IN THE SUPREME COURT OF IOWA

NO. 15-2126

IN THE MATTER OF THE ESTATE OF MARGARET E. WORKMAN, Deceased,

DENNIS WORKMAN,
Plaintiff-Appellant,

vs.

GARY WORKMAN, Individually and as Executor of the Estate of Margaret E. Workman,
Defendant-Appellee,

and

LAVERNE WORKMAN, CYNTHIA NOGGLE, RANDY NOGGLE, MINDY SHERWOOD, JASON WORKMAN, CHRISTINE THOMPSON, and JEFFREY WORKMAN,

Defendants.

APPEAL FROM THE DISTRICT COURT FOR SCOTT COUNTY, IOWA
THE HONORABLE JOHN D. TELLEEN, JUDGE
SCOTT COUNTY CASE NO. ESPR074050

DEFENDANT-APPELLEE GARY WORKMAN'S FINAL BRIEF

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ROUTING STATEMENT

Pursuant to Iowa Rules of Appellate Procedure 6.903(2)(d) and 6.1101(3), this case should be transferred to the Court of Appeals, as it presents the application of existing legal principles.

STATEMENT OF THE CASE

On December 26, 2012, Margaret E. Workman ("Margaret") passed away, leaving three surviving children: (1) Contestant-Appellant Dennis Workman ("Dennis"); (2) Proponent-Appellee Gary Workman ("Gary"); and (3) Cynthia Noggle ("Cindy"). Margaret's July 19, 2007 Will ("2007 Will"), as amended by her June 27, 2008 Codicil ("2008 Codicil"), were admitted to probate on January 25, 2013, and Gary was appointed executor of Margaret's estate.

On June 14, 2013, Dennis filed a Petition to set aside the probate of the Will (App. 1-10). The Petition included four counts: (I) Undue Influence; (II) Lack of Testamentary Capacity; (III) Constructive Trust; and (IV) Accounting. *Id*. On October 21, 2013, Dennis filed an Amended Petition containing the same four counts. (App. 11-21).

On July 9, 2014, Gary filed a Motion for Summary Judgment. (App. 38-41). On March 12, 2015, the Honorable Judge J. Hobart Darbyshire entered an Order denying Gary's Motion for Summary Judgment with

respect to Dennis's claim of undue influence, and granting Gary's Motion for Summary Judgment on Dennis's claim that Margaret lacked testamentary capacity. (App. 797-806).

On November 16, 2015, a jury trial was held on Dennis's claim of undue influence. (App. 223 at 4:2-5). On November 18, 2015, only 63 minutes after the case was submitted, the jury returned a verdict finding that Gary did not exercise undue influence over Margaret when she executed the 2007 Will or 2008 Codicil. (App. 809-810) (App. 555 at 311:20). On November 19, 2015, the Honorable Judge John D. Telleen entered judgment in Gary's favor, dismissing Dennis's claims of undue influence (App. 813-14). On December 10, 2015, Dennis filed a Notice of Appeal.

STATEMENT OF THE FACTS

At her death, Margaret owned approximately 200 acres of farmland in Scott County, Iowa. (App. 832-39) (App. 281 at 37:18-24). After spending several years in California, in 1981 Gary moved back to Scott County, to farm with his father, LaVerne. (App. 381 at 137:10-12). Since moving back, Gary has lived between one to five miles from his parents, seen his parents almost daily, and helped with the family farm and property. (App. 429-30 at 185:22-186:20; App. 497 at 253:3-10). Dennis testified that Margaret had "100 percent trust" in Gary. (App. 283 at 39:8-12; App. 326 at 82:6-10). On

the other hand, Margaret did not trust Dennis. (App. 449-50 at 205:24-206:1).

Dennis claims that "[A] review of [Margaret's] Wills during that 34 year period demonstrates a steady attrition of Dennis's inheritance in favor of Gary and his heirs." Dennis's Brief at pp. 18-19.[1] This is demonstrably false, as some of Margaret's subsequent estate planning documents were less favorable to Gary than prior ones. Many parts of Dennis's purported Statement of Facts also contain self-serving statements which were either rebutted by other testimony, or which the jury was free to reject.[2] What is undisputed, however, is that Dennis had various legal and financial issues, and that these issues not only concerned, but also affected his parents.

Dennis filed for bankruptcy several times. (App. 294-301 at 50:11-57:20). Dennis also had judgments entered against him in excess of one million dollars. (App. 298 at 54:2-8). Margaret and LaVerne were aware of many of Dennis's legal and financial issues, and these issues concerned Margaret. (App. 298 at 54:12-22; App. 328 at 84:21-25). Dennis's creditors also contacted Margaret and LaVerne to attempt to get them to pay off

[1] Margaret's estate planning documents were only executed over a period of 25, not 34 years.
[2] Dennis's Brief at p. 6-8.

Dennis's judgments. (App. 874-76) (App. 301-03 at 57:21-59:15). Dennis discussed these issues with his parents. (App. 303 at 59:1-15).

