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 RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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ARGUMENT

I. DENNIS DID NOT PRESERVE ANY ALLEGED CLAIM OF ERROR PERTAINING TO THE DISTRICT COURT'S RULING ON GARY'S MOTION FOR SUMMARY JUDGMENT.

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 with this case is that Dennis's Notice of Appeal references that it was submitted "pursuant to Iowa Rule of Civil Procedure 1.264(3) . . . ." *See* attached Exhibit at p. 1. 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." *See* Ex. at p. 1. 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 from which Dennis now seeks further review. 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. *Compare* Iowa R. App. P. 6.1401, Form 1 (2015) with *See* Ex. at pp. 1-2. 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).

In *Rowen v. Lemars Mut. Ins. Co. of Iowa*, the Iowa Supreme Court explicitly confirmed that "[c]ompliance with the rules *is mandatory and jurisdictional*." *Schrader v. Sioux City*, 167 N.W.2d 669, 672 (Iowa 1969) (quoting *McCoy v. Totten*, 145 N.W.2d 662, 670 (Iowa 1966)) (emphasis added); *see also Richardson v. Neppl*, 182 N.W.2d 384, 388 (Iowa 1970). Longstanding Iowa precedent has been that "a notice of appeal must sufficiently describe the judgment or order appealed from so as to leave no doubt as to its identity." *Schrader*, 167 N.W.2d at 672-73 (Iowa 1969). Dennis cannot dispute the fact that his Notice did not reference any appeal from the Order on Motion for Summary Judgment.

If this Court were to accept Dennis's argument that his Notice was sufficient to preserve appeal and give the Court jurisdiction to review the District Court's Order on Motion for Summary Judgment, it would have to overrule longstanding precedent and render Rule 6.102(2) meaningless. For

the foregoing reasons, Gary disputes that Dennis's Notice is sufficient with respect to preserving any claim of error pertaining to the Order on Motion for Summary Judgment; thus the Iowa Supreme Court does not have authority to consider Dennis's Application for Further Review.

II. BECAUSE IT MERGED WITH THE TRIAL, THE DISTRICT COURT'S DENIAL OF GARY'S MOTION FOR SUMMARY JUDGMENT IS NOT REVIEWABLE.

Assuming, arguendo, the Court finds Dennis preserved error on anything relating to the Order on Motion for Summary Judgment, the Order on Motion for Summary Judgment is still not reviewable.

> A district court's denial of a party's motion for summary judgment *is no longer appealable or reviewable* once the matter has proceeded to a trial on the merits. *In re Marriage Johnson*, 781 N.W.2d 553, 555 (Iowa 2010) ("We have said on numerous occasions that the *district court's denial of a motion for summary judgment is not appealable* if the case proceeded to a trial on the merits."); *Lindsay v. Cottingham & Butler Ins. Servs., Inc.*, 763 N.W.2d 568, 572 (Iowa 2009); *Kiesau v. Bantz*, 686 N.W.2d 164, 174 (Iowa 2004). After a trial on the merits, a court's decision to deny a motion for summary judgment merges with the trial. *Johnson*, 781 N.W.2d at 555-56; *Lindsay*, 763 N.W.2d at 572; *Kiesau*, 686 N.W.2d at 174. Accordingly, an appellate court "*cannot consider the assignments of error relating to the denial of the motion for summary judgment*" once the issue has been tried. *Lindsay*, 763 N.W.2d at 572.

Figley v. W.S. Indus., 801 N.W.2d 602, 607 (Iowa Ct. App. 2011) (emphasis added).

Judge Darbyshire *denied* Gary's Motion for Summary Judgment on the issue of undue influence. *See* App. 804. Because the underlying case proceeded to trial on the merits on Dennis's claim of undue influence, Judge Darbyshire's decision to deny Gary's Motion for Summary Judgment merged with the trial. *Figley*, 801 N.W.2d at 607. Dennis thus could not appeal Judge Darbyshire's denial of Gary's Motion for Summary Judgment or any purported holding or dicta therein, as said decision "is no longer appealable or reviewable." *Id.* Consequently, the issue on which Dennis seeks further review is "no longer appealable or reviewable," and this Court "cannot consider the assignments of error relating to the denial of the motion for summary judgment." *In re Marriage Johnson*, 781 N.W.2d 553, 555 (Iowa 2010); *Figley*, 801 N.W.2d at 607 (citations omitted).

