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But we do find a genuine issue of material fact with respect to A.W.'s allegation that LPS breached its duty of reasonable care to C.B. Specifically, we hold that pursuant to the principles articulated in the Restatement (Third) of Torts, foreseeability is not part of the duty analysis performed by the court, but is part of the breach analysis performed by the finder of fact. And while the evidence of prior criminal activity in the neighborhood of Arnold Elementary School was not sufficient to support a conclusion that a sexual assault on the premises was reasonably foreseeable, there was sufficient evidence for reasonable minds to differ as to whether Siems' assault of C.B. was a foreseeable consequence of LPS' failure to initially note Siems' entry into the school or to carefully monitor Siems, and C.B., after it was determined that Siems had entered the school.

Therefore, we reverse the district court's summary judgment and remand the cause for further proceedings with respect to LPS' allegedly negligent conduct after Siems entered Arnold Elementary School.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

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## STATE OF NEBRASKA EX REL. L. TIM WAGNER, DIRECTOR OF INSURANCE OF THE STATE OF NEBRASKA, AS LIQUIDATOR OF AMWEST SURETY INSURANCE COMPANY, APPELLEE, v. GILBANE BUILDING COMPANY, A RHODE ISLAND CORPORATION, APPELLANT.

786 N.W.2d 330

Filed July 16, 2010. No. S-09-879.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and the court gives that party the benefit of all reasonable inferences deducible from the evidence.

3. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
4. **Summary Judgment: Proof.** A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.
5. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
6. **Insurance: Words and Phrases.** An insurer is considered insolvent under the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act if it is unable to pay its obligations when they are due or when its admitted assets do not exceed its liabilities plus the greater of any capital and surplus required by law to be maintained or the total par or stated value of its authorized and issued capital stock.
7. **Summary Judgment: Evidence: Affidavits.** Evidence that may be received on a motion for summary judgment includes affidavits.
8. **Debtors and Creditors: Time.** Retrojection is the inverse of projection. A retrojection analysis begins with a debtor's financial condition at a certain point in time and extrapolates back in time in an attempt to show that the debtor must have been insolvent at some earlier relevant time.
9. ____: ____. Retrojection is a widely used method for determining insolvency, and courts have concluded that if the retrojection period stretches too far back from the date on which the insolvency of the debtor is known, it is untenable.
10. **Debtors and Creditors: Time: Evidence.** Courts will only consider retrojection if the evidence of insolvency on the certain date is accompanied by evidence that the debtor's financial condition did not change during the pendency period between the time of the payment and the date of proven insolvency.
11. **Courts: Appeal and Error.** After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Robert F. Craig and Anna M. Bednar, of Robert F. Craig, P.C., for appellant.

Michael S. Degan, of Husch, Blackwell & Sanders, L.L.P., and Robert L. Nefsky, of Rembolt Ludtke, L.L.P., for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

## NATURE OF THE CASE

This case is on appeal to this court for the second time. See *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008) (*Gilbane I*). The case generally involves whether four payments made by Amwest Surety Insurance Company (Amwest) to appellant Gilbane Building Company (Gilbane), shortly before Amwest went into liquidation, were voidable preferential transfers under the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act (NISRLA). In *Gilbane I*, we concluded that three of the four payments were preferential transfers. However, in *Gilbane I*, we also concluded that the record was not sufficient to reach a conclusion on the validity of the transfer on January 5, 2001 (January 2001 transfer), and that the district court had erred when it had determined that the January 2001 transfer was also preferential. This court affirmed in part and reversed in part, and remanded the cause for further proceedings. On remand, appellant, Gilbane, and appellee, the Nebraska Director of Insurance in his capacity as liquidator (liquidator), filed cross-motions for summary judgment. The district court for Lancaster County held a hearing on the motions and granted the liquidator's motion for summary judgment, concluding that the liquidator had established that Amwest was insolvent at the time of the transfer at issue. The district court denied Gilbane's motion for summary judgment. Gilbane appeals. We affirm.

