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Thomas Kalkowski, appellant and cross-appellee, v. Nebraska National Trails Museum Foundation, Inc., and City of Ogallala, Nebraska, appellees and cross-appellants, and Ogallala/Keith County Chamber of Commerce, appellee.

826 N.W.2d 589

Filed February 12, 2013. No. A-12-122.

1. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
3. **Limitations of Actions.** Generally, a cause of action accrues and the period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
4. ____. For a limitations period to begin to run, it is not necessary that a plaintiff have knowledge of the exact nature or source of a problem, but only that a problem exists.
5. **Limitations of Actions: Fraud.** A 4-year statute of limitations period governs claims of fraud, but the cause of action shall not be deemed to have accrued until the discovery of the fraud.
6. **Limitations of Actions: Pleadings.** A plaintiff seeking to invoke the discovery clause to toll the statute of limitations must allege facts showing why the cause of action reasonably could not have been discovered during the limitations period.
7. **Limitations of Actions: Fraud.** An action for fraud does not accrue until there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to such discovery.
8. **Limitations of Actions: Pretrial Procedure.** Discovery, as applied to the statute of limitations, occurs when one knows of the existence of an inquiry or damage and not when he or she has a legal right to seek redress in court.
9. **Limitations of Actions: Pretrial Procedure: Fraud.** The discovery provision in Neb. Rev. Stat. § 25-207 (Reissue 2008) relates to when an action must be instituted and does not depend upon the eventual success of a fraud claim.
10. **Taxation: Public Purpose: Legislature.** It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a tax invalid because it is not for a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind.

11. **Public Purpose.** The general encouragement of growth and industry through such devices as publicity and advertising are public purposes.
12. **Taxation: Public Purpose.** There is no hard-and-fast rule in determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose, and each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.

Appeal from the District Court for Keith County: DONALD E. ROWLANDS, Judge. Affirmed.

Randy Fair, of Dudden & Fair, P.C., L.L.O., for appellant.

James R. Korth and Tanya M. Martens, of McGinley, O'Donnell, Reynolds & Korth, P.C., L.L.O., for appellee Nebraska National Trails Museum Foundation, Inc.

Michael J. McQuillan and Joshua Wendell, of McQuillan Law Office, P.C., L.L.O., for appellee City of Ogallala, Nebraska.

Philip E. Pierce, of Pierce Law Office, for appellee Ogallala/Keith County Chamber of Commerce.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

The district court for Keith County dismissed the complaint filed by Thomas Kalkowski against the Nebraska National Trails Museum Foundation, Inc. (Foundation); the City of Ogallala, Nebraska (City); and the Ogallala/Keith County Chamber of Commerce (Chamber) (collectively the Appellees) after finding that although Kalkowski's action against the Appellees was not barred by the applicable statute of limitations, the transfers of money at issue were not fraudulently concealed and were made for a public purpose under Neb. Rev. Stat. § 13-315 (Reissue 2012). Kalkowski appeals, and the Foundation and the City cross-appeal the district court's determination that Kalkowski's action was not barred by the statute of limitations. For the reasons that follow, we affirm the decision of the district court.

BACKGROUND

On June 24, 1997, Douglas Teaford appeared on behalf of the Foundation at a regular meeting of the city council (Council) and requested funds for the Foundation's proposed museum. The site of the proposed museum is located in Keith County, approximately 10 to 14 miles west of Ogallala. The City tabled the Foundation's request until the July 8 meeting to enable the City to obtain a legal opinion. Minutes for the July 8 meeting do not mention the Foundation's request, but do show that the City tabled a resolution of intent to provide funds to the Chamber "until budget time." In a letter to the Chamber dated July 15, 1997, the City informed the Chamber that the City "intend[ed] to introduce a request for an additional $20,000 each year in the 1998 and 1999 fiscal budgets for economic development and promotion." The letter did not mention the Foundation or its request for funds for a proposed museum. On October 28, the City wrote a check to the Chamber in the amount of $25,625. On November 3, the Chamber wrote a check for $20,000 to the Foundation.

