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DISTRICT IV

December 16, 2014

To:

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You are hereby notified that the Court has entered the following opinion and order:

2012AP2421 Warner Kent Bahler v. David Bahler (L.C. # 2011CV73)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Warner Kent Bahler ("Kent"), pro se, appeals a judgment dismissing his challenge to the validity of his parents' revocable living trust. Kent does not challenge the sufficiency of the evidence to support the court's ruling. Rather, he argues the circuit court erroneously exercised its discretion by: (1) permitting Kent's counsel to withdraw two days before trial; (2) denying Kent's motion for a continuance; and (3) excluding an "expert witness." Kent also contends the circuit court erred by denying his jury trial request. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See*

WIS. STAT. RULE 809.21 (2011-12).[1] We reject Kent's arguments, and summarily affirm the judgment.

Kent's parents, Vivian and Werner Bahler, died in 2006 and 2008, respectively. Under their respective wills, which incorporated by reference their revocable living trust, Kent and four half-siblings were given $5000 each. All of the couple's tangible property and the balance of all trust assets were left to Kent's full brother, David Bahler. Kent filed the underlying suit against David and the Trust, alleging that his parents' signatures on the trust document were forged.[2]

After the deadline set for amending pleadings passed, Kent moved to amend his complaint with a claim for "intentional interference with an expected inheritance." Both the amendment attempt and attendant jury trial request were denied, and the matter was scheduled for a trial to the court. After receiving the list of witnesses Kent anticipated calling at trial, David's counsel took the position with Kent's counsel that Ronald Rice, one of two witnesses identified as a forensic handwriting expert, appeared to be a "charlatan." Counsel signaled that if Rice remained on the witness list, his testimony would be challenged under ***Daubert v. Merrell***

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

[2] Kent first challenged the Trust in Green County Circuit Court case No. 2008CV188. According to the circuit court's electronic docket entries, that action was dismissed based on Kent's failure to comply with discovery orders.

Dow Pharm., Inc., 509 U.S. 579 (1993).[3] Based on an assurance by Kent's counsel that Rice would not be called as a witness, David's counsel did not depose him.

Days before trial, Kent's counsel moved to withdraw, alleging that he had not been paid and he had strategic differences with his client. Specifically, Kent's counsel complained that Kent hired Rice as his expert without consulting counsel. The court granted counsel's motion to withdraw two days before trial, but instructed counsel to appear as standby counsel. The court excluded Rice as a witness and denied Kent's subsequent motion for a continuance. After a trial, the court dismissed the suit. This appeal follows.

Kent argues that the circuit court erred by permitting his counsel to withdraw two days before trial. The decision whether to allow retained counsel to withdraw from representation lies within the sound discretion of the circuit court, subject to the requirements of due process. ***State ex rel. Dressler v. Circuit Court for Racine Cnty.***, 163 Wis. 2d 622, 632, 472 N.W.2d 532 (Ct. App. 1991); ***Sherman v. Heiser***, 85 Wis. 2d 246, 255-56, 270 N.W.2d 397 (1978). "'A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record.'" ***Johnson v. Cintas Corp. No. 2***, 2012 WI 31, ¶22, 339 Wis. 2d 493, 811 N.W.2d 756 (quoted source omitted). We will search the record for reasons to sustain the circuit court's exercise of discretion. ***Lofthus v. Lofthus***, 2004 WI App 65, ¶21, 270 Wis. 2d 515, 678 N.W.2d 393.

[3] Under Wisconsin's ***Daubert*** statute, WIS. STAT. § 907.02(1), expert testimony is admissible if: (1) scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue; (2) the witness is qualified as an expert by knowledge, skill, experience, training, or education; (3) the testimony is based upon sufficient facts or data; (4) the testimony is the product of reliable principles and methods; and (5) the witness has applied the principles and methods reliably to the facts of the case.