## STATEMENT OF FACTS

We recite the underlying facts, some of which were recited in *Gilbane I*. Gilbane entered into a subcontract with Crane Plumbing & Heating Co., Inc. (Crane), under which Crane was to perform plumbing work on a construction project. Crane obtained two bonds issued by Amwest on or about December 17, 1997, with Gilbane as the obligee on both bonds. In January 2000, Crane abandoned the project. Amwest then made four payments to Gilbane to cover Crane's contractual obligations. The first payment was made on January 5, 2001, in the amount of $357,779.69. The second payment was made on April 9, in the amount of $26,150.23. The third payment

was made on April 13, in the amount of $215,292.12. The final payment was made on May 21, in the amount of $4,222.04. Amwest obtained a replacement subcontractor for completion of the project.

A petition to place Amwest in liquidation was filed on June 6, 2001. Amwest was declared insolvent in an order issued the following day. The liquidator filed a complaint alleging that the four payments made by Amwest to Gilbane in 2001 were preferential transfers voidable under Neb. Rev. Stat. § 44-4828(1)(b)(ii) (Reissue 2004). The parties filed cross-motions for summary judgment. The district court granted the liquidator's motion for summary judgment, determining that the three payments made in April and May were made within 4 months before the filing of the petition for liquidation and were therefore voidable as preferences pursuant to § 44-4828(1)(b)(ii). The court further determined that there was no genuine issue of material fact as to the insolvency of Amwest at the time of the January 2001 transfer and, therefore, that that payment was a voidable preference pursuant to § 44-4828(1)(b)(i). Gilbane appealed that order.

In *Gilbane I*, this court determined, inter alia, that the April and May 2001 transfers were preferential as the district court had found but that there were genuine issues of material fact whether Amwest was insolvent at the time of the January 2001 transfer. In *Gilbane I*, we noted that the liquidator's expert opinion was not in affidavit form and could not be considered evidence at the summary judgment hearing. We affirmed in part and reversed in part, and remanded the cause for further proceedings. We also determined in *Gilbane I* that § 44-4828(9), a subsection generally involving setoffs, did not apply to the case.

Following our mandate, on remand, the district court entered a judgment on January 22, 2009, awarding to the liquidator the payment of the three transfers made in April and May 2001, totaling $245,644.39. On March 2, 2009, the liquidator filed a motion for summary judgment seeking to recover the January 2001 transfer as a voidable preferential transfer. Gilbane filed a cross-motion for summary judgment on May 12, 2009, asserting § 44-4828(9) as a total defense to the liquidator's recovery of

the January 2001 transfer. Gilbane also filed a motion requesting an order from the district court declaring that its order and judgment of January 22, 2009, was not a final order. The court held a hearing on the cross-motions for summary judgment on May 22. On July 29, the district court entered an order granting the liquidator's motion and denying Gilbane's motion.

In its July 29, 2009, order, the court concluded that Amwest had cured the deficiencies in its expert testimony that had resulted in remand by providing sworn expert testimony. The district court also determined that the liquidator had established Amwest was insolvent on January 5, 2001, and that the payment at issue was an impermissible preference. The court determined that Gilbane had failed to introduce into evidence any proper expert testimony refuting the expert testimony proffered by the liquidator and had otherwise failed to rebut the liquidator's expert testimony. The court concluded that Gilbane's defense of entitlement to the January 2001 transfer as a setoff under § 44-4828(9) had already been rejected by this court and that such rejection was the law of the case, and, in the alternative, that Gilbane had failed to establish that it had "furnish[ed] any goods or services to or for the benefit of Amwest." The district court entered a second order on July 29, 2009, denying Gilbane's motion in which it sought an order declaring that the district court's January 22 judgment and order was not final. Gilbane appeals from both orders.

