COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2482 **Cir. Ct. No. 2006CV169**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

ESTATE OF EARL LANZENDORF EX. REL. TIMOTHY LANZENDORF, PERSONAL REPRESENTATIVE, AND TIMOTHY LANZENDORF,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

KAREN SHAW,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Columbia County: DANIEL GEORGE, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Bridge, JJ.

¶1 VERGERONT, J. This appeal and cross-appeal arise out of a dispute between the Estate of Earl Lanzendorf and Earl's son, on the one hand, and Earl's wife, on the other hand. The Estate and Earl's son, Timothy, sued Earl's wife, Karen Shaw, alleging breach of the marital property agreement

between Earl and Shaw. The jury determined that Shaw had not breached the agreement, while deciding against her on her counterclaim for unconscionability.

¶2 Timothy and the Estate (collectively, the Estate) appeal,[1] contending that the circuit court erred in giving a jury instruction on the presumption of donative intent and in not allowing Timothy to testify in rebuttal regarding conversations with Earl. He also argues there was insufficient evidence for some of the special verdict questions. Shaw cross-appeals, contending that the circuit court erroneously exercised its discretion in allowing Janine Lanzendorf, Timothy's wife, to testify about a conversation with Earl.

¶3 We affirm on both the appeal and the cross-appeal. On the appeal we hold the jury instruction on donative intent was a correct statement of the law; we affirm the circuit court's ruling on Timothy's rebuttal testimony; and we conclude the evidence was sufficient to support the challenged special verdict questions. On the cross-appeal we affirm the circuit court's ruling on the challenged testimony.

BACKGROUND

¶4 Earl and Shaw were married in February 2003. Just prior to the marriage they signed a marital property agreement. The agreement provided that the property each party owned at the time of the agreement or thereafter acquired was to be classified as that party's solely owned property. It also provided that the parties were to "share approximately equally in the financial responsibility for

[1] We will use "estate" to refer to both the Estate and Timothy as parties and will use "Timothy" when we mean that individual.

providing … food, clothing, shelter, transportation, insurance, health care, and other necessaries … for the family unit." The responsibilities for self-support and other liabilities, whenever incurred, were to be those of the incurring party as though he or she were unmarried, although the agreement expressly recognized that either party could voluntarily pay the individual liabilities and obligations of the other.

¶5 After the marriage Earl began living with Karen in her home. They were married for approximately two-and-one-half years when Earl died.

¶6 Earl's will named his granddaughter and Timothy as the beneficiaries of his estate and specifically stated it made no provision for his wife, Karen. The will designated Timothy as the personal representative. A dispute arose when Timothy decided that Earl had made excessive contributions to the marriage and Karen had not followed the marital property agreement. The dispute centered on payments on Karen's mortgage, expenditures for repairs and improvements to Karen's home, the purchase of cars, and other living expenses for which Earl contributed more than half.

¶7 When the parties were unable to resolve their dispute, Timothy filed a complaint personally and as a representative of the Estate. The complaint alleged Karen required Earl to pay for her share of their joint expenses as well as her personal expenses, contrary to the martial property agreement and in breach of the duty of good faith implied in every contract. After various pretrial motions, the case proceeded to trial on the Estate's claims and Shaw's counterclaim that the agreement was void because Earl withheld his medical condition from her.

¶8 With respect to the Estate's claims, the jury answered most of the numerous special verdict questions on the allocation of various expenditures in

Shaw's favor. On Shaw's counterclaim, the jury found that she was aware of Earl's health condition. After the circuit court denied the post-verdict motions of both parties, it entered judgment on the verdict in favor of Shaw in the amount of $16,376.24 plus costs. The Estate appeals and Shaw cross-appeals.

DISCUSSION

I. Estate's Appeal

¶9 The Estate contends that the court erred in giving a jury instruction on the presumption of donative intent and in not allowing Timothy to testify in rebuttal regarding his conversations with Earl. He also argues there was insufficient evidence to support the verdict questions on the allocation of money market account funds, obligations and expenditures related to Shaw's home, and costs of vehicles.

