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consulted with experts on fingerprint evidence and the reliability of eyewitness identification.[70] But, while we know such rebuttal evidence was not presented at trial, the record does not establish whether trial counsel considered or explored such strategies, what may or may not have led trial counsel not to pursue the strategies, or what such experts would have said had they been retained and called to testify. In other words, from our review of the record, we cannot make any meaningful determination whether expert testimony beneficial to Nolan could have been produced or, if it could have, whether trial counsel made a reasonable strategic decision not to present certain evidence.[71] The record is, therefore, not sufficient to adequately review these claims on direct appeal, and we decline to consider them at this time.[72]

IV. CONCLUSION

For each of the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

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[70] See, e.g., *People v. Abney*, 13 N.Y.3d 251, 918 N.E.2d 486, 889 N.Y.S.2d 890 (2009); *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984), *overruled on other grounds, People v. Mendoza*, 23 Cal. 4th 896, 4 P.3d 265, 98 Cal. Rptr. 2d 431 (2000). See, also, *State v. Clopten*, 223 P.3d 1103 (Utah 2009) (collecting cases).

[71] See *Young, supra* note 65.

[72] See *id.* See, also, *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

PRIME HOME CARE, LLC, APPELLEE AND CROSS-APPELLANT, v. PATHWAYS TO COMPASSION, LLC, APPELLANT AND CROSS-APPELLEE.

809 N.W.2d 751

Filed January 20, 2012. No. S-11-030.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion

independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

3. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
4. **Names.** The registration of trade names in Nebraska is governed by the Trademark Registration Act, Neb. Rev. Stat. §§ 87-126 to 87-144 (Reissue 2008).
5. ____. The evil sought to be eliminated by trade name protection is confusion.
6. **Names: Proof.** In a case for trade name infringement, the plaintiff has the burden to prove by a preponderance of the evidence the existence of (1) a valid trade name entitled to protection and (2) a substantial similarity between the plaintiff's and the defendant's names, which would result in either actual or probable deception or confusion by ordinary persons dealing with ordinary caution.
7. ____: ____. Descriptive trademarks are entitled to protection only if the plaintiff can prove secondary meaning under the common law. To establish secondary meaning, a party must show by a preponderance of the evidence that the primary significance of the term in the mind of the consuming public is not the product but the producer.
8. ____: ____. Secondary meaning can be established for trade name protection in many ways, including, but not limited to, direct consumer testimony; survey evidence; exclusivity, manner, and length of use of a mark; amount and manner of advertising; amount of sales and number of customers; established place in the market; and proof of intentional copying by the defendant.
9. **Names.** One of the factors to be considered as to whether a trademark has acquired secondary meaning is whether actual purchasers of the product bearing the claimed trademark associate the trademark with the producer.
10. ____. Once a party has demonstrated that there is a protectable trade name, either by demonstrating that the name is distinctive or by proving secondary meaning, the next step is to determine whether there has been an infringement on the trade name.
11. **Names: Proof.** The likelihood of confusion in the use of trade names can be shown by presenting circumstances from which courts might conclude that persons are likely to transact business with one party under the belief they are dealing with another party. If the similarity is such as to mislead purchasers or those doing business with the company, acting with ordinary and reasonable caution, or if the similarity is calculated to deceive the ordinary buyer in ordinary conditions, it is sufficient to entitle the one first adopting the name to relief.
12. **Names.** Among the considerations for determining whether trade name confusion exists are (1) degree of similarity in the products offered for sale; (2) geographic separation of the two enterprises and the extent to which their trade areas overlap; (3) extent to which the stores are in actual competition; (4) duration of use without actual confusion; and (5) the actual similarity, visually and phonetically, between the two trade names.
13. **Rules of Evidence: Appeal and Error.** The admission of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.

