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IN THE SUPREME COURT OF IOWA

NO. 19-1724
Pottawattamie County No. CVCV115108

DAVID BUBOLTZ and DONNA REECE,
Plaintiffs-Appellants/Cross-Appellees,

v.

PATRICIA BIRUSINGH, Individually and in her capacity as Co-Executor of The Estate of Cletis C. Ireland, and KUMARI DURICK, Defendants-Appellees'/Cross-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POTTAWATTAMIE COUNTY ORDERS DATED AUGUST 7 AND DURING TRIAL ENDING SEPTEMBER 13, 2019
Honorable Craig Dresimeier, Judge

FINAL REPLY BRIEF FOR APPELLEES / CROSS-APPELANTS

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT DID NOT ERR IN FAILING TO SUBMIT PLAINTIFFS' CLAIM FOR INTENTIONAL INTERFERENCE WITH INHERITANCE

State v. Christensen, 792 N.W.2d 685 (Iowa 2010)
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III. A NEW TRIAL IS REQUIRED DUE TO THE IMPROPER CLOSING ARGUMENT BY PLAINTIFF BUBOLTZ'S COUNSEL

Iowa R. Civ. P. 32:3.4

REPLY TO STATEMENT OF FACTS

In their Reply Proof Brief, Appellants take issue with Appellees' characterization of the relationships between the Appellants and Ms. Ireland, and with testimony regarding Ms. Ireland's intentional disposition of her estate. (Appellants' Reply Proof Brief, p. 7-13.) These comments warrant specific reply. In Appellee's Proof Brief, Appellees elected to forgo an exhaustive recitation of the factual record in these proceedings. However, in Appellants' Reply Proof Brief, Appellants continued a pattern of manipulation – which is present throughout the entire record of these proceedings – that is improper, misleading, and even absurd. Accordingly, a brief additional response is now required.

1. Ms. Ireland's Bequests Were Intentional

At the center of the dispute between the parties is the attorney, James Sulhoff, who drafted the will at issue in these proceedings. In their Reply Proof Brief, Appellants claim that Appellees' "insinuation" that the "ideas expressed in Ms. Ireland's will were clearly hers" is not accurate. [1] (Appellants' Reply Proof Brief, p. 7.) It is not disputed that Mr. Sulhoff's

[1] In Appellees' Proof Brief, the undersigned Counsel incorrectly cited to page 48 of the trial transcript in quoting Mr. Sulhoff. The quote contained in Appellees' Amended Proof Brief was taken from page 48 of Mr. Sulhoff's deposition and not page 48 of the trial transcript. The incorrect citation was accidental and was due to an error in the undersigned Counsel's notes. However, the fact that the ideas contained in Ms. Ireland's 2015 Will were clearly hers is well established by the factual summary provided herein.

memory is not what it once was. It is also not disputed that Mr. Sulhoff made typographical errors in the documents. However, the record does overwhelmingly establish that the changes made to Ms. Ireland's 2001 will in 2015 were the result of ongoing discussions between Ms. Ireland and Mr. Sulhoff that were intentional and thoughtful, and which took place over a period of many months.

Mr. Sulhoff has been in practice since June of 1982 (Tr. 52:1), and represented Ms. Ireland from the late eighties, until her death in 2016 (Tr. 24:5-13). During those thirty-four years, Mr. Sulhoff prepared Ms. Ireland's taxes and assisted with other matters. (Tr. 24:17-22.)

In 2001, Mr. Sulhoff prepared a will for Ms. Ireland. (Tr. 24:20-22; App. pp. 280-281) This was not Ms. Ireland's first will. (Tr. 64:2-6.) Mr. Sulhoff testified that she had a prior will that had been prepared by Lavon Billings in Red Oak. (Id.) Mr. Sulhoff was also aware that Ms. Ireland had made previous changes to her estate plan in 1977 and 1985. (Tr. 64:2-66:16; App. pp. 282-283)

In 2014 and 2015, Ms. Ireland again sought Mr. Sulhoff's assistance in revising her estate plan and updating the 2001 will.

Mr. Sulhoff testified that he would typically meet with Ms. Ireland in March to prepare her taxes. (Tr. 56:13-23.) Mr. Sulhoff's file contained a

copy of Ms. Ireland's tax return for 2013, which was signed on April 14, 2014 (App. pp. 291), as well as handwritten notes which would have been used by Mr. Sulhoff to prepare the return (App. p. 290).

In addition to preparing her taxes, Mr. Sulhoff testified that he drafted a power of attorney for Ms. Ireland in April 2014 (Tr. 31:25-32:1; App. pp. 266-275), which designated Appellees as her powers of attorney (Tr. 119:5-7.) Mr. Sulhoff's file contained notes from Ms. Ireland, with questions about the powers of attorney. (App. p. 289) These notes also contain a list of specific bequests. (App. p. 289)

During the trial, Mr. Sulhoff testified that he had ongoing concerns about Ms. Ireland's specific bequests because he was concerned that there was not going to be sufficient cash in the estate to pay the bequests after paying the inheritance taxes. (Tr. 38:1-25; App. pp. 289) When he raised his concerns, Ms. Ireland responded, "I don't care. That's the way I want it." (Tr. 38:24-25.) According to Mr. Sulhoff, Ms. Ireland ultimately whittled down her list of specific requests and eliminated some of them. (Tr. 39:1-6.)

