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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0298**

Morgan Wright,
Appellant,

vs.

Nuvola, LLC, et al.,
Respondents,

Andrew Gittleman,
Defendant.

**Filed August 19, 2019
Affirmed
Bratvold, Judge**

Hennepin County District Court
File No. 27-CV-15-5438

Christopher W. Madel, Jennifer M. Robbins, Matthew J.M. Pelikan, Cassandra B. Merrick, Madel PA, Minneapolis, Minnesota (for appellant)

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Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

In an appeal from a final judgment following a bench trial on appellant's battery claim against respondent, appellant argues that the district court (1) abused its discretion

by denying appellant's midtrial request to call additional witnesses and (2) erred by failing to make reasonable accommodations for appellant's medical condition or to hold an evidentiary hearing to determine what accommodations were reasonable. Because we conclude that Wright did not preserve her evidentiary challenge by moving for a new trial, and because the district court properly exercised its discretion in reasonably accommodating Wright's medical condition, we affirm.

FACTS

The following summary is based on the district court's findings of fact. Respondent Francesco Parisi has lived at a condominium building in Minneapolis since 2014. Parisi is the sole owner of respondent Nuvola LLC (Nuvola). Appellant Morgan Wright lived a few blocks away from Parisi. Wright has "a significant medical history," which includes "seizures, post-traumatic stress disorder, and depression." Wright has a certified service dog, which she uses "to warn her of impending seizures." Wright testified that, following a seizure, she sometimes makes statements that, as the district court found, "have no basis in fact."

Wright and Parisi met outside Parisi's condominium "while she was walking [her service dog]" in September 2014. Wright "discussed her desire to live in [Parisi's condominium building] and stated that one of the units . . . was for sale," but that it was too big for her and she could not afford it. Parisi "immediately saw an opportunity to purchase [the unit] and partition it; selling one half of [the unit] to Wright and retaining the other half to expand his residence."

The parties soon began a “physical and romantic relationship” and saw each other “almost on a daily basis.” Wright and Parisi agreed to buy and partition the unit “[w]ithin the first month of their romantic relationship.” Parisi, through his company Nuvola, purchased the unit in fall 2014.

The parties signed a purchase agreement on December 9, 2014, providing that Wright would buy “her half” of the unit from Nuvola. The closing date was set for March 1, 2015. The parties agreed that if Wright was “unable or unwilling to complete [the] purchase by July 31, 2015,” the purchase agreement would be cancelled. The parties each contributed \$15,000 of earnest money to a joint account, which they agreed would be applied to partition costs, as stated in a purchase-agreement addendum.

Wright and Parisi’s relationship “became strained in late 2014” because of disagreements about partitioning the unit. Their arguments “escalated” when Wright “was unable to sell her residence to obtain financing.” Wright and Parisi’s romantic relationship ended “at some point in early 2015,” and they saw each other “less frequently.”

On the morning of January 22, 2015, the parties began exchanging texts. Wright asked Parisi if they were “ever going to see each other again.” Parisi responded that Wright should “[c]all an electrician to get things moved on [her] side.” Although more texts followed, no message stated or referred to a plan to meet that evening.

Wright testified that Parisi assaulted her on the evening of January 22, 2015. Wright’s testimony about the assault is summarized in the district court’s findings of fact. According to the district court, Wright stated that she went to Parisi’s house, and he “confessed that he had engaged in inappropriate sexual behavior with other people” and

also stated “that he was HIV positive.” Wright “tried to leave,” but Parisi blocked her exit, struck her, and threw her to the ground. Wright “had a seizure and lost consciousness.” When she regained consciousness, she was in a different room and “realized that Parisi was having intercourse with her anally” without her consent. Wright testified that, as a result of the sexual assault, she suffered damage to her teeth, a torn anus, rectal prolapse, and fecal incontinence.

Parisi testified that he did not assault or meet with Wright on January 22 and denied making any statements about inappropriate sexual conduct or being HIV positive. Parisi testified that the last time he and Wright had sex was consensual and occurred on January 10 or 12, 2015.

