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amendments, we conclude that a suit to recover unconstitutional taxes cannot be brought under § 77-1735. Trumble filed suit outside the tax year in which the challenged taxes were levied or assessed, so the district court did not have jurisdiction under § 25-21,149. Since the district court lacked jurisdiction, it properly dismissed the action. The judgment of the district court is affirmed.

AFFIRMED.

GERRARD, J., not participating in the decision.
MILLER-LERMAN, J., not participating.

BIG JOHN'S BILLIARDS, INC., APPELLEE AND CROSS-APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLANTS AND CROSS-APPELLEES.

811 N.W.2d 205

Filed March 16, 2012. No. S-11-077.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
5. **Jurisdiction: Appeal and Error.** If the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction.
6. **Jurisdiction: Final Orders: Appeal and Error.** The first step in determining the existence of appellate jurisdiction is to determine whether the lower court's order was final and appealable.
7. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.
8. **Summary Judgment.** A summary judgment motion does not invoke a special proceeding. Instead, a summary judgment proceeding is a step in the overall action.

9. **Summary Judgment: Appeal and Error.** Orders granting partial summary judgment are not appealable unless the order affects a substantial right and, in effect, determines the action and prevents a judgment.
10. **Final Orders: Appeal and Error.** To be a final order under the first category of Neb. Rev. Stat. § 25-1902 (Reissue 2008), the order must dispose of the whole merits of the case and leave nothing for the court's further consideration.
11. **Final Orders: Words and Phrases.** A substantial right under Neb. Rev. Stat. § 25-1902 (Reissue 2008) is an essential legal right.
12. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.
13. **Final Orders.** Substantial rights under Neb. Rev. Stat. § 25-1902 (Reissue 2008) include those legal rights that a party is entitled to enforce or defend.
14. ____. An order that completely disposes of the subject matter of the litigation in an action or proceeding both is final and affects a substantial right because it conclusively determines a claim or defense.
15. **Summary Judgment: Final Orders.** Partial summary judgments are usually considered interlocutory. They must ordinarily dispose of the whole merits of the case to be considered final.
16. **Final Orders.** An order resolving all the issues raised in an independent special proceeding is a final, appealable order.
17. **Constitutional Law: Statutes: Moot Question: Final Orders.** If a plaintiff's other claims in an action are rendered moot by the court's ruling that a statute is unconstitutional, the trial court's order completely disposes of the subject matter of the litigation. Such an order both is final and affects a substantial right.
18. **Final Orders: Appeal and Error.** The primary reason for requiring a final order to dispose of all the issues presented in an action is to avoid piecemeal appeals arising out of the same operative facts.
19. ____: ____. To fall within the collateral order doctrine, an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Appeal dismissed.

Jon Bruning, Attorney General, Dale A. Comer, Lynn A. Melson, and Natalee J. Hart for appellants.

Theodore R. Boecker, Jr., of Boecker Law, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

SUMMARY

In this declaratory judgment action, we are asked to decide whether certain exemptions under the Nebraska Clean Indoor Air Act (the Act)[1] are constitutional. The district court determined that the exemptions were unconstitutional. We do not reach the issue because we conclude that the State has not appealed from a final order.

BACKGROUND

Big John's Billiards, Inc. (Big John), filed this action against the State of Nebraska, the Department of Health and Human Services; Kerry Winterer, the department's chief executive officer; the Nebraska Liquor Control Commission; Hobart Rupe, the commission's executive director; and the Douglas County Health Department (collectively the State). In its operative complaint, Big John sought a declaration that the Act was special legislation, violated Nebraska's equal protection clause, and constituted a regulatory taking. In sum, it claimed that the Act's exemptions granted a privilege or immunity to a select class of businesses. It claimed that no rational basis existed for distinguishing these businesses from other public places or places of employment which were subject to and adversely affected by the Act or local regulations. In addition, Big John alleged that the Act deprived it of a property interest by prohibiting it from allowing its customers to smoke. It asked for a temporary restraining order and injunction until the issues were decided, but the court denied that request.

The State originally moved to dismiss the complaint under Neb. Ct. R. Pldg. § 6-1112(b)(1), (2), and (7). But after Big John filed an amended complaint, the State filed an answer, generally denying Big John's constitutional claims and affirmatively alleging that the complaint failed to state a cause of action. The State also alleged that the court lacked subject matter jurisdiction over this action as against the state defendants. It asked the court to dismiss the complaint with prejudice. Big

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[1] Neb. Rev. Stat. §§ 71-5716 to 71-5734 (Reissue 2009 & Cum. Supp. 2010).

John then moved for partial summary judgment on its special legislation claim. The State moved for summary judgment on all issues.