Mr. Sulhoff's file also contained two copies of Ms. Ireland's 2001 will with notes regarding revisions. One copy of the 2001 will contains notes which Mr. Sulhoff testified were made by him based on a telephone call with Ms. Ireland. (Tr. 77:15-79:12; Supp. App. pp. 463-464) On that copy,

Mr. Sulhoff's notes change the executor from Ms. Reece[2] to Ms. Birusingh and have the name "Kumari Durick" written above Section III, which is the section of the will that contains the bequest of the farm. (Id.) The other copy of the 2001 will contains notes that were created by Ms. Ireland. (Tr. 68:24-70:1; App. pp. 284-285) Ms. Ireland's notes indicate a change in the bequest of the farm from Edith Mae Martens and David Buboltz to Patti or Kumari or Dan.[3] (Id.) Both sets of notes were made on the 2001 version of the will.

It is unknown when the notes were made, and it is unknown whether or not Mr. Sulhoff began discussing the changes to the will with Ms. Ireland in April 2014 when he updated Ms. Ireland's power of attorney. However, what is known, is that on November 25, 2014, Mr. Sulhoff sent a letter to Ms. Ireland which contained a draft of a new will that incorporated some of the changes contained in the notations on the two copies of the 2001 will. (Tr. 35:1-36:8; App. pp. 286-288)

In his November 2014 letter to Ms. Ireland, Mr. Sulhoff stated, "Enclosed please find a copy of the Will I prepared for you. I apologize for not getting this to you much sooner but it was among some papers and overlooked. Let us know if this is what you want. If it is satisfactory, you

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[2] Ms. Reece's maiden name was Ms. Maertens. (Tr. 67:23-24). For simplicity, she will be referred to herein solely as Ms. Reece.

[3] Dan is most likely the husband of Appellee, Kumari Durick. (Tr. 203:2-5.)

will need to sign the original and, if necessary, I will bring it down to you to sign." (Tr. 35:3-19; App. pp. 286-288)

Attached to the letter is a draft of a new will that appoints Ms. Birusingh as co-executor in place of Ms. Reece and makes Ms. Birusingh's daughter, Kumari Durick, the beneficiary of the farm. (App. pp. 287-288) This version of the will is dated 2014. (Id.) The 2014 version of the draft will contains additional notes from Mr. Sulhoff's assistant, Mabel, who typed the will, and which indicate that Mabel needs more information from Ms. Ireland to complete her work. (Tr. 79:21-80:16; App. pp. 287-288)

On February 13, 2015, Mr. Sulhoff went to see Ms. Ireland and left a draft of the will with her upon which she could make any notes.[4] (Tr. 45:1-6, 68:24-71:17, 73:2-24.) Mr. Sulhoff then returned to pick up the will the following day, on February 14, 2015, and discussed the disposition of her estate with her further. (Id.)

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[4] Mr. Sulhoff testified that he left a copy of the will with Ms. Ireland during his February 2015 visit and that Ms. Ireland made notes on the document. (Tr. 68:24-70:25.) Mr. Sulhoff further testified that those February notes were shown on Exhibit G (App. pp. 284-285). (Id.) However, it is probable that Mr. Sulhoff's memory on this point is incorrect. The will contained on (App. pp. 284-285) is the 2001 version. As discussed, Mr. Sulhoff drafted a new version of the will in November 2014 based on the notes shown on Exhibit G (App. pp. 284-285). (Tr. 35:1-36:8; App. pp. 286-288) Therefore, by February of 2015, it is unlikely that Mr. Sulhoff would have reviewed the 2001 will with Ms. Ireland, because he had already created a new version of the will in 2014 that incorporated the changes provided by Ms. Ireland in the notes of Exhibit G. (App. pp. 284-285). It is more likely that notes made by Ms. Ireland during Mr. Sulhoff's February 2015 visit were the handwritten words "Birusighn" [s.i.c.] contained on Exhibit G. (App. pp. 287-288)

During these February visits, Mr. Sulhoff again discussed his concerns about the specific bequests and the inheritance tax issues. (Tr. 71:9-73:1). He also discussed the changes that she was seeking because, as Mr. Sulhoff testified, “I had to have a clear understanding of what she wanted so that I could accurately reflect that in a written document.” (Tr. 73:18-20.)

In March 2015, Ms. Birusingh took Ms. Ireland to visit her lawyer so that Ms. Ireland’s income tax could be completed. (Tr. 142:20-24.) During this meeting, Ms. Ireland again discussed her will with Mr. Sulhoff. (Tr. 142:25-144:3.) Prior to this meeting, Ms. Ireland had told Ms. Birusingh that Ms. Ireland intended to bequeath the farm to Ms. Birusingh. (Id.) At the meeting with Mr. Sulhoff, Ms. Birusingh told Ms. Ireland and Mr. Sulhoff that she didn’t want the farm and suggested instead that Ms. Ireland consider putting the farm in a foundation to fund a scholarship in Ames. (Id.)

On “May 18, 2015 or thereabout” Mr. Sulhoff made additional revisions to the will. (Tr. 36:2-4; See also the handwritten notations on App. p. 286.)

Mr. Sulhoff eventually finalized the will and visited Ms. Ireland on June 3, 2015 to have Ms. Ireland sign the document. (Tr. 33:12-14, 39:7-23.) Before Ms. Ireland signed the 2015 Will, Mr. Sulhoff went through the

document line by line with her "to make sure it was her intent." (Id.) After Mr. Sulhoff reviewed the will with Ms. Ireland, Ms. Ireland said, "that was what she wanted," "that that accurately reflected her wishes" (Tr. 40:4-5) and "I want to sign it" (Tr. 39:17).

During the period of time that Ms. Ireland was revising her will in 2014 and 2015, she discussed her wishes for the farm with Mr. Sulhoff. In the notes contained on (App. pp. 284-285) and provided to Mr. Sulhoff, Ms. Ireland wrote the following:

> *Due to many reasons, I will use the following Will. I will forever be grateful for the help Doc and Patti B. have given me. Kumari and Dan have also helped. So therefore, the following Will. After I lost my drivers license these people made my life. A copy of the will in Great Western Bank box.*

(Tr. 69:10-23; App. pp. 284-285)

Mr. Sulhoff also testified to the conversations he had with Ms. Ireland regarding the bequest:

> *[Ms. Ireland] was a very proud and independent person, and she wanted to take care of the person who was taking care of her. That's what she informed me at the time we discussed the Wills in that spring was that [Ms. Birusingh] was taking care of her and she wanted to reward her for taking care of her.*

(Tr. 31:11-16.)

At some point during the course of their many conversations, Ms. Ireland told Mr. Sulhoff that she had informed Ms. Birusingh that she

planned to give Ms. Birusingh the farm, and Ms. Birusingh told her that she didn't want the farm. (Tr. 37:3-11.) Ms. Ireland asked Mr. Sulhoff if she could give the farm to Ms. Birusingh's daughter, Kumari Durick. (Id.) Mr. Sulhoff told Ms. Ireland, "It is your farm. You have to clearly tell me where you want it to go, and I will write that Will in accordance with your wishes." (Id.)

Mr. Sulhoff also testified that the role of the attorney is to ascertain the intent of the testator. (Tr. 27:3-6.) "As the old caselaw says," Mr. Sulhoff testified, "The intent of the testator is the polestar." (Id.) Mr. Sulhoff further testified that the attorney who drafts the will has to "ascertain their intent to make sure it's accurately reflected in black and white on a Will." (Id.)

In summary, over a period of at least seven months (from November 2014 to June 2015), and perhaps as long as fourteen months (from April 2014 to June 2015), Mr. Sulhoff and Ms. Ireland discussed her wishes on the phone, through the mail, and during at least four in-person meetings. The culmination of those conversations, and the question and answer sessions, was the will at issue in these proceedings.

Despite this extensive, well-established timeline, which was corroborated by multiple witnesses, and evidenced through numerous documents, Appellants point to the testimony of Ms. Reece, who testified

that Mr. Sulhoff told her that he would be happy to assist her in contesting the 2015 Will. (Appellants' Amended Proof Brief, p. 19; Tr. 455:3-6.) The suggestion that any attorney would offer to assist in the contest of a Will that he had written is simply not credible. Further, Ms. Reece's testimony on this point was flatly denied by Mr. Sulhoff. (Tr. 86:12-17.)

2. Ms. Ireland's Relationships with Donna Reece and David Buboltz

The statements made by Ms. Ireland that she was giving the farm to the Birusingh family because they took care of her and she wanted to reward them (App. pp. 284-285; Tr. 31:11-16) chafes against our ethical sensibilities, because in an ethical and moral society, the notion of being rewarded for kind and neighborly conduct through a bequest from a friend at death is distasteful and risks destroying the meaning of all of our human relationships.

Ms. Birusingh obviously felt the same way. At one point, Ms. Ireland told Ms. Birusingh, "I don't know how I'm ever going to pay you back." (Tr. 193:4-11.) To which Ms. Birusingh responded, "You know, this is not a payback situation, what we do. And I really don't want the farm." (Id.) In fact, Ms. Birusingh continually told Ms. Ireland she didn't want the farm (Tr. 37:6-11, 142:16-144:3, 152:10-20, 207:1-7) and suggested that the farm be placed in a charitable foundation instead (Id).

