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KIMBERLY COTTON, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

810 N.W.2d 132

Filed July 1, 2011. No. S-10-114.

1. **Tort Claims Act: Appeal and Error.** A district court's findings of fact in a proceeding under the State Tort Claims Act will not be set aside unless such findings are clearly erroneous.
2. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Trial: Evidence.** An objection based upon insufficient foundation is a general objection.
4. **Trial: Evidence: Appeal and Error.** If an objection based on foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose.
5. ____: ____: ____. An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.
6. **Statutes: Immunity: Waiver.** Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver.
7. **Judgments: Appeal and Error.** In making the determination as to factual questions, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed.

Michael P. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellant.

Robert S. Keith, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

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

PER CURIAM.

NATURE OF CASE

Kimberly Cotton appeals from the order and judgment entered in favor of the State of Nebraska by the district court

for Sarpy County in which the district court determined that because no vehicular pursuit occurred under Neb. Rev. Stat. § 81-8,215.01(5) (Reissue 2008) of the State Tort Claims Act and that, in any event, the actions of the driver of the vehicle under investigation were the sole proximate cause of the accident in which Cotton was injured, the State was not liable to Cotton as an injured innocent third party. We affirm.

STATEMENT OF FACTS

Cotton was severely injured in an accident that occurred March 8, 2006, when a pickup crossed the centerline and struck her vehicle. The pickup crossed the centerline because it had been struck by a Ford Mustang driven by Aaron Anson at a high rate of speed. Anson testified he was driving the Mustang, a stolen vehicle, and was attempting to evade a Nebraska State Patrol Trooper, Kent Kavan, when he hit the pickup.

Cotton filed the present action against the State of Nebraska under the State Tort Claims Act, in particular § 81-8,215.01, which makes the State liable for injuries to innocent third parties proximately caused by a vehicular pursuit by a state-employed law enforcement officer.

Section 81-8,215.01(1) provides: "In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by the state during vehicular pursuit, damages shall be paid to such third party by the state employing the officer."

Section 81-8,215.01(5) defines "vehicular pursuit" as

> an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

The state trooper, Kavan, testified that he initially saw a Mustang pass on a highway near where he was parked. Kavan thought that the Mustang might be one that had been reported stolen but, because he did not have a good view of the license

plate, he did not have enough information for a traffic stop. The Mustang continued on the highway. Kavan decided to catch up to the Mustang in order to read the license plate and run the numbers to determine whether it was the stolen vehicle.

When Kavan reached the stop sign at the entrance to the highway, he had to wait for other vehicles to pass before he could enter the highway. In the time it took to get onto the highway, Kavan lost sight of the Mustang and various other vehicles had come between Kavan and the Mustang. Kavan testified that he did not activate his vehicle's emergency lights or siren, but that he drove at an increased rate of speed in his unsuccessful attempt to catch up to the Mustang.

Before he succeeded in approaching the Mustang, the accident occurred at some distance in front of Kavan. The record shows that there were several vehicles between Kavan and the Mustang at the time of the accident. Kavan activated his vehicle's emergency lights after he saw the accident, and he briefly stopped to assess the accident scene. When Kavan saw the Mustang drive out of the ditch and take off, he began to chase it and continued this pursuit for a short time before he discontinued the pursuit in order to return to the accident scene. The stolen Mustang and its driver were later apprehended by other law enforcement officers.

During Kavan's testimony, the State offered into evidence a copy of a videotape made from a camera inside Kavan's vehicle. The court admitted the videotape into evidence over Cotton's objection based on foundation. Kavan testified that the camera was set up such that it would automatically begin recording when he turned on the emergency lights on top of his vehicle. The videotape was consistent with Kavan's testimony that he did not turn on his vehicle's emergency lights until after the accident occurred and that there were still vehicles between Kavan and the Mustang when he turned on the lights.

Kavan's testimony conflicted in important respects with the testimony of Anson, the driver of the stolen Mustang. Anson admitted that he was driving a stolen vehicle. He testified that he did not see the trooper parked by the side of the highway and that the first time he saw the trooper's vehicle on the highway, it was about three or four vehicles behind him. He stated

he considered turning off the highway to avoid the trooper. Anson testified that soon after he initially saw the trooper's vehicle, it was directly behind him with its emergency lights flashing. Anson stated that he began speeding in order to get away and that the accident happened when he was trying to pass other vehicles.