Margaret executed her first will in 1983 ("1983 Will"). (App. 815-817). Under the 1983 Will, if LaVerne predeceased Margaret, Gary's daughter, Christine, would receive 40 acres which LaVerne would have received had he been alive, Gary would receive *all of* the remaining 160 acres, and Dennis would not receive any of Margaret's farmland. (App. 815-16 at ¶3).

It was very important to Margaret that her farmland remain in the family, and Margaret was concerned about Dennis's creditors taking the farmland. (App. 518-19 at 274:19-275:4; App. 519 at 275:10-16). In 1985, Margaret executed a codicil to her 1983 Will ("1985 Codicil") (App. 818-19). Under her 1985 Codicil, Margaret explicitly provided that "[a]ll benefits which are provided in my [1983 Will] and this codicil for my son, Dennis, are hereby withdrawn, and all such benefits shall pass to Gary Workman and J.F. Casterline as Trustees." (App. 818 at ¶II). Margaret gave Gary and Attorney Casterline "sole discretion" to distribute and release income, principal or specific property, prohibited Dennis from assigning or pledging any benefits or property, and forbid Dennis's creditors from attaching, garnishing, or levying on the property. *Id*.

In her 1987 Will, Margaret added a provision explicitly noting that "[i]t may appear that I have provided more generously for my son, Gary, than my other two children, but in part it is in repayment for work and improvements he has done on our farmlands." (App. 823 at ¶10). Every one of Margaret's subsequent wills contains similar precatory language explaining why Margaret was leaving a disproportionate share of her estate to Gary. (App. 829 at ¶9) (App. 838 at ¶8) (App. 842 at §1.02) (App. 858 at §1.02). Margaret also added a "no contest clause" to her 1987 Will. (App. 823 at ¶11). Again, every one of Margaret's subsequent wills contained a similar no contest clause. (App. 829-30 at General Provisions ¶A) (App. 838 at ¶9(A)) (App. 847 at §3.06) (App. 862 at §3.06).

In 1992, Dennis filed articles of incorporation for Big Star Industries, a Kansas corporation. (App. 304 at 60:2-10). Despite the fact that they were never involved with Big Star in any way, and despite the fact that he did not discuss Big Star with his parents, Dennis listed his parents as the sole shareholders of Big Star. (App. 304-305 at 60:24-61:10). In 1995, Margaret executed a third Will ("1995 Will"). (App. 825-32). The 1995 Will was less favorable to Gary and his family, as it gave a total of $20,000, instead of $5,000, to Cindy's children, and LaVerne also received the 2 acre homestead

outright, as opposed to a life estate. (App. 825 at ¶2(B), ¶2(C), ¶3) (App. 820 at ¶2(A), ¶2(C)(2)).

In 1997, the Kansas Department of Revenue mailed a notice to LaVerne attempting to collect approximately $3,500 from Big Star. (App. 312-13 at 68:20 – 69:13) (App. 902-04). Margaret and LaVerne retained an attorney to disavow any interest in Big Star or responsibility for the debt. (App. 312-15 at 69:20 – 71:7) (App. 905-06) (App. 907-09).

In 1999, Margaret executed a fourth will ("1999 Will"). (App. 833-40). Dennis claims that Gary "had been attending meetings with LaVerne and Margaret about estate planning just prior to this Will." Dennis's Brief at p. 12 (citing Ex. 17). However, this allegation is misleading, as the only reference to Exhibit 17 was in Attorney Tronvold's closing remarks, which do not constitute evidence, and Exhibit 17 only references LaVerne's farm, and not Margaret's estate planning documents. (App. 868-70). The undisputed evidence was that the only meetings Gary attended with his parents and attorneys involved LaVerne's property and trust. (App. 412-413 at 168:25 – 169:4) (App. 416-17 at 172:24 – 173:1) (App. 519 at 275:22-24). Dennis also claims that "Gary testified that he was instrumental in setting up the trust." First, Gary denied this allegation. (App. 406 at 162:14-16).

Second, this allegation is irrelevant, as the discussion pertained to LaVerne's trust, not Margaret's. (App 408 at 163:3-25).

In 2000, the Kansas Department of Revenue sent Notices to Margaret and LaVerne attempting to collect over $600,000 Big Star owed. (App. 316-18 at 72:20 – 74:15) (App. 910-15). Margaret and LaVerne again retained an attorney to disavow any interest in Big Star or responsibility for the debt. (App. 316-21 at 72:20 – 77:18) (App. 905-06) (App. 874-98). Less than one year later, in 2001, Margaret executed a fifth will ("2001 Will"). (App. 841-49). The 2001 Will was also less favorable to Gary, as Gary's payment to The Margaret E. Workman Family Trust increased from $80,000 to $100,000. (App. 834-35 at ¶4(A)) (App. 844 at §3.01(h)).

In 2003, Margaret executed a First Codicil to the 2001 Will ("2003 Codicil"). (App. 850-53). In 2006, Margaret executed a Second Codicil to the 2001 Will ("2006 Codicil"). (App. 854-56). In 2007, Margaret executed her sixth and final will, the 2007 Will. (App. 857-64). Finally, in 2008, Margaret executed her 2008 Codicil, which, again, was less favorable to Gary. (App. 865-66).