III. BECAUSE HE IS NOT AN INTERESTED PARTY, DENNIS LACKS STANDING TO FILE AN APPLICATION FOR FURTHER REVIEW.

Assuming, arguendo, the Court finds that Dennis both preserved error on anything relating to the Order on Motion for Summary Judgment and that the Order is reviewable, Dennis still lacks standing to file the Application for Further Review. Only an interested person may contest the acts of a fiduciary. *See* Iowa Code §633.122. As the Iowa Supreme Court has confirmed, "[a]n interested person in the context of Section 633.122 is one whose interests are directly affected by a diminution of the [estate] assets".

In re Estate of Boyd, 634 N.W.2d 630, 638-39 (Iowa 2001).

The Iowa Court of Appeals recently affirmed the ruling of the Honorable Judge John Telleen that Dennis violated the "no contest provision" in the Decedent's Will and that Dennis did not file his will contest in good faith or with probable cause. *See In re Estate of Workman*, No. 16-0908, 2017 Iowa App. LEXIS 190 (Iowa Ct. App. Feb. 22, 2017) (unpublished opinion). The Court of Appeals affirmed the District Court's decision revoking Dennis's shares and interest under the Decedent's Will. *Id.* Dennis is thus not a beneficiary of the Estate, is not an interested person in the Estate, and has no standing to file his Application for Further Review.

IV. THE COURT SHOULD NOT ACCEPT THE APPLICATION FOR FURTHER REVIEW.

> [L]awyers and their clients are entitled to rely upon common-law principles in determining their rights and liabilities whenever such principles of the common law have not been changed by statute. To undertake to change those principles by judicial decision is a function which we should be reluctant to exercise.

In re Proestler's Will, 5 N.W.2d 922, 926 (Iowa 1942). Assuming, arguendo, the Court finds that: (1) Dennis preserved error on anything relating to the Order on Motion for Summary Judgment; (2) the District Court's Denial of Gary's Motion for Summary Judgment is Reviewable; and (3) Dennis has standing to file an Application for Further Review, there is

still no reason for the Court to change longstanding Iowa precedent. In his Petition for Further Review, Dennis is claiming that Judge Darbyshire *erred by following Iowa law*. Our appellate court system would be inundated with 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.

A. Dennis's Purported Grounds for Further Review are Contradicted by his Purported Grounds for Appeal.

In his Routing Statement in his appeal, Dennis claimed that the Supreme Court should retain this matter because he claimed it presented (1) a substantial issue of first impression; or (2) fundamental and urgent issues of broad public importance requiring prompt or ultimate determination. *See* Ex. at p. 3 (referencing Iowa R. App. P. 6.1101(2)(c) and (d)). Of course, Dennis never identified these alleged substantial issues of "first impression". Regardless, the Iowa Supreme Court transferred the case to the Iowa Court of Appeals.

Notably, in his Routing Statement, Dennis did not cite Iowa Rule of Appellate Procedure 6.1102(2)(b), or claim that there is a "conflict between a published decision of the court of appeals or supreme court." Iowa R. App. P. 6.1102(2)(b); Ex. at p. 3. However, after his arguments in the appeal heard by the Court of Appeals failed, Dennis switched tactics and now

claims that certain decisions are in conflict, and that Iowa law is "unclear." *See* Application at p. 12. If Dennis truly believed Iowa law was unclear, he would have cited Iowa Rule of Appellate Procedure 6.1102(2)(b) in his initial appeal.

Similarly, in his Routing Statement, Dennis did not cite Iowa Rule of Appellate Procedure 6.1102(2)(f) or claim that the case presented "substantial questions of enunciating or changing legal principles." Iowa R. App. P. 6.1102(2)(f); Ex. at p. 3. Again, now that the Court of Appeals rejected his claims, Dennis has switched strategies, and instead of claiming that there is a substantial issue of *first impression*, Dennis now claims that the court of appeals *has* decided a case "where there is an important question of changing legal principles." *See* Iowa R. App. P. 6.1103(b)(3); Application at p. 3. What Dennis is now advocating for is the opposite of an issue of first impression – a substantial *change in longstanding Iowa precedent*. If Dennis truly believed there was an important question of changing legal principals as he now claims, he would have cited Iowa Rule of Appellate Procedure 6.1102(2)(f) in his initial appeal.

