

**Heather N. Harkin, appellee,**

**v.**

**John W. Blatter, appellant.**

**No. A-10-705**

**Court of Appeals of Nebraska**

**April 12, 2011**

NOT DESIGNATED FOR PERMANENT  
PUBLICATION

Appeal from the District Court for Douglas County:  
Gary B. Randall, Judge.

Angela H. Heimes, of Heimes Law, P.C., L.L.O.,  
and Michael W. Heavey, of Colombo & Heavey, P.C.,  
for appellant.

Anthony W. Liakos, of Govier & Milone, L.L.P.,  
for appellee.

Sievers and Cassel, Judges, and Hannon, Judge,  
Retired.

**MEMORANDUM OPINION AND  
JUDGMENT ON APPEAL**

Cassel, Judge.

**I. INTRODUCTION**

John W. Blatter appeals from an order dismissing both his motion to set aside judgment and his complaint for modification of a paternity judgment ordering payment of child support. At trial, the district court sustained an oral motion to dismiss made by Heather N. Harkin. We conclude that the court treated the motion as the equivalent of a motion for directed verdict rather than as a motion attacking Blatter's pleadings. On the motion to set aside judgment, Blatter failed to show that he exercised due diligence and, thus, failed to establish a prima facie case. However, the evidence on Blatter's complaint for modification, viewed most favorably to him, was sufficient to survive a motion to dismiss. We therefore affirm the court's dismissal of the motion to set aside judgment and reverse the dismissal of the complaint for modification and remand the cause for a new trial on such complaint.

**II. BACKGROUND**

We first summarize the parties' earlier proceedings. In August 2002, Harkin filed a petition to establish custody and visitation. She alleged that Blatter was the

father of her child, who was born in June 2002, and that although she and Blatter were never married, he had affirmatively acknowledged the paternity of the child. Harkin asked the court to issue an order determining that Blatter was the father of the child, granting her custody subject to Blatter's reasonable rights of visitation, and establishing Blatter's child support obligation.

Summons was served on Blatter on January 9, 2003, at an address on Queensland Drive in Austin, Texas. Blatter filed a "response to summons" and attached an affidavit on February 14. Blatter questioned the paternity of the child and asked to have paternity established before any further proceedings.

Harkin responded by filing a motion for genetic testing on February 19, 2003, and a hearing was set for March 11. According to the certificate of service, Blatter was served by regular mail at the Queensland Drive address. Blatter's response to the motion was filed on March 10. In its order filed on March 17, the district court stated that a hearing was held on March 14 at which Harkin's attorney appeared and Blatter appeared telephonically. The district court ordered the genetic testing of Blatter and the child.

Harkin sent discovery requests to Blatter on April 21, 2003, but Blatter never responded. Harkin filed an amended motion to compel and notice of hearing on June 17, and such motion was granted in an order signed on July 9 and filed on July 10. Because Blatter was not present at the hearing on the motion to compel, Harkin mailed a copy of the court's July 9 order to him on July 10, as shown by her certificate of mailing filed on July 15. Harkin filed a notice of trial on September 9. According to the certificates of service on each of Harkin's filings, Blatter was served by regular mail at the Queensland Drive address.

A hearing on Harkin's petition to establish paternity, custody, visitation, and child support was held on October 17, 2003. Blatter did not appear in person or telephonically. Harkin testified that Blatter was self-employed and that although the court issued an order compelling him to produce income documents, Blatter had not complied with that order. Harkin testified that during their relationship, Blatter told her his income was over \$200, 000 per year. She recounted a conversation she had with Blatter:

We were having [a] conversation about one of my clients, and this particular client made over \$150, 000 but had no savings or any -- I work in the banking business, and I had said to him, I don't understand how someone who makes that kind of money can not have a savings. His comment was to me, Well, I make well over \$200, 000 and I don't have any sort of savings. It's all in the

businesses.

The DNA testing report and a statement of medical expenses associated with the birth and health care of the child were received into evidence at the October 2003 hearing, but those exhibits do not appear in our record.

The district court's decree of paternity was signed on October 17, 2003, and filed on October 20. The district court found that Blatter was the child's biological father. The court awarded custody to Harkin subject to Blatter's "reasonable rights of visitation to include supervised visitation." Blatter was ordered to pay child support in the amount of \$1,075.86 per month retroactive to February 1, 2003. A child support worksheet was attached to the decree in which the court assigned \$200,000 per year as Blatter's income. Blatter was also ordered to pay one-half of work-related daycare expenses, one-half of the child's health insurance premium, and 75 percent of the child's uncovered medical expenses incurred after the first \$1,200 per calendar year. Blatter was ordered to reimburse Harkin \$6,000 for medical expenses incurred for the birth and the child's health care and \$249 for her costs of genetic testing. The district court also ordered that the child's last name be changed to Harkin.