A. Jury Instruction On Donative Intent

¶10 The uncontested evidence showed that Earl added Shaw's name to a money market account and to a checking account. In addition, there was evidence that Earl deposited funds into the joint checking account. Over the Estate's objection, the circuit court instructed the jury that "when a person places an individual asset, such as cash, into a joint account or changes an individual account into a joint one with a spouse," there is a rebuttable presumption that the person had the intent to make a gift. The instruction also informed the jury that this presumption could be rebutted by "the greater weight of the credible evidence

that the donor did not intend to make a gift."[2] The jury's answers to the special verdict questions concerning the bank accounts indicate that it applied the presumption and found that the evidence did not override the presumption.

¶11 Generally, a trial court has broad discretion when instructing a jury, and we affirm if the jury instructions fully and fairly explain the relevant law. ***Horst v. Deere & Co.***, 2009 WI 75, ¶17, No. 06AP2933. In this case the parties' dispute over the instruction centers on whether it was an accurate statement of law. This presents a question of law, which we review de novo. ***Id.***

¶12 The Estate claims the circuit court erred in instructing the jury to presume donative intent from evidence that Earl added Shaw's name to his bank accounts or deposited money in a jointly titled bank account. According to the Estate, the circuit court erred in relying on ***Derr v. Derr***, 2005 WI App 63, 280 Wis. 2d 681, 696 N.W.2d 170, as a basis for the instruction because that was a divorce case in which there was no marital property agreement. In ***Derr*** we applied the principle of donative intent to determine whether a party to a divorce action had intended to donate to the marriage an asset that was otherwise nondivisible under WIS. STAT. § 767.255(2) (2003-04)[3] because it was a gift.

[2] Just before the instruction on the rebuttable presumption, the jury was instructed on donative intent:

> You are instructed that in order for there to have been a gift of money from Earl Lanzendorf to Karen Shaw there must have been a clear, unmistakable, and unequivocal intention on the part of Earl Lanzendorf to make a gift of money at the time it was delivered by Earl Lanzendorf to Karen Shaw and to relinquish all right of dominion and control of the money and to invest all such right of dominion and control in Karen Shaw.

[3] In 2005, WIS. STAT. § 767.255 was renumbered and now appears as WIS. STAT. § 767.61. All other references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Derr, 280 Wis. 2d 681, ¶¶50, 60-62. In discussing donative intent we explained that "when an owning spouse acts in a manner that would normally evince an intent to gift" property to the marriage, donative intent is presumed, subject to rebuttal by "sufficient countervailing evidence." ***Id.*** (citations omitted). We identified from the case law certain circumstances that create a rebuttable presumption of donative intent, including transferring nondivisible property to joint tenancy and depositing nondivisible funds into a joint bank account. ***Id.***, ¶¶34-36.

¶13 The Estate asserts that the controlling case is not ***Derr*** but ***Gardner v. Gardner***, 190 Wis. 2d 216, 527 N.W.2d 701 (Ct. App. 1994), because in that divorce case there was a marital property agreement. In ***Gardner*** the wife argued that the husband's deposit into a joint account of his individual funds, which he used to pay his individual obligations, changed those funds to joint property and thereby entitled her to reimbursement of one-half of those funds in the divorce property division. ***Id.*** at 236. The marital property agreement, determined to be valid, provided that each party was to pay his or her individual obligations with his or her individual funds. ***Id.*** The circuit court found that the husband was using the joint checking account as "nothing more than a temporary storage facility" for the husband's property, and we upheld this a proper exercise of the court's discretion in dividing property at divorce. ***Id.*** at 235-36, 238.

¶14 The circuit court read ***Gardner*** as illustrating a factual determination rather than establishing a standard of law, and it decided that ***Derr*** did establish a standard that was applicable here. We agree with the circuit court's reading of ***Gardner***. In ***Gardner*** we did not address the issue of a rebuttable presumption. It appears the circuit court did not apply one and, in any event, the issue was not raised on appeal. In addition, our decision in ***Gardner*** that the circuit court

reasonably exercised its discretion—in concluding that the husband used the joint account as a temporary holding place for his individual funds—does not mean that, as a matter of law, a deposit of individual funds into a joint account in a different fact situation cannot be evidence of intent to make the funds joint property. Finally, ***Gardner*** does not address a key aspect of the fact situation here: namely, the undisputed evidence that Earl added Shaw's name to his accounts.