In their Reply Proof Brief, Appellants accuse Appellees of attempting to minimize and downplay the relationship between Ms. Ireland and Appellants. (Appellants' Reply Proof Brief, p 8.) In support of the closeness of these relationships, Appellants ironically demonstrate the closeness of Ms. Ireland's relationships with Appellants through an extensive list of kind deeds that were performed by the Appellants for Ms. Ireland, which are similar in nature to the types of kind deeds performed for Ms. Ireland by the Appellees. (Id., pp 8-13.) Appellants appear to be pushing the Appellate Court to weigh the value of the kind deeds of both sides in order to determine which are more important. Is it better that Mr. Buboltz knew Ms. Ireland for 30 years (Tr. 287:20-24) or that Dr. Birusingh knew her for more than 20 (Tr. 110:3-7)? Was it more important that Ms. Birusingh took Ms. Ireland to the Doctor (Tr. 115:11-116:19) or that Mr. Buboltz took her out in the tractor (290:4-14)? Did Ms. Ireland want to have that birthday party that the Birusinghs threw for her (Tr. 219:7-18; App. p. 299), or did she actually hate that type of attention (Tr. 345:16—346:9)?

Contrary to Appellants' argument, Appellees are in no way arguing that Ms. Ireland wasn't close to the Appellants. Appellees also aren't arguing that they were closer to Ms. Ireland than Appellants, or that the kind

deeds performed by Appellees for Ms. Ireland were more important than the kind deeds performed by Appellants for Ms. Ireland.

Instead, Appellees argue that the ongoing analysis of the quid pro quos present in all of Ms. Ireland's relationships lose site of the fact that what all of these acts of kindness establish is that Ms. Ireland had a pattern, throughout her life, of rewarding the people who were helping her.

Ms. Ireland's long-time attorney, Mr. Sulhoff testified, "[Ms. Ireland] was a very proud and independent person, and she wanted to take care of the person who was taking care of her." (Tr. 31:11-16.)

This testimony is consistent with Ms. Ireland's estate planning throughout her life, which she changed in 1977 with a holographic will (App. p. 283; Tr. 64:12-24), in 1986 with a change in beneficiary of her IRA (Tr. 65:18-25; App. p. 282), sometime prior to 2001 with a will prepared by Mr. Billings in Red Oak (Tr. 64:2-6), and in 2001 with the first will prepared by Mr. Sulhoff. Sometime after 2008, she began discussing changes to her will with Ms. Reese (Tr. 407:13-24) and she made notes in 2014 regarding changes to her specific bequests (App. p. 289). Ultimately, Ms. Ireland executed her final Will in 2015, after an extensive process that lasted months and is summarized above. Accordingly, the evidence overwhelmingly established that the ideas expressed in the Wills were Ms. Ireland's.

Two other facts require mention.

First, Appellants state that Ms. Ireland executed a Will in 2001 "naming Plaintiffs as beneficiaries of the farm." (Appellants' Proof Brief, p. 14.) This statement is not accurate. Ms. Ireland's 2001 Will did not *name* the Appellant Donna Reece as the beneficiary of Ms. Ireland's farm. (App. pp. 278-279). In fact, there is not a Will, or even a draft of a Will, anywhere in the record that *explicitly names* Ms. Reece as the intended beneficiary of Ms. Ireland's farm. To be clear, Ms. Reece's mother, Edith Mae Maertens (Tr. 392:9-10), is explicitly named in Ms. Ireland's 2001 will as a co-beneficiary of the farm with Mr. Buboltz (App. pp. 278-279). Ms. Maertens died in 2008. (Tr. 407:13-15.) Ms. Reece testified that after Ms. Maertens died, Ms. Ireland told Ms. Reece that she had written a new will in which Ms. Ireland made Ms. Reece a co-beneficiary of the farm. (Tr. 407:16-24.) However, no such will is in evidence.

In an effort to bridge this gap, Appellants state that Ms. Reece, who is the first cousin once removed of Ms. Ireland (Tr. 392:14-19), was the "closest relative" of Ms. Ireland (Appellants' Proof Brief, p. 9). This statement is also not accurate. At the time Ms. Ireland died, Ms. Ireland's first cousin, Ralph Selders, was still alive. (Tr. 132:23-25, 133:1-4, 136:11-14).

Second, in the Reply Proof Brief, Appellants again blame Appellees for the fact that Ms. Reese, who lived in Colorado, was not with Ms. Ireland when she died. However, Ms. Birusingh told Ms. Reese that Ms. Ireland was in hospice and was "near the end." (Tr. 130:24-131:19.) Ms. Reese also testified that she knew that Ms. Ireland was in hospice and knew that hospice is an end of life and comfort care program. (Tr. 464:15-25.) That Ms. Ireland's life was coming to an end was also known to Ms. Reese's family, which was evidenced by the fact that Ms. Ireland's cousin, Ralph Selders, spent several hours with Ms. Ireland on the day she died. (Tr. 132:23-25.)