Harkin mailed a copy of the decree of paternity to Blatter on October 17, 2003, as shown by her certificate of mailing filed that same day. Harkin stated the decree was sent to Blatter at the Queensland Drive address.

We now summarize the proceedings leading to the instant appeal. Blatter filed a complaint for modification on February 12, 2009. He alleged that "since the time of the Decree there has been a material change in circumstances which warrant modification of said Decree." The alleged "material change in circumstances" were that (1) he did not earn or have the earning capacity attributed to him when the child support was originally set, (2) the parties' incomes since entry of the decree and application of the Nebraska Child Support Guidelines would result in a change of at least 10 percent to his child support obligation, and (3) an equitable distribution of the dependency exemption and tax credit for federal and state income tax purposes was warranted based on the parties' financial circumstances. Blatter requested that the court enter an order modifying child support and awarding him the dependency exemption and tax credits for the minor child.

On February 19, 2009, Blatter filed a motion to set aside judgment. In his motion, Blatter asked the court to set aside its order dated October 17, 2003, because (1) he changed his residence during the pendency of the original case and no notice of the final trial date was forwarded to his new location, (2) he was unaware of the entry of the decree "for a few years," and (3) the income used for Blatter to arrive at his child support amount was too high and "ought to be set aside based on either fraud or

mistake."

Harkin filed an answer and counterclaim in response to Blatter's complaint for modification on March 20, 2009. In her answer, Harkin admitted certain paragraphs of Blatter's complaint, including paragraph 5 which stated "[t]hat since the time of the Decree there has been a material change in circumstances which warrant modification of said Decree." However, Harkin denied paragraph 6 of Blatter's complaint which specifically set forth his alleged material change in circumstances. Harkin prayed that Blatter's complaint be dismissed. In her counterclaim, Harkin alleged that since the entry of the decree of paternity there had been a material change in circumstances, i.e., that the Nebraska Child Support Guidelines had been modified, and therefore requested that the court order her obligation to pay out-of-pocket medical expenses for the child be reduced to \$480 per year.

On May 15, 2010, Blatter filed an amended notice of evidentiary hearing, which notified Harkin that a hearing on the motion to set aside judgment would be held on May 19. At the beginning of the hearing on May 19, the district court stated that "there has been an application to modify filed in this action -- which was actually a motion to set aside judgment which was filed on February 19th of 2009. . . . There's an answer and counterclaim on file. . . . [W]e are here for purposes of trial." After counsel entered their appearances, the court stated, "Okay. [Blatter's counsel], it's your motion." Blatter was the only witness called to testify. However, the deposition of Barbara Kueny was received into evidence in lieu of live testimony because Kueny died prior to the May 19 hearing.

Kueny was Harkin's counsel during the original proceedings in 2002 and 2003. In her deposition, Kueny testified that Blatter was originally served summons at his Queensland Drive address. After Blatter was served, Kueny had multiple contacts with him via telephone and written documentation until the time of the March 2003 hearing regarding the DNA test, at which hearing Blatter appeared telephonically. After the March 2003 hearing, Kueny mailed several documents to Blatter at his Queensland Drive address. Kueny testified that in April, she served discovery requests to Blatter but never received formal answers. She filed a motion to compel and sent notice to Blatter. A hearing on the motion was set for the end of June, but Blatter did not appear at that hearing. Kueny mailed a copy of the court order to Blatter on July 10. She mailed a notice of trial to Blatter in September, with trial set for October, and again Blatter did not appear. Kueny mailed a copy of the court's decree on October 17, but on December 23 she received a return of service stating "moved and left no address, unable to forward." Kueny testified that Blatter never notified her of a different address. She further testified that other than the return on December 23, no other correspondence had

been returned to her.

Blatter testified that he had no contact with Harkin's attorney after the genetic testing was done. However, he testified that he had tried to contact, and left messages for, Harkin's counsel several times before and after the date of the final paternity order. Blatter testified that he did have contact with Harkin's attorney's legal aide, but "this was later on in 2006, 2007 I saw there was a judgment."

Blatter moved several times after Harkin filed the petition to establish paternity, and he testified as to all of the places he lived. Blatter testified that the summons was originally served on him when he lived on Queensland Drive. He testified that in April 2003, he moved but arranged to have his mail forwarded, as he did every time he moved. From April 20 through October 26, Blatter lived at an address on County Road 467 in Devine, Texas--this was his address at the time of the final paternity order. He then lived at an address on South Lakeline Boulevard in Austin. From July 13 through November 13, 2004, Blatter again lived at the address on County Road 467 in Devine. In November, he then moved to an address on Jonas Drive in Canyon Lake, Texas.

