UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0781

September Term, 2014

CARLA ROYAL

v.

ROSEMARY WEST, ET AL.

Meredith,
Berger,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: June 4, 2015

This appeal arises out of an order of the Circuit Court for Baltimore City granting appellee's, Rosemary West's ("West"), motion for judgment against appellant, Carla Royal ("Royal") pursuant to Md. Rule 2-519. Royal contends the circuit court made improper factual findings to her detriment that resulted in the entry of judgment against her.

On appeal, Royal presents one issue for our review,[1] which we rephrase as follows:

> 1. Whether the circuit court's factual findings at the conclusion of appellant's case-in-chief were clearly erroneous.

For the reasons set forth below, we shall affirm the judgment of the Circuit Court for Baltimore City.

FACTUAL AND PROCEDURAL BACKGROUND

On the morning of August 28, 2010, Royal was walking her two dogs near the corner of Castle and Orleans Streets in Baltimore City. As Royal was walking, a large, black, unleashed dog approached her and her two dogs. The unleashed dog jumped on Royal with its paws and caused her to fall on her back. As a result, Royal suffered a fractured vertebrae.

Thereafter, Royal filed a complaint in the Circuit Court for Baltimore City against West, alleging liability on theories of strict liability and negligence. Royal's negligence

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[1] The issue, as presented by Royal, is:

> I. Did the trial judge err in granting judgment for the defendant by ruling appellant did not establish ownership upon appellee?

theory was based on the premise that West's violation of a Baltimore City ordinance[2] that requires dogs to be leashed was the breach of a duty owed to Royal. A bench trial was held on May 29, 2014, during which the judge served as fact finder.

At trial, Royal testified that she was walking her dogs the morning of August 28, 2010, when a large, unleashed, black dog approached her from an alley and jumped on her. She further testified the dog was unaccompanied by a person, but that she had seen this dog on several previous occasions. Royal testified that she believed the dog belonged to West because she had seen the dog in West's yard on two or three occasions. Royal further testified that she had seen the dog play with West's granddaughter, and on three occasions West called the dog to "come in the yard." On cross-examination, Royal qualified her testimony by stating that although she had seen the dog enter West's backyard, she had never seen the dog "contained" in the backyard.

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[2] Section 10-307(b) of the Baltimore City Revised Code reads:

> (b) *Animals generally.*
>
> > (1) Except as otherwise authorized under paragraph (2) of this subsection, all animals must be kept:
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> > > (I) confined in a building or secure enclosure;
> >
> > > (ii) secured by a leash or otherwise; or
> >
> > > (iii) restrained according to rules and regulations adopted by the Commissioner.

Baltimore City, Md., Revised Code, § 10-307(b) (1983).

Royal also called a juvenile, D.D., who testified that he saw the black dog approach and knock Royal down. D.D. further testified that he did not know "where the dog lived," but that he had seen it "around the neighborhood on the loose." Later, D.D. testified that he had seen the dog in a friend's, another juvenile's, backyard. The other juvenile lived with her mother, Angie, and her uncle, Eric.

Royal then called her friend Nina Brooks ("Brooks") who testified that the black dog belonged to West's son. Brooks further testified that her son was twenty-six years old and was friends with and grew up with West's son. Additionally, Brooks stated that she had never seen West with the black dog.

Finally, Royal called Marcia Pearl ("Pearl") who had lived with Royal for seven years. Pearl testified that she often walked the two dogs that are cared for by Royal and her. Pearl further testified that she had seen the black dog escape West's backyard on four or five occasions. Pearl averred that when the dog escaped West's backyard, Pearl saw West come outside and "summon the dog back inside," to which the dog responded every time. On cross-examination, Pearl also testified that on at least one occasion, she had seen another woman call and reprimand the dog from West's house.

At the conclusion of Royal's case-in-chief, West made a motion for judgment, pursuant to Maryland Rule 2-519. The basis for West's motion was that Royal had failed to establish that the dog was owned by West, and therefore she owed no duty to Royal. The trial judge considered all the testimony that had been presented and concluded that she did

not "believe that anyone has proven . . . that in fact Ms. West is the owner of this dog." Consequently, the trial judge granted West's motion for judgment.

Royal subsequently filed this timely appeal.

DISCUSSION

I. Motion for Judgment

This appeal is raised in the context of the trial court granting West's motion for judgment. A motion for judgment is governed by Maryland Rule 2-519 which provides:

> **(a) Generally.** A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence. The moving party shall state with particularity all the reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.
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> **(b) Disposition.** When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstance, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

Md. Rule 2-519.

