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

using this information for research, it is highly recommended that you verify your results by consulting the official sources of the information. In some cases the information may need to be updated. DO NOT RELY ON THE TEXT CONTAINED ON THIS WEBSITE IF THE PRECISE LANGUAGE IS IMPORTANT FOR YOUR PURPOSES.

http://dhhs.ne.gov/pages/disclaim.aspx

Administrative Memorandum #1-95

Administrative Memorandum #1-95 is found at Exhibit 19. It is dated January 23, 1995, and is on the letterhead of the Nebraska Department of Social Services, a state agency that no longer exists. The Department of Social Services was eliminated as of 1997 by the Nebraska Partnership for Health and Human Services Act, 1996 Nebraska Laws L.B. 1044, a comprehensive statute that eliminated or consolidated numerous state agencies into the Nebraska Department of Health and Human Services. Administrative Memo #1-95 was issued and signed by Mary Dean Harvey, the then-Director of the Nebraska Department of Social Services, and issued to "District Administrators" and "Division Administrators". The Memo stated in relevant part:

> It is my decision that effective immediately, it is the policy of the Department of Social Services that children will not be placed in the homes of persons who identify themselves as homosexuals. This policy also applies to the area of foster home licensure in that, effective immediately, no foster home license shall be issue to unrelated, unmarried adults living together.

I have directed staff of the Human Services Division to immediately *begin the process of drafting proposed program and licensing regulations in this area that can be brought before public hearing in the more formal manner as soon as possible.*

(E19) (Emphasis added.)

Although Harvey's 1995 memo recognized the need for actual regulations for her policy memo, no evidence was presented that any regulation was ever promulgated or adopted. And, as the district court accurately found in its amended order, "If Memo #1-95 is a 'rule' under the APA [Administrative Procedure Act], then it is invalid because it was never formally adopted pursuant to APA procedures." (T87)

Thus, the Plaintiffs/Appellees proceeded to file their Complaint in 2013 alleging that the foregoing policy memo of a defunct agency, which memo was never adopted as a regulation, presented grounds for what the district court described as a "facial constitutional challenge". (T83)

Testimony of DHHS CEO Kerry Winterer

Exhibits 57 and 7 are the deposition testimony of DHHS CEO Kerry Winterer that was received in evidence without objection at the hearing on the Appellees' motion for summary judgment. The exhibits are cumulative with Exhibit 57 being portions of the deposition and exhibit 7 being the entire deposition. Winterer's testimony, given on July 22, 2014, included the following:

- Winterer was CEO of the Nebraska Department of Health and Human Services.

- The process for obtaining a foster care license from the Department, assuming one applied, included a background criminal check with fingerprinting, plus training relative to the requirements to be a foster parent.
- A foster parent license was effective for two years.
- A DHHS determination of suitability for placing a child in a licensed foster parent's home was conducted on a variety of factors that Winterer explained as being in the "best interests of the child" criteria.
- Foster parent licensing allows for licensing of an individual adult, but not for joint licensing of adults unless both of the adults were married.
- Regarding Administrative Policy Memorandum #1-95, Winterer testified:
    - Memorandum #1-95 was not the current policy of DHHS.
    - There was nothing about Memorandum #1-95 which remained as DHHS policy.
    - It was not the policy of DHHS to not place children in homes of people who were homosexuals.
    - A person's sexual orientation was irrelevant to whether a person would be a good foster or adoptive parent.

(E57,49:8-64:15)

Testimony, Thomas Pristow, DHHS Director of Division of Children and Family Services

Exhibits 58 and 6 are the deposition testimony of Thomas Pristow, DHHS Director of the Division of Children and Family Services. The exhibits are cumulative with Exhibit 58 being portions of the deposition and exhibit 6 being the entire deposition. Pristow's

deposition testimony was received in evidence without objection at the hearing on the Appellees' motion for summary judgment. Pristow's testimony, given on September 25, 2014, included the following:

- Pristow was the DHHS Director of the Division of Children and Family Services and had been the Director since March 21, 2012.
- Since becoming Director in March of 2012, Pristow had received 15 requests to approve placement of foster children with gay or lesbian foster parents. In response to the question, "And out of those 15, how many have you approved?", Pristow answered, "All of them". (E58:16-22)
- Regarding Administrative Policy Memorandum #1-95, Pristow testified:
  - Memorandum #1-95 was not the current policy of DHHS. (E58,29:8-15)
  - Memorandum #1-95 was "put out by the previous – it was when the department was not designed as it is now as a social services director. It's a different administrative structure in 1995 than what we have now." (E58,28:13-5)
  - Pristow had given instructions in person to his service area administrators and to his Division's Deputy Director, in the summer of 2012, that "licensing does not discriminate against gay and lesbians, that anyone can become licensed" and that "all foster parents that are licensed should be considered for placement within the best interests of the child." (E58,33:15-35:23)

- There were no restrictions for foster parent licensing if the applicant was gay or lesbian. (E58,15:11-18)

Testimony, Vicki Maca, DHHS Deputy Director Division of Children and Family Services

Exhibits 59 and 8 are the deposition testimony of Vicki Maca, DHHS Deputy Director of the Division of Children and Family Services, which was received in evidence without objection. The exhibits are cumulative with Exhibit 59 being portions of the deposition and exhibit 8 being the entire deposition. Thomas Pristow was Maca's immediate supervisor. Maca's testimony included the following:

Q: What is the current DHHS practice concerning gay or lesbian individuals serving as foster or adoptive parents?

A: The current practice is that if it's deemed to be in the child's best interest, that the field [employees of DHHS] will continue to pursue that placement, that the director will ultimately decide if that placement can occur, which is different than this policy memo [Memo #1-95].

Q: So, then, under current practice, DHHS staff may not deny a license based on the applicant identifying as homosexual?

A: Correct.

Q: And, additionally, under the current practice, DHHS may not deny a placement based upon the applicant identifying as a homosexual?

A: Correct. We are – we are looking at best interest of the child.

Q: Are there any other way that current practice differs from the policy stated in Administrative Memo No. 1-95?

A: Well, we do place children with gay or lesbian families, and we do license them.

(E59:73:7-74:7)

Affidavit of Tony Green

Tony Green, an employee of DHHS, provided an affidavit that Administrative Memorandum #1-95 was removed from the DHHS website on or around February 20, 2015. (E60) Green's affidavit was received in evidence without objection at the hearing on the Appellees' motion for summary judgment.

Affidavits of Plaintiffs/Appellees

The affidavits of the six Plaintiffs/Appellees can be found at exhibits 50-55. The affidavits can be accurately described as brief, verifying the specific allegations of the Complaint describing who the Plaintiffs are, and expressing the desire to serve as foster parents. The affidavits are all dated in March of 2015. None of the affidavits states that any of the Appellees had actually applied for a foster parent license with DHHS. Necessarily, none of the affidavits state that an application for a foster parent license was denied by DHHS.

Summary of Argument

The Appellees' novel theory of § 1983 liability is based neither on actual enforcement nor injury, but rather on an outdated memo that was on a government website – even though the memo was not the government agency's current policy at the time of filing suit. While it is a best practice that a government website contain current and

accurate information, it is not a constitutional violation warranting an injunction and attorney's fees when the website contains an old memo that is no longer agency policy.

The Appellants agree with the district court's finding that Memo #1-95 is not current policy, and has not been enforced since at least 2012, one year before this lawsuit was filed. DHHS has placed and will continue to place foster children in homes when it is in the best interest of the child, including homes of same sex couples and gay and lesbian individuals. Over the course of this lawsuit, and before, Appellees could have applied and been accepted, but simply did not apply for a foster parent license. Contrary to their Complaint, the Appellees have and have had an adequate remedy at law, namely the remedy of filing an application with DHHS for a foster parent license. They do not require an injunction to obtain the license that they allege they want, but which they have not bothered to seek by filing an application.

Therein lies a series of errors made by the district court. Under Appellees' § 1983 lawsuit for prospective injunctive relief, the district court could only enjoin ongoing unconstitutional conduct causing injury, not issue an advisory opinion concerning an antiquated and unenforced administrative memo on a government website. Even after finding the memo was not current policy, and without identifying any injury, the district court proceeded to enjoin enforcement of a memo that had no longer been in effect or enforced for over year prior to the filing of the Complaint. The district court entered an injunction only because there was some evidence of low level DHHS employee confusion.

