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RITA A. SUTTON AND KAI CARLSON, APPELLEES, V. HELEN KILLHAM ET AL., APPELLEES, AND 3RP OPERATING, INC., INTERVENOR-APPELLANT.

820 N.W.2d 292

Filed May 8, 2012. No. A-11-083.

1. **Oil and Gas: Mines and Minerals: Words and Phrases.** A working interest is an operating interest under an oil and gas lease that provides its owner with the exclusive right to drill, produce, and exploit the minerals.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
3. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. **Judgments: Receivers: Appeal and Error.** All orders appointing receivers, giving them further directions, and disposing of the property may be appealed to the Court of Appeals in the same manner as final orders and decrees.
5. **Final Orders: Appeal and Error.** There are three types of final orders which may be reviewed on appeal. The three types are (1) an order which affects a substantial right in an action and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
6. **Judgments: Receivers.** The appointment of a receiver is a provisional remedy governed by Neb. Rev. Stat. §§ 25-1081 to 25-1092 (Reissue 1995), which precludes it from falling in the category of a special proceeding.
7. **Receivers: Words and Phrases.** The provisional remedy governed by Neb. Rev. Stat. §§ 25-1081 to 25-1092 (Reissue 1995) includes § 25-1087, which provides for further directions to a receiver from the court upon the application of any party.
8. **Summary Judgment: Receivers.** An order granting summary judgment to a receiver is not an order affecting a substantial right and not made during a special proceeding.
9. **Judgments: Receivers: Appeal and Error.** Neb. Rev. Stat. § 25-1090 (Reissue 2008) specifically authorizes an appeal from all orders appointing receivers, giving them further directions, and disposing of the property; however, the denial of the appointment of a receiver is not expressly within the ambit of § 25-1090.
10. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
11. **Statutes.** When general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same.

12. **Actions: Parties: Final Orders: Appeal and Error.** An appeal can be taken pursuant to Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.
13. **Summary Judgment: Receivers: Words and Phrases: Appeal and Error.** A summary judgment in a receiver's favor that he is not liable for a claim is a direction by the court to a receiver from which an appeal can be taken pursuant to Neb. Rev. Stat. § 25-1090 (Reissue 2008).
14. **Appeal and Error.** To be considered by an appellate court, an error must be both assigned and specifically argued in the brief of the party claiming error.

Appeal from the District Court for Cheyenne County: BRIAN C. SILVERMAN, Judge. Affirmed.

Gregory J. Beal for intervenor-appellant.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellees Helen Killham et al.

Sterling T. Huff, of Island & Huff, P.C., L.L.O., receiver.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

INTRODUCTION

Fred L. Carlson and Twila A. Carlson had six children during the course of their marriage. Fred and Twila, through their wills, each created a trust generally for the benefit of their children. Twila died on July 9, 1999, and Fred died on January 21, 2000. Their only son, Dan Carlson, is the trustee of both trusts, which contain farmland in Cheyenne and Kimball Counties, and located on some of the land are two oil wells. Two of the daughters, Rita Sutton (Rita) and Kai Carlson, have been involved in protracted litigation with Dan and the other three sisters, Helen Killham, Dianne Johnson, and Beth Zajonc (Beth), that has gone on more than 10 years, although we note that the record suggests that Kai died in approximately 2010. That litigation began in the Cheyenne County Court, but ultimately ended up in the Cheyenne County District Court as the instant case. This case has twice been before this

court, but we determined in both prior appeals that we did not have jurisdiction and dismissed the appeals. See cases Nos. A-05-847 (appeal dismissed on August 30, 2005, because order being appealed did not dispose of all claims of all parties) and A-07-1133 (appeal dismissed on March 3, 2008, because order being appealed was not definite enough to show final determination of all issues raised by counterclaims).

The complexity of the litigation is illustrated by the fact that between the two previous appeals and the instant appeal, there are 719 pages of pleadings and orders in the transcripts.

