

IN THE NEBRASKA COURT OF APPEALS

FILED

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

OCT 28 2008

EVANS V. RAYMOND

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

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JULIA EVANS ET AL., APPELLEES,

v.

ROBERT C. RAYMOND, APPELLANT, AND THE FIRST NATIONAL BANK AND TRUST
OF VINITA, OKLAHOMA, AS SPECIAL ADMINISTRATOR OF THE ESTATE
OF GALE E. EVANS, DECEASED, INTERVENOR-APPELLEE.

Filed October 28, 2008. No. A-06-643.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge.
Affirmed.

P. Stephen Potter and Barbara Brogan for appellant.

David A. Domina, of Domina Law Group, P.C., L.L.O., and, on brief, Claudia L. Stringfield-Johnson, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellees.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Julia Evans, Dwight David Evans, Ronald E. Evans, and Cheryl A. Hock (collectively the Evanses) filed a suit in the district court for Dawson County, bringing various claims against Robert C. Raymond, Jerry Armagost, Evans Bakery, Inc., Regional Investment Group, L.L.C., Kathleen Thuman, James Stinehagen, Larry Peterson, and Michael Brosius (collectively the defendants). The First National Bank and Trust of Vinita, Oklahoma (First National), as special administrator of the estate of Gale E. Evans, deceased, filed a complaint in intervention. The defendants filed various counterclaims against the Evanses. By virtue of various pretrial dismissals, a jury trial was held on only the Evanses' and First National's claims against Raymond and one of Raymond's counterclaims against the Evanses. The jury found in favor of

the Evanses and First National on their claims against Raymond, awarding damages of \$500,000 and \$765,000, respectively, and in favor of the Evanses on Raymond's remaining counterclaim. Raymond perfected this appeal following the district court's denial of his posttrial motions. Raymond asserts errors relating to the exclusion of certain evidence and the sufficiency of the evidence as to both liability and damages. For the reasons set forth herein, we affirm.

BACKGROUND

Parties and Dispute.

Julia was the spouse of Gale, who died on December 13, 2000. Dwight, Ronald, and Cheryl are all children of Gale.

Evans Bakery was incorporated in Nebraska in January 1969. From the inception of Evans Bakery, Gale was its president, a director, and a stockholder. From its inception and until March 15, 2000, Julia worked for and was an officer, director, and stockholder in Evans Bakery. David, Ronald, and Cheryl were all stockholders of Evans Bakery and were employees of the bakery at various times throughout its existence. Raymond served as a certified public accountant for Evans Bakery beginning in 1972.

During the 1970's, Evans Bakery continued its retail bakery operations and began selling and marketing frozen dough products, primarily to customers such as large retail grocery chains. In 1979, Gale built a plant in Vinita, Oklahoma, and relocated the base of the operations there. The bakery's sales began to decline in 1995, and Gale's health began to deteriorate in 1996.

In 1998, Gale underwent heart surgery. Also in that year, Raymond discovered that the bakery's sales had seriously declined, causing an extreme cashflow problem for Evans Bakery. In late 1998, after the bank refused to lend Evans Bakery any more funds, Raymond negotiated a \$200,000 loan for Evans Bakery from a bank in Gothenburg. In January 1999, Gale mortgaged certain property in Oklahoma to obtain another \$150,000 for Evans Bakery.

Gale began to recover his health in early 1999, and in March, he announced that he was "back in charge" of Evans Bakery. In June, Gale sent a note to Julia with regard to a contract the bakery was negotiating with Wal-Mart, setting the wholesale prices for certain products on that contract. Raymond subsequently discovered that the Evanses had given Wal-Mart a substantial discount on various items and then misrepresented those amounts to Gale. Evans Bakery was also losing money on a contract with United Grocers in Portland, Oregon, due to discounts and transportation costs. In early 2000, Raymond prepared a report for Gale which documented the annual losses sustained by Evans Bakery from 1995 through 2000.

On about February 8, 2000, Raymond was issued 200 shares in Evans Bakery, which were the first shares he owned in the company. Raymond was also elected chief executive officer of Evans Bakery.

