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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-425

Filed 15 January 2025

Bladen County, No. 22 CVD 335

TINA CLARK, Plaintiff,

v.

JOHN CLARK, Defendant.

Appeal by Plaintiff from Judgment entered 27 September 2023 by Judge Will M. Callihan, Jr. in Bladen County District Court. Heard in the Court of Appeals 6 November 2024.

*Tharrington Smith, LLP, by Jeffrey R. Russell and Casey C. Fidler, for Plaintiff-Appellant.*

*Ward & Smith, P.A., by John M. Martin and J. Albert Clyburn, for Defendant-Appellee.*

HAMPSON, Judge.

**Factual and Procedural Background**

Tina Clark (Plaintiff) appeals from a Judgment finding the Premarital Agreement executed by Plaintiff and John Clark (Defendant) is valid and enforceable. The Record before us tends to reflect the following:

The parties were married on 12 July 1997. Six days prior to their wedding, on 6 July 1997, Defendant presented Plaintiff with a Premarital Agreement, which she then signed. The parties separated on 19 September 2021.

Plaintiff initiated this action by filing a Complaint in Bladen County District Court on 9 June 2022. The Complaint included, *inter alia*, a claim for Equitable Distribution, Motion for Interim Distribution and Motion for Declaratory Judgment Invalidating Prenuptial Agreement, seeking to set aside the Premarital Agreement. On 16 August 2022, Defendant filed an Answer and Counterclaims, which included pleading the Premarital Agreement in bar of Plaintiff's Equitable Distribution claims and seeking specific performance of the Premarital Agreement.

This matter was heard in the district court on 30 August and 1 September 2023. During the hearing, Plaintiff and Defendant both testified as to their recollection of the events surrounding the signing of the Premarital Agreement. Defendant also presented the depositions of Joanne Schneider, the legal secretary of the attorney who prepared the Premarital Agreement, and Judy Barefoot, the secretary who notarized the Premarital Agreement.

On 27 September 2023, the trial court entered a Judgment declaring the Premarital Agreement valid and enforceable. In the Judgment, after reciting its Findings of Fact, the trial court made the following Conclusion of Law: "The Plaintiff has not presented clear and convincing evidence to rebut the validity of the premarital agreement executed by the Parties on July 11, 1997." The trial court

further concluded: “The Plaintiff has not presented clear and convincing evidence that the parties’ premarital agreement was either procedurally or substantively unconscionable.” Plaintiff timely filed Notice of Appeal on 25 October 2023.<sup>1</sup>

### Issue

The dispositive issue on appeal is whether the trial court erred by applying a “clear and convincing” standard of proof.

### Analysis

“The standard of appellate review for a decision rendered in a non-jury trial is whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment.” *State v. Tinch*, 266 N.C. App. 393, 399, 831 S.E.2d 859, 864 (2019) (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001)). “Conclusions of law are reviewed de novo[.]” *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

“[I]n North Carolina, a preponderance of the evidence quantum of proof applies

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<sup>1</sup> Plaintiff contends this Court has jurisdiction over this appeal notwithstanding the pendency of other claims in this matter, arguing the trial court’s order, in effect, constitutes a final resolution of her Equitable Distribution claim. Thus, Plaintiff asserts, this Court has jurisdiction under N.C. Gen. Stat. § 50-19.1. Defendant makes no argument to the contrary. We conclude—for purposes of this appeal—Plaintiff has made a sufficient showing for us to assume appellate jurisdiction in this case.

in civil cases unless a different standard has been adopted by our General Assembly or approved by our Supreme Court.” *Adams v. Bank United of Tex. FSB*, 167 N.C. App. 395, 401, 606 S.E.2d 149, 154 (2004) (citing *In re Thomas*, 281 N.C. 598, 603, 189 S.E.2d 245, 248 (1972)). Here, however, the trial court applied a “clear and convincing” evidence standard of proof. It stated: “The Plaintiff has not presented clear and convincing evidence to rebut the validity of the premarital agreement executed by the Parties on July 11, 1997” and “The Plaintiff has not presented clear and convincing evidence that the parties’ premarital agreement was either procedurally or substantively unconscionable.” “The clear and convincing standard requires evidence that should fully convince. This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters.” *In re I.K.*, 273 N.C. App. 37, 42, 848 S.E.2d 13, 18 (2020) (quoting *In re A.C.*, 247 N.C. App. 528, 533, 786 S.E.2d 728, 734 (2016)). Thus, in applying the clear and convincing standard, the trial court held Plaintiff to a higher burden of proof than is appropriate under our caselaw.