14. **Pleadings.** The pleadings in a cause are not mere ordinary admissions for the purposes of use in that suit, but are judicial admissions.
15. **Pleadings: Evidence: Waiver.** In effect, pleadings are not a means of evidence, but a waiver of all controversy, so far as the opponent may desire to take advantage of them, and therefore, a limitation of the issues.
16. **Pleadings: Evidence.** Any reference that may be made to pleadings, where the one party desires to avail himself or herself of the other's pleading, is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings.
17. ____: ____. Judicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence.
18. **Attorney Fees: Appeal and Error.** An appellate court reviews the award of attorney fees for an abuse of discretion.
19. **Attorney Fees.** To determine proper and reasonable fees, it is necessary for the court to consider the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.
20. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Patrick D. Pepper, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellant.

Tiernan T. Siems and Andrew M. Collins, of Erickson & Sederstrom, P.C., for appellee.

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

HEAVICAN, C.J.

I. INTRODUCTION

Following a bench trial, Pathways to Compassion, LLC (Pathways), appeals from the decision of the Douglas County District Court granting Prime Home Care, LLC, a permanent injunction and attorney fees. Prime Home Care sought a permanent injunction pursuant to Neb. Rev. Stat. § 87-217 (Supp. 2011), part of the statutes governing the protection

of trade names, and Neb. Rev. Stat. § 87-303 (Cum. Supp. 2010), part of the Uniform Deceptive Trade Practices Act,[1] to prevent Pathways from using the name "Compassionate Care Hospice." Pathways appeals, contending that "Compassionate Care Hospice" was too descriptive to be protectable as a registered trade name under either § 87-217 or § 87-303. Prime Home Care cross-appealed, alleging that it is owed additional attorney fees and, because Pathways did not have a registered Nebraska agent at the time of the suit, that Prime Home Care should have been granted a default judgment. We affirm the decision of the district court.

II. BACKGROUND

Jacqueline K. Ross, the owner and operator of both Prime Home Care and "Compassionate Care Hospice," testified during the bench trial that she had been a partner in Nurses in Motion, L.L.C., which registered the trade name "Compassion Care Hospice" in 2003. At trial, Ross testified that "Compassion Care Hospice" was a typographical error and that the company had always presented itself as "Compassionate Care Hospice." Nurses in Motion assigned the registration of the trade name "Compassion Care Hospice" to Prime Home Care in September 2005.

In November 2006, pursuant to Neb. Rev. Stat. § 87-130 (Reissue 2008), Prime Home Care filed an application to register the trade name "Compassionate Care Hospice" with the Secretary of State. In that application, Prime Home Care stated that the name had been in use since October 1, 2006. At the same time, apparently in order to clear up any confusion, Prime Home Care filed with the Secretary of State a notice of "Consent to Use of Similar Trade Name," allowing Prime Home Care to use both "Compassion Care Hospice" and "Compassionate Care Hospice." The Secretary of State allowed Prime Home Care to register both names.

Judith Grey is the chief operating officer of "Compassionate Care Hospice Group," which operates hospice facilities in 19

[1] See Neb. Rev. Stat. §§ 87-301 to 87-306 (Reissue 2008 & Cum. Supp. 2010).

different states. When the group expanded into Nebraska in 2009, it filed a request with the Secretary of State to form a limited liability corporation under the name "Compassionate Care Hospice of Nebraska, LLC." The Secretary of State sent out a rejection notice on March 11, which stated:

> The requested name is not available at this time as we currently have "Compassion Care Hospice" and "Compassionate Care Hospice" on file. To continue to file under the requested name original letters of consent from these entities must accompany the articles. If consent is not an option, please re-file under an available name.

At that point, Grey formed a limited liability corporation under the name "Pathways to Compassion, LLC." Grey was listed as the registered agent, but was not at the time a Nebraska resident as required under Neb. Rev. Stat. § 21-2609 (Reissue 2007). However, at some point during the proceedings, Pathways named a Nebraska resident as its registered agent.

