Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
11/02/2026 09:38 AM CST



force was not justifiable and a self-defense instruction was not warranted by the evidence. Accordingly, Smith's trial counsel was not ineffective for not requesting a self-defense instruction, and the trial court did not err in failing to give such an instruction.

## VI. CONCLUSION

Because we find that the jury should have been instructed on both attempted second degree murder and the lesser-included offense of attempted sudden quarrel manslaughter, we reverse, and remand this cause for a new trial on the charge of attempted second degree murder. Smith's convictions for first degree assault and use of a weapon to commit a felony are affirmed because no error was assigned to such. We find no merit to any of Smith's remaining assignments of error.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

---

# ABANTE, LLC, DOING BUSINESS AS ABANTE MARKETING AND ABANTE HOLDINGS, LLC, APPELLANT, V. PREMIER FIGHTER, L.L.C., ET AL., APPELLEES.

814 N.W.2d 109

Filed April 10, 2012. No. A-11-202.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
5. **Summary Judgment: Final Orders.** The granting of a summary judgment is a final order where it concludes all issues between the two parties on either side of the motion.

6. **Final Orders: Appeal and Error.** An appellate court's role is not to find a determination under Neb. Rev. Stat. § 25-1315 (Reissue 2008) by implication; rather, an appellate court's review is limited to an analysis of the express determination made by the trial court.
7. **Final Orders: Jurisdiction: Appeal and Error.** Without an express determination that there is no reason for delay and an express direction for the entry of final judgment from the trial court, an appellate court is without jurisdiction to hear an appeal from an order that does not dispose of all of the claims against all of the parties.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Appeal dismissed.

John C. Fowles, of Fowles Law Office, P.C., L.L.O., for appellant.

Steven M. Delaney, of Reagan, Melton & Delaney, L.L.P., for appellee MMAStop, Inc.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

## INTRODUCTION

Abante, LLC, doing business as Abante Marketing and Abante Holdings, LLC, appeals from an order of the district court for Sarpy County, Nebraska, that entered summary judgment in favor of MMAStop, Inc., one of the appellees. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Because the order appealed from fails to dispose of the claims against the remaining appellees, two of whom are the subject of a bankruptcy stay, and fails to make findings necessary for certification under Neb. Rev. Stat. § 25-1315 (Reissue 2008), we dismiss the appeal for lack of jurisdiction.

## BACKGROUND

In its operative complaint, Abante alleged that Matthew H. Anselmo induced Abante to finance a merchandise order from a retailer for Premier Fighter, L.L.C.; that Abante agreed to finance approximately $240,000 of the order; and that pursuant to instructions from Anselmo, Abante sent approximately $120,000 to MMAStop by wire transfer to begin the

production of merchandise, with the remainder sent directly to Premier Fighter. Abante further alleged that Anselmo, acting as an employee and agent of Premier Fighter, executed a promissory note to Abante in the amount of $240,000, due on or before October 12, 2008, with interest to accrue at 100 percent. Abante alleged that only one payment of $3,500 has been made on the note, which payment was received from M & M Marketing, L.L.C. Abante alleged that the money it wired to MMAStop was not used for the production of merchandise, but was instead used to offset indebtedness of Anselmo to MMAStop. Abante sought recovery against Premier Fighter on the promissory note in the total sum of $476,500, representing principal and interest remaining due. Abante sought recovery against Anselmo and M & M Marketing for the same amount, alleging that they were jointly and severally liable for the obligation of Premier Fighter by virtue of Anselmo's having disregarded the corporate identities of Premier Fighter and M & M Marketing. Abante sought recovery against Anselmo in the sum of $236,500 on the basis of fraud, asserting that Anselmo fraudulently induced Abante to make a loan. Finally, Abante sought recovery against MMAStop for return of the wired money in the sum of $120,000.

During the pendency of the proceedings, a suggestion in bankruptcy was filed showing that Premier Fighter and M & M Marketing had filed involuntary chapter 7 bankruptcy petitions. The district court entered an order for bankruptcy stay, staying all future proceedings in the case. Thereafter, Abante filed a motion seeking approval to proceed against MMAStop only, which motion was granted by the district court in an order which further indicated that the bankruptcy stay remained in place as to all other defendants. The record shows that Anselmo was the sole owner of M & M Marketing, which in turn owned Premier Fighter. At the time of the summary judgment hearing, Anselmo was incarcerated in a federal prison as a result of a fraud conviction.

