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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1298

In re the Billie V. Darkenwald Revocable Trust, dated January 21, 1983, restated February 5, 1999, as amended, Casey Darkenwald,
Respondent,

vs.

Thomas Darkenwald, trustee of the Billie V. Darkenwald Trust dated January 21, 1983, Restated February 5, 1999, as amended,
Appellant.

Filed June 1, 2020
Affirmed
Bryan, Judge

Wright County District Court
File No. 86-CV-17-802

Michael J. Mergens, Ken R. Hall, EntrePartner Law Firm, PLLC, Minneapolis, Minnesota (for respondent)

Clifford S. Anderson, Clifflaw, PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Reyes, Judge; and Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

BRYAN, Judge

Appellant challenges the district court's denial of his motions for new trial, for judgment as a matter of law, and for summary judgment. We conclude that the district court did not abuse its discretion in making evidentiary rulings, instructing the jury, or denying appellant's motions for new trial. We also conclude that the evidence supports the jury's verdict regarding lack of testamentary capacity and affirm the denial of appellant's motion for judgment as a matter of law. We do not consider appellant's challenge of the district court's denial of his summary judgment motion because such decisions are outside the proper scope of review after a trial on that issue has occurred.

FACTS

Gilbert M. Darkenwald Sr. (Mr. Darkenwald) and Bille V. Darkenwald (Ms. Darkenwald) had four children and nine grandchildren. Appellant Thomas Darkenwald, and respondent Casey Darkenwald are grandchildren of Mr. and Ms. Darkenwald. The Darkenwald family built a series of real estate companies, including the Riverbend Manufactured Home Park (Riverbend Entities) and a group of businesses located in Rogers, Minnesota (Rogers Entities). Mr. and Ms. Darkenwald held the majority of their assets in two trusts, the Gilbert M. Darkenwald trust (GMD trust) and the Billie V. Darkenwald trust (BVD trust). Mr. Darkenwald died in 2010 and Ms. Darkenwald died in 2016. Prior to July 26, 2013, all of the children and grandchildren were included in both trusts. On July 26, 2013, however, Ms. Darkenwald amended the BVD Trust by removing respondent, respondent's father, and respondent's siblings from the list of beneficiaries to her trust. In addition, Ms. Darkenwald made a new will, disinheriting respondent, respondent's father, and respondent's siblings. At that time, appellant was the trustee for both the GMD and the BVD trusts.

After Ms. Darkenwald died, respondent contested the new will and the BVD trust amendment on two grounds: that Ms. Darkenwald lacked the mental capacity to take these actions and that Ms. Darkenwald made the changes as a result of undue influence. Appellant moved for summary judgment, but the district court denied the motion, identifying questions of fact for a jury on both grounds. The case proceeded to trial and the jury found that respondent proved by clear and convincing evidence that on July 26, 2013, Ms. Darkenwald: "lacked testamentary capacity to make a new will and amend her trust." In addition, the jury found by clear and convincing evidence that on that same date, "the new will and Eighth Amendment of [the BVD Trust] was the product of undue influence by Thomas R. Darkenwald." The district court issued an order directing entry of judgment in respondent's favor in light of the jury's verdict. Appellant moved for judgment as a matter of law (JMOL) and new trial, but the district court denied both motions. This appeal followed. Appellant challenges these orders from the district court, arguing that the trial evidence does not support the jury's verdict on either question[1] and that the district court made several errors in its evidentiary rulings at trial.

A. Evidentiary Rulings

The district court made several evidentiary rulings at issue in this appeal, including admitting evidence regarding bank statements as substantive exhibits (exhibits 32, 33, 34, 48, 49, and 50), excluding demonstrative exhibits (exhibits 182, 183, and 184)[2] that related

[1] In light of our conclusions regarding testamentary capacity, we need not address the alleged errors regarding the undue-influence claim. *See, e.g., Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 888 (Minn. 2010) ("[I]f the plaintiff is entitled to recover on one ground, a court need not consider the other grounds.").

