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criminal act of making false statements under oath. Even in rough-and-tumble political discourse, a charge of specific illegal conduct by a public individual, if false and made with actual malice, is not protected by the First Amendment and is defamatory. Whether these accusations are false and made with malice can only be determined by examining evidence at trial. Neither the trial court nor this court has seen the affidavit. I would conclude that the district court erred when it determined prematurely that the affidavit-related allegations in publications Nos. 3 and 4 could not succeed at trial and therefore dismissed these claims at the pretrial stage. To this limited extent, I would reverse the district court's order, permit the case to proceed solely as to the defamation claims regarding publications Nos. 3 and 4, and await the evidence.

Betty Vandenberg, appellee, v. Butler County Board of Equalization, appellant.

796 N.W.2d 580

Filed April 28, 2011. No. S-10-783.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.

Appeal from the Tax Equalization and Review Commission. Reversed and remanded.

Julie L. Reiter, Butler County Attorney, for appellant.

No appearance for appellee.

Heavican, C.J., Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

McCormack, J.

NATURE OF CASE

The Butler County Board of Equalization (Butler County) appeals an order of the Tax Equalization and Review Commission (TERC). TERC determined that the irrigation pump at issue in this case is a fixture and should be taxed as real property. The issue on appeal is whether the irrigation pump should be classified as a fixture and taxed as real property or a trade fixture and taxed as personal property, as defined in Neb. Rev. Stat. § 77-105 (Reissue 2009). For the following reasons, we reverse TERC's determination.

BACKGROUND

Betty Vandenberg owns a parcel of land which she leases to individuals who farm the land. The parcel contains an irrigation well, a pump, a motor for the pump, a gear box attaching the motor to the pump, a pipe to carry water from the pump to a center pivot, and the center pivot, which is used to irrigate the land. The only property at issue in this appeal is the irrigation pump. The pump hangs inside a cased well and is secured to the land with a cement cap and bolts. The county assessor determined the pump was taxable as personal property. Vandenberg appealed this determination to TERC.

After a hearing, TERC reversed the assessor's determination and found that the pump qualified as a fixture. TERC relied, in part, on *Cook v. Beermann*.[1] In *Cook*, this court determined that an irrigation pump in a well was a fixture included in the sale of real property. The pump in the present case, TERC reasoned, is like the irrigation pump in *Cook* and qualifies as a fixture. TERC noted that not all fixtures are real property for purposes of taxation.[2] To determine whether the pump should be taxed as real or personal property, TERC analyzed the applicability of § 77-105. While § 77-103 provides that "fixtures" shall be taxed as real property, "trade fixtures" are taxable as personal property under § 77-105. Section 77-105 states in part: "The term tangible personal property also includes trade fixtures,

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[1] *Cook v. Beermann*, 201 Neb. 675, 271 N.W.2d 459 (1978).

[2] See Neb. Rev. Stat. § 77-103 (Reissue 2009).

which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased." TERC noted that the pump is machinery, but is not "used in a commercial, manufacturing or processing activity." Accordingly, TERC determined that the pump was a fixture and should be taxed as real property.

Butler County appeals. No brief was filed on behalf of Vandenberg.

ASSIGNMENTS OF ERROR

Butler County assigns that TERC erred in finding that an irrigation pump is (1) a fixture and therefore real property for the purposes of taxation and (2) not "machinery and equipment" used directly in "commercial, manufacturing, or processing activities," as set forth in § 77-105.

STANDARD OF REVIEW

[1-3] Appellate courts review decisions rendered by TERC for errors appearing on the record.[3] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record.[5]

ANALYSIS

Amendment to § 77-105

Section 77-105 states in full:

> The term tangible personal property includes all personal property possessing a physical existence, excluding money. *The term tangible personal property also includes trade fixtures, which means machinery and equipment,*

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[3] *Vitalix, Inc. v. Box Butte Cty. Bd. of Equal.*, 280 Neb. 186, 786 N.W.2d 326 (2010).

[4] *Id.*

[5] *Id.*

> *regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased*. The term intangible personal property includes all other personal property, including money.

