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

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

BRIEF OF APPELLANT

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Neb.Rev.Stat.§25-1912

Neb.Ct.R.Pl. §6-1115

STATEMENT OF APPELLATE JURISDICTION

Appellant filed its Notice of Appeal on the 19th day of May 2015 seeking Appellate review of the trial court's Findings and Order entered April 21, 2015. Jurisdiction is proper pursuant to Neb.Rev.Stat.§25-1912.

STATEMENT OF THE CASE

I. Nature of the Case.

The Plaintiff, Nautilus Insurance Company filed the instant Interpleader action against the Defendants and each Defendant following a fire that destroyed certain insured real and personal property. This Court granted Defendant Pinnacle Bank's ("Pinnacle") Motion for Summary Judgment on Pinnacle's claim to the insurance proceeds related to the loss of the real property. Thereafter, this Court also granted Pinnacle's motion for summary judgment as to the insurance proceeds for the loss of certain personal property ("Personal Property"). Defendants Blasini, Inc., ("Blasini") and Richard Bruno, d/b/a Bruno Investments (collectively, "Bruno") appealed the latter order relative to insurance proceeds for the Personal Property. The Court of Appeals reversed and remanded the matter to the District Court for further proceedings. *Nautilus Ins. Co. v. Cheran Investments, LLC.*, 2014 WL 22809 (2014).

Following remand, both Appellant and Appellee Pinnacle Bank separately moved for Summary Judgment under the Law of the Case Doctrine.

II. Issues Tried Below.

Appellant moved for Summary Judgment on the Law of the Case Doctrine arguing that the pleadings on file and this Court's Memorandum Opinion and Judgment on Appeal left no genuine issue as to any material fact for the reason that whether Appellant owed any money to

Dr. Raj for the purchase of the Personal Property was not before the Court and that Appellant was therefore entitled to judgment as a matter of law.

Appellee also moved for Summary Judgment under the Law of the Case Doctrine arguing that there was no genuine issue as to whether Bruno owed money to Dr. Raj under the purchase agreement for the Personal Property and Pinnacle was therefore entitled to judgment as a matter of law.

III. How the Issues were Decided.

The trial court determined that the issue of whether Appellant owed money to Dr. Raj for the Personal Property was properly before the Court. The Court further found there was no genuine issue as to whether the Appellant owed any money to Dr. Raj. The Court further found that because Appellant owed money to Dr. Raj, Pinnacle Bank was entitled to all of the insurance proceeds for damage or loss of the Personal Property under the Security Agreement by Cheran Investments, LLC granting Pinnacle Bank a security interest in the assets of Cheran Investments, LLC.

Having so found, the Trial Court denied Appellant's Motion for Summary Judgment and granted Pinnacle's Motion for Summary Judgment and awarded Pinnacle the insurance proceeds for the loss or damage to the Personal Property in the amount of $96,774.10 plus interest.

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 Ne.b 584, 837 N.W.2d 805 (2013).

ASSIGNMENT OF ERRORS

The District Court erred in the following:

I. The trial court erred in finding that Bruno owed a financial obligation to Dr. Raj.

II. Even if the trial court properly found that Bruno owed a financial obligation to Dr. Raj, the trial court erred in awarding the insurance proceeds to Pinnacle Bank on that basis.

III. The trial court erred in finding that upon a showing of a financial obligation by Bruno to Dr. Raj, the insurance proceeds should be awarded to Pinnacle Bank.

IV. The trial court erred in awarding the proceeds without a finding as to the amount of the obligation owed

V. The trial court erred in failing to find that the pleadings and evidence provided no basis upon which Pinnacle Bank could support a claim to the insurance proceeds for the loss or damage to the Personal Property and that Bruno was therefore entitled to judgment as a matter of law.

PROPOSITIONS OF LAW

1. Once a responsive pleading is served, a party may only amend its pleadings with leave of the Court or upon stipulation of the parties. Neb.Ct.R.Pl. §6-1115.

2. 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).
3. 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).
4. A company's identity as a separate legal entity will be preserved until sufficient reason to the contrary is presented. *Christian v. Smith,* 276 Neb. 867, 759 N.W.2d 447 (2008).
5. 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).
6. 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. Bruno purchased the subject personal property from Dr. Raj and his wife pursuant to a written Purchase Agreement ("Purchase Agreement") signed by Dr. Raj and Bruno whose signatures were notarized and dated November 12, 2008. (T121)
2. Pinnacle Bank filed its Answer and Cross-Claim ("Pinnacle's Answer") herein on August 1, 2011 and made no allegation related to any payment owed by Bruno to Dr. Raj either as a Cross-Complaint or affirmative defense. (T6.)