PROCEDURAL AND FACTUAL BACKGROUND

The present appeal is being pursued by 3RP Operating, Inc., which filed a "Claim . . . for Operating Expenses on Oil Well" on January 11, 2007, seeking payment by the court-appointed receiver of its claim for $39,024.38. 3RP Operating is designated as an intervenor. The issue being appealed is the decision of the Cheyenne County District Court that granted summary judgment to the court-appointed receiver, Sterling T. Huff, on his denial of the intervenor's claim. The claim was for costs and fees for the operation of one of the two oil wells that were part of the trusts. The wells have been referenced as "Carlson No. 1" and "Carlson No. 1A," but as far as we can discern, only one of the two wells, Carlson No. 1A, has been operational. The ownership of the mineral rights and working interests in the oil wells has been one of many disputes in this litigation involving the six Carlson siblings, as well as who was, or who would be, the operator of the wells.

[1] We believe the explanation of some unique terms that are common to the oil and gas industry will be of benefit to the reader. The Supreme Court's opinion in *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007), is helpful in this regard, even though the contracts involved provide for application of Texas law. The *Coral Prod. Corp.* opinion explained that a "working interest is an operating interest under an oil and gas lease that provides its owner with the exclusive right to drill, produce, and exploit the minerals." 273 Neb. at 396, 730 N.W.2d at 372, citing *H.G. Sledge v.*

Prospective Inv. & Trading, 36 S.W.3d 597 (Tex. App. 2000). In evidence is the affidavit of a petroleum engineer which provides some helpful definitions. The engineer says that a holder of a "mineral interest" or "royalty interest" is the mineral owner, who is referenced as the "lessor" in an oil and gas lease and typically receives a 12½-percent share of the revenue from the sale of a well's production, but is not required to pay any operating expense and does not have any voice in oil and gas production matters. The engineer says that "working interest" owners are the owners of the physical oil well and all equipment, who gain their ownership as the lessee in an oil and gas lease and typically receive 87½ percent of lease revenues, but pay 100 percent of the drilling and production costs and have full responsibility for all decisions regarding the well. An "operator," according to the engineer, is responsible for the day-to-day operation of the well and is bound by the operating agreement (a verbal or written agreement by and between all working interest holders and the operator). The engineer further explains that an "operator of record" of a well must post a bond with the Nebraska Oil and Gas Conservation Commission (NOGCC) and comply with the NOGCC's regulatory and reporting requirements.

Returning to the claim filed by 3RP Operating, it is important to point out that the records of the Nebraska Secretary of State in evidence show that 3RP Operating, the named claimant, did not have a legal corporate existence until September 8, 2006. However, on April 23, 2003, a "sundry notice" was filed with the NOGCC by Rita designating herself as "owner" concerning Carlson No. 1A. The notice is designated as a "change of [o]perator" and states, "change operations to protect lease—Rita . . . dba 3RP [O]perating [address omitted] Effective date 1 [M]ay 2003." The evidence is clear, as the trial court found in its journal entry and order of December 30, 2010, granting summary judgment to the receiver, that 3RP Operating was the "alter ego of [Rita's husband] and his family, inclusive of Rita . . . but during the relevant period of 2003 through June 2006 it was not a corporation." The receiver, Huff, filed a notice of disallowance of 3RP Operating's claim on September 22, 2008. Nothing further happened concerning the claim until the

receiver filed a motion on November 1, 2010, seeking summary judgment on his denial of 3RP Operating's claim. The matter was heard in the district court on December 17, and it was clearly stated by the court and counsel that the only matter then before the court was the motion for summary judgment of the receiver with respect to the claim of 3RP Operating. Whether there were other matters, issues, or motions pending and unresolved at that time was not stated one way or another by the court or counsel, although as eventually recounted later, the court ruled on a number of other matters.

The Cheyenne County District Court, as alluded to above, entered its decision on the summary judgment motion on December 30, 2010. The court found that 3RP Operating was a corporation, but that it had no corporate existence during the time period for which payment for oil well operation was sought in the claim—from 2003 through June 2006—and that "Rita . . . dba 3RP Operating took over as operator of the well after Dan [the trustee who had initially been the operator following the parents' deaths], without the agreement or permission of the other [holders of] working interests in the Carlson Wells." The court further found that there was never an operating agreement signed or agreed to by all interested parties. While not expressly stated, the implicit holding of the district court was that the corporation making the claim, 3RP Operating, lacked standing to do so because it had not even existed during the time period for which operating expenses were being sought. The court also found that it had "not been shown any substantial or material benefit to the Defendants or Receiver from the actions of 3RP Operating . . . or [Rita's family] dba 3RP Operating." The court concluded as a matter of law that the receiver's motion for summary judgment should be sustained and that 3RP Operating shall recover nothing from "either Receiver." (The record shows that before Huff was appointed by the court as receiver on April 2, 2007, a different receiver had been appointed on April 22, 2003, and that he resigned and was relieved of his duties in December 2006.