All of this occurred on summary judgment where the district court unambiguously concluded Memo #1-95 was not the current policy of DHHS while simultaneously

referencing supposed disputes of fact regarding whether or not it was still DHHS "policy." If there really was a dispute of fact regarding whether Memo #1-95 is the "policy" of DHHS, then the district court erred in granting Appellees' motion for summary judgment by reason of the dispute of fact which the district court recognized in its amended order.

Finally, any change in DHHS's policy with respect to Memo #1-95 occurred voluntarily by DHHS before the lawsuit was filed. Thus, the district court's order lacked the necessary judicial *imprimatur* for Appellees to be prevailing parties here. And, even if Appellees were somehow prevailing parties under § 1988, they did not submit any evidence supporting a fee award. Therefore the district court erred in awarding Appellees fees without an evidentiary basis.

Argument

A. Assignment of Error 1: District Court erred by receiving hearsay evidence at hearing on motion for summary judgment.

During the hearing on the Appellees' motion for summary judgment, the State Appellants 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) The State Appellants argue error only with respect to the district court's receipt in evidence of the following five exhibits over hearsay objections:

- Exhibit 18 – a newspaper article purportedly by the Omaha World Herald
- Exhibit 27 – a newspaper article purportedly by the Lincoln Journal Star

- Exhibit 34 – an email dated June 4, 2013, from someone purporting to be with the Nebraska Ombudsman's Office
- Exhibit 43 – a newspaper article purportedly by the Omaha World Herald
- Exhibit 48 – a one-page map purporting to summarize foster and adoption laws for all states in the United States.

The district court's amended order made findings that specifically and improperly relied upon the hearsay newspaper article exhibit 27 (T80) and the Ombudsman email exhibit 34 (T85).

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) and 27-802 (Reissue 2008). *Am. Home Assur. Co. v. Greater Omaha Packing Co.*, No. 15-1313, 2016 WL 1319414 (8th Cir. 2016), stated that, "[N]ewspaper articles are 'rank hearsay' that do not fit a hearsay exception." (quoting *Nooner v. Norris*, 594 F.3d 592, 603 (8th Cir.2010)). 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). The federal rule of evidence defining and excluding hearsay as evidence is substantially similar to the Nebraska Evidence Rules.

When the Appellees offered the above-listed five exhibits, they did not limit their offer to some relevant purpose other than the truth of the matter stated in the exhibits. And, when the State Defendants objected on the grounds of hearsay, the Appellees remained silent as to any relevant or limited purpose other than the truth of the matters asserted in the exhibits. (14:21-16:22) The district court's reception of the exhibits was the erroneous reception of inadmissible hearsay evidence. (3rdST; 16:17-19; T80; T85)

B. Assignment of Error 2: District Court erred by granting summary judgment when there were genuine issues of material fact.

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).

The Statement of Facts section of this brief summarizing the deposition testimony of DHHS CEO Kerry Winterer, DHHS Director Thomas Pristow, and DHHS Deputy Director Vicki Maca are incorporated by reference. The testimony of those three agency heads showed that there was a material dispute of facts over the entire theory and basis of the allegations of the Appellees' Complaint. Specifically, the testimony of Winterer, Pristow, and Maca created a material dispute of fact by having the effect of denying, as a matter of fact, the following allegations of the Complaint:

- The actual Nebraska policy did not categorically exclude gay and lesbian individuals and couples from serving as foster and adoptive parents to children in state custody.

- Administrative Memorandum # 1-95 was not the policy of DHHS and had not been the policy since at least the summer of 2012 – over a year prior to the filing of the lawsuit.
- Because Administrative Memo # 1-95 was not the policy, neither it nor the actual DHHS policy automatically disqualified potential qualified foster and adoptive parents by reason of being gay or lesbian.
- The Appellees, each and every one of them, had an adequate remedy at law and were suffering no wrongs of any continuing nature that would cause any irreparable harm. Instead, the Appellees only needed to do what others who were gay or lesbian had done – apply for a foster parent license that would not be denied for the categorical reason of their sexual orientation.

The district court's finding that DHHS does not enforce Memo #1-95 is internally at odds and contrary to the allegations of the Appellee's Complaint that the Memo *was* the policy of DHHS. In short, the district court's amended order granted summary judgment to the Appellees after finding that the Complaint's allegations were not true as to Memo #1-95 being the policy of DHHS. The district court even found that, "The current policy of DHHS as set forth in the deposition of Pristow allows gay individuals, gay couples, and 'unrelated, unmarried adults living together' to obtain foster care licenses and to adopt state wards." (T86) At minimum, the district court's finding itself recognized a dispute of material fact concerning the allegations of the Appellees' Complaint and, accordingly, the district court should not have granted summary judgment.