3. The Security Agreement under which Pinnacle now claims to be entitled to funds owed to Dr. Raj is dated April11, 2011 and attached to Pinnacle's Answer as Exhibit E (T31) and separately offered in support of Pinnacle's Motion for Summary Judgment (E1,25:22)
4. The Cheran Security Agreement grants to Pinnacle a security interest in all the assets of Cheran. It does not grant a security interest in any assets owned by Dr. Raj. (E1,25:22)
5. On August 26, 2011, Cheran filed its Answer ("Cheran Answer") to each of the pending complaints, answering Bruno's Cross-Complaint at paragraphs 3 through 5, Perkin's Cross-Complaint at paragraph 6, and Pinnacle's Cross-Complaint at paragraph 7. (1T51[1])
6. On September 1, 2011, Cheran filed an Amended Answer ("Cheran Amended Answer") which amended answer was filed within rule time and again answered each of the pending complaints, answering Bruno's Cross-Complaint at paragraphs 3 through 5, Perkin's Cross-Complaint at paragraph 6, and Pinnacle's Cross-Complaint at paragraph 7. (1T53)
7. Following Cheran's Answer to Pinnacle's Cross-Complaint, on December 8, 2011, Pinnacle filed an Amended Answer and Cross-Complaint ("Pinnacle's Amended Answer"). Pinnacle's Amended Answer was filed without leave of the Court. (T83)
8. In Pinnacle's Amended Answer, Pinnacle asserts, for the first time by any party in this proceeding, that Bruno is indebted to Cheran, and therefore to Pinnacle Bank, in the amount of $150,000.00 and makes no assertion that Bruno is indebted to Dr. Raj. (T83).

SUMMARY OF ARGUMENT

The financial obligation owed by Bruno, if any, was owed to Dr. Raj as an individual. This proposition is controlled by the Law of the Case Doctrine in that the issue of who were

[1] Pursuant to Neb.Ct.R.App.P.§2-104(D) portions of the Transcript requested herein are contained in the Transcript found at A-13-22. Notations to the "First" Transcript will be set out as (1T__).

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.

The issue of whether an obligation owed to Dr. Raj is subject to the April 11, 2011 Security Agreement is not subject to the Law of the Case Doctrine as that issue was not placed before the Court. What is more, the Judgment on Appeal in *Nautilus I* ("Judgment on Appeal") states both that the Security Agreement grants "Pinnacle a security interest in all of Cheran Investments' business assets" and later that "[a]s noted previously, the April 11, 2011, security agreement between Pinnacle and Dr. Raj also included as security all rights Dr. Raj had to present or future payments". As the Court correctly noted in the first instance, the Security Agreement was not between Dr. Raj and Pinnacle but only between Cheran and Pinnacle. As the issue of whether the Security Agreement reached Dr. Raj's assets rather than just Cheran's was not before the Court, the portions of the Judgment on Appeal relied upon by Pinnacle herein are not the Law of the Case but dicta, and contradictory dicta, at that.

Following remand, the issue of what, if anything, Bruno owed to Dr. Raj under the Purchase Agreement—as required by the Law of the Case—was not before the Court as no party pled Bruno owed any obligation to Dr. Raj.

ARGUMENT

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

a. *The allegations in Pinnacle's Amended Answer and Cross-Complaint were not propery before the trial Court.*

The trial court erred in finding that Bruno owed a financial obligation to Dr. Raj which could be exercised upon Pinnacle as that issue was not before the Trial Court. Pinnacle first asserted this claim in its Amended Answer and Counterclaim filed on December 8, 2011.

Amendments to pleadings are governed by Nebraska Court Rules of Pleading §6-1115 (a), which states in relevant part, as follows:

> A party may amend the party's pleading once as a matter of course before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may amend it within 30 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires.

Because Nebraska's current notice pleading rules are modeled after the Federal Rules of Civil Procedure, the Court must look to federal decisions for guidance. See *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005). Similar to the Nebraska Rule, Fed.R.Civ.P. 15(a) provides that once a responsive pleading has been filed, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

Here, Pinnacle filed its Answer and Cross-Claim on August 1, 2011. (T6). In response thereto, Cheran filed its Answer (1T51) and Amended Answer (1T53). Once those Answers to Pinnacle's Answer and Cross-Claim were filed, Pinnacle was permitted to amend its pleading "only by leave of the court or by written consent of the adverse party." Neb.Ct.R.Pl. §6-1115(a).

