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on lost wages and no damages were specifically apportioned, the entire verdict is deemed compensation for lost wages. See 45 U.S.C. § 231(h)(2). Therefore, the entire award became subject to RRTA taxes. See I.R.C. § 3121(a). Under the RRA, the entire award is compensation subject to RRTA taxes that must be paid by the employer.

The district court erred when it required that the parties agree in writing that no portion of the general verdict could be considered lost wages to avoid BNSF's obligation to pay RRTA taxes on Heckman's entire award.

VI. CONCLUSION

We conclude that Heckman's entire award was compensation subject to RRTA taxation. The district court erred in denying BNSF's motion for satisfaction and discharge of judgment and ordering that the parties agree in writing that no portion of the general verdict was based on lost wages. Therefore, we reverse the judgment and remand the cause with directions that the district court enter a satisfaction and discharge of the judgment upon proof of payment of $6,202.70 by BNSF to the IRS on account of the lost wages paid to Heckman.

REVERSED AND REMANDED WITH DIRECTIONS.

SHERMAN T., INDIVIDUALLY AND AS NEXT FRIEND OF BRAYDEN N., APPELLANT, V. KARYN N., APPELLEE.

837 N.W.2d 746

Filed August 16, 2013. No. S-12-515.

1. **Trial: Courts.** A court cannot err with respect to a matter not submitted to it for disposition.
2. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.
3. **Standing: Claims: Parties.** To have standing, a litigant must assert the litigant's own rights and interests.
4. **Motions to Dismiss: Rules of the Supreme Court: Jurisdiction: Pleadings: Service of Process.** When a motion to dismiss raises both Neb. Ct. R. Pldg. § 6-1112(b)(1) and § 6-1112(b)(6), the court should consider dismissal under

§ 6-1112(b)(1) first and should then consider § 6-1112(b)(6) only if it determines that it has subject matter jurisdiction. Similarly, when a motion to dismiss raises § 6-1112(b)(6) and any combination of § 6-1112(b)(2), (4), and (5), the court should consider dismissal under § 6-1112(b)(2), (4), and (5) first and should then consider dismissal under § 6-1112(b)(6) only if it determines that it has personal jurisdiction and that process and service of process were sufficient.

5. **Motions to Dismiss: Rules of the Supreme Court: Appeal and Error.** An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6).
6. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
7. **Constitutional Law: Due Process: Equal Protection: Statutes: Presumptions: Proof.** Where a statute is challenged under either the Due Process Clause or the Equal Protection Clause of the state and federal Constitutions, the general rule is that legislation is presumed to be valid, and the burden of establishing the unconstitutionality of the statute is on the one attacking its validity.
8. **Due Process.** The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process, a court must consider the nature of the individual's claimed interest.
9. ____. A claim that one is being deprived of a liberty interest without due process of law is typically examined in three stages. The question in the first stage is whether there is a protected liberty interest at stake. If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due.
10. **Equal Protection.** The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.
11. **Equal Protection: Proof.** The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim. In other words, the dissimilar treatment of dissimilarly situated persons does not violate equal protection rights.
12. ____: ____. In an equal protection challenge, once the challenger establishes that he or she is similarly situated to another group, the analysis then focuses on whether the challenger is receiving dissimilar treatment pursuant to the statute at issue as compared to the similarly situated group. Such dissimilar treatment caused by the statutory classification does not constitute a violation of the challenger's right to equal protection if the statutory classification promotes a legitimate government interest or purpose.

13. **Equal Protection: Statutes.** In an equal protection challenge to a statute, the level of judicial scrutiny applied to a particular classification may be dispositive.
14. **Constitutional Law: Statutes.** Legislative classifications involving either a suspect class or a fundamental right are analyzed with strict scrutiny, and legislative classifications not involving a suspect class or fundamental right are analyzed using rational basis review.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Willow T. Head, of Law Offices of Willow T. Head, P.C., L.L.O., for appellant.