ARGUMENT

I. DENNIS HAS NOT SET FORTH ANY CLAIM OF REVERSIBLE ERROR.

A. Preservation of Error.

A notice of appeal "shall specify the parties taking the appeal and the decree, judgment, order, or part thereof appealed from." Iowa R. App. P. 6.102(2)(a) (2015). The first issue is that Dennis's Notice of Appeal references that it was submitted "pursuant to Iowa Rule of Civil Procedure 1.264(3) . . . ." Rule 1.264(3) pertains to "[a]n order certifying or refusing to certify an action as a class action . . . ." Iowa R. Civ. P. 1.264(3) (2015). This case has nothing to do with a class action.

The second issue is that the Notice only states that it pertains to the "Judgment following Jury Verdict entered November 19, 2015 by the Honorable John Telleen." Despite the mandatory nature of Rule 6.102(2)(a), the Notice does not reference any appeal from the Order on Motion for Summary Judgment. Iowa R. App. P. 6.102(2)(a) (2015) ("*shall* specify . . . .") (emphasis added).

The third issue is that Rule 6.102(2)(a) further provides that "[t]he notice shall substantially comply with form 1 in rule 6.1401." Iowa R. App. P. 6.102(2)(a) (2015). Dennis's Notice does not resemble, or substantially comply with Form 1. *See* Iowa R. App. P. 6.1401, Form 1 (2015). Dennis's

Notice only references the November 19, 2015 Jury Verdict, and does not contain the language in Form 1 referencing not only the final order, but also referencing an appeal "from all adverse rulings and orders inhering therein." Iowa R. App. P. 6.1401, Form 1 (2015). For the foregoing reasons, Gary disputes that Dennis' Notice is sufficient with respect to preserving any claim of error pertaining to the Order on Motion for Summary Judgment.

B. Standard and Scope of Review.

Assuming, *arguendo*, the Court finds that Dennis preserved error on this alleged issue, Gary agrees with Dennis that the standard of review on a motion for summary judgment is for correction of errors at law. *Whalen v. Connelly*, 593 N.W.2d 147, 152 (Iowa 1999). Gary does not know what the scope of review is, as Dennis's purported claim is confusing and the Order on Motion for Summary Judgment had no bearing on the eventual trial of the issue of undue influence.

C. Argument.

Dennis's Statement of the Case starts with the false assertion that Dennis "filed a petition alleging that the Will offered into probate in this matter was invalid based on: (1) lack of testamentary capacity; (2) undue influence; and (3) confidential relationship." Dennis's Brief at p. 3. Neither Dennis's Petition nor Amended Petition contains any count alleging that

Margaret's 2007 Will or 2008 Codicil was invalid based on any alleged "confidential relationship." (App. 1-10) (App. 11-21). Additionally, Dennis has not cited any authority that a will or codicil can be invalidated based on an alleged confidential relationship.

Dennis posits that the first issue on appeal is whether "[t]he District Court erred in determining in its summary judgment ruling that the burden of proof did not shift to Gary Workman as a result of a confidential relationship and undue influence." Dennis's Brief at p. 19. Dennis literally appears to be claiming that Judge Darbyshire *erred by following Iowa law*. *See* Dennis's Brief at p. 21 (stating that "the issue presented on this appeal is whether this should continue to be the standard for cases . . . ."). Our appellate court system would be inundated by claims if every party could appeal a trial court decision solely because they wanted a change in the law. If Dennis wanted to change Iowa law he should first become an Iowa resident, and then write his legislator.

Dennis's claim that "The District Court *ruled* in its motion for summary judgment on the relationship between a confidential relationship and undue influence" is also misleading, as that issue was not before the Court. Dennis's Brief at p. 20 (emphasis added). The only "rulings" Judge Darbyshire made were on the only two issues before him, and he granted

Gary's Motion for Summary Judgment on the claim of lack of testamentary capacity, and denied Gary's Motion for Summary Judgment on the claim of undue influence. (App. 797-806).

Dennis next spent almost ten pages of his argument by copying block quotations from the Restatement (Third) of Property, Kansas, New Jersey, and other case law. *See* Dennis's Brief at pp. 21–30. These citations are entirely irrelevant to any issue in dispute. Dennis then makes numerous allegations without citation to the record,[3] as well as confusing, unsupported presumptions about juries and trials,[4] and outright misstatements of the law.[5]

Ultimately, Judge Darbyshire *denied* Gary's Motion on the issue of undue influence. (App. 797-806). The Order on Motion for Summary Judgment, and any discussion or dicta therein pertaining to undue influence in no way impacted the jury's consideration of Dennis's claims of undue influence at trial or prejudiced him in any manner whatsoever. This Court must deny Dennis's claim that "the District Court erred in determining in its summary judgment ruling that the burden of proof did not shift to Gary Workman as a result of a confidential relationship and undue influence".

