Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
11/03/2026 09:26 AM CST

of finding that Woolley and Marks Clare owed a duty to anyone other than FFG and Presidents Trust.

Unlike the plaintiffs in *Perez*, FFG has not demonstrated that Woolley knew her opinion would benefit the related entities or that the alleged harm to the related entities was foreseeable. FFG has also failed to specifically allege damages suffered by the related entities and has been unable to allege a sufficiently close connection between Woolley's actions and the claimed damages. FFG has been unable to demonstrate that imposing liability under these circumstances would prevent future harm. And, finally, we find that imposing liability under the circumstances would impose an undue burden on the legal profession. Therefore, FFG's second assignment of error is also without merit.

CONCLUSION

We find that FFG did not have standing to sue, because any damages would go to the receiver and not to FFG. We also find that FFG did not demonstrate that Woolley owed it a "special duty" separate and distinct from the duty Woolley owed Presidents Trust. FFG cannot use the corporate form of an LLC as a shield from liability while still attempting to recover profits it claims to have lost. We also find that the related entities do not have standing to sue because there was no attorney-client relationship between the related entities and Woolley, and we decline to impose liability on the basis that the related entities were third-party beneficiaries.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JOSEPH E. TAMAYO, APPELLANT.
791 N.W.2d 152

Filed November 19, 2010. No. S-09-223.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.

2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Speedy Trial.** To calculate the time for speedy trial purposes, a court must exclude the day the information 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.
4. ____. 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.
5. **Speedy Trial: Mental Competency: Case Disapproved.** To the extent that *State v. Bolton*, 210 Neb. 694, 316 N.W.2d 619 (1982), suggests that psychiatric treatment is generally excludable as "other proceedings concerning the defendant" under Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 2008), *Bolton* is disapproved.
6. **Speedy Trial: Mental Competency.** An "examination and hearing on competency" within the meaning of Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 2008) is the statutory procedure for determining competency to stand trial established by Neb. Rev. Stat. § 29-1823 (Reissue 2008).

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and CASSEL, Judges, on appeal thereto from the District Court for Douglas County, J. PATRICK MULLEN, Judge. Judgment of Court of Appeals affirmed as modified, and cause remanded with direction.

James J. Regan for appellant.

Jon Bruning, Attorney General, James D. Smith, and Nathan A. Liss for appellee.

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

GERRARD, J.

Joseph E. Tamayo was charged with murder and a weapons charge and, before trial, filed a motion to have a psychiatric expert appointed to evaluate him. The motion was granted, and the psychiatric evaluation took several months. The issue presented in this appeal is whether the State proved that the time associated with that evaluation was an automatically excludable period under Nebraska's speedy trial statutes.[1] We find

[1] See Neb. Rev. Stat. § 29-1201 et seq. (Reissue 2008).

that it did not, and affirm the judgment of the Nebraska Court of Appeals to that effect. But we modify the Court of Appeals' decision to provide that the trial court should consider, upon remand, whether there was nonetheless good cause for the delay in bringing Tamayo to trial.

BACKGROUND

Tamayo was charged on January 18, 2008, with the crimes of first degree murder and use of a deadly weapon to commit a felony. On April 7, he filed a "Motion for Psychiatric Expert," for the purposes of determining his "mental capacity to waive his Miranda rights and/or to voluntarily provide a statement to law enforcement officers" and determining his "mental capacity as it relates to the defense of not responsible by reason of insanity under Nebraska law." (Emphasis in original.)

On April 11, 2008, the district court sustained Tamayo's motion on his "request to hire the services of a psychiatrist . . . as it relates to his ability to provide a voluntary statement and to the possible defense of not responsible by reason of insanity." Tamayo, who was indigent, was "authorized to engage the services of a psychiatrist for the above-stated purposes." No hearing on that motion appears in the record, and neither the motion nor the court's order expressly mentions any issue of Tamayo's competence to stand trial.

Dr. Bruce Gutnik, a psychiatrist, was hired to evaluate Tamayo. At some point, it was evidently decided that Gutnik should also evaluate Tamayo's competence to stand trial. The record contains a letter from Gutnik to Tamayo's counsel referring to a September 22, 2008, telephone call during which Tamayo's counsel had apparently asked for "an additional report addressing . . . Tamayo's competence to stand trial." Gutnik authored a "competence evaluation" dated September 24, 2008, in which Gutnik stated that Tamayo was seen, at the request of his attorney, "to provide an independent psychiatric evaluation to determine his sanity at the time of the alleged crime and competence to stand trial and to give statements to the police." In the end, Gutnik opined that Tamayo was "marginally competent to stand trial."