Stephanie Weber Milone for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

This is an appeal from the dismissal of a paternity action brought by Sherman T., who claims to be the biological father of Brayden N. He filed an amended complaint with the district court to establish paternity both as an individual and on behalf of Brayden as "next friend." Alternatively, Sherman asked the district court to find Neb. Rev. Stat. § 43-1411 (Reissue 2008) unconstitutional, because it denied him due process and equal protection under both the state and federal Constitutions. Karyn N., Brayden's mother, filed an answer and counterclaim in response and later filed a motion to dismiss Sherman's amended complaint.

The district court dismissed with prejudice the amended complaint filed by Sherman as an individual as untimely. The court also dismissed the amended complaint with prejudice as to Sherman's filing as the next friend of Brayden, finding suit may be brought on behalf of a child as next friend only when said child lacks a guardian. Finally, the court dismissed Karyn's counterclaim without prejudice.

Sherman claims the district court erred in dismissing the amended complaint filed by Sherman as an individual because Karyn waived a statute of limitations defense. Sherman further argues that the district court erred in dismissing Karyn's counterclaim and that the application of Nebraska's paternity statute to his case violates his rights to due process and equal protection. We affirm in part and in part reverse the order of the district court.

FACTUAL BACKGROUND

Karyn is the biological mother of Brayden. Brayden was born out of wedlock in 2005. Six years later, on September 15, 2011, Sherman filed a complaint, both individually and as Brayden's next friend, in the district court for Douglas County, seeking to establish paternity.

Karyn moved to dismiss Sherman's paternity complaint on September 26, 2011. Karyn's motion to dismiss asserted, among other arguments, that Sherman's complaint was filed out of the 4-year statute of limitations for paternity actions pursuant to § 43-1411. Two days later, on September 28, Sherman moved for leave to amend his complaint. The district court granted Sherman leave to amend without considering Karyn's motion to dismiss. On October 13, Sherman filed his amended complaint both individually and as Brayden's "next friend," seeking to establish paternity.

In his amended complaint, Sherman again alleged that he and Karyn had had sexual intercourse, which may have resulted in the birth of Brayden, and that Sherman is believed to be the father of Brayden. Sherman's amended complaint also requested that the 4-year statute of limitations period of § 43-1411 be tolled because Sherman was allegedly incapacitated and receiving medical treatment out of the country around the time of the child's birth, and as such, Sherman lacked actual knowledge of the child's birth. In the event the district court did not toll the 4-year statute of limitations, Sherman requested an order finding that § 43-1411 is unconstitutional. Sherman argued that the statute should be found unconstitutional because:

> A. The statute as applied would deny [Sherman] due process and equal protection under the 14th Amendment to the United States Constitution and Article I-3 of the Nebraska State Constitution.
>
> B. The statute as applied would deny [Sherman] due process and equal protection and there is no compelling public policy interests that currently exist to deny [Sherman, the] alleged father[,] the opportunity to establish paternity and pursue parental rights under the facts of this case. The results of strict application of the statute would contradict the original legislative intent.
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> C. The statute, if not tolled[,] would be unconstitutional as it would deny [Sherman] his fundamental constitutional right to parent his child.

On October 24, 2011, Karyn entered a voluntary appearance in the case. On November 16, Karyn filed an answer to Sherman's amended complaint, arguing numerous defenses to Sherman's claims, and filed a counterclaim to Sherman's amended complaint. Karyn's counterclaim for child support acknowledged that she and Sherman had sexual intercourse and that Sherman may be the father of Brayden. The counterclaim also mentioned that a separate paternity action, filed by the State on behalf of Brayden, was already pending in which both she and Sherman were named defendants. On November 18, Sherman filed a reply and answer to Karyn's counterclaim, praying for dismissal of Karyn's counterclaim.