In the course of this court's normal initial jurisdictional review of all appeals, we issued an order in this appeal to show

cause with respect to whether the underlying action had been finally resolved. Receiving no response to our order, we dismissed the appeal. 3RP Operating filed for a rehearing, which we granted, and we reinstated the appeal; however, in our order doing so, we directed the parties to address the issue of jurisdiction. Thus, we turn to the jurisdictional issue.

JURISDICTION

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case, *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009), and the defendants-appellees' claims also assert that we lack jurisdiction. Nonetheless, notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Id.* The issues raised in this protracted litigation are not easily summarized, and it might be said that this case has traveled a rough road to get to this point.

Before proceeding further, we believe it is helpful to summarize a proceeding before the district court that occurred on August 26, 2004. What we know about that proceeding is contained in a court reporter's transcript of that proceeding, duly certificated and offered and received in evidence in the summary judgment proceeding, which the district court directed its court reporter to prepare. This transcript is about 60 pages, so we limit ourselves to trying to capture the gist of it, as such relates to the jurisdictional issue we are going to discuss—and ultimately to the summary judgment.

Present for the proceeding, when it began at approximately 10 p.m. on August 26, 2004, were the six sibling litigants, their counsel, and a lawyer-mediator. Counsel began by saying to the court, "As you know, the parties have been in mediation all day . . . . We . . . believe that we've reached a resolution of this litigation and I'd like to recite what my understanding of the terms of that resolution is based on the lengthy mediation that we've had." Then, over the next nearly 60 pages, counsel, the court, and the parties attempted to agree on what they had agreed on in the mediation. First was the fact that Rita was going to purchase all of the trust real estate from her siblings

for $460,000 and that she would receive good and merchantable title. This then led to an extensive discussion of the terms of the purchase, interest rates, what would happen if she defaulted on payment, et cetera. In Rita's counsel's recitation of the agreement was included the fact that while the parties had agreed upon what would happen with the land that the parents had placed in the trusts, the parties had not agreed and could not agree upon the oil wells. We quote from counsel's statement to the court:

> The issue of the oil well and the working interest has not been resolved by the parties. The parties have agreed that — It's my understanding that — Well, they've agreed that that issue would be submitted and would be tried to this court. And the issue, as I understand it, would be whether or not the purchaser of the land is entitled, pursuant to the terms of the Trust or Deeds of Distribution and law, to purchase the working interest, the mineral/royalty interest for the land that's being purchased. . . .
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> . . . But the issue of that oil well would be left to try to this court. I guess to phrase it alternatively, would be, [M]ay the defendant's [sic] partition the working interest and mineral rights that are part of the land and sell [such] at public auction[?] . . . [A]nd . . . when the issue of the oil well has been finally litigated and determined the parties would dismiss with prejudice any pending litigation.

The trial court then asked counsel for Dan and his three codefendant sisters if that was the understanding of his clients. From this point forward, the discussion involved what sort of releases would be given; when such would be given; how past land taxes would be handled; how the pending receivership would be wound up; who would replace the then-receiver, if that became necessary; whether a new trustee was needed and, if so, who; dismissal of pending county court litigation; the receiver's unpaid bills; title insurance; the certified public accountant's bills; past farming expenses; how to convey clear title to the land; and payment of closing costs on the land transfer.

Eventually, near the end of the proceeding, the lawyers told the judge they were "at ease" with the agreement. The judge then asked each of the six sibling litigants, "Is the agreement outlined here in the courtroom today your agreement?" When the court got to Beth, she said, "[B]ut on the oil well, we'll still — that's still to be worked out?" and the court responded, "Yeah, we're still going to meet each other again. . . . But all other litigation is resolved by you saying yes," and Beth then said, "Yes." The court then made several clear statements about the oil wells, including that "the interest in the oil well and the working interest in the oil well [would be resolved] at trial." And in fact, the court mentioned still having a "November trial date for the remaining issues."

