

IN THE NEBRASKA COURT OF APPEALS

NAUTILUS INSURANCE COMPANY,

Plaintiff,

vs.

CHERAN INVESTMENTS, PINNACLE  
BANK, MICHAEL PERKINS,  
INDIVIDUALLY (alias PERKINS &  
PERKINS CO.), BLASINI, INC., and  
RICHARD BRUNO, INDIVIDUALLY (alias  
BRUNO INVESTMENTS),

Defendants.

447  
CASE NO: A-15-477  
Trial Court No.: CI 11-2935

**FILED**

OCT 28 2015

CLERK  
NEBRASKA SUPREME COURT  
COURT OF APPEALS

Proceedings before the Hon. Joseph Troia, District Court in and for Douglas County, Nebraska.

REPLY BRIEF OF APPELLANT

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CASES CITED

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STATUTES CITED

Neb.Rev.Stat. §25-1912

Neb.Ct.R.Pl. §6-1115

## STATEMENT OF APPELLATE JURISDICTION

Appellant's and Pinnacle Bank's respective Statements of Appellate Jurisdiction is uncontroverted by either party.

## STATEMENT OF THE CASE

Appellant accepts Pinnacle's Bank's additions to the Statement of the Case and the additional language cited therein from *Nautilus I*, except that Appellant disagrees that the cited text is "analysis" by the Court of Appeals and since same is not a holding it is necessarily, dicta.

## STANDARD OF REVIEW

An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Shada v. Farmers Ins. Exch.*, 286 Neb. 444, 840 N.W.2d 856 (2013).

In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Guinn v. Murray*, 286 Neb. 584, 837 N.W.2d 805 (2013).

## PROPOSITIONS OF LAW

1. Issues outside the pleadings can only be tried by express or implied consent. *Blinn v. Beatrice Cmty. Hosp. & Health Ctr., Inc.*, 270 Neb. 809 (Neb. 2006); *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006 (Neb. 2015).

2. Implied consent to trial of unpled issue can be found where evidence received without objection relates only to unpled issue. Where evidence relates both to pled and unpled issue, no implied consent can be demonstrated. *Blinn v. Beatrice Cmty. Hosp. & Health Ctr., Inc.*, 270 Neb. 809 (Neb. 2006); *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006 (Neb. 2015).
3. The Law of the Case Doctrine provides that the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case. *State v. Gales*, 269 Neb. 443 (Neb. 2005); *State v. White*, 257 Neb. 943, 601 N.W.2d 731 (1999).
4. The Law of the Case Doctrine does not apply to issues not presented to the Appellate Court. *New Tek Mfg. v. Beehner*, 275 Neb. 951 (Neb. 2008).

#### APPELLANT'S STATEMENT OF FACTS

1. Appellant accepts Appellee's Statement of Facts save and except Appellee's assertion that "Appellant did not pay any part of the purchase price" as that matter is not uncontroverted.

#### SUMMARY OF ARGUMENT

This Court previously determined that the financial obligation owed by Bruno, if any, was owed to Dr. Raj as an individual. This proposition is now controlled by the Law of the Case Doctrine in that the issue of who were parties to the Purchase Agreement and who was vested with ownership of the subject Personal Property were presented to and decided by this Court in *Nautilus Ins. Co. v. Cheran Inv.*, A-13-22 (2014) (hereinafter "*Nautilus I*").

The Security Agreement upon which Pinnacle relies relates only to Cheran Investments, LLC. There is no evidence of any assignment to Cheran of Dr. Raj's interest under the Purchase

Agreement and no party has pled or offered evidence to disregard Cheran's separate legal identity such that Dr. Raj's personal assets should be subject to Cheran's obligations to Pinnacle. Further, even if Appellee's Amended Answer and Cross-Complaint were properly before the Court or tried by express or implied consent, the pleading itself does not raise the issue of whether Bruno owed any money to Dr. Raj.

### ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT BRUNO OWED A FINANCIAL OBLIGATION TO DR. RAJ.

a. *Whether Bruno owed sums to Dr. Raj was not Tried by Consent.*

It is uncontroverted that Pinnacle Bank's Amended Answer was filed outside rule time and without leave of the Court and that no responsive pleading was ever filed thereto by any party. It is further uncontroverted that Bruno objected to presentment of that issue at the time of Pinnacle Banks motion for summary judgment in *Nautilus II*. Further, it is uncontroverted that Pinnacle Bank's Amended Answer did not allege any funds were owed by Bruno to Dr. Raj. Instead, Pinnacle Bank, alleges:

On or about April 1, 2011, Cheran executed and delivered to Pinnacle Bank a Security Agreement pursuant to which Cheran granted Pinnacle Bank a security interest in all business assets...(T85)

and

In the event this Court determines ownership [of the Personal Property] to be in Blasini, Inc., then, in such event, Pinnacle Bank has a perfected security interest in any and all sums due and owing from Blasini, Inc. to Cheran Investments, LLC or Chola, Inc. for and on account of the sale of such property. (T86)

What is more, Pinnacle alleged the basis for its claim to the unpaid proceeds of the Purchase Agreement, if there were any arose "[b]y virtue of [Pinnacle's] status as a secured creditor of Cheran". (T86).