On November 23, 2011, the district court denied Karyn's first motion to dismiss. On February 3, 2012, Karyn filed a second motion seeking dismissal of Sherman's amended complaint pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(1), (2), and (6), and (d) for lack of jurisdiction over the subject matter, lack of jurisdiction over the person, and failure to state a claim upon which relief can be granted, respectively. Specifically, Karyn argued that Sherman's individual action was barred by the 4-year statute of limitations. Karyn's motion also argued that Sherman lacked standing to assert paternity as Brayden's "next friend." Such cause of action, Karyn asserted, does not belong to Sherman, but, rather, to Brayden in the event he

lacked a guardian. Since his birth, however, Karyn alleged that Brayden has always been in her custody. Karyn also argued that she had not been properly served with process. And finally, Karyn contended that Sherman does not possess the capacity to sue or be sued, because Sherman's legal counsel had advised that Sherman had suffered an aneurysm rupture and paralysis.

On February 21, 2012, Sherman filed an objection to Karyn's motion to dismiss. Karyn's motion to dismiss came on for a hearing wherein both Sherman and Karyn were represented by counsel. We have no record or transcript of the February 21 hearing on Karyn's motion to dismiss.

Karyn's motion to dismiss was granted by the district court in a written order filed May 9, 2011. The district court held that the amended complaint for paternity filed by Sherman as an individual should be dismissed with prejudice because it is barred by the statute of limitations. The court further found that the amended complaint for paternity as the next friend of Brayden should be dismissed with prejudice because a next friend action may be brought only when the child at issue lacks a guardian. The court found that pursuant to Neb. Rev. Stat. § 30-2608(a) (Reissue 2008), Karyn, as the biological mother of Brayden, born out of wedlock, was Brayden's "natural guardian," and that therefore, a next friend could not act on Brayden's behalf. Finally, the court found that as Karyn's counterclaim was filed against "a Plaintiff who has no capacity or standing to sue it constitutes an action against an individual who is not a proper party plaintiff." Therefore, the court then dismissed Karyn's counterclaim against Sherman without prejudice. The court made no findings regarding Karyn's argument that she had not been properly served with process; Karyn's allegation that Sherman's claims should be dismissed because he allegedly did not possess the capacity to sue; or Sherman's tolling argument and constitutional claims, both found in his amended complaint.

This case was never consolidated with the separate action brought by the State. Sherman now appeals. Upon reviewing Sherman's assignments of error, we find that the order of the

district court dismissing Sherman's claims with prejudice and Karyn's counterclaim without prejudice should be affirmed in part and in part reversed.

ASSIGNMENTS OF ERROR

Sherman assigns that (1) Karyn waived the statute of limitations defense when she filed a counterclaim seeking affirmative relief and that therefore, the matter should not be time barred and dismissed; (2) the district court erred in dismissing Karyn's counterclaim on its own motion; (3) the 4-year statute of limitations provided in § 43-1411 is unconstitutional and violates the Equal Protection Clauses of the state and federal Constitutions; and (4) the 4-year statute of limitations provided in § 43-1411 is unconstitutional and violates the Due Process Clauses of the state and federal Constitutions.

STANDARD OF REVIEW

The determination of which statute of limitations applies is a question of law.[1] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.[2] A question of jurisdiction is a question of law.[3]

An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[4] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.[5] In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the

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[1] *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002).

[2] *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002).

[3] *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001).

[4] *Moats v. Republican Party of Neb.*, 281 Neb. 411, 796 N.W.2d 584 (2011), *cert. denied* 565 U.S. 882, 132 S. Ct. 251, 181 L. Ed. 2d 145.

[5] *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[6]

ANALYSIS

Whether District Court Erred in Dismissing Sherman's Claim as Time Barred.

On appeal, Sherman raises the argument for the first time in this matter that Karyn's counterclaim for child support, in which she alleges that she and Sherman had sexual relations and that Sherman may be the father of Brayden, acts as a judicial admission. Sherman contends that such judicial admission "constitutes a waiver of all controversy" with respect to the statute of limitations issue raised in Karyn's motion to dismiss Sherman's amended complaint.[7] As such, Sherman argues the district court erred in dismissing his claim as time barred by the 4-year statute of limitations provided in § 43-1411.