On October 15, 2008, a hearing was held on the report. The court opened the hearing by stating that the court had "entered an order regarding the allowance of a psychiatrist, by [Tamayo], to determine possible defenses in this case. And I think that perhaps that order's been expanded upon." The State replied by explaining that "in prior discussions it was somewhat regarding insanity but also kind of a general mental state of [Tamayo]. And in that regard the issue of competency was raised and was addressed by [Gutnik]." Tamayo's counsel agreed that Tamayo was examined for competence to assist in his defense and stand trial "pursuant to my request and the Court's order." Gutnik's report was entered into evidence, and on October 20, the court entered an order finding Tamayo competent to stand trial.

On January 30, 2009, Tamayo filed a motion for absolute discharge. The dispositive issue was the extent to which the time attributable to Tamayo's psychiatric evaluation was excludable from the 6-month calculation. The district court found it "clear from the time of [Tamayo's] counsel['s] request for the appointment of a psychiatrist that such an appointment was for the purpose of determining [Tamayo's] competency to stand trial in addition to other related matters regarding statements he may have given to police." Accordingly, the court concluded that the entire period from April 8 to October 20, 2008, was excludable under § 29-1207(4)(a), which excludes from speedy trial calculations "[t]he period of delay resulting from other proceedings concerning the defendant, including, but not limited to, an examination and hearing on competency and the period during which he or she is incompetent to stand trial . . . ." The court found that the period was excludable as "an examination and hearing on competency" and overruled the motion to discharge.

The Court of Appeals reversed that decision.[2] The district court's finding that Tamayo's competency had been at issue from April 8, 2008, onward was, according to the Court of Appeals, "simply and clearly wrong."[3] The Court of Appeals found that the earliest suggestion in the record that Tamayo's

---

[2] *State v. Tamayo*, 18 Neb. App. 430, 783 N.W.2d 240 (2010).

[3] *Id.* at 437, 783 N.W.2d at 246.

competency to stand trial was at issue was the September 22 telephone call to Gutnik from Tamayo's counsel, asking Gutnik to opine on Tamayo's competency to stand trial.

The Court of Appeals also acknowledged this court's decision in *State v. Bolton*,[4] which the Court of Appeals conceded suggests that a defendant's psychiatric evaluation or treatment is generally excludable under § 29-1207(4)(a), not as "an examination and hearing on competency," but as "other proceedings concerning the defendant." However, the Court of Appeals found "[n]o other case" using "this expansive notion that merely because a defendant is undergoing psychiatric evaluation or treatment, the speedy trial clock is tolled."[5] Instead, the Court of Appeals found that *Bolton* was inconsistent with a definition of "proceeding" we later explained in *State v. Murphy*.[6] So, the Court of Appeals reversed the decision of the district court and ordered Tamayo's absolute discharge.[7] We granted the State's petition for further review.

ASSIGNMENT OF ERROR

The State assigns that the Court of Appeals erred by concluding that Tamayo was entitled to a statutory discharge.

STANDARD OF REVIEW

[1,2] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.[8] But statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[9]

---

[4] *State v. Bolton*, 210 Neb. 694, 316 N.W.2d 619 (1982).

[5] *Tamayo, supra* note 2, 18 Neb. App. at 444, 783 N.W.2d at 250.

[6] *State v. Murphy*, 255 Neb. 797, 587 N.W.2d 384 (1998).

[7] See *Tamayo, supra* note 2.

[8] *State v. Wells*, 277 Neb. 476, 763 N.W.2d 380 (2009).

[9] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010), *cert. denied* 560 U.S. 945, 130 S. Ct. 3364, 176 L. Ed. 2d 1256.

ANALYSIS

[3,4] Nebraska's speedy trial statutes provide in part that "[e]very person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section."[10] To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4) to determine the last day the defendant can be tried.[11] And, under § 29-1208, 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.[12] We are aware that the speedy trial statutes were amended operative July 15, 2010—we have referred in this opinion to the version of the statutes that was in effect at the time of the trial court proceedings, but note that the amendments would not have affected our analysis.

In this case, Tamayo was charged on January 18, 2008. The district court found, and neither party disputes, that 107 days were excludable due to Tamayo's pretrial filings of a plea in abatement and a motion to suppress evidence. With those 107 days added, the State had until Monday, November 3, to bring Tamayo to trial.[13]

Tamayo filed his motion to discharge on January 30, 2009. So, the critical issue is whether any time associated with Tamayo's psychiatric evaluation is excludable from the 6-month speedy trial calculation. The State contends it is. Specifically, the State makes three arguments in support of its assignment of error: (1) *State v. Bolton*[14] is controlling, (2) § 29-1207(4)(a) is not limited to determinations of competency to stand trial, and (3) the Court of Appeals did not properly follow the correct standard of review. We consider each argument in turn.