During the trial, Kavan and a sergeant with the State Patrol attempted to testify regarding the meaning of the word "apprehend" in § 81-8,215.01(5). This testimony was excluded. However, Cody Paro, another state trooper, did testify in a manner similar to the excluded evidence.

In its findings of fact, the court discounted Anson's testimony and generally credited Kavan's testimony. The court found that "[t]he greater weight of the evidence demonstrates that . . . Anson accelerated his vehicle to high speeds and drove his car erratically, if not recklessly, prior to Trooper Kavan engaging his emergency lights and siren." The court also found that there "is no credible evidence that Trooper Kavan was directly behind Anson prior to the accident as contended by Anson." The court determined that Kavan had not turned on his vehicle's emergency lights or siren prior to the accident and that Kavan was investigating the matter prior to the accident.

The court concluded that Kavan's actions did not constitute an "active attempt to apprehend" Anson under the statute and therefore concluded that a "vehicular pursuit" as defined in § 81-8,215.01(5) had not occurred prior to the accident. The court also found that, even if there had been a pursuit,

> the proximate cause of the accident was due solely to the decision of . . . Anson to operate his vehicle in a reckless manner. Anson made the decision to flee even though he had no firm basis to believe that the trooper was pursuing or trying to apprehend him. It is telling that no other vehicles on the road made any attempt to flee from Kavan, even though Kavan was clearly accelerating in an attempt to catch up to someone or get somewhere quickly.

Because there was no vehicular pursuit and, in any event, Anson's actions were the sole proximate cause of the injuries to Cotton and Cotton "failed to prove that . . . Trooper Kavan's

actions were a proximate cause of the accident," the court determined that the State was not liable to Cotton. The district court entered judgment in favor of the State.

Cotton appeals.

ASSIGNMENTS OF ERROR

Cotton claims that the district court erred when it admitted into evidence the videotape from the camera in Kavan's vehicle and excluded certain opinion testimony regarding the meaning of the word "apprehend" under § 81-8,215.01(5). For a variety of reasons, Cotton also claims, summarized and restated, that the district court erred when it concluded that there was not a vehicular pursuit under § 81-8,215.01(5) and that Anson's actions were the sole proximate cause of her injuries.

STANDARD OF REVIEW

[1] A district court's findings of fact in a proceeding under the State Tort Claims Act will not be set aside unless such findings are clearly erroneous. *Cingle v. State*, 277 Neb. 957, 766 N.W.2d 381 (2009).

[2] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Travelers Indem. Co. v. Gridiron Mgt. Group, ante* p. 113, 794 N.W.2d 143 (2011).

ANALYSIS

Admission of the Videotape Was Not Error.

Cotton claims that the district court erred when it admitted the videotape taken by the camera in Kavan's vehicle which depicted events at the accident scene. We find no merit to this assignment of error.

The videotape was offered by the State at trial as support for Kavan's testimony that the camera automatically begins recording when the emergency lights are activated and that Kavan did not activate his lights until after the accident occurred. The videotape also supported Kavan's testimony that there were several vehicles between Kavan's vehicle and the Mustang when Kavan activated his vehicle's emergency lights.

At trial, Cotton objected to admission of the videotape solely on the basis of foundation. The objection was overruled, and the videotape was received in evidence. On appeal, Cotton claims that receipt of the videotape was error for a variety of reasons.

[3,4] An objection based upon insufficient foundation is a general objection. *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009). If such an objection is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose. *Id*. We understand Cotton's appellate argument to be that the videotape was not admissible for any purpose.

Under the Nebraska Evidence Rules, Neb. Rev. Stat. § 27-1001(2) (Reissue 2008), photographs include videotapes. Videotapes are authenticated or identified where the trial court is satisfied by sufficient evidence that the matter in question is what its proponent claims. Neb. Rev. Stat. § 27-901 (Reissue 2008). The record shows that the testimony surrounding the videotape was sufficient to establish that the videotape accurately recorded the images and events in question, that it had not been edited, and that the matter in question was what the proponent purported it to be. Contrary to Cotton's objection, the foundation for receipt of the videotape was sufficient.