[1,2] The record indicates, however, that Sherman failed to raise this "waiver" argument before the district court. We have held that a court cannot err with respect to a matter not submitted to it for disposition[8] and that an issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.[9] Thus, without considering whether Karyn waived the statute of limitations defense, we find that Sherman's first assignment of error is without merit.

Whether District Court Erred in Dismissing Karyn's Counterclaim on Its Own Motion.

[3] Sherman's second assignment of error addresses whether the district court erred in dismissing Karyn's counterclaim without prejudice "on its own motion." (This court notes that Sherman prayed for dismissal of Karyn's counterclaim in his

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[6] *Id.*

[7] Brief for appellant at 14.

[8] *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010).

[9] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

reply filed with the district court.) Sherman does not have standing to assert this alleged error. To have standing, a litigant must assert the litigant's own rights and interests.[10] Sherman cites no legal authority showing that he may force Karyn to proceed on her own claim brought through her counterclaim. Thus, as Sherman lacks standing to assert that the district court erred in dismissing Karyn's counterclaim, Sherman's second assignment of error is without merit.

Whether 4-Year Statute of Limitations Provided in § 43-1411 Is Unconstitutional and Violates Equal Protection and Due Process Clauses of State and Federal Constitutions.

Finally, Sherman requests, as argued in both his amended complaint and appellate brief, that this court find the 4-year statute of limitations as set forth in § 43-1411 is unconstitutional as applied to the facts of his case pursuant to the Due Process and Equal Protection Clauses of the state and federal Constitutions. Section 43-1411 provides that a paternity action may be instituted by "(1) the mother or the alleged father of such child, either during pregnancy or within four years after the child's birth . . . or (2) the guardian or next friend of such child or the state, either during pregnancy or within eighteen years after the child's birth."

We note that during oral argument, counsel for Sherman affirmatively answered the question of whether Sherman was making a facial constitutional challenge to § 43-1411. As such facial challenge does not appear anywhere in Sherman's amended complaint filed with the district court or his appellate brief filed with this court, we do not construe his assignment of error as facially challenging the constitutionality of § 43-1411. Rather, we construe Sherman's amended complaint and appellate brief as assigning an "as applied" constitutional challenge.

[4] Although the district court's order does not set forth its precise reasoning, it implicitly found no merit to Sherman's constitutional claims. First, Karyn's motion asked for dismissal

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[10] *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (2011).

of Sherman's amended complaint for lack of subject matter and personal jurisdiction and for the failure to state a claim. Karyn also argued in her motion that Sherman lacked capacity to sue or be sued. We have previously concluded that when a motion to dismiss raises both § 6-1112(b)(1) and § 6-1112(b)(6), the court should consider dismissal under § 6-1112(b)(1) first and should then consider § 6-1112(b)(6) only if it determines that it has subject matter jurisdiction.[11] Similarly, when a motion to dismiss raises § 6-1112(b)(6) and any combination of § 6-1112(b)(2), (4), and (5), the court should consider dismissal under § 6-1112(b)(2), (4), and (5) first and should then consider dismissal under § 6-1112(b)(6) only if it determines that it has personal jurisdiction and that process and service of process were sufficient.[12]

Clearly, the district court has subject matter jurisdiction of an action to determine paternity of a child. See Neb. Rev. Stat. § 43-1411.01 (Reissue 2008). Similarly, the court could easily have determined that because of Karyn's voluntary appearance, the portion of the motion contesting the court's personal jurisdiction over her clearly lacked merit. Thus, we assume that the district court first found no merit to the grounds attacking subject matter or personal jurisdiction and then considered the sufficiency of the complaint to state a claim. The district court explicitly addressed and rejected Sherman's argument that he is a next friend, and the order simply concludes that the statute of limitations bars Sherman's individual action. In so doing, the district court implicitly rejected Sherman's constitutional arguments which were raised in his amended complaint. Similarly, the district court implicitly found no merit in Sherman's argument that the running of § 43-1411 should be tolled.

