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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1230**

In the Matter of the Estate of:
Arthur Mathewson, deceased.

**Filed July 29, 2008
Reversed
Schellhas, Judge**

Ramsey County District Court
File No. 62-PR-06-273

Michael R. Cunningham, James M. Clay, Gray, Plant, Mooty, Mooty & Bennett, P.A.,
500 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402 (for respondent
Securian Trust Company, N.A., as personal representative)

Robert J. Shane, 700 Lumber Exchange Building, 10 South Fifth Street, Minneapolis,
MN 55402 (for appellant Dorothy Sledge)

Considered and decided by Hudson, Presiding Judge; Shumaker, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges a district court order that adopts a probate court referee's order modifying a previous order that awarded appellant the contents of a decedent's safety deposit box. Because we conclude that the district court abused its discretion in considering newly discovered evidence as the basis for modifying a previous order, we reverse.

FACTS

On May 6, 2005, appellant Dorothy Sledge was summoned to St. Joseph's Hospital by Arthur Mathewson's physician. Mathewson was dying from leukemia, and Sledge and Mathewson had been close friends for nearly 30 years. During Mathewson's illness, Sledge had performed services on his behalf including running errands, cleaning, cooking, and purchasing necessities. At the hospital, in the presence of a third party, Judy Jones, Mathewson instructed Sledge to retrieve his wallet from a drawer. Mathewson then removed from his wallet an envelope that contained a key to his safe deposit box and handed the envelope to Sledge. In substance, Mathewson told Sledge that if he died, she should get in touch with his attorney and tell him that she had the key to the safety deposit box and that the contents were something he gave her. Mathewson informed Sledge that the box contained \$41,000 in cash and was located in downtown St. Paul near a McDonald's. Sledge kept the safety deposit box key. On May 13, 2005, while residing in a nursing home and in the presence of Jones, Mathewson gifted to Sledge his 2001 Ford Windstar minivan and gave the car keys to her. On May 16, 2005, Mathewson (decedent) died.

On March 22, 2006, respondent Securian Trust Company, N.A. (Securian), filed a petition for formal probate of the decedent's estate in Ramsey County District Court and also filed an acceptance of appointment as personal representative. On March 29, 2006, the court administrator issued a notice to creditors to present their claims within four months of the date of the notice.

In July 2006, before the expiration of the time for presenting creditor claims, Securian cashed two certificates of deposit in decedent's name and received \$122,000. Securian received the proceeds without having possession of the actual certificates of deposit because Securian did not yet know their location. Also, before the expiration of the creditors' claims period, Sledge contacted decedent's personal attorney and informed him that decedent had made gifts to her of the safety deposit box contents and the 2001 Ford Windstar minivan. Sledge told decedent's personal attorney that she had the key to decedent's safety deposit box. Decedent's personal attorney informed Sledge that the matter was being handled in probate court, leading Sledge to believe erroneously that her claims were presented in probate court by decedent's personal attorney.

On August 2, 2006, shortly after the expiration of the creditors' claims period, Sledge's attorney mailed a written statement of claim to Securian's attorney. On August 15, 2006, Sledge filed a formal notice of claim with the probate court. On August 17, 2006, Securian filed a notice of disallowance of claim, stating "Dorothy Sledge's claim dated August 2, 2006 for funds located in the Decedent's safety deposit box and the Decedent's vehicle is hereby disallowed in its entirety." The probate court set an evidentiary hearing on Sledge's claim for November 21, 2006. Securian deposed Sledge on November 9, 2006. Securian did not inventory the safety deposit box before the evidentiary hearing.

Sledge and Jones testified at the evidentiary hearing on November 21, 2006. On November 29, 2006, a probate court referee recommended an order that included findings of fact and conclusions of law. On December 5, 2006, the district court countersigned

and filed the recommended order, granting, among other things, Sledge's petition for allowance of her claim previously denied. Notably, the order included:

Findings of Fact

20. [Securian] offered no evidence to rebut or contest the testimony of [Sledge] and her witness.