[2] Initially, appellant offered two charts as exhibits 180 and 181, but the district court excluded them. Appellant revised the charts and offered the revised versions as exhibits 182 and 183. The district court also excluded the revised exhibits. Appellant contests the exclusion of exhibits 182 and 183.

to the bank statements, and excluding six other exhibits (exhibits 14, 28, 120, 122, 139, and 143). The bank statement exhibits and the demonstrative exhibits both relate to the undue-influence claim.[3] Similarly, four of the remaining six exhibits in question relate to the undue-influence claim.[4] Only two of the exhibits in question concern Ms. Darkenwald's mental capacity: exhibits 139 and 143. Exhibit 139 is an email dated September 15, 2015, by Ms. Darkenwald's nurse informing the recipient that Ms. Darkenwald "has advanced with her disease of Dementia," and due to an increase in "resistive behaviors," Ms. Darkenwald would be transferred to a different part of the residential facility where staff could better care for her. Exhibit 143 is a letter dated February 8, 2018, to respondent's counsel from Health Information Management Services on Mayo Clinic letterhead. The letter states that they did not have any medical records regarding Ms. Darkenwald's mental health, dementia, or competency.

[3] The bank statements memorialized transactions from a bank account holding Ms. Darkenwald's personal social security payments and the cash assets of the two trusts. The district court admitted the bank statement exhibits, concluding that how that money was spent by appellant (the trustee) related to specific undue influence factors. The district court excluded appellant's demonstrative exhibits regarding the account on the grounds that they asserted facts that were better left to testimonial evidence. In addition, the district court concluded that exhibit 184 would confuse the jury and left out necessary data.

[4] Exhibit 14 is a letter regarding a dispute over payments due from the Riverbend Entities. The district court excluded exhibit 14 based on relevancy and hearsay, noting that the exhibit did not refer to the BVD trust, the trust amendment, or the new will, and the letter was discussed in exhibit 15, which was admitted. Exhibit 28 is a letter regarding breaches of "Riverbend's Partnership agreement." Exhibit 120 is a "cease contact" letter directing respondent and his parents to cease contact with Ms. Darkenwald. Exhibit 122 is an undated Valentine's Day card to Ms. Darkenwald from respondent's parents. The district court excluded exhibits 28, 120, and 122 on hearsay grounds.

B. Ms. Darkenwald's Testamentary Capacity

The parties do not dispute that Ms. Darkenwald suffered from dementia. Instead, they presented competing evidence regarding the effect of her dementia on her ability to form a rational judgment regarding disposition of her property. Both parties presented expert testimony regarding Ms. Darkenwald's mental capacity at the time that she amended her trust and executed a new will in July 2013.

Both parties' experts agreed that Ms. Darkenwald suffered from moderate dementia and impairment of cognition when she signed the trust amendment and new will in July 2013. Both parties also agreed that she was diagnosed with Alzheimer's disease 17 months later. Appellant's expert described a sliding scale of cognitive impairment, explaining that people with dementia will have both good days and bad days, during which they seem very confused. As dementia progresses, there are more and more days when those patients appear forgetful, confused or lost. Ultimately, appellant's expert concluded that Ms. Darkenwald understood the nature and extent of her property when she signed the trust amendment and new will. Respondent's expert disagreed, given the complexity of Ms. Darkenwald's estate. In addition, respondent's expert testified that Ms. Darkenwald exhibited cognitive impairment during her deposition[5] less than two months after amending her trust and executing a new will. During the deposition, she was unable to answer questions about even basic matters, was unable to name all of her nine grandchildren,

[5] The deposition was taken as part of discovery in a separate legal dispute involving the family members.

rambled off topic, forgot to put her reading glasses on when reading documents, and at one point incorrectly stated that all of the trust would go to her daughter.

Appellant also presented testimony from Ms. Darkenwald's attorney who drafted the trust amendment and the new will in 2013. The attorney satisfied himself that Ms. Darkenwald was competent when he asked her to review and sign the documents at issue. At trial, however, the attorney also conceded that he has no training on mental impairment or cognition. In addition, he acknowledged that he asked mostly yes-or-no questions. On cross-examination, he stated that he did not realize that people suffering from dementia will answer yes-or-no questions regardless of whether they know the answer to the question. In hindsight, the attorney stated he would have obtained a medical opinion regarding competency before having her sign the trust amendment and new will. The attorney acknowledged that during this time, litigation attorneys at his firm represented appellant in a dispute among Darkenwald family members. These attorneys prepared an affidavit for Ms. Darkenwald, explaining her decision to disinherit respondent, respondent's father, and respondent's siblings. Ms. Darkenwald signed this affidavit on the same day that she signed the trust amendment and the new will. The attorney testified that in hindsight, it would have been prudent for Ms. Darkenwald to have been represented by a lawyer outside his firm, instead of him.