From the time it expanded into Nebraska, Pathways did business as "Compassionate Care Hospice of Nebraska," even after Pathways had received the above notice and had discovered that a company called "Compassionate Care Hospice" was doing business in the Omaha, Nebraska, area. One of the managers of Pathways approached Ross to request permission to use the name "Compassionate Care Hospice of Nebraska," which permission Ross denied. Ross' attorney sent Pathways a cease-and-desist letter, requesting that it not use the trade name "Compassionate Care Hospice." Grey testified that she continued using the name after receiving the cease-and-desist letter. Grey acknowledged that she also received a letter from the Nebraska Attorney General's office informing her that the use of "Compassionate Care Hospice" could result in criminal charges for deceptive trade practices. At trial, when asked about the letters, Grey repeatedly said, "I turned [them] over to my attorney." She eventually admitted that she was waiting for the outcome of this case to decide whether to cease using the name "Compassionate Care Hospice."

Prime Home Care filed this action alleging that Pathways' use of "Compassionate Care Hospice" injured Prime Home Care's business and caused confusion in the market, constituting a

deceptive trade practice. The district court agreed, finding that "Compassionate Care Hospice" was not so generic as to be unregistrable but that even if merely descriptive, it had acquired secondary meaning as applied to Prime Home Care's business. The district court entered a permanent injunction and granted attorney fees in the amount of $27,500. Pathways appealed, and Prime Home Care cross-appealed.

III. ASSIGNMENTS OF ERROR

Pathways assigns, consolidated and restated, that the district court erred in (1) granting Prime Home Care's request for a permanent injunction and attorney fees; (2) finding that Pathways violated the Uniform Deceptive Trade Practices Act; and (3) admitting exhibit 37, a document entitled "Assignment of Registration of Trade Name" between Nurses in Motion and Prime Home Care.

In its cross-appeal, Prime Home Care assigns that the district court erred in (1) denying its motion for default as a result of Pathways' failure to designate a proper registered agent, (2) not awarding the full amount of attorney fees requested, and (3) admitting Pathways' expert witness testimony.

IV. STANDARD OF REVIEW

[1] An action for injunction sounds in equity.[2]

[2] In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[3]

[3] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.[4]

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[2] *Nebraska Irrigation, Inc. v. Koch*, 246 Neb. 856, 523 N.W.2d 676 (1994).

[3] *Id.*

[4] *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004).

V. ANALYSIS

1. Arguments on Appeal

(a) Trial Court Did Not Err in Granting Injunction or Attorney Fees

Pathways' brief lists multiple assignments of error related to the district court's decision to grant Prime Home Care's motion for an injunction and attorney fees and in the related findings of fact. We address these assignments of error together.

Pathways first argues that the trial court erred in granting Prime Home Care's request for an injunction and attorney fees pursuant to § 87-217, part of the statutes governing the protection of trade names, and § 87-303, part of the Uniform Deceptive Trade Practices Act. Pathways' argument rests on its contention that "Compassionate Care Hospice" is merely descriptive and therefore is not a protectable trade name.

[4] The registration of trade names in Nebraska is governed by the Trademark Registration Act.[5] Section 87-130 sets forth the requirements for an application for registration of a trade name, which is then approved or denied by the Nebraska Secretary of State. Under Neb. Rev. Stat. § 87-209(5)(a) (Supp. 2011), a trade name will not be registered if it

> [i]s merely descriptive or misdescriptive . . . . The Secretary of State may accept as evidence that a trade name has become distinctive proof of continuous use by the applicant as a trade name in this state or elsewhere for five years preceding the date of the filing of the application for registration.

Section 87-217 provides in part:

> Any registrant of a trade name may proceed by suit to enjoin the use, display, or sale of any counterfeits or imitations thereof, and a court of competent jurisdiction may restrain such use, display, or sale on terms which the court deems just and reasonable and may require the defendants to pay to the registrant (1) all profits attributable to the wrongful use, display, or sale, (2) all

[5] See Neb. Rev. Stat. §§ 87-126 to 87-144 (Reissue 2008).

damages caused by the wrongful use, display, or sale, or (3) both such profits and damages, and reasonable attorney's fees.