3. Other Matters that Require Response

In Appellants' Reply Proof Brief, Appellants continue a pattern of manipulation – which is present throughout the entire record of these proceedings – that is improper, misleading, and even absurd. In Appellees' Proof Brief, Appellees elected to forgo an exhaustive recitation of the factual record in these proceedings. However, response to several specific items is now required.

On appeal, Appellants have accused the Birusingh family of a "Machiavellian Plot" (Appellants' Proof Brief, p. 9), which is apparently evidenced by ongoing acts of kindness that the Birusinghs performed for

Ms. Ireland over a period of years (Tr. 173:1-176:23, 181:15-186:24), including grocery runs, assistance with trips to medical appointments, and assistance in navigating the transition to and among nursing homes and rehabilitation centers (Id).

In their Briefs, Appellants have stated that the Birusinghs were "preying" on Ms. Ireland after identifying her as a "mark" because of her ownership of a farm (Appellants' Proof Brief, p. 9), when the record consistently reflects the fact that after Ms. Ireland told Ms. Birusingh that she wanted to give Ms. Birusingh the farm, Ms. Birusingh repeatedly told Ms. Ireland that she didn't want it Tr. 37:6-11, 142:16-144:3, 152:10-20, 207:1-7).

Appellants state Ms. Birusingh insisted on discussing Ms. Ireland's estate planning with Ms. Irelands' attorney during a meeting in March of 2015 (Appellants' Proof Brief, p. 19), but fail to mention that what Ms. Birusingh told Ms. Ireland and her attorney during the March meeting, was that she didn't want the farm, and suggested instead that Ms. Ireland consider putting the farm in a foundation to fund a scholarship in Ames (Tr. 142:16-144:3).

Appellants accuse Dr. Birusingh, who was a retired physician and is the late husband of the Defendant Patricia Birusingh, of practicing medicine

without a license (Appellants' Proof Brief, p. 14) in response to Dr. Birusingh's selfless act of answering Ms. Ireland's call, driving out to her farm, and bandaging her arm after a fall. (Tr. 172:9-23).

Appellants have attacked Ms. Birusingh in a similarly manipulative manner. One example, is Appellants' portrayal of Ms. Birusingh as a serial litigator, for having been the plaintiff in some thirty lawsuits – a fact that she could not even recall (Tr. 108:7-15) – due to her being named as a plaintiff in numerous eviction proceedings, which occurred as a result of her ownership of an apartment building (Tr. 158:8-18).

Appellants' manipulation is ever-present. Even the Defendants' simple gesture of having a birthday party for Ms. Ireland was met with contempt by the Appellant, Ms. Reece, who lives in Colorado (Tr. 394:10-12) and testified that Ms. Ireland never would have wanted a party (Tr. 345:16-23); an opinion she apparently formed after having previously given Ms. Ireland lotion for her birthday, and later being told by Ms. Ireland that she hadn't used the lotion because she didn't like the smell (Tr. 403:8-16).

The absurdity of Appellants' antics have been on display from the opening statement, when Appellants' counsel informed the jury that he and his cousin call each other "cousin brothers" (Tr. 10:10), to the closing argument, where Appellants' counsel bragged about the success of his law

practice and informed the jury about his impression of the credibility of his client, Mr. Buboltz (Tr. 507:5-508:2).

REPLY ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN FAILING TO SUBMIT PLAINTIFFS' CLAIM FOR INTENTIONAL INTERFERENCE WITH INHERITANCE.

A. REPLY TO PRESERVATION OF ERROR.

On Appeal, Appellants argue that the elements applied by the District Court for the tort of intentional interference with inheritance were incorrect. (Appellants' Proof Brief, p. 20-35.) On this point, Appellees agree. Appellants argue that different elements should be imposed. (Id.) Appellees again agree. Appellants cite a variety of authorities in support of this argument. (Id.) In Reply, Appellees provide an alternate interpretation of many of the very same authorities cited by Appellants and provide other authorities that are persuasive on the same issue. Appellees are not raising a new issue or a new argument; but rather, Appellees are providing the Appellate Court with a thorough and complete overview of the law in Reply to the issue Appellants have appealed.