C. Contested Jury Instructions

The district court completely or partially declined to provide five of appellant's proposed jury instructions, numbered as jury instructions 15, 17, 19, 21, and 23.

Appellant's proposed jury instruction 15 follows the model instruction, except that it also includes this statement: "It is the generally recognized rule that testamentary capacity requires only that the testator have capacity to know and understand the nature and extent of her bounty, as distinguished from the requirement that she have actual knowledge thereof." The district court provided the model instruction, noting that the requested language was superfluous.

Appellant's proposed jury instructions 17 and 21 would have informed the jury that the law presumes sufficient testamentary capacity and presumes that a will did not result from undue influence. Appellant's proposed jury instruction 19 included language comparing undue influence to using a testator as a "mere puppet." Appellant's proposed jury instruction 23 follows the language of the model instruction regarding the applicable standard of proof, with one exception. Appellant requested that the district court include the following additional language: "In order to prove a claim by clear and convincing evidence, a party's evidence should be unequivocal and uncontradicted, and intrinsically probable and credible." The district court did not give proposed jury instructions 17, 19, 21, or 23. Instead, the district court provided the model instructions regarding the definition and elements of undue influence and testamentary capacity, and regarding the burden and standard of proof, which state that "[c]lear and convincing evidence is shown where the truth of the facts asserted is highly probable."

D E C I S I O N

I. Motion for New Trial under Rule 59.01(f)

Appellant argues that the district court erred in admitting some evidence, excluding other evidence, and determining what instructions to give the jury. We conclude that the district court did not abuse its discretion when it made the various contested decisions during the trial.

A. Evidentiary Rulings

Rule 59.01(f) of the Minnesota Rules of Civil Procedure permits a district court to grant new trial on the basis of erroneous admission of evidence. *E.g.*, *Kedrowski v. Lycoming Engines*, 933 N.W.2d 45, 62 (Minn. 2019). "The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). "In the absence of some indication that the [district] court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result." *Id.* at 46. In addition, appellant must demonstrate that the error "changed the result of the trial." *George v. Estate of Baker*, 724 N.W.2d 1, 9 (Minn. 2006) ("An evidentiary error is prejudicial if it might reasonably have influenced the jury and changed the result of the trial."); *see also Kedrowski*, 933 N.W.2d at 62; *City of Moorhead v. Red River Valley Co-op. Power Ass'n*, 830 N.W.2d 32, 39–40 (Minn. 2013).

In this case, appellant argues that the district court erred when it admitted evidence regarding bank statements offered as substantive exhibits (exhibits 32, 33, 34, 48, 49, and

50) and when it excluded demonstrative exhibits (exhibits 182, 183, and 184) that related to the bank statements. Appellant also challenges the exclusion of six other exhibits that do not relate to bank statements (exhibits 14, 28, 120, 122, 139, and 143). All but two of these contested rulings exclusively relate to the undue-influence claim.[6] Appellant acknowledges that both exhibits 139 and 143 are hearsay, but argues that both documents satisfy the hearsay exception for statements relating to medical diagnoses.[7] *See* Minn. R. Evid. 803(4).

The medical treatment exception to the hearsay rule applies to "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." *Id*. The rationale behind the rule is "the patient's belief that accuracy is essential to effective treatment." 2 Charles T. McCormick, *McCormick on Evidence* § 277, at 432 (Robert P. Mosteller, et al. eds., 8th ed. 2020). Neither exhibit 139 nor exhibit 143 satisfies the requirements of this exception.

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[6] Because we affirm the district court's denial of appellant's motion for JMOL regarding Ms. Darkenwald's testamentary capacity, we need not address the evidentiary rulings for the exhibits that concern the undue-influence claim.

