IN THE COURT OF APPEALS OF IOWA

No. 2-265 / 11-1110
Filed June 27, 2012

IN THE MATTER OF THE ESTATE OF LENORA L. BURESH, Deceased

WESLEY L. BURESH and BENJAMIN W. BURESH,
Plaintiffs-Appellants,

vs.

SHARON PFAB and GLEN A. BURESH, Individually and As Executor of the Estate of Lenora L. Buresh,
Defendants-Appellees.

Appeal from the Iowa District Court for Linn County, Nancy A. Baumgartner, Judge.

Wesley Buresh and Benjamin Buresh appeal from the district court's overruling their motion for directed verdict, motion for judgment notwithstanding the verdict, and motion for new trial. **AFFIRMED.**

Guy P. Booth, Cedar Rapids, for appellants.

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellee Buresh.

Matthew D. Piersall of Piersall Law Firm, Cedar Rapids, for Estate of Buresh.

Kenneth F. Dolezal of Dolezal Law Office, for appellee Pfab.

Heard by Vogel, P.J., and Tabor and Bower, JJ.

VOGEL, P.J.

Wesley (Wes) Buresh Jr. and Benjamin (Ben) Buresh appeal from the district court's various rulings all related to the jury's verdict that Lenora Buresh's will should not be set aside. The jury found Lenora had the mental ability to make a will, that it was not procured by undue influence, and that it was duly executed. The district court noted "there were unusual circumstances in the preparation and execution of the will," but nonetheless, allowed the verdict to stand as it was not inconsistent with or against the weight of the evidence. We agree and therefore affirm.

I. Background Facts and Proceedings

This case surfaces from a long history of conflict within a family. Wesley and Lenora were the parents of four children: Glenn, Ben, and twins Sharon and Wes. Upon Wesley's retirement in 1971, the three sons formed a partnership to operate the farm owned by Wesley and Lenora. In 1981, the partnership dissolved after many disagreements among the brothers. In the following years, Glenn believed Ben and Wes were not paying enough rent on some of the land they continued to farm; Sharon expressed similar dissatisfaction.

In January 2004, Glenn sent a series of four letters to Wesley and Lenora, as well as to Ben, Wes, and Sharon, expressing his concern regarding "family issues," namely the "gains" Ben and Wes received by "not paying the normal average rent rate" for twenty-two years. It is clear, however, that Wesley and Lenora did not share Glenn's concerns. An undated, handwritten letter,[1] signed

[1] At trial, Ben testified that as a result of Glenn's "threatening" letters, he and Wes "figured we better get some evidence that shows [the rents] were satisfied" and that this

by Wesley and Lenora, stated: "We Wesley and Lenora L Buresh, are completely satisfied with the rent money paid us on the farm ground and buildings from 1981 to 2002 crop yrs. Wes Jr. and Ben Buresh are paid up in full."

In February 2004, Wesley and Lenora each executed a will, drafted by David Marner, their attorney for more than thirty years. In their respective wills, Wesley and Lenora directed that upon the death of the surviving spouse, the property be divided into equal shares for each of the four children, with Solon State Bank nominated to serve as executor. Until this point, there is no evidence of any preferential treatment to either Wes or Ben. Following the execution of the wills in February 2004, Wesley and Lenora each struggled with a series of health issues and lived in a nursing home for approximately one year.[2]

While in the nursing home, one of Lenora's friends, Dorothy Krivanek, wrote a will for Lenora. Dorothy brought the will to Lenora so she could read it and sign it. Sharon happened to stop by when Dorothy was there and wanted to read the will before Lenora signed it. Dorothy left with the unsigned will before Sharon could read it; she then sent a copy of the will to attorney Ken Dolezal.

In April 2005, Wesley and Lenora returned home, where they required twenty-four hour in-home healthcare. On June 23, 2006, Lenora told Sharon she

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letter, entered as Exhibit C, was prepared to demonstrate the rents were paid in full. Ben, however, did not recall when the letter was written—he suggested it may have been in 2004, in response to Glenn's letters, but maybe 2002 based on its reference to the rent from 1981 to 2002. Glenn also testified that he recognized the handwriting of the letter as that of Lenora.