## ASSIGNMENTS OF ERROR

Gilbane claims, summarized and restated, that the district court erred in (1) granting the liquidator's motion for summary judgment and denying Gilbane's own motion for summary judgment; (2) rejecting Gilbane's defense under § 44-4828(9); and (3) denying Gilbane's motion for an order declaring that the judgment of January 22, 2009, was not a final ruling under Neb. Rev. Stat. § 25-1902 (Reissue 2008).

## STANDARDS OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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. See *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010). In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and the court gives that party the benefit of all reasonable inferences deducible from the evidence. See *id.*

[3] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court. *City of Falls City v. Nebraska Mun. Power Pool*, 279 Neb. 238, 777 N.W.2d 327 (2010).

## ANALYSIS

### *The District Court Did Not Err When It Granted Summary Judgment in Favor of the Liquidator.*

In its first assignment of error, Gilbane claims that the district court erred in granting summary judgment in favor of the liquidator. Gilbane specifically claims that the methodology used by the liquidator's expert when he determined that Amwest was insolvent on January 5, 2001, was deficient. Gilbane further argues that because Gilbane presented sufficient evidence to rebut the liquidator's expert testimony, entry of summary judgment was improper. We reject Gilbane's assignment of error and conclude that the district court did not err when it granted summary judgment in favor of the liquidator.

[4,5] A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009). After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.*

In *Gilbane I*, we noted that unlike the three voided payments, the January 2001 transfer occurred outside the 4-month period before Amwest filed its petition, and that the liquidator was therefore required under § 44-4828(1)(b)(i) to prove that Amwest was insolvent at the time of the January 2001 transfer in order to void this transfer.

[6] We explained in *Gilbane I* that an insurer is considered "insolvent" under the NISRLA if it is

> "unable to pay its obligations when they are due or when its admitted assets do not exceed its liabilities plus the greater of: (i) Any capital and surplus required by law to be maintained; or (ii) The total par or stated value of its authorized and issued capital stock."

276 Neb. at 696-97, 757 N.W.2d at 203. Accord Neb. Rev. Stat. § 44-4803(14)(b) (Reissue 2004). We also noted that "[i]n preference cases arising under federal bankruptcy law, courts have held that the testimony of an accountant or other financial expert is generally necessary to prove insolvency at the time of a challenged transfer." *Gilbane I*, 276 Neb. at 697, 757 N.W.2d at 203.

In *Gilbane I*, we reviewed the evidence presented by the liquidator in support of its motion for summary judgment, which evidence included testimony from Michael James Fitzgibbons, an accountant who served as special deputy receiver for Amwest. Fitzgibbons testified that expert Joseph J. DeVito was retained to review certain financial records which Fitzgibbons and others under his supervision had prepared to show the financial condition of Amwest as of June 30, 2000, and to determine whether Amwest was insolvent as of that date. The record in *Gilbane I* included two reports purportedly authored by DeVito; one was dated February 28, 2006, and the second was dated June 28, 2006. Both reports were attached to the affidavit of an attorney representing the liquidator which indicated only that the reports were true and correct copies. The reports set forth DeVito's opinion regarding the insolvency of Amwest as of June 30, 2000, and the period subsequent to that date.

[7] After reviewing the record in *Gilbane I*, we agreed with Gilbane that the properly considered evidence was insufficient to establish Amwest's insolvency on January 5, 2001. Unlike the three other payments which were properly voided based on their being statutorily prohibited preferences, the January 2001 transfer was not impugned by sufficient evidence, and summary judgment as to this transfer was error. In making this determination, we noted that the "'evidence that may be received on a motion for summary judgment includes . . . affidavits.'" *Gilbane I*, 276 Neb. at 698, 757 N.W.2d at 204, quoting Neb. Rev. Stat. § 25-1332 (Reissue 2008).