On January 23, 2015, Wright withdrew her earnest money without telling Parisi. Parisi sent over 20 text messages to Wright on January 23 and 24. Wright responded on January 24, stating that she was at a funeral. None of the texts referred to a sexual assault.

Wright called a friend, a retired police officer on January 24, and was upset. The district court found that Wright “did not tell [him] why she was upset or that she had been raped.” In a February 12 appointment with her psychologist, Wright indicated that “she was stressed because . . . she was moving,” but “did not tell” her psychologist that Parisi had assaulted her.

In February 2015, Parisi and Wright exchanged “approximately 200 text messages,” which the district court described as “candid” and summarized as expressions of “their love for each other, their jealousies, and a desire to complete the [p]urchase [a]greement.” In one text, Wright stated that she was “sorry [she] betrayed [Parisi’s] trust” by taking the

earnest money. The district court found that none of the texts referred to sexual assault, abuse, emotional outbursts, or improper sexual behavior.

Wright also saw two doctors, including her treating physician, in February 2015 and did not mention a sexual assault or fecal incontinence in either visit. More than two years later, in 2017, Wright requested that her treating physician amend her medical record “to state that [her treating physician] performed a rectal exam and noted a fissure.” The physician denied her request because she “did not recall” performing a rectal exam at the visit.

In March 2015, Wright “sent an email to Parisi expressing her intent to commit suicide.” In the email, Wright accused Parisi of engaging in inappropriate sexual conduct with others, but did not accuse Parisi of sexual assault. Wright was subsequently treated at a hospital for “evaluation of suicidal ideation.” The district court found that, during treatment, Wright “never accused Parisi of rape and never said she suffered from fecal incontinence or rectal prolapse.” In a follow-up appointment with her psychologist, she did not mention sexual assault.

Wright was unable to close the condominium purchase on the anticipated date of March 1, 2015. Because Wright was “still living in her partitioned [unit],” Parisi served Wright with a declaratory cancellation of the purchase agreement. At approximately the same time, Wright sought an order for protection and, nine days later, initiated this lawsuit, which requested a temporary restraining order to suspend cancellation of the purchase

agreement. The district court granted the temporary restraining order, but required Wright to pay a monthly sum to cover utilities, insurance, and “running costs.”¹

Wright amended her complaint in September 2015, adding claims of breach of contract and breach of warranty. Wright again amended the complaint in January 2016, adding claims of waste, fraud, battery, tortious interference with contract, and intentional infliction of emotional distress. In her battery claim, Wright alleged that on January 22, 2015, Parisi “struck [Wright] several times with his fists, and used unwanted physical conduct and intimidation to prevent [her] from leaving his [unit],” but did not mention a sexual assault. Parisi brought a motion to dismiss Wright’s claims. The district court granted Parisi’s motion in part, leaving Wright with claims of fraud, battery, and tortious interference with contract.

In the district court’s scheduling order for a trial, it required that exhibit lists, exhibits, witness lists, and any motions in limine be filed “no later than two weeks prior to the start of the trial block.” The case was set for a trial block from June 12, 2017, through June 30, 2017.

¹ Two other cases arose from these facts. First, Nuvola initiated eviction proceedings against Wright in August 2015. The housing court determined that Wright’s failure to perform under the purchase agreement caused the contract to expire. *Nuvola, LLC v. Wright*, No. A15-1778, 2016 WL 3223231, at *2-3 (Minn. App. June 13, 2016), *review denied* (Minn. Aug. 23, 2016). Wright sought review of the decision, and the district court affirmed. *Id.* at *3. Wright then appealed to this court, which affirmed in June 2016. *Id.* at *1. Second, in June 2016 and February 2017, Wright reported to the Minneapolis Police Department that Parisi had sexually assaulted her on January 22, 2015. After the second report, the state charged Parisi with criminal sexual conduct. Parisi spent three weeks in custody, but was released after the prosecutor determined there was no probable cause.

Wright provided her medical records to opposing counsel seven days before the trial, and her witness list four days before trial, listing seven witnesses. Parisi listed five witnesses. On June 11, the parties agreed to limit testimony to Wright and Parisi.

