

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1397**

Paul Nelsen,
Plaintiff,

Peter Nelsen, et al., individually and as interested persons
for the benefit of the Estate of Norma Nelsen,
Appellants,

vs.

Lawrence Nelsen, et al.,
Respondents.

**Filed May 17, 2021
Affirmed
Bjorkman, Judge**

Kandiyohi County District Court
File No. 34-CV-18-422

John E. Mack, New London Law P.A., New London, Minnesota (for appellants)

Gordon H. Hansmeier, Paul E. Storm, Rajkowski Hansmeier, Ltd., St. Cloud, Minnesota
(for respondents)

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

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

In this appeal from summary judgment dismissing their breach-of-fiduciary-duty claim, appellants argue that respondents (1) breached their fiduciary duty to collect rent for decedent's real property, and (2) financially exploited decedent. We affirm.

FACTS

This appeal arises from a dispute between decedent Norma Nelsen's six living children: Paul Nelsen; appellants Peter Nelsen, Elizabeth Costas-Nelsen, and Mary Nelsen; and respondents Lawrence Nelsen and Robert Nelsen.¹

In March 2014, decedent executed a power of attorney appointing respondents as her attorneys-in-fact, with power to act on her behalf in all matters of property and finance. The following fall, Lawrence petitioned the district court to establish a guardianship for decedent, noting her declining health. The court found decedent lacked the capacity to care for herself and, because of significant family conflict, appointed a professional guardian. The power of attorney survived the guardianship.

In 2016 and 2017, respondents, acting as attorneys-in-fact, disposed of much of decedent's property, except for a home she owned on Green Lake. They sold a residence and a Quonset hut she owned in Willmar, both of which required significant repairs. The record suggests, and the parties do not dispute, that respondents used much of the proceeds to pay for decedent's care. And they commissioned the demolition of the failing and

¹ Because almost all of the parties have the same surname, we refer to them individually by first name.

environmentally contaminated building that housed the family business—Nelsen Cleaners—of which decedent owned 75% (but all of the real property) and Paul owned 25%.

Decedent died in October 2017. Her estate consisted of the Green Lake property and nearly \$20,000 in bank accounts.² In her 2007 last will and testament, she provided for gifts of \$1,000 each to a theater and a church; devised the Green Lake property to respondents; and divided the residue of her estate between Paul (30%), Peter (17.5%), Mary (17.5%), the issue of her deceased son Lee Nelson (17.5%), and a trust for Elizabeth (17.5%).

In July 2018, appellants and Paul initiated this action, asserting three claims. First, they alleged that respondents breached their fiduciary duty to decedent by disposing of her non-Green Lake assets in bad faith and by failing to rent out the Green Lake property, “which decreased the value of the Estate.” They specifically asserted that “the Green Lake Property could have been rented to offset its expenses and to supplement the income of [decedent].” Second, they demanded an accounting. Third, Paul alleged that respondents, acting as decedent’s attorneys-in-fact, breached her fiduciary duty to Nelsen Cleaners and co-owner Paul by spending the business’s funds without accounting to Paul. Paul subsequently amended the complaint to assert additional claims.

After extensive discovery, respondents moved for summary judgment on the first two claims. The district court granted the motion, reasoning that (1) appellants and Paul

² One of decedent’s accounts was also subject to a \$50,000 loan from Lawrence, which he made to cover part of the cost of demolishing Nelsen Cleaners.

failed to present any evidence that would support a finding that respondents breached their fiduciary duty to decedent or acted in bad faith to the detriment of appellants and Paul, and (2) respondents satisfied the demand for an accounting by producing voluminous records of their actions as attorneys-in-fact. But the court did not order immediate entry of partial judgment. The district court conducted a bench trial on Paul's claims and, in April 2020, again ruled in respondents' favor. Appellants filed a timely motion for a new trial, reiterating the arguments they presented in opposing summary judgment. The district court entered judgment in June and, in October, denied the new-trial motion. Appellants now challenge the dismissal of their breach-of-fiduciary-duty claim.³

DECISION

Summary judgment is proper if “there is no genuine issue as to any material fact” and the moving party “is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.01. A party opposing summary judgment must produce competent, admissible evidence that creates a genuine issue for trial. *Twin Cities Metro-Certified Dev. Co. v. Stewart Title Guar. Co.*, 868 N.W.2d 713, 720 (Minn. App. 2015). If a party fails to establish an essential

³ Appellants could not appeal the partial summary judgment until final judgment was entered in June 2020. Minn. R. Civ. App. P. 103.03(a); Minn. R. Civ. P. 54.02; *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 609 N.W.2d 868, 873 n.6 (Minn. 2000). By that time, appellants had filed their new-trial motion. Because the motion was timely and authorized (albeit irregular following a summary-judgment ruling), their time to appeal was tolled until late October, when the district court ruled on that motion and respondents served notice of the district court's order. See Minn. R. Civ. App. P. 104.01, subd. 2 (providing that certain “proper and timely” posttrial motions toll the time for appeal until service of notice of filing the order disposing of the motion); *Madson v. Minn. Mining & Mfg. Co.*, 612 N.W.2d 168, 171 (Minn. 2000) (explaining that a motion need not be meritorious to be “proper,” only procedurally sufficient and of a type authorized by rule 104.01, subdivision 2).

element of its claim, the moving party is entitled to summary judgment. *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002). We review de novo whether there are genuine issues of material fact and whether the district court correctly applied the law. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017).