On February 1, 1999, in a letter to Steve Krajewski, the city manager, Teaford wrote, "Please consider this letter the official request for funding the second installment committed to by the City Council on July 15, 1997." Krajewski replied on February 2, stating:

> Please allow me to attempt to clarify the confusion with respect to your letter dated February 1, 1999, specifically your request for the "second installment committed to by the City Council on July 15, 1997". The City's commitment, dated July 15, 1997, was to provide $20,000 each year for 1998 and 1999 to the [Chamber], *not* the [Foundation].

(Emphasis in original.) On February 23, the City wrote a check to the Chamber for $20,000. On March 2, the Chamber wrote a check for $20,000 to the Foundation.

In February 2004, as part of a separate lawsuit between Kalkowski and the Foundation involving Kalkowski's lease of the real estate owned by the Foundation, Kalkowski received an affidavit signed by Teaford in support of the Foundation's request for an injunction preventing Kalkowski from disking

the ground. Attached to the affidavit was a financial report showing the investment of various organizations in the project. This report listed cash gifts of $20,000 in the years 1997 and 1999 from the "City/Chamber." Prior to receiving this document, Kalkowski had no knowledge that the Foundation allegedly received money from the City. On March 22, 2005, at a regular Council meeting, Kalkowski asked the City to take certain steps regarding the transactions at issue. On April 12, the City decided to take no action on the matter.

Kalkowski filed the initial complaint in this action on April 22, 2005, and an amended complaint on July 8. Kalkowski alleged that the unlawful and fraudulent transfer of at least $40,000 of the City's public funds to the Foundation via the Chamber benefited the Foundation, whose proposed museum site is located more than 10 miles outside of Ogallala. Kalkowski alleged that the transfer of funds was made under the guise of "economic development and promotion" and was thus not within his reasonably diligent attention, observation, and judgment. Kalkowski alleged that the Appellees concealed the donations from the general public for the purposes of keeping taxpayers from objecting to them. Kalkowski sought a judgment to return the public funds to the City; to enjoin the City from contributing additional public funds to the Foundation, whether directly or through the Chamber; and to enjoin the Chamber from contributing additional public funds of the City to the Foundation.

In their responsive pleadings, the Appellees all asserted that Kalkowski's complaint was barred by the applicable statute of limitations. All of the parties filed motions for summary judgment, which were heard by the district court on November 13 and December 1, 2006.

On January 16, 2007, the district court entered an order sustaining the Appellees' motions for summary judgment, overruling Kalkowski's motion for summary judgment, and dismissing the case. The district court found that Kalkowski was barred "by the four year statute of limitations by virtue of the fact that matters appearing of public record operate as constructive notice and constitute discovery of facts with respect to fraud." The court noted that the transactions challenged by

Kalkowski occurred in November 1997 and February 1999 and determined that the payments were part of the public budget records, disclosed on Council agendas and minutes. The court accepted the Appellees' argument that the City's records, which are open by statute to the public, put Kalkowski on notice of the transactions which he claimed were impermissible. The court noted that Kalkowski did not allege or show any facts that would indicate that the City or any of the other Appellees refused him access to their records and books at that time. Accordingly, the court held that Kalkowski's claim was barred by the statute of limitations, which ran "no later than March 2, 2003."

Kalkowski appealed, and on July 22, 2008, this court reversed the district court's dismissal on the basis of the statute of limitations, finding that Kalkowski was not put on notice of the City's expenditure of funds in question by public records available at that time. We remanded the matter for further proceedings. See *Kalkowski v. Nebraska Nat. Trails Museum Found.*, No. A-07-268, 2008 WL 2839037 (Neb. App. July 22, 2008) (selected for posting to court Web site).

Following the above mandate, a trial was held on December 14 and 15, 2011. Teaford was a Foundation board member from approximately 1995 through 1998 and served as executive director from approximately 1999 through 2007. Teaford explained that when he sent the February 1999 letter to the Council, his understanding was that he needed to ask the City for the additional $20,000. However, Teaford admitted that he had some confusion over the source of the funds and that the return letter from the City cleared it up. Teaford testified that the financial document attached to his 2004 affidavit which showed contributions from the "City/Chamber" was an internal document used by the Foundation.

Gregory Beal, a Foundation board member from 1997 through 1999, testified that there was no question that the money was given to the Foundation by the Chamber and not the City.