The bench trial started on Monday, June 12. At the outset, the parties stated that they had agreed to dismissal of the fraud and tortious interference claims, leaving battery as the only claim for trial. Wright's attorney informed the district court that there were only going to be "two witnesses," Wright and Parisi.

Wright testified first. Near the end of her direct examination, Wright appeared to start shaking. A man, who identified himself as Wright's boyfriend, explained that Wright was having a seizure and could not continue testifying. Wright's attorney requested a continuance, which the district court granted until Wednesday, June 14. The court requested an update on her status "as soon as [Wright] can." Late on Tuesday afternoon, Wright informed the district court that she would be unable to testify and requested another continuance.

The district court denied the continuance, but Wright did not appear at trial on June 14. The district court requested a letter from Wright's medical doctor certifying that "she has experienced a condition or a seizure" that "interfere[d] with her ability to provide testimony." The district court continued the case and requested the physician's letter by the "close of business day on Friday [June 16]." Wright did not provide a physician's letter by June 16, but submitted medical records. The district court extended the deadline for a physician's letter until June 26, which Wright also missed.

On June 27, Wright provided a letter from a physician, who had reviewed her medical records but had not personally examined her. The physician's letter stated that Wright was medically unable to testify during the week of June 12, 2017. At some point, Wright asked to complete her trial testimony by video deposition.

In a June 29 order, the district court concluded that Wright's "incapacity at trial was not adequately substantiated" but also found that Wright is "likely to suffer another event similar to the one that occurred on June 12, 2017." The district court granted a continuance to Wright and granted her request to finish her testimony by video deposition. The trial was scheduled to resume on July 24, 2017. On July 7, Wright retained new trial counsel.

Wright's video deposition began on July 14, 2017. At one point during her cross-examination, Wright said she felt like she was going "to vomit," and her testimony stopped. The deposition resumed on July 17, during which Wright appeared to suffer a seizure after a few questions.

The parties had a telephone hearing with the district court on July 18.² Wright requested that she be allowed to complete cross-examination via written deposition. Wright also requested that she be allowed to call additional witnesses. The district court denied both requests in a July 19 order and scheduled the trial to resume the next day.

On July 20, the trial proceeded in open court. Wright completed her cross-examination without any apparent medical issues, and she was excused. On July 24, Parisi testified and the trial concluded.

² A hearing transcript is not in the record.

The district court issued its written findings of fact, conclusions of law, and order for judgment on November 22, 2017. The district court found that, “[w]ith respect to her disability,” Wright has “seizures, post-traumatic stress disorder, and depression.” The district court concluded that Wright failed to prove her claim for battery and entered judgment for Parisi. Wright appeals.

D E C I S I O N

I. Wright failed to preserve her challenge to the district court’s denial of her midtrial motion to call additional witnesses.

Wright asserts that the trial court’s “refusal to allow [her] to call any witnesses besides herself amounted to the sanction of dismissal and was an abuse of discretion.” Wright admits that her “first trial counsel did not comply with the Court’s scheduling order” and that her “initial trial counsel indicated that he would not call other witnesses.”

“Rulings on evidentiary matters and the conduct of trial are left to the discretion of the trial court and will not be reversed absent an abuse of discretion.” *Lundman v. McKown*, 530 N.W.2d 807, 829 (Minn. App. 1995), *review denied* (Minn. May 31, 1995). When a party challenges conduct within the district court’s discretion, such as trial procedure and evidentiary rulings, as well as other “issues arising during the course of trial,” the party must file a motion for a new trial to obtain appellate review. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 310 (Minn. 2003) (quotation omitted). A new trial motion gives the district court “time to consider the context of the objection and the effect the error may have had on the outcome of the case.” *Id.* But a party

is not required to file a new trial motion to obtain review of substantive questions of law.
*Id.*³

We conclude that Wright failed to preserve her challenge to the district court's denial of her motion to call additional witnesses. Wright made the request more than one month after the trial had started. The parties did not submit formal briefing, and the district court issued an order denying Wright's request. After the case was submitted for a decision and the district court issued its findings of fact, Wright did not file a motion for a new trial. Because Wright requested permission to call additional witnesses after the trial began and did not file a posttrial motion for a new trial, she failed to preserve her challenge to the district court's denial of her request, and the issue is outside the scope of our review. *See Alpha Real Estate*, 664 N.W.2d at 310.