21. [Sledge's] testimony is credible, given the nature of her relationship with the decedent, the fact that decedent had no other natural object of his bounty, the details the decedent conveyed to her about his safety deposit box contents, the fact that the decedent transferred to [Sledge] the key to the safety deposit box and the keys to the van, and because these transactions were witnessed by a third party.

Conclusions of Law

5. A valid inter vivos gift requires delivery, intention to make a gift on the part of the donor, and absolute disposition by the donor of the thing which he intends to give to another. *Oehler v. Falstrom*, 142 N.W.2d 581, 273 Minn. 453 (1966) and *Olsen v. Olsen*, 562 N.W.2d 797 (Minn. 1997). The decedent's donative intent was demonstrated by the surrounding circumstances in this case. The decedent informed [Sledge], in the presence of Judy Jones, that decedent was giving [Sledge] the contents of the safety deposit box. . . . The decedent informed [Sledge] that he was giving [Sledge] title to his 2001 Ford Windstar Minivan. The gifts were made by the decedent at a time when he was lucid and aware that he only had two to three weeks to live. The gifts were made with decedent's absolute disposition and without reservation of any rights. The decedent evidenced his donative intent when he delivered to [Sledge] the key to the safety deposit box and the keys to the van. The decedent intended to part with all rights in the safe deposit box and the van.

6. Prior to his death, the decedent gifted to [Sledge], the contents of his safety deposit box at U.S. Bank and his 2001 Ford Windstar Minivan.

Order

1. The Petition to Present a Late Claim is hereby GRANTED.
2. The Petition for Allowance of Claim Previously Denied is hereby GRANTED.
3. The personal representative, Securian Trust Company, is ordered to forthwith facilitate the opening of decedent's safety deposit box at US Bank in St. Paul to allow [Sledge] to remove and retain all contents of the safety deposit box.
4. U.S. Bank is directed to inventory the contents of the safety deposit box prior to delivery of the contents to [Sledge], and to deliver a copy of the inventory to Robert J. Shane, Esq., attorney for [Sledge], and to deliver a copy of the inventory to James M. Clay, Esq., attorney of record for Securian Trust Company, personal representative.
5. The personal representative, Securian Trust Company, is ordered to forthwith facilitate the transfer of the motor vehicle title for the decedent's 2001 Ford Windstar Minivan to [Sledge].

On December 11, Securian moved for "a Temporary Stay from paragraphs 3 and 4 of the Order Allowing Claim dated December 5, 2006, until December 15, 2006 in order that the Personal Representative, Securian Trust Company, may review and inventory the content of the safety deposit box located at US Bank [sic]." The court file does not contain an order granting a stay, but it does reflect that a telephone conference was held by the district court on December 11, 2006. On December 19, 2006, the safety deposit box was opened and inventoried. The contents included approximately \$5,600 in cash and coins and the two certificates of deposit which had been cashed in July 2006 for \$122,000.

On December 29, 2006, Securian filed a motion for a new trial and/or new proceedings pursuant to Minn. R. Civ. P. 59.01(d)-(g), or alternatively for relief from the previous order pursuant to Minn. R. Civ. P. 60.02(b), (e)-(f), a memorandum of law, an affidavit of Michelle L. Goertzen, and an affidavit of Richard T. Franks.¹ Pursuant to its motion, Securian argued that the certificates of deposit found in the safety deposit box constituted newly discovered evidence; the district court's original order was contrary to the evidence or the law; and the district court's order would be inequitable if given prospective effect.