In February 2000, at Gale's request, Raymond contacted a Nebraska attorney regarding some estate planning for Gale. Raymond and the attorney flew to Oklahoma to meet with Gale on February 24, at which time Gale executed a new will, established a revocable trust into which he transferred his shares of Evans Bakery, and signed a financial durable power of attorney document. Raymond was appointed as trustee of the trust, followed by Armagost as the second appointee in the event of Raymond's death or disqualification. The initial primary beneficiary of the trust was Gale. Raymond was not named as a beneficiary of the trust, but the trust did name

"key employees of Evans Bakery" as one of the beneficiaries upon Gale's death. Raymond and Armagost were named in the will as the first and second appointees to be personal representative of Gale's estate. The will devised all property to the trustee of the trust for administration pursuant to terms of the trust. The will was designed to "pour" those assets not already in the trust at the time of Gale's death into the trust. Raymond was named as Gale's agent in the power of attorney document. The purpose of the power of attorney document was to appoint an agent and give that agent certain powers over Gale's financial matters and assets.

On February 26, 2000, the Evanses held an illegal shareholders' meeting at which they purported to "retire" Gale and terminate Raymond's employment. At the February 26 meeting, they also issued enough additional shares of stock in Evans Bakery to give the Evans children a controlling interest in the company. A temporary restraining order was obtained against the actions taken at the February 26 meeting. On March 15, a meeting was held with the board of directors of Evans Bakery, wherein Raymond was appointed as chief executive officer of the bakery. Also at the March 15 meeting, Julia, David, Ronald, and Cheryl were terminated as employees of the bakery.

At the time of the March 2000 meeting, the net worth of Evans Bakery had fallen below \$1,000,000, causing a risk that its lender would elect to call its loan as provided in the loan agreement. On about March 27, Raymond organized Regional Investment, a Nebraska limited liability company. Raymond, Thuman, Stinehagen, Peterson, and Brosius were members of Regional Investment.

Pursuant to a March 31, 2000, convertible debenture agreement (CDA), Evans Bakery issued to Regional Investment convertible debentures in exchange for a loan of \$500,000 for the original investment. Under the CDA, Regional Investment held the option to exchange the debt of the bakery for 28 percent of the shares of the bakery's common stock. As a result of the CDA, Regional Investment had the right to acquire the stock of Evans Bakery for \$400 a share.

On about April 25, 2000, Raymond sent a letter to the existing shareholders of Evans Bakery indicating that Regional Investment was exercising its option to exchange the bakery's indebtedness for the shares of common stock. Raymond further advised the existing shareholders of their preemptive rights. Although Regional Investment held the right to convert its loan to Evans Bakery into common stock in the company, Evans Bakery did not issue the stock to Regional Investment. Instead, Evans Bakery issued the stock to Raymond, Thuman, Stinehagen, Peterson, and Brosius individually, making Thuman, Stinehagen, Peterson, and Brosius, in addition to Raymond, shareholders of Evans Bakery. By virtue of separate activity which occurred after March 2000, Armagost also became a shareholder and officer of Evans Bakery. On May 15, Raymond exercised his preemptive rights and purchased an additional 142 shares of stock in Evans Bakery, the only shareholder to exercise rights at that time.

Gale continued to be a stockholder in Evans Bakery until his death, at which time he was a resident of Oklahoma. First National was appointed special administrator of Gale's estate. First National was authorized by court order to institute litigation for the purpose of recovering assets of Gale's estate.

At the time of his death, Gale was the sole shareholder of Evans Sales Company, a Nebraska corporation that performed services exclusively for Evans Bakery. Evans Sales Company received fees for its services as a percentage of the annual sales of Evans Bakery.

Evans Sales Company was incorporated on April 1, 1973. On December 14, 2000, Brosius incorporated Midwest Management and Marketing Corporation, which took over the activities previously performed by Evans Sales Company.

On January 26, 2004, Evans Bakery filed a chapter 11 bankruptcy petition in the U.S. Bankruptcy Court. Since that time, Evans Bakery has not conducted any business activities.

Pleadings.