The trial court made a finding that the agreement was fair and the land was going to be sold, that "it [was] now the order of [the] court" that an order would be prepared, and that the agreement could and should be performed before the November 2004 trial date that was previously mentioned. The last eight pages of the transcript dealt with the spouses' signing necessary documents and with the release of a $15,000 bond held at a bank.

However, the record reveals that the mediated agreement was never reduced to a written agreement or a "traditional" court order. Rather, some 7 months later, on March 31, 2005, the district court entered an order finding that "various Motions pending decision as of August 27, 2004, were rendered moot" by the parties' agreement of that evening, although the order did not specify which motions. The court then found that "no journal entry satisfactory to the parties[']counsel [had been] proposed to the Court." Thus, the court recited that it had directed the preparation of a transcript of the proceeding of August 27, which transcript is attached to the order "and is incorporated [by reference th]erein." (The district court is in error insofar as the evening hearing was on August 26, not 27.) Finally, the order provides, "[T]he parties' agreement is approved, the parties are directed to comply with the agreement and the Court specifically orders said compliance." In short, the transcript of August 26 became, in effect, the court's order.

The status of this litigation, after the late-night proceeding when the mediated agreement was attempted to be put on the record, followed by the rather unique order of March 31, 2005, "incorporating" the approximately 60-page transcript of that proceeding by reference, appears to be that all issues concerning the parties' inheritance from their parents' trusts insofar as the land was concerned were settled by agreement. However, all issues and matters concerning the oil wells and the working interests therein were to be resolved by trial—supposedly in November. However, another order was entered by the district court on March 31 that needs to be part of the story.

The second March 31, 2005, order rules on four motions filed by Dan and the three sisters who are his codefendants in the present case: a "rule 12(f)" motion, a "rule 12(b)" motion, a motion in limine, and a motion for "whole or partial summary judgment." The order begins with some history in that the court noted that prior to any district court action, Rita, her husband, and her son and his wife (for convenience hereafter collectively referenced as Rita) had filed two actions in the Cheyenne County Court against Dan and the four other sisters, cases Nos. CI 01-10 and CI 02-188—by inference cases filed in the years 2001 and 2002 respectively. The district court's order then recounts that case No. CI 01-10 was an action for declaratory judgment by which Rita sought a determination that she had a right to purchase "the oil production rights and mineral interests" for a price in accord with her appraisal or "such other fair market appraisal as shall be determined pursuant to the terms of the trust agreements." According to the district court, the county court on January 3, 2002, directed the trustee (Dan) to convey the land in undivided equal interests to the six sibling litigants as beneficiaries. The record shows that such conveyances were done, but that apparently Rita continued to advance her claim that under the trusts, she was entitled to a "right of first refusal" to acquire her siblings' interests therein—including their working interests in the oil wells. The mediated agreement put all of the land in Rita's ownership, but left open the issue of whether she was entitled to the working interests also, as well as any other issues concerning the oil wells.

Additionally, the district court's second March 31, 2005, order recited that the county court's decision addressed whether the "'Sale Provision'" and the "'Lease Provision'" applied to mineral rights. By way of additional background, it is clear that Rita took the position after both parents' deaths that the right of first refusal given to her with respect to the land included the right to acquire her other siblings' working interests in the oil wells. That said, the district court's second March 31 order quoted the county court's decision: "'The Court concludes from the language used that the two rights [regarding the sale provision and the lease provision] do not apply to the mineral interests.'" The transcript in the first appeal contains this order of the county court, dated January 4, 2002, and the district court's recitation of its contents is accurate. This appears to have been a final resolution of Rita's claim to all working interests under the sale provision and the lease provision in the oil wells that was never appealed. The district court's second March 31, 2005, order further recites that a county court trial was scheduled for January 23, 2002, on the request for a permanent injunction—a temporary injunction had previously been entered on April 19, 2001—barring the defendants-appellees from interfering with Rita's possession of the land as lessee or her right to farm the land. The district court's recitation of the county court proceeding said that on January 22, 2002, the parties signed a letter agreement in an attempt to resolve all litigation. And the district court recites that upon the plaintiffs' motion, the county court released the $50,000 bond Rita had posted for the temporary injunction. This settlement was never completed, according to the district court's order, which also recites that the final pleading in case No. CI 01-10, the first county court case, was Rita's dismissal with prejudice filed November 12, 2004. We note that the transcript concerning the mediated settlement contains the statement by Rita's counsel, "The only pending litigation besides this case is CI 01[-]10 in [the] county court. We'll dismiss it." Immediately after that statement, discussion was had about mutual releases and dismissal of actions so that the result would be that only the "working interest/mineral interest issue" would remain and any other issues would be mutually dismissed by the parties.