A party need not cite a specific statute or rule in support of an issue in order to cite that statute or rule on appeal. *State v. Christensen*, 792 N.W.2d

685 (Iowa 2010). A party's failure "to cite the specific statute or rule in support of an issue at the district court level is not dispositive of whether the issue has been preserved for appeal." *Schneider v. State*, 789 N.W.2d 138, 147 (Iowa 2010). Rather, the preservation question turns on whether "the nature of the error has been timely brought to the attention of the district court." *Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (Iowa 2006)("[e]rror preservation does not turn ... on the thoroughness of counsel's research and briefing"); *see also Bartlett Grain Co., LP v. Sheeder*, 829 N.W.2d 18, 24 n.4 (Iowa 2013) (finding error preserved, even though parties did not cite to specific UCC provision because appellant alerted the court of its "essential claim"); *Collister v. City of Council Bluffs*, 534 N.W.2d 453, 454–55 (Iowa 1995) (holding that the city preserved error on a statutory immunity argument by claiming at trial, without citing the statute, that there was no duty to warn the plaintiffs).[5]

B. REPLY TO SCOPE AND STANDARD OF REVIEW.

On Appeal, Appellants are requesting that the Appellate Court do two very different things. In the first part of their argument, they are asking the

[5] It is worth noting that Appellants contradicted themselves on this issue in their Proof Reply Brief. In Section Two of their Proof Reply Brief, Appellants provide a variety of new arguments in Reply to Appellees' appeal on the issue of whether hearsay was improperly admitted at trial. (Appellants' Proof Reply Brief, pp. 25-32). At trial, Appellants argued *only* that the statement was admissible because Defendants/Appellees had "opened the door" to the testimony. (Tr. 344:6.) On appeal, Appellants now argue, for the first time on appeal, that the statement was "not hearsay," subject to one of three hearsay exceptions, and/or proper impeachment. (Appellants' Proof Reply Brief, pp. 22-32.)

Appellate Court to "become a leader in the law" by modifying the elements provided by the Court of Appeals in *Bronner v. Randall*, 877 N.W.2d 195 (Iowa App. 2015). (Appellants' Proof Brief, pp. 7, 20-35.) In the second part of their argument, they are asking that the Appellate Court overturn the District Court's ruling on Defendants' Motion for Summary Judgment. (Appellants' Proof Brief, pp. 35-48.)

The standard of review for each request is different, as previously argued by Appellees. (Appellees' Amended Proof Brief, pp. 24-25.)

C. REPLY ARGUMENT.

1. The June 12 *Youngblut* Decision Requires that the Intentional Interference Claim be Dismissed.

Hours before Appellees were planning to file this Reply Brief, the Iowa Supreme Court issued their opinion in *Youngblut v. Youngblut*. *Youngblut v. Youngblut,* No. 18-1416, 2020 WL 3107690, at *1 (Iowa June 12, 2020). In *Youngblut*, the Iowa Supreme Court provided additional analysis of the tort of intentional interference with inheritance, and the relationship between the tort and probate remedies.

In the decision, Justice Mansfield recognized (while citing many of the same authorities relied upon by Appellees) that "enthusiasm for the tort appears to be waning" (Id. at *8) but recognized that the tort still had some role in Iowa (Id. at *9).

To determine the role the tort plays today, the Court recognized the evolution of the tort and the distinct roles of probate and tort, stating:

> For one thing, the Restatement (Third) of Torts has moved away from the position of the Restatement (Second) of Torts that we relied upon in *Frohwein*. *See Restatement (Third) of Torts: Liab. for Econ. Harm* § 19, at 160–61 (Am. Law Inst. 2020).
>
> The Third Restatement limits the ability to pursue a claim for tortious interference with an inheritance or gift: "A claim under this Section is not available to a plaintiff who had the right to seek a remedy for the same claim in a probate court." Id. § 19(2). Comment c to this section adds,
>
>> Thus if the defendant coerced the decedent into executing a will that excluded the plaintiff, the plaintiff's appropriate response is a claim to that effect in the probate court where the will is tested. A claim in tort is not available.
>> ....
>> A proceeding in probate is considered available, for purposes of this Section, even if it offers less generous relief than would be attainable in tort. Nor does a probate court become unavailable because the limitations period has expired for pursuing a claim there. If a claim falls within a probate court's jurisdiction, or would have if timely, permitting a suit in tort is not appropriate.
>
> Id. § 19 cmt. c, at 162–63.
>
> The reporter's note states, "This Section emphasizes the importance of limiting tort claims to avoid interference with other mechanisms for resolving disputes about inheritances." Id. § 19 reporter's note a, at 166. The reporter's note further states that the "contrary view" in *Huffey* is being "disapproved here." Id. § 19 reporter's note c, at 167.

Youngblut v. Youngblut, No. 18-1416, 2020 WL 3107690, at *7 (Iowa June 12, 2020).

Furthermore, although the issue on appeal in *Youngblut* was somewhat more narrow (and therefore, so was the holding), the Court explicitly acknowledged the persuasiveness of the Third Restatement, stating:

> For these reasons, we now hold that a party alleging a decedent's will was procured in whole or in part by tortious interference must join such claim together with a timely will contest... Additionally, we acknowledge the persuasiveness of some recent scholarly views including that of the Third Restatement.

Id. at *11.

Because Appellants are not seeking a remedy based on *independently tortious conduct* and are instead seeking a remedy based on the same claim – undue influence – they are required to pursue their remedy through the will contest. *Id*. (A claim for intentional interference with inheritance "is not available to a plaintiff who had the right to seek a remedy for the same claim in a probate court… even if it offers less generous relief than would be obtained in tort")(*internal citations omitted*).