[2] At trial, Marner testified that when he visited Wesley and Lenora in the nursing home following the execution of the February 2004 wills, they may have discussed making some changes in what they were doing in the wills and that "there was some disharmony between [Wesley and Lenora] about what to do."

was going to "make a will." Attorney Dolezal[3] and two witnesses came to Wesley and Lenora's house. According to Sharon, attorney Dolezal felt that Lenora would be more comfortable with Sharon explaining the will to her and what was transpiring. The others left the room, leaving Sharon alone with Lenora. Sharon then read the will to her mother, explained it to her, told her she could not "sway" her, and asked her if she had any questions. After fifteen to twenty minutes, and having confirmation from her mother that the will was as she wanted it to be, Sharon called the others back to the room, then left them alone with Lenora. Attorney Dolezal leafed through the will page-by-page, asking if Lenora had questions. Lenora then signed the new will in the presence of attorney Dolezal and the two witnesses.[4]

The June 2006 will nominated Sharon, Glenn, and Ben to serve as co-executors, with decision making by majority vote. The will also stated that all property was to be divided among the children in equal shares, provided the conditions of Article IV were met. Article IV provided:

> My executors shall establish and determine all unpaid debts, gifts, criminal activity, and forgivenesses plus average compounded interest. This shall be based on all payments, monetary gifts, equipment, average land and building rent, and property sold to each child from my husband, Wesley F. Buresh, and myself since April 3, 1981. I request each child's share of debt, forgiveness, or gift with interest be deducted from his share of the estate. The remaining net amount to be divided equally to all deserving children. If any one child does not comply with my requests and/or contests this will he shall be excluded from receiving any part of my estate except for one dollar. My executors may use any reasonable means necessary to determine the indebtedness. The gift of $104,000 to Sharon Pfab dated December, 2004 is in

[3] Prior to representing Lenora in the execution of this will, attorney Dolezal represented Sharon in a petition for voluntary guardianship of Lenora.

[4] The record is silent as to where Wesley was when this occurred.

> consideration for her share of land (26.7A) sold to each of her three brothers in 1976 and shall be excluded from her share owed. My wish is to balance the bottom line to each child.

The consequence of this Article is that it could result in a deduction to Ben and Wes's respective shares for any rent paid from 1981 to 2002 that was not the equivalent of the "average land and building rent" during that period, even though Wesley and Lenora acknowledged a few years earlier that they were "completely satisfied" with the rents received from those crop years.

Wesley died on September 25, 2007, and Lenora died on March 4, 2008. A petition for probate of Lenora's will was filed by Sharon and Glenn on May 9, 2008.[5] On August 22, 2008, Wes filed a petition to set aside the probate of Lenora's will pursuant to Iowa Code section 633.308 (2007). An amended petition was filed on March 23, 2009, joining Ben as a party to the proceeding. Ben and Wes alleged the will should be set aside for lack of due execution, lack of testamentary capacity, and undue influence.[6] A jury trial was held from April 18 to 21, 2011. On April 22, 2011, the jury returned the following verdict: (1) Lenora's will was duly executed; (2) Lenora had the mental ability to make the will; and (3) the will was not procured by undue influence. Ben and Wes filed a post-trial motion for judgment notwithstanding the verdict and a motion for new trial. Sharon and Glenn resisted. The district court denied both motions. Ben and Wes appeal.

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[5] Ben declined to serve as an executor of the estate.

[6] Although fraud was included among the initial allegations, there were no jury instructions as to or defining fraud, nor was the jury asked to decide the question of fraud. Wes and Ben do not appeal asserting grounds of fraud.

II. Standard of Review

We review a district's ruling on a motion for directed verdict for correction of errors at law. *Pavone v. Kirke*, 801 N.W.2d 477, 486–87 (Iowa 2011). "A directed verdict is required only if there was no substantial evidence to support the elements of the plaintiff's claim." *Id.* (internal citation omitted). Accordingly,

> [O]ur role is to determine whether the trial court correctly determined if there was substantial evidence to submit the issue to the jury. In doing so, we must view the evidence in the light most favorable to the nonmoving party and take into consideration all reasonable inferences that could be fairly made by the jury.

Id.

Our review of a district court's decision to deny a motion for judgment notwithstanding the verdict is for errors at law. *Van Sickle Constr. v. Wachovia Commercial Mortg., Inc.*, 783 N.W.2d 684, 687 (Iowa 2010). "Our role is to decide whether there was sufficient evidence to justify submitting the case to the jury when viewing the evidence in the light most favorable to the nonmoving party." *Id.*

Finally, the scope of our review of a district court's ruling on a motion for new trial "depends on the grounds raised in the motion." *Pavone*, 801 N.W.2d at 496. A sufficiency of the evidence claim presents a legal question and we review the district court's ruling for legal error. *Estate of Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004).

III. Motion for Directed Verdict/Motion Notwithstanding the Verdict

At trial, Ben and Wes moved for a directed verdict alleging the proponents, Sharon and Glenn, failed to prove the will was duly executed; the district court denied this motion. The court concluded it would take the motion "under

advisement" so it could review the cases cited by counsel. In their post-trial motion for judgment notwithstanding the verdict, Ben and Wes reasserted the motion for directed verdict, again alleging the will was not duly executed. In its ruling on the motion for judgment notwithstanding the verdict, the district court noted,

> Contestants argue that the circumstances surrounding the execution of the will were highly unusual and did not comply with the requirements of Iowa Code section 633.239(1). That there were unusual circumstances in the preparation and execution of the will does not mean that there was insufficient evidence to generate a jury question on the issue of due execution. Jury Instruction 7 correctly set forth the seven elements of due execution found in Iowa Code section 633.239(1). . . .
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> The testimony of Patricia Maher established substantial evidence for each of the elements of due execution of the will and it was proper to submit the issue to the jury.