(Emphasis supplied.) The emphasized portion above was added by the passage of 2007 Neb. Laws, L.B. 334. The Committee Statement on L.B. 334 gives the purpose of the amendment:

> [T]o specifically exclude trade fixtures from the definition of real property (section 77-103), and include trade fixtures within the definition of personal property (section 77-105). Trade fixtures would be defined as machinery and equipment used directly in commercial, manufacturing, or processing activities. The degree of attachment to the real property would be irrelevant under [the amendment].[6]

The Nebraska Administrative Code also defines trade fixtures:

> Trade fixture shall mean an item of machinery or equipment, used in commercial, manufacturing, or processing activities. The degree of attachment shall have no influence towards classifying the machinery or equipment as real property. Trade fixtures are items of personal property which are placed upon or affixed to real property for the sole purpose of carrying on a trade or business.[7]

Because Vandenberg leases the land to farmers who utilize the land to obtain monetary profits, Butler County argues that the pump is a piece of machinery used in commercial activities. At the hearing before TERC, Vandenberg argued that according to the tax code, she obtains rental income from the property, not income from a trade or business. Based upon our de novo review of the record, we determine that the pump in this case qualifies as a trade fixture.

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[6] Committee Statement, L.B. 334, Revenue Committee, 100th Leg., 1st Sess. (Feb. 1, 2007).

[7] 350 Neb. Admin. Code, ch. 10, § 001.29 (2009).

The language of § 77-105 is clear: The term "tangible personal property" includes trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased. TERC correctly determined that the pump qualifies as machinery. The statute does not specify *who* must use the machinery so that it shall be classified as a trade fixture. The language only specifies *how* the machinery must be used to be classified as personal property—such use being commercial, manufacturing, or processing activities.

It is undisputed that the parcel of land in this case is used for farming. The Nebraska Administrative Code defines agricultural land as "a parcel of land primarily used for agricultural . . . purposes."[8] "Agricultural purposes" means "used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture."[9] Commercial production is also defined as "agricultural and horticultural products produced for the primary purpose of obtaining a monetary profit."[10] The pump is used to move water from a well to a pivot system in order to irrigate the crops produced on the parcel land. These crops are produced for the primary purpose of obtaining a monetary profit. Such use amounts to commercial production of agricultural products, which qualifies as "commercial activity" for the purposes of § 77-105.

Whether Vandenberg personally engages in commercial activities on the land is irrelevant. The statutory language clearly focuses on the activity being conducted on the land, not who is conducting that activity. The pump is used directly in commercial activity conducted on the property. The pump meets the requirements provided in § 77-105, and therefore,

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[8] 350 Neb. Admin. Code, ch. 14, § 002.05 (2009).

[9] 350 Neb. Admin. Code, ch. 10, § 001.05F (2009).

[10] 350 Neb. Admin. Code, ch. 14, § 002.58 (2009).

it should be classified as a trade fixture and taxed as personal property.

Applicability of Three-Part Test

Butler County argues that the three-part test for determining whether a fixture is real or personal property, discussed in *Cook*[11] and later approved in *Northern Natural Gas Co. v. State Bd. of Equal.*,[12] was superseded by the amendment to § 77-105. The test was articulated in *Northern Natural Gas Co.*:

> To determine whether an item constitutes a fixture, this court looks at three factors: (1) actual annexation to the realty, or something appurtenant thereto, (2) appropriation to the use or purpose of that part of the realty with which it is connected, and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold.[13]

The three-part test was appropriately applied in *Cook* and remains appropriate for determinations of whether fixtures should be encompassed by land sale contracts. However, § 77-105 clearly controls the issue of classifications of fixtures for taxation purposes. Accordingly, the three-part test does not apply to taxation determinations of this nature. To the extent that *Northern Natural Gas Co.*[14] holds to the contrary, it is expressly overruled.

CONCLUSION

For the foregoing reasons, we reverse TERC's determination and remand the cause for further proceedings consistent with this opinion.

Reversed and remanded.

Wright, J., not participating.

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[11] *Cook v. Beermann, supra* note 1.

[12] *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), *disapproved on other grounds, MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

[13] *Id.* at 817, 443 N.W.2d at 257.

[14] *Northern Natural Gas Co. v. State Bd. of Equal., supra* note 12.