No. A-16-18

IN THE NEBRASKA COURT OF APPEALS

GREG STEWART, STILLMAN STEWART, LISA BLAKEY, JANET RODRIGUEZ, TODD VESELY, and JOEL BUSCH,

Appellees.

v.

DAVE HEINEMAN, KERRY WINTERER, and THOMAS PRISTOW,

Appellants.

Appeal from the District Court of Lancaster County
John A. Colborn, District Judge

Brief of Appellants, State of Nebraska officials Heineman, Winterer, and Pristow

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Jurisdiction

On August 5, 2015, the district court entered an order granting summary judgment in favor of the Appellees. (T61-71). The Appellants timely filed a motion to alter or amend the judgment on Monday, August 17, 2015. (T73-77). Neb. Rev. Stat. § 25-1329 provides that, "A motion to alter or amend a judgment shall be filed no later than ten days after the entry of the judgment." Because the deadline for filing the motion to amend was on a Saturday when the district court clerk's office was closed, the Monday filing of the motion to alter or amend was timely filed per Neb. Rev. Stat. § 25-2221. The thirty day time period for filing an appeal from a final order "shall be terminated . . . (b) by a timely motion to alter or amend a judgment under section 25-1329." See, Neb. Rev. Stat. § 25-1912.

On August 18, 2015, the district court entered an order allowing the Appellees to file a motion for attorney fees within 30 days after the district court's decision on the Appellants' motion to alter or amend the judgment. (ST1-3). The district court next sustained the Appellants' motion to alter or amend and entered an amended order granting summary judgment in favor of the Appellees on September 16, 2015. (T78-91). Within 30 days of the amended summary judgment order, the Appellees filed a motion for attorney fees and expenses on October 16, 2015, which was timely filed per the above-mentioned order of August 18, 2015. (T93, ST1-3) On December 15, 2015, the district court entered an order awarding attorney fees and expenses to the Appellees' attorneys, at which time the district court's amended summary judgment order became a final, appealable order (T97).

Since the district court had specifically reserved ruling on attorney fees until after entry of the amended order, the appeal from the amended summary judgment order was timely. *Murray v. Stine*, 291 Neb. 125, 129, 864 N.W.2d 386, 389 (2015), stated that, "a party seeking statutorily authorized attorney fees, for services rendered in a trial court, must make a request for such fees prior to a judgment in the cause." Where the district court, as it did here, ordered that it would reserve ruling on attorney fees until after judgment and specifically ordered, prior to the judgment, the time period by which a motion for attorney fees needed to be filed, this Court has determined that the judgment was not a final and appealable order. (ST1-3); *see Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000).

If Appellants had appealed prior to a ruling on the pending request for fees, the appeal would have been premature. "[A] judgment does not become final and appealable until the trial court has ruled upon a pending statutory request for attorney fees." *Kilgore v. Nebraska Dep't of Health & Human Servs.*, 277 Neb. 456, 462, 763 N.W.2d 77, 82 (2009). This Court has "declined to exercise jurisdiction when an appeal is filed before a scheduled hearing or when the trial court has reserved ruling on attorney fees." *Murray,* 291 Neb. at 129, 864 N.W.2d at 389. Accordingly, since the district court reserved ruling on attorney fees, the appeal from the amended order was timely because it was filed within 30 days of the district court's order on attorney fees.

The Appellants timely appealed from the September 16, 2015 amended summary judgment order and the December 15, 2015 attorney fee order by filing a notice of appeal

and depositing the docket fee on January 6, 2016, which was within 30 days of the district court's order on attorney fees.

Statement of the Case

A. Nature of the Case

The Appellees filed a complaint seeking an injunction (not damages) under 42 U.S.C. § 1983 enjoining the Appellants Governor of Nebraska, Chief Executive Officer of the Nebraska Department of Health and Human Services ("DHHS"), and Director of the Nebraska Division of Children and Family Services of DHHS (all in their official capacities) from enforcing an alleged state policy, as set forth in a 1995 administrative memo issued by a predecessor agency that appeared on the DHHS website, and also enjoining DHHS from restricting gay and lesbian individuals and couples "from being considered or selected as foster or adoptive parents now or at any time in the future." (T27; T1-28)

The Appellees' basis for an injunction was that the 1995 memo violated two of the Appellees' constitutional rights, namely the constitutional right to due process and the constitutional right to equal protection. Because of the two alleged constitutional violations, the Appellees requested the district court to declare the 1995 memo void and unenforceable and that DHHS should be enjoined "from enforcing" the 1995 memo. (T27)