We used the plural "actions" in the sentence immediately above because the district court's second March 31, 2005, order recites that on July 29, 2002, Rita filed another action in the Cheyenne County Court, case No. CI 02-188 mentioned above. This was a "Petition for Declaratory Judgment, Specific Performance of Agreement and for Damages," which included enforcement of the January 22 letter agreement. The district court's order says that after a special appearance was filed, "the County Court held that it had no jurisdiction and transferred the action to this Court" and that "the transferred action became this case." Our transcript from the first appeal contains the county court's order of November 21, 2002, in which it ordered the case transferred to the district court, citing Neb. Rev. Stat. § 25-2706 (Reissue 2008).

The district court's second March 31, 2005, order then recounts that "[t]rial of the Plaintiff's Petition was completed, resulting in the finding of the [district c]ourt that the Plaintiff had failed to meet her burden" because there was no meeting of the minds, and that Rita's petition was dismissed. The district court then says:

> The portion of the action remaining is the Defendants' Counterclaims. In the meantime, a Receiver was appointed to manage the real estate during the pendency of this action. Upon the Motion of the Receiver, the parties agreed to mediation. The mediation occurred on August 2[6], 2004. . . . A stipulation was made on the record.
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> The Defendants agreed to sell their interest in the farmland to the Plaintiff, Rita . . . . The parties agreed the settlement did not include mineral interests. Plaintiff retained the right to pursue purchase of the mineral interests under the terms of the Trust, and the Defendants reserved their right to seek partition of the mineral rights pursuant to their Counterclaims Nos. 3, 4, 5 and 6. The Defendants' other Counterclaims were dismissed by the Defendants.
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> The [district c]ourt finds that the Plaintiff, Rita . . . , did reserve [in the mediated agreement her] right to pursue the purchase of the mineral interests and oil wells pursuant to the . . . Trusts.

We take this quoted finding to mean that the matter of the working interests and mineral (or royalty) rights was reserved and unresolved by the settlement agreement that resulted from the mediation. This would be consistent with our reading of the transcript of the proceeding on the evening of August 26, 2004.

The district court then turned to its decision on the defendants' motion for summary judgment in whole or in part. In this regard, the district court initially recited the determination of the county court that the mineral interests were not subject to the right of first refusal apparently granted to Rita in her father's trust and observed that no appeal was filed from that decision. Next, the district court recited that the county court directed the trustee, Dan, to convey title to the six beneficiaries and that he had conveyed an undivided one-sixth of the land to each as directed. The district court said that Dan, as trustee, had "sever[ed] the mineral interests and convey[ed] an undivided 1/6 interest in the mineral interests to the six beneficiaries." The court then discussed the right of first refusal, recounting that the county court had ruled that the mineral interests were not subject to such and stating that in any event, the right of first refusal would apply only if an owner wanted to sell, and no owner had indicated a desire to sell. The district court concluded this issue, holding that the mineral interests "are not subject to the first right of refusal," that Rita "ha[d] no right to purchase the mineral interests from the other beneficiaries," and that all beneficiaries "have an undivided 1/6 interest in the mineral interests as described in the Deeds of Distribution." Finally, the court set a pretrial hearing on "the Defendants' Counterclaims Nos. 3, 4, 5 and 6"—which are the defendants-appellees' action to partition the working interests in the Carlson oil wells—for April 12, 2005. An appeal was filed in this court from what we have referred to as the second order of March 31, i.e., the order we have just detailed. That appeal was docketed as our case No. A-05-847, and, as said, was dismissed for lack of jurisdiction. Thus, it appears that Rita's claim that she acquired the mineral rights and working interests of her siblings was resolved against her, the appeal that was filed was dismissed,

and no cross-appeal concerning the decision is made in the instant appeal.

Whether there was a trial on the defendants' counterclaims mentioned in the district court's order is not revealed by the record, or at least not that we can discern. However, in an order from the district court dated August 1, 2007, reciting that the matter for decision was the "Referee's Report Recommending Sale and Proposing Procedure," the court found that because working interests are recorded and tracked as an interest in real estate, "a partition action is the appropriate legal response to a dispute between working interest owners," and that the court had jurisdiction. The court then listed the six owners of the working interest in question and ordered a partition sale of the working interest as the referee had apparently recommended.