The Evanses filed the operative complaint in this case on July 6, 2001. The Evanses set forth claims for fraudulent misrepresentation and breach of fiduciary duty against Raymond and claims for tortious interference with a business expectancy, unjust enrichment, and civil conspiracy against all defendants except Evans Bakery. The Evanses also alleged invalid corporate acts by Raymond and Armagost in their capacity as members of the board of directors and/or corporate officers of Evans Bakery and alleged their entitlement to access to the books and records of Evans Bakery. The Evanses sought special damages of \$184,125 plus general damages in an amount to be proven at trial, as well as orders for an examination of company records, a rescission of the CDA and transfer of stock, an injunction, and the appointment of a receiver.

The defendants answered and filed counterclaims. The operative counterclaims are found in the defendants' pleading filed November 17, 2005, and include a counterclaim alleging that the Evanses breached their fiduciary duty owed to the other shareholders of Evans Bakery in various respects.

First National filed a complaint in intervention on February 19, 2004. First National jointed in the allegations set forth in the other parties' pleadings and alleged a breach of fiduciary duty by Raymond and unjust enrichment by Raymond, Armagost, Thuman, Stinehagen, Peterson, and Brosius.

Pretrial Dismissals.

On September 8, 2005, the district court entered an order regarding the dismissal of specific claims by the Evanses and the dismissal of certain counterclaims based upon a joint stipulation between the relevant parties. The court dismissed the Evanses' claims against Armagost, Regional Investment, Thuman, Stinehagen, Peterson, and Brosius with prejudice. The court also dismissed the counterclaims of Armagost, Thuman, Stinehagen, Peterson, and Brosius with prejudice. The claims of the Evanses against Raymond and Evans Bakery were not affected by the September 8 order. On August 12, the district court entered an order dismissing First National's complaint in intervention as to the Evanses and as to all defendants except for Raymond.

The district court entered an order on March 17, 2006, following the final pretrial conference. Among other things, the order reflected the dismissal of Evans Bakery as a party from the case without objection from any party. The court also dismissed, upon Raymond's motion, all of Raymond's counterclaims against the Evanses except for Raymond's counterclaim for breach of fiduciary duty.

Order in Limine.

The district court entered an order on March 10, 2006, granting the Evanses' motion in limine to exclude Raymond's expert, Fred A. Lockwood, from testifying at trial due to certain

discovery violations by Raymond. We have set forth the details of the court's examination of this issue in the analysis section below.

Jury Trial and Verdict.

A jury trial was held on the remaining parties' remaining claims on March 27 through April 1, 2006. The evidence brought forth at trial includes the evidence we have already set forth above. Because the trial record is quite lengthy, we have incorporated additional relevant evidence as necessary in the analysis section below.

The jury found in favor of both the Evanses and First National on their claims against Raymond, awarding \$500,000 to the Evanses and \$765,000 to First National. The jury returned a verdict in favor of the Evanses on Raymond's remaining counterclaim. The district court entered judgment on April 4, 2006, and its order reflects that all issues in the cause were submitted to the jury.

Posttrial Proceedings.

Raymond filed a motion for new trial on April 7, 2006, and a motion for judgment notwithstanding the verdict on April 10. Raymond filed amended motions for new trial and judgment notwithstanding the verdict on May 17. On May 23, the district court entered an order denying Raymond's motions. Raymond subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Raymond asserts that the district court erred in (1) refusing to allow Raymond's expert, Lockwood, to testify at trial; (2) refusing to admit the findings of fact and conclusions of law from the probate case filed in Oklahoma; (3) failing to grant his motions for directed verdict and new trial on the issues of liability and damages; and (4) failing to dismiss the claims against Raymond when it dismissed the other defendants.

STANDARD OF REVIEW

The determination of an appropriate sanction under Neb. Ct. R. Disc. § 6-337 rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Coral Production Corp. v. Central Resources, Inc.*, 273 Neb. 379, 730 N.W.2d 357 (2007). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Sturzenegger v. Father Flanagan's Boy's Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Id.*

In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008).

In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the

benefit of every inference which can reasonably be deduced from the evidence. *State of Florida v. Countrywide Truck Ins. Agency*, 275 Neb. 842, 749 N.W.2d 894 (2008). Concerning the overruling of a motion for a directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only when reasonable minds can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Frank v. Lockwood*, 275 Neb. 735, 749 N.W.2d 443 (2008).