A party asserting a breach-of-fiduciary-duty claim must prove four elements: duty, breach, causation, and damages. *Hansen v. U. S. Bank Nat’l Ass’n*, 934 N.W.2d 319, 327 (Minn. 2019). The existence of a duty is undisputed—as attorneys-in-fact under decedent’s power of attorney, respondents owed her a fiduciary duty. *State v. Campbell*, 756 N.W.2d 263, 271 (Minn. App. 2008), *review denied* (Minn. Dec. 23, 2008). The issue here is breach. “Whether a fiduciary duty has been breached generally is a question of fact.” *Berremann v. W. Publ’g Co.*, 615 N.W.2d 362, 367 (Minn. App. 2000), *review denied* (Minn. Sept. 26, 2000). But summary judgment is appropriate if “no rational finder of fact could conclude” that a breach occurred. *Id.* The district court granted summary judgment on that basis, concluding that appellants failed to present any evidence of breach.

Appellants argue that they did produce evidence of breach—respondents’ failure to rent out the Green Lake property.⁴ They contend that this failure breached respondents’ duty to “maximize” decedent’s assets. We disagree for two reasons.

⁴ Appellants also argue that they have standing to bring a breach-of-fiduciary-duty claim. Respondents disputed this argument in the district court. But the court dismissed appellants’ claims without addressing standing. Accordingly, the issue is not before us. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (“A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.” (quotation omitted)).

First, appellants overstate respondents' duty. Respondents were decedent's attorneys-in-fact, not her guardians. An attorney-in-fact "has no affirmative duty to exercise any power conferred upon the attorney-in-fact under the power of attorney." Minn. Stat. § 523.21 (2020). But if an attorney-in-fact exercises a conferred power, the person must do so "in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs and shall have the interests of the principal utmost in mind." *Id.* In other words, respondents were not obligated to maximize decedent's assets, only to ensure that whatever actions they took with respect to them were prudent and prioritized her interests.

Second, appellants have not presented any evidence that would support a determination that respondents violated their fiduciary duty by failing to rent out the Green Lake property. Appellants assert that renting out the lake home was the only reasonable course of action because it could have commanded \$2,000 per week during the summer months. But they produced no evidence of the property's likely rental value. Nor do they identify any evidence that decedent wanted respondents to rent out the home, or that their reason for not doing so—because they considered the cost of making the home rentable to be "prohibitive"—was unsound. And most important, they identify no evidence that failing to rent out the home resulted in there being insufficient funds for decedent's care. Indeed, appellants essentially acknowledge the opposite by claiming that, without rental income, the decedent's assets would have proved insufficient "if she had lived much longer."⁵

⁵ Appellants also assert that respondents engaged in "self-dealing" by using the lake home themselves without paying rent to decedent. But they identify no evidence that respondents

Appellants also contend that respondents financially exploited decedent, a vulnerable adult, by failing to collect rent at the Green Lake home and disposing of her other assets. But their exploitation argument is not an independent claim; it merely restates their breach-of-fiduciary-duty claim and likewise fails as a matter of law. Appellants produced no evidence of exploitative behavior. They assert that respondents “contraven[ed] [decedent’s] intent as expressed in her will” by disposing of the non-Green Lake properties. The plain language of decedent’s will defeats this argument by making only three specific devises (the two monetary gifts and the Green Lake property), while apportioning whatever remains of her estate among her other children. Appellants also argue that respondents should have asked decedent whether she wanted them to sell the non-Green Lake properties rather than, for example, taking out a loan against the lake property to make the repairs necessary at the other properties. But respondents had no such duty when exercising a conferred power. *See Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36, 44 (Minn. App. 2010) (“An attorney-in-fact is an agent, one who stands in the shoes of a principal.” (quotation omitted)). And all of respondents’ challenged transactions occurred after decedent was subject to guardianship; she was not in a position to offer input, and appellants did not present evidence that the guardian had concerns about the transactions.

used the property, that respondents failed to provide monetary or other compensation to decedent for any such use, or that failure to do so was inconsistent with the wishes of decedent, who devised it to them.

In sum, appellants failed to present any issues of material fact that warrant a trial on their claim that respondents breached their fiduciary duty to decedent. Accordingly, we conclude the district court did not err by granting summary judgment on that claim.

Affirmed.