For completeness, the Appellants note that the district court's reliance on the United States Supreme Court decision in *Obergefell v. Hodges* was misguided. The district court erroneously concluded:

> Therefore, consistent with the holding of *Obergefell v. Hodges*, this court must order Defendants to refrain from adopting or applying policies, procedures, or review procedures that treat gay and lesbian individuals differently from similarly situated heterosexual individuals and couples when evaluating foster care or adoption applicants under the "best interests of the child" standard set forth in DHHS' regulations.
>
> (T90)

Obergefell v. Hodges did not adopt a freestanding gay or lesbian rights amendment to the United States Constitution. The *Obergefell* holding concerned only the constitutional right to same sex marriage and state recognition of valid same sex marriages. The United States Supreme Court clearly articulated its holding in *Obergefell* as follows:

> The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.
>
> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015).

The *Obergefell* decision had no bearing on the facts of this case.

C. Assignment of Error 3: District Court erred by granting summary judgment and issuing an injunction when Appellees did not have standing.

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 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, 852, 814 N.W.2d 102, 106 (2012) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). 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. *Butler Cty.*, 283 Neb. at 907, 814 N.W.2d at 728. "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." *Id.* "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." *Id.*

The Appellees presented no evidence of suffering any injury, much less any imminent future injury. There is no evidence in the record that Memo #1-95 is or has been enforced against any of the Appellees. Rather, the record is that the Appellees, as alleged in their Complaint and verified by their affidavits, are "able and ready to apply to be foster parents and would apply but for the Policy [alleged in the Complaint as being Memo #1-95]. In short, the Appellees have proven only that they are gay or lesbian individuals who have not applied for a foster parent license. Until they apply for a license, they have

suffered no injury and do not require an injunction. Rather, what the Appellees require is something they can easily do for themselves – make an application for a foster parent license.

There is absolutely no evidence in the record that Memo #1-95 has been enforced against anyone since at least 2012. Of those gay or lesbian persons who did apply since 2012, the undisputed evidence showed every single application was granted. (E58,25:16-22).

On this record, Appellees have failed to satisfy their burden of proving a non-conjectural threat of harm. Simply stated, instead of applying (assuming they met the licensing criteria) and having their applications granted, Appellees brought this lawsuit.

It bears repeating that this is not an action for damages. Any request for a declaratory judgment establishing past liability of Appellees, in their official capacity, would have been forbidden by the Eleventh Amendment. See, *Verizon Md. Inc. v. PSC*, 535 U.S. 635, 646 (2002). This is solely an action for prospective injunctive relief. To avoid the Eleventh Amendment bar, Appellees had to allege an ongoing violation of federal law. While they may have alleged so, Appellees failed to identify any ongoing unconstitutional conduct to enjoin.

The district court did not find, nor did Appellees present evidence of, any injury that they have suffered. Accordingly, the Appellees lack standing.

D. Assignment of Error 4: District Court erred by deciding a moot case.

To the extent the DHHS website contained the outdated and unenforced Memo #1-95, and assuming the Memo's existence on the website bore any constitutional

significance, that issue is now moot. "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, 747, 861 N.W.2d 742, 749 (2015).

The unenforced Memo #1-95 was removed from the DHHS website in February of 2015. (E60,2,¶5). However, injunctive relief is not available to Appellees when the memo was already removed from the website before judgment. *Id.* The issue presented in the litigation, as alleged in the Complaint that Memo #1-95 was the Policy of the State, "cease[d] to exist." *Nebuda,* 290 Neb. at 748, 861 N.W.2d at 750. Removal of a memo that was not the State's policy from the website in 2015 mooted any related claims Appellees may have had.

E. Assignment of Error 5: District Court erred by awarding attorney fees.

The district court erred by awarding the Appellees' attorney fees. There are four alternative arguments why the district court erred:

1. Because the district court erred by granting summary judgment, the Appellees were not prevailing parties.
2. Alternatively to the first reason, the Appellees were also not "prevailing parties" because the district court's judgment did not "affect the behavior of the defendant towards the plaintiff" because the State Appellants had voluntarily discontinued the Policy alleged in the Complaint at least one year prior to the filing of the suit.