> Such affidavits, however, "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

*Gilbane I*, 276 Neb. at 698, 757 N.W.2d at 204. Because DeVito's reports were not part of an affidavit by DeVito and because the affidavit of counsel identifying the attached "'true and correct'" copies of DeVito's reports did not convert such reports into affidavits, we concluded that the reports themselves were not sworn and did not meet the statutory definition of an affidavit. *Id.* Accordingly, as unsworn summaries of facts or arguments, the DeVito reports were inadmissible as evidence. Because the admissible evidence in *Gilbane I* was insufficient to meet the liquidator's burden of establishing that Amwest was insolvent on January 5, we reversed the decision with respect to the transfer by Amwest in January 2001 and remanded the cause for further proceedings.

On remand, the liquidator again filed a motion for summary judgment. In support of the motion for summary judgment, the liquidator entered into evidence, inter alia, the affidavit of Fitzgibbons dated September 13, 2004, the affidavit of Fitzgibbons dated September 7, 2005, and the affidavit of DeVito dated February 27, 2009. Attached to DeVito's affidavit were the two reports of examinations conducted by DeVito which were discussed in *Gilbane I*. The district court

also admitted into evidence the transcripts of two depositions of DeVito. No claim is made on appeal that DeVito is not an expert.

In opposition to the liquidator's motion, Gilbane entered into evidence, inter alia, Amwest's annual statement for the year ending December 31, 2000, and the affidavit of an attorney for Gilbane dated February 23, 2007, attached to which was a "Statement of Actuarial Opinion Regarding Loss and Loss Adjustment Expense Reserves as of December 31, 2000" authored by someone associated with "the firm of KPMG LLC" (KPMG).

Based on the entirety of the record made on remand, the district court determined that Amwest was insolvent on January 5, 2001, and that the transfer to Gilbane on that date should be voided. On appeal, Gilbane contends that the liquidator has again failed to prove Amwest's insolvency at the time of the January 2001 transfer because although DeVito provided his expert testimony in a sworn affidavit, the methodology used by DeVito was improper, and therefore, his testimony does not establish Amwest's insolvency on January 5. Gilbane also argues that even if the liquidator's evidence tended to establish Amwest's insolvency as of the January 2001 transfer, in its evidence in opposition to the liquidator's motion, Gilbane raised genuine issues of material fact precluding entry of summary judgment. In particular, Gilbane asserts that its evidence puts the date of Amwest's insolvency in doubt.

After reviewing the record, we agree with the district court that the liquidator cured the deficiencies in its evidence which had occurred in *Gilbane I* and that the methodology used by DeVito was proper. Further, the liquidator met its burden of establishing that Amwest was insolvent on the date of the January 2001 transfer and Gilbane did not provide meaningful evidence to rebut this determination. Thus, it was not error to grant the liquidator's motion for summary judgment, thereby voiding the January 2001 transfer.

On appeal, we understand Gilbane's objections to the methodology used by DeVito to be twofold. First, Gilbane argues that DeVito's determination that Amwest was insolvent is in error because DeVito did not calculate Amwest's loss reserves

in accordance with Neb. Rev. Stat. § 44-401.01 (Reissue 2004). In this regard, Gilbane contends that because DeVito did not determine the loss reserves by looking at the present value of estimated future payments as of January 2001, but instead looked at the actual development of claims through December 31, 2004, his determination of insolvency was in error. Second, Gilbane contends that DeVito's use of "retrojection," a method used to prove insolvency indirectly, was flawed because the dates he used to establish insolvency on January 5, 2001, were unacceptably distant from the January 5 date of the transfer at issue. We explain retrojection further below.

We are not persuaded by either of Gilbane's arguments. With regard to the first argument, the record shows that DeVito's determination of insolvency complied with the statutory definition of insolvency under the NISRLA. As noted above, under the NISRLA, an insurer is considered insolvent if it is

> unable to pay its obligations when they are due or when its admitted assets do not exceed its liabilities plus the greater of:
>
> (i) Any capital and surplus required by law to be maintained; or
>
> (ii) The total par or stated value of its authorized and issued capital stock . . . .