[5,6] We construe the district court's order as dismissing Sherman's constitutional claims for failure to state a claim pursuant to § 6-1112(b)(6). We review such cases de novo.[13]

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[11] *Doe, supra* note 5.

[12] *Id.*

[13] See *id.*

To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[14]

[7] Where a statute is challenged under either the Due Process Clause or the Equal Protection Clause of the state and federal Constitutions, the general rule is that legislation is presumed to be valid, and the burden of establishing the unconstitutionality of the statute is on the one attacking its validity.[15]

[8,9] It is apparent that Sherman is advancing a procedural due process claim in that Sherman asserts he should be able to establish paternity outside of the 4-year limitations period provided in the statute he challenges. The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process, a court must consider the nature of the individual's claimed interest.[16] A claim that one is being deprived of a liberty interest without due process of law is typically examined in three stages. The question in the first stage is whether there is a protected liberty interest at stake. If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due.[17]

[10] Sherman also advances an equal protection claim in his amended complaint. The Equal Protection Clause of the 14th

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[14] *Id.*

[15] See *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012).

[16] *In re Interest of S.J.*, 283 Neb. 507, 810 N.W.2d 720 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 837, 184 L. Ed. 2d 663 (2013); *In re Interest of S.C.*, 283 Neb. 294, 810 N.W.2d 699 (2012).

[17] *Id.*

Amendment, § 1, mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.[18]

[11] We have held that the initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim. In other words, the dissimilar treatment of dissimilarly situated persons does not violate equal protection rights.[19]

[12-14] Once the challenger establishes that he or she is similarly situated to another group, the analysis then focuses on whether the challenger is receiving dissimilar treatment pursuant to the statute at issue as compared to the similarly situated group.[20] Such dissimilar treatment caused by the statutory classification does not constitute a violation of the challenger's right to equal protection if the statutory classification promotes a legitimate government interest or purpose.[21] In an equal protection challenge to a statute, the level of judicial scrutiny applied to a particular classification may be dispositive.[22] Legislative classifications involving either a suspect class or a fundamental right are analyzed with strict scrutiny, and legislative classifications not involving a suspect class or fundamental right are analyzed using rational basis review.[23]

We find Sherman's amended complaint states both a plausible due process claim and an equal protection claim on its face. First, in accepting all the factual allegations pled regarding Sherman's constitutional claims as true and drawing all reasonable inferences in favor of Sherman, such factual

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[18] *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

[19] *Id.*

[20] See *id.*

[21] See *id.*

[22] *Id.*

[23] *Id.*

allegations suggest the existence of the elements required to show both a due process and an equal protection violation. Further, the factual allegations raise a reasonable expectation that discovery will reveal evidence of these two constitutional claims. Accordingly, we reverse the district court's dismissal of Sherman's constitutional claims and remand the cause for further proceedings not inconsistent with this opinion.

CONCLUSION

As Sherman failed to argue before the district court that Karyn waived the statute of limitations defense and, as such, the district court erred in dismissing his paternity action, Sherman's first assignment of error is meritless. We also find that Sherman does not have standing to challenge the dismissal of Karyn's counterclaim. Thus, Sherman's second assignment of error is meritless. Finally, as noted above, based upon the record before us, we reverse the district court's dismissal of Sherman's constitutional claims and remand the cause for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE ESTATE OF INA WEGNER ODENREIDER, DECEASED. CHRISTY L. NEEL, APPELLEE, V. ROBERT WEGNER ET AL., APPELLANTS.

837 N.W.2d 756

Filed August 16, 2013. No. S-12-579.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Decedents' Estates: Judgments: Appeal and Error.** When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law that an appellate court independently reviews.
4. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.