B. There Is Nothing "Unclear" About the Status of Iowa Law.

Dennis claims Iowa law is currently "unclear". Application at p. 12. As Dennis refuses to note, *In re Estate of Todd* involved both a testamentary

challenge "as well as thirteen inter vivos transfers". *In re Estate of Todd*, 585 N.W.2d 273, 275 (Iowa 1998). The language Dennis and the *Burkhalter* case cite from *In re Estate of Todd* pertained to the *Todd* Court's discussion of inter vivos, not testamentary transfers. *See In re Estate of Todd* at 276; *Burkhalter v. Burkhalter*, 841 N.W.2d 93, 100 (Iowa 2013). There is nothing "unclear" on the status of Iowa law.

C. There Are No "Substantial Questions of Changing Legal Principles" at Issue.

In his Application for Further Review, Dennis does not even attempt to argue or elaborate about what he believes is "substantial" about the alleged issue he raises. Regardless, even the cases Dennis cites undermine his arguments that there are "changing legal principles." The underlying Kansas case Dennis cites is more than twenty years old. *See* Application at p. 8 (citing *Heck v. Archer*, 927 P.2d 495, 499-500 (Kansas Ct. App. 1996)). In *Heck*, the Kansas Court of Appeals even confirms that there are differences in Kansas between the burdens of proof for testamentary and inter vivos transfers. *See Heck*, 927 P.2d at 499.

The Nevada case cited in the case Dennis cites relates to burden-shifting in inter vivos transfers, which is the same law Iowa applies. *In re Estate of Bethurem*, 313 P.3d 237 (Nev. 2013) (citing *In re Jane Tiffany Living Trust* 2001, 177 P.3d 1050, 1062 (Nev. 2008)). The New Jersey case

Dennis cites even notes that the New Jersey Supreme Court has "long held" that burden shifting applies. Application at pp. 9-10 (citing *In re estate of Stockdale,* 953 A.2d 454, 470 (N.J. 2008) (citing *In re Rettenhouses's Will*, 117 A.2d 401 (1955)). Dennis then cites cases from other jurisdictions, some of which are more than 70 years old. *See* Application at p. 10. None of these cases or the "long held" positions in the various jurisdictions supports Dennis's argument that there are any "changing" legal principles.

To the contrary, as Dennis notes, less than four years ago the Iowa Supreme Court revisited the burden-shifting analysis in *Burkhalter v. Burkhalter*, 841 N.W.2d 93 (Iowa 2013). *See* Application at p. 12. The *Burkhalter* opinion was issued: (1) more than four years after an apparent "Colorado Lawyer" article—which is not controlling, precedential, or other legal authority—cited by Dennis[1]; (2) subsequent to every case Dennis cites in his Application; and (3) six months after Dennis filed his will contest in this case. If the Iowa Supreme Court had wanted to change the law it would have done so in *Burkhalter*. There are no "substantial questions of changing legal principles," and Dennis has not cited any alleged changes from any jurisdiction since the *Burkhalter* opinion.

[1] *See* Application at p. 5, footnote 1.

D. There Are Good Reasons for the Different Burdens of Proof With Respect to Inter Vivos and Testamentary Transfers.

There are legitimate, well-thought-out reasons for the distinction between inter vivos and testamentary transfers. Some of the reasons are discussed in *Burkhalter v. Burkhalter*, 841 N.W.2d 93 (Iowa 2013), and the cases therein. It does not seem prudent to revisit all of the legitimate reasons upon which the courts have made their common law rule, except for a brief reference to two practical matters.

First, individuals are more likely to transfer the vast majority of their property, sentimental property, and important property via a testamentary transfer. If an individual transferred inter vivos the majority of their property, property that held particular sentiment to them, or property which was important to them, particularly to an individual who is not the natural object of their affection and under "suspicious circumstances", it could potentially justify the burden-shifting under Iowa law. On the other hand there is nothing suspicious about an individual transferring, through testamentary instruments, the majority of their property, property that held particular sentiment to them, or property which was important to them, particularly to a natural object of their affection.