That fact notwithstanding, Pinnacle filed Pinnacle's Amended Answer on December 8, 2011 (T83), some three months later without leave of the Court or consent of the adverse party. No party hereto has replied to Pinnacle's Amended Answer or responded to the Cross-Claim set out therein. Further, Pinnacle's Amended Answer set out for the first time a new theory of recovery. Specifically, Pinnacle newly alleged that Bruno owed funds to Cheran, that Cheran's interest thereto was pledged to Pinnacle, and Pinnacle could therefore recover against Bruno on Cheran's behalf.

b. *Even if Pinnacle's Amended Answer and Cross-Complaint were properly before the trial Court, the issue of whether Bruno owed sums to Dr. Raj was not pled.*

The trial court determined that "Blasini, Inc., and Richard Bruno, d/b/a Bruno Investments are indebted to Dr. Raj". (T137). Even if Pinnacle's Amended Answer is determined to be an operative pleading, it fails to place the issue of whether Bruno is indebted to Dr. Raj before the Court. Pinnacle's Amended Complaint, in direct contrast, 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)

Because the issue of whether Bruno owed sums to Dr. Raj was never pled, even if Pinnacle's Amended Answer is properly before the Court, the only way by which the trial court could reach the issue is by implied or express consent.

c. *There was neither express nor implied consent to trial on the issue of whether Bruno owed sums to Dr. Raj.*

Neb.Ct.R.Pl. §6-1115(b) provides that when issues not raised by the pleadings have been tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. As a threshold issue, the Nebraska Supreme Court has assumed, but never held that implied consent under Neb.Rev.Stat.§6-1115(b) applies to summary judgment. *Id.*, at 816. This issue would need to be finally decided by this Court before further analysis into the matter.

Outside the summary judgment context, this Court has held that implied consent may arise in two situations:

> First, the claim may be introduced outside of the complaint—in another pleading or document—and then treated by the opposing party as if pleaded. Second, consent may be implied if during the trial the party acquiesces or fails to object to the introduction of evidence that relates only to that issue.
>
> Implied consent may not be found if the opposing party did not recognize that new matters were at issue during the trial. The pleader must demonstrate that the opposing party understood that the evidence in question was introduced to prove new issues.

United Gen. Title Ins. Co. v. Malone, 289 Neb. 1006 (Neb. 2015), citing *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 817, 708 N.W.2d 235 (2006).

In determining whether the opposing party understood that the evidence in question was introduced to prove new issues, the analysis is whether the evidence can relate *only* to the new issue. *Blinn*, supra at 817. The *Blinn* Court further stated that a " court may not find consent when evidence supporting an issue allegedly tried by implied consent is also relevant to other

issues actually pleaded and tried." *Id.*, at 818. Further, the burden is on Pinnacle to demonstrate that Bruno understood that the evidence offered at summary judgment was introduced to prove the new issue of whether Bruno owed sums to Dr. Raj. *Id.*, at 817. Pinnacle cannot meet its burden as all the evidence submitted by Pinnacle relates solely to, or also to, the pled issue of Pinnacle's claim to any funds owed to Cheran. "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).

II. EVEN IF THE TRIAL COURT PROPERLY FOUND THAT BRUNO OWED A FINANCIAL OBLIGATION TO DR. RAJ, THE TRIAL COURT ERRED IN AWARDING THE INSURANCE PROCEEDS TO PINNACLE BANK ON THAT BASIS.

As set forth above, the Purchase Agreement for the Personal Property was entered into between Bruno and Dr. Raj. This is the Law of the Case as this Court analyzed the Purchase Agreement in *Nautilus I* to determine the parties thereto, the terms thereof, and the resulting ownership interests of Dr. Raj and Bruno. Further, it is undisputed that the Cheran Security Agreement granted to Pinnacle only those assets held by Cheran. (T31; E1,25:22). 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). As such, the issue of whether Bruno ever paid under the Purchase Agreement is wholly immaterial. Even if never paid, a fact Bruno disputes, the sums owing would be owed to Dr. Raj, not Cheran and would therefore not be subject to the Cheran Security Agreement.

By contrast, 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). Here, the issue before the Court in *Nautilus I* was to determine the parties to the Purchase Agreement, the terms thereof, and the resulting ownership interests of Dr. Raj and Bruno in the Personal Property.

The issue of whether an obligation owed to Dr. Raj is subject to the April 11, 2011 Security Agreement is not subject to the Law of the Case Doctrine as that issue was not placed before the Court. The Judgment on Appeal states both that the Security Agreement grants "Pinnacle a security interest in all of Cheran Investments' business assets" and later that "[a]s noted previously, the April 11, 2011, security agreement between Pinnacle and Dr. Raj also included as security all rights Dr. Raj had to present or future payments". As the Court correctly noted in the first instance, the Security Agreement was not between Dr. Raj and Pinnacle but only between Cheran and Pinnacle. As the issue of whether the Security Agreement reached Dr. Raj's assets rather than just Cheran's was not before the Court, the portions of the Judgment on Appeal relied upon by Pinnacle and the trial Court are not the Law of the Case but dicta. Further, this dicta is in contrast both to the position taken by Pinnacle and the evidence submitted herein (T31; E1,25:22) which clearly establishes Pinnacle's claim is limited to the assets of Cheran under the Security Agreement.