MMAStop moved for summary judgment, and a hearing was held at which numerous depositions and exhibits were received in evidence. On February 24, 2011, the district court entered an order granting summary judgment in favor of MMAStop,

finding that Abante's cause of action for money had and received against MMAStop was without merit. The order did not address the remaining defendants, did not dismiss the action, and did not make any findings under § 25-1315. Abante filed this timely appeal.

## ASSIGNMENT OF ERROR

Abante assigns, summarized and restated, that the district court erred in granting summary judgment in favor of MMAStop.

## STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

## ANALYSIS

[2-4] The dispositive issue in this appeal is whether the district court's order granting summary judgment in favor of MMAStop is a final, appealable order. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Id*. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. *Wright v. Omaha Pub. Sch. Dist.*, 280 Neb. 941, 791 N.W.2d 760 (2010). Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Id*. Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009).

[5] It has been recognized that the granting of a summary judgment is a final order where it concludes all issues between the two parties on either side of the motion. See *Blue Cross*

*and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004). However, where multiple parties are involved in the case, § 25-1315(1) is implicated. This section provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In the present case, there are several claims for relief against multiple parties and the summary judgment order did not dispose of the remaining claims or parties. Nor did the district court expressly direct the entry of a final judgment or make an express determination that there is no just reason for delay, as required by § 25-1315(1). This same situation was presented to the Nebraska Supreme Court in *Kilgore v. Nebraska Dept. of Health & Human Servs., supra*. In that case, summary judgment was granted in favor of only two of multiple defendants. On appeal, the Supreme Court concluded that while the summary judgment order affected a substantial right and satisfied the requirements of § 25-1902(1), it did not satisfy the requirements of § 25-1315. See, also, *Ferer v. Aaron Ferer & Sons Co.*, 16 Neb. App. 866, 755 N.W.2d 415 (2008) (summary judgment order which disposed of some but not all of appellant's claims and which did not make determination pursuant to § 25-1315 was not final, appealable order).

[6] Both parties in this appeal urge the conclusion that there is a final order, despite acknowledging that the order does not

make the express findings required by § 25-1315. The parties suggest that the § 25-1315 determination was implied by the district court's decision to allow Abante to proceed against MMAStop but leaving the bankruptcy stay in place as to the remaining defendants. The parties also argue that there is no active case with respect to the three other defendants and that the cause of action brought against MMAStop does not interrelate with the claims relevant to the other defendants. The Supreme Court has made it abundantly clear that an appellate court's role is not to find a § 25-1315 determination by implication; rather, our review is limited to an analysis of the express determination made by the trial court. See *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007). See, also, *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005) (rather than leave assessment of status of trial proceedings to appellate conjecture, § 25-1315(1) requires express determination that there is no just reason for delay of appeal of order disposing of less than all claims or parties and express direction for entry of judgment as to those adjudicated claims or parties). Further, even if the order allowing the case to proceed as to MMAStop only can somehow be viewed as invoking § 25-1315, a proposition that we do not accept, the order did not provide the required explanation supporting certification. See *Murphy v. Brown*, 15 Neb. App. 914, 738 N.W.2d 466 (2007).

[7] This case presents a somewhat different factual situation due to the bankruptcy stay in place for Premier Fighter and M & M Marketing. Neither party has presented us with any authority, nor are we aware of any, that the bankruptcy stay excuses or alters the requirement for an express determination and direction by the trial court under § 25-1315. While this may be relevant to the trial court's determination when presented with a request for certification of a final order, it does not change the conclusion that without an express determination that there is no reason for delay and an express direction for the entry of final judgment from the trial court, an appellate court is without jurisdiction to hear an appeal from an order that does not dispose of all of the claims against all of the parties. See *Cerny v. Todco Barricade Co., supra.*

Because the order granting summary judgment to MMAStop does not dispose of all of the claims against all of the parties, and does not make an express determination and direction under § 25-1315, this appeal must be dismissed for lack of jurisdiction.

## CONCLUSION

The order granting summary judgment in favor of MMAStop is not a final, appealable order.

APPEAL DISMISSED.

---

JASON M. CITTA, APPELLANT, V.
TRICIA J. FACKA, APPELLEE.
812 N.W.2d 917

Filed April 10, 2012. No. A-11-549.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Actions: Paternity: Child Support: Equity.** While a paternity action is one at law, the award of child support in such an action is equitable in nature.
4. **Paternity: Child Support: Appeal and Error.** A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
5. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
6. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
7. **Child Custody.** When a parenting plan has not been developed and submitted to the court, the court shall create the parenting plan in accordance with the Parenting Act.
8. **Rules of the Supreme Court: Pretrial Procedure: Evidence.** Under Neb. Ct. R. Disc. § 6-336(a), matters are deemed admitted unless, within 30 days after