2. Reply Argument.

Even if the Appellate Court finds *Youngblut* to be inapplicable, Appellants' arguments in reply are unpersuasive. In Appellees' Amended Proof Brief, Appellees argued that the law on intentional interference with inheritance is far from settled and provided a thorough summary of the

applicable judicial landscape. In their Briefs, both Appellees and Appellants discuss and analyze many of the same cases, and each side picks and chooses the framework that they feel is applicable. As is common with Plaintiffs and Defendants, Plaintiffs/Appellants would like to avail themselves of the greatest number of remedies with the lowest burden of proof, while Defendants/Appellees have argued for a more equitable approach.

However, the conclusion of Appellants' argument is most unusual - that a party be allowed to recover punitive damages, attorney fees, and other remedies, for the commission of an intentional tort without any showing that a defendant had committed an act that was either intentional or tortious, and without even a showing that the defendant knew about existence of the plaintiff. This framework would mean that any change in an estate plan would give rise to a claim of tortious interference with inheritance.

Knowledge of the Bequest is Required

The first element that Appellants would like to eliminate is the "knowledge" element. In their Reply Proof Brief, Appellants discuss decisions from California and Connecticut where courts have found that a knowledge element is appropriate. (Appellants' Amended Proof Reply Brief, p. 17-18.) In their argument, Appellants point out that in addition to

requiring knowledge of the expectancy, California courts have also provided an additional protection, which only makes the tort available when a probate remedy (such as a will contest) is not available. (See discussion, Id. at 18.) This makes the availability of the tort more restrictive, not less.

Appellants' analysis of the Connecticut case is simply inconclusive.

As discussed by Appellees in their Amended Proof Brief, pp. 43-48, in those jurisdictions that do not include an element requiring knowledge of the expectancy, the requirement may simply be too obvious to state. It would be most unusual to allow for the commission of an intentional tort against a party who was not known to exist.

Undue Influence Is Not Sufficient to Support the Tort Claim

The second requirement of the tort that Appellants would like to eliminate is the requirement of an accompanying intentional tort, arguing that a finding of undue influence alone should be sufficient to support remedies of punitive damages and attorney fees. After devoting several pages of argument to some good old fashioned mudslinging in which Appellants accuse Appellees' counsel of "piracy" and being "unoriginal," Appellants return to a discussion of the now familiar Iowa cases *Frohwein* and *Huffey* in support of their argument that undue influence alone is

sufficient to support the tort of intentional interference with inheritance.[6] (Appellants' Amended Proof Reply Brief, pp. 23-24.) However, both of these cases, in the very quotations provided by Appellants in support of their argument, require independently tortious conduct.

Appellants quote *Frohwein* for the proposition that a cause of action "exists against one who *fraudulently* induces or procures a will to the exclusion or damage of another." *Frohwein*, 264 N.W.2d 792 (emphasis added). Therefore, as of 1978, it's obvious that the Iowa Supreme Court felt that fraudulent conduct was required – mere persuasion or even undue influence were not enough to support the tort.

Appellants quote *Huffey* in support of their argument that undue influence alone is sufficient to support the tort (even in the absence of knowledge of the expectant beneficiary), but the passage cited by Appellants totally overlooks the discussion in *Huffey* about the requirement that the tortfeasor engage in fraud or other tortious means. *Huffey v. Lea*, 491 N.W.2d 518, 521 (Iowa 1992).

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[6] Appellees' counsel would urge the Appellate Court to review the Stanford Law Review articles for themselves. The article provides an excellent and inciteful overview of some of the issues presented to the Appellate Court. The article was published in 2015, which means that some of the authorities and analysis contained in the article, including the passage quoted by Appellants in their Proof Reply Brief, are no longer current. Appellees' counsel has endeavored to provide current and accurate authorities in citations in their Amended Proof Brief.

Finally, Appellants point to the Restatement (Third) of Torts; Liab. For Econ. Harms, §19 (2019) for support. However, the Restatement is directly contrary to Appellants' argument. As an initial matter, the Restatement (Third) states that the tort isn't even available "to a plaintiff who had the right to seek a remedy for the same claim in a probate court." Restatement (Third) of Torts: Liab. for Econ. Harm § 19 (2020). Furthermore, Comment b, which is relied upon by Appellants explicitly states, "merely persuading a testator to disinherit an heir does not give rise to liability." Id.

II. THE DISTRICT COURT ERRED IN ALLOWING HIGHLY PREJUDICIAL HEARSAY EVIDENCE

A. REPLY TO PRESERVATION OF ERROR

Appellants argue that Appellees failed to assert where their objection to the hearsay statements was made and overruled. (Appellants' Amended Proof Reply Brief, p. 26.) However, in the very next sentence of their Reply Brief, Appellants cite to the section of Appellees' Proof Brief and the Trial Transcript that contains the relevant passage, objection and ruling. (Id.)