The court specifically limited the hearing to the special legislation issue raised by Big John's motion for partial summary judgment. Nothing in the record indicates that the court dismissed Big John's other constitutional claims that the Act constituted a regulatory taking and violated Nebraska's equal protection clause.

The court concluded that the legislative history clearly showed that the Act's purpose was to protect employees and the public from secondhand smoke by eliminating smoking in public places and places of employment—not to create separate facilities for smokers. It determined that the exemptions for designated hotel rooms, cigar bars, and retail cigarette outlets directly conflicted with the Act's public health purpose. It also concluded that the cigar bar exemption gave those businesses an economic advantage over similar businesses. Big John had argued that the legislative history showed that the Act would not have passed without the exemptions. Therefore, it argued that the court should strike down the Act in its entirety despite its severability provision.[2] But the court implicitly rejected that argument. It concluded that the exemptions under § 71-5730(1), (3), and (4) were unconstitutional special legislation but severable from the rest of the Act, which was still valid. It sustained in part and in part overruled Big John's motion for partial summary judgment. It overruled the State's motions for summary judgment "on the issue of special legislation." It did not direct entry of a final judgment under Neb. Rev. Stat. § 25-1315 (Reissue 2008).

ASSIGNMENTS OF ERROR

The State assigns, restated, that the court erred as follows:

(1) entertaining the parties' motions for summary judgment because it lacked subject matter jurisdiction as to any claims against the state defendants;

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[2] See 2008 Neb. Laws, L.B. 395, § 21.

(2) applying a special legislation test that focused on the purpose of the Act instead of the purpose of the exemptions; and

(3) determining that § 71-5730(1), (3), and (4) were unconstitutional special legislation.

STANDARD OF REVIEW

[1,2] A jurisdictional issue that does not involve a factual dispute presents a question of law.[3] We independently review questions of law decided by a lower court.[4]

ANALYSIS

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[5] Big John argues that we lack jurisdiction over this appeal because the State did not appeal from a final order. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.[6]

[5,6] Additionally, the State contends that the court lacked subject matter jurisdiction to decide any claim raised in Big John's complaint. This claim also presents an issue of appellate jurisdiction. If the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction.[7] But when an appeal presents these two distinct jurisdictional issues, the first step in determining the existence of appellate jurisdiction is to determine whether the lower court's order was final and appealable.[8]

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[3] *Johnson v. Johnson*, 282 Neb. 42, 803 N.W.2d 420 (2011).

[4] *Id.*

[5] *In re Adoption of Amea R.*, 282 Neb. 751, 807 N.W.2d 736 (2011).

[6] *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011), *modified on denial of rehearing* 281 Neb. 978, 802 N.W.2d 420, *cert. denied* ___ U.S. ___, 132 S. Ct. 1016, 181 L. Ed. 2d 736 (2012).

[7] *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008).

[8] *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

THE ORDER IS NOT FINAL

[7] Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.[9]

The State contends that an order granting a motion for partial summary judgment can be a final order when it affects a substantial right. It contends that the court's order declaring subsections of § 77-5730 unconstitutional affected a substantial right because the State has a strong interest in defending the constitutionality of state statutes. It argues that the court's order clearly diminished its defenses and that we should review a partial summary judgment declaring a statute unconstitutional.

[8-10] A summary judgment motion does not invoke a special proceeding.[10] Instead, a summary judgment proceeding is a step in the overall action.[11] And as a step in an action, a motion for summary judgment is not a summary application made in an action after a judgment is rendered. So orders granting partial summary judgment are not appealable unless the order affects a substantial right and, in effect, determines the action and prevents a judgment.[12] To be a final order under the first category of § 25-1902, the order must dispose of the whole merits of the case and leave nothing for the court's further consideration.[13]

[11-14] A substantial right under § 25-1902 is an essential legal right.[14] And a substantial right is affected if an order affects the subject matter of the litigation, such as diminishing

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[9] *In re Adoption of Amea R., supra* note 5.

[10] See, *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007); *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003).

[11] See, e.g., *Williams, supra* note 10.

[12] See *Cerny, supra* note 10.

[13] See *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003).

[14] See *In re Adoption of Amea R., supra* note 5.

a claim or defense that was available to an appellant before the order from which an appeal is taken.[15] It follows from these principles that substantial rights under § 25-1902 include those legal rights that a party is entitled to enforce or defend.[16] Therefore, an order that completely disposes of the subject matter of the litigation in an action or proceeding both is final and affects a substantial right because it conclusively determines a claim or defense.

[15] Obviously, partial summary judgments are usually considered interlocutory.[17] They "must ordinarily dispose of the whole merits of the case" to be considered final.[18] The cases cited by the State do not persuade us that we should treat this order differently.