[5,6] The evil sought to be eliminated by trade name protection is confusion.[6] In a case for trade name infringement, the plaintiff has the burden to prove by a preponderance of the evidence the existence of (1) a valid trade name entitled to protection and (2) a substantial similarity between the plaintiff's and the defendant's names, which would result in either actual or probable deception or confusion by ordinary persons dealing with ordinary caution.[7]

(b) "Compassionate Care Hospice" Acquired Secondary Meaning

Pathways' argument rests on the premise that "Compassionate Care Hospice" is merely descriptive and has not acquired secondary meaning. Under § 87-209(5)(a), a trade name shall not be registered if it is "merely descriptive or misdescriptive." The district court found that "Compassionate Care Hospice" was not merely descriptive but that even if it was, the name had acquired secondary meaning, which requires that the consuming public associates the name with the source, rather than with the product itself.[8] We decline to address whether the district court erred in determining that "Compassionate Care Hospice" was not merely descriptive because we find that, in any event, the name had acquired secondary meaning as it concerned Prime Home Care's hospice services.

Although existing Nebraska case law mentions "secondary meaning," this court has not yet had cause to address what evidence is required to prove such.[9] Pathways urges us to look to federal authority for direction in interpreting the Lanham Act,

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[6] *Equitable Bldg. & Loan v. Equitable Mortgage*, 11 Neb. App. 850, 662 N.W.2d 205 (2003).

[7] *Id.*

[8] See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 123 S. Ct. 2041, 156 L. Ed. 2d 18 (2003).

[9] *Ransdell v. Sixth Street Food Store*, 174 Neb. 875, 120 N.W.2d 290 (1963); *Equitable Bldg. & Loan, supra* note 6.

also known as the Trademark Act of 1946,[10] because that act is very similar to Nebraska's Trademark Registration Act. We agree that federal law is instructive, and we adopt the requirements for trade name protection defining secondary meaning as set out in federal case law.

[7,8] Under the Lanham Act, a plaintiff alleging trademark infringement has to prove first that the trademark is entitled to protection and, second, that the defendant's use of a trademark will cause confusion.[11] Descriptive trademarks are entitled to protection only if the plaintiff can prove secondary meaning under the common law.[12] To establish secondary meaning, a party must show by a preponderance of the evidence that the primary significance of the term in the mind of the consuming public is not the product but the producer.[13] Under federal law,

> [s]econdary meaning can be established in many ways, including (but not limited to) direct consumer testimony; survey evidence; exclusivity, manner, and length of use of a trademark; amount and manner of advertising; amount of sales and number of customers; established place in the market; and proof of intentional copying by the defendant.[14]

Pathways claims that Prime Home Care did not present sufficient evidence to prove secondary meaning. We disagree.

(i) Testimony of Consumers

[9] One of the factors to be considered as to whether a trademark has acquired secondary meaning is whether actual

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[10] See 15 U.S.C. §§ 1051 to 1141n (2006 & Supp. IV 2010).

[11] *Gruner + Jahr USA Pub. v. Meredith Corp.*, 991 F.2d 1072 (2d Cir. 1993).

[12] *Id.*

[13] *General Motors Corp. v. Lanard Toys, Inc.*, 468 F.3d 405 (6th Cir. 2006).