Finally, the Court received no evidence that would permit Pinnacle to disregard the corporate entity of Cheran Investments, LLC and reach the insurance proceeds as a purported asset of Dr. Raj. A company's identity as a separate legal entity will be preserved until sufficient reason to the contrary is presented. *Christian v. Smith,* 276 Neb. 867, 759 N.W.2d 447 (2008).

III. THE TRIAL COURT ERRED IN FINDING THAT UPON A SHOWING OF A FINANCIAL OBLIGATION BY BRUNO TO DR. RAJ, THE INSURANCE PROCEEDS SHOULD BE AWARDED TO PINNACLE BANK.

The Court in *Nautilus* stated in dicta that "[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*, supra. (Emphasis added.) First, the *Nautilus I* Court did not determine that such funds *must* be paid to Pinnacle, if found to be owing. That determination was left to the trial Court. Even if the trial Court properly determined that funds remained owing to Dr. Raj by Bruno, the Court would then be obligated to find sufficient legal or factual basis to award insurance proceeds for the loss of the Personal Property to Pinnacle; that is, the trial Court would need to determine that the debt by Bruno to Dr. Raj is covered by the Cheran Security Agreement. As outlined above, all evidence submitted establishes that Pinnacle's claim to the insurance proceeds is limited to Pinnacle's rights under the Cheran Security Agreement. (T31; E1,25:22) Given that the Cheran Security Agreement relates only to assets of Cheran, the trial Court erred in awarding the insurance proceeds for the loss of the Personal Property to Pinnacle.

IV. THE TRIAL COURT ERRED IN AWARDING THE PROCEEDS WITHOUT A FINDING AS TO THE AMOUNT OF THE OBLIGATION OWED

Further complicating the trial Court's Finding and Order on Summary Judgment is the fact that, despite all the foregoing, the trial Court determined that Bruno was indebted to Dr. Raj in an unstated amount. (T137). Then, having so found, the Court awards the entirety of the insurance proceeds to Pinnacle without a determination as to whether Bruno's purported obligation to Dr.

Raj is less than, greater than, or equal to the insurance proceeds. Further, the Court enters no judgment against Bruno and in favor of Dr. Raj to which Pinnacle can claim any right.

V. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE PLEADINGS AND EVIDENCE PROVIDED NO BASIS UPON WHICH PINNACLE BANK COULD SUPPORT A CLAIM TO THE INSURANCE PROCEEDS FOR THE LOSS OR DAMAGE TO THE PERSONAL PROPERTY AND THAT BRUNO WAS THEREFORE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

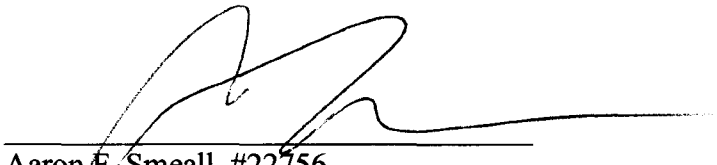
Based on the foregoing, the pleadings and evidence properly admitted during the course of the parties' Motions for Summary Judgment (T128, 131) established that Bruno owed no obligation to Cheran and that Pinnacle's claim arose solely by virtue of the Cheran Security Agreement.

The issue of whether Bruno owed any sums to Dr. Raj was neither pled nor tried by implied consent. As there is no pleading upon which the trial Court could grant relief to Dr. Raj, who sought no affirmative relief herein, Bruno was entitled to Judgment as a matter of law. For that reason, the trial Court erred in not awarding the insurance proceeds in the amount of $96,774.10 plus interest to Bruno.

CONCLUSION

On the foregoing, Appellant respectfully states that this Court should reverse the Order of the trial Court granting Pinnacle summary judgment and should require entry of Summary Judgment in favor of Bruno.

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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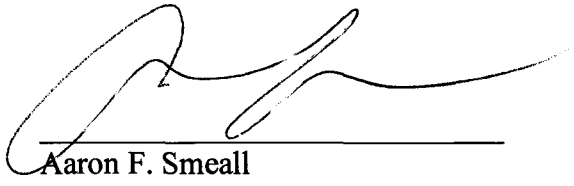

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