We have attempted to track the tortuous course of this litigation because whether an appellate court has jurisdiction may be determined by whether all claims between all parties have been resolved. Given the size and complexity of the record in this case, plus the transcripts in the two previous appeals, that determination is hardly easy. Although we have attempted to trace this rather jumbled procedural background, we have studiously avoided determining or commenting on the correctness or propriety of the numerous orders and journal entries beyond the summary judgment. We now attempt to return our focus to the initial question—do we have jurisdiction of this appeal?

[4] The brief for the defendants-appellees, citing Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) and *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007), asserts that we lack jurisdiction because there are multiple parties, claims, and causes of action and that the law is that all claims between all parties must be resolved before there is a final, appealable order. Conspicuously absent from the defendants-appellees' argument, despite our request that the parties address the jurisdiction issue, is any assertion of any unresolved claim between any parties with accompanying citation to where such is found in this massive record. On the other hand, the appellant, 3RP Operating, claims that Neb. Rev. Stat. § 25-1090 (Reissue

2008) in effect allows an interlocutory appeal in a case such as this, where a receiver is appointed and given directions by the court—as has obviously happened in this case via the trial court's ruling that the receiver is not obligated to pay the charges that 3RP Operating seeks to recover from him. Section 25-1090 provides:

> When a decree is rendered in a suit in which a receiver has been appointed and such decree does not finally determine the rights of the parties, any one of them may apply to the court for the possession of the property and proceeds thereof in the receiver's hands. If such application is resisted, the matter may be referred to a master to take and report to the court the testimony of the parties. Upon the filing of the report, the court shall, by its order, award the possession of the property and the proceeds thereof to the party entitled thereto, and thereupon the receiver shall surrender the property and the proceeds thereof to such party. *All orders appointing receivers, giving them further directions, and disposing of the property may be appealed to the Court of Appeals in the same manner as final orders and decrees.*

(Emphasis supplied.)

[5] The well-known general rule in Nebraska is that only final orders are appealable. See Neb. Rev. Stat. § 25-1911 (Reissue 2008). The leading case, *O'Connor v. Kaufman*, 255 Neb. 120, 122, 582 N.W.2d 350, 352-53 (1998), holds:

> [T]here are three types of final orders which may be reviewed on appeal. The three types are (1) an order which affects a substantial right in an action and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.

[6-8] Given the more than 10-year history of claims and counterclaims involving probate, trust construction, oil and gas law, and a variety of other issues, we find it a bit difficult to hang a descriptive label on this litigation. However, focusing on what is before us in this appeal, we have a claim for

payment asserted by an intervenor against a receiver. We note that it has been held that the appointment of a receiver is not a special proceeding. See *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). Citing *Slaymaker v. Breyer*, 258 Neb. 942, 607 N.W.2d 506 (2000), the court in *Nebraska Nutrients v. Shepherd* held that the appointment of a receiver is a provisional remedy governed by Neb. Rev. Stat. §§ 25-1081 to 25-1092 (Reissue 1995), which precludes it from falling in the category of a special proceeding. See, also, *Federal Farm Mtg. Corporation v. Ganser*, 145 Neb. 589, 17 N.W.2d 613 (1945) (where record showed that assets remained in hands of receiver, there was no court order distributing these assets to either appellee or appellant, and receivership was continuing, there was no final order, and without such order of distribution, there was nothing for Supreme Court to determine until such was properly brought before it). It seems to follow that if the appointment of a receiver is not a special proceeding, the many decisions that a court might make to give a receiver direction, such as whether to pay a bill such as that submitted by 3RP Operating, would likewise not be special proceedings. In this regard, we note that the provisional remedy governed by §§ 25-1081 to 25-1092 said not to be a special proceeding in *Nebraska Nutrients v. Shepherd* includes § 25-1087, which provides for "further directions" to a receiver from the court upon the application of any party. Whether the receiver has to pay the claim of 3RP Operating was placed in the hands of the court by the receiver's motion for summary judgment, and the "direction" was not to pay it. Therefore, we conclude that the order granting summary judgment to the receiver is not an order affecting a substantial right and not made during a special proceeding, and thus, it is not a final, appealable order under the second type of final order from *O'Connor v. Kaufman, supra*.