[14] *Filipino Yellow Pgs. v. Asian Journal Publications*, 198 F.3d 1143, 1151 (9th Cir. 1999). See, also, *Gruner + Jahr USA Pub., supra* note 11; *Spraying Systems Co. v. Delavan, Inc.*, 975 F.2d 387 (7th Cir. 1992); *International Kennel Club v. Mighty Star, Inc.*, 846 F.2d 1079 (7th Cir. 1988); *American Scientific Chem. v. American Hosp. Supply*, 690 F.2d 791 (9th Cir. 1982).

purchasers of the product bearing the claimed trademark associate the trademark with the producer.[15] Prime Home Care presented witness testimony from the acting administrative director of an assisted living facility, who testified that he had referred patients to Compassionate Care Hospice in the past and that he associates that name with Ross, the owner of Prime Home Care. An administrator at another assisted living facility also testified that she had referred patients to Prime Home Care and that she associated the name "Compassionate Care Hospice" with Ross and Prime Home Care. Prime Home Care's community outreach director, who as a former administrator with an assisted living facility had also made referrals to "Compassionate Care Hospice," testified that he associated the name with Ross.

Pathways claims that Prime Home Care should have presented a great deal more testimony from actual consumers, but the evidence at trial suggested Prime Home Care had a relatively small market share. Ross testified that at the time of trial, Prime Home Care had only 12 patients. Ross further testified that the Omaha hospice market was very small and that "Compassionate Care Hospice" served fewer clients than did some of the other hospice providers in the area. Prime Home Care argues that the number of people who did testify is proportionate to the actual consuming public and thus sufficient to show that consumers associated "Compassionate Care Hospice" with Ross and her company.

(ii) Degree and Manner of Advertising

Prime Home Care also entered as evidence advertising it had utilized, including business cards, brochures, telephone book advertisements, pill boxes, pens, and note pads. Although some of the items advertised Prime Home Care and "Compassionate Care Hospice" side by side, other items, such as the brochures, advertised only "Compassionate Care Hospice." Ross testified that "Compassionate Care Hospice" markets itself mostly face-to-face, but that it also advertises in the telephone book and disseminates brochures. Ross testified that employees of Prime

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[15] *Filipino Yellow Pgs., supra* note 14.

Home Care belong to a number of different committees, such as the Bellevue Fire and Rescue Division, and that employees market through participation in those committees. Ross stated that Prime Home Care also conducts seminars and presentations designed to increase referrals to its services.

During trial, Ross was asked how much Prime Home Care had spent on advertising for "Compassionate Care Hospice" since 2003. Ross stated her accountant told her that Prime Home Care had spent $120,000 during that time period but that she believed that number was not an accurate reflection of funds actually spent on advertising. Ross stated that the figure did not include her salary or the salaries of other marketers and that it was her opinion that $500,000 to $600,000 would be a more accurate figure.

A nurse marketer for Prime Home Care testified that she worked on marketing and increasing Prime Home Care's client base. She stated that she had given presentations to physicians and social workers regarding Prime Home Care's hospice care services. She testified that Prime Home Care is a small, local operation and that it did business as "Compassionate Care Hospice."

(iii) Length and Manner of Use of Claimed Trademark

Pathways has several assignments of error related to the district court's admission of evidence and findings of fact regarding Prime Home Care, or its predecessor's, use of the name prior to October 1, 2006. Pathways' arguments rest on two assumptions. The first assumption is that Prime Home Care's complaint constituted a judicial admission and that no evidence of its use prior to October 1, 2006, should have been admitted. And the second assumption is that the record does not support a finding that Prime Home Care established secondary meaning through continuous use. We discuss the admission of exhibit 37, the "Assignment of Registration of Trade Name," below, and determine that Prime Home Care's complaint was not a judicial admission that precluded admitting evidence of Prime Home Care's use of "Compassionate Care Hospice" prior to October 1, 2006.

Furthermore, after our de novo review of the record, we find the record does support the following facts: Ross and her partner in Nurses in Motion first registered "Compassion Care Hospice" in 2003. Ross testified that the name on the registration was a typographical error and that Nurses in Motion had actually used the name "Compassionate Care Hospice" continuously since 2003. Nurses in Motion assigned the name to Prime Home Care in 2005, and Prime Home Care filed a trade name registration for the name in 2006. At the same time, Prime Home Care filed a notice allowing the use of a similar trade name. Therefore, at the time of trial, Prime Home Care or its predecessor had been using the name "Compassionate Care Hospice" for 6 years or more. Ross further stated that Prime Home Care's hospice services were certified by Medicare and licensed by the State of Nebraska under the name "Compassionate Care Hospice."