---

[10] § 29-1207(1).

[11] *State v. Lebeau, ante* p. 238, 784 N.W.2d 921 (2010).

[12] *Id.*

[13] See *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

[14] *Bolton, supra* note 4.

STATE v. BOLTON

We note that the State's reliance on *Bolton* has been raised for the first time on further review—the State's brief to the Court of Appeals did not cite the case. But, because the Court of Appeals discussed *Bolton* in its opinion, we will consider it as well.

As noted above, § 29-1207(4)(a) provides that a defendant's speedy trial clock is tolled during "[t]he period of delay resulting from other proceedings concerning the defendant, including, but not limited to, an examination and hearing on competency and the period during which he or she is incompetent to stand trial . . . ." That provision was at issue in *Bolton*, in which the defendant was charged with assault. A capias was issued after the defendant did not cooperate with counsel in seeking a psychiatric evaluation. But before the defendant could be arrested, his family filed a petition to have him committed as a mentally ill dangerous person, and on February 27, 1980, he was placed in the county hospital by the county board of mental health. The defendant was diagnosed with possible schizophrenia and transferred to the Lincoln Regional Center.

On December 18, 1980, the superintendant of the regional center sent a status update to the district court, which included a psychologist's note dated April 29, 1980, opining that the defendant was competent to stand trial. On February 4, 1981, after further examinations and a hearing, the court found the defendant competent to stand trial. A bench trial was held on February 25, and the defendant was convicted.

On appeal, the defendant claimed he had not received a speedy trial. He argued, among other things, that the period excludable due to his incompetency ended on April 29, 1980, when his psychologist had opined that he was competent. But we rejected that argument, noting that according to the medical records, the defendant was still participating in mental health treatment well after that. This court explained that during the entire period between the defendant's commitment and the court's finding that he was competent, the defendant "was engaged in treatment programs for his psychiatric condition."[15]

---

[15] *Id.* at 699, 316 N.W.2d at 622.

So, we concluded, the entire period between February 27, 1980, and February 4, 1981, was "attributable to psychiatric evaluations and treatment" and was "excludable as an 'other proceeding' under the provisions of § 29-1207(4)(a)."[16] We also stated, as an alternative basis for our decision, that the defendant's incompetency ended only when the district court found him competent to stand trial.[17]

But we revisited § 29-1207(4)(a), although not in the context of mental health treatment, in *State v. Murphy*.[18] The issue in *Murphy* was the period of time excludable due to the defendant's depositions. Specifically, the defendant had filed a motion to take depositions, which was sustained. The defendant took the depositions, then later filed a motion to discharge on speedy trial grounds, which was overruled. On appeal from the denial of his motion to discharge, the defendant argued that the period of time excludable under § 29-1207(4)(a) due to his motion to take depositions ended when the motion was granted—not, as the State contended, when the depositions were complete.

We agreed, holding that while the time until the depositions were complete was not automatically excluded under § 29-1207(4)(a), it *could* be excludable (with appropriate findings) under § 29-1207(4)(f), which excludes "periods of delay not specifically enumerated in this section, but only if the court finds that they are for good cause." In particular, we explained that

> § 29-1207(4)(a) refers only to "proceedings." Black's Law Dictionary 1204 (6th ed. 1990) states that a "proceeding" is "[i]n a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object." If the term "proceedings" was read broadly, rather than in its "particular sense," § 29-1207(4)(a) would include any delay

---

[16] *Id.*

[17] See *id.*

[18] *Murphy, supra* note 6.

> at trial that "concerns" the defendant. If the Legislature had intended that the term "proceeding" encompass such a broad purview, there would have been little reason for the Legislature to have provided for exclusion under § 29-1207(4)(f), the "catchall provision."[19] Thus, the term "proceeding" must be read narrowly.
>
> Clearly, a motion for depositions is an "application to a court of justice" and, thus, is a "proceeding," as the statute specifically provides. However, once that application has been granted, no further application to a court of justice is required to obtain the depositions. Of course, a defendant may later make a motion to compel the taking of depositions. Such a motion would be a "proceeding" under § 29-1207(4)(a), and the time required for its disposition would be automatically excluded. Nonetheless, to the extent the parties rely on their own devices to secure the necessary depositions, the taking of the depositions is not a "proceeding" within the meaning of § 29-1207(4)(a).
>
> Thus, the period of time from the trial court's ruling on a motion for depositions until the depositions are concluded is not excludable under § 29-1207(4)(a). . . . However, such a period may or may not be excluded under § 29-1207(4)(f), with the inquiry turning upon whether there is "good cause" for the delay.[20]