§ 44-4803(14)(b).

DeVito testified that he used the Nebraska statutory definition of insolvency in making his determination that Amwest was insolvent. He explained that to determine whether Amwest was insolvent, he reviewed Amwest's statutory quarterly statement as of June 30, 2000; Amwest's restated financial statements as of June 30, 2000, as prepared by the liquidator; and documents supporting the adjusting entries made by the liquidator, including general ledger accounts, accounting schedules, journal entries, and accounting analyses through December 31, 2004. Upon reviewing these materials, DeVito concluded that Amwest was insolvent as of June 30, 2000. DeVito further concluded that Amwest remained insolvent on January 5, 2001, the date of the transfer at issue, and remained continuously insolvent through the date of DeVito's supplemental report dated June 28, 2006.

The district court accurately described DeVito's methodology in its order. In arriving at his determinations, DeVito examined the actual loss experience data as the information developed through December 31, 2004; he then compared this information to the estimated loss reserves set aside by Amwest as of June 30, 2000. Based on this information, DeVito determined that Amwest had substantially underreserved claims and was insolvent as of June 30, 2000. To determine that Amwest was insolvent at the time of the January 2001 transfer, DeVito used a retrojection analysis, which we review in more detail below. Based on Amwest's records from the year 2000 through December 31, 2004, DeVito determined that Amwest was actually insolvent as of June 30, 2000, and remained insolvent until the time of his report in 2006. Given the facts relied upon, this determination is in accordance with the definition of insolvency in the NISRLA. We do not find merit in Gilbane's argument that DeVito's methodology was flawed or inconsistent with § 44-401.01.

[8] Gilbane also objects to DeVito's retrojection analysis and his determination that Amwest was insolvent on January 5, 2001. Retrojection is a method used to prove insolvency indirectly. As noted in *In re Stanley*, 384 B.R. 788, 807 (S.D. Ohio 2008), "'[i]nsolvency is not always susceptible to direct proof and frequently must be determined by proof of other facts or factors from which the ultimate fact of insolvency on the transfer dates must be inferred or presumed.'" In *In re Stanley*, the bankruptcy court defined retrojection as the

> inverse of projection. A retrojection analysis begins with a debtor's financial condition at a certain point in time (typically the petition date) and extrapolates back in time in an attempt to show that the debtor must have been insolvent at some earlier relevant time (*e.g.,* the date of an alleged fraudulent transfer).

384 B.R. at 807.

[9,10] Retrojection is a widely used method for determining insolvency, and as Gilbane observes in its brief, courts have concluded that if the retrojection period stretches too far back from the date on which the insolvency of the debtor is known, it is untenable. See, e.g., *In re Stanley, supra*; *In re Laines*, 352

B.R. 397 (E.D. Va. 2005); *In re Washington Bancorporation*, 180 B.R. 330 (D.C. 1995); *In re War Eagle Floats, Inc.*, 104 B.R. 398 (E.D. Okla. 1989). The cases make clear that "courts will only consider retrojection if the evidence of insolvency on the certain date is accompanied by evidence that the debtors [sic] financial condition did not change during the pendency period between the time of the payment and the date of proven insolvency." *In re Washington Bancorporation*, 180 B.R. at 334. It has been observed that "[w]here a debtor is shown to be insolvent at a date subsequent to a particular transfer and the debtor's condition did not change during the interim period, it is logical and permissible to presume that the debtor was insolvent at the time of the transfer." *In re Damason Const. Corp.*, 101 B.R. 775, 778 (M.D. Fla. 1989). We agree with the foregoing authorities and conclude that retrojection is a permissible method by which to prove insolvency when accompanied by evidence that no substantial change occurred in the insolvent entity's condition during the look-back period.

