IN THE IOWA SUPREME COURT

NO. 15-2126

DENNIS WORKMAN,

Plaintiff/Appellant,

vs.

GARY WORKMAN, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MARGARET E. WORKMAN, and LAVERNE WORKMAN, CYNTHIA NOGGLE, RANDY NOGGLE, MINDY (NOGGLE) SHERWOOD, CHRISTINE (WORKMAN) THOMPSON AND JEFFREY WORKMAN.

Defendant/Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
HON. JUDGE JOHN D. TELLEEN
SCOTT COUNTY PROBATE NUMBER ESPR074050

PLAINTIFF/APPELLANT'S FINAL REPLY BRIEF

REQUEST FOR ORAL ARGUMENT

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ISSUE I: 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

A. Preservation of error and standard of review.

Defendant argues that the Plaintiff did not preserve error because of some technical defect in the Notice of Appeal. The Defendant claims it lacks the words "from all adverse ruling and orders inhering therein." (Defendant's Brief p. 8). Defendant fails to support the contention that this is fatal to error preservation with any case law interpreting the Notice of Appeal statute as such. The case law on the subject makes it clear that a Notice of Appeal is mandatory but not jurisdictional. *Rowen v. Lemars Mut. Ins. Co. of Iowa*, 347 N.W.2d 630, 638 (Iowa 1984).

The preservation of error standard is designed to ensure that the District Court had an opportunity to rule on the issue before appeal. This issue was preserved by Plaintiffs when resisting the Motion for Summary Judgment. (See Plaintiffs' Resistance to Motions for Summary Judgment, App. ---). The District Court specifically ruled on these issues. (Order on Motion for Summary Judgment, App. 797).

B. Argument.

The Defendant's criticism of the Plaintiff's position is based on a misapprehension of the Plaintiff's position. The Plaintiff contends that this Court should adopt the formulation of undue influence and confidential relationships set forth in Restatement (Third) of Property: Wills and Trusts § 8.3. Admittedly, this would be a change in Iowa law. For the reasons stated in the Plaintiff's Appellant Brief it would be appropriate for this Court to consider whether the new formulation of the rule better serves the interests of justice. Defendant is unwilling to engage in a discussion of this point and instead spends his time criticizing "block quotes."

The District Court did in fact rule on the subject of which confidential relationship law to apply to the case. The fourth section of the summary judgment order is entitled "confidential relationship" and discusses the effect of a confidential relationship on an undue influence claim. (Order on Summary Judgment p. 8, App. 805). The Court specifically determined the burden of proof for the parties, which it also applied at trial, in a case involving a confidential relationship and a will contest. (Order on Summary Judgment p. 8, App. 805). The Court concluded "It remains for the Plaintiff to establish at trial the Defendant unduly influenced Mrs. Workman and there is a fact question precluding summary judgment on that issue." (Order on Summary Judgment p. 8, App. 805).

The issue in this case is whether the correct standard for the burden of proof is the one set forth in the Restatement (Third) of Property: Wills and Trusts § 8.3. The different allocation of the burden of proof utilized in this case prejudices the jury verdict because it requires a party at a unique information disadvantage to bear a burden of proof. The District Court's determination that Iowa law applies burden shifting to inter vivos gifts, but not to testamentary bequests is based on law that many jurisdictions and the scholars now believe is obsolete. This Court should evaluate the reasoning provided and cited for the change and make an appropriate decision about the state of Iowa law.

ISSUE II: THE DISTRICT COURT ERRED IN DENYING A MOTION TO AMEND THE PLEADINGS TO CONFORM WITH THE EVIDENCE

The essence of the Plaintiff's argument on this subject is that denial of the motion to amend the pleadings to conform to the evidence allowed the Defendant to create confusion among the jury. The Defendant has often repeated his contention that because the 2008 Codicil is "less favorable" to Gary then the Plaintiff cannot win this contest. The Defendant presented this rather interesting interpretation of events to the jury.[1] The jury then

[1] The evidence demonstrates a steady deterioration of Dennis's share of the estate from a share of farm ground valued over $2,500,000 to $25,000 paid out in $2,500 increments over 10 years.

received an instruction that appeared to support the contention because it stated the contest was limited to the 2007 and the 2008 codicil.