[7] At trial, appellant's counsel offered the two exhibits "under the medical exception." In his brief, however, appellant refers to medical diagnoses, but cites to the hearsay exception for business records, perhaps inadvertently: "both exhibits . . . were reliable reports of 'diagnoses' of [Ms. Darkenwald's] condition and may come in 'any form.' Minn. R. Evid. 803(6)." Because of the arguments before the district court and because neither exhibit meets the requirements of a business record, we consider the exception for statements relating to medical treatment.

The first document, exhibit 139, is an email dated September 15, 2015, by Ms. Darkenwald's nurse informing the recipient that Ms. Darkenwald "has advanced with her disease of Dementia," and due to an increase in "resistive behaviors," Ms. Darkenwald would be transferred to a different part of the residential facility where staff could better care for her. Exhibit 139 is not a statement made by Ms. Darkenwald. The declarant, a nurse, is not the subject of any medical treatment. In addition, the statement was not made for purposes of determining a medical diagnosis or a course of treatment. We conclude that the district court did not abuse its discretion when it determined that exhibit 139 did not satisfy Rule 803(4). The second document, exhibit 143, is a letter dated February 8, 2018, to respondent's counsel from Health Information Management Services on Mayo Clinic letterhead. The letter states that they did not have any medical records regarding Ms. Darkenwald's mental health, dementia, or competency. The district court did not abuse its discretion when it determined that the letter did not satisfy Rule 803(4).

Moreover, even assuming that the district court had erred, appellant has not established that the error was prejudicial. Both experts agreed that Ms. Darkenwald suffered from moderate dementia when she signed the trust amendment and the new will in July 2013. Neither exhibit relates to Ms. Darkenwald's mental capacity in July 2013 and we cannot conclude that their exclusion changed the result of the trial. *See George*, 724 N.W.2d at 9.

B. Jury Instructions

Paragraph (f) of rule 59.01 also permits a new trial if a district court erred in its instructions to the jury or in its verdict form. *Halla Nursery, Inc. v. Baumann-Furrie &*

Co., 454 N.W.2d 905, 910-11 (Minn. 1990). District courts generally have "considerable latitude" in choosing jury instructions, *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002), and denying a motion for a new trial on the ground of erroneous jury instruction rests within the district court's discretion. *Paulson v. Lapa, Inc.*, 450 N.W.2d 374, 378 (Minn. App. 1990), *review denied* (Minn. Mar. 22, 1990). We will not reverse absent a clear abuse of that discretion. *Id.* In this case, appellant challenges the district court's decisions not to provide five separate proposed jury instructions, numbered as 15, 17, 19, 21, and 23. Although appellant lists these five instructions, appellant makes no argument regarding proposed jury instructions 15 and 23. We will not consider these two instructions and instead address proposed jury instructions 17, 19, and 21.[8]

Appellant argues that the district court failed to instruct the jury regarding a presumption of capacity (proposed jury instruction 17) and a presumption of a lack of undue influence (proposed jury instruction 21). We disagree. Minnesota statutes establish prima facie burdens of proof and burdens of persuasion for proponents and challengers to a will. Minn. Stat. § 524.3-407 (2018); *In re Estate of Novotny*, 385 N.W.2d 841, 843 (Minn. App. 1986). The district court properly instructed the jury regarding the burdens and standards of proof, requiring respondent to prove undue influence and lack of capacity

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[8] Appellant waived the challenges relating to proposed jury instructions 15 and 23. An assignment of error in a brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (declining to address allegations unsupported by legal analysis or citation); *see also Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971); *see State v. Anderson*, 871 N.W.2d 910, 915 (Minn. 2015) (applying this aspect of *Schoepke*).

by clear and convincing evidence. These instruction did not inadequately or improperly state the law. We conclude that the district court did not abuse its discretion in declining to provide proposed jury instructions 17 and 21.

Appellant also argues that the district court erred when it declined to provide proposed jury instruction 19. Appellant's proposed jury instruction modified the model instruction to include the imagery of a puppet master controlling the testator like a puppet. We conclude that the law does not require the jury instruction to include an evocative puppet analogy to accurately state the law. The district court did not abuse its discretion when it provided the model instruction instead of the one proposed by appellant.