On April 20, 2007, the probate court referee recommended an order modifying the previous order allowing Sledge's claim. The referee recommended denial of Securian's motion for a new trial on the basis that no new trial was necessary since all evidence was "now before the court." The referee referred to the certificates of deposit found in the safety deposit box as "newly discovered evidence" and stated that "it is only fair and equitable that the Court decide the issue of ownership of the certificates of deposit." The referee found that there was no evidence to indicate that the two certificates of deposit were payable to anyone other than the decedent or that the decedent had intended to gift the certificates to Sledge. Notably, the referee included language in the recommended order that "[b]oth parties are at fault for not using due diligence and cooperating in the opening of the safety deposit box," and, "had the parties cooperated, the contents of the safety deposit box could have been easily discovered prior to the court trial in this

¹ Securian filed an amended notice of motion and motion on January 8, 2007, noting a hearing date of February 6, 2007. The remainder of the amended notice of motion and motion is identical to the original filed on December 29, 2006.

matter.” The referee recommended that the proceeds from the certificates of deposit remain in the possession of the decedent’s estate and that Sledge retain all other contents of the safety deposit box. The referee did not set forth in the recommended modification order the legal basis or authority on which he recommended that Securian be granted the relief it requested. The district court countersigned and filed the recommended modification order. This appeal for the district court’s order follows.

D E C I S I O N

I. Securian’s Rule 59 Motion

A. Certificates of Deposit Not Newly Discovered Evidence

Sledge challenges the modification order, arguing that the probate court referee abused his discretion in considering “newly discovered evidence,” that being the contents of the decedent’s safety deposit box inventoried after the evidentiary hearing. Securian argues that because the district court denied its motion for a new trial pursuant to Minn. R. Civ. P. 59.01, no analysis of the test for newly discovered evidence is necessary. We disagree. The record clearly shows that in granting Securian its requested relief, the probate court referee considered the certificates of deposit as newly discovered evidence. In the recommended modification order, the referee characterized the certificates of deposit as “newly discovered evidence,” and the district court countersigned the order without revision. Accordingly, we review the district court’s consideration of the certificates of deposit as newly discovered evidence.

“Generally, to be ‘newly discovered evidence’ . . . evidence must have been in existence at the time of trial but not known to the party at that time.” *Swanson v.*

Williams, 303 Minn. 433, 436, 228 N.W.2d 860, 862 (1975). For newly discovered evidence to be considered, the moving party must show that it exercised “proper diligence to discover it before the trial was exercised, and, further, it must appear that the newly discovered evidence is such that it probably will lead to a different result in a new trial.” *Bruno v. Belmonte*, 252 Minn. 497, 503, 90 N.W.2d 899, 903 (1958) (citation omitted). “A motion for a new trial upon the ground of newly discovered evidence is properly denied for lack of diligence of the moving party where the same diligence which led to the discovery of the new evidence after trial would have discovered it had such diligence been exercised prior thereto.” *George v. Estate of Baker*, 724 N.W.2d 1, 12 n.8 (Minn. 2006) (quotation omitted). “A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and the court’s discretion is to be exercised sparingly.” *Wurdemann v. Hjelm*, 257 Minn. 450, 465, 102 N.W.2d 811, 821 (1960) (quotation omitted). The burden is on the moving party to show “affirmatively and unequivocally that the new evidence was not in fact discovered until after the trial and that it *could not have been discovered before the trial by the exercise of reasonable diligence.*” *In re Hore’s Estate*, 222 Minn. 197, 203, 23 N.W.2d 590, 592 (1946) (emphasis added) (quotation omitted).

The district court assessed fault against both parties “for not using due diligence and cooperating in the opening of the safety deposit box,” specifically noting that “had the parties cooperated, the contents of the safety deposit box could have been easily discovered prior to the court trial in this matter.” But Sledge had neither the legal duty nor practical ability to open the safety deposit box to inventory its contents, thus, the

court's assessment of fault against Sledge is unsupported by law or fact. Sledge's counsel sent her statement of claim to Securian on August 2, 2006, and filed a formal claim on August 15. Securian made no inquiry about the safety deposit box until depositing Sledge on November 9, 2006. Regardless of why the parties together did not open the safety deposit box before the evidentiary hearing on November 21, 2006, Securian had the legal authority to do so and did not. Minn. Stat. § 55.10, subd. 4 (2006); Minn. Stat § 524.3-711 (2006) (stating that “[u]ntil termination of the appointment a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate”). Securian acknowledges that it had the power to have the safety deposit box opened, but did not ask the court to continue the evidentiary hearing to allow it to open the box for an inventory. Instead, Securian proceeded with the evidentiary hearing fully aware that the subject of the hearing was Sledge's claim to the contents of the safety deposit box and without any personal knowledge of the contents of the safety deposit box, i.e., no independent knowledge of the value of Sledge's claim.

