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decree should be set aside. Todd, who did nothing to investigate whether Amy was pregnant with his child, cannot now seek equitable relief to intervene and set aside the paternity decree in this action, especially when doing so negates the effect of statutes duly enacted by the Legislature.

CONCLUSION

Todd attempted to intervene in the pending action to modify the 2001 paternity decree. The trial court erred in relying upon § 25-2001 in order to permit Todd to intervene and set aside the 2001 decree of paternity that Jeffrey is Fianna's father. For the foregoing reasons, we conclude the trial court abused its discretion in allowing Todd to intervene and in setting aside the paternity decree of 2001.

The judgment of the trial court is reversed, and the cause is remanded with directions to dismiss Todd from the action and to proceed on Amy's request to modify the paternity decree.

REVERSED AND REMANDED WITH DIRECTIONS.

MUTUAL OF OMAHA BANK, APPELLEE, V. PATRICK J. KASSEBAUM AND APRIL M. KASSEBAUM, APPELLANTS, AND TIMOTHY R. ENGLER, APPELLEE.

814 N.W.2d 731

Filed June 1, 2012. No. S-11-749.

1. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
2. **Judgments: Moot Question: Appeal and Error.** When a party voluntarily complies with the mandate of the trial court, satisfying the judgment, the appeal no longer presents an actual controversy, but an abstract question.
3. ____: ____: ____. Where the payment of a judgment compelled by law is not voluntary, payment will not render an appeal moot.
4. **Torts: Claims: Assignments: Death: Abatement, Survival, and Revival.** The common-law rule regarding the assignability of tort claims is that such a right of action is not assignable where the tort causes a strictly personal injury and does not survive the death of the person injured.
5. ____: ____: ____: ____: ____. The prohibition against the assignability of a tort claim is grounded on two principles: (1) that prior to more recent statutory

amendments, personal claims did not survive the death of the victim, and (2) that prohibiting the assignment of tort claims prevents champerty and maintenance.

6. **Assignments: Words and Phrases.** Champerty consists of an agreement whereby a person without interest in another's suit undertakes to carry it on at his own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation.
7. **Actions: Words and Phrases.** Maintenance exists when a person without interest in a suit officiously intermeddles therein by assisting either party with money or otherwise to prosecute or defend it.
8. **Claims: Assignments.** Where only the proceeds of the litigation, and not control of the litigation, have been assigned, there is little or no concern of intermeddling as a reason for declining to allow the assignment of the claim.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Katie Martens, of Ritnour & Associates, P.C., L.L.O., and, on brief, Matthew S. Torres for appellants.

William F. Austin, of Erickson & Sederstrom, P.C., and, on brief, William C. Nelson for appellee Mutual of Omaha Bank.

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

HEAVICAN, C.J.

INTRODUCTION

Mutual of Omaha Bank (Bank) filed a petition seeking declaratory judgment against Patrick J. Kassebaum and April M. Kassebaum. In particular, the Bank sought to have the district court declare the rights of the parties with respect to an assignment executed by the Kassebaums. The Kassebaums filed a motion to dismiss or, in the alternative, a motion for summary judgment, alleging that the assignment was ineffective. The district court denied the motion, and the matter proceeded to trial. A jury entered a verdict in favor of the Bank in the amount of $126,376.42. The Kassebaums appeal. We affirm.

FACTUAL BACKGROUND

The Kassebaums are the owners of residential real estate located in Seward County, Nebraska. Financing for this

property was obtained through a series of promissory notes and deeds of trust, first with Security Federal Savings, and then with its successor, the Bank. Two promissory notes and deeds of trust were executed on July 1, 1999, one in the amount of $240,000 and the other in the amount of $156,000. On July 26, 2002, a third note and deed of trust were executed in the amount of $31,692.56.

The Kassebaums had difficulty paying the amounts due on the notes. Various efforts were made to help the Kassebaums become current. Ultimately, on May 25, 2007, the Kassebaums refinanced the notes and executed two more notes and deeds of trust in the amounts of $336,000 and $98,350.

On that same date, the Kassebaums also executed an assignment of settlement proceeds or monetary judgment in favor of the Bank. At the time they executed the assignment, the Kassebaums had pending in federal court a lawsuit against Bausch and Lomb, Inc. The basis of this suit was a claim for damages suffered by Patrick when a defective Bausch and Lomb product caused him to suffer severe injuries to his left eye. Patrick eventually settled the suit, and the proceeds were deposited to the trust account of Timothy R. Engler, Patrick's counsel in the litigation. Engler is a nominal defendant in this case.

The Bank filed a declaratory judgment action on January 19, 2010, seeking that the balance of the funds held by Engler be distributed to the Bank as required by the assignment. Specifically, the Bank sought judgment in the amount of $365,601.55 plus interest.