The seven elements of a duly executed will were set out in jury instruction seven, which read:

> Proponents Glenn Buresh and Sharon Pfab must prove the Will was duly executed. They must prove the following propositions:
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> 1. The Will was in writing.
> 2. The Will was signed by Lenora L. Buresh.
> 3. The Will was declared by Lenora L. Buresh to be her Will.
> 4. The Will was witnessed by two persons who were of legal age and mentally competent.
> 5. The witnesses were requested by Lenora L. Buresh to witness and sign the Will.
> 6. The witnesses signed and witnessed the Will in each other's presence.
> 7. The witnesses signed and witnessed the Will in the presence of Lenora L. Buresh.
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> If you find Proponents have proved all of these propositions, you shall find that that Will was duly executed. If Proponents have failed to prove any of these propositions, you shall find that that Will was not duly executed.

At trial, Patricia Maher testified regarding the events surrounding the execution of the June 2006 will. Maher, who was unacquainted with Wesley and Lenora, but a client of attorney Dolezal's, came to the Buresh house to serve as a witness for Lenora's will signing.[7] Maher explained that the will signing took place in what appeared to be the former living room, which was set up with two single beds and a table, and that Lenora was seated at the table by the picture window. She also stated the second witness was attorney Dolezal's wife, Martha. When attorney Dolezal asked Lenora if she knew why they were there, Lenora responded, "Yes, you're a lawyer." Maher stated that she assumed attorney Dolezal had a part in preparing the will, because he had the will in his hand when he entered the Buresh home.

Maher explained that she and Martha were formally introduced to Lenora and her daughter Sharon. She then recalled that she, Martha, and attorney Dolezal left the room for approximately fifteen or twenty minutes as attorney Dolezal had asked Sharon to go over the will with Lenora. After Sharon was finished, she invited Maher, Martha, and attorney Dolezal back into the room. Maher explained that attorney Dolezal then told Lenora that they were there to talk about the will and asked if she had any questions, to which Lenora replied, "No." Sharon was then asked to leave the room. Maher testified that once Sharon left,

> Mr. Dolezal put the Will on the table in front of Mrs. Buresh and page-by-page-by-page went over this Will with her: Do you have any questions? This is Page 2, do you have any questions? Do you have any questions on Page 3? That type of thing. She

[7] Attorney Dolezal represented Maher in 2001 in the administration of her late husband's estate.

> didn't. She interrupted us at one point to point out a cardinal that was in her yard outside the picture window. Evidently, she had become quite a bird watcher so she mentioned the cardinal was back and then went back to the business of page by page with the Will.

Maher also testified that she was "very confident" that Lenora was focused on the will and acknowledged the document in front of her was the will. When asked whether Lenora asked Maher and Martha to witness the will, Maher responded, "I'm not officially going to say yes, but she looked at us and smiled and Mr. Dolezal put a pen in our hands so she knew that we were a witness, yes." Maher further explained that when attorney Dolezal asked Lenora if she wanted Maher and Martha to witness the will, Lenora "smiled and nodded her head. . . . As in to say yes, okay." Maher then recalled that (1) she, Martha, and Lenora signed the will, (2) she was present when Martha signed the will, (3) Martha was present when Maher signed the will, and (4) Lenora was present when Maher and Martha witnessed the will. Maher also confirmed that she and Martha were of legal age and that she did not observe anything to suggest Martha lacked mental competence on the day the will was signed and witnessed.

Neither attorney Dolezal nor Martha Dolezal testified at trial.[8] As a proponent of the will, Sharon testified she was at her mother's house when Lenora informed her, "Sharon, I'm going to make a will." Attorney Dolezal then arrived, along with two witnesses. Sharon stated that she "stayed in the other room and [Dolezal] talked to Mom and explained to her the Will." Sharon then explained,

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[8] At trial, attorney Dolezal represented Sharon Pfab in her individual capacity and as executor of Lenora's estate.

> And then [Dolezal] says to me, Sharon, your mother is more comfortable with you, kind of go with her and explain what's going on and then I'll come back and do my legal work. So [Dolezal] and the two witnesses left the house, Mother and I was in the living room by the table and I says, well, Mother, [Dolezal] wants me to go over the Will with you, explain it to you. So I read the Will to Mother explained it to her and everything.
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> And she says, Sharon, what do you think of it? And I says, well, Mother, this is your Will. You have to say if you want this or if you don't like it, don't sign it. I says, I'm your daughter, Mom. I can't sway you one way or the other. You have to make your own decision what you want. And she says, yes, I understand. And I says, do you understand everything that is in this Will? And she says, yes, I do. I says, well, then I'll call [Dolezal] back in and then he can do his legal work.
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> So [Dolezal] came back in with the witnesses. I went into . . . the dining room—which was a doorway between the living room and that office room. So I went in there and I sat by the desk and [Dolezal] proceeded with the Will.