[3] Dennis's Brief at p. 34.
[4] Dennis's Brief at pp. 34, 35.
[5] Dennis's Brief at p. 35 (claiming that "the burden of proof requires that the jury find against a plaintiff if they are unable to determine where the truth lies").

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DENNIS'S ORAL MOTION TO AMEND THE PLEADINGS ON THE LAST DAY OF TRIAL.

A. Preservation of Error.

Dennis has preserved a claim of error on the issue of whether Judge Telleen abused his discretion when he denied Dennis's motion to amend the pleadings.

B. Standard and Scope of Review.

Gary agrees with Dennis that the standard of review on the denial of a motion for leave to amend is for abuse of discretion. *In re Estate of Bearbower*, 426 N.W.2d 392, 394 (Iowa 1988). The scope of review is limited to Judge Telleen's decision to deny Dennis's oral motion for leave to amend to include claims that Gary exercised undue influence over Margaret when she executed her 1983 Will, 1985 Codicil, 1987 Will, 1995 Will, 1999 Will, 2001 Will, 2003 Codicil, and 2006 Codicil.

C. Argument.

Dennis claims that the District Court erred when, on the third and final day of trial, it did not permit him to amend his pleadings to claim that Gary exercised undue influence over Margaret when she executed her eight prior estate planning documents. Iowa courts "are reluctant to find an abuse of discretion in a trial court ruling granting or denying a party leave to amend. This is true even though allowance of an amendment is the general

rule and denial the exception." *In re Estate of Bearbower*, 426 N.W.2d 392, 394 (Iowa 1988) (*quoting Johnston v. Percy Const., Inc.*, 258 N.W.2d 366, 370-71 (Iowa 1977)). Appellate courts "accord the district court *considerable* discretion when ruling on [motions for leave to amend]," and "reverse only when a *clear* abuse of discretion is shown." *Cargill Inc. v. Mitchell*, No. 6-165/05-0993, 2006 Iowa App. LEXIS 435, 5-6 (Iowa Ct. App. Apr. 26, 2006) (subsequently reported at 720 N.W.2d 192 (Iowa Ct. App. 2006)) (emphasis added) (citing *Bennett v. Redfield*, 446 N.W.2d 467, 474-75 (Iowa 1989)); *see also Alison-Kesley AG Ctr., Inc. v. Hildebrand*, 485 N.W.2d 841, 845 (Iowa 1992). "If there is a solid legal basis supporting the ruling on a motion to amend, there is no abuse of discretion." *Bearbower*, 426 N.W.2d at 394. As even Dennis concedes, the decision whether to grant an amendment is "within the sound discretion of the trial court." Dennis's Brief at p. 36.

1. Dennis not only should have known, but clearly knew of the relevant testimony prior to trial.

Until it is successfully contested, an earlier will is presumed to be valid. *In re Will of Crissick*, 156 N.W. 415, 422 (Iowa 1916). A party may attempt to contest multiple wills in the same action. *See In re Estate of Klages*, 209 N.W.2d 110, 114 (Iowa 1973) (citing *In re Yahn's Estate*, 45 N.W.2d 702 (Wisc. 1951)). Neither in the *Swartzendruber* case Dennis cites

in his Brief, nor in any other case Dennis has cited, did the contestant attempt to amend *during trial* to challenge any prior will. *Swartzendruber v. Lamb*, 582 N.W.2d 171, 173 (Iowa 1998).

"[W]hen a movant seeks to amend a petition based on trial testimony the movant knew or should have known prior to trial, the amendment is more properly denied than one that might have been otherwise allowed earlier in the proceedings. *Meincke v. Northwest Bank & Trust Co.*, 756 N.W.2d 223, 229 (Iowa 2008) (citing *Alison-Kesley AG Ctr., Inc. v. Hildebrand*, 485 N.W.2d 842, 846 (Iowa 1992)); *Mora v. Saverei*, 222 N.W.2d 417, 422-23 (Iowa 1974) (upholding denial of a motion to amend where testimony presented "no surprise" to moving party). In *Meincke*, the Iowa Supreme Court found that the plaintiff "knew, or should have known, the testimony that supported her fraud claim before trial because [the witness] offered similar testify during his deposition . . . ." *Id*. at 429. The Court thus held that the trial court did not abuse its discretion when it denied the plaintiff's motion to amend during trial. *Id*.

In the Petition he filed June 4, 2013, Dennis explicitly acknowledged that "Upon information and belief, there have been many prior Last Will and Testament revisions and changes for the past approximately 25 or more years." (App. 4). Despite acknowledging this fact, Dennis only claimed that

"[o]n July 19, 2007 and at all times thereafter, [Margaret] was susceptible to undue influence, and that "t]he Last Will and Testament is the result of undue influence." (App. 5-6). Dennis also limited his claim for relief, requesting that "the alleged instrument be adjudged not to be the Last Will and Testament of Margaret E. Workman. . . ." (App. 6).