The Kassebaums filed a motion to dismiss and/or a motion for summary judgment on March 15, 2010, alleging that the assignment was unenforceable. Specifically, the Kassebaums contended that the assignment occurred before the "claims were liquidated by settlement or judgment" and that the assignment was "against the public policy . . . and void as a matter of law." The district court denied this motion, concluding that the assignment of a claim might be unenforceable, but that in this case, it was only the proceeds that were assigned. As such, the district court ruled that the assignment was not invalid for the reasons raised by the motion.

The matter then proceeded to trial. In their answer, the Kassebaums raised a number of affirmative defenses, none of which are at issue on appeal. Following a jury trial, on August 11, 2011, the court accepted the verdict and entered a judgment against the Kassebaums and in favor of the Bank for $126,376.42, as well as judgment interest and costs. This amount was stipulated to by the parties. Engler subsequently paid and distributed to the Bank the funds held under his control.

This case raises the issue of whether an assignment of unliquidated proceeds from a personal injury claim is valid and enforceable under Nebraska law.

ASSIGNMENTS OF ERROR

On appeal, the Kassebaums argue that the district court erred in (1) denying their motion to dismiss/motion for summary judgment and (2) enforcing the assignment.

STANDARD OF REVIEW

[1] An appellate court reviews questions of law independently of the lower court's conclusion.[1]

ARGUMENT

Mootness.

The Bank first asserts that because the Kassebaums have paid the judgment entered against them, this appeal is moot.

[2,3] When a party voluntarily complies with the mandate of the trial court, satisfying the judgment, the appeal no longer presents an actual controversy, but an abstract question.[2] But where the payment of the judgment compelled by law is not voluntary, payment will not render an appeal moot.[3] Thus, the question presented here is whether the Kassebaums' payment in this case was voluntary.

We addressed the voluntariness of the payment of a judgment in *Green v. Hall*.[4] There, we concluded that the payment

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[1] *Tymar v. Two Men and a Truck*, 282 Neb. 692, 805 N.W.2d 648 (2011).

[2] *Hormandl v. Lecher Constr. Co.*, 231 Neb. 355, 436 N.W.2d 188 (1989).

[3] *Green v. Hall*, 43 Neb. 275, 61 N.W. 605 (1895).

[4] *Id.*

was involuntary because it was made to avoid a forced sale, which could not be undone by legal process.[5] Conversely, in *Hormandl v. Lecher Constr. Co.*,[6] we concluded that the payment was voluntary where the defendant's insurer, also a third-party defendant, paid the judgment.

In addition, this issue was addressed in *Ray v. Sullivan*.[7] In that case, the Nebraska Court of Appeals found that an appeal was moot where the record did not show that the defendants were aware that execution of the judgment had been ordered by the district court. The Court of Appeals reasoned that in the absence of this showing, it could not be determined whether the motivation in paying the judgment was the execution of judgment or if the payment was made voluntarily. The Court of Appeals concluded that it was the burden of the appealing party to show why any payment was not voluntary.

The record shows that the settlement proceeds from the Bausch and Lomb litigation were held in Engler's trust account. Following the jury's finding in this case, Engler was served with the judgment entered by the district court. That judgment specifically ordered Engler to pay the funds over to the Bank. Engler averred to all these facts in an affidavit contained in the record.

Engler was presented with a judgment of the district court ordering him to perform a legal duty. Engler performed that duty. On these facts, any payment by Engler is not considered voluntary on the part of the Kassebaums. We therefore reject the Bank's argument that this appeal is moot.

Assignment.

The primary issue presented by this appeal is whether an assignment of proceeds made at a time when the amount to be assigned was unliquidated is valid and enforceable under Nebraska law. This is an issue of first impression in Nebraska.

[4,5] The common-law rule regarding the assignability of tort *claims* is that such a right of action is not assignable where

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[5] *Id.* See, also, *Burke v. Dendinger*, 120 Neb. 594, 234 N.W. 405 (1931).

[6] *Hormandl, supra* note 2.

[7] *Ray v. Sullivan*, 5 Neb. App. 942, 568 N.W.2d 267 (1997).

the tort causes a strictly personal injury and does not survive the death of the person injured.[8] This prohibition is grounded on two principles: (1) that prior to more recent statutory amendments, personal claims did not survive the death of the victim, and (2) that prohibiting the assignment of tort claims prevents champerty and maintenance.[9]

[6,7] "'Champerty consists of an agreement whereby a person without interest in another's suit undertakes to carry it on at his or her own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation.'"[10] "'Maintenance exists when a person without interest in a suit officiously intermeddles therein by assisting either party with money or otherwise to prosecute or defend it.'"[11]

There is a split of authority regarding whether an assignment of the *proceeds* of litigation violates this common-law prohibition[12]:

> It has been held that, although a personal injury claim is not assignable before judgment, an assignment of the proceeds of whatever recovery is had in such an action is enforceable, at least where the plaintiff retains control of the lawsuit without any interference from the assignee. However, it has also been held that even the proceeds of such a claim are not assignable, since an assignment of the proceeds is, in effect, an assignment of the claim.[13]

Those courts that hold proceeds are assignable generally conclude that the reasons behind the prohibition against assigning a claim do not apply in the case of the proceeds.