The evidentiary record is quite clear, and counsel admitted at oral argument that the receivership has not been wound up and the receiver discharged. Thus, the summary judgment before us is not a "category one" order under *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998), that affects a substantial right in an action and which determines the action

and prevents a judgment. And finally, the order on appeal is not within the third category of final orders delineated in *O'Connor v. Kaufman, supra*, either, i.e., a summary application in an action after judgment is rendered. We say this because while the land issues were settled via the mediated agreement and the working interests of the beneficiaries were determined by the district court's August 1, 2007, order which ordered a partition sale thereof, the record does not reveal that such partition of the working interests has been completed, nor that the receivership has been wound up and closed out. Accordingly, if our analysis were limited to the teachings of *O'Connor v. Kaufman, supra*, we would necessarily find that we lack jurisdiction.

However, as mentioned earlier, counsel for 3RP Operating argues that § 25-1090 gives us jurisdiction by allowing, in effect, an interlocutory appeal of a nonfinal order entered in the course of the receivership, despite the restrictions found in *O'Connor v. Kaufman, supra*. In *Robertson v. Southwood*, 233 Neb. 685, 447 N.W.2d 616 (1989), the court briefly discussed § 25-1090 in a partnership dispute in which the trial court had appointed a receiver and had ultimately entered a judgment effectively resolving all matters between the partnership and the plaintiff-appellant partner, who had filed a declaratory judgment action seeking a determination that he was free from all liability to the partners or the partnership, and in which the partners had counterclaimed for an accounting.

One of the assignments of error in *Robertson v. Southwood, supra*, was that the trial court erred in appointing a receiver. The Nebraska Supreme Court, citing § 25-1090, said "[t]he appointment of a receiver may be treated as a final order," but noted that the plaintiff chose not to appeal within 30 days after the receiver was appointed and stated that since the "cause must be remanded in any event, the plaintiff's assignment of error in this regard will not be addressed." *Robertson v. Southwood*, 233 Neb. at 693, 447 N.W.2d at 621. The Supreme Court noted that the receiver's accounting was not properly done under applicable statutes and did not consider some assets and that the partnership had not been properly wound up and terminated even though it had been dissolved some 5 years

previously. Thus, for these reasons, the cause was remanded for further proceedings, the court noting that "[w]hether a receiver may be appointed on remand remains an issue to be determined at that time." *Id*. Although the court in *Robertson v. Southwood, supra*, did not actually determine the assignment of error that a receiver should not have been appointed, there is at the very least the suggestion in the opinion that § 25-1090 creates a "special" class of final orders, involving the appointment of receivers and directions given to them by trial courts, that is not subject to the traditional jurisdictional analysis of *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998). There is, of course, some compelling logic to this conclusion given that it is easy to imagine actions taken by a receiver, with court direction, which could be undone only with an investment of considerable time and expense—if at all.

[9] The next instance when the Supreme Court addressed § 25-1090 was in *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). While we think it unnecessary to recount the complicated procedural and factual background of that case, the issue was squarely presented to the Supreme Court as to whether an order denying the appointment of a receiver was a final, appealable order—the exact opposite of the claim of error in *Robertson v. Southwood*. The *Nebraska Nutrients v. Shepherd* court reasoned as follows:

> The order denying [the] application for appointment of a receiver clearly does not fall within the first or third [of the *O'Connor v. Kaufman*] categories, but [the applicant] argues that the order was one affecting a substantial right and made in a special proceeding. He relies upon *Robertson v. Southwood*, 233 Neb. 685, 693, 447 N.W.2d 616, 621 (1989), in which we held pursuant to . . . § 25-1090 . . . that "[t]he appointment of a receiver may be treated as a final order." This statement was simply a recognition of the fact that § 25-1090 specifically authorizes an appeal from "[a]ll orders appointing receivers, giving them further directions, and disposing of the property . . . ." The statute makes no mention of orders *denying* a request for appointment of a receiver, and *Robertson* is therefore inapposite.