¶15 The circuit court's conclusion that ***Derr's*** analysis of donative intent was applicable is supported by a recent supreme court case, ***Steinmann v. Steinmann***, 2008 WI 43, 309 Wis. 2d 29, 749 N.W.2d 145. ***Steinmann*** applied the donative intent analysis of ***Derr*** to property initially classified as individual property under a marital property agreement. ***Steinmann*** was decided after the trial in the present matter and before the circuit court entered judgment on the verdict. Although neither party mentions ***Steinmann*** in their appellate briefs, we discuss it because it directly addresses the Estate's argument.

¶16 ***Steinmann*** concerned the division of property in a divorce where there was a valid marital property agreement that was binding on the court in the divorce. ***Steinmann***, 309 Wis. 2d 29, ¶¶5-6. The wife argued that all of the assets that could be traced to property that was classified as her individual property under the agreement remained her individual property despite being jointly titled and so could not be divided in the divorce. ***Id.***, ¶¶23-24. She relied on ***Gardner*** to argue that the application of donative intent principles (also referred to as transmutation) is limited to gifted and inherited properties, which are generally exempt from division in divorce under WIS. STAT. § 767.255(2) (2003-04). ***Id.***, ¶32. The court declined to read ***Gardner*** to establish the rule advanced by the wife and concluded

that the principles of donative intent are applicable to property classified as individual property under a marital property agreement. ***Id.***, ¶¶33-38.[4] The court also citied ***Derr*** approvingly, stating, "[d]onative intent is presumed where property is transferred, or transmuted, from non-divisible property to joint tenancy subject to division." ***Id.***, ¶29, citing ***Derr***, 280 Wis. 2d 681, ¶¶35, 40.

¶17 The ***Steinmann*** court then decided that the circuit court had not erred in determining that the wife had transmuted her separate property to marital property by the deeds conveying joint title. ***Id.***, ¶¶46-49. In this discussion the court relied on case law outside the divorce context concluding that the execution and deliverance of a deed raises the presumption that the grantor intended what the deed purported to convey. The court also referred to our statement in ***Derr*** that, in applying the rebuttable presumption, we are saying that "[i]n the absence of countervailing evidence, gifting is the only reasonable inference." ***Id.***, ¶51, citing ***Derr***, 280 Wis. 2d 681, ¶33.

¶18 Under ***Steinmann***, then, the fact that property is classified as individual property under a marital property agreement does not preclude a donative intent inquiry to determine if the property has become joint property. In addition, under ***Steinmann*** a rebuttable presumption of donative intent is not precluded as a matter of law simply because a marital property agreement has classified the property as individual property. Thus, ***Steinmann*** disposes of the Estate's argument that, because there is a marital property agreement, the court

[4] The husband in ***Steinmann v. Steinmann***, 2008 WI 43, ¶¶30, 32, 34, 36, 309 Wis. 2d 29, 749 N.W.2d 145, made a parallel argument with respect to the different principle of tracing—the process of establishing the identity of an asset by determining its source and value—and the court reached a parallel conclusion: tracing is not limited to gifted and inherited property.

erred in instructing on a presumption of donative intent.[5] Accordingly, we conclude the circuit court did not err in giving the instruction.

B. Trial Court's Exclusion of Timothy's Rebuttal Testimony

¶19 The Estate contends the circuit court erroneously exercised its discretion in not allowing Timothy to testify regarding his conversations with Earl to rebut Shaw's testimony on conversations with Earl. The Estate implicitly acknowledges that the dead man's statute, WIS. STAT. § 885.16, generally does not allow testimony about interactions with the deceased on behalf of an interested party. However, the Estate asserts, there is an exception when the "opposite party shall first, in his or her own behalf, introduce testimony of himself or herself or some other person concerning such transaction or communication[.]"[6] ***Id.*** The

[5] We recognize that ***Steinmann*** addresses a marital property agreement in the context of a divorce, not a death. However, the Estate relies on ***Gardner v. Gardner***, 190 Wis. 2d 216, 527 N.W.2d 701 (Ct. App. 1994), a divorce case, and does not contend that our analysis should differ because the marital property agreement in this case is applied to determine ownership of property upon the death of one spouse.

