260 Ill. App. 3d at 653.

¶ 44 The evidence established that Cynthia possessed the ring and that Paul had a superior interest in the ring. Therefore, Cynthia's continued possession of the ring constituted wrongful detention for purposes of the replevin statute.

¶ 45 Cynthia also argues that the trial court erred when it did not require Paul to prove either that he demanded the ring or that a demand would have been futile. Generally a replevin action cannot be maintained until the plaintiff has made a demand for the surrender of the property and the defendant has refused. *Carroll*, 392 Ill. App. 3d at 515. "However, a demand is not necessary before bringing a suit in a replevin action where the circumstances indicate its futility." *Id.*

¶ 46 Cynthia alleges that nowhere in the transcript is there evidence or proof of a demand being made. However, when asked if she refused to sign documents Paul sent her asking her to sign off on his credit cards she testified:

"CYNTHIA: I refused until he would sign off on mine also and the car—on my car title that he did not. I asked him to get everything together, my State Farm account, my credit card that he also was on, my car title, and all he wanted to do was he wanted me to take *the ring*, his car keys and his thing and put it in my building for him to be able to come and pick up. And I told him not until we sit down and got everything signed on my side and his side." (Emphasis added.)

Based on this testimony, it is not against the manifest weight of the evidence for the trial court to have determined that Paul had made a demand for the return of the ring.

¶ 47 Even if a demand had not been made, a demand is not necessary when circumstances indicate it would have been futile. *Carroll*, 392 Ill. App. 3d at 515. In *Carroll*, James Carroll and Alison Curry became engaged in April 2000, and shortly thereafter the parties began living together. *Id.* at 512. In 2005, Alison accused James of infidelity and ordered him to leave her home. *Id.* James testified that he considered the engagement broken as of that date. Alison testified that she intended to end the engagement when she told James to leave. *Id.* James made no demand for the return of the ring prior to the filing of a replevin action. *Id.* The court found that James gave Alison the ring in contemplation of marriage, that the parties did not marry, and that Alison intended to terminate the engagement when she ordered James to leave her home. *Id.* at 514-15. The court found that the gift of the ring was conditioned on the subsequent marriage of the parties, and the condition attached to the gift was not fulfilled; therefore, James established his right to possession of the ring. *Id.* at 515. The court found that James made no presuit demand for the return of the ring, but that such a demand would have been unavailing and was not necessary because Alison continuously maintained that, because James breached his promise of fidelity, he caused the breakup of the engagement, and she was entitled to retain possession of the ring. *Id.* In the instant case, Cynthia continuously maintained that the ring was a dual-purpose gift, that Paul broke the engagement, and that she was entitled to the ring. Paul asked for the return of the ring and Cynthia did not give it back. A formal demand would not have been necessary because, based on Cynthia's position that she was entitled to the ring, it would have been futile.

¶ 48 Finally, Cynthia argues that the trial court erred when it denied her motion to reconsider. She argues that the trial court failed to apply the existing law correctly in that it did not rule on her affirmative defenses. Cynthia argues that the court failed to address the following affirmative defenses in her pleadings: that Paul broke off the engagement with her, that Paul gave the ring to her as a gift as he had given her much jewelry over the years, and

that Paul admitted that the breakup between the parties was his fault. She further argues that her motion to reconsider pointed out inconsistencies in Paul's testimony as well as misapplication of the law by the trial court.

¶ 49 The decision whether to grant or deny a motion to reconsider lies within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. *General Motors Acceptance Corp. v. Stoval*, 374 Ill. App. 3d 1064, 1078 (2007). "The intended purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law." *Id.* Newly discovered evidence is evidence not available prior to the time of the hearing. *Id.* In the instant case, Cynthia presented no newly discovered evidence or changes in the law. Additionally, she provided the court with no evidence of misapplication of the law.

¶ 50 The trial court did address Cynthia's affirmative defenses. It found that the ring was an engagement ring given in contemplation of marriage. It considered all of the testimony regarding the couple's relationship, the events each party felt constituted a breakup, and the voice mail from Paul in which he stated, "[S]o it's all my fault." The trial court rejected Cynthia's argument that Paul broke up with her and found that she broke up with him or, in the alternative, the breakup was mutual.

¶ 51 Cynthia argues that Paul's testimony was inconsistent. As the finder of fact, it is the trial court's responsibility to resolve inconsistencies and conflicts in the evidence, as well as to weigh the testimony and determine the credibility of the witnesses. *People v. Bannister*, 236 Ill. 2d 1, 18 (2009). While Cynthia points to inconsistencies in Paul's testimony, the trial court resolved the conflicts in the evidence, decided what weight to give his testimony, and determined that Paul was credible. The trial court's denial of the motion to reconsider was not against the manifest weight of the evidence.

¶ 52 The diamond ring Paul gave Cynthia was an engagement ring. There is sufficient

evidence in the record to support the trial court's finding that Cynthia broke the engagement in March 2011 and that she retained possession of the ring despite Paul's demand for its return. Therefore, the trial court did not err in ordering Cynthia to return the diamond engagement ring to Paul.

¶ 53

CONCLUSION

¶ 54 For the foregoing reasons, the judgment of the circuit court of Williamson County is affirmed.

¶ 55 Affirmed.