3. The Appellees' presented no evidence at the hearing on their motion for attorney fees and, thus, the district court had no evidentiary basis to award attorney fees.

4. If this Court concludes that the amended order of September 16, 2015, was a final and appealable order, the district court erred by awarding fees three months later without having jurisdiction to do so.

In order to recover attorney fees in a § 1983 action, the Appellees need to be prevailing parties under 42 U.S.C. § 1988. The question of prevailing party status under § 1988, a statutory term, presents a legal issue for decision, which is reviewed de novo. *Jenkins by Jenkins v. State of Mo.*, 127 F.3d 709, 713-14 (8th Cir. 1997). 42 U.S.C. § 1988(b) provides in relevant part as follows:

> In any action or proceeding to enforce a provision of sections . . . 1983, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

Concerning the State's first argument, it is fundamental that if the district court erred by granting summary judgment to the Appellees, the Appellees were not prevailing parties and the district court also erred by awarding attorney fees.

For the State's second argument, the district court never determined Appellees were prevailing parties. Rather, the district court simply sustained Appellees' motion and awarded fees. But, 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, 777, 862 N.W.2d 76, 87 (2015) (citing *Lefemine v. Wideman*, 133 S.Ct. 9 (2012)). While an injunction or declaratory judgment will usually satisfy that test, "it 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, 4 (1988). "The real value of the judicial pronouncement-what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion-is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*." *Hewitt v. Helms,* 482 U.S. 755, 761 (1987) (emphasis in original).

In the present case, there was no such result. It was chronologically impossible for any 2012 change in the DHHS policy toward gays and lesbians to have been caused by the Appellees' 2013 lawsuit. "A plaintiff cannot be a prevailing party under federal fee-shifting statutes without 'the necessary judicial *imprimatur* on the change.'" *Melanie M.,* 290 Neb. at 779, 862 N.W.2d at 88. Significantly, the district court found, as previously stated, that, "The current policy of DHHS as set forth in the deposition of Pristow allows gay individuals, gay couples, and 'unrelated, unmarried adults living together' to obtain foster care licenses and to adopt state wards." (T86) Given the absence of a change in DHHS policy resulting from the district court's judgment, the Appellees do not legally qualify as "prevailing parties".

The State Appellants' third argument is a basic lack of evidence to support the district court's attorney fee award. "[T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Here, Appellees did not meet their

evidentiary burden because they offered no evidence that is part of the bill of exceptions supporting any fee award. (48:1-59:7) The only evidence received at the fee hearing was the affidavit of Amy Miller, which addresses only customary hourly rates in the absence of any evidence of time or hours spent. (E64,53:16-25) The district court erred by awarding $173,960.55 in fees and costs without any evidence. (T97).

Despite the fact that Appellees filed documents with the clerk of the district court concerning fees, they did not offer any evidence in support of their motion for fees. *See Lomack v. Kohl-Watts*, 13 Neb. App. 14, 20, 688 N.W.2d 365, 369 (2004) (holding that showing of attorney fees in the transcript was not evidence):

> In the case at bar, no evidence was presented to the trial court regarding Lomack's attorney fees. A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered. *Coates v. First Mid–American Fin. Co.*, 263 Neb. 619, 641 N.W.2d 398 (2002); *Huddleson v. Abramson*, 252 Neb. 286, 561 N.W.2d 580 (1997). Lomack's only showing of attorney fees can be found in the transcript, on a document captioned "Showing by Plaintiff Regarding Attorney's Fees to Be Considered."
>
> *Id.*

This Court has "consistently stated that a bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered." *In re Estate of Panec*, 291 Neb. 46, 56, 864 N.W.2d 219, 226 (2015). This principle applies equally to evidence regarding attorney fees because

the court needs some factual basis to make a finding and an appellate court requires evidence in the record for review of a lower court's award of fees. See, *Emery v. Moffett,* 269 Neb. 867, 873, 697 N.W.2d 249, 255 (2005) ("Without a stipulation or evidence, an award appears arbitrary and leaves us with nothing in the record to allow for meaningful review."). *Webb v. Bd. of Educ. of Dyer Cty., Tenn.,* 471 U.S. 234, 241-42, 105 S. Ct. 1923, 1928 (1985), cited with approval *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933 (1983), for the principle that "the party seeking an award of fees [under 42 U.S.C. § 1988] has the burden of submitting 'evidence supporting the hours worked and rates claimed.'" "State courts are required to follow federal precedent when hearing actions brought under § 1983." *Kellogg v. Nebraska Dep't of Corr. Servs.*, 269 Neb. 40, 46, 690 N.W.2d 574, 579 (2005).

