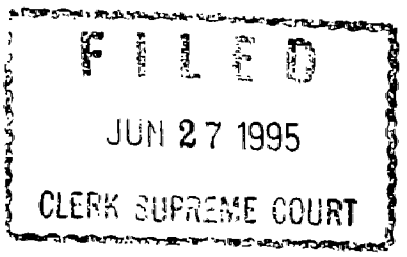
IN THE COURT OF APPEALS OF IOWA

No. 5-043 / 94-457



ROBERT D. PETERS,

Plaintiff-Appellant,

v.

LORI WHALEN,

Defendant-Appellee

Appeal from the Iowa District Court for Cerro Gordo County, Gilbert K. Bovard, Judge.

The plaintiff appeals from the district court's judgment giving him only a partial recovery for cash allegedly loaned to the defendant. **AFFIRMED AS MODIFIED.**

Andrew P. Nelson of Meyer, Lorentzen & Nelson, Decorah, for appellant.

J. Mathew Anderson of Laird, Heiny, McManigal, Winga, Dufy & Stambaugh, P.L.C., Mason City, for appellee.

Considered by Donielson, C.J., and Habhab and Huitink, JJ. Hayden, J., takes no part.

PER CURIAM

Robert D. Peters and Lori M. Whalen lived next door to each other on East State Street in Mason City. Whalen separated from her husband in late 1990 and was living in the house with her two children. She became divorced from her husband in February 1991.

While Whalen was in the process of becoming divorced, Peters developed a romantic interest in her. He bought gifts for her, such as silky pajamas, a winter coat, and perfume, and sent her notes, a card, and a poem. Peters knew Whalen had a certain amount of financial difficulty due to the divorce. He told her she could count on him for financial assistance.

Between January 1991 to March 1992, Peters gave Whalen cash and checks worth $7095.61. The following is a list of the loans Peters claims he made:

(1) In January 1991, Whalen received $500 from Peters to pay her divorce attorney. She later paid back $200 of this amount.
(2) In February 1991, when Whalen was housesitting for Peters, she used $50.61 of money he had left for "household emergencies" to pay her own utility bill.
(3) In August or September 1991, Peters tore up Whalen's check to Interstate Power for $80 and paid the bill himself.
(4) In September 1991, Whalen received $1700 from Peters. The money was either used to fix up Whalen's house or for monthly expenses.
(5) In December 1991, Peters gave Whalen $100 and asked her to buy some jeans for him. Whalen bought jeans for $30 and did not return the change.
(6) Later in December 1991, Whalen received $1500 from Peters. It is unclear what this money was used for.
(7) In January 1992, Whalen received $2000 from Peters to help pay her debts. She gave him her diamond engagement ring as security.

(8) Later in January 1992, Whalen asked to borrow $40 to buy medication for her children.
(9) In February 1992, Whalen received $1200 from Peters. It is unclear what this money was used for.
(10) In March 1992, Whalen received $155, which she used to pay for her license plates and a fine.

Thus, the evidence shows that when Whalen needed money for attorney fees, utility bills, repairs to her house, or to renew her driver's license, she turned to Peters.

Additionally, Whalen obtained a loan of $5000 from a bank and Peters co-signed the note. Whalen did not keep up payments on the note and Peters was required to pay $4447.76 to satisfy the debt.

Although Whalen was ready to rely on Peters' financial support, she did not reciprocate his romantic interest. In May 1992, she sold her house and moved to a different part of Mason City. She did not tell Peters her new address or telephone number. Peters was able to trace Whalen, and he then demanded $11,543.37, which he claimed she owed him.

Peters filed the present suit against Whalen, alleging there was an oral loan agreement between the parties, and seeking to enforce the agreement. He submitted a bill of particulars which detailed the date of each payment, its purpose, and the amount. He later amended his petition to include a claim for unjust enrichment.

In response to Peters' request for admissions, Whalen admitted she was legally responsible to pay Peters $4447.76 which he had paid on the bank loan. The district

court granted Peters' motion for partial summary judgment against Whalen in the amount of $4447.76.

The case proceeded to trial as to the other amounts Peters claimed were due him. Whalen admitted she had received the amounts Peters set forth in his bill of particulars. She also admitted she had agreed to repay Peters $195 in addition to the previous judgment for $4447.76. The amount of $195 comes from $40 borrowed in January 1992 and $155 borrowed in March 1992. Whalen claimed, however, the other payments from Peters were gifts.