On December 6, 2013, the Court entered a Trial Scheduling Order scheduling a jury trial to commence on September 8, 2014. (App. 22 at ¶1). As part of the Trial Scheduling Order, pleadings closed 60 days before trial, and all motions were to be filed at least 60 days before trial. (App. 23-24 at ¶5, 9). The Iowa Rules of Civil Procedure also permit a party to amend a pleading. Iowa R. Civ. P. 1.402 (2015). If Dennis had discovered new information after receiving discovery or taking depositions, or even after the trial was previously continued at Dennis's request, he could have filed a motion to amend. He did not.

Dennis cannot claim he was surprised by any testimony or evidence at trial. *See Meincke v. Northwest Bank & Trust Co.*, 756 N.W.2d 223, 229 (Iowa 2008); *Mora v. Saverei*, 222 N.W.2d 417, 422-423 (Iowa 1974). Judge Telleen did not abuse his "considerable discretion" when he denied Dennis's motion to amend. *Cargill Inc. v. Mitchell*, No. 6-165/05-0993,

2006 Iowa App. LEXIS 435, 5-6 (Iowa Ct. App. Apr. 26, 2006) (subsequently reported at 720 N.W.2d 192 (Iowa Ct. App. 2006)).

2. The fact that the parties referenced Margaret's prior estate planning documents during trial is not sufficient to justify amendment.

i. Any alleged undue influence with respect to Margaret's prior estate planning documents was not tried by consent of the parties.

Iowa Rule of Civil Procedure 1.457 provides "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Iowa R. Civ. P. 1.457 (Iowa 2015). "The rule addresses issues which were not raised in the pleadings but were nonetheless tried by consent of the parties." *Cargill Inc. v. Mitchell*, No. 6-165/05-0993, 2006 Iowa App. LEXIS 435, 6 (Iowa Ct. App. Apr. 26, 2006) (subsequently reported at 720 N.W.2d 192 (Iowa Ct. App. 2006)).

It is undisputed that Gary has never expressly consented to trial of issues not raised in the pleadings. Even in his Brief, Dennis never claims that the parties impliedly consented to trial of Margaret's 1983-2006 estate planning documents. To the contrary, Gary explicitly objected when Dennis made his oral motion for leave to amend on the last day of the trial. (App. 451-57).

ii. Whether the parties "voluntarily offered evidence" is not the standard for a motion to amend a claim under Iowa law.

Instead of citing a Rule of Civil Procedure, Dennis claims that the test for amendment is "whether the parties voluntarily presented evidence concerning the testatrix's intent in drafting the various wills form 1983-2007." Dennis' Brief at pp. 36-37. The logical fallacy of this argument is self-evident – if a plaintiff could force a court to allow amendment during trial simply by presenting evidence on a legal claim it has never pled, courts would be faced with a slippery slope resulting in unfair surprise and prejudice to defendants. In support of his assertion, Dennis claims that "[w]here the parties voluntarily offer evidence on an issue the denial of an amendment to conform to such proof would be beyond fair discretion." Dennis's Brief at p. 36 (quoting *Laverty v. Hawkeye Security Ins. Co.*, 140 N.W.2d 83, 88 (Iowa 1966)).

First, the Iowa Supreme Court's discussion leading to this quotation in *Laverty* pertained to Rule 88 of the Iowa Rules of Civil Procedure, the predecessor to Rule 1.421. *Id.*; *Antolk v. McMahon*, 744 N.W.2d 82 (Iowa 2007). Rule 1.421 addresses defenses to a claim for relief, not attempts to amend to add additional claims. Iowa R. Civ. P. 1.421 (2015).

Second, as Dennis failed to mention, this quotation is immediately preceded by the qualification that "[w]hile the issues may not be substantially changed wide discretion is vested in the trial court." *Laverty*, 140 N.W.2d at 88. As discussed in subsection II(C)(3)(i), below, unlike *Laverty*, the issues in this case would have "substantially changed" if Dennis had been permitted to amend as he requested. Third, unlike the present case, the evidence in *Laverty* purportedly justifying amendment was uncontroverted. *Id*. at 88. Fourth, in *Laverty*, just as Gary is requesting this court do, the Supreme Court held that the trial court did not abuse its discretion in ruling on the proposed amendment.

In the *Dulin* case Dennis cites: (1) the Iowa Supreme Court only mentions "leave to amend" in one place on the last page of the opinion; (2) the evidence was "uncontroverted"; and (3) the issue involved setoff and the evidence showed that the plaintiff could not prove any amounts due and owing. *Dulin v. Washington Nat'l Ins. Co.*, 135 N.W.2d 635, 638 (Iowa 1965). Similarly, the issue in the *Barnhouse* case Dennis cites also involved a claim for setoff "on uncontested facts." *Barnhouse v. Hawkeye State Bank*, 406 N.W.2d 181, 188 (Iowa 1987). Uncontested claims involving setoff—a defense which can undermine the plaintiff's ability to prove any amounts are due and owing—are readily distinguishable from attempting to introduce

entirely new disputed claims like challenging prior estate planning documents in a will contest.

iii. Dennis has not shown that the proposed amendment actually conformed to the alleged proof.