B. Issues before the District Court

The Appellants (hereafter collectively described as "the State") filed an Answer that can be characterized as a denial of the Appellees' Complaint. The State's Answer also alleged that the Appellees lacked standing because none of them suffered any injury, none

of them had ever actually applied with DHHS to obtain a license as foster parents, and thus, none of them had been denied a foster parent license by reason of their sexual orientation. (T47-52)

The Appellees filed a motion for summary judgment on the basis that "the pleadings on file [i.e., the Complaint]" and evidence showed that there was no genuine issue of material facts and that the Appellees were entitled to judgment as a matter of law. (T57)

C. How the issues were decided by the district court

During the hearing on the Appellees' motion for summary judgment, a plethora of evidence consisting of 60 exhibits were received at the hearing on the motion for summary judgment, including numerous depositions and affidavits. (16:17-22; 18:1-8) The State specifically objected on the grounds of hearsay to nine exhibits offered by the Appellees, including newspaper articles, letters, emails, and other documents, all of which objections were overruled by the district court. (16:4-12; 3rdST)

Among the summary judgment evidence were the depositions of the named defendants Kerry Winterer and Thomas Pristow, the two top DHHS agency administrators for DHHS's policies and placements for foster children and foster parent licensing. Both Winterer and Pristow testified that DHHS policy was that sexual orientation of a foster parent applicant was not a grounds for denial of a foster parent license and that DHHS did not deny placement of foster children because of the sexual orientation of a foster parent. Both Winterer and Pristow denied that the 1995 administrative memo was agency policy. The 1995 administrative memo was removed from the DHHS website in February 2015, per affidavit evidence confirming its removal.

The district court entered two orders sustaining the Appellees' motion for summary judgment and granting injunctive relief. The first order was amended by the district court's second order after the State filed a three-page motion to alter or amend the first order, which motion cited 13 legal errors committed by the district court in its first order. (Motion:T73-75)

The district court's 14-page second or amended order, which is the subject of this appeal, found and ordered as follows:

- The district court amended the first order to "clarify the relief granted" because the first order "may be read more broadly than the court intended." (T79)
- "Plaintiffs present a facial constitutional challenge . . ." (T83)
- The district court found that, "The current policy of DHHS as set forth in the deposition of Pristow [named defendant head of DHHS Children and Family Services Division, which actually places children with foster parents] allows gay individuals, gay couples, and 'unrelated, unmarried adults residing together' to obtain foster care licenses and to adopt state wards. *Thus, DHHS's current policy reflects its interpretation and application of the 'best interests of the child' standard in its regulations. This current stated policy of DHHS is wholly inconsistent with Memo #1-95* [1995 agency memo that was the subject of the complaint]." (T86) (Emphasis added.)
- The 1995 agency memo was never "formally adopted into any regulation as required by the APA [Administrative Procedure Act]." (T87)

- In 2012 [one year prior to the Appellees' filing of their Complaint seeking prospective injunctive relief], the named defendant Thomas Pristow, as Director of the Division of Children and Family Services, instructed DHHS employees that Memo #1-95 would no longer be followed by DHHS. (T80).
- The 1995 agency memo "was removed from the DHHS website in February 2015." (T80)
- "Pursuant to the holding of the United States Supreme Court in *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015), the court holds that Memo #1-95 is stricken as, on its face, it violated the Equal Protection and Due Process Clauses." (T88). Memo #1-95 burdens the fundamental right to marry. *Id.* The State was "enjoined from enforcing Memo #1-95 and/or applying a categorical bar to gay and lesbian individuals and gay and lesbian couples seeking to be licensed as foster care parents or to adopt a state ward." (T91).
- The State was enjoined from applying any policies, procedures, or review processes treating gay and lesbian individuals and couples differently from heterosexual individuals and couples. *Id.*

(Amended summary judgment order, T78-91)

D. Standards of Review

Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Doty v. W. Gate Bank, Inc.*, 292 Neb. 787 (2016). In appellate

review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds. *Arens v. NEBCO, Inc.*, 291 Neb. 834, 870 N.W.2d 1 (2015).

Standing is a jurisdictional component of a party's case. *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012). A jurisdictional question which does not involve a factual dispute presents a question of law. *Kelliher v. Soundy*, 288 Neb. 898, 852 N.W.2d 718 (2014). When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court. *Kimminau v. City of Hastings*, 291 Neb. 133, 864 N.W.2d 399 (2015).