Blatter testified that he did not receive notice of the final hearing on the paternity action. He testified that the only document he received was from "Nebraska state social services" in 2006 at his Canyon Lake address telling him that he owed \$1,075 per month in child support, plus arrearages. Blatter testified that he did not receive any notification of the court order or hearing from the time of the genetic testing until the 2006 letter.

Blatter testified that he has reviewed "the transcript" from the 2003 proceeding in which Harkin claimed that his income was \$200,000. Blatter testified that he never told Harkin his income was \$200,000. He testified that his actual income was \$40,000 to \$50,000. Blatter's income tax returns from 2003 to 2007 were received into evidence without objection and show that Blatter earned nowhere near \$200,000 per year.

Toward the end of Blatter's direct examination, the following colloquy took place on the record:

[Blatter's counsel:] Do you believe that there was a fraud or misrepresentation by [Harkin] of your income at [the October 2003] hearing?

[Blatter:] Total fraud. I was appalled at what I read in the transcript.

[Blatter's counsel:] I have no further questions with regard to this motion, Your Honor.

THE COURT: Cross?

[Harkin's counsel:] Your Honor, I'm going to move to

dismiss. I don't think we've stated a cause of action for setting aside the decree, and I would move to dismiss.

THE COURT: Sustained.

(Adjournment accordingly.)

In its order filed on June 12, 2010, the district court dismissed both Blatter's complaint for modification and his motion to set aside judgment. The order states that "[t]he [c]ourt heard the sworn testimony of [Blatter], received certain exhibits into evidence, including the transcript from the [c]ourt's hearing on October 17, 2003[, ] and took judicial notice of the pleadings in this matter." The district court also dismissed Harkin's counterclaim.

Blatter timely appeals. We note that Harkin has not cross-appealed from the dismissal of her counterclaim, and thus, we do not consider it.

### III. ASSIGNMENTS OF ERROR

Blatter assigns, restated and consolidated, that the trial court erred by dismissing his complaint for modification and his motion to set aside judgment for (1) failure to state a claim for relief without affording him an opportunity to amend and (2) failure to make a prima facie case.

### IV. STANDARD OF REVIEW

A motion to dismiss in a nonjury trial is equivalent to a directed verdict in a jury trial. *R.J. Miller, Inc. v. Harrington*, 260 Neb. 471, 618 N.W.2d 460 (2000). When considering a motion to dismiss in a nonjury trial, a court must resolve every controverted fact in the nonmoving party's favor and give that party the benefit of every reasonable inference to be drawn therefrom. *Id.* When a trial court sustains a motion to dismiss, it resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw only one conclusion. *Id.* When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010).

An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim. *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

### V. ANALYSIS

#### 1. Nature of Blatter's Motion

Although the district court did not explicitly characterize Harkin's oral motion, it evidently treated the motion as the bench-trial equivalent of a motion for directed verdict. Although Blatter argues that he had not

"formally rested" his case, brief for appellant at 10, Blatter's trial counsel had told the court that she had "no further questions with regard to this motion." If Blatter's attorney had stated only that she had "no more questions" or "no more questions of this witness," it would not have appeared that Blatter had completed his presentation of evidence. However, by adding "with regard to this motion," trial counsel's statement can reasonably be understood as resting Blatter's case.

Blatter does not assign error to the trial judge's treatment of his trial counsel's statement as a rest. For an appellate court to consider an alleged error, the error must be both specifically assigned and specifically argued in the brief of the party assigning the error. *Rasmussen v. State Farm Mut. Auto. Ins. Co.*, 278 Neb. 289, 770 N.W.2d 619 (2009). Because Blatter did not assign such error, we cannot consider Blatter's argument that he had not rested his case.