Second, an inter vivos transfer can be challenged while the transferor is still alive. The transferor can, in many circumstances, testify and rebut

allegations of undue influence or lack of capacity. On the other hand, with a testamentary transfer the decedent cannot directly rebut allegations of undue influence or lack of capacity. There should continue to be different standards for challenges to testamentary and inter vivos transfers.

V. If the Court Changes Iowa Law it Should Not Change the Law Retroactively, or at Least Not Make it Applicable to the Present Case.

Even if, arguendo, the Court decides to change Iowa law, it should not remand the current case for a new trial. Nothing requires a court that is changing the law to make the change retroactive. As the Iowa Supreme Court noted in *In re Proestler's Will*, "lawyers and their clients are entitled to rely upon common-law principles in determining their rights and liabilities whenever such principles of the common law have not been changed by statute." *In re Proestler's Will*, 5 N.W.2d 922, 926 (Iowa 1942).

Dennis filed his underlying will contest in June 2013. *See* App. 1-10. For over four-and-a-half years, Gary and his counsel and the other defendants have relied on the common law in determining his rights and liabilities. It would be grossly inequitable to force Gary, Gary's family, and the other defendants to go through several more years of litigation.

As Dennis concedes, "the law should not shift the burden in every will contest where a confidential relationship exists." Application at p. 14. Even

the authorities Dennis cites note that the "existence of a confidential relationship is not sufficient to raise a presumption of undue influence." Application at p. 6 (citing Restatement (Third) of Property §8.3, comment h). None of the factors cited in comment h are helpful to Dennis. There was no evidence of a confidential relationship or suspicious circumstances.

Dennis's Application also contains unsupported "arguments"[2], unbridled speculation,[3] imaginary horribles,[4] claims that the jury was free to reject,[5] and outright false recitations of the law.[6] Dennis also disingenuously claims he "was simply unable to develop or present evidence." Application at p. 16. Dennis had multiple attorneys, conducted discovery, took depositions, and called multiple witnesses and introduced a volume of exhibits at trial. It is unclear what more Dennis could want in order "to develop and present evidence."

Finally, Dennis did not preserve any claim of error with respect to the Order on Motion for Summary Judgment due to the deficiencies in his

[2] Application at p. 13 (Claiming that "jurors or judges rarely hear the evidence about the content of the confidential conversations."); Application at p. 17 (Claiming that "[t]his leads many jurors to conclude . . . .").
[3] Application at p. 12 (Claiming that "[t]he undoubted source of this struggle…."); Application at p. 15 (Claiming that "It seems likely . . ."); Application at p. 16 (Claiming there is a "significant likelihood that a jury would find a failure in Gary's evidence to rebut the presumption."); Application at p. 16 (Claiming that "A jury . . . most likely would hesitate to rule in his favor in such a situation . . . .).
[4] Application at pp. 13-14 (Claims of what a beneficiary can allegedly do including "victimize both the donor and the other beneficiaries").
[5] Application at p. 15 (Claiming that "[t]he evidence demonstrates that Dennis Workman was kept from returning to work on the farm on numerous occasions").
[6] Application at p. 17 (Claiming that "the burden of proof requires that the jury find against a plaintiff if they are unable to determine where the truth lies.").

Notice of Appeal, and Dennis lacks standing to file an Application for Further Review due to the Court of Appeals' recent affirmation that Dennis's shares and interests under the Decedent's Will are revoked. Given the aforementioned circumstances, even if the Court would otherwise make a decision retroactive it should not do so, or at least not make the decision apply to this specific case.

CONCLUSION

Dennis did not preserve any claim of error with respect to the Order on Motion for Summary Judgment, the Court lacks jurisdiction, and Dennis lacks standing to file an Application for Further Review. Iowa law on the subject is also clear and there is no reason to interfere with longstanding precedent, particularly in light of the fact the Iowa Supreme Court discussed these same issues just over three years ago. This Court should decline Dennis's Application for Further Review.

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CERTIFICATE OF FILING

I hereby certify that on February 23, 2017, I filed this Resistance to Application for Further Review on behalf of 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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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2017, I served this Resistance to Application for Further Review 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 Resistance to Application for Further Review on behalf of Defendant-Appellee Gary Workman, Individually and as the Executor of the Margaret Workman Estate was $18.00 and that amount has been paid in full.

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CERTIFICATE OF COMPLIANCE

1. This Resistance complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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Dated: February 23, 2017

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