The court determined the case of *Shold v. Goro*, 449 N.W.2d 372 (Iowa 1989) (*Shold I*) was controlling. The court concluded that under *Shold I*, Peters was entitled to judgment against Whalen for such amounts as he could establish were advanced to her as loans. The court found Peters had failed to establish the following payments were loans or to carry his burden to invoke the doctrine of unjust enrichment as to a payment of $1700 in September 1991, a payment of $1500 in December 1991, and a payment of $1200 in February 1992.

The district court found a payment of $500 to Whalen in January 1991, which she used to pay her divorce lawyer, was a loan because Whalen later paid Peters $200, which he credited against the debt. The court also found a payment to Whalen of $2000 in January 1992 was a loan because she gave Peters her diamond engagement ring as security at the time she received the money.

The court determined Peters was entitled to recover $6942.76 against Whalen, which included the previous summary judgment for $4447.76. The parties agreed the diamond engagement ring was to be sold and the proceeds applied against the judgment.

Peters filed a motion pursuant to Iowa Rule of Civil Procedure 179(b). He asked the court to award him the total amount requested in his petition, $11,543.37. In particular, he sought to have the court reverse its decision as to the payments of $1700, $1500, and $1200 (a total of $4400). The court reiterated its position that Peters had the burden to prove by a preponderance of the evidence that the transactions were loans rather than gifts. The court concluded Peters had failed to meet his burden. Peters has appealed.

This case was tried in equity[1], and our review is de novo. *See* Iowa R. App. P. 4. In equity cases, especially when considering the credibility of witnesses, the

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[1] An unjust enrichment action is generally an equitable matter. *Regal Insurance Co. v. Summit Guar. Corp.*, 324 N.W.2d 697, 704 (Iowa 1982). In *Gard v. Razanskas*, 248 Iowa 1333, 1336, 85 N.W.2d 612, 614 (1957), our supreme court cited with approval this language from the Restatement of Restitutions.

> "A person who has been unjustly enriched at the expense of another is required to make restitution to the other... A person is unjustly enriched if the retention of the benefit would be unjust. A person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money."

Shold v. Goro, 449 N.W.2d 372, 373-74.

court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7).

Peters contends the district court erred by failing to shift the burden of going forward with the evidence to Whalen after he made a prima facie showing that he had advanced those funds to her. He states that once he met his burden to show he advanced those certain amounts of money to Whalen, she had the burden to show the payments were not a loan.

As noted above, the district court relied upon the decision in *Shold I* in reaching its conclusion. The factual situation in *Shold I* was somewhat similar to that in the present case. *Shold I*, 449 N.W.2d at 372. The plaintiff and the defendant had a romantic relationship. *Id.* The plaintiff advanced money to the defendant, and later brought a suit claiming the payments were loans. *Id.* The supreme court found plaintiff was entitled to a judgment against defendant for all of the amounts advanced as loans, subject to any credits by reason of any forgiveness of indebtedness by plaintiff or payments by defendant. *Id.* at 374. The case was then remanded for a hearing on this issue. *Id.*

After remand, the case came up again on appeal. *Shold v. Goro*, 480 N.W.2d 892 (Iowa 1992) (*Shold II*). The supreme court found the plaintiff was entitled to recover for the amounts advanced to defendant for which the parties either expressly or impliedly agreed she would be reimbursed. *Id.* at 893. The court held:

> In sorting through the advances, the burden of proof regarding expected repayment will be important. Jerri's right of recovery differs from but is akin to an action for moneys had and received. [citation omitted.] Under these special circumstances we believe and hold that, although the burden of proof is upon Jerri to establish her claim, she made out a prima facie case upon showing the funds were advanced. As to any funds advanced, the burden of going forward then shifts to Terry to show no repayment of the advance was contemplated.

Id. at 893-894.

In the present case, Peters claims he has set forth a prima facie case. We agree. Whalen admitted she received the amounts Peters set forth in his bill of particulars. However, the district court did not place upon her the burden of going forward to show no repayment of the advance was contemplated. The court stated:

> Although arguably Lori's testimony also left substantial voids in the tapestry of events, it is not her burden to establish the elements necessary to recover.