II. The district court properly exercised its discretion in reasonably accommodating Wright's medical condition.

Wright states that her appeal "does not . . . contest the underlying credibility determinations" made by the district court.⁴ Instead, Wright asserts that the district court

³ Wright argues that *County of Hennepin v. Bhakta* governs review of this issue. 922 N.W.2d 194, 199 (Minn. 2019). *Bhakta* held that "pretrial orders on motions in limine are appealable regardless of whether those orders have been assigned as error in a motion for a new trial." *Id.* Wright is not challenging a pretrial order, thus, *Bhakta* is not controlling here.

⁴ In her principal brief to this court, Wright's third point heading states that she "maintains her objections" to the district court's "credibility determinations." But in the first paragraph under the point heading, Wright states that she "does not here challenge those determinations as a matter of law." Additionally, she reiterates her argument that the district court erred by failing to reasonably accommodate her disability. Finally, she contends that, had the district court granted her accommodation requests, it "could have fundamentally altered the court's perception of the evidence." Based on her brief to this

failed to make reasonable accommodations for her medical condition or to hold an “accommodation hearing” to determine what would constitute a reasonable accommodation. Wright asserts that she has a “protected disability within the meaning of Minnesota’s Human Rights Act (MHRA) and the Americans with Disabilities Act (ADA).” For relief, Wright requests a new trial, or, in the alternative, remand for an evidentiary hearing.

The MHRA provides that the state has a duty to “ensure physical and program access” to public services “for disabled persons.” Minn. Stat. § 363A.12, subd. 1 (2018). A “public service” includes “any public facility, department, agency, board or commission, owned, operated or managed by or on behalf of the state of Minnesota.” Minn. Stat. § 363A.03, subd. 35 (2018). “A disabled person is any person who (1) has a physical, sensory, or mental impairment which materially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.” *Id.*, subd. 12 (2018). Title II of the ADA has similar language. *See* 42 U.S.C. §§ 12131(2), 12132 (2012).⁵

In its written findings of fact, the district court determined, “With respect to [Wright’s] disability, [she] had a significant medical history.” But the district court did not

court, we conclude that Wright does not challenge the district court’s credibility determinations and instead argues that the district court’s denial of her requests prejudiced her case.

⁵ The ADA provides that persons with disabilities have a “fundamental right of access to the courts” and requires “reasonable modifications that would not fundamentally alter the nature of the service provided.” *Tennessee v. Lane*, 541 U.S. 509, 532-34, 124 S. Ct. 1978, 1993-94 (2004) (quotation omitted).

find that Wright's disability materially limited her ability to testify or participate in courtroom procedure. Rather, in deciding Wright's motions for a continuance, the district court determined that Wright's "incapacity at trial was not adequately substantiated," and that her medical records did not substantiate her "inability to testify." The district court found, in part, that Wright had failed to timely supply relevant documentation of her medical conditions, and that her supporting physician letter was based "solely on a review of [her] medical records." The trial record supports the district court's findings. Despite Wright's medical condition, she was able to complete her trial testimony through a combination of courtroom testimony and video-deposition testimony.

Still, Wright argues that her disability "significantly impaired her ability to participate" in the trial and contends that the district court committed reversible error when it failed to (A) hold an evidentiary hearing to determine appropriate accommodations for her medical condition and (B) reasonably accommodate her when it denied her motions to complete cross-examination by written deposition and to call additional witnesses. Wright claims that the standard of review is *de novo* because disability status is a question of law. But Wright's arguments challenge *discretionary* decisions by the district court. "Rulings on evidentiary matters and the conduct of trial are left to the discretion of the trial court and will not be reversed absent an abuse of discretion." *Lundman*, 530 N.W.2d at 829. This court will only grant a new trial on appeal "if the errors resulted in prejudice to the complaining party." *Id.*