The evidence presented and contested at trial concerned a slow erosion of Dennis's share from 1983 through 2007. Each side had a fair opportunity to develop and present evidence on the subject. Gary certainly had extensive testimony prepared discussing his reasoning for his mother's actions. He conducted discovery, gathered evidence and presented it at trial concerning what a low-down-dirty-scoundrel Dennis was during the 1980s and 1990s. A considerable amount of that testimony appears in the Defendant's brief in this case. This testimony ranged back all the way the 1983 Will. Yet in this appeal Defendant claims he was unable to comprehend and understand that the reasons for the wills between 1983 and 2007 would be an issue in the case.

Defendant criticizes the Plaintiff based on a contention that the Plaintiff could have made the motion sooner. (Defendant's Brief p. 13). This is a rather unique manner of looking at the rule. The commentary to the Iowa Rules of Civil Procedure demonstrates the opposite is true:

> "It is now generally accepted that there may be no subsequent challenge of issues which are actually litigated, if there has been actual notice and adequate opportunity to cure surprise. If it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies

> in the language of particular pleadings. Actuality of notice there must be, but the actuality, not the technicality, must govern." Kuhn v. Civil Aeronautics Bd., C.A.1950, 183 F.2d 839, 841-842, 87 U.S.App.D.C. 130.
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> A motion to amend to conform to proof of issues tried by consent may be made and granted at any time after presentation of the evidence has begun, Page v. Wright, C.C.A. 7th, 1940, 116 F.2d 449, certiorari dismissed 61 S.Ct. 831, 312 U.S. 710, 85 L.Ed. 1142, and is frequently allowed during the course of the trial after the close of the testimony, Great Atlantic & Pac. Tea Co. v. Jones, C.A.4th, 1949, 177 F.2d 166, and even after return of verdict, Holley Coal Co. v. Globe Indem. Co., C.A.4th, 1950, 186 F.2d 291, or entry of judgment, Davis v. Food Mart, Inc., C.A.5th, 1964, 334 F.2d 27, or on appeal, City of Green Cove Springs v. Donaldson, C.A.5th, 1965, 348 F.2d 197, or after remand, Emich Motors Corp. v. General Motors Corp., D.C.Ill.1954, 15 F.R.D. 354.
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> Amendments to conform to the proof are permitted in order to bring the pleadings into line with the issues actually developed at the trial even though the issues were not adequately presented by the pleadings as originally drawn. Falls Industries, Inc. v. Consolidated Chem. Indus. Inc., C.A.5th, 1959, 258 F.2d 277. Issues not raised by the pleadings which are tried by the express or implied consent of the parties, are treated in all respects as if raised in the original pleadings. Gallon v. Lloyd-Thomas Co., C.A.8th, 1959, 264 F.2d 821. A party impliedly consents to the introduction of issues not raised in the pleadings by failure to object to the admission of evidence relating thereto, unless he is not represented by counsel. Albers Milling Co. v. Farmers Produce Co., C.A.8th, 1955, 222 F.2d 915.
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> Iowa R. Civ. P. 1.402, comments on Enactment 1943-Former Rule 88.

The Defendant's claim that the rule does not allow for amendment after the close of evidence is simply a self-serving misrepresentation of the law.

Defendant also claims that he did not consent to trial of these issues. Despite this claim, the Defendant cites to no motions in limine, objections at trial or Rule 104(b) motions designed to presentation of evidence concerning the wills prior to 2007. Defendant undoubtedly was aware that Dennis's theory was that there was a slow attrition of Dennis's share since 1983. Otherwise Defendant would not have presented evidence in a manner that attempted to tie certain financial misfortunes with contemporaneous alterations of the estate scheme. If the issue should really be limited to the undue influence of the 2007 Will and the 2008 codicil then the Defendant should have objected on relevance grounds to discussion of the reasons for the wills prior to that time. Rather than do so the Defendant instead opted to present salacious testimony about Dennis's financial misfortunes. This decision is consent to trial of those issues. The Defendant opened the proverbial door by not objecting to the evidence in the first place and then presenting evidence on the same subject.