One of the cases the State relies on is *Dorshorst v. Dorshorst*,[19] decided in 1963. That was a probate case where a party's appeal of a probate order to the district court was treated as a new trial and the parties were required to file new pleadings.[20] The issue was whether the decedent's surviving spouse was entitled to a "widow's allowance," a statutory allowance for support from the estate during administration. The district court sustained the surviving spouse's motions for a judgment on the pleadings and summary judgment. But it reserved deciding the size of the allowance.

The administrator appealed, assigning that the district court erred in failing to rule that a prenuptial agreement precluded the support allowance. The surviving spouse argued that we should

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[15] *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010).

[16] Compare *In re Adoption of Amea R., supra* note 5.

[17] See, e.g., *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009); *Cerny, supra* note 10; *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

[18] *Connelly, supra* note 17, 278 Neb. at 318, 769 N.W.2d at 400. Accord, e.g., *City of Omaha v. Morello*, 257 Neb. 869, 602 N.W.2d 1 (1999).

[19] See *Dorshorst v. Dorshorst*, 174 Neb. 886, 120 N.W.2d 32 (1963).

[20] See, *Mitchell v. Tucker*, 183 Neb. 155, 158 N.W.2d 614 (1968), *overruled, Hornung v. Hatcher*, 205 Neb. 449, 288 N.W.2d 276 (1980); *In re Estate of Normand*, 88 Neb. 767, 130 N.W. 571 (1911); *In re Estate of Sehi*, 17 Neb. App. 697, 772 N.W.2d 103 (2009).

dismiss the appeal for lack of a final order. We explained the finality of the order as follows:

> The only contested issue raised by the pleadings is the sufficiency of the antenuptial agreement as a defense to the petition for the widow's allowances. The judgment of the district court finally determines that question and is an appealable order. It affects a substantial right. Its effect is to determine the action by preventing a judgment for the defendants. . . . An order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of matters incidental thereto.[21]

In short, in *Dorshorst*, we treated the size of the allowance as an incidental issue. But we would not analyze the finality of the order the same way today.

[16] Probate proceedings are special proceedings under § 25-1902's second category of final orders.[22] We will entertain appeals from probate orders resolving claims for statutory allowances and a surviving spouse's elective share before the final probate judgment is entered.[23] In effect, a claimant's petition for these statutory rights invokes a proceeding that is independent from the overall probate proceeding because the claimant's rights exist independent of any distributive interest the claimant has in the probate estate.[24] But unlike the decision in *Dorshorst*, we now require the order appealed from to have disposed of all the issues related to the claim or defense.[25] This is consistent with our recent holding that an order resolving all the issues raised in an independent special proceeding is a final, appealable order.[26]

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[21] *Dorshorst, supra* note 19, 174 Neb. at 888, 120 N.W.2d at 33.

[22] See *In re Estate of Muncillo*, 280 Neb. 669, 789 N.W.2d 37 (2010).

[23] See, e.g., *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007); *In re Estate of Jakopovic*, 261 Neb. 248, 622 N.W.2d 651 (2001).

[24] See Neb. Rev. Stat. §§ 30-2317, 30-2318, and 30-2322 to 30-2324 (Reissue 2008).

[25] See *In re Estate of Rose, supra* note 23.

[26] See *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010).

But these cases provide no support for the State's position that this partial summary judgment is a final order. The court's order did not resolve an issue that is distinct from the issues in the overall action; it resolved one of Big John's claims, leaving two other claims to be decided. Even under the rule stated in *Dorshorst*,[27] unresolved, additional claims in an action are not incidental issues.

Similarly, the order here is not like the order that we considered in *In re 1983-84 County Tax Levy*.[28] There, residents and taxpayers in a Class I school district (a grade school only district) challenged a county tax levy to support high school education in Class III school districts as unconstitutional. The plaintiffs also contended that the levy exceeded the county's needs and was made for an unlawful and unnecessary purpose. The court ruled that the statute was unconstitutional in its entirety, and the defendants appealed.

The plaintiffs claimed that the defendants had not appealed from a final order because the court had determined only the constitutional issue. We agreed that an order determining only some of the issues in an action is ordinarily not a final order. But we concluded that because the court determined that the statute was unconstitutional, then in the absence of an appeal, it would determine nonresident high school tuition under the previous statute and have no need to determine the other challenges to the levy.

In *In re 1983-84 County Tax Levy*, the plaintiffs' additional claims were subsumed within their constitutional challenge.[29] So the court's ruling that the statute was unconstitutional rendered their additional claims moot. That is, after the ruling, the plaintiffs no longer had a legally cognizable interest in having the trial court resolve their claims that the levy was invalid for additional reasons.[30]

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[27] *Dorshorst, supra* note 19.