On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted that is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Frank v. Lockwood, supra*. To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Id.* A motion for judgment notwithstanding the verdict may be granted when the movant's previous motion for directed verdict, made at the conclusion of all the evidence, should have been sustained. *Id.*

Decisions regarding motions for new trial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion. *Sturzenegger v. Father Flanagan's Boy's Home, supra*.

ANALYSIS

Exclusion of Lockwood's Testimony.

Raymond asserts that the district court erred in refusing to allow his expert, Lockwood, to testify at trial.

The record shows that on July 9, 2005, the Evanses served Raymond interrogatories requesting in interrogatory No. 3 information concerning any expert witness he expected to call to testify at trial, including "the witnesses' area of expertise, compensation arrangements, all other cases in which the witness has given expert testimony, including Affidavit testimony, during the past 5 year, all basis for each opinion, and each opinion of the expert." On the same day, the Evanses served requests for production of documents asking Raymond to produce all documents identified in the answers to the July 9 interrogatories. Three months later, on October 14, Raymond served answers and responses to the Evanses' July 9 discovery requests. The totality of Raymond's response to the discovery request concerning experts was to state, "Answer No. 3: Fred Lockwood, CPA." Raymond supplemented his response on November 8 by stating, "Answer No. 3: [Raymond] would add, Joan Windrum, CPA. Information concerning Ms. Windrum and Mr. Lockwood will be forthcoming."

In an order filed October 20, 2005, the district court extended the discovery deadline to November 21 and ordered Raymond to answer the interrogatories and respond to the requests for production propounded by the Evanses by November 15.

The Evanses were not satisfied with Raymond's October 14, 2005, response and sent a letter dated November 15, 2005, to Raymond's counsel asking for an answer to interrogatory No. 3 "in complete detail." On November 22, Raymond's counsel sent a memorandum to the Evanses' attorney, stating, in its entirety, "Enclosed please find a copy of Mr. Lockwood's testimony in the Oklahoma trial [Gale's probate case]."

In a February 28, 2006, motion in limine, the Evanses requested an order excluding from presentation at trial the expert testimony of Lockwood. At the hearing on the motion, the exhibits received into evidence by the district court included exhibit 379, a transcription of Lockwood's testimony in the Oklahoma trial. In the Oklahoma trial, Lockwood testified about the valuation of Evans Bakery as of March 15, 2000. Lockwood's opinion concerning the value of the bakery was originally prepared to assist Gale during divorce proceedings. At the hearing on the motion in limine, the district court also received exhibit 371, Lockwood's valuation report. The court found no evidence to show that exhibit 371 was transmitted to the Evanses' counsel or otherwise made a part of Raymond's discovery responses.

In ruling on the Evanses' motion in limine, the district court relied on *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987). In that case, the Nebraska Supreme Court stated that a purpose of the discovery process is exploration of all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute. The court observed that the discovery process provides adequate pretrial preparation as a basis for an informed cross-examiner and informative cross-examination. *Id.* Further, the discovery process enables litigants to prepare for a trial without the element of an opponent's tactical surprise. *Id.*

The *Norquay* court determined that under Neb. Ct. R. Disc. § 6-326(e)(1)(B), there is an explicit duty to seasonably supplement a response to a request for discovery directed toward identity of an expert witness expected to be called at trial, the subject matter of expected testimony from such expert, and the substance of the expert witness' expected testimony. As a consequence of § 6-326(e) and within the purview of that rule, a litigant has the right to have interrogatories answered and the duty to supplement answers previously given in response to an adversary's interrogatories, which is a continuing duty to supplement prior responses. *Id.*

