

IN THE SUPREME COURT OF THE STATE OF NEVADA

RESOURCE HEALTHCARE, LLC, A  
NEVADA LIMITED LIABILITY  
COMPANY; AND STEVE CARLTON,  
AN INDIVIDUAL,  
Appellants,

vs.

SUSAN KILBURN, AN INDIVIDUAL,  
Respondent.

No. 42417

**FILED**

MAY 17 2006

BY *Anette A. Bloom*  
ANETTE A. BLOOM  
CLERK OF SUPREME COURT  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This order addresses an appeal of both a district court judgment upon a jury verdict and a post-judgment order awarding attorney fees and costs in a contract action. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

In its verdict, the jury determined that respondent Susan Kilburn was not liable to the appellants for a guaranty that her ex-husband, Richard Kilburn, had allegedly made her sign through coercion and undue influence. We conclude that the district court erred in instructing the jury. Therefore, we reverse the district court's judgment and remand for a new trial consistent with this order, and vacate the district court's order awarding attorney fees and costs.

Jury instructions

Each party has the right "to have the jury instructed on the theories of its case which are supported by the evidence."<sup>1</sup> However, we

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<sup>1</sup>Colorado Environments v. Valley Grading, 105 Nev. 464, 467, 779 P.2d 80, 81 (1989).

agree with the appellants that the district court erred in instructing the jury and that the errors are prejudicial.

Susan Kilburn raised the affirmative defense to the complaint of the appellants that she lacked the mental capacity to enter into an enforceable contract. As to that issue, the district court approved Jury Instruction No. 27, which stated that “[t]he test of contractual capacity is whether a person is able to understand the nature of his action and apprehend its consequences.”

Although Instruction No. 27 substantially complies with our case law, the record does not reflect that the court instructed the jury that the respondent had the burden of proof to establish the affirmative defense of lack of capacity by a preponderance of the evidence.<sup>2</sup> Instruction No. 16 only defines burden of proof and preponderance of the evidence. On remand, the correct jury instruction in place of Instruction No. 27 is the following: “Susan Kilburn must prove lack of capacity to contract by a preponderance of the evidence. The capacity to contract involves a person’s inability to understand the terms of an agreement, not his actual understanding. Capacity relates to the status of the person rather to the circumstances surrounding the transaction.”<sup>3</sup>

Ms. Kilburn testified that she had undergone drug addiction therapy and did not understand the guaranty when she signed it. However, rebuttal witness Denette Corrales testified that she handed Susan the entire guarantee document and saw Susan sign the signature page. Rebuttal witness Sybil Brown testified that Susan did not appear

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<sup>2</sup>See Gault v. Grose, 39 Nev. 274, 282, 155 P. 1098, 1100 (1916).

<sup>3</sup>General Motors v. Jackson, 111 Nev. 1026, 900 P.2d 345 (1995).

impaired during that time and “seem[ed] like she could make decisions.” We therefore conclude that the incomplete instruction on capacity was prejudicially erroneous, warranting a new trial upon the issue of Susan Kilburn’s affirmative defense of lack of mental capacity.

The district court instructed the jury on Ms. Kilburn’s defense that she had signed the guaranty under undue influence. Jury Instruction No. 26 reads as follows: “A signature will be presumed secured by undue influence where the alleged signor is lacking in such mental vigor as to enable him to protect himself against imposition even though his mental weakness is not such as to justify his being regarded as totally incapacitated.” Instruction No. 26 incorrectly stated the law. Although the district court based Instruction No. 26 on our opinion in Ross v. Giacomo,<sup>4</sup> that opinion does not apply to the facts of this case. It applies only to using undue influence to secure testamentary gifts, not, as in this case, to a claim of undue influence as a defense to enforcing a signed contract. This incorrect statement of the law and risk of jury confusion prejudiced the appellants.

Finally, the district court erred in giving Instruction No. 30 as to coercion, duress, and undue influence. This instruction is appropriate only if the appellants had perpetrated the alleged fraud or had knowledge of Mr. Kilburn’s fraudulent or coercive conduct.<sup>5</sup> The parties do not


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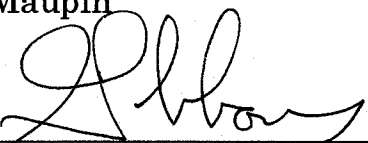
<sup>4</sup>97 Nev. 550, 556, 635 P.2d 298, 302 (1981).

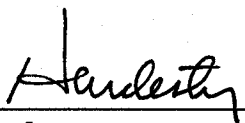
<sup>5</sup>See Bill Stremmel Motors v. IDS Leasing Corp., 89 Nev. 414, 417, 514 P.2d 654, 656 (1973).

dispute that appellants did not engage in such conduct. This erroneous instruction risked confusing the jury and was prejudicial.<sup>6</sup>

Accordingly, we ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order. Further, we vacate the order of the district court awarding attorney fees and costs.<sup>7</sup>

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. Jessie Elizabeth Walsh, District Judge  
McDonald Carano Wilson LLP/Las Vegas  
Harris Merritt Chapman, Ltd.  
Clark County Clerk

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<sup>6</sup>Instruction No. 29 is the correct statement of the law.

<sup>7</sup>On remand, the district court shall release and exonerate the preliminary injunction bond filed by the appellants on April 5, 2002.