Securian has failed to show “affirmatively and unequivocally” that the certificates of deposit could not have been discovered prior to the evidentiary hearing. The record reflects that Securian did not exercise reasonable diligence to discover the contents of the safety deposit box before the evidentiary hearing on November 21, 2006. The district court abused its discretion in considering the certificates of deposit as newly discovered evidence.

B. Duty to Inventory Decedent's Property

Securian did not inventory the contents of decedent's safety deposit box before the evidentiary hearing on November 21, 2006, despite its statutory duty to inventory the decedent's estate.

Within six months after appointment, or nine months after the death of the decedent, whichever is later, a personal representative . . . shall prepare and file or mail an inventory of property owned by the decedent at the time of death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item.

Minn. Stat. § 524.3-706 (2004). Securian did not inventory the contents of the safety deposit box until December 19, 2006, 19 months after the decedent's death, 9 months after its appointment as personal representative, and more than 4 months after learning of Sledge's claim to the contents.

In its brief to this court, Securian argues that the contents of the safety deposit box were unknown before the evidentiary hearing because of inaction on the part of Sledge, "unavailability of [Sledge's] counsel," and "a lack of adequate cooperation between counsel for the parties." In its affidavit submitted to the district court, Securian explained to the probate court referee why it did not have the safety deposit box opened and inventoried before the evidentiary hearing. Securian's representative said: "I also understood that Securian as the Personal Representative of the decedent could, *like the decedent*, request that U.S. Bank drill into the safety deposit box to inventory the contents without Ms. Sledge's consent and without need for a key. However, this course of action

would have resulted in an expense to the estate and also would not have allowed for the continued security of the contents.” But Sledge had no legal right to have the box drilled because she was neither an authorized signer on the box nor the personal representative of the decedent’s estate. Securian’s explanations about why the decedent’s safety deposit box was not inventoried before the evidentiary hearing are unavailing, especially in light of Securian’s course of action in proceeding to an evidentiary hearing involving the contents of the safety deposit box, at substantial legal expense to the estate, without knowing the value of the claim it was litigating.

C. Original Order Not Contrary to Law or Evidence in the Case

Securian argued to the district court that the original order was contrary to the evidence or the law. This argument fails as a matter of law.

“The applicable test for granting a new trial on the basis that the evidence does not justify the verdict is whether the verdict is so contrary to the preponderance of the evidence as to imply that the [fact-finder] failed to consider all the evidence, or acted under some mistake.” *Clifford v. Geritom Med, Inc.*, 681 N.W.2d 680, 687 (Minn. 2004) (quotation omitted). Necessarily, this test requires us to review the evidence as it was presented at trial, which did not include any testimony related to the certificates of deposit. Moreover, we are obliged by positive mandate to presume that the modification order is not based on a finding that the original order is contrary to the evidence, as such basis is not explicitly stated in the modification order. Minn. R. Civ. P. 59.01(g); *In re Buck’s Estate*, 122 Minn. 463, 467, 142 N.W. 729, 730 (1913).

When arguing that a district court's decision is contrary to the law, the moving party must concede the facts as presented to be true, so as to argue that the law properly applied to those facts could not yield the result reached by the district court. *In re Buck's Estate*, 122 Minn. at 467-68, 142 N.W. at 730-31. Although Securian offered no evidence and did not rebut Sledge's evidence at the evidentiary hearing, it has not conceded the findings of fact contained in the original order nor has it shown how the law was improperly applied to the facts as found by the referee and adopted by the district court in the original order.