Dennis's allegation that the parties referenced prior estate planning documents is not sufficient to justify amendment. Instead, the proposed amendment must also actually conform to the proof. *B&B Asphalt Co. v. T.S. McShane Co.*, 242 N.W.2d 279, 284 (Iowa 1976). In *B&B Asphalt*, the plaintiff moved "for leave to amend to add allegations of breach of warranty at the conclusion of its evidence." *Id* at 283. On appeal, the Supreme Court noted that "[a] fundamental problem with plaintiff's proposed amendment is that it *did not actually conform to proof*." *Id.* at 284 (emphasis added). The Supreme Court thus held that "it was not an abuse of discretion for the trial court to deny the amendment." *Id.*

The elements necessary to establish a finding of undue influence are:

1. Susceptibility to undue influence,
2. Opportunity to exercise such influence and effect the wrongful purpose,
3. Disposition to influence unduly for the purpose of procuring an improper favor, and
4. Result clearly the effect of undue influence.

In re Estate of Davenport, 346 N.W.2d 530, 532 (Iowa 1984) (citing *Matter of Estate of Herm*, 284 N.W.2d 191, 200-01 (Iowa 1979)). Dennis has not

identified evidence which was admitted at trial that shows that Gary exercised undue influence over Margaret when she executed her eight prior estate planning documents which would justify amendment to "conform to the proof" for any or all of those documents. Dennis cannot point to specific evidence justifying amendment and a jury question on each of the four prongs of the test for undue influence for every one of Margaret's eight prior estate planning documents he sought to challenge in his motion for leave to amend.

iv. The evidence Gary presented at trial was in direct response to, and necessitated by the evidence Dennis presented.

In this case, Dennis spent five pages of his Brief referencing things Gary and the undersigned did at trial, then claimed "[i]f the previous wills were going to confuse the issue and therefore should not be contested [Gary] spent a lot of time discussing them and the circumstances of their making." *See* Dennis's Brief at pp. 37-41. However, Dennis's insinuation that this was simply a case of Gary injecting evidence of every prior estate planning document into the case is false, and contradicted by Dennis's own statements.

Dennis presented his case first, and is now literally criticizing Gary for rebutting the evidence Dennis injected into the record. As Dennis

admits, his theory was that Gary, since he returned to farm in 1981, began to "curry influence and favor with his mother" and "influenced an erosion of Dennis's share under the various wills." Dennis' Brief at p. 43. Dennis characterized what occurred as a "continuous deterioration" or "steady attrition" of Dennis's alleged inheritance in favor of Gary and his heirs. Dennis's Brief at pp. 8, 19. To attempt to prove his theory of a "continuous" or "steady" attrition, Dennis, with his first witness, himself, and thereafter, presented evidence with respect to Margaret's prior estate planning documents. (App. 295 at 51:15-18). At trial, Dennis's attorney also recognized the necessity of referencing the prior documents in Dennis's presentation of his claims:

> Unfortunately in this case without the history or the series and the gradual erosion you lose the perspective if you don't see them all. This case mandates they all be presented because of the way it was eroded and that is consistent with what her desires were.

(App. 455 at 211:21-25).

Dennis is essentially asking this Court to give defendants two untenable choices: (1) either fail to rebut the evidence introduced by a plaintiff; or (2) allow the plaintiff to amend during trial to plead a new legal theory to take advantage of evidence the plaintiff injected into the record. Dennis has previously attempted to take advantage of "evidence" he injected

into the record.[6] Gary, as was his prerogative, and as necessitated by the evidence Dennis introduced, referenced Margaret's prior estate planning documents to rebut Dennis' claims.

3. Gary would have been prejudiced if the District Court had permitted Dennis to amend his claim on the last day of trial.

i. An amendment would have substantially changed Dennis's claims.

"[A]n amendment to conform to the proof should not be allowed if it will substantially change the claim." *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103, 108 (Iowa 1995). Going into trial, and for the two-and-a-half years since Dennis filed his Petition, it was Gary's understanding that he would only have to rebut the claim that he exercised undue influence over Margaret when she executed her 2007 Will and 2008 Codicil. Gary directed his efforts in discovery, depositions, pre-trial preparation, and during the first two days of trial accordingly. If Dennis had been allowed to amend, instead of having to defend claims of undue influence under the *Davenport* test for only the 2007 Will and 2008 Codicil, Gary would have needed to defend against eight additional claims of undue influence at eight different times over the course of over twenty years.

[6] *See* App. 557-597.

If the circumstances surrounding Margaret's execution of her prior estate planning documents were at issue Gary could have: (1) sent additional or different discovery; (2) deposed additional witnesses; (3) asked additional or different questions during depositions; (4) changed his litigation strategy and preparation for trial; (5) presented testimony from additional witnesses at trial; (6) presented additional exhibits at trial; and/or (7) presented live testimony from certain witnesses like Dr. Iltis and Attorney Dendinger, instead of having their depositions read in. As Judge Telleen explicitly recognized, "there could have been and would have been in my estimation much different evidence presented, much different proof presented, many different witnesses called, it's too late in the game and the motion to amend is denied." (App. 457 at 213:1-5).