(iv) Exclusive Use of Trademark

After Pathways began doing business in Nebraska, Prime Home Care took immediate steps to protect its trade name. Although Pathways had operated outside Nebraska as "Compassionate Care Hospice" or "Compassionate Care Hospice Group," Prime Home Care presented evidence at trial that it did business as "Compassionate Care Hospice" exclusively in Nebraska for 6 years prior to Pathways' expansion into this state.

The district court found that Prime Home Care had met its burden to show that "Compassionate Care Hospice" had attained secondary meaning as related to Prime Home Care's hospice services. Specifically, the district court found that Prime Home Care, or its predecessor, had been using the name continuously since 2003, and referral sources testified that they associated "Compassionate Care Hospice" with Ross of Prime Home Care. We review the district court's findings de novo on the record. Given the evidence outlined above, we find that the district court did not err.

Having determined the district court did not err when it found that "Compassionate Care Hospice" had secondary meaning, we next turn to whether the district court erred

when it granted Prime Home Care's request for a permanent injunction.

(c) Injunction and Likelihood of Confusion

Under § 87-209(6), protection is given to trade names registered in this State. Section 87-217 provides that "[a]ny registrant of a trade name may proceed by suit to enjoin the use, display, or sale of any counterfeits or imitations thereof, and a court of competent jurisdiction may restrain such use, display, or sale on terms which the court deems just and reasonable . . . ."

[10] We set forth the requirements for granting an injunction to protect a trade name in *Nebraska Irrigation, Inc. v. Koch*.[16] Once a party has demonstrated that there is a protectable trade name, either by demonstrating that the name is distinctive or by proving secondary meaning, the next step is to determine whether there has been an infringement on the trade name.[17] We have determined that Prime Home Care demonstrated it had a protectable trade name, because it established that "Compassionate Care Hospice" had attained secondary meaning in this state as related to Prime Home Care. But in order to obtain a permanent injunction, Prime Home Care bears the burden of proving that there was a likelihood of confusion.[18]

[11,12] The likelihood of confusion in the use of trade names can be shown by presenting circumstances from which courts might conclude that persons are likely to transact business with one party under the belief they are dealing with another party. If the similarity is such as to mislead purchasers or those doing business with the company, acting with ordinary and reasonable caution, or if the similarity is calculated to deceive the ordinary buyer in ordinary conditions, it is sufficient to entitle the one first adopting the name to relief.[19] Among the considerations for determining whether

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[16] *Nebraska Irrigation, Inc., supra* note 2.

[17] See *id.*

[18] See *id.*

[19] *Id.*

trade name confusion exists are (1) degree of similarity in the products offered for sale; (2) geographic separation of the two enterprises and the extent to which their trade areas overlap; (3) extent to which the stores are in actual competition; (4) duration of use without actual confusion; and (5) the actual similarity, visually and phonetically, between the two trade names.[20]

(i) Degree of Similarity of Product and Trade Name

In this case, the two trade names are essentially identical. Prime Home Care used "Compassionate Care Hospice" and sometimes "Prime Home Care and Compassionate Care Hospice." Pathways did business as "Compassionate Care Hospice of Nebraska." Ross testified at trial that at least on one occasion, a Pathways representative stated that she worked for "Compassionate Care Hospice." Furthermore, both Pathways and Prime Home Care offer identical or nearly identical services.

(ii) Geographical Trade Areas and Competition

Both Prime Home Care and Pathways operate within the Omaha area, and both market to the same groups. One of Ross' business associates informed Ross that she had seen the name "Compassionate Care Hospice" on a building in the same geographic region. Ross also testified that she was at a seminar when a representative from Pathways was present and was using the name "Compassionate Care Hospice." From the record, it is clear that Prime Home Care and Pathways were operating in the same geographical area and competing for the same or similar clients.