We consider a prima facie case to be one in which there is some substantive evidence to support the plaintiff's case. *See In re Estate of Held*, 231 Iowa 85, 97, 300 N.W. 699, 704 (1941). Under the supreme court's ruling in *Shold II*, a prima facie case is made out in this type of action when a plaintiff shows money was advanced to the defendant. *Shold II*, 480 N.W.2d at 894.

We believe Peters introduced sufficient evidence to establish a prima facie case by showing funds of $11,543.37 (which includes the summary judgment entry of $4447.76) had been advanced to Whalen. Whalen admitted she had received this

amount from Peters. She also admitted she had agreed to repay Peters $4642.76 ($4447.76 + $195) of this amount.

We then examine the evidence from the viewpoint of whether Whalen has sufficiently shown no repayment of the remaining sums advanced was contemplated. Like the trial court, we find the evidence shows the parties intended that Whalen would repay the $500 she received in January 1991 to pay her divorce attorney. Peters testified this was a loan and Whalen was to pay him after the dissolution. Furthermore, Whalen did repay him $200 on this debt.

We also find that a loan of $50.61 was created when Whalen housesat for Peters in February 1991. Peters had left some signed checks for Whalen to use for household emergencies. Whalen used one of the checks for her own utility bill. We determine a loan was created because Peters was unaware Whalen had used his money until later, and thus, he could have no donative intent at the time the payment was made. In addition, we believe the signed checks were to be used for emergencies involving his residence, not Whalen's.

In September 1991, Whalen received $1700 from Peters. Peters testified Whalen asked to borrow the money in order to fix up her house before she sold it. He stated she told him she would pay him back after she sold her house. Whalen

testified[2] the money was used to pay bills in order to improve her credit rating. We determine Whalen has not meet her burden to show this advance was not a loan.

Whalen received $1500 from Peters in December 1991. Peters testified Whalen wanted the money to pay off her debts so that she would be in a better position to refinance her house. Whalen did not rebut Peters' testimony about this transaction; nor did she challenge Peters' testimony that she requested the sum of $1500. We determine Whalen did not meet her burden to show no repayment of this advance was contemplated.

Peters wrote a check for $2000 to Whalen in January 1992. At that time Whalen gave him her diamond engagement ring, which she admitted was to stand as collateral for the debt she owed him. We agree with the trial court the advance of $2000 was clearly a loan.[3]

Whalen received $1200 from Peters in February 1992. He testified he thought Whalen had been in danger of overdrawing her checking account, but was not sure whether this was the check written in response to that situation. Whalen offered no

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[2] In addition, Whalen admitted, during her direct examination by Mr. Nelson, that she asked Peters for the $1700. Her first answer was that she was going to use the money "for trying to refinance the house (on East State Street)." She later testified the funds were to be used for "odds and ends". The record establishes that she called Peters at work to secure this amount.

[3] Whalen wrote Peters a note stating: "Bob Peters, I will pay you back the $2000 plus more when I refinance the house. Thank you for everything. As of 1-15-30-92. Lori Whalen." We agree with the trial court that this document is vague as to date and time, but when its contents are considered with her testimony and the testimony of Peters, it is clear she considered some of the funds (if not all) she received by her to be loans.

testimony concerning this transaction. A reasonable inference from the testimony is that she initiated the request for this sum of money. We determine she again failed to meet her burden to show the advance was not a loan.

We determine that in two instances Whalen did meet her burden to show the parties did not contemplate repayment of an advance. In August or September 1991, Peters tore up Whalen's check to Interstate Power and wrote his own check for $80. He admitted she told him she would rather pay her own bill. We conclude Peters' voluntary payment of the utility bill was a gift.

In December 1991, Peters gave Whalen $100 and asked her to buy him some jeans. She brought back jeans which had a price tag of $30. She did not give Peters any change, and Peters did not ask for the change. We determine there was no agreement between the parties that Whalen would repay Peters the $70 difference. We conclude the $70 was either a gift to Whalen or a payment to her for doing Peters' shopping for him.

In summary, the evidence shows Whalen admitted she had agreed to repay Peters for advances of $4642.76. In addition, she did not meet her burden to show no repayment was contemplated of other advances of $6750.61. Whalen did show no repayment was contemplated of advances of $150.

We determine the district court decision should be modified and the judgment against Whalen should be increased to $11,393.37. This amount includes the amount of $4447.76 which was awarded to Peters in the partial by summary judgment. We

affirm the decision of the district court in all other respects. Costs assessed one-half to each party.

AFFIRMED AS MODIFIED.