A. *Evidentiary hearing*

Wright argues that she requested an evidentiary hearing to determine what reasonable accommodations her disability requires under the ADA or MHRA. Wright appears to claim that she submitted this motion orally during the July 18, 2017 telephone hearing. But the transcript of this hearing was not ordered by Wright and is not in the record. It is an appellant's duty to order a transcript "of those parts of the proceedings not already part of the record which are deemed necessary for inclusion in the record." Minn. R. Civ. App. P. 110.02, subd. 1(a); *see also Truesdale v. Friedman*, 127 N.W.2d 277, 279 (Minn. 1964) (stating that appellant has the duty to provide the appellate court with a record that is "sufficient to show the alleged errors and all matters necessary for consideration of the questions presented"). Because Wright did not provide us with the transcript of the July 18 telephone hearing, we are unable to consider what transpired during the telephone hearing, beyond what is stated in the district court's decision. *See* Minn. R. Civ. App. P. 110.01 ("The documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases.").

Wright's written correspondence with the district court dated the day after the telephone hearing mentions an evidentiary hearing as an alternative to a written deposition, but Wright did not move for an evidentiary hearing.⁶ The district court's July 19 order

⁶ Wright also did not provide notice to the district court before the trial began that she required a reasonable accommodation. In its June 29 order granting a continuance, the district court found Wright had suffered two seizures in district court proceedings before the trial began. The district court also found that, despite this history, Wright failed to advise the court or otherwise request a reasonable accommodation before trial began.

addressing Wright's motions does not mention a motion for an evidentiary hearing. Because there is no record of a motion for an evidentiary hearing, and the district court did not consider such a motion, the issue is not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that an appellate court generally will not consider matters not argued to and considered by the district court).

Even assuming that Wright moved for an evidentiary hearing and that the district court implicitly denied it, the district court did not abuse its discretion. At the time Wright claims she sought an evidentiary hearing, Wright's trial testimony was nearly complete and the trial was almost concluded. Moreover, the district court had already considered Wright's medical evidence of her condition and concluded that she did not adequately substantiate her incapacity and, importantly, that her medical condition could be reasonably accommodated by granting continuances and allowing video-deposition testimony. Notably, Wright did not identify in district court what additional evidence she would offer at an evidentiary hearing; consequently, Wright does not articulate how she was prejudiced by the lack of an evidentiary hearing. Thus, it was not an abuse of discretion for the district court to deny a request for an evidentiary hearing. *Cf. Westbrook State Bank v. Anderson Land & Cattle Co.*, 364 N.W.2d 416, 420 (Minn. App. 1985) (holding a district court did not abuse its discretion after it denied appellant a continuance to seek counsel after trial had already started).⁷

⁷ Wright argues that persons with disabilities are entitled to an evidentiary hearing upon request, citing *Strook v. Kedinger*, 766 N.W.2d 219, 226-28 (Wis. Ct. App. 2009). But *Strook* dealt with a defendant who "properly notified the [trial] court that he needed an interpreter" *before* a court hearing. *Id.* at 228. The trial court was required to act on his

B. Reasonable accommodations

Wright generally argues that the district court “fail[ed] to make a reasonable accommodation for [her] seizures.” Because the only requests the district court denied were to testify via written deposition and to call additional witnesses, we construe the argument as one that the district court erred in denying Wright’s motions for written deposition and to call additional witnesses as reasonable accommodations. We address each argument in turn.

1. Written deposition

The rules of civil procedure generally require trial testimony to occur in open court. Minn. R. Civ. P. 43.01 (“In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by statute or by these rules, the Minnesota Rules of Evidence, or other rules adopted by the Supreme Court.”). One exception to this rule is that a district court has discretion to admit deposition testimony in lieu of trial testimony if a “witness is unable to . . . testify because of . . . sickness” and the deposition is used against a party that had an opportunity to be “present” at the deposition. Minn. R. Civ. P. 32.01(c). There is no general exception for written depositions in lieu of cross-examination. *See id.*

request, but the trial court instead proceeded with a substantive hearing, which the defendant declined to attend. *Id.* at 222-24. In his absence, the trial court dismissed the defendant’s motion for an interpreter, struck his counterclaims and crossclaims, and questioned the legitimacy of his disability in open court. *Id.* at 224-26. *Strook* held that the trial court’s decision to “hear the interpreter issue and the substantive issue simultaneously, was an improper exercise of discretion.” *Id.* at 229. Here, unlike in *Strook*, Wright did not notify the district court of any disability requiring reasonable accommodation before her trial started. Moreover, *Strook* did not hold that an evidentiary hearing is always required and Wright points to no Minnesota law to support this claim.