Royal contends "[t]he lower court did not view the facts and available inferences most favorable to the Appellant and therefore, erred as a matter of law." In the context of a jury trial, the second provision of Md. Rule 2-519(b) prevails as the general rule so as to prevent

the judge from usurping the role of the fact finder. *See e.g.*, *C & M Builders, LLC v. Strub*, 420 Md. 268, 291 (2011) ("When, as here, a defendant moves for judgment based on . . . the legal insufficiency of plaintiff's evidence, a trial judge must determine if there is 'any evidence, no matter how slight, that is legally sufficient to generate a jury question.'" (quoting *Tate v. Bd. of Educ.*, 155 Md. App. 536, 544-45 (2004)). In an action tried by the court, however, the first sentence of Md. Rule 2-519(b) is operative, which allows the court to "proceed, as the trier of fact, to determine the facts and to render judgment." Md. Rule 2-519.

To understand the rationale of this rule, it is critical to understand the burdens of proof borne by the parties. The colloquial term "burden of proof" can properly be disentangled to encompass two similar yet distinct burdens, namely, the burden of production, and the burden of persuasion. The burden of production "is satisfied by making out a prima facie case . . . [which includes] the duty of going forward with evidence at the beginning." James B. Thayer, *The Burden of Proof*, 4 Harv. L. Rev. 45, 69 (1890). Stated differently, if the burden of production is not satisfied, it "means that the evidence thus far offered on a specific fact-in-issue, if believed, would not justify a jury of rational and impartial persons in finding the fact-in-issue in favor of the party having the burden." 9 Wigmore, *Evidence* § 2498a, at 336 (3d. Ed. 1940). Indeed:

> In analyzing whether a proponent has met the burden of production, the court lists the constituent elements of the proposition to be proved -- the crime, the tort, the contract, etc. -- and then determines whether the evidence in the case, if given

> the maximum credibility and maximum weight, could permit the fact finder fairly to find each of those constituent elements.

Terumo Med. Corp. v. Greenway, 171 Md. App. 617, 626 (2006). Accordingly, in order to satisfy the burden of production, the court must be able to affirmatively conclude that a fact finder could fairly accept a litigant's factual proposition given the evidence presented.

On the other hand, the burden of persuasion "is the device for deciding an issue on which at the close of the case the mind of the trier is in equilibrium." Edmund M. Morgan, *The Law of Evidence, 1941-1945*, 59 Harv. L. Rev. 481, 492 (1946). In a civil case, this burden is "on the plaintiff to prove by a preponderance of the evidence that 'it is more probable than not that defendant's act caused his injury.'" *Fennell v. S. Md. Hosp. Ctr., Inc.*, 320 Md. 776, 787 (1990) (quoting *Peterson v. Underwood*, 258 Md. 9, 17 (1970)); *accord Potts v. Armour & Co.*, 183 Md. 483, 486 (1944) ("It is an elementary rule that the plaintiff in an action for damages for injuries alleged to have been caused by negligence has the burden of proving affirmatively the alleged negligence by a preponderance of the evidence."). "This does not mean plaintiff is required to exclude every other possible cause of the accident . . . . But where plaintiff by his own evidence shows two or more equally likely causes of the injury, for only one of which defendant is responsible, plaintiff cannot recover." *Peterson*, *supra*, 258 Md. at 17 (citations omitted).

Whether a plaintiff has satisfied the burden of persuasion is determined by the trier of fact after hearing the evidence and determining the probative value of each piece of evidence. *In re Adoption/Guardianship of Amber R.*, 417 Md. 701, 720 (2011). Whether the

burden of production has been satisfied, however, is a matter of law to be determined in all instances by the court. *See District of Columbia v. Singleton*, 425 Md. 398, 407 (2012) (court determines whether "plaintiffs' evidence is insufficient to create a triable issue"). Accordingly, the second clause of Md. Rule 2-519(b) is designed to allow a judge to render judgment when a plaintiff has failed to satisfy their burden of production in all cases. The first sentence of Md. Rule 2-519(b), however, permits the judge to render judgment when the plaintiff has failed to satisfy their burden of persuasion only when the judge and the fact finder are one in the same.

Here, the trial judge was well within her discretion to assess whether Royal satisfied her burden of persuasion because the concerns that require a judge to submit a case to the jury are non-existent when the judge, as fact finder, can determine a plaintiff has failed to satisfy their burden of persuasion notwithstanding the arguments of the defense. In recognition of this reality, Md. Rule 2-519(b) permits judges to rely on their findings of fact and credibility determinations when deciding a motion for judgment during a bench trial. When acting as fact finder, "it is settled . . . that a judge may pick and choose the evidence on which to base his findings." *Attorney Grievance Com'n of Md. v. Miller*, 301 Md. 592, 603 (1984). Indeed, it would be nonsensical to require the fact finder to ignore his or her evidentiary intuitions, only to subject the fact finder to further evidence which would likely only reaffirm and bolster those beliefs. Our rules do not require this exercise in inefficacy. Rather, in a non-jury trial, "[t]he trial judge is not compelled to make any evidentiary

inferences whatsoever in favor of the party against whom the motion for judgment is made." *Pahanish v. W. Trails, Inc.*, 69 Md. App. 342, 353 (1986). We, therefore, hold that the trial judge did not err in making evidentiary findings and relying on those findings when deciding upon a motion for judgment during a bench trial.[3]

II. Determination of Ownership

As stated in Part I, *supra*, the trial judge acted within her discretion by making factual findings, and rendering judgment based on those findings. Royal further contests, however, the substance of the judge's factual finding. Royal claims, contrary to the findings of the trial judge, that she has presented sufficient evidence to prove that West was the owner of the dog.