The Nebraska Supreme Court stated that sanctions under Neb. Ct. R. Disc. § 6-337 exist not only to punish those whose conduct warrants a sanction but to deter those, whether a litigant or counsel, who might be inclined or tempted to frustrate the discovery process by their ignorance, neglect, indifference, arrogance, or, much worse, sharp practice adversely affecting a fair determination of a litigant's rights or liabilities. *Norquay, supra.* To avoid sanctions under § 6-337(d), an interrogated party must either answer or object to the interrogatories or move for a protective order relieving the interrogated party from answering the interrogatories. *Id.* As a sanction for noncompliance with § 6-326(b)(4)(A)(i) and the duty to supplement required by § 6-326(e)(1)(B), preclusion of an expert witness' testimony, insofar as such testimony concerns an opinion or facts known in the witness' capacity as an expert, may be an appropriate sanction under § 6-337(d). *Id.* In determining whether to exclude testimony of an expert witness called by a party who has failed to comply with a request for discovery, the *Norquay* court determined that the trial court should consider the explanation, if any, for the party's failure to respond, or respond properly, to a request for discovery concerning an expert witness; importance of the expert witness' testimony; surprise to the party seeking preclusion of the expert's testimony; needed time to prepare to meet the testimony from the expert; and the possibility of a continuance. *Id.*

In the present case, the district court applied the above factors and found that Raymond had failed to satisfy § 6-326, specifically finding that Raymond failed to supplement his previous

interrogatory answers seasonably. The court determined that the delivery of Lockwood's Oklahoma testimony to the Evanses' counsel 7 days after the deadline for such delivery did not satisfy the duty to supplement seasonably. The court found that Raymond had adduced no evidence that he took any steps to answer the discovery request made by the Evanses other than by submitting Lockwood's testimony in the Oklahoma probate case. The court determined that this mode of answer did not meet the requirements of the discovery rules. The court noted that Raymond's explanation for the failure to respond properly to the request for discovery was that his submission of the transcription of Lockwood's testimony in the Oklahoma trial was a proper response. The court found that such action did not satisfy the requirements imposed upon the parties by the Nebraska discovery rules, in that there must be an actual answer made to the discovery requests and the response must address the specific request made in the manner requested. The court found that in this case, Raymond was required to disclose the subject matter of Lockwood's intended testimony, the opinions that would be given, and the bases therefore. The court reasoned that merely substituting a copy of Lockwood's prior testimony in another trial, albeit a trial involving some of the same parties, did not properly respond to the interrogatory request. The court found this particularly true when the issues in the two trials were different. Finally, the court noted that Raymond was present when Lockwood testified in the Oklahoma case on May 3, 2002, and was aware since that time of Lockwood's opinions. The court observed that at the time of the Evanses' July 9, 2005, discovery request, Raymond had known for more than 3 years what Lockwood would testify to, the bases of his opinions, and the other information sought by the Evanses in their discovery request. The court found no explanation offered by Raymond as to why, despite his obvious knowledge of Lockwood's testimony, he did not make any disclosure of the contents of Lockwood's intended testimony until after the court-imposed deadline for supplementing his prior response.

The district court next determined that Lockwood appeared to be the only expert witness who would be called to testify on behalf of Raymond and thus that Lockwood's expert testimony was important to Raymond's case.

The district court found the possibility of a continuance to be very limited. The court observed that the case was set for trial on March 27 through 29, 2006, and had been set for those dates for several months. The court further observed that trial dates previously set in the case were postponed twice at Raymond's request.

In considering the time needed to prepare to meet the testimony of the witness, the district court found that substantial time would be required to meet Lockwood's testimony given the nature of the opinions and the factual bases underlying the conclusions. The court noted that the report Lockwood relied upon in the Oklahoma trial was more than 130 pages long and that Lockwood's trial testimony was 76 pages long. The court found it more likely than not, given the schedules described by the parties' counsels, that the time between the court's decision and trial would be insufficient for the Evanses' counsel to prepare to meet Lockwood's testimony.

Finally, the district court found the element of surprise to be present in this case. The district court found that although the identity of the witness was not a surprise to the Evanses, the extent and nature of Lockwood's testimony appeared to be a surprise. The court observed that Raymond had yet to tell the Evanses, clearly and concisely, the content of Lockwood's expected testimony in the present case. The court reasoned that while it would be possible for the Evanses'

counsel to infer, or in the absence of reason to guess, what Lockwood would testify to by studying and reading the transcription of Lockwood's Oklahoma testimony and his evaluation report, the Evanses were not required to engage in such activity. The court found, instead, that the Evanses had the right to rely upon the discovery process to prepare for trial.

After consideration of all of the relevant factors and the evidence adduced by the parties at the hearing on the motion in limine, the district court granted the motion, thereby precluding Lockwood from testifying as an expert witness at trial.