[6] WISCONSIN STAT. § 885.16 provides:

> Transactions with deceased or insane persons. No party or person in the party's or person's own behalf or interest, and no person from, through or under whom a party derives the party's interest or title, shall be examined as a witness in respect to any transaction or communication by the party or person personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his or her title or sustains his or her liability to the cause of action from, through or under such deceased or insane person, or in any action or proceeding in which such insane person is a party prosecuting or defending by guardian, unless such opposite party shall first, in his or her own behalf, introduce testimony of himself or herself or some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in respect to matters to which such testimony relates. And no stockholder, officer or trustee of a corporation in its behalf or interest, and no

(continued)

Estate argues that this exception applies here because Shaw "opened the door" by testifying about Earl's intentions and actions, making rebuttal testimony by Timothy appropriate.

¶20 Generally, rulings on the admission or exclusion of evidence are committed to the circuit court's discretion. ***Bell v. Neugart***, 2002 WI App 180, ¶15, 256 Wis. 2d 969, 650 N.W.2d 52. We affirm a discretionary decision if the circuit court applies the correct law to the facts of record and reaches a reasonable result. ***Id.*** When the exercise of discretion involves the proper construction or application of a statute, we review that particular issue de novo. ***Id.***

¶21 For the following reasons we conclude the Estate is not entitled to a reversal and new trial on this ground.

¶22 The Estate does not specify what testimony of Shaw "opened the door," nor does it provide a record cite to the court's ruling on what Shaw was permitted to testify to and why. We see from the record that both parties filed motions in limine relating to the dead man's statute. The Estate asked that no testimony be permitted on Shaw's conversations or transactions with Earl. Shaw sought to prevent Janine, Timothy's wife, from testifying for the Estate on conversations with Earl on hearsay grounds and also under the dead man's statute. Based on the court's comments made at the beginning of Janine's testimony, it appears the court ruled on the motions off the record and anticipated that they

---

> stockholder, officer or trustee of a corporation from, through or under whom a party derives the party's interest or title, shall be so examined, except as aforesaid.

would later be put on the record. However, the Estate does not provide a record cite for a later ruling and we have not discovered a later ruling.

¶23 From the court's comments during Janine's and Shaw's testimony, the parties' briefs, and the cross-appeal, it appears that the court ruled pretrial against Shaw on her objections to Janine's testimony on conversations with Earl. It is also apparent from those materials and the court's response to objections during Shaw's testimony that the court ruled pretrial that, if Janine did testify about certain conversations with Earl, Shaw could testify on those matters. While it appears the court explained its reasoning off the record, the Estate does not tell us what the court's reasoning was. If the court's reasoning was that Janine's testimony on conversations and transactions with Earl would trigger the exception and permit Shaw's testimony on her conversations and transactions with Earl on those same topics, that appears to be consistent with the dead man's statute.

¶24 With respect to the Estate's desire to have Timothy testify in rebuttal after Shaw testified, the Estate does not provide a record cite to a request on this point or to the court's denial of a request. We are uncertain whether there was a request after Shaw testified or whether the Estate means that the court's pretrial ruling itself precluded Timothy from testifying in rebuttal and thus there was no need for a later request. If there was a later request, we cannot review the court's denial of that request without knowing on what topics the Estate sought to present Timothy's rebuttal testimony and what the court ruled. If there was no later request and this issue was preserved by the pretrial motion and objections, then we are still hampered by the lack of information on the court's pretrial ruling and on the specific testimony of Shaw that the Estate believes made it appropriate for Timothy to testify in rebuttal.

¶25 If we have missed something in our search of the record, it is due to the Estate's failure to meet its obligation to provide record cites as required by WIS. STAT. § 809.19(1)(e). *See* ***Tam. v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (it is a party's obligation to provide record cites in the appellate brief and this court is not obligated to search the record when none are provided). If the record is lacking, that is due to the failure of the Estate to meet its obligation as an appellant to provide a record that permits us to review the challenged ruling; in the absence of a complete record, we assume the missing portion supports the circuit court's exercise of discretion. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986).

¶26 In reviewing a discretionary decision it is particularly important that we know what the circuit court was asked to do, what the court ruled, and why. We need to know this because we are endeavoring to determine if the court acted reasonably, not to substitute our judgment for that of the circuit court. For this reason, we begin with the circuit court's on-the-record explanation of the reasons underlying its decision. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). Given the inadequacy of the Estate's brief on this issue and the apparent inadequacy of the record, we have no basis for deciding that the circuit court acted unreasonably. Accordingly, we affirm the court's ruling.