Even if the question of whether Blatter had rested is encompassed within his assignments that the court erred in sustaining the motion to dismiss, the considerable discretion over the conduct of trial conferred upon a trial judge would defeat any such argument. Blatter provides no authority to show that particular words or conduct are required in order to rest one's case at trial. Neb. Rev. Stat. § 25-1107 (Reissue 2008) prescribes the normal order of trial, and subsection (3) states merely that "[t]he party who would be defeated if no evidence were given on either side must first produce his evidence; the adverse party will then produce his evidence." This statute does not specify a particular means by which a party must state that he or she has completed presenting evidence. Although § 25-1107 expressly applies to jury trials, Neb. Rev. Stat. § 25-1128 (Reissue 2008) generally applies the statutes respecting trials by jury to trials by the court, and thus, § 25-1107 applies to a bench trial. Further, Neb. Rev. Stat. § 27-611(1) (Reissue 2008) empowers a trial judge to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence." In *Malchow v. Doyle*, 275 Neb. 530, 748 N.W.2d 28 (2008), the Nebraska Supreme Court reiterated that a trial judge has broad discretion over the general conduct of a trial; therefore, an appellate court reviews complaints about trial conduct for abuse of discretion. The record does not suggest that Blatter had other witnesses to call or additional documentary evidence to offer. We perceive no abuse of discretion in the court's treating trial counsel's statement as a report that she had no further evidence and thus, as the equivalent of a formal statement that Blatter was resting his case.

Thus, we view the motion to dismiss not as a motion authorized by Neb. Ct. R. Pldg. § 6-1112(b)(6) to attack Blatter's pleadings, but, rather, as the bench-trial version of a motion for directed verdict.

## 2. Motion to Set Aside Judgment

### (a) Legal Basis of Motion to Set Aside

Before turning to the merits of the trial court's ruling on Harkin's motion to dismiss, we observe that Blatter filed his motion to set aside the decree of paternity more than 5 years after the decree had been entered on February 23, 2003, and thus, the district court's power to grant relief rested solely upon its equity jurisdiction. To reach this conclusion, we demonstrate that the other sources of a trial court's power to set aside its own judgment have no application under the circumstances in the case before us.

The court's inherent power to vacate or modify within the same term of court had expired. The regular term for the district court for Douglas County begins on January 1 of each calendar year and concludes on December 31 of the same calendar year. See Rules of Dist. Ct. of Fourth Jud. Dist. 4-1C (rev. 1995). Thus, the court's inherent power ended on December 31, 2003.

While the Legislature has provided statutory authority for the exercise of the court's power to vacate or modify after the end of the term under certain circumstances, the statute provides no assistance to Blatter. Neb. Rev. Stat. § 25-2001(1) (Reissue 2008) states: "The inherent power of a district court to vacate or modify its judgments or orders during term may also be exercised after the end of the term, upon the same grounds, upon a motion filed within six months after the entry of the judgment or order." Thus, this statute provides additional authority only where the judgment or order is made less than 6 months before the end of the term. Because the district court's term continued for more than 6 months after the date of the order's entry, § 25-2001(1) did not operate to extend the time during which the court could exercise its inherent power.

Although § 25-2001(4) provides statutory authority to vacate an order after expiration of term, such proceedings must be brought within 2 years. Section 25-2001(4) states:

A district court may vacate or modify its own judgments or orders after the term at which such judgments or orders were made . . . (b) for fraud practiced by the successful party in obtaining the judgment or order; [and] (f) for unavoidable casualty or misfortune, preventing the party from prosecuting or defending . . .

However, Neb. Rev. Stat. § 25-2008 (Reissue 2008) requires that a proceeding brought pursuant to § 25-2001(4) "must be commenced no later than two years after the entry of the judgment or order" with certain exceptions not applicable here. Clearly, Blatter did not file his motion to set aside judgment within the 2-year period.

This leads us to the conclusion that the only other

basis for the district court to vacate its judgment would be its equitable power, which the Legislature has no power to limit. Thus, § 25-2001(2) states: "The power of a district court under its equity jurisdiction to set aside a judgment or an order as an equitable remedy is not limited by [§ 25-2001]." We therefore turn to the merits of Harkin's motion to dismiss Blatter's motion to set aside judgment.

#### (b) Merits of Motion to Dismiss

In order to invoke a district court's independent equity jurisdiction to vacate a judgment outside of term, Nebraska precedent requires the moving party to plead and prove that he or she has exercised due diligence.

With regard to the invocation of the equity powers set forth in § 25-2001, the applicant, to be successful, must first allege and prove that he exercised due diligence and that his failure to secure a proper decision in the prior term was not due to his own fault or negligence.

*Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448, 453, 558 N.W.2d 531, 535 (1997), *overruled on other grounds*, *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000). ""Where such a petition fails to set forth that the facts were not discovered within two years of the trial, and fails to show any reason for extending the two years allowed by statute for setting aside judgments for fraud, equity is powerless to relieve."" *Katz v. Swanson*, 147 Neb. 791, 796, 24 N.W.2d 923, 926-27 (1946). Furthermore, lack of diligence of a party or his attorneys is not an unavoidable casualty or misfortune under § 25-2001. *Johnston Grain Co. v. Tridle*, 175 Neb. 859, 124 N.W.2d 463 (1963), *overruled on other grounds*, *Moackler v. Finley*, 207 Neb. 353, 299 N.W.2d 166 (1980).