At trial, Raymond attempted to have Lockwood testify as a witness to impeach the methodology of the Evanses' expert witness in his valuation of Evans Bakery. The district court sustained the Evanses' and First National's objections to Lockwood's testimony, which included an objection based on the court's prior ruling on the motion in limine. Raymond then made an offer of proof, stating that Lockwood would testify that the methodology used by the Evanses' expert to appraise Evans Bakery was inappropriate.

We find no abuse of discretion in the district court's exclusion of Lockwood's testimony at trial. Such a sanction for the discovery violation was within the court's discretion, and although Lockwood's testimony was clearly of some importance to Raymond's case, Raymond's counsel conducted an extensive and thorough cross-examination of the Evanses' expert and Raymond himself testified at length about the issues raised at trial. While it is true that the Evanses would have had some knowledge of Lockwood's testimony in the Oklahoma trial, given their involvement in the probate case, the record shows that Lockwood's report in that case was originally prepared to assist Gale during divorce proceedings. Given the differing issues between the two trials, we cannot say that the district court abused its discretion with respect to the discovery sanction imposed.

Raymond argues that he should have been allowed to present rebuttal testimony from Lockwood in order to impeach the testimony of the Evanses' expert. The district court's final pretrial order did not preclude the use of any witness for impeachment purposes, but it found that impeachment purposes did not include the presentation of evidence which merely contradicted other evidence. "With respect to rebuttal, contradiction is directed to the accuracy of testimony and supplies additional factual evidence, while impeachment is directed to discrediting a witness's credibility and ordinarily does not furnish factual evidence." 75 Am. Jur. 2d *Trial* § 283 (2007). We find no abuse of discretion in the district court's determination that Raymond, contrary to the court's ruling in the final pretrial order, was attempting through Lockwood to supply additional contradictory factual evidence rather than simply to discredit the Evanses' expert.

Exclusion of Findings From Oklahoma Case.

Raymond asserts that the district court erred in refusing to admit the findings of fact and conclusions of law from the probate case filed in Oklahoma. Exhibit 244, the findings of fact and conclusions of law from the Oklahoma case, is 27 pages in length. The exhibit, filed on February 11, 2003, in the Oklahoma case, shows that the court in that case considered issues including whether undue influence was exerted on Gale, whether Gale lacked testamentary capacity at the time he executed the will and trust, whether certain property should be returned to the estate, whether the title to certain real estate should be quieted, and whether Raymond should be

removed as trustee for breach of his duties. The Oklahoma court made various findings of fact, including findings about the creation and execution of the will and trust, the relationship between Gale and Raymond, Gale's state of health prior to executing the will and trust, Raymond's activities upon becoming chief executive officer of Evans Bakery, the formation of Regional Investment and Midwest Management, and the declining sales of Evans Bakery. There is little of this factual information that was not more than adequately set forth during the 6-day trial in the present case. The Oklahoma court did conclude that Raymond did not exert any undue influence over Gale with regard to the will and trust and that the presumption that Gale had testamentary intent on the date of the execution of the will and trust was not rebutted. Although these conclusions of law were not admitted into evidence in the present case, the underlying facts from which such conclusions could be drawn were brought forth in the evidence. The record in this case does make clear, however, that the Oklahoma case was resolved favorably to Raymond. The district court sustained the Evanses' and First National's objections to exhibit 244 on the basis of "402, 403, and 802."

Given the issues in the present case, the conclusion by the Oklahoma court that Raymond did not unduly influence Gale in the execution of the will and trust has some relevance. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Karel v. Nebraska Health Systems*, 274 Neb. 175, 738 N.W.2d 831 (2007). However, as noted above, the greater part of the findings of fact contained within exhibit 244 were brought forth in the present case and because of the specific nature of the probate issues raised in the Oklahoma case, exhibit 244 contained certain findings of fact and conclusions of law that simply had no bearing on the matters at issue in Nebraska. Under Neb. Rev. Stat. § 27-403 (Reissue 1995), relevant evidence may be excluded if its probative value is substantially outweighed by needless presentation of cumulative evidence. *Curran v. Buser*, 271 Neb. 332, 711 N.W.2d 562 (2006). Under § 27-403, a trial judge has broad discretion in determining the admissibility of evidence. *Curran, supra*. We find no abuse of the district court's discretion in its decision to exclude exhibit 244 from evidence. Given the length of trial in this case, the inclusion of exhibit 244 in the mass of information presented for the jury's consideration would have been needlessly cumulative.