Defendant would cast this in a significantly different manner. Defendant claims the testimony and evidence he provided about estate documents predating the 2007 Will was "in direct response to, and necessitated by the evidence Dennis presented." (Defendant's Brief p. 19). This position might have some merit if this Court were to ignore that

Defendant could have taken any number of steps to prevent the presentation of such evidence. Defendant opted not to do so for purposes of making Dennis look bad in front of the jury. Simply stated, the rules allow a Defendant to object. Defendant was not helpless to prevent the presentation of the Dennis's evidence. In fact, if the Defendant wanted to prevent trial on that issue it should have taken affirmative steps to do so. *Peters v. Peters*, 214 N.W.2d 151, 155 (Iowa 1974). (stating "where as here the parties proceed without objection to try an issue not presented by the pleadings, it amounts to consent to try that issue and is rightfully in the case."); *See also State v. Parker*, 747 N.W.2d 196 (Iowa 2008); *Rouse v. Rouse*, 174 N.W.2d 660 (Iowa 1970); *Reserve Ins. Co. v. Johnson*, 150 N.W.2d 632 (Iowa 1967); *In re Miller's Estate*, 159 N.W.2d 441 (Iowa 1968).

Defendant claims the amendment would substantially prejudice him because he did not conduct discovery or procure witnesses on the subject. This would have been an issue to raise in an objection to Dennis presenting evidence concerning the erosion of his shares over 25 years and the steadily growing influence of Gary during that same time. If Gary thought this was prejudicial then he could have objected or even asked for a continuance to procure additional witnesses. See I.R.C.P. 1.911. Again the fact that Gary presented evidence to explain the reasons for those previous estate

documents casts serious doubt on his contention that he was surprised by the issue.

The Defendant claims that a contest of the previous estate documents would have necessitated a separate trial for each document. The deciding factor on this question is whether the contest of the separate documents would have created a "danger of confusing the jury." *Swartzenruber v. Lamb*, 582 N.W.2d 171 (Iowa 1998). The opposite is true in this case. When the District Court refused to amend the pleadings to include the prior wills the Court unwittingly allowed the Defendant to confuse the jury through his argument that the 2008 codicil was "less favorable" to him and thus he must win. The jury may easily have interpreted the instructions, limited to the 2007 Will and 2008 Codicil, as lending credence to the Defendant's contention. The instruction encouraged the jury ignore the evidence of undue influence prior to 2007 and the steady attrition of Dennis' share from 1983 through 2007. The result is prejudice to the Plaintiff.

The Defendant also claims there is a lack of prejudice in the case because of the doctrine of reaffirmation. The Defendant believes this is a clever "gotcha" moment and has since the beginning of this case. Defendant contends that it would be impossible for a jury to find undue influence in a situation where the last will is slightly less favorable to the person exercising

the undue influence. In this case the Defendant claims that Margaret adding a restriction on selling on the farm in the 2008 codicil is sufficient as a matter of law to show that Gary was not unduly influencing Margaret. The Defendant's argument ignores the steady increase of Gary's shares over the years. The various testamentary instruments erode Dennis's share from approximately $1,250,000 in value to $25,000 paid out in $2,500 increments over 10 years. One small step back does not demonstrate a lack of undue influence. More importantly, the Defendant's argument on this subject only serve to emphasize the prejudice that occurs when the disallowance of the amendment places an undue emphasis on the formation of only 2007 will and 2008 codicil.

CONCLUSION

The Court should reverse the District Court Ruling on Summary Judgment and remand for a jury trial on the merits on all legal theories presented by the Plaintiff. The Court should reverse the denial of the motion to amend to conform to proof and remand for a jury trial on the merits on all legal theories presented by the Plaintiff.

REQUEST FOR ORAL ARGUMENT

Pursuant to I.R. App. P. 6.908, Plaintiff-Appellant's request to be heard in oral argument on this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this brief contains 2,605 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(9).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and they type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14.

By: /s/ Eric M. Updegraff .

CERTIFICATE OF SERVICE

I, Eric M. Updegraff, a member of the Bar of Iowa, hereby certify that on the 1st day of June, 2016, I served the above Appellant's Final Reply Brief and Request for Oral Argument by electronic filing thereof to the following:

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By: /s/ Eric M. Updegraff .

CERTIFICATE OF FILING

I, Eric M. Updegraff hereby certify that I, or a person acting on my direction, did file the attached Appellants' Final Reply Brief and Request for oral Argument by electronic filing thereof to the Clerk of the Iowa Supreme Court at 1111 East Court Avenue, Des Moines, Iowa 50319 on this 6th day of May, 2016.

By: /s/ Eric M. Updegraff .

ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of producing the foregoing Appellant's Final Reply Brief and Request for Oral Argument was
$ _____.

By: /s/ Eric M. Updegraff .