Krajewski, who served as the city manager from approximately 1997 through 2007, testified that the Council agreed to provide the Chamber additional funds. He testified that he

believed there was an awareness of the Council that the money given to the Chamber would then go to the Foundation.

Mary Lou Heelan, a Council member from approximately 1997 through 2000, testified that the Council gave money to the Chamber at their request to be used toward promotional purposes for the area. She recalled no discussion that the money transferred to the Chamber would ultimately be given to the Foundation. Heelan testified that if she had known of such a plan, she would not have approved of it.

The deposition testimony of Joel Sanders was admitted as evidence. Sanders was a Council member in 1997 and testified that he had reservations about giving money to the Foundation because it was outside Ogallala's city limits. He said there were discussions that the money could be utilized through the Chamber; however, he could not recall the basis for any of these discussions.

Several former Chamber members also testified about their recollections of the relevant time period. Jim Glenn, who was on the Chamber board and served as director in 1999, testified that he did not specifically recall approval for the money to go to the Foundation, but he knew that the Chamber was supporting the project. Glenn testified that the Chamber was doing everything it could to support economic development in the area. Glenn's signature was on one of the checks written by the Chamber to the Foundation, and Glenn testified that he would not have signed a check without authorization.

Timothy Jimenez, who was a Chamber board member during the relevant time period, also did not recall a specific vote authorizing $40,000 to go to the Foundation. Additionally, Jan Johnson, a Chamber board member during 1996 and 1997, remembered a presentation from the Foundation but did not recall a request, discussion, or voting on funds.

Marion Kroeker McDermott was the project director for the Chamber in 1998 and became executive director in 2000. She was unable to find any documents or minutes discussing the transfer of $40,000 from the Chamber to the Foundation; however, she testified that prior to 2000, the Chamber's books were a mess and there were some gaps in the recordkeeping.

All of the individuals from the City, the Chamber, and the Foundation testified that there was no intent to deceive the public, no facts were concealed, and no illegal activities were performed.

Finally, there was testimony that the museum being built by the Foundation would benefit the City. Teaford testified that Ogallala is the primary community in Keith County with amenities that tourists would require. Krajewski compared the museum to Lake McConaughy, which is also outside of Ogallala's city limits, but attracts people to spend money in Ogallala's restaurants, hotels, and gas stations. McDermott testified that an entity could benefit the City even if it were outside of city limits, because Ogallala is the largest community in the county and tourists would likely stay in its motels, eat in its restaurants, and shop in its stores. Finally, Beal, a Foundation board member, testified that the City would be the primary beneficiary of the project because Ogallala has lodging, restaurants, and people.

On January 17, 2012, the district court entered an order in favor of the Appellees and dismissing Kalkowski's complaint. The district court first readdressed whether Kalkowski filed the action before the statute of limitations expired. The district court held that Kalkowski filed his complaint within approximately 13 months of learning the facts and circumstances which gave rise to the litigation via the Teaford affidavit filed February 9, 2004. Teaford's affidavit was the first time Kalkowski received actual notice of city funds being transferred to the Chamber and subsequently transferred by the Chamber to the Foundation. The court held that Kalkowski could not, with reasonable diligence, have discovered this information through the minutes of the Council or other records readily available to the public. The Chamber is a nonprofit corporation, and its records were private in nature and not available to the public. Therefore, the statute of limitations began running on February 9, 2004, and Kalkowski's initial complaint, filed on April 22, 2005, was well within the statute of limitations.

As to the merits of Kalkowski's fraudulent concealment claim, the court found that at no time did any of the City's

employees engage in any fraudulent concealment, civil conspiracy, or other improper activity to conceal from Kalkowski or the general public that a transfer of funds totaling $40,000 had been made from the City to the Chamber. The court also found that the expenditure of funds by the City to the Chamber, which funds were subsequently transferred from the Chamber to the Foundation, were appropriate and expended for a public purpose. The court noted that so long as the funds are utilized for the purpose of encouraging immigration, new industries, and investment in Ogallala, § 13-315 permits their expenditure. The court noted that several witnesses testified that constructing the museum would increase immigration and tourism within Ogallala. While the direct economic impact could not be precisely determined at that time, the court noted that it would not second-guess the decision of the elected officials of the Council in this regard.