There is a clear distinction between simply referencing evidence at trial, and using that evidence in a manner in an attempt to rebut an explicit claim in the case. Dennis cannot seriously contend that Gary had a full and fair opportunity to present evidence on all of Margaret's prior estate planning documents. For instance, in his Brief, Dennis makes references to letters from Attorney Joni Axel. Gary never deposed Attorney Axel nor called her as a witness at trial to explain the circumstances surrounding her

drafting of the letters. Gary did not present live testimony from Attorney Lowell Dendinger at trial.

Neither party introduced much testimony about the specific circumstances surrounding Margaret's execution of the majority of her prior estate planning documents, including whether: (1) Margaret was susceptible to undue influence at the execution of each and every one of those prior estate planning documents; (2) Gary had the opportunity to exercise undue influence and effect a wrongful purpose at that time; (3) Gary had a disposition to unduly influence Margaret at that time; or (4) Margaret's disposition of her assets in those instruments was "clearly" the result of undue influence. As Judge Telleen explicitly recognized in denying Dennis's oral motion to amend, "the defense has prepared their whole strategy and their whole basis of this case in defending the 2007 Will and the 2008 Codicil and did not defend the earlier Wills. . . ." (App. 456-57 at 212:23-213:1).

Even if Gary could have recalled some witnesses who had already testified, he would not have had time to prepare for the same. Similarly, it would have been impossible for Gary to examine some witnesses—including Dr. Iltis and Attorney Dendinger whose testimony had been read into evidence—on the new claims at issue. It would also have been

impossible for Gary to call new witnesses such as Attorney Axel, or Margaret's friends, neighbors, or relatives, who could testify as to: (1) whether Margaret was susceptible to undue influence at the time of her execution of each and every prior estate planning document in the 1980s, 1990s, and 2000s; (2) whether Gary had the opportunity to exercise undue influence and effect a wrongful purpose at that time; or (3) whether Gary had a disposition to unduly influence Margaret at that time.

A full and fair trial of Dennis's claims with respect to every one of Margaret's prior estate planning documents would have taken several days, necessitated the introduction of additional evidence and witnesses, and substantially changed the issues to be decided by the jury from just addressing the 2007 Will and 2008, to having to make findings about eight additional estate planning documents. An amendment which would have substantially changed the claims "midway through the trial" must be denied. *Tomka*, 528 N.W.2d 108.

ii. Separate trials would have been necessary if Dennis had attempted to challenge all of Margaret's estate planning documents in the same proceeding.

The Iowa Supreme Court has held that the validity of a will which is admitted to probate "alone should be tried and submitted to the jury for its consideration without having such issue clouded with [other] wills which

had been made, revoked and destroyed." *Swartzendruber v. Lamb*, 582 N.W.2d 171, 174 (Iowa 1998) (citing *In re Estate of Cocklin*, 497 N.W. 864, 865 (Iowa 1941)). In reaching this conclusion in *Swartzendruber*, the Court explicitly recognized that "consideration of facts surrounding the execution of earlier wills can, in some instances, distract the jury's focus from the facts surrounding the execution of the will that has been admitted to probate. When that danger exists, separate actions should be required." *Id*. at 175 (citing *Cocklin's Estate,* 297 N.W.).

If Dennis had previously contested all of Margaret's prior estate planning documents Gary could have, and would have moved for separate trials. (App. 452-55 at 208:17 – p. 211:11). For instance, Dennis read in medical testimony from Dr. Mark Iltis. (App. 364 at 120:6-7). However, Dennis did not produce any medical testimony that Margaret was susceptible to undue influence at any time before execution of her 2007 Will. Had Dennis attempted to challenge all of Margaret's prior estate planning documents in the same proceeding the jury could have confused Dr. Iltis' testimony with respect to Margaret's mental state when she executed her 2007 Will and 2008 Codicil, with the absolute lack of evidence of any alleged susceptibility on Margaret's part to undue influence prior to that time.

"The law presumes a person is free from undue influence." *Burkhalter v. Burkhalter*, 841 N.W.2d 93, 96 (Iowa 2013) (quoting Iowa State Bar Ass'n, *Iowa Civil Jury Instructions* 2700.4 (2015)).

> Undue influence must be such as to substitute the will of the person exercising the influence for that of the testator, thereby making the writing express, not the purpose and intent of the testator, but that of the person exercising the influence. It must operate *at the very time* the will is executed and must be the dominating factor.

In re Estate of Roberts, 140 N. W.2d 725, 730 (1966) (emphasis added). If trial had been allowed on all ten estate planning documents Margaret executed over the course of twenty-five years, the jury could also—as Dennis likely hoped—have just made a "general" finding that Gary had exercised undue influence over Margaret. It is unlikely that a jury would have taken the time to make separate and distinct findings on each of the four elements of a claim for undue influence "at the very time" Margaret executed each and every one of her ten estate planning documents. *In re Estate of Roberts*, 140 N. W.2d 725, 730 (1966). The jury would have been required to sort through documentation, oral testimony, and the circumstances existing at ten distinct times over the course of twenty-five years, without being influenced by testimony and evidence relating to subsequent occurrences, essentially "peeling off" each subsequent estate

planning document. This would have been an exhausting, if not impossible task.