With that, the only way the issue of whether Bruno owed any funds to Dr. Raj could have been before the Court is by express or implied consent. Pinnacle argues that the issue of whether funds were owed by Bruno to Dr. Raj was tried by consent by virtue of the proceedings in *Nautilus I*. The only basis upon which Pinnacle Bank argues that the issue was tried by consent is the offer and receipt without objection of Dr. Raj's Affidavit. (E3,1-2:22; Brief of Appellee, p.10). To support its claim of trial by implied consent, Pinnacle Bank points to Dr. Raj's statement that "[b]ecause [Appellant] have failed or refused to pay the purchase of price, \$150,000.00, said amount is due and owing to me." However, this assertion is insufficient to support a trial on the issue by consent. Implied consent to trial of an unpled issue can be found where evidence received without objection relates only to an unpled issue. Where evidence relates both to pled and unpled issues, no implied consent can be demonstrated. *Blinn v. Beatrice Cmty. Hosp. & Health Ctr., Inc.*, 270 Neb. 809 (Neb. 2006); *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006 (Neb. 2015).

Appellee argues that because Dr. Raj's affidavit alleges Bruno's non-payment and that affidavit was received into evidence in *Nautilus I*, the issue of whether Bruno owed Dr. Raj any funds as asserted in an improperly filed pleading—Pinnacle's Amended Answer—was before the Court in *Nautilus I*. This argument ignores the fact that the Affidavit of Dr. Raj relates to a pled issue and therefore cannot support implied consent. *Blinn*, supra. Specifically, Dr. Raj's affidavit relates to ownership of the property, the properly pled and central issue in *Nautilus I*, (1T53) and relates to all of the claims of Perkins & Perkins, also properly pled (1T54). "A court will not imply consent to try a claim merely because evidence relevant to a properly pleaded issue incidentally tends to establish an unpleaded claim." *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 1029 (Neb. 2015).

- b. *Because the issue of whether any funds were owed by Bruno to Dr. Raj was not before the Trial Court, this Court need not address the issue of Pinnacle's interest in any such funds.*

The trial court's first obligation in passing on an issue is to determine whether it has personal and subject matter jurisdiction. Here, Pinnacle Bank asserted that the trial court has subject matter jurisdiction over the issue of whether any funds were owing to Dr. Raj under the law of the case doctrine. However, the law of the case doctrine argument pre-supposes that the issue was previously before the Court. As outlined above, Pinnacle Bank's argument fails.

Pinnacle Bank points to this Court's language in *Nautilus I* where the Court stated "[t]o the extent the evidence establishes that Blasini and/or Bruno are obligated to Dr. Raj for amounts due under the [Purchase Agreement] for the personal property... the trial court *could* direct that the insurance proceeds be paid over to Pinnacle." *Nautilus I*, supra. (Emphasis added.) Pinnacle Bank asserts this language establishes that the pendency before the Court of whether Bruno owed any sums to Dr. Raj is the law of the case. This argument has no merit.

This Court clearly state in *Nautilus I* that "[t]he [trial] court made no specific findings regarding a breach of contract or what, if any, payments were made by Blasini and/or Bruno to Dr. Raj. Accordingly, *this matter cannot be decided* on the record before us." (T126). The Law of the Case Doctrine provides that the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case. *State v. Gales*, 269 Neb. 443 (Neb. 2005); *State v. White*, 257 Neb. 943, 601 N.W.2d 731 (1999). Here, this Court clearly stated that it was making no holding on whether Bruno owed any sums to Dr. Raj and there is nothing in the record to suggest that matter was presented. Further, this Court's opinion in *Nautilus I* is specifically limited to two issues: ownership of the personal property (T123) and the



propriety of the interpleader (T125). Pinnacle Bank's argument that any other issues are law of the case—specifically whether Bruno was indebted to Dr. Raj—fails under *Gails* and *White*, supra. The Law of the Case Doctrine does not apply to issues not presented to the Appellate Court. *New Tek Mfg. v. Beehner*, 275 Neb. 951 (Neb. 2008).

CONCLUSION

Because the Court properly concluded in *Nautilus I* that Bruno owned the damaged personal property and would be entitled to the proceeds related thereto unless the trial court properly determined that Bruno was indebted to Dr. Raj and because the issue of such indebtedness was never before the trial Court, Appellant respectfully requests this Court reverse the Order of the trial Court granting Pinnacle summary judgment and require entry of Summary Judgment in favor of Bruno in the amount of \$96,774.10 plus pre-judgment interest.

Blasini, Inc., Defendant and  
Richard Bruno, Individually and as alias Bruno  
Investments, Defendant

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the following by causing same to electronically transmitted or by First Class United States Mail, postage prepaid to any party not participating in E-Service:

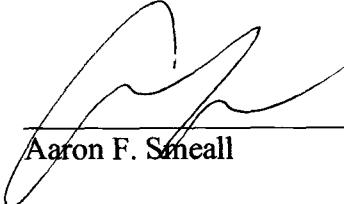
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this 23<sup>rd</sup> day of October, 2015.



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Aaron F. Smeall