Kalkowski appeals, and the Foundation and the City cross-appeal.

ASSIGNMENTS OF ERROR

Kalkowski alleges, restated, that the trial court erred in finding (1) that the transfer of $40,000 from the City to the Chamber was not the result of any fraudulent concealment, civil conspiracy, or other improper activity and (2) that the transfer of these funds was for a public purpose as authorized by Nebraska law.

On cross-appeal, the Foundation and the City both allege that the trial court erred in finding that Kalkowski's claim was not barred by the statute of limitations.

STANDARD OF REVIEW

[1] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Behrens v. Blunk*, 284 Neb. 454, 822 N.W.2d 344 (2012).

[2] On appeal from an equity action, we decide factual questions de novo on the record and, as to questions of both fact

and law, are obligated to reach a conclusion independent of the trial court's determination. *County of Sarpy v. City of Gretna*, 273 Neb. 92, 727 N.W.2d 690 (2007).

ANALYSIS

Statute of Limitations.

The Foundation and the City both allege via cross-appeal that the district court erred in finding that Kalkowski's action was not barred by the statute of limitations.

[3,4] Generally, a cause of action accrues and the period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit. *Irving F. Jensen Co. v. State*, 272 Neb. 162, 719 N.W.2d 716 (2006). For a limitations period to begin to run, it is not necessary that a plaintiff have knowledge of the exact nature or source of a problem, but only that a problem exists. *Nuss v. Alexander*, 269 Neb. 101, 691 N.W.2d 94 (2005).

[5-8] Neb. Rev. Stat. § 25-207(4) (Reissue 2008) provides that an action on the ground of fraud can only be brought within 4 years, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud. A plaintiff seeking to invoke the discovery clause to toll the statute of limitations must allege facts showing why the cause of action reasonably could not have been discovered during the limitations period. *Nuss v. Alexander, supra*. An action for fraud does not accrue until there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to such discovery. *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012). Discovery, as applied to the statute of limitations, occurs when one knows of the existence of an inquiry or damage and not when he or she has a legal right to seek redress in court. *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005).

The district court found that Kalkowski did not discover the facts constituting the basis of his cause of action until Teaford's affidavit was filed on February 9, 2004. The affidavit included as an exhibit a document from the Foundation

indicating that it received $20,000 from the "City/Chamber" in both 1997 and 1999. The district court found that Kalkowski could not, with reasonable diligence, have discovered through the minutes of the Council or other records readily available to the public that the City had transferred funds to the Chamber in 1997 and 1999, and the court further found that such funds were immediately transferred to the Foundation. The Chamber's records were private in nature and not available to the public.

We agree with the district court that the records readily available to the public provide no link between the money transferred by the City to the Chamber and the money transferred by the Chamber to the Foundation. The Foundation document attached to Teaford's affidavit referencing contributions from the "City/Chamber" was Kalkowski's first indication that there might be a link between the two and became the basis of his discovery of the alleged fraud. Therefore, the district court correctly determined that Kalkowski had 4 years from February 9, 2004, in which to file this litigation and that Kalkowski's complaint, filed April 22, 2005, was well within the statute of limitations.

[9] The Appellees argue that the discovery exception should not be applied in this case because the district court found that the Appellees did not engage in fraudulent concealment with regard to the transfer of funds from the City to the Chamber and because Kalkowski did not appeal this finding. However, the discovery provision in § 25-207 relates to when an action must be instituted and does not depend upon the eventual success of a fraud claim. Therefore, we find no merit to the Foundation's and the City's cross-appeals. The district court's finding that Kalkowski's claim was not barred by the statute of limitations was not clearly wrong.

Illegal Transfer of Funds and Public Purpose.

Kalkowski argues that the district court erred in finding that the transfer of funds from the City to the Chamber and ultimately from the Chamber to the Foundation was for a public purpose and was not an illegal expenditure. Kalkowski

does not challenge on appeal the district court's finding that the City did not fraudulently conceal the true purpose for the transfer of funds; therefore, we need not address that finding further.