Appellees stand on their previous argument.

B. REPLY TO SCOPE AND STANDARD OF REVIEW

Appellees stand on their previous argument.

C. REPLY ARGUMENT

Appellants open their argument by stating that the Appellees failed to include an essential portion of the transcript (Id., p. 27), and that this omission was intentional (Id., p. 28). However, Appellees not only discussed the passage referenced by Appellants, but quoted the same exact relevant portion of the passage. (Appellees' Amended Proof Brief, p. 64-65).

That distraction aside, Appellants then argue, without discussion, that the hearsay exceptions in Iowa Rule of Evidence 5.803(1), (2) and (3) apply. (Appellants' Amended Proof Reply Brief, p. 28.) This argument fails.

Rule 5.801(1) is referred to as the "present sense impression rule" and does not apply because the hearsay statement was not made "while or immediately after" Mr. Sulhoff perceived it. Iowa R. Evid. 5.803(1); 8 Ia. Prac., Civil Litigation Handbook § 33:15 ("For example, a witness to a motor vehicle accident who states, "That guy must be doing at least 50 mph" is the type of statement contemplated by this exception to the hearsay rule.")

Rule 5.801(2) is referred to as the "spontaneous declaration rule" and does not apply because the hearsay statement was not made while Mr. Sulhoff was under the "stress of excitement" that caused the statement. Iowa R. Evid. 5.803(2); *State v. Augustine*, 458 N.W.2d 859, 860–61 (Iowa Ct. App. 1990)("While there is no strict time limit within which the declaration

must be made after the event occurs, the timing must be such that the declarant was "under the influence of the excitement of an incident, rather than on reflection, fabrication or deliberation.").

Rule 5.803(3) is referred to as the "state of mind" exception and does not apply because the hearsay statement was not spontaneous. Rule 5.803(3). Statements relating to the declarant's state of mind and then-existing physical condition "must meet a requirement of spontaneity in order to possess a circumstantial guarantee of trustworthiness for admissibility." *Bratton v. Bond*, 408 N.W.2d 39, 45 (Iowa 1987).

Appellants next argue that the statement is not hearsay, pursuant to the definition contained in Iowa R. Evid. 5.801(d). (Appellants' Amended Proof Reply Brief, p. 28.) Rule 5.801(d) states that a prior inconsistent statement of a witness who testifies at trial is not hearsay if the prior statement was made "under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition," and the witness testifies at the trial or hearing and is subject to cross-examination concerning the prior, sworn, inconsistent statement. Rule 5.801(d)(1)(A). Here, the hearsay statement does not satisfy any of these requirements – it was not made under oath, subject to the penalty of perjury, or at a trial, hearing, deposition, or other proceeding.

Appellants then argue that the hearsay statement was admissible under the rules of impeachment. (Appellants' Amended Proof Reply Brief, p. 30-31.) As discussed in greater detail in their Proof Brief (Appellees' Amended Proof Brief, p. 65-66), evidence of contrary statements made out of court are not admissible as affirmative proof of facts related in the statement and are only admissible as tending to discredit and impeach the witness. *Chandler v. Harger*, 113 N.W.2d 250 (Iowa 1962).

Admission of hearsay evidence over a proper objection is presumed to be prejudicial error unless the contrary is affirmatively established." *State v. Nims*, 357 N.W.2d 608, 609 (Iowa 1984). The hearsay testimony was obviously highly prejudicial which was further demonstrated by the fact that Appellants' counsel returned to these words again and again in his closing argument, weaving the hearsay into an absolutely devastating theme for the entire dispute (Tr. 507:9, 512:4), improperly influencing the jury and leading to an outcome that is obviously unsubstantiated.

III. A NEW TRIAL IS REQUIRED DUE TO THE IMPROPER CLOSING ARGUMENT BY PLAINTIFF BUBOLTZ'S COUNSEL

Appellants' counsel's argument that his closing argument was not improper because it is "given in nearly every one of his many jury trials" is unpersuasive. An attorney may not state a personal opinion as to the justness of a cause or express an opinion on the credibility of a witness. *Iowa R. Prof'l Conduct. 32:3.4.* That Appellants' counsel admits in his brief to doing so with regularity, further compels the need for a new trial.

CONCLUSION

The Appellate Court should affirm the District Court's dismissal of Plaintiffs' tort claim and remand for a new trial on Plaintiffs' claim to set aside the will.

CERTIFICATE OF FILING

The undersigned hereby certifies that on the 6th day of July 2020, one (1) copy of Appellees' Proof Reply Brief was filed via EDMS system with the Clerk of the Iowa Supreme Court.

Charles N. Wittmack

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of July, 2020, one (1) copy of Appellees' Proof Reply Brief was provided to the undersigned by the Clerk via EDMS system:

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ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Appellees' Amended Proof Brief was the sum of $____0____.

Charles N. Wittmack

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Charles N. Wittmack

July 6, 2020
Date