[5] We agree with the Court of Appeals that our language in *Bolton* is inconsistent with our more recent decision in *Murphy*. As noted above, in *Bolton*, the "other proceeding" at issue was the psychiatric treatment the defendant was receiving after his family had him committed—even though that treatment was not initiated pursuant to an "application to a court of justice." *Bolton* clearly relies on the broader understanding of "proceeding" that we expressly repudiated in *Murphy*. And *Murphy* is the more recent, and more definitive, construction of § 29-1207(4)(a). So, to the extent that *Bolton* suggests

---

[19] *State v. Turner*, 252 Neb. 620, 629, 564 N.W.2d 231, 237 (1997).

[20] *Murphy, supra* note 6, 255 Neb. at 803-04, 587 N.W.2d at 389.

that psychiatric treatment is generally excludable as "other proceedings concerning the defendant" under § 29-1207(4)(a), *Bolton* is disapproved.

Examination and Hearing on Competency

The State also argues that even if Tamayo's psychiatric evaluation is not an "other proceeding," it is still excluded under § 29-1207(4)(a) as a period of delay resulting from "an examination and hearing on competency." The State contends that the phrase "examination and hearing on competency" does not specify competency *to stand trial*. So, the State argues, evaluation of Tamayo's competency to do other things is also excludable under that provision.

We, however, reject the State's argument because it is inconsistent with the context of the language upon which it relies, and with the statute as a whole. Section 29-1207(4)(a) excludes "an examination and hearing on competency and the period during which [the defendant] is incompetent to stand trial." In that context, it is difficult to read "competency" as intending anything other than competency to stand trial. And the other specific exclusions set forth in § 29-1207(4)(a)—such as the "time from filing until final disposition of pretrial motions of the defendant" and the "time consumed in the trial of other charges against the defendant"—are all consistent with the definition of "proceeding" adopted in *Murphy*, because they require a specific application to the court that requires formal judicial disposition. This permits a period of time excluded under § 29-1207(4)(a) to be readily calculated, because the beginning and end of an excludable period are clearly defined. Similarly, an examination on competency to stand trial is a specific statutory "proceeding" initiated when the question is brought to the attention of the court and concluded when and if the court finds the defendant competent to stand trial.[21]

Were we to construe § 29-1207(4)(a) as suggested by the State, on the other hand, the periods of time excludable due to evaluations for various "general competency" or "insanity"

---

[21] See Neb. Rev. Stat. § 29-1823 (Reissue 2008).

determinations would be, in many cases, quite unclear. Many such evaluations would not, for instance, require inpatient hospitalization, nor would the court necessarily be informed of particular evaluations arranged by privately retained counsel. Oftentimes the defense relies on its own devices to secure mental evaluations for various purposes—sometimes culminating in issues at trial, sometimes not. The trial court in this case was aware of the pending examination only because Tamayo, as an indigent defendant, needed the court's approval to hire an expert.

And it would not be clear when the time excludable due to such evaluations would end. For example, under circumstances such as those of the instant case, a defendant may choose to go forward with an insanity defense or a defense based on the voluntariness of his statements to law enforcement, or he may, at some point, choose to abandon one or both of those defenses. There is no clear point in time at which the "proceedings" associated with a general competency/insanity evaluation would conclude. Therefore, using § 29-1207(4)(a) to exclude the time for evaluations relating to various "general competency" and "insanity" determinations would be to automatically exclude a potentially indeterminate period of time. It would be inconsistent with the purpose and structure of § 29-1207(4)(a) to read an "examination and hearing on competency" to include the vague and often undefined periods that would be implicated by any sort of evaluation that could be described as involving "competency."

[6] In short, we hold that an "examination and hearing on competency" within the meaning of § 29-1207(4)(a) is the well-defined statutory procedure for determining competency to stand trial established by § 29-1823, because it is consistent with the other provisions of the statute and our decision in *Murphy*. Therefore, we find no merit to the State's contention that § 29-1207(4)(a) should be read to encompass any other determinations that could conceivably be characterized in terms of "competency." As discussed more completely below, other types of psychiatric evaluation or treatment are more appropriately considered under the catchall provision of § 29-1207(4)(f), with the inquiry turning upon whether the

defendant's evaluation or treatment provided good cause for any delay in bringing the defendant to trial.[22]

Standard of Review

Finally, the State argues that the Court of Appeals did not abide by the correct standard of review which, as noted above, requires an appellate court to affirm a trial court's factual findings unless they are clearly erroneous.[23] The State argues that the trial court was entitled to rely upon the statement of Tamayo's counsel that Tamayo was examined for competency to stand trial. But we agree with the Court of Appeals. As explained above, the issue is not what sort of evaluation Gutnik was actually performing—it is the time period that can be excluded due to an "examination and hearing on competency" pursuant to §§ 29-1207(4)(a) and 29-1823.