We conclude that the district court's denial of Wright's request to submit to cross-examination via written deposition was not an abuse of discretion for two reasons. First, Wright does not cite any legal authority affording a district court discretion to grant such a request, and there is no rule of civil procedure expressly permitting written deposition in lieu of cross-examination.

Second, Wright fails to establish any prejudice. The record reflects that the district court repeatedly accommodated Wright. On the first day of trial, Wright had a seizure, and the district court granted a continuance. On the second day of trial, the district court granted a continuance after Wright failed to provide timely notice that she would be unable to attend trial. The district court requested a physician letter from Wright certifying that her medical conditions "interfere[d] with her ability to provide testimony." Wright missed the deadline to submit the letter, and after the district court granted an extension, she missed it again. When Wright did submit a letter, the district court concluded that Wright's "incapacity at trial was not adequately substantiated" but nevertheless granted another continuance to Wright and additionally granted her request to testify by video deposition.

Against this backdrop, the district court denied Wright's motion to submit to a written deposition in lieu of cross-examination in open court or by video deposition. The district court reasoned that a written deposition of Wright's cross-examination would be prejudicial to Parisi because it would be difficult for the district court to assess credibility and her late motion only provided "one or two days" for Parisi to develop written questions. The district court instead provided "a final opportunity" for Wright to complete her cross-examination in the courtroom. Wright did so without incident. We conclude that the

district court acted well within its discretion in denying Wright's motion to submit to cross-examination by written deposition.

2. *Additional witnesses*

Wright argues that her "medical condition prevented her from fully participating in the trial," making "the need to have additional witnesses present . . . more significant." Wright appears to argue that she made a midtrial request for additional witnesses as a reasonable accommodation at trial for her medical condition. But the record does not reflect a motion for additional witnesses as a reasonable accommodation. Instead, Wright's request for additional witnesses appears to have been a change in trial strategy after she hired a new attorney on July 7. Because Wright did not present her motion for additional witnesses to the district court as a request for a reasonable accommodation, and she did not move for a new trial, the issue is not properly before us on appeal. *See Thiele*, 425 N.W.2d at 582.

Even assuming that Wright requested additional witnesses as a reasonable accommodation, the district court did not abuse its discretion by denying her request. In its order denying her midtrial request to call additional witnesses, the district court reasoned that the parties had agreed to only call Wright and Parisi and that adding a witness "at this late date [would be] . . . highly prejudicial" to Parisi. The district court did not abuse its discretion in denying Wright's request.

We also observe that Wright's offer of proof, which refers to three witnesses, does not reveal any testimony that would have presented new evidence. According to the offer of proof, Wright would have submitted testimony on three points. First, a doctor would

have testified about treating Wright for fecal incontinence starting in 2017. But the medical records of these visits had already been received into evidence. Second, a dentist would have testified that Wright had damaged teeth a year after the alleged battery. But the proposed testimony did not link the damages to the alleged battery. Third, a friend would have testified to what Wright had already testified to at trial—that she called him two days after the alleged assault and was “upset” but did not mention the sexual assault. Wright fails to show how she was prejudiced by the exclusion of these witnesses.

Finally, even assuming that it was error for the district court to deny Wright’s motions, there was no prejudice to Wright because she completed her testimony within a reasonable time. This was, in large part, because the district court continued to grant Wright’s requests for continuances. And even with all of Wright’s testimony, the district court rejected her battery claim because it did not find Wright credible: “Wright’s testimony that she failed to report being raped by Parisi for over a year because she was unable to deal with the rape is not credible given the facts of this case and the numerous other allegations she made against Parisi.”

Because Wright did not preserve her evidentiary challenge to the district court’s denial of her midtrial request to call additional witnesses, and because the district court properly exercised its discretion in reasonably accommodating Wright’s medical condition, we affirm.

Affirmed.