C. Sufficiency of the Evidence

¶27 The Estate contends the evidence is insufficient to support the answers to the special verdict questions regarding the allocation of money market account funds, obligations and expenditures related to Shaw's home, and costs of cars.

¶28 Pursuant to WIS. STAT. § 805.14(1):

> No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

In reviewing a denial of a motion under § 805.14(1), this court applies the same standard. ***Weiss v. United Fire & Casualty Co.***, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995). Applying this standard, we are satisfied that the evidence is sufficient.

¶29 Question 14 asked how the transfer of $11,282.93 from the money market account to the joint checking account should be allocated. The jury allocated 100% to Shaw. The jury heard undisputed evidence that Earl had added Shaw's name to the money market account and to the checking account. The marital property agreement provided that "property titled in the name of both parties during the marriage shall be owned as joint tenancy with right of survivorship property unless expressly stated to be owned as tenants in common." A reasonable jury, properly instructed on the rebuttable presumption for donative intent, could find that Earl intended to make the funds in the money market account joint property when he added her name and that the funds transferred from the joint money market account to the joint checking account were jointly owned. Under the terms of the marital property agreement, Shaw would have the right of survivorship property—meaning the joint accounts would belong to her upon Earl's death. *See* ***Lang v. Lang***, 161 Wis. 2d 210, 228, 467 N.W.2d 772 (1991) (the joint tenant with right of survivorship becomes sole owner upon death of other joint tenant).

¶30 The Estate's argument to the contrary is based on evidence that, it contends, indicates that Earl viewed the money market funds he deposited in the joint account as his because he loaned $11,000 from the account to Lanzendorf Transfer, Inc. Assuming without deciding that this would be a reasonable inference from the evidence, this is not the standard. The standard is whether a reasonable jury, viewing the credible evidence most favorably to the verdict, could decide that this evidence of the loan did not rebut the presumption of donative intent. We conclude that it could. Similarly, the Estate points to testimony of Shaw that, it contends, shows that she did not believe that Earl meant her to have the money market funds. The Estate's interpretation of Shaw's testimony on this point is not the only reasonable one and is not the view most favorable to the verdict.

¶31 Question 3 asked how the $22,641.78 in payments toward the mortgage on Shaw's home should be allocated. The jury answered 50% to Earl and 50% to Shaw. There was evidence that Earl knew Shaw had a mortgage on her home when he married her, that the parties after marriage lived in her home even though Earl had a mortgage-free house, that he paid half of the mortgage payments while he was living in Shaw's home, and that he shared in the mortgage interest deduction on their joint tax returns. Based on this evidence the jury could reasonably find that Earl decided to pay half of the mortgage as a fair share of his shelter costs under the marital property agreement and that Shaw was therefore not obligated to reimburse the Estate for this amount. Although the mortgage was Shaw's liability, the agreement expressly permitted both parties "to voluntarily pay or satisfy individual liabilities or obligations of the other."

¶32 There were several questions on the allocation of costs for improvements on Shaw's home. (Questions 4-9.) The jury answered all but

question 9 by a 50/50 allocation. Question 9 related to improvements on the basement, and the jury allocated these 100% to Shaw. There was evidence that Earl paid from his own funds for one-half, or other substantial portions, of the improvements. Shaw testified that Earl was the one who wanted some of the improvements. Others were repairs on parts of the house he used—except the basement, which was allocated 100% to Shaw. Shaw also testified that the air conditioning was for his comfort as well as hers. The marital property agreement did not prevent Earl from contributing to these expenses. A reasonable jury could find that he chose to do so and that Shaw was not obligated to give the money back to the Estate, as the Estate contended.

¶33 There were four special verdict questions related to transportation that the Estate challenges. Two asked how the down payments on two vehicles should be allocated; one asked how the monthly payments on a home equity loan on Earl's lake house should be allocated; and one asked how the payoff amount of the home equity loan should be allocated. There was evidence that Earl used the home equity loan to purchase one of the vehicles, which was then traded in for the other vehicle plus a cash payment. The jury allocated 100% of these obligations to Earl.