[28] *In re 1983-84 County Tax Levy*, 220 Neb. 897, 374 N.W.2d 235 (1985).

[29] *Id.*

[30] *Id.* See, also, *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010).

[17] Unless an exception applies, a court or tribunal must dismiss a moot case.[31] So if a plaintiff's other claims in an action are rendered moot by the court's ruling that a statute is unconstitutional, the trial court's order completely disposes of the subject matter of the litigation. Such an order both is final and affects a substantial right.

This same mootness reasoning was implicitly applied in our recent opinion, deciding a constitutional challenge to a common levy for the school districts in a learning community. In *Sarpy Cty. Farm Bureau v. Learning Community*,[32] the district court ruled that a common levy violated Nebraska's constitutional proscription of levying property taxes for a state purpose. It did not reach the plaintiffs' alternative constitutional challenges to the statutory scheme. But the court's order rendered the remaining challenges moot. The mootness reasoning also applies to our decision in *Sarpy County v. City of Springfield*,[33] another case on which the State relies.

But the mootness reasoning does not apply here. It is true that the court's ruling rendered moot Big John's other challenge to the same exemptions under the Act. But Big John's regulatory taking claim is not limited to the exemptions that the Act gives to other persons or entities. Big John claims that the smoking ban per se deprives it of a property interest by reducing its customer base and, thus, the revenues its business generates. The facts and legal arguments relevant to this claim have not been presented or addressed, and the claim is not moot because of the court's special legislation ruling. The court specifically determined that the Act's unconstitutional exemptions were severable, so Big John's regulatory taking claim was alive and pending when this appeal was filed.

[18] The primary reason for requiring a final order to dispose of all the issues presented in an action is to avoid

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[31] *Westovick, supra* note 30.

[32] *Sarpy Cty. Farm Bureau v. Learning Community, ante* p. 212, 808 N.W.2d 598 (2012).

[33] *Sarpy County v. City of Springfield*, 241 Neb. 978, 492 N.W.2d 566 (1992).

piecemeal appeals arising out of the same operative facts.[34] We conclude that the effect of this partial summary judgment does not wholly determine the action or prevent a judgment on all the remaining claims. Accordingly, it is not a final order.

Because the district court has not entered a final order, this court does not have appellate jurisdiction over this appeal. We therefore do not decide whether the district court had jurisdiction over the subject matter.[35]

Collateral Order Doctrine Does Not Apply to the State's Appeal on the Merits

The State alternatively argues that we can immediately review the order under the collateral order doctrine because the State raised sovereign immunity as a defense to this action. It relies on our decision in *StoreVisions v. Omaha Tribe of Neb*.[36] There, we held that an order denying an Indian tribe's motion to dismiss a breach of contract action for lack of jurisdiction was not a final order. But because the court had denied the tribe's motion to dismiss on sovereign immunity grounds, we exercised jurisdiction over the sovereign immunity issue under the collateral order doctrine.

[19] To fall within the collateral order doctrine, an order must (1) conclusively determine the disputed question, (2) resolve an important issue *completely separate from the merits of the action*, and (3) be effectively unreviewable on appeal from a final judgment.[37] In *StoreVisions*, the tribe appealed from an order denying its motion to dismiss on sovereign immunity grounds. Here, in contrast, the State did not renew its motion to dismiss after Big John filed an amended complaint. So the State is not appealing from an order requiring it to litigate. It has already litigated the special legislation issue and cannot ask us to review the merits of that claim under the

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[34] See, e.g., *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008).

[35] See *Pennfield Oil Co., supra* note 8.

[36] *StoreVisions, supra* note 6.

[37] *Id.*

collateral order doctrine. We conclude that this claim is without merit.

CONCLUSION

We conclude that because the district court has not entered a final order, we lack appellate jurisdiction over this appeal. We therefore dismiss.

APPEAL DISMISSED.

GERRARD, J., not participating in the decision.
WRIGHT, J., not participating.

IN RE INTEREST OF S.J., ALLEGED TO BE A DANGEROUS SEX OFFENDER. S.J., APPELLANT, V. MENTAL HEALTH BOARD OF THE FOURTH JUDICIAL DISTRICT, APPELLEE.

810 N.W.2d 720

Filed March 16, 2012. No. S-11-314.

1. **Mental Health: Judgments: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record. In reviewing a district court's judgment, an appellate court will affirm unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment.
2. **Constitutional Law: Due Process.** The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
4. **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.
5. ____. 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.
6. **Due Process: Mental Health: Convicted Sex Offender.** A liberty interest is implicated if a subject is committed to inpatient treatment pursuant to the Sex Offender Commitment Act.