Sharon further testified that her mother understood what Sharon had showed her in the will.

On our review of the record, we find there was substantial evidence to submit the issue of due execution to the jury. As such, a directed verdict was not required. *Pavone*, 801 N.W.2d at 487. Moreover, because we review the record in the light most favorable to the nonmoving party and consider all reasonable inferences the jury could fairly make, the district court did not err in denying Ben and Wes's motion for directed verdict. *See id.* (explaining the appellate court's role in determining whether the trial court correctly determined there was substantial evidence to submit the issue to the jury). We also agree with the district court's denial of the motion notwithstanding the verdict because there was "sufficient evidence to justify submitting the case to the jury when viewing the evidence in the light most favorable to the nonmoving party." *Van Sickle Constr.*, 783 N.W.2d at 687. We therefore affirm as to this issue.

IV. Motion for New Trial

Ben and Wes's primary argument as it relates to all three motions is that all the circumstances surrounding the execution of the will, as explained in jury instructions 8 and 9,[9] do not lend substantial evidence to support the jury's verdict, or are against the weight of the credible evidence. In particular, they assert that Lenora was of diminished capacity, totally dependent on twenty-four-hour-a-day physical care, and a ward under a conservatorship.

Lenora had been under voluntary conservatorship—arranged by Ben and Wes—since March 2005. In June 2005, a district judge had ruled that Lenora could not terminate the conservatorship, finding she had failed to make a prima facie showing that she "has some decision making capacity." We agree that these facts are troubling and tend to undermine Lenora's capacity to make a will in June 2006. In addition, it is extremely inappropriate that attorney Dolezal isolated Lenora with Sharon for fifteen to twenty minutes before the execution of the will occurred. The difficult question we must answer is whether the district court erred in not granting the motion for new trial. To that end, the only assertion on appeal is that the will was not duly executed. All the facts—as

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[9] Instruction No. 8 states:

> With regard to element No. 3 of Instruction No. 7 [("The Will was declared by Lenora L. Buresh to be her Will")], you may consider all of the circumstances surrounding the signing of the Will, including the language of the Will itself, in determining whether Lenora L. Buresh declared the Will to be her Will.

Instruction No. 9 states:

> With regard to element No. 5 of Instruction No. 7 [("The witnesses were requested by Lenora L. Buresh to witness and sign the Will")], you may consider all of the circumstances surrounding the signing of the Will, including what may be implied by Lenora L. Buresh's actions, in determining whether Lenora L. Buresh requested the witnesses to witness and sign the Will.

troubling as they appeared both to the district court and to this court on appeal—were nonetheless carefully presented in the lengthy trial and the jury was properly instructed, reaching its conclusion in a special verdict. *See Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 610 (Iowa 2006) ("A special verdict consists entirely of questions that elicit special written answers to resolve the material issues of fact in the case, and the court then enters judgment based on the findings made by the jury."). The following questions were answered by the jury:

> Question No. 1: Was the Will of Lenora L. Buresh duly executed? Answer "yes" or "no."
> ANSWER: YES
> . . . .
> Question No. 2: Did Lenora L. Buresh have the mental ability to make the Will? Answer "yes" or "no."
> ANSWER: YES
> Question No. 3: Was the Will of Lenora L. Buresh procured by undue influence? Answer "yes" or "no."
> ANSWER: NO

"If a jury verdict is not supported by sufficient evidence and the verdict fails to effectuate substantial justice, a new trial may be ordered." *Bredberg v. Pepsico*, *Inc.*, 551 N.W.2d 321, 326 (Iowa 1996). However, we are generally reluctant to interfere with a jury verdict and give considerable deference to a district court's decision not to grant a new trial. *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 594 (Iowa 1999). Riddled with questionable conduct, there is nonetheless sufficient evidence in the record to support the jury's verdict. Accordingly, we must reject Ben and Wes's contention that the district court erred in declining to grant their motion for new trial. We therefore affirm as to this issue.

V. Conclusion

We affirm the district court with respect to the denial of the motion for directed verdict and the motion for judgment notwithstanding the verdict, as there was sufficient evidence to justify submitting the case to the jury when viewing the evidence in the light most favorable to the nonmoving party. We also conclude the district court did not err in denying the motion for new trial because the jury's verdict finding Lenora's will was duly executed is supported by sufficient evidence.

AFFIRMED.