Section 13-315 provides that a city council has the power to appropriate or expend annually from the general funds or from revenue received from any proprietary functions an amount not to exceed a specified amount "for the purpose of encouraging immigration, new industries, and investment and to conduct and carry on a publicity campaign." Section 13-315 further provides that the money may be expended directly by the city or paid to the chamber of commerce or other organization for these purposes under the direction of the board of directors of the organization. Neb. Rev. Stat. § 13-316 (Reissue 2012) requires that the amount to be expended for the ensuing year shall be fixed at the time of making up the annual budget and shall be included in the budget.

[10-12] The Nebraska Supreme Court upheld the constitutionality of that portion of the predecessor statute to § 13-315 which allows expenditure of funds "for the purpose of encouraging immigration, new industries, and investment and to conduct and carry on a publicity campaign," as well as the provision that such expenditures can be made through chambers of commerce or other listed organizations. See *Chase v. County of Douglas*, 195 Neb. 838, 241 N.W.2d 334 (1976). In reaching this conclusion, the court noted that this provision describes a public purpose and rests upon two legal propositions. The first proposition is that it is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. *Id*. "However, to justify a court in declaring a tax invalid because it is not for a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind." *Id*. at 846, 241 N.W.2d at 339. The second proposition relied upon by the court is that the general encouragement of growth and industry through such devices as publicity and advertising are public purposes. *Id*. The court in *Chase* recognized that there is

> "'[n]o hard and fast rule . . . in determining whether a proposed expenditure of public funds is valid as devoted to a "public use or purpose" [and] each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.'"

Id. at 847, 241 N.W.2d at 340.

In our de novo review, we find that there was sufficient evidence presented to the district court that the funds allocated by the City to the Chamber were for a public purpose and that the City satisfied the requirements of making such expenditures under these statutes. The City allocated $20,000 in its annual fiscal budgets for the years in question for economic development and promotion, as required by § 13-316. These funds were paid to the Chamber, as allowed by § 13-315, which in turn transferred funds to the Foundation. There was sufficient evidence that the promotion of the Foundation's museum would provide an economic benefit for the City, which fits within the public purpose of the general encouragement of growth and industry. See *Chase v. County of Douglas, supra*.

Kalkowski also argues that the transfer of the funds from the Chamber to the Foundation was illegal because the Chamber board did not specifically approve of this use. Kalkowski refers to that portion of § 13-315 which provides that such funds may be paid to the chamber of commerce to be expended "under the direction of the board of directors." Kalkowski points to the lack of any records showing authorization for the transfer of funds from the Chamber to the Foundation. In our independent review of the record, we find that there was insufficient evidence presented by Kalkowski to conclude that the expenditure of funds was not under the direction of the Chamber's board of directors. Most of the witnesses associated with the Chamber at the time of the expenditures either did not remember this time period or simply affirmed that they would not have expended the funds without prior approval. And, there was evidence that the Chamber's recordkeeping prior to 2000 was either poor or nonexistent. Kalkowski failed to prove that the expenditures

by the Chamber were not made under the direction of its board of directors.

We find no error in the district court's determination that the expenditure of funds by the City to the Chamber, which funds were subsequently transferred from the Chamber to the Foundation, were appropriate and for a public purpose, according to § 13-315.

CONCLUSION

The district court did not err in finding that Kalkowski's claim was not barred by the statute of limitations or in finding that the expenditure of funds by the City was for a public purpose and in conformity with the statutes.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DEAN L. OSBORNE, APPELLANT.

826 N.W.2d 892

Filed February 19, 2013. No. A-12-112.

1. **Courts: Jurisdiction: Appeal and Error.** A district court sitting as an intermediate appellate court may timely modify its opinions, a notion consistent with the generally recognized common-law rule that an appellate court has the inherent power to reconsider an order or ruling until divested of jurisdiction.
2. **Courts: Appeal and Error.** Judicial efficiency is served when any court, including an appellate court, is given the opportunity to reconsider its own rulings, either to supplement its reasoning or to correct its own mistakes.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
4. **Sexual Assault: Convictions: Proof.** According to Neb. Rev. Stat. § 28-320(1) (Reissue 2008), a conviction for third degree sexual assault requires proof that the defendant subjected another person to sexual contact without the consent of the victim or where the defendant knew or should have known that the victim