(iii) Duration of Use Without Actual Confusion

Several witnesses for Prime Home Care testified that they were confused by Pathways' use of the name. Witnesses who had referred clients to Prime Home Care testified that they had been confused by the appearance of "Compassionate Care Hospice of Nebraska" in the area. Prime Home Care's

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[20] *Id.*

community outreach director testified that one of Prime Home Care's clients had mistaken Pathways for Prime Home Care. The confusion appears to have arisen very soon after Pathways expanded into Nebraska.

Prime Home Care presented sufficient evidence to show that Pathways was operating a business with a nearly identical name in the same geographical area and serving the same or similar clients. Prime Home Care also presented evidence that consumers had been confused between the two names. We find the district court did not err when it found that confusion existed as a result of Pathways' use of Prime Home Care's protected trade name.

(d) Attorney Fees

We next turn to Pathways' claim that the trial court erred in its award of attorney fees. Prime Home Care sought attorney fees under both § 87-217, which addresses trade name infringement, and § 87-303, which is part of the Uniform Deceptive Trade Practices Act. We therefore address Pathways' argument that the district court erred in finding that Pathways had violated the Uniform Deceptive Trade Practices Act, in conjunction with its argument that the district court erred when it awarded Prime Home Care attorney fees. As discussed below, we find that Prime Home Care could have recovered attorney fees under either § 87-217 or § 87-303.

Pathways claims the trial court could award attorney fees only if Prime Home Care can prove that it willfully engaged in a trade practice it knew to be deceptive. But § 87-217, quoted above, provides that a trade name registrant may receive reasonable attorney fees in a case for trade name infringement where no such deception is required. As discussed above, the district court did not err in granting Prime Home Care's request for an injunction and Prime Home Care showed that a likelihood of confusion existed. Under § 87-217, Prime Home Care is entitled to reasonable attorney fees.

Prime Home Care also sought attorney fees under § 87-303, part of the Uniform Deceptive Trade Practices Act. Pathways claims that because it had a good faith belief that it could use the trade name "Compassionate Care Hospice," the district

court erred when it found that Pathways had violated the act. Under § 87-302, "a person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she . . . [c]auses likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services" or "[c]auses likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another."

As noted above, Prime Home Care presented evidence that Pathways knew the trade name "Compassionate Care Hospice" was already in use when it expanded into Nebraska. Pathways continued to do business under that name even after being notified by the Secretary of State that "Compassionate Care Hospice" was in use and after Ross' attorney sent a cease-and-desist letter.

Hence, we find that the district court did not err in determining that Pathways had engaged in deceptive trade practices or in granting Prime Home Care's request for attorney fees under either § 87-217 or § 87-303. These assignments of error are without merit.

(e) Trial Court Did Not Err When It Admitted Exhibit 37

In its next assignment of error, Pathways argues that the trial court erred by admitting exhibit 37, which was the "Assignment of Registration of Trade Name" between Nurses in Motion and Prime Home Care. Prime Home Care's amended complaint stated that it had "registered the trade name 'Compassionate Care Hospice,' under which it had conducted business in Nebraska since October 1, 2006 in connection with its home healthcare and hospice care business." Exhibit 37 appears to support Prime Home Care's contention that some form of the name "Compassionate Care Hospice" was in use prior to October 1, 2006, the date of the trade name registration. Pathways claims that because Prime Home Care made a judicial admission in its amended complaint, exhibit 37 should not have been admitted.