¶34 The Estate's argument on these questions is not well developed. We understand the Estate to be asserting that, because the marital property agreement provided that the parties should each be equally responsible for transportation costs, the jury was required to allocate the amounts in these four questions on a 50/50 basis. We disagree that the agreement requires this regardless of the testimony. It appears from Shaw's brief, not contradicted in the Estate's reply,

that there was evidence that Earl took out the home equity loan on his house in his name alone; thus it is an individual debt under the agreement.[7] It is not equivalent to Shaw's mortgage, as the Estate suggests, because Shaw did not live in Earl's house and there is no evidence that she voluntarily made payments on that loan with her individual funds, as did Earl on her mortgage.

¶35 There was evidence that the down payments on the two vehicles were made with Earl's individual assets, he placed the vehicles in Shaw's name as well as his, and he did not ask her to contribute. We see no reason the jury could not have concluded from this evidence that Earl had the donative intent to make Shaw a joint owner of the vehicles. In addition, according to Shaw's brief and not contradicted by the reply brief, the jury did allocate vehicle operating expenses equally**.** In short, the Estate's cursory argument on these four questions does not persuade us that the answers to these four questions were not based on sufficient evidence.

II. Cross-Appeal

¶36 On her cross-appeal Shaw challenges the circuit court's ruling admitting Janine's testimony that she had a conversation with Earl about Shaw's knowledge of pulmonary fibrosis prior to the marriage. Shaw bases the challenge on two grounds—double hearsay and the dead man's statute. Absent this testimony, Shaw asserts, there was no evidence that she had knowledge of Earl's pulmonary fibrosis before the marriage. Shaw requests that we reverse the jury's

[7] We may treat as a concession a proposition asserted in a response brief and not disputed in the reply brief. ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

"yes" answer to the question of Shaw's knowledge and remand with instructions to the circuit court to answer the question "no" as a matter of law. We conclude Shaw is not entitled to relief for the following reasons.

¶37 Much of the impediment we found to reviewing the Estate's evidentiary challenges also exists for Shaw's evidentiary challenge. Shaw does refer us to the transcript where her counsel objected to this testimony by Janine on the grounds of both double hearsay and the dead man's statute. However, both counsel's objection and the court's brief statement overruling it refer to the court's earlier ruling, and the basis of that earlier ruling is not apparent from this brief interchange. Like the Estate, Shaw does not provide us with a citation to the record of the court's pretrial ruling on the parties' motions in limine, and, as we have already stated, we are unable to locate it.

¶38 Shaw does tell us in her brief that the court overruled her hearsay objection on the ground that Janine's testimony came within the exception under WIS. STAT. § 908.03(3) for a "then existing state of mind, emotion, sensation, or physical condition." However, she asserts, this is hearsay within hearsay, *see* WIS. STAT. § 908.05, and the § 908.03(3) exception does not apply to Earl's statement to Janine about what he told Shaw—only to his statement to Shaw. We cannot tell from our review of the record or from Shaw's brief what the court ruled in response to this hearsay within hearsay argument. Without a record of the court's ruling—or at least a fuller explanation of it—we will not reverse the court's hearsay ruling.

¶39 With respect to the dead man's statute, Shaw's brief provides us with a somewhat better understanding of the court's ruling. She asserts the court ruled that the dead man's statute was to be construed strictly and on that basis

concluded that Janine had no financial interest in the outcome because she was not a beneficiary under the will. The Estate agrees this was the basis for the court's ruling and argues that the circuit court is correct, citing ***Bethesda Church v. Menning***, 72 Wis. 2d 8, 11-13, 239 N.W.2d 528 (1976). This case holds that the spouse of a beneficiary under a will is considered competent to testify about interactions with the deceased because the interest of a beneficiary's spouse is too speculative to disqualify the spouse. ***Id.*** Shaw does not file a reply brief and does not explain why the court erroneously exercised its discretion in light of this case. We take this as a concession that the Estate is correct. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

CONCLUSION

¶40 We affirm on both the appeal and the cross-appeal. On the appeal, we hold the jury instruction on donative intent was a correct statement of the law; we affirm the circuit court's ruling on Timothy's rebuttal testimony; and we conclude the evidence was sufficient to support the challenged special verdict questions. On the cross-appeal, we affirm the circuit court's ruling allowing Janine's testimony.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.