There was a dispute at trial regarding whether Kavan had activated his vehicle's emergency lights prior to the accident. The videotape included footage from the end of a previous stop prior to and unrelated to the accident in question, followed immediately by the accident scene. The videotape was consistent with Kavan's testimony that after the preceding unrelated stop, the next time he activated the lights, thus turning on the camera, was after the accident. Contrary to Kavan's testimony, Anson testified that the lights were on prior to the accident. According to Cotton, Anson's testimony regarding the lights provides some evidence that a vehicular pursuit was in progress. The videotape was relevant to the issue of whether a vehicular pursuit occurred.

The foundation for admitting the videotape was sufficient, and the subject matter was relevant. The district court did not err when it admitted the videotape.

Exclusion of Testimony Regarding Opinions as to the Statutory Definition of "Apprehend" Was Not Error.

Certain testimony was successfully objected to by the State or otherwise stricken during the trial. Cotton claims it was error for the district court to exclude the testimony of Kavan and the State Patrol sergeant concerning their understanding of the word "apprehend" as used in § 81-8,215.01(5). We find no error in the district court's rulings.

By various procedural means prior to and during the trial, Cotton sought to elicit the opinions of Kavan and the State Patrol sergeant with respect to their understanding of "apprehend" as used in § 81-8,215.01(5). The purpose of this proposed testimony was to demonstrate to the court that "apprehend" was defined by experienced law enforcement people as including "the act or investigation to catch someone in the wrongdoing." Cotton argues that this definition establishes that even if Kavan was merely investigating or catching up to Anson, such acts amount to an active attempt to apprehend, thus satisfying the "apprehend" element in § 81-8,215.01(5). A review of the record shows that the district court did permit another state trooper, Paro, to give opinion testimony comparable to that excluded above.

[5] The district court did not err when it excluded Cotton's proposed evidence regarding the meaning of "apprehend" as used in § 81-8,215.01(5). The evidence sought to be entered consisted of a legal opinion as to statutory interpretation. It is generally not error to exclude evidence which calls for a legal conclusion. See *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004) (expert testimony concerning question of law generally not admissible). Further, even if evidence is erroneously excluded, such error is reversible only if the complaining party was prejudiced by the exclusion of such evidence. See *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). An improper exclusion of evidence is

ordinarily not prejudicial where substantially similar evidence is admitted without objection. *Id.*

Here, Paro's testimony was substantially similar to the excluded testimony and, regardless of the propriety of admitting Paro's testimony or the correctness of such opinion, Cotton was not prejudiced by the rulings complained of. Cotton sought to put before the trial court a certain understanding of "apprehend," and she was able to do so. This assignment of error is without merit.

The District Court Did Not Err When It Determined That Anson's Actions Were the Sole Proximate Cause of Cotton's Injuries and That the State Was Not Liable Under § 81-8,215.01.

The substance of this case is Cotton's claim that she was entitled to damages under the State Tort Claims Act because she was an innocent third party whose injuries were proximately caused by a vehicular pursuit conducted by a state law enforcement officer. There is no dispute that she was an innocent third party. Cotton claims the district court erred when it concluded that a "vehicular pursuit" under § 81-8,215.01(5) had not occurred prior to the accident, that her injuries were not proximately caused by Kavan's actions, and that the State was not liable. She makes numerous arguments in support of these claims.

Cotton focuses considerable attention in her appellate brief on the issue of whether there was a vehicle pursuit under § 81-8,215.01(5). However, even assuming without deciding that there was a pursuit, we determine the court's factual findings and conclusions to the effect that Anson's actions were the sole proximate cause of Cotton's injuries and that Cotton failed to prove that Kavan's actions proximately caused the accident are determinative of this appeal and without error. Accordingly, we find no merit to this assignment of error.

This case is brought under the State Tort Claims Act. The controlling provisions of § 81-8,215.01 provide:

> (1) In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by the state during

> vehicular pursuit, damages shall be paid to such third party by the state employing the officer.
>
> . . . .
>
> (5) For purposes of this section, vehicular pursuit means an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

[6] The quoted statutes essentially provide that the State is liable for injuries to an innocent third party proximately caused by a state law enforcement officer during a vehicular pursuit. See *Meyer v. State*, 264 Neb. 545, 650 N.W.2d 459 (2002). Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver. *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005).