[13-16] The admission of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial

court.[21] The pleadings in a cause are not mere ordinary admissions for the purposes of use in that suit, but are judicial admissions.[22] In effect, they are not a means of evidence, but a waiver of all controversy, so far as the opponent may desire to take advantage of them, and therefore, a limitation of the issues.[23] Thus, any reference that may be made to them, where the one party desires to avail himself or herself of the other's pleading, is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings.[24]

[17] Pathways claims that based on the doctrine of judicial admissions and Prime Home Care's amended complaint, October 1, 2006, should be considered the first date Prime Home Care used "Compassionate Care Hospice." Prime Home Care counters by stating that "[j]udicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence."[25]

Prime Home Care argues that its amended complaint makes no mention of its use of "Compassionate Care Hospice" prior to October 1, 2006. Prime Home Care also argues that even if the statement in its amended complaint could be read in such a way, it would be inadvertent.

We find that the trial court did not abuse its discretion by admitting exhibit 37, because Prime Home Care's admissions cannot be said to have been unequivocal, deliberate, or clear. Pathways' final assignment of error is without merit.

2. Arguments on Cross-Appeal

(a) Prime Home Care's Motion for Default

In its cross-appeal, Prime Home Care assigns that the district court erred when it denied its motion to default. Prime

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[21] *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999).

[22] *Lange Building & Farm Supply, Inc. v. Open Circle "R", Inc.*, 210 Neb. 201, 313 N.W.2d 645 (1981).

[23] *Id.*

[24] *Id.*

[25] Brief for appellee at 25, citing *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006).

Home Care argues that § 21-2609 requires a limited liability corporation to have a properly designated registered agent. Because we found that the district court properly granted Prime Home Care's request for an injunction, we need not address this assignment of error.

(b) Prime Home Care Not Entitled to Additional Attorney Fees

Next, Prime Home Care argues that the district court committed an abuse of discretion by not granting the full amount of attorney fees. It alleges that by the end of the trial, its attorney fees totaled $55,700.50 and that the district court awarded only $27,500. In its order, the district court stated that it had

> reviewed the entire file herein and determines that the value of [Prime Home Care's] services including all criteria specified in the Cannons [sic] of Ethics relating to attorney fees warrant the award of an attorney fee to [Prime Home Care] for the benefit of [its] attorney in the amount of $27,500.00.

[18-20] As Prime Home Care noted, we review the award of attorney fees for an abuse of discretion.[26] To determine proper and reasonable fees, it is necessary for the court to consider the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.[27] In this respect, a judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[28]

The attorney invoices appear to support Pathways' contention that some of the fees were incurred on unrelated matters. The district court appears to have considered the appropriate

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[26] See *Schirber v. State*, 254 Neb. 1002, 581 N.W.2d 873 (1998).

[27] *Id.*

[28] *Id.*

factors in its award of attorney fees, and its finding is not clearly untenable. We therefore find that the district court did not abuse its discretion in the amount of attorney fees it awarded. This assignment of error is without merit.

(c) Expert Witness Testimony

Finally, Prime Home Care argues that the trial court erred in admitting the expert testimony of a lexicographer. Prime Home Care alleges that this testimony was not helpful to the fact finder and did not have sufficient foundation. The expert witness testified as to the descriptiveness of the name "Compassionate Care Hospice." Because we did not decide whether "Compassionate Care Hospice" was merely descriptive, but concentrated our analysis on whether it had acquired secondary meaning, we need not address this assignment of error.

VI. CONCLUSION

We find that the name "Compassionate Care Hospice" acquired secondary meaning as related to Prime Home Care's hospice services. We further find that the district court did not err in granting an injunction and attorney fees to Prime Home Care. Finally, we find that Prime Home Care's assignment of error on cross-appeal regarding attorney fees is without merit.

AFFIRMED.

WRIGHT, J., not participating in the decision.

STATE OF NEBRASKA, APPELLEE, V.
TIMOTHY D. JIMENEZ, APPELLANT.
808 N.W.2d 352

Filed January 20, 2012. No. S-11-303.

1. **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.
2. **Extradition and Detainer: Words and Phrases.** A detainer is a notification filed with the institution in which an individual is serving a sentence, advising the prisoner that he or she is wanted to face criminal charges pending in another jurisdiction.