Assignments of Error

1. The district court erred by receiving hearsay evidence at the hearing on the Appellee's motion for summary judgment.
2. The district court erred by granting summary judgment when there were genuine issues of material fact.
3. The district court erred by granting summary judgment and issuing an injunction when the Appellees did not have standing.
4. The district court erred by deciding a case that was moot.

5. The district court erred in awarding Appellees' attorney fees.

Propositions of Law

I.

A party seeking statutorily authorized attorney fees, for services rendered in a trial court, must make a request for such fees prior to a judgment in the cause.

Murray v. Stine, 291 Neb. 125, 864 N.W.2d 386 (2015).

II.

A judgment does not become final and appealable until the trial court has ruled upon a pending statutory request for attorney fees.

Kilgore v. Nebraska Dep't of Health & Human Servs., 277 Neb. 456, 763 N.W.2d 77 (2009).

III.

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. Hearsay is not admissible unless otherwise provided for under the Nebraska Evidence Rules or elsewhere.

State v. Castillo-Zamora, 289 Neb. 382, 855 N.W.2d 14 (2014).

Neb. Rev. Stat. § 27–801(3) (Reissue 2008).

Neb. Rev. Stat. § 27–802 (Reissue 2008).

IV.

Newspaper articles are 'rank hearsay' that do not fit a hearsay exception.

Am. Home Assur. Co. v. Greater Omaha Packing Co., No. 15-1313, 2016 WL 1319414 (8th Cir. 2016).

Nooner v. Norris, 594 F.3d 592 (8th Cir.2010).

V.

When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.

State v. Kibbee, 284 Neb. 72, 815 N.W.2d 872 (2012).

VI.

Summary judgment is proper only when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

Doty v. W. Gate Bank, Inc., 292 Neb. 787 (2016).

VII.

Standing is a jurisdictional component of a party's case.

Butler Cty. Sch. Dist. v. Freeholder Petitioners, 283 Neb. 903, 814 N.W.2d 724 (2012).

VIII.

A party invoking a court's jurisdiction bears the burden of establishing the elements of standing.

Field Club Home Owners League v. Zoning Bd. of Appeals of Omaha, 283 Neb. 847, 814 N.W.2d 102 (2012).

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

IX.

Standing requires that a litigant have a personal stake in the outcome of a controversy that warrants invocation of a court's jurisdiction and justifies exercise of the court's remedial powers on the litigant's behalf. To have standing, a litigant must assert its own rights and interests and demonstrate an injury in fact, which is concrete in both a qualitative and temporal sense. The alleged injury in fact must be distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical.

Butler Cty. Sch. Dist. v. Freeholder Petitioners, 283 Neb. 903, 814 N.W.2d 724 (2012).

X.

A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive.

Nebuda v. Dodge Cty. Sch. Dist. 0062, 290 Neb. 740, 861 N.W.2d 742 (2015).

XI.

A plaintiff is a prevailing party when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Melanie M. v. Winterer, 290 Neb. 764, 862 N.W.2d 76 (2015).

Lefemine v. Wideman, 133 S.Ct. 9 (2012).

XII.

While an injunction or declaratory judgment will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff. *Rhodes v. Stewart*, 488 U.S. 1 (1988).

Statement of Facts

The Appellees' Motion for Summary Judgment

The Appellees' motion for summary judgment sought an order of summary judgment against the State Defendants "because *the pleadings on file*, together with affidavits and other evidence Plaintiffs will timely provide, show that there is no genuine issue as to any material fact and the Plaintiffs are entitle to judgement as a matter of law." (T57) (Emphasis added.) The Complaint was the only pleading "on file" setting out the Plaintiffs/Appellants claims and basis for injunctive relief. (T1-28)

The Appellees' Complaint (filed on August 27, 2013)

The allegations of the Appellees' Complaint included the following claims and basis for injunctive relief:

- "Nebraska policy that categorically excludes gay and lesbian individuals and couples from serving as foster and adoptive parents to children in state custody is unconstitutional." (T1,¶1)
- "The state policy *at issue*, set forth in 'Administrative Memorandum – Human Services – #1-95' ('Administrative Memo #1-95' or *the 'Policy'*),

was announced by the Nebraska Department of Health and Human Services ('DHHS') in 1995 *and remains in effect today*. (Ex.1) The Policy prohibits DHHS from issuing foster home licenses to or placing children with 'persons who identify themselves as homosexuals' . . . The Policy . . . has the effect of categorically banning gay and lesbian individuals and couples from adopting children from state custody because, before individuals may adopt children from state care, they must first be licensed as foster parents." (T1-2,¶1) (Emphasis added.)

