

IN THE COURT OF APPEALS OF IOWA

No. 4-567 / 93-1763

FILED

FEB 28 1995

CLERK SUPREME COURT

PATRICIA GIPSON and DOUG GIPSON,

Appellants,

vs.

FIRSTAR BANK OF CEDAR RAPIDS,
Fiduciary of the Estate of
George F. Taylor,

Appellee.

Appeal from the Iowa District Court for Linn County,
David M. Remley, Judge.

Patricia and Douglas Gipson filed an action against Firstar Bank of Cedar Rapids, executor of George Taylor's estate, alleging Taylor had breached an oral contract with them by leaving them nothing in his will. Following a jury verdict for Firstar, Gipsons appeal. **AFFIRMED.**

Peter C. Riley and Tom Riley of Tom Riley Law Firm, P.C., Cedar Rapids, for appellants.

Richard G. Hileman, Jr., and Leonard T. Strand of Simmons, Perrine, Albright & Ellwood, Cedar Rapids, for appellee.

Heard by Hayden, P.J., and Sackett and Huitink, JJ.

HAYDEN, P.J.

Patricia and Douglas Gipson filed a petition at law against Firststar Bank of Cedar Rapids (Firststar), executor of George Taylor's estate, alleging Taylor had breached an oral contract with them. The alleged oral agreement provided Taylor would leave the residue of his estate to Gipsons if they cared for him in his old age.

Following a trial, a jury returned a verdict in favor of Firststar. Gipsons filed a motion for new trial arguing the trial court had erroneously instructed the jury on the standard of proof. The motion was denied.

Gipsons appeal. They argue the trial court erred in instructing the jury Gipsons had to prove their claim by clear, convincing, and satisfactory evidence. Gipsons contend they had to prove their claim only by a preponderance of the evidence.

I. Scope of Review.

The proper scope of review with regard to denial of a new trial motion is on assigned errors of law when the motion was based on legal issues, such as the legal accuracy of jury instructions. State v. Lindsey, 302 N.W.2d 98, 101 (Iowa 1981); Julian v. City of Cedar Rapids, 271 N.W.2d 707, 709 (Iowa 1978). A new trial is not appropriate unless the alleged error materially affected the movant's substantial rights. Iowa R. Civ. P. 244.

II. Preservation of Error.

To begin, error has not been preserved here. First, Gipsons submitted a proposed clear, convincing, and satisfactory instruction, rather than a preponderance of evidence instruction, to the trial court. At no time did they file, or propose on the record, an alternative burden of proof instruction. Second, while Gipsons did object to the giving of instructions referring to clear, convincing, and satisfactory evidence, the stated basis of their objection was not the basis they now assert on appeal. Gipsons' objection to these instructions was not based on a claim a mere preponderance burden applies because their claim is a claim at law for money damages. Instead, Gipsons objected to these instructions only on grounds a clear, convincing, and satisfactory burden of proof "is not appropriate in a case like this where the oral contract to make the will has been admitted by the deceased in sworn testimony."

Objections to jury instructions must be specific enough to alert the trial court to the basis of the complaint so the court has an opportunity to correct the alleged error before instructing the jury. Moser v. Stallings, 387 N.W.2d 599, 603-04 (Iowa 1986); Lockard v. Carson, 287 N.W.2d 871, 873 (Iowa 1980). Only those grounds and objections asserted on the record may be considered on appeal. Iowa R. Civ. P. 196; Moser, 387 N.W.2d at 604. Under these circumstances, Gipsons did not adequately

preserve this issue for appeal. See State v. LeCompte, 327 N.W.2d 221, 223 (Iowa 1982) (party cannot "amplify or change" its objection on appeal).

III. Prejudice.

Even assuming Gipsons properly preserved error, and assuming they are correct in claiming the burden of proof instruction was erroneous, Gipsons still have failed to show their substantial rights were materially affected. Absent such a showing, they are not entitled to a new trial. Iowa R. Civ. P. 244.

Gipsons' sole complaint is the jury instructions imposed too high of a burden of proof on them. However, as our supreme court has stated: "A judgment should not be reversed and litigation prolonged unless error appears which we may reasonably suppose affected the result to the prejudice of the losing party." Baysinger v. Haney, 261 Iowa 577, 583, 155 N.W.2d 496, 499 (1968). An erroneous jury instruction does not automatically, absent prejudice, require a new trial. Edwards v. City of Des Moines, 349 N.W.2d 786, 788 (Iowa App. 1984).

At trial, there was evidence Gipsons forced Taylor into a nursing home against his will. There was evidence Gipsons misappropriated Taylor's assets. There was evidence Gipsons had little or no contact with Taylor for the last eight years of his life. Under this record, we hold the trial court's burden of proof instruction--even if incorrect--was not prejudicial to Gipsons.

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Costs on appeal are to be taxed to Gipsons. Judgment of the trial court affirmed.

AFFIRMED.