This Court has previously vacated the underlying order and remanded the matter to the trial court where the trial court applied an incorrect quantum of proof. *See Durham Hosiery Mill Ltd. P’ship v. Morris*, 217 N.C. App. 590, 597, 720 S.E.2d 426, 430 (2011); *Dellinger v. Lincoln Cnty.*, 248 N.C. App. 317, 330, 789 S.E.2d 21, 30-31 (2016). In *In re J.C.*, the trial court terminated a parent’s parental rights in a

minor child using a “beyond a reasonable doubt” standard instead of the correct clear and convincing evidence standard. 380 N.C. 738, 744, 869 S.E.2d 682, 686-87 (2022). Our Supreme Court determined the proper remedy was to vacate the order and remand it to the trial court to reconsider the record before it applying the correct standard of proof, “unless ‘the record of this case is insufficient to support findings which are necessary to establish *any* of the statutory grounds for termination.’” *Id.* at 746, 869 S.E.2d at 688 (quoting *In re M.R.F.*, 378 N.C. 638, 648, 862 S.E.2d 758, 766 (2021)) (emphasis in original). Likewise, in *Durham Hosiery Mill*, this Court vacated an order and remanded the matter to the trial court where, as here, the trial court mistakenly applied the clear and convincing evidence standard rather than the appropriate preponderance of the evidence standard of proof. 217 N.C. App. at 597, 720 S.E.2d at 430.

Defendant concedes the trial court applied an incorrect standard of proof. However, Defendant contends remand is not warranted because it would be futile. *See Arnold v. Ray Charles Enters., Inc.*, 264 N.C. 92, 99, 141 S.E.2d 14, 19 (1965) (“To remand this case for further findings, however, when defendants, the parties upon whom rests the burden of proof here, have failed to offer any evidence bearing upon the point, would be futile.”); *Cnty. of Durham, by and through Durham DSS v. Hodges*, 257 N.C. App. 288, 298, 809 S.E.2d 317, 325 (2018) (“Since there is no evidence to support the required findings of fact, we need not remand for additional findings of fact.”). We disagree.

Defendant asserts remand is futile because “besides her not credible testimony[.]” Plaintiff had no evidence to support her claims. In support of his argument, Defendant cites to *Hodges*, in which this Court, after concluding the trial court’s findings were not supported by competent evidence, reversed the trial court’s order—rather than remand it—because “we have determined that there is simply no evidence to support the required ultimate finding.” *Id.* at 296, 809 S.E.2d at 324. However, the sentence prior to that one expressly notes: “If there were *any dispute* in the evidence, it would be appropriate for us to remand to the trial court[.]” *Id.* at 296, 809 S.E.2d at 323 (emphasis added). Similarly, Defendant points to *Arnold*, a case in which our Supreme Court concluded remand would be futile. 264 N.C. at 99, 141 S.E.2d at 19. There, however, the parties had stipulated the entirety of the evidence before the trial court would be the exhibits and transcript of proceedings in a prior trial of the same case in another jurisdiction. *Id.* The Court noted the defendants had “chosen to rest their defense upon the transcript of a former trial in which they failed to offer evidence essential to the defense” and emphasized its authority to direct a verdict against a party “who has the burden of proof, if there is no evidence in his favor, *as where he fails to introduce any evidence[.]*” *Id.* (emphasis in original) (quoting *First Nat’l Bank & Trust Co. v. Levy*, 209 N.C. 834, 835, 184 S.E.2d 822, 823 (1936)).

Here, in contrast to those cases, Plaintiff *did* offer evidence; and although it was not persuasive to the trial court under the clear and convincing evidence

standard of proof, we cannot say it would be the same had the trial court applied the preponderance of the evidence standard. Defendant urges us to discount Plaintiff's testimony because the trial court found it "not credible." However, the trial court's determination of the credibility of Plaintiff's testimony is precisely the issue here. The Record reveals the trial court weighed both Plaintiff's testimony and Defendant's evidence and found one more credible than the other. Thus, this is clearly a case in which there *is* "any dispute in the evidence." *Hodges*, 257 N.C. App. at 296, 809 S.E.2d at 323. The Record reflects both that the trial court applied an incorrect standard of proof in this case and that there was a dispute in the evidence. Therefore, the appropriate remedy is to vacate the Judgment and remand this matter to the trial court to apply the correct quantum of proof.

### **Conclusion**

Accordingly, for the foregoing reasons, we vacate the Judgment and remand this matter to the trial court for Findings based on the preponderance of the evidence standard. On remand, the trial court may, in its discretion, either decide the matter on the existing Record or, if the trial court deems it necessary, permit the parties to present additional evidence.

VACATED AND REMANDED.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).