II. Motion for New Trial under Rule 59.01(g) and Motion for JMOL

Appellant challenges the denial of his motions for new trial and for JMOL, arguing that the verdict is contrary to the evidence presented. Because the evidence supports the verdict, we conclude that the district court did not abuse its discretion when it denied the motion for a new trial and we affirm the denial of the motion for JMOL.

Motions for a new trial and for JMOL both require this court to review whether the evidence supports the verdict, although we apply different standards of review to the district court's disposition of each motion. "We review a district court's decision to grant or deny a new trial for an abuse of discretion." *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018) (citation omitted). "We review de novo a district court's decision to deny a motion for judgment as a matter of law." *Id.* at 838 n.5 (quotation omitted). An appellate court "will not set aside a jury verdict on an appeal from a district court's denial of a motion for a new trial unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Navarre v. S. Wash. Cty. Sch.*, 652 N.W.2d 9, 21 (Minn. 2002) (quotations omitted). Appellate courts "neither reconcile conflicting evidence nor decide issues of witness credibility, which are exclusively the province of the factfinder." *Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004). Instead, appellate courts defer to district court credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). Similarly, when reviewing motions for JMOL, we "view[] the evidence in the light most favorable to [the nonmoving party]," *Christie*, 911 N.W.2d at 838 n. 5, and grant JMOL only when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Minn. R. Civ. P. 50.01(a).

Testamentary capacity exists if the testator can form a rational judgment concerning her property and the claims of others on her property. *In re Estate of Torgersen*, 711 N.W.2d 545, 552 (Minn. App. 2006) *review denied* (Minn. June 20, 2006). We have established the following four factors to consider in determining whether a testator possesses the requisite testamentary capacity: (1) reasonableness or naturalness of the property disposition; (2) the testator's conduct within a reasonable time before and after execution of the disputed will; (3) prior adjudication involving testator's mental capacity; and (4) expert testimony pertaining to the mental and physical condition of the testator. *In re Estate of Anderson*, 384 N.W.2d 518, 520 (Minn. App. 1986).

The record is not manifestly contrary to the verdict and contains a legally sufficient basis for a reasonable jury to find in favor of respondent regarding testamentary capacity. The parties agree that the trust amendment and new will significantly changed the disposition of the Darkenwald estate. Both parties' experts agreed that Ms. Darkenwald suffered from moderate dementia and impairment of cognition when she signed the trust amendment and new will in July 2013. Both parties also agreed that she was diagnosed with Alzheimer's disease 17 months later. Respondent's expert concluded that Ms. Darkenwald exhibited cognitive impairment during her deposition two months after signing the trust amendment and new will. Ms. Darkenwald was unable to answer questions about even basic matters, unable to state the names of all of her grandchildren, rambled off topic, forgot to put her reading glasses on when reading documents, and at one point incorrectly stated that all of the trust would go to her daughter. Although the attorney who drafted the trust amendment and the new will testified that he was satisfied that Ms. Darkenwald was competent, the attorney also explained that he had no training on mental impairment or cognition and acknowledged that he asked mostly yes-or-no questions. On cross-examination, he stated that he did not realize that people suffering from dementia will answer yes-or-no questions regardless of whether they know the answer to the question. The attorney stated that, in hindsight, he should have obtained a medical opinion regarding competency.

Based on this evidence, a reasonable jury could find that respondent established clear and convincing evidence that Ms. Darkenwald lacked the requisite testamentary capacity to amend the trust and execute a new will. The district court did not abuse its discretion in denying the motion for new trial. In addition, reviewing the evidence in the light most favorable to the verdict, we conclude that the record supports the verdict, and we affirm the denial of the motion for JMOL.

III. Denial of Appellant's Motion for Summary Judgment

Appellant also challenges the denial of his motion for summary judgment. Such decisions, however, fall outside the proper scope of review after a jury verdict. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 918-19 (Minn. 2009) ("We therefore hold that the denial of respondents' motion for summary judgment is not properly within the scope of review on appeal from the judgment and we will not consider it."). "[T]he [district] court's conclusion at the summary judgment stage that there was a genuine dispute of fact becomes moot once the jury reaches a verdict on that issue." *Id.* at 918.

Affirmed.