II. Securian's Rule 60.02 Motion

Securian argued to the probate court referee that it was entitled to relief from the original order pursuant to Minn. R. Civ. P. 60.02(b), (e)-(f).²

"The district court has authority, pursuant to Minn. R. Civ. P. 60.02, to relieve a party from the effect of a judgment. Whether to do so is a discretionary decision for the district court; that decision will not be reversed on appeal in the absence of an abuse of discretion." *Riley on Behalf of Swanson v. Herbes*, 524 N.W.2d 523, 526 (Minn. App. 1994).

² At oral argument before this court, Securian conceded that rule 60.02(b) is not applicable. As a matter of law, Securian is not entitled to relief under rule 60.02(b), which states that a party is entitled to relief from a judgment for "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial pursuant to Rule 59.03." Minn. R. Civ. P. 60.02(b). Securian timely moved for a new trial pursuant to Minn. R. Civ. P. 59.03 and, therefore, is not entitled to relief under rule 60.02(b).

A. Entitlement to Relief Under Rule 60.02(e)

Securian moved the district court for an order granting relief pursuant to Minn. R. Civ. P. 60.02(e), which reads, in relevant part:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representatives from a final judgment (other than a marriage dissolution decree), order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons:

(e) The judgment has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application[.]

“The burden of proof in a proceeding under [r]ule 60.02 is on the party seeking relief.” *City of Barnum v. Sabri*, 657 N.W.2d 201, 205 (Minn. App. 2003).

To prevail under Minn. R. Civ. P. 60.02(e), a moving party must show that a present challenge to an underlying order would have merit.

....

Under [r]ule 60.02(e), the main objective is to determine whether *changed circumstances* exist and, if so, whether they render it inequitable for the judgment to have prospective application. Whether it is equitable for a judgment to continue to have prospective application must be determined on a case-by-case basis and requires courts to strike a “delicate balance between the sanctity of final judgments . . . and the incessant command of a court's conscience that justice be done in light of all the facts.”

Sabri, 657 N.W.2d at 206 (quoting *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988)) (emphasis added and omitted).

Securian relies on *Sabri* in arguing that it has demonstrated changed circumstances. But *Sabri* is readily distinguished. In *Sabri*, the landowner sought to introduce evidence of remedial actions he had taken subsequent to the district court entering an order permitting the city to raze his building. 657 N.W.2d at 204, 206. At issue in *Sabri* was the introduction of evidence of changed circumstances in the condition of the building. The factual distinction between *Sabri* and this case is clear. Evidence of changed circumstances after the issuance of an order, as addressed in *Sabri*, is clearly different from evidence readily discoverable by a party before trial and at the time of trial, but not discovered until after the issuance of an order. Securian's inventory of the safety deposit box only after the evidentiary hearing had occurred does not constitute changed circumstances within the meaning of rule 60.02(e) or the holding in *Sabri* and is not properly the basis for relief under rule 60.02(e). Securian has failed to show that its challenge to the underlying order would have merit.

B. Securian Not Entitled to Relief Under the Residual Clause of Rule 60.02(f)

Securian's argument under Minn. R. Civ. P. 60.02(f) also fails. Rule 60.02(f) states that a court may relieve a party from a final judgment, order, or proceeding for "[a]ny other reason justifying relief from the operation of the judgment." "Clause (f) [of rule 60.02] has been designated as a residual clause, designed only to afford relief in those circumstances exclusive of the specific areas addressed by clauses (a) through (e)." *Chapman v. Special Sch. Dist. No. 1*, 454 N.W.2d 921, 924 (Minn. 1990). "Relief is available only under exceptional circumstances and then, only if the basis for the motion

is other than that specified under clauses (a) and (e).” *Id.* Because Securian’s motion was based on rule 60.02(e), relief under clause (f) is not available.

None of the grounds raised by Securian is sufficient to support the relief granted to Securian in the modification order absent an abuse of discretion.

Reversed.