In marriage dissolution cases, Nebraska appellate courts have departed from a strict affidavit requirement. See, *Brozek v. Brozek,* 292 Neb. 681, 874 N.W.2d 17 (2016); *Garza v. Garza,* 288 Neb. 213, 846 N.W.2d 626 (2014). But, the State Appellants are unaware of any holding of this Court eliminating the evidentiary requirements for an award of fees under 42 U.S.C. § 1988. Since the Appellees did not submit evidence supporting any fee award, as required when seeking an award of fees under § 1988, the district court erred in awarding fees and costs without evidence.

The Appellants' fourth argument why the district court erred is a jurisdictional one that is asserted out of an abundance of caution. As explained in the Jurisdiction Section at the beginning of this brief, this Court should have jurisdiction to consider the Appellants' assignments of error with respect to the district court's amended order because the amended

order on summary judgment was not a final, appealable order until the district court's order on fees. But, this Court may wish to consider clarifying its precedent for § 1988 attorney fee cases for the benefit of district courts and the practicing Bar.

Murray v. Stine, 291 Neb. 125, 864 N.W.2d 386 (2015), indicates that a plaintiff must act with anticipation as a prevailing party and move for attorney fees prior to any order or judgment in favor of the plaintiff by the district court. Failure to do so, combined with a judgment silent on fees, means the judgment is a final and appealable order. *Murray,* 291 Neb. at 129, 864 N.W.2d at 389. If the prevailing party fails to appeal or cross-appeal a judgment that is silent on fees, the prevailing party may have no recourse to further challenge the original denial at a later time in the district court. See, *Olson v. Palagi*, 266 Neb. 377, 381, 665 N.W.2d 582, 586 (2003).

Moreover, the district court would be without jurisdiction to later enter an order awarding attorney fees if the prevailing party did not previously appeal or cross-appeal the judgment silent on fees. *Id.* If the district court entered a later fee award without jurisdiction, a non-prevailing party who may have acquiesced to the earlier judgment because it was silent on fees could then appeal an award made without jurisdiction. Alternatively, if the district court entered a later fee award without jurisdiction and a non-prevailing party had already timely appealed the judgment, the non-prevailing party would need to file a second appeal in the same case on the heels of the first appeal to raise the issue of the district court's lack of jurisdiction to enter an award of attorney fees.

Here, under this framework, if the amended order of September 16, 2015, is considered a final and appealable order that was silent on fees, the district court erred by

later awarding fees without jurisdiction. The end result is that the district court's judgment (without fees) will stand, but no fees could have been awarded three months later because neither party timely appealed the judgment.

In sum, the appeal of the September 16, 2015, amended order was timely. But if this Court holds that it wasn't, the district court was without jurisdiction to award attorney fees on December 15, 2015, and the district court's order awarding attorney fees should be reversed with directions to vacate it.

Conclusion

For the foregoing reasons, this Court should reverse the judgment of the district court.

Dave Heineman, Kerry Winterer, and Thomas Pristow (official capacities), Appellants

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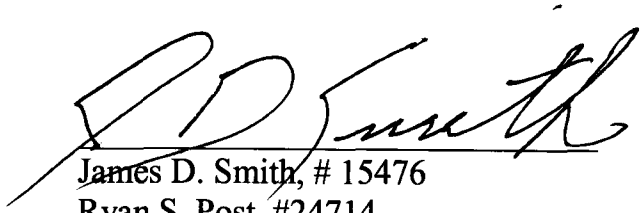

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I, Jennifer Walsh, depose and state that on April 15, 2016, in accordance with Neb. Ct. R. App. P. § 2-109(B)(6), copies of the foregoing brief were served upon Appellees by depositing them in the United States mail, first-class postage prepaid, addressed to Appellees' counsel at the following addresses:

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Subscribed in my presence and sworn to before me April 15, 2016.

GENERAL NOTARY - State of Nebraska
DESIREE KONWINSKI
My Comm. Exp. August 3, 2019

Notary Public