Failure to Direct Verdict.

Raymond asserts that the district court erred in failing to grant his motions for directed verdict and new trial on the issues of liability and damages based upon the sufficiency of the evidence. As previously noted, the trial in this case lasted for 6 days. The amount of evidence submitted for the jury's consideration was extensive--the trial testimony covers more than 1,000 pages of the bill of exceptions and the exhibits admitted at trial were also voluminous. For the sake of brevity, we have not detailed the evidence as it specifically relates to the theories of recovery raised in the Evanses' operative complaint or First National's complaint in intervention; nor have we detailed the specific evidence as to damages testified to by the Evanses' expert witness.

Raymond's assignment of error is framed primarily in terms of the district court's failure to grant his motion for directed verdict. Raymond moved for a directed verdict after the Evanses

and First National rested. The court denied Raymond's motion for directed verdict at that point, and Raymond proceeded to present evidence. We find no evidence in the record that Raymond renewed his motion for directed verdict at the close of all evidence.

A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence, waives any error in the ruling on the motion. *Bradley T. & Donna T. v. Central Catholic High Sch.*, 264 Neb. 951, 653 N.W.2d 813 (2002). A motion for judgment notwithstanding the verdict may not properly be sustained in the absence of a motion for directed verdict made at the close of all the evidence. *Spulak v. Tower Ins. Co.*, 251 Neb. 784, 559 N.W.2d 197 (1997); *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994). See Neb. Rev. Stat. § 25-1315.02 (Cum. Supp. 2006). To the extent that Raymond's assignment of error relates to his motion for directed verdict made at the close of the Evanses' and First National's evidence and to his posttrial motion for judgment notwithstanding the verdict, he has waived it. To the extent his assignment of error relates to the district court's failure to grant his motion for new trial, we find no abuse of discretion.

Failure to Dismiss Raymond.