The proper standard of review for actions tried without a jury is set forth by Maryland Rule 8-131 which provides:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

[3] We note there is a question as to whether the trial judge did in fact draw any inferences to Royal's detriment. In her ruling, the trial judge purported to render her decision after "reviewing the testimony [in a] light most favorable to the Plaintiff[.]" This statement suggests that the judge may have found that Royal had failed to satisfy the burden of production, in which case the grant of West's motion for judgment might have been proper, regardless of whether a jury was present. After judgment, however, Royal proceeded to argue that she had sufficiently made her *prima facie* case. For the reasons stated above, Royal's argument is immaterial because assuming, *arguendo,* that Royal satisfied her burden of production, the court could have rightfully found that she failed to satisfy her burden of persuasion.

Md. Rule 8-131(c). Indeed, "[t]hese rules have been consistently interpreted to require that appellate courts accept and be bound by the findings of fact of the lower court unless they are clearly erroneous." *Ryan v. Thurston*, 276 Md. 390, 391-92 (1975) (interpreting former Md. Rules 886 and 1086, from which the current Md. Rule 8-131(c) was derived). Furthermore, "'[i]f any competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly erroneous.'" *Webb v. Nowak*, 433 Md. 666, 678 (2013) (quoting *Figgins v. Cochrane*, 403 Md. 392, 409 (2008)).

In a bench trial, the deference we afford to the circuit court's factual findings is proper because "[t]he trial court is not only the judge of a witness' credibility, but is also the judge of the weight to be attached to the evidence." *Ryan*, *supra*, 276 Md. at 392. Indeed, the trial judge sits in a superior posture to assess credibility and weigh evidence at the time it is presented, than do we after the significant passage of time and upon review of facts contained in a stagnant record. For this reason, Md. Rule 8-131(c) prohibits us from "sit[ting] as a second trial court, reviewing all the facts to determine whether an appellant has proven his case. Nor is it our function to weigh conflicting evidence." *Goss v. C.A.N. Wildlife Trust, Inc.*, 157 Md. App. 447, 456 (2004).

Although the degree of deference we afford to the factual findings of the trial court is already quite high, our holding is buttressed by the failure of the trial judge to be persuaded of a particular fact, rather than her being affirmatively persuaded:

> [I]t is far easier to sustain as not clearly erroneous the decisional phenomenon of not being persuaded than it is to sustain the very

> different decisional phenomenon of being persuaded. Actually to be persuaded of something requires a requisite degree of certainty on the part of the fact finder (the use of a particular burden of persuasion) based on legally adequate evidentiary support (the satisfaction of a particular burden of production by the proponent). There are with reasonable frequency reversible errors in those regards. Mere non-persuasion, on the other hand, requires nothing but a state of honest doubt. It is virtually, albeit perhaps not totally, impossible to find reversible error in that regard.

Starke v. Starke, 134 Md. App. 663, 680-81 (2000); *accord Pollard's Towing, Inc. v. Berman's Body Frame & Mech., Inc.*, 137 Md. App. 277, 289-90 (2001) ("Far less is required to support a merely negative instance of non-persuasion than is required to support an affirmative instance of actually being persuaded of something.").

In the case *sub judice*, the trial court heard testimony from Royal, D.D., Brooks, and Pearl regarding the owner of the dog that caused Royal's injuries. Royal and Pearl testified that they believed the dog belonged to West due to the degree of familiarity she appeared to have with the dog. D.D. and Brooks, however, testified that, in their view, persons other than West were the owner of the dog.

West was aware that she "enjoyed the luxury of not having to prove anything. [She] could simply sit back and rest content as the appellant failed to carry [her] burden of persuasion." *Bricker v. Warch*, 152 Md. App. 119, 138 (2003). Accordingly, West moved for judgment under Md. Rule 2-519. Thereafter, the trial court concluded that based on the combined inconclusiveness of Royal's and Pearl's testimony, and the conflicting testimony of D.D. and Brooks, it did not "believe that anyone has proven . . . that in fact Ms. West is

the owner of this dog." Royal's inability to prove ownership based on her and Pearl's testimony, as well as the inconsistences raised in the testimony of D.D. and Brooks, is competent material evidence that supports the trial court's findings. Considering the conflicting evidence before the trial court, the court's failure to be persuaded was not clearly erroneous. We, therefore, affirm the factual findings of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.