The rules of professional conduct allow an attorney to withdraw from representing a client if "the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client." *See* SCR 20:1.16(b)(6) (2008). At the hearing on the motion to withdraw, counsel explained that Kent's actions prevented him from trying the case that he put together. Counsel asserted that Kent had effectively usurped decisions regarding strategy and witnesses from counsel, thus forcing counsel to try the case that Kent put together. Acknowledging that trial was scheduled in two days, counsel noted, however, that Kent "knows more about this case, the history, the handwriting, than anybody probably involved in this case" as he had "dedicated four years to it." Counsel therefore opined that Kent was fully able to proceed with the scheduled trial. Based on this record, the court properly exercised its discretion when it allowed counsel to withdraw but, after being informed that Kent was amenable to counsel's acting as standby counsel during trial, directed counsel to remain as standby counsel at trial.

Kent also challenges Rice's exclusion as an expert witness. A court has discretion to exclude the testimony of a witness if a party is prejudiced by opposing counsel's failure to name the witness. *See* ***Magyar v. Wisconsin Health Care Liab. Ins. Plan***, 211 Wis. 2d 296, 302, 564 N.W.2d 766 (1997). Although Rice was initially named as a potential witness, Kent's counsel agreed to withdraw him from the list and David relied on that representation. Kent waited until days before trial to reinstate Rice on the witness list, by which time scheduling commitments precluded David's counsel from deposing him. Because David was prejudiced by Kent's last minute attempt to call Rice as a witness, the court properly exercised its discretion to exclude Rice as an expert witness.

Even were we to assume the court erred by excluding Rice, we conclude the error was harmless. Where evidence is erroneously admitted or excluded we conduct a harmless error analysis to determine whether the error affected the substantial rights of the party. ***Martindale v. Ripp***, 2001 WI 113, ¶¶30, 32, 246 Wis. 2d 67, 629 N.W.2d 698. An error affects the substantial rights of a party when there is a "reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Id.***, ¶32. Our inquiry requires that we weigh the effect of the improperly excluded evidence against the totality of the credible evidence presented supporting the verdict. ***Nowatske v. Osterloh***, 201 Wis. 2d 497, 506–07, 549 N.W.2d 256 (Ct. App. 1996).

Here, attorney Charles Wellington testified that he prepared the will and trust documents and that they were signed by Werner and Vivian in his presence. Wellington further testified that the couple told him they wanted to provide for David "primarily" because he lived with them and helped them, and they had provided for Kent adequately in other ways. Family members confirmed that as Werner and Vivian aged, David cared for them personally and also assisted in running the family business, a trailer park. Vivian's sister-in-law testified that the couple stated their intent to bequeath the trailer park and money from the trailer park to David, with $5,000 set aside for each of their other children. Richard Beem, Vivian's son from an earlier marriage, likewise testified that his mother mentioned "they were leaving the trailer court to [David]." Finally, a forensic document examiner opined to a reasonable degree of professional certainty that the signatures were not forged, and the court found the expert to be credible. In light of the overwhelming evidence supporting the circuit court's decision, we conclude it is not reasonably possible that Rice's testimony, had it been admitted, would have altered the outcome.

Next, Kent argues that the circuit court erred by denying his request for a continuance. In Wisconsin, a continuance is not a matter of right. ***Rechsteiner v. Hazelden***, 2008 WI 97, ¶92, 313 Wis. 2d 542, 753 N.W.2d 496. The decision to grant or deny a continuance lies within the circuit court's discretion. ***Id.*** Kent sought a continuance because his counsel withdrew; he could not afford to pay Katherine Koppenhaver, the handwriting expert identified on his witness list; and a continuance would allow time to depose Rice, the expert he wanted to call. The court denied the motion, noting that although the present case had been pending for over a year, this was the "second time through." The court added:

> We had scheduling orders as to the matter of Mr. Rice. There was a point in time where your attorney was representing you. There was a commitment that [Rice] would not be called, based upon that I made my ruling. Defendant did not prepare for it, it's not his fault that he was not prepared. So therefore, and also for judicial economy, we are proceeding on this matter. There are all kinds of witnesses called. Your motion is denied.

The court properly exercised its discretion because it considered proper factors and gave a reasonable basis for its decision to deny the continuance.

Finally, Kent contends that the circuit court erred by denying his jury trial request. This argument, however, is undeveloped and falls below even the lenient standards we apply to pro se appellants. Therefore, we need not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments).

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals