**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-1004**

Thomas A. Bronczyk, as assignee of Anthony J. Bronczyk, Sr.,
Appellant,

vs.

Anthony J. Bronczyk, Jr., et al.,
Respondents,

Thomas A. Bronczyk,
Respondent.

**Filed March 23, 2010**
**Affirmed**
**Larkin, Judge**

Beltrami County District Court
File No. 04-CV-08-5750

Alan B. Fish, Rita E. Fish-Whitlock, Alan B. Fish, P.A., Roseau, Minnesota (for appellant)

James B. Wallace, Park Rapids, Minnesota (for respondents Anthony J. Bronczyk, Jr., et al.)

Thomas A. Bronczyk, Kelliher, Minnesota (pro se respondent)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

## U N P U B L I S H E D  O P I N I O N

**LARKIN**, Judge

Appellant challenges the district court's award of summary judgment for respondents. Because appellant failed to present admissible evidence raising a genuine issue of material fact, we affirm.

## FACTS

In October 2006, Anthony J. Bronczyk, Sr. (decedent) commenced a lawsuit in Beltrami County District Court seeking a judgment determining that respondents, six of decedent's children, had no right, title, or interest in certain real estate and rescinding a quit claim deed that purportedly conveyed the real estate from decedent and his wife to respondents. The complaint states:

> In June of 1995, [respondent] Katherine J. Bronczyk, one of [decedent's] daughters, caused to be prepared a Quit Claim Deed from [decedent] to [respondents] as grantees . . . and on June 28, 1995, fraudulently and intentionally caused signatures to be placed thereon and the instrument notarized as though it were the signatures of [decedent] and [his] then wife, Katherine R. Bronczyk, who is now deceased, without the presence of either [decedent] or [his] wife at the purported time of acknowledgement of the deed, without consent and with intent to defraud [decedent].

The complaint further alleged that decedent never signed the deed, and that if he did, such signature could only have been the result of his daughter, respondent Katherine J. Bronczyk, taking advantage of decedent's vulnerability and "fraudulently inducing [his] signature by falsely and fraudulently representing to [decedent] that the deed was for some other purpose." The complaint asserted that decedent did not become aware of

the deed or the alleged fraud until October 2001. Decedent passed away in either July or August 2007[1] while the litigation was pending. Prior to his death, decedent assigned his interest in this lawsuit to his son, appellant Thomas A. Bronczyk.

Respondents moved for summary judgment, arguing that there was no genuine issue of material fact regarding whether decedent's signature had been forged or fraudulently induced. Respondents also argued that the suit was barred by the statute of limitations. The district court awarded summary judgment to respondents, and this appeal follows.

**D E C I S I O N**

"A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "On an appeal from summary judgment, [an appellate court] ask[s] two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "[An appellate court] review[s] de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). An award of summary judgment will be affirmed if it can be sustained on any ground.

[1] The parties' briefs state two different dates of death: July 9, 2007 and August 19, 2007. The record does not conclusively establish decedent's date of death.

*Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

"On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio*, 504 N.W.2d at 761. "A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). "[T]he party resisting summary judgment must do more than rest on mere averments." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). And evidence offered to defeat a motion for summary judgment must be admissible at trial. *Hopkins v. Empire Fire & Marine Ins. Co.*, 474 N.W.2d 209, 212 (Minn. App. 1991).

A material fact is one that will affect the outcome or result of a case. *Zappa v. Fahey*, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (1976). A genuine issue of material fact "must be established by substantial evidence." *Murphy v. Country House, Inc.*, 307 Minn. 344, 351, 240 N.W.2d 507, 512 (1976) (quotation omitted). A factual dispute does not exist when

> the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.

*DLH, Inc.*, 566 N.W.2d at 71.

Appellant claims that summary judgment was inappropriate, arguing that genuine issues of material fact exist regarding whether decedent signed the deed, and if so,

whether he was fraudulently induced to do so. We begin our review with appellant's forgery claim. Appellant relied heavily on the affidavits of decedent and a purported handwriting expert to establish the alleged forgery. The district court concluded that decedent's affidavit was inadmissible hearsay and that the purported handwriting expert's affidavit lacked probative value. We address each affidavit in turn.

*Decedent's Affidavit*

In his affidavit, decedent denied signing the deed and claimed that he did not learn of the deed's existence until October 2001. Decedent executed his affidavit in October 2006, nearly one year before his death. The district court concluded that decedent's affidavit was inadmissible hearsay and therefore did not consider it in determining whether there was a genuine issue of material fact. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c) (quotation marks omitted). "Hearsay is not admissible except as provided by [the Minnesota Rules of Evidence] or by other rules prescribed by the Supreme Court or by the Legislature." Minn. R. Evid. 802.

The district court considered and rejected appellant's argument that decedent's affidavit is admissible as former testimony under Minn. R. Evid. 804(b)(1) and as a statement under belief of impending death under Minn. R. Evid. 804(b)(2). The former-testimony exception to the hearsay rule provides that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness.

> In a civil proceeding testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered or a party with substantially the same interest or motive with respect to the outcome of the litigation, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Minn. R. Evid. 804(b)(1). Because the statement in decedent's affidavit is not testimony that was given at a hearing or deposition and respondents were not afforded an opportunity to develop the statement by direct, cross, or redirect examination, the district court correctly determined that the affidavit is not former testimony under Minn. R. Evid. 804(b)(1).

The statement-under-belief-of-impending-death exception provides that a statement made by a declarant will not be excluded under the hearsay rule if it is made "while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." Minn. R. Evid. 804(b)(2). Neither requirement is satisfied here. Decedent signed the affidavit approximately one year before his death, and there is no evidence in the record that he believed his death was imminent when he signed the affidavit. Moreover, the affidavit does not "concern[] the cause or circumstances of what [decedent] believed to be impending death." *Id*. The district court therefore correctly determined that the affidavit does not fall within the hearsay exception under Minn. R. Evid. 804(b)(2). Because decedent's affidavit was inadmissible hearsay, the district court did not err by refusing to consider it when determining whether there was a genuine issue of material fact. *See*

*Hopkins*, 474 N.W.2d at 212 (stating evidence offered to defeat a summary judgment motion must be admissible at trial).

Appellant complains that the district court limited its analysis to decedent's affidavit and did not consider evidence of conversations in which decedent denied signing the deed. Appellant asserts that such evidence is admissible as a result of the repeal of the "Dead Man Statute." Under the "Dead Man Statute," an interested person was incompetent to testify regarding conversations with a deceased person. Minn. Stat. § 595.04 (1986), *repealed by* 1987 Minn. Laws ch. 346, § 18, at 2222. The statute was superseded by Minn. R. Evid. 617. Minn. R. Evid. 617 1989 comm. cmt. The rule provides that "[a] witness is not precluded from giving evidence of or concerning any conversations with, or admissions of a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof." Minn. R. Evid. 617. But rule 617 does not *require* the admission of decedent's conversations with others regarding the deed. *See Manderfeld v. Krovitz*, 539 N.W.2d 802, 809 (Minn. App. 1995) (stating that the rule "does not . . . supersede all other rules of evidence prohibiting admission of such testimony on other grounds"), *review denied* (Minn. Jan. 25, 1996). Decedent's statements to others, like decedent's affidavit, are inadmissible hearsay, and appellant offers no argument regarding application of an exception that would justify their admission.

*Handwriting Expert's Affidavit*

Appellant also relied heavily on the affidavit of R.N., a purported handwriting expert and document examiner. According to R.N.'s affidavit, he compared decedent's

alleged signature on the deed to multiple known signatures of decedent. R.N.'s affidavit suggests that the signature on the deed was not made by decedent because it contained a cursive middle initial and samples of decedent's known signature either did not include a middle initial or included a printed middle initial. R.N. also noted that two different pens were used to create the signatures of decedent and his wife on the deed. The district court rejected R.N.'s opinion that decedent's signature on the deed was not made by decedent. The district court noted that "the evidence shows unequivocally that [decedent] routinely included his middle initial on legal documents"[2] and that R.N. failed to explain why the fact that two different pens were used "has any significance whatsoever." Thus, the district court concluded that R.N.'s affidavit had "no probative value."

"The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist." *DLH, Inc.*, 566 N.W.2d at 70. The district court must not weigh the evidence on a motion for summary judgment. *Id.* "However, when determining whether a genuine issue of material fact for trial exists, the court is not required to ignore its conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented." *Id.* "When qualified expert opinion with adequate foundation is laid on an element of a claim, a genuine issue

[2] In support of their summary judgment motion, respondents submitted samples of numerous known signatures of decedent that contained a cursive middle initial, including deeds. At the summary judgment hearing, respondent also directed the district court's attention to decedent's signature on the complaint verification in this case, which contains a cursive middle initial.

of material fact exists." *Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 266 (Minn. 1992).

Appellant offered R.N.'s affidavit as expert testimony. The admission of expert testimony is governed by rule 702 of the Minnesota Rules of Evidence, which states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability.

Minn. R. Evid. 702. It is the district court's responsibility to scrutinize evidence offered under rule 702 and exclude it when the testimony is irrelevant, confusing, or otherwise unhelpful. *State v. Nystrom*, 596 N.W.2d 256, 259 (Minn. 1999). A determination regarding the admissibility of expert testimony rests within the sound discretion of the district court, and we will not reverse the determination unless there is clear error. *Id.*

The district court cited *DLH, Inc.* in support of its conclusion that R.N.'s affidavit had "no probative value." The district court also noted that appellant failed to present evidence establishing R.N.'s expertise as a document examiner.[3] Finally, the district court cited *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000), for the principle that expert testimony must be relevant and helpful to the trier of fact to be admissible and

[3] R.N.'s affidavit indicates that his curriculum vitae and qualifications were attached to the affidavit. The district court's memorandum states that they were not. We have reviewed the district court file and likewise do not find R.N.'s curriculum vitae or qualifications attached to his affidavit or otherwise filed in the district court. Accordingly, we do not consider R.N.'s qualifications, which were included in the appendix to appellant's reply brief. *See* Minn. R. Civ. App. P. 110.01 ("The papers filed in the [district] court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases.").

*Larson v. Anderson, Taunton & Walsch, Inc.*, 379 N.W.2d 615, 620 (Minn. App. 1985), *review denied* (Minn. Mar. 14, 1986), for the proposition that expert testimony "must be based on facts sufficient to form an adequate foundation for an opinion."

The legal authority relied on by the district court concerns the admissibility of expert testimony. *Goeb* states: "The proponent of scientific evidence has the burden to establish the proper foundation for the admissibility of the test by showing that the methodology used is reliable and in the particular instance produced reliable results." 615 N.W.2d at 816. In *Goeb*, the supreme court affirmed the district court's determination that the proffered expert testimony lacked foundational reliability and was inadmissible because the expert's methodology was unreliable. *Id.* at 814-16. *Larson* also involved determinations regarding the admissibility of expert testimony and concerned the adequacy of the proffered expert qualifications and the foundational reliability of the proffered expert opinions. 379 N.W.2d at 620-21. Similarly, the district court's reasons for rejecting R.N.'s opinion concerned foundational reliability. For example, the district court reasoned that R.N.'s opinion was based on samples of decedent's known signature that did not contain cursive middle initials, even though there were samples of decedent's known signature that contained cursive middle initials.

Given the district court's obligation to determine whether expert testimony is admissible under rule 702, the legal authority cited by the district court, and the district court's stated reasons for rejecting R.N.'s opinion, we view the district court's determination that R.N.'s affidavit had no probative value as a determination that the proffered expert opinion was inadmissible under rule 702. This determination was within

the district court's discretion. And the district court's determination of questions of fact preliminary to this admissibility determination was appropriate. *See* Minn. R. Evid. 104(a) (providing that preliminary questions concerning the admissibility of evidence and the qualification of a person to be a witness shall be determined by the district court). Thus, the district court did not err in its determination that the affidavit of R.N. was not sufficiently probative to establish a genuine issue of material fact regarding the alleged forgery.

We next address appellant's claim that if decedent signed the deed, his signature was fraudulently induced by respondent Katherine J. Bronczyk. This claim is primarily based on the contention that the deed was prepared at the direction of respondent Katherine J. Bronczyk. As support for this contention, appellant points to a letter from decedent's attorney that states that the deed was prepared as "discussed with Katherine." Appellant asserts that this statement refers to respondent Katherine J. Bronczyk. This assertion is not supported by record evidence. An affidavit of the attorney who drafted the letter states that the "Katherine" referred to in the letter was Katherine R. Bronczyk, decedent's late wife, and not respondent Katherine J. Bronczyk, decedent's daughter.

Appellant's claim that respondent Katherine J. Bronczyk fraudulently induced decedent's signature on the deed is based on speculation and mere averments. Appellant offers no evidence to support this claim. The district court characterized appellant's approach as "specious conspiracy theory." We agree. Moreover, appellant's assertion that decedent was incapable of making a rational decision when he signed the deed is speculative and is not supported by record evidence.

Because appellant failed to present admissible evidence suggesting that decedent's signature on the deed was forged or fraudulently induced, the district court properly granted summary judgment for respondents. *See Lubbers*, 539 N.W.2d at 401 (stating that summary judgment is mandatory for the defendant when "the record reflects a complete lack of proof on an essential element of the plaintiff's claim"). Because we affirm on this ground, we do not address appellant's claim that the district court erred by dismissing the case as untimely under the statute of limitations.

Appellant raises several additional issues for the first time on appeal. Appellant's complaint challenged the validity of the deed based on two theories: forgery and fraud. Appellant's prayer for relief requested judgment "rescinding the said deed as a forgery and fraudulent conveyance," and the district court's summary judgment award was based on the two pleaded theories. Appellant now argues that the district court failed to consider what decedent intended when he "purportedly" executed the deed, whether delivery of the deed was intended or completed, and whether respondents accepted delivery of the deed. The district court did not consider these theories because they were not raised. Generally, a reviewing court must consider "only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). While these theories relate to a general challenge to the validity of the deed, they were not raised in appellant's complaint or considered by the district court, and they are not properly before this court. *See id.; Antonson v. Ekvall*, 289 Minn. 536, 539, 186 N.W.2d 187, 189 (1971) (upholding district court's denial of new trial motion based on legal theory that had not

been raised at an earlier stage of the action; although pleadings were general enough to have possibly made a claim based on ejectment theory, the complaint contained no language that would alert anyone to a claim based on ejectment theory, and plaintiff did not present ejectment theory to the district court during trial).

Appellant also argues that the district court erred by not allowing appellant to amend his claim to include a cause of action for settlement. But the record does not indicate that appellant sought, or the district court denied, leave to amend. Thus, this issue is waived on appeal. *Thiele*, 425 N.W.2d at 582. Lastly, appellant sets forth a promissory-estoppel claim in his reply brief. Because this issue is raised for the first time on appeal, we do not consider it. *See id.*; *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990) (commenting that issues not raised or argued in appellant's brief cannot be revived in a reply brief), *review denied* (Minn. Sept. 28, 1990).

**Affirmed.**

Dated:

Judge Michelle A. Larkin