We understand Gilbane's argument to be that DeVito's retrojection analysis is deficient because he uses a period so lengthy as to be inherently unreliable. We find no merit to this argument. In his deposition testimony in evidence, DeVito explained that in his retrojection analysis, he found two dates, June 2000 and June 2001, on which he determined Amwest was insolvent and then considered Amwest's condition on January 5, 2001. We note that DeVito used the date the court determined Amwest to be insolvent, which he believed was June 7, 2001. However, the parties concede that the court actually determined insolvency as of March 2001. DeVito further stated that based on the financial records he reviewed, Amwest was insolvent as of June 2000, and that he thus used June 2000 as the earliest insolvency date. DeVito stated in his affidavit that the financial records reflected there was no substantial change in Amwest's financial condition over the period from June 2000 to June 2001, which he reviewed, and that therefore, he determined the company was insolvent for the entire period between June 2000 and June 2001, which period included January 5, 2001, the date of the transfer at issue.

We note that the date the court determined Amwest was insolvent was March 2001 and that the date of the transfer was only 3 months earlier. This is an acceptable retrojection period. See, e.g., *Misty Management Corp. v. Lockwood*, 539 F.2d 1205 (9th Cir. 1976) (5-month retrojection period acceptable). Given the evidence that there was no substantial change in Amwest's condition during the retrojection period, DeVito's retrojection analysis is not flawed and his opinion that Amwest was insolvent on January 5, 2001, is supported by the record. We reject Gilbane's argument that DeVito's methodology was flawed.

On remand, the liquidator adequately cured the defects in its evidence by producing an expert witness whose opinion established that Amwest was insolvent at the time of the January 2001 transfer. The burden then shifted to Gilbane to rebut the evidence presented by the liquidator.

Gilbane argues it successfully carried its burden and directs us to the "Statement of Actuarial Opinion Regarding Loss and Loss Adjustment Expense Reserves as of December 31, 2000" prepared by someone associated with KPMG at or near the end of December 2000 which Gilbane presented as its evidence. Gilbane entered this document into evidence by attaching it to Gilbane's opposition to Amwest's motion for summary judgment. The report was accompanied by the affidavit of Gilbane's attorney dated February 23, 2007. The KPMG report was not accompanied by an affidavit of the author of the report. In *Gilbane I*, we specifically rejected this methodology for entering evidence at the summary judgment stage. Therefore, we cannot consider the KPMG report when reviewing whether Gilbane successfully rebutted DeVito's testimony so as to create a genuine issue of material fact for trial. Gilbane did not enter into evidence any other expert testimony challenging DeVito's conclusions or creating genuine issues of material fact as to Amwest's insolvency. Accordingly, the district court did not err in determining that Amwest was insolvent on January 5, 2001, thus voiding the transfer on this date. The district court did not err when it granted the liquidator's motion for summary judgment, and we affirm its decision.

*The District Court Did Not Err When It Rejected Gilbane's § 44-4828(9) Setoff Defense.*

Gilbane next claims that under the provisions of § 44-4828(9), it was entitled to a setoff because it allegedly advanced credit to Amwest, and that the district court erred when it rejected Gilbane's claim. Gilbane contends that given this purported credit, the January 2001 transfer was not a voidable preferential transfer. As Gilbane sees it, after the January 2001 transfer, it continued to provide goods and services to and for the benefit of Amwest, for which Amwest made payments on April 9 and 13 and May 21. The liquidator counters that Gilbane's argument is without merit because this court already addressed and rejected this claim in *Gilbane I*. Alternatively, the liquidator contends that there is no support in the record to substantiate Gilbane's argument.

The district court concluded that this argument was without merit and denied Gilbane's motion for summary judgment based on this argument. The district court concluded that the April 9 and 13 and May 21, 2001, payments, which this court affirmed were voidable preferential transfers in *Gilbane I*, were made to Gilbane based on an antecedent debt, not for goods and services provided by Gilbane to Amwest, and that therefore, they did not meet the definition of a setoff in § 44-4828(9).