- "Administrative Memo #1-95 automatically disqualifies potentially qualified foster and adoptive parents despite the shortage of foster and adoptive families available to meet the needs of children in state custody." (T11,¶38)
- "Administrative Memo #1-95 disqualifies individuals who may be the best and sometimes the only placement option for some children." (T11,¶39)
- "Administrative Memo #1-95 prevents caseworkers and other state professionals from considering gay and lesbian applicants and making placements with such applicants even if such applicants may be in the best interest of a particular child." (T11,¶40)
- The six named Plaintiffs who filed the Complaint, all Lincoln residents, were alleged as follows:
    - Greg Stewart and Stillman Stewart were married in California in 2008, have previously raised children that they adopted out of foster care in California, and are "able and ready to apply to be foster parents

and would apply but for the Policy." (T11,¶48-T13,¶52) (Emphasis added.)

- Lisa Blakey and Janet Rodriguez, who "have been in a committed relationship for over eight years" and "are able and ready to apply to be foster parents *and would apply but for the Policy.*" (T13,¶53-T14,¶60) (Emphasis added.)
- Todd Vesely and Joel Busch, who "have been in a committed relationship for over nine years" and "continue to be able and ready to apply to be foster parents *and would apply but for the Policy.*" (T14,¶61-T15,¶70) (Emphasis added.)

- Other than the Governor of Nebraska, who was named as a defendant in his official capacity as Governor to enforce Nebraska laws, the remaining two named defendants sued in their official capacities were alleged [correctly] as follows:
  - Kerry Winterer as Chief Executive Officer of DHHS, whose duties included supervising Children & Family Services, a DHHS division that "is responsible for foster care and adoption services in Nebraska, and oversee the enactment as well as approval of administrative and policy memoranda concerning foster and adoptive parents and eligibility requirements." (T16,¶74)
  - Thomas Pristow as Director of Children & Family Services, a division of DHHS, was responsible "to make rules, policies, and procedures

relating to foster care and adopting, and to protect the best interest of children under state care. . . . Under Defendant Pristow's supervision, CFS [Children & Family Services Division] has the authority to enact administrative and policy memoranda concerning foster and adoptive parents and eligibility requirements." (T16,¶75-T17,¶76)

- "Defendants' enforcement, under the color of state law, of Administrative Memo #1-95's categorical exclusion against gay and lesbian individuals and couples" violated the equal protection clauses of the Nebraska and United States Constitutions. (T22,¶113; T23,¶121)
- "Defendants' enforcement, under the color of state law, of Administrative Memo #1-95's categorical exclusion against gay and lesbian individuals and couples" deprived the Plaintiffs/Appellees of "their constitutional right to substantive due process" under the Nebraska and United States Constitutions. (T25,¶131; T27,¶140)
- "*Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm.*" (T27,¶142) (Emphasis added.)
- The remedies requested by the Complaint included:
    - A declaration that "DHHS's Policy in Administrative Memo #1-95 violates Plaintiffs' rights to equal protection and due process"
    - An injunction against the Defendants "enforcing Administrative Memo #1-95"

- An award of attorney fees and costs for the Plaintiffs.

(T27-28)

Summary Judgment Hearing Evidence: The Dispute of Material Facts

The district court received a large amount of evidence at the hearing on the motion for summary judgment. Sixty exhibits were received, of which the noteworthy exhibits for this appeal are the deposition testimony of the Defendants/Appellants Kerry Winterer and Thomas Pristow, both of whom categorically denied that Administrative Memo #1-95 was the policy of DHHS or that there was any categorical exclusion from foster parent licensing on the basis of being gay, lesbian, or any other sexual orientation. The evidence, as explained below, was that Administrative Memo #1-95 had ceased to be the policy of DHHS at least by the summer of 2012, which would have been over a year before the filing of the Plaintiffs/Appellees' lawsuit. Administrative Memo #1-95, which had appeared on the DHHS website, was removed from the website in February of 2015. As an aside, the DHHS website, which apparently served as the entire basis for this lawsuit being filed because the old 1995 memo was on the website, contains a link to "General Disclaimer" at the bottom of the home page. Clicking on the disclaimer link shows the following advisory:

General Disclaimer

> All of the information on the Nebraska Department of Health & Human Services (DHHS) Website is believed to be accurate and reliable, however, the DHHS assumes no responsibility for any errors appearing in the information. Further, the DHHS assumes no responsibility for the use of the information provided. If you are