As we noted in the standard of review section above, in considering Harkin's motion to dismiss, we must resolve every controverted fact in Blatter's favor and give him the benefit of every reasonable inference to be drawn therefrom. The principles cited there also dictate that the ruling on Harkin's motion can be affirmed only when the facts are such that reasonable minds can draw only one conclusion.

Upon de novo review, we agree that Blatter did not prove that he exercised due diligence. Blatter testified that he had tried to contact, and left messages for, Harkin's counsel several times before and after the date of the final paternity order. However, he did not claim that he provided Harkin's counsel with his new address. Additionally, he testified that when he moved from his Queensland Drive address in April 2003, he arranged to have his mail forwarded, and that he did not receive notice of the final hearing on the paternity action. But he did not testify or otherwise demonstrate that he notified the district court of his new address. The controlling statute at the time of the original paternity proceedings

required Blatter to notify the court of his change of address. Neb. Rev. Stat. § 25-534 (Reissue 1995) provided, in relevant part, as follows:

Every party appearing in an action without an attorney . . . shall designate on the record an address to which mail addressed to such party . . . may be sent. Service by mail shall be by ordinary first-class mail addressed to such designated address, or if none is so designated, to the last-known address of such party or attorney. Service by mail is complete upon mailing.

The record shows without dispute that Blatter never notified the trial court of any change in address and that his Queensland Drive address was the only address he furnished to the court. Viewing the evidence in the light most favorable to Blatter, we can reach only one conclusion regarding his motion to set aside judgment--he failed to prove that he exercised due diligence. Thus, we conclude that the district court did not err in sustaining Harkin's motion to dismiss as to Blatter's motion to set aside judgment. We next consider whether the court erred in sustaining the motion as to Blatter's complaint for modification.

#### 3. Complaint for Modification

The legal requirements for a child support modification are well settled. A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered. *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009). Modification of child support is entrusted to the discretion of the trial court. *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009). Courts may consider various factors to determine whether a material change of circumstances has occurred. Among the factors to be considered are (1) changes in the financial position of the parent obligated to pay support, (2) the needs of the children for whom support is paid, (3) good or bad faith motive of the obligated parent in sustaining a reduction in income, and (4) whether the change is temporary or permanent. *Incontro v. Jacobs*, *supra*.

However, in the procedural context of Harkin's motion to dismiss, the district court was required to view the evidence most favorably to Blatter. On appeal from an order of a trial court dismissing an action at the close of the plaintiff's evidence, an appellate court must accept the plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence. *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001). A motion to dismiss for failure to prove a prima facie case should be treated as a motion for a directed verdict. *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994).

And when we so view the evidence upon our de

novo review, we cannot say that the record permitted only one conclusion. The original child support judgment was premised upon income attributable to Blatter of \$200, 000 per year. As we noted in the background section above and without going into unnecessary detail, Blatter testified that his actual income in the years subsequent to the original judgment was \$40, 000 to \$50, 000 per year. Blatter's income tax returns from 2003 to 2007 reflect income of considerably less than \$200, 000 per year. If we accept Blatter's testimony and evidence as truthful, as we must for purposes of the motion, he obviously established a material change in circumstances which would result in a significantly decreased amount of child support. While it may well have been the case that upon conclusion of all of the evidence, the district court could have weighed the evidence and reasonably held for Harkin, in ruling upon Harkin's motion to dismiss the court did not have that power--it was required to view the evidence most favorably to Blatter. When so viewed, there was sufficient evidence to make out a prima facie case for modification of the judgment. Accordingly, the district court erred in sustaining Harkin's motion to dismiss Blatter's complaint for modification.

#### VI. CONCLUSION

Blatter did not assign error to the district court's treatment of Harkin's motion to dismiss as the bench-trial equivalent of a motion for directed verdict. Even if the issue was part of Blatter's assignment of error regarding the motion to dismiss, the district court did not abuse its discretion in treating the motion as such. Viewing Blatter's evidence in the light most favorable to him, he failed to adduce evidence that he exercised due diligence. We therefore affirm the court's dismissal of Blatter's motion to set aside judgment. However, because his evidence bearing on the complaint for modification, viewed in such light, established a prima facie case, the district court erred in sustaining Harkin's motion to dismiss Blatter's complaint for modification. We therefore reverse the dismissal of the complaint for modification and remand the cause for a new trial on such complaint.

Affirmed in part, and in part reversed and remanded for a new trial.