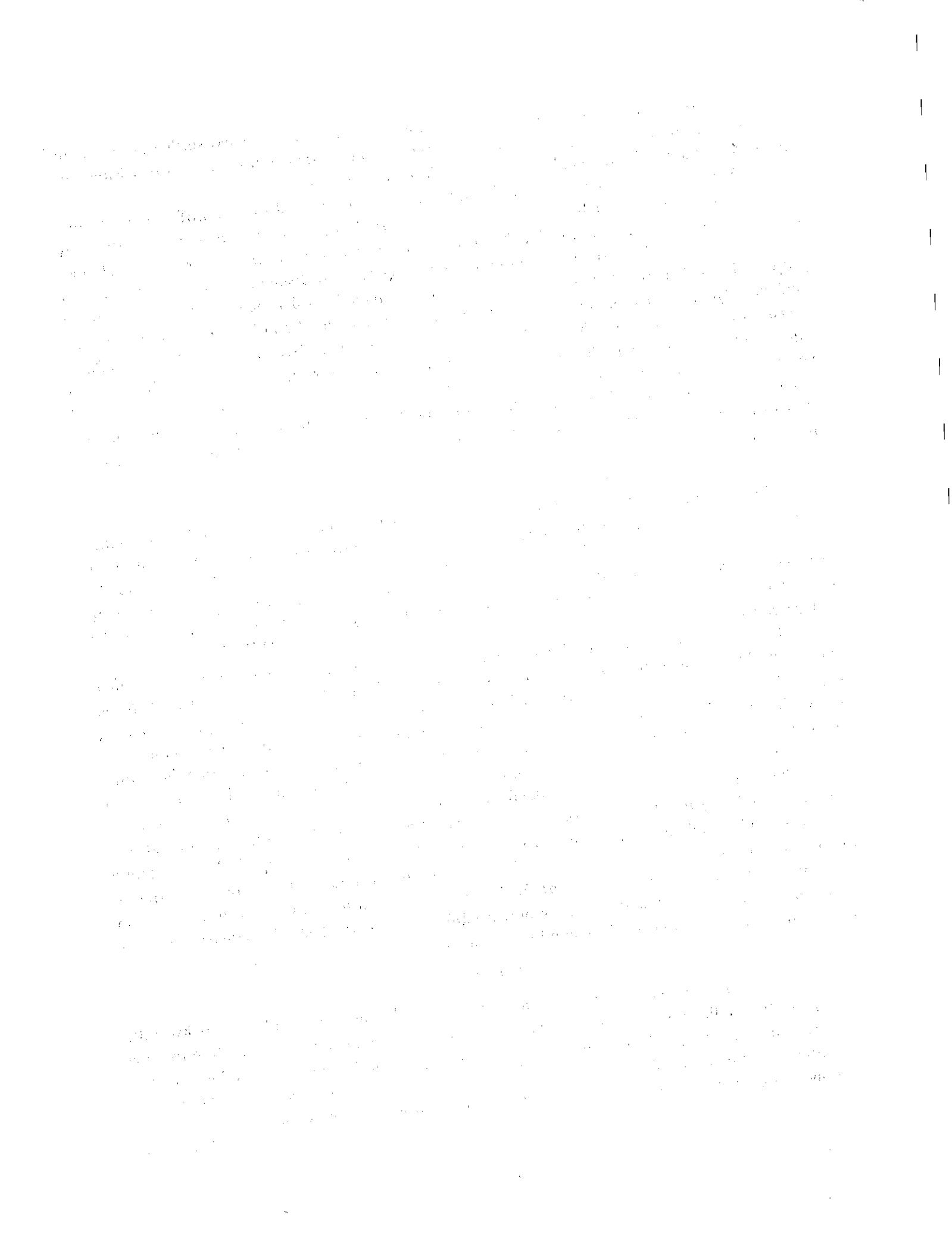
Finally, Raymond asserts that the district court erred in failing to dismiss the claims against him when it dismissed the other defendants. The record shows that the dismissal of the other defendants was accomplished by means of a stipulation between the Evanses and the affected defendants and by means of a dismissal of those defendants filed by First National. Raymond was specifically excluded from the dismissals of the other defendants entered by the district court.

Raymond argues that he should have been dismissed at the same time as the other defendants by virtue of his status as an agent of Regional Investment, relying on *Mallette v. Taylor & Martin, Inc.*, 225 Neb. 385, 406 N.W.2d 107 (1987) (in absence of specific statute, valid release of either of parties to principal-agent relationship releases other). There is nothing in the record to show that this argument was presented to the district court at the time the claims against the other defendants were dismissed. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *State ex rel. Stenberg v. Consumer's Choice Foods*, 276 Neb. 481, 755 N.W.2d 583 (2008). Regardless, Raymond was sued in his individual capacity, so any principle-agent theory would be inapplicable. Raymond could have negotiated a settlement with the Evanses and/or First National prior to trial or presented arguments to the district court for his dismissal from the case at the time the other defendants were dismissed, and he cannot now establish error on the part of the district court by virtue of his not having done so. Raymond's assignment of error is without merit.

CONCLUSION

The district court did not abuse its discretion in excluding from evidence Lockwood's testimony or the findings of the Oklahoma court or in failing to grant Raymond's motion for new trial. Raymond has waived his assignment of error relating to the district court's failure to grant his motions for directed verdict and judgment notwithstanding the verdict, and his assignment of error concerning the court's failure to dismiss him from the case is without merit.

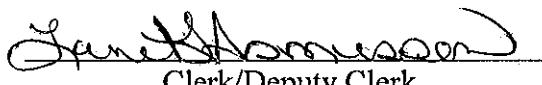
AFFIRMED.



THE STATE OF NEBRASKA, ss.

I hereby certify that I have compared the foregoing copy of an opinion filed by this Court with the original on file in my office and that the same is a correct copy of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand
and caused to be affixed the Seal of this Court, in the City of
Lincoln.

A handwritten signature in black ink, appearing to read "Janet L. Thompson".

Clerk/Deputy Clerk

COURT OF APPEALS NO. A-06-0643

TRIAL TRIBUNAL NO. CI01-172

DATE OPINION FILED October 28, 2008

DATE OPINION CERTIFIED October 28, 2008