The appellate courts of this State have decided numerous cases under Neb. Rev. Stat. § 13-911 (Reissue 2007), which is the comparable statute under the Political Subdivisions Tort Claims Act, and we have previously indicated that we may look to cases under both § 13-911 and § 81-8,215.01 in analyzing law enforcement vehicular pursuit issues. See *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006).

In *Mid Century Ins. Co. v. City of Omaha*, 242 Neb. 126, 494 N.W.2d 320 (1992), we reviewed the factual findings of the trial court and affirmed the denial of recovery sought under § 13-911 based on the absence of proximate cause. In *Lalley v. City of Omaha*, 266 Neb. 893, 670 N.W.2d 327 (2003), we indicated that for liability to attach under § 81-8,215.01, the actions of the law enforcement officer need to be merely a proximate cause of the damages, not the sole proximate cause. We apply the reasoning of these cases to the facts of the present case.

[7] The court's opinion is 17 pages in length. In its findings of fact, the court describes competing testimony and even

inconsistencies within testimony. In making the determination as to factual questions, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010). A district court's findings of fact in a proceeding under the State Tort Claims Act will not be set aside unless such findings are clearly erroneous. *Cingle v. State*, 277 Neb. 957, 766 N.W.2d 381 (2009). In a section entitled "Resolution of Facts," the court generally found Anson's testimony not to be credible, because "[b]y his own admission, . . . Anson's memory is far from exact, is blurred, and full of gaps. He was under the influence of methamphetamine at the time of the incident. Many of his statements are clearly rebutted by the videotape and the weight of the evidence."

The court heard testimony surrounding the accident and found that Anson drove the Mustang "erratically, if not recklessly." The court elsewhere stated that Anson operated the Mustang "in a reckless manner." We cannot say these findings are clearly erroneous. See *Cingle v. State, supra*. The court logically concluded that "the accident was due solely" to Anson's conduct and that Cotton failed to prove that Kavan's actions were a proximate cause of her injuries. The court's findings and conclusions are supported by the record and properly apply the principles enunciated in our jurisprudence described above. The court's proximate cause analysis was not error.

In sum, we find no error in the district court's determinations that "the proximate cause of the accident was due solely to the decision of . . . Anson to operate his vehicle in a reckless manner" and that Cotton "has failed to prove that . . . Trooper Kavan's actions were a proximate cause of the accident." Even assuming without deciding that there was a vehicular pursuit under § 81-8,215.01(5), the law enforcement officer's actions were not a proximate cause of Cotton's injuries and the court did not err when it entered judgment in favor of the State.

CONCLUSION

We find no error in the evidentiary rulings challenged on appeal. Further, the district court did not err when it determined that, even if there had been a vehicular pursuit under § 81-8,215.01(5), Kavan's actions were not a proximate cause of Cotton's injuries. We affirm the district court's order entering judgment in favor of the State.

AFFIRMED.

AMERICAN NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, APPELLEE AND CROSS-APPELLEE, V. MICHAEL MEDVED, AN INDIVIDUAL, APPELLANT, HIGHWAY LEASING, LLC, A NEBRASKA LIMITED LIABILITY COMPANY, AND GET GOING, LLC, DOING BUSINESS AS MPG CARRIERS, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLEES, AND LAURA MEDVED, APPELLEE AND CROSS-APPELLANT.

801 N.W.2d 230

Filed July 1, 2011. Nos. S-10-611, S-10-616.

1. **Jurisdiction: States.** When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law.
2. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
3. **Parties: Words and Phrases.** An indispensable or necessary party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
4. **Parties: Jurisdiction.** If necessary parties to a proceeding are absent, the district court has no jurisdiction to determine the controversy.
5. **Contracts: Judgments: Merger.** As a general rule, when a claim on a contract is reduced to judgment, the contract between the parties is voluntarily surrendered and canceled by merger in the judgment and ceases to exist.
6. **Actions: Damages: Judgments: Merger.** When a cause of action for the recovery of money damages is merged in a valid and final judgment in favor of the plaintiff, the cause of action is extinguished and a new cause of action on the judgment is created.