Section 44-4828(9) provides:

> If a creditor has been preferred and afterward in good faith gives the insurer further credit without security of any kind for property which becomes a part of the insurer's estate, the amount of the new credit remaining unpaid at the time of the petition may be set off against the preference which would otherwise be recoverable from him or her.

In *Gilbane I*, we addressed Gilbane's claim that the district court erred in not applying § 44-4828(9). We concluded that Gilbane did not advance credit to Amwest, and there was no claim of setoff. Accordingly, we concluded that § 44-4828(9) did not apply. Indeed, as the liquidator points out in its brief, we observed in *Gilbane I* that what Gilbane is now claiming was a "'credit'" in favor of Amwest was instead payment for

Gilbane's benefit because the payment permitted completion of the project underlying this case. See brief for appellee at 29. We noted in *Gilbane I* that Gilbane's use of "the funds it received from Amwest to pay a replacement subcontractor demonstrates that the transfers were both to and for the benefit of Gilbane, in that they permitted the completion of Crane's original contractual obligation to Gilbane." 276 Neb. at 693-94, 757 N.W.2d at 201.

Our decision that Gilbane did not advance Amwest credit is the law of the case with respect to the alleged setoff. The money paid by Amwest and later deemed to be preferential payments does not alter this decision. See *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008). Therefore, we affirm the ruling of the district court in which it rejected Gilbane's setoff claim.

*The District Court Did Not Err When It Rejected Gilbane's Request to Deem the January 22, 2009, Judgment and Order a Nonfinal Order.*

Finally, Gilbane claims that the district court erred when it denied Gilbane's motion to declare the district court's January 22, 2009, judgment and order a nonfinal order. We find no merit to this assignment of error.

On January 22, 2009, the district court entered a judgment and order in accordance with this court's December 23, 2008, mandate issued pursuant to *Gilbane I*. The district court's order simply directed payment of the three voidable preferential transfers in accordance with this court's mandate.

[11] After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. *Pennfield Oil Co., supra*. Upon remand of the cause in *Gilbane I*, the district court was authorized to take action on only the remaining issue regarding the January 2001 transfer. The January 22, 2009, order was final because no further action could be taken with respect to the issues surrounding the status of those three payments. Therefore, we affirm the district court's decision that its January 22 order was final and its denial of Gilbane's request to the contrary.

## CONCLUSION

On remand, the liquidator cured the defects in its evidence identified in *Gilbane I* and established by its expert admissible evidence in support of its motion for summary judgment that Amwest was insolvent as of the date of the January 2001 transfer. Gilbane failed to rebut this showing; therefore, the district court's determination that Amwest was insolvent on January 5, 2001, was supported by the record and the grant of summary judgment in favor of the liquidator was not error. The district court did not err in denying Gilbane's motion for summary judgment based on Gilbane's defense pursuant to § 44-4828(9), because that issue was previously considered and rejected by this court and that decision is the law of the case. Finally, the district court did not err when it denied Gilbane's request to deem its January 22, 2009, order a nonfinal order. Finding no merit to Gilbane's assignments of error, we affirm.

AFFIRMED.

WRIGHT, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
LAURA LEBEAU, APPELLANT.
784 N.W.2d 921

Filed July 16, 2010. No. S-09-890.

1. **Statutes.** The meaning of a statute is a question of law.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.
3. **Speedy Trial: Indictments and Informations: Pleadings.** Although Nebraska's speedy trial act, Neb. Rev. Stat. § 29-1201 et seq. (Reissue 2008), expressly refers to indictments and informations, the act also applies to prosecutions on complaint in the county court.
4. **Speedy Trial.** To calculate the time for speedy trial purposes, a court must exclude the day the complaint was filed, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2008) to determine the last day the defendant can be tried.
5. ____. Under Neb. Rev. Stat. § 29-1208 (Reissue 2008), if a defendant is not brought to trial before the running of the time for trial, as extended by excludable periods, he or she shall be entitled to absolute discharge from the offense charged.