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[8] 6 Am. Jur. 2d *Assignments* § 55 (2008). Cf. *Milbank Ins. Co. v. Henry*, 232 Neb. 418, 441 N.W.2d 143 (1989).

[9] See, e.g., *A. Unruh Chiropractic v. De Smet Ins. Co.*, 782 N.W.2d 367 (S.D. 2010).

[10] *Andersen v. Ganz*, 6 Neb. App. 224, 230, 572 N.W.2d 414, 418 (1997) (quoting 14 C.J.S. *Champerty and Maintenance* § 2 a. (1991)).

[11] *Id.* at 230, 572 N.W.2d at 418-19 (quoting 14 C.J.S., *supra* note 10, § 2 b.).

[12] Annot., 33 A.L.R.4th 82 (1984).

[13] 6 Am. Jur. 2d, *supra* note 8, § 58 at 188.

First, statutes now exist which allow certain personal causes of action to nevertheless survive the death of the victim.[14]

And more and more courts are finding that the second reason is also inapplicable to an assignment of proceeds, at least in cases where the assignee has no control over the litigation: Where the assignee has no control, champerty and maintenance are not as great a concern.[15] As was noted by the North Carolina Supreme Court:

> There is a distinction between the assignment of a claim for personal injury and the assignment of the proceeds of such a claim. The assignment of a claim gives the assignee control of the claim and promotes champerty. . . . The assignment of the proceeds of a claim does not give the assignee control of the case and there is no reason it should not be valid.[16]

However, other courts have declined to enforce the assignment of proceeds. Usually those courts base their decision on a rejection of the conclusion that the fears of champerty and maintenance are lessened when the assignment is one of proceeds,[17] further reasoning that the distinction between the claim and the proceeds is a "fiction,"[18] or one without a "'difference.'"[19]

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[14] See, e.g., *Hernandez v. Suburban Hosp.*, 319 Md. 226, 572 A.2d 144 (1990). Cf. Neb. Rev. Stat. § 25-1401 (Reissue 2008).

[15] See, e.g., *Hernandez, supra* note 14; *Achrem v. Expressway Plaza Ltd.*, 112 Nev. 737, 917 P.2d 447 (1996); *Charlotte-Mecklenburg Hospital Auth. v. First of Ga. Ins. Co.*, 340 N.C. 88, 455 S.E.2d 655 (1995); *In re Musser*, 24 B.R. 913 (D.C. Va. 1982) (concluding assignment would be enforceable under Virginia law).

[16] *Charlotte-Mecklenburg Hospital Auth., supra* note 15, 340 N.C. at 91, 455 S.E.2d at 657.

[17] *Karp v. Speizer*, 132 Ariz. 599, 647 P.2d 1197 (Ariz. App. 1982); *Town & Country Bk v. Country Mu. In. Co.*, 121 Ill. App. 3d 216, 459 N.E.2d 639, 76 Ill. Dec. 724 (1984); *Quality Chiropractic v. Farmers Ins. Co.*, 132 N.M. 518, 51 P.3d 1172 (N.M. App. 2002); *A. Unruh Chiropractic, supra* note 9.

[18] *Town & Country Bk, supra* note 17, 121 Ill. App. 3d at 218, 459 N.E.2d at 640, 76 Ill. Dec. at 725.

[19] *A. Unruh Chiropractic, supra* note 9, 782 N.W.2d at 371 (quoting *Karp, supra* note 17).

Neb. Rev. Stat. § 25-1563.02 (Reissue 2008) is also instructive. This section provides that lump-sum or periodic payment settlements made as compensation for personal injury or death shall be exempt from attachment, garnishment, or other legal or equitable process and from all claims of creditors. Notably, however, this section protects these proceeds "unless a written assignment to the contrary has been obtained."[20]

[8] We find the cases holding that an assignment of proceeds is enforceable to be the better reasoned position. Where only the proceeds of the litigation, and not control of the litigation, have been assigned, there is little or no concern of intermeddling as a reason for declining to allow the assignment of the claim. Section 25-1563.02, though concerned with liquidated amounts, lends further support to this conclusion. While the Legislature enacted § 25-1563.02 to provide some protection to certain types of personal injury "proceeds" similar to the ones at issue in this case, it did not see fit to prohibit written assignment of those proceeds. We therefore conclude that the Kassebaums' assignment is valid and enforceable under Nebraska law.

CONCLUSION

We conclude that this appeal is not rendered moot by Engler's payment of the judgment. We also conclude that the unliquidated proceeds of personal injury litigation are assignable. As such, the decision of the district court is affirmed.

AFFIRMED.

STEPHAN, J., not participating.

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[20] § 25-1563.02(1).