Separate actions would have been required even if Dennis had filed a timely motion to amend. Gary would have been severely prejudiced if the Court had permitted Dennis to not only amend on the last day of trial, but also to amend to challenge all of Margaret's estate planning documents in the same proceeding. Judge Telleen did not abuse his discretion in denying Dennis's motion to amend.

4. The District Court's denial of Dennis's motion for leave to amend was not prejudicial to Dennis.

In order to constitute reversible error, the trial court's decision to overrule Dennis's Oral Motion for Leave to Amend must also have also been prejudicial to Dennis and actually affected the outcome of the action. *In re Estate of Bearbower*, 426 N.W.2d 392, 394 (Iowa 1988). Even assuming, *arguendo*, the District Court abused its discretion in denying Dennis's oral motion to amend the pleadings halfway through trial, such abuse of discretion was not prejudicial to Dennis.

After the District Court denied Dennis's oral motion for leave to amend Gary moved for a directed verdict on both the 2007 Will and 2008 Codicil. (App. 457-70). As Judge Telleen noted in denying Gary's motion for directed verdict with respect to the 2007 Will, Dennis's evidence was

"extremely thin but I think it is better for judicial economy in this case is to deny the motion for directed verdict and see what the jury does with it." (App. 465). The 2008 Codicil, however, is different.

The only substantive change the 2008 Codicil made from the 2007 Will was to add a restriction on Gary's ability to sell the farmland. (App. 466) (App. 865-66). In other words, the 2008 Codicil was *less favorable* to Gary. *Id*. Dennis may have influenced Margaret to draft the 2008 Codicil. (App. 339-42 at 95:4 – 98:4). When asked by his counsel whether "it even matters if the 2008 Codicil was written," Dennis replied "no". (App. 352-53 at 108:24 – 109:2) (App. 467 at 223:11-13). Not only does that statement underscore the weakness of Dennis's claims, but it is also contrary to the law.

In her 2008 Codicil, Margaret explicitly certifies that:

> **In all other respects not modified herein, I hereby reaffirm the provisions of my Last Will and Testament dated July 19, 2007.**

(App. 865-66) (emphasis added). Under the doctrine of reaffirmation, "a will or codicil which was invalid as originally executed because of undue influence is republished and validated by the execution of a codicil thereto by the testator at a time when that person was no longer subject to undue influence." *Abel v. Bittner*, 470 N.W.2d 348, 350 (Iowa 1991); (App. 469-

70). The jury did not find that Gary exercised undue influence over Margaret when she executed her 2008 Codicil, thus under the doctrine of reaffirmation Dennis was prohibited from avoiding the provisions of the 2007 Will and any prior estate planning documents. *Id*. at 351.

Even if the jury could have found that Gary exercised undue influence over Margaret when she executed any or all of her prior estate planning documents, because Margaret reaffirmed her 2007 Will in her 2008 Codicil, any previous undue influence by any party is entirely irrelevant. The result would have been the same – Margaret's 2007 Will as amended by her 2008 Codicil, which was admitted to probate, would still stand. Dennis was not prejudiced in any way by the District Court denying Dennis's oral motion for leave to amend on the last day of trial.

CONCLUSION

Dennis has not preserved error on Judge Darbyshire's Ruling on the Motion for Summary Judgment. Even if Dennis did preserve error, Dennis has not set forth any claim of reversible error, only that this Court should establish new law – a task better left to the legislature. Judge Telleen did not abuse his discretion when he denied Dennis's oral motion to amend the pleadings on the last day of trial. Dennis was also not prejudiced by the

denial of his motion to amend. The Court should affirm the District Court's rulings in their entirety.

REQUEST FOR ORAL SUBMISSION

Defendant-Appellee Gary Workman, Individually and as Executor of the Estate of Margaret E. Workman, requests oral submission.

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CERTIFICATE OF FILING

I hereby certify that on May 27, 2016, I filed this Final Brief for Defendant-Appellee Gary Workman, Individually and as Executor of the Estate of Margaret E. Workman, by electronically filing it with the Iowa Judicial System's EDMS system.

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I hereby certify that on May 27, 2016, I served this Final Brief for Defendant/Appellee Gary Workman, Individually and as Executor of the Estate of Margaret E. Workman, on all other parties to this Appeal by mailing one (1) copy thereof by United States Mail with First Class Postage affixed to the following parties:

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ATTORNEY'S COST CERTIFICATE

I, Daniel P. Kresowik, of the firm Stanley, Lande & Hunter, P.C., hereby certify that the actual cost of printing the preceding Final Brief for behalf of Defendant-Appellee Gary Workman, Individually and as the Executor of the Margaret Workman Estate was $36.90 and that amount has been paid in full.

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CERTIFICATE OF COMPLIANCE

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