The record establishes beyond reasonable dispute that the first time any question as to Tamayo's competency to stand trial was brought before the trial court—in other words, when the "proceeding" on competency was initiated by application to the court—was October 15, 2008. That proceeding was concluded on October 20, when the court entered its order finding Tamayo competent to stand trial. This results in an excludable period of 5 days, which is well short of what would be necessary to bring Tamayo's trial within the statutory time limit.

Good Cause for Delay

We note, however, that although general psychiatric evaluation and treatment are not automatically excludable under § 29-1207(4)(a), such a period might be excluded under § 29-1207(4)(f), which permits exclusion of "[o]ther periods of delay not specifically enumerated in this section, but only if the court finds that they are for good cause." And given the issues implicated by Tamayo's motion to appoint a psychiatrist, and the related representations made by counsel, it is certainly possible that the State would be able to demonstrate that

---

[22] See *Murphy, supra* note 6.

[23] *Wells, supra* note 8.

Tamayo's psychiatric evaluation provided good cause to delay bringing him to trial.[24]

But because the trial court in this case decided Tamayo's motion to discharge on the basis of § 29-1207(4)(a), it had no reason to make the specific findings as to good cause or causes which are required if a court relies on § 29-1207(4)(f).[25] Accordingly, although we affirm the judgment of the Court of Appeals reversing the trial court's decision, the trial court should be instructed, upon remand, to determine whether any of the delay in bringing Tamayo to trial is excludable for good cause, and we modify the Court of Appeals' judgment to that extent.[26]

CONCLUSION

We conclude that the trial court erred in overruling Tamayo's motion to discharge based on § 29-1207(4)(a), and for that reason, we affirm the Court of Appeals' judgment reversing the trial court's order. But we modify the Court of Appeals' judgment to reflect that the trial court should be instructed, upon remand, to determine whether Tamayo's psychiatric evaluation provided good cause for any delay in bringing Tamayo to trial.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTION.

---

[24] See, e.g., *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004).

[25] See, e.g., *Murphy, supra* note 6.

[26] See *id.*

HEAVICAN, C.J., dissenting.

I respectfully dissent from the decision of the majority affirming as modified, and remanding with direction, the decision of the Nebraska Court of Appeals.

In reaching this conclusion, I concur with Judge Cassel's dissent to the Court of Appeals' decision in this case. In his dissent, Judge Cassel reasoned that the standard of review in this case places a high burden on the defendant and that Tamayo was unable to overcome this burden and show that the district court clearly erred in its factual finding regarding

whether the evaluation period in question was a "competency proceeding."

In reaching his conclusion, Judge Cassel noted that Tamayo's counsel stated, in part, that the purpose of the evaluation at issue was to examine Tamayo "'for competence to assist me in his defense and to stand trial.'"[1] I agree that this was a judicial admission on the part of Tamayo. And when this admission is considered with other evidence suggesting Tamayo was also being evaluated for competence, it is clear to me that the district court did not clearly err in reaching its conclusion that a "competency proceeding" was held from April 8 to October 20, 2008.

I would reverse the judgment of the Court of Appeals and instead affirm the judgment of the district court denying the motion to discharge.

---

[1] *State v. Tamayo*, 18 Neb. App. 430, 447, 783 N.W.2d 240, 252 (2010) (Cassel, Judge, dissenting) (emphasis omitted).

STATE OF NEBRASKA, APPELLEE, V.
RAYMOND MATA, JR., APPELLANT.
790 N.W.2d 716

Filed November 19, 2010. No. S-10-121.

1. **Pleadings.** The decision to grant or deny an amendment to a pleading rests in the discretion of the trial court.
2. **Postconviction: Right to Counsel.** In the absence of a showing of an abuse of discretion, the failure to provide court-appointed counsel in postconviction proceedings is not error.
3. ____: ____. Where the record shows that a justiciable issue of law or fact is presented in a postconviction action, an indigent defendant is entitled to the appointment of counsel.
4. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge. Reversed and remanded with directions.