261 Neb. at 744, 626 N.W.2d at 494 (emphasis in original). As we earlier noted, the Supreme Court in *Nebraska Nutrients v. Shepherd, supra*, held that the appointment of a receiver is a provisional remedy and thus does not fall within the category of a special proceeding. Accordingly, the court said that regardless of whether a substantial right was affected, the denial was not a final order; but as the court noted, the denial of the appointment of a receiver was not expressly within the ambit of § 25-1090. *Nebraska Nutrients v. Shepherd, supra*, is the last Nebraska appellate decision to discuss § 25-1090.

We must admit to some difficulty in reconciling these two decisions discussing § 25-1090, as well as determining how our now well-known final order jurisprudence from *O'Connor v. Kaufman, supra*, fits into the analysis. Our research reveals that the key last sentence of § 25-1090 has been in the statute unchanged, except that at the time of this court's creation, the statute was changed so that it provided that the appeal would go to the Nebraska Court of Appeals instead of the Supreme Court. See 1991 Neb. Laws, L.B. 732, § 46. Other than this change, the last sentence has been intact since 1867, and there is no legislative history available that goes back that far to enlighten us. That said, we turn to the well-known doctrines of statute construction.

[10-12] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court. *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006). When general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000); *In re Invol. Dissolution of Battle Creek State Bank*, 254 Neb. 120, 575 N.W.2d 356 (1998). With reference to the issue under discussion, we believe that the general statute is § 25-1315(1), and the effect of that statute is that an appeal can be taken pursuant to such statute only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order as to one or more but fewer than all of the causes of action

or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal. See *Halac v. Girton*, 17 Neb. App. 505, 766 N.W.2d 418 (2009). In the present case, while the first two conditions for an "interlocutory appeal" under § 25-1315(1) are present, there is no certification or direction from the trial court that allows such an appeal even though there are unresolved claims between some of the parties to the case. In *Jones v. Jones*, 16 Neb. App. 452, 747 N.W.2d 447 (2008), we dismissed an appeal for lack of jurisdiction because the trial court simply had not certified the case under § 25-1315(1). Thus, this appeal cannot fit into the very small "pigeonhole" created by § 25-1315(1) for an immediate appeal when one claim in a multiclaim or multiparty case is resolved but other claims remain pending.

[13] However, when we consider the specific statute allowing for appeal of orders that provide directions to a receiver, § 25-1090, we conclude that the summary judgment in the receiver's favor that he is not liable for the claim brought by 3RP Operating is a "direction" to a receiver from which an appeal is allowable. Moreover, the summary judgment is "final" in the broad sense of that term because it fully and completely determines the dispute between the intervenor, 3RP Operating, and the receiver. Accordingly, we determine that we have jurisdiction, and we now turn to the merits of the summary judgment decision.

SUMMARY JUDGMENT

Did District Court Properly Enter Judgment for Receiver?

The district court's basic rationale for the finding that the receiver did not have to pay the claim of 3RP Operating was that the claim was being brought by a corporation for costs and expenses for the operation of the Carlson oil wells, but that such corporation did not even exist during the time when the claim was asserted. After thorough review of the record, there is no question that the claim at issue is asserted by a corporation, and the evidence is undisputed that such corporation did not gain legal existence until September 8, 2006.

On April 23, 2003, Rita filed a "sundry notice" with the NOGCC to change the operator of the Carlson No. 1A well (the only operational well of the two Carlson wells) from "C & S Productions" to "Rita . . . dba 3RP [O]perating." The "Affidavit of 3RP Operating," which identified Rita's husband as that company's president, was offered and received in evidence on the summary judgment motion. In that affidavit, Rita's husband states that "Rita . . . d/b/a 3RP posted a bond and began operating the oil well on April, 21, 2003." The rebuttal affidavit of the receiver, Huff, stated that as of December 13, 2010, 3RP Operating had not resigned as operator, and that the NOGCC rejected his attempt to become operator of the Carlson well and returned the bond he submitted. Thus, the evidence shows that Rita, "d/b/a 3RP" (sometimes referenced in the record as "d/b/a 3RP Operating,") remains the operator and that insofar as the record reveals, 3RP Operating, the corporate entity making the claim before us in this appeal, has never been the operator of either of the two Carlson wells. And, Rita in various pieces of evidence in our record disclaims any ownership or position in the corporation 3RP Operating. The evidence offered in support of the claim is the claim itself made on behalf of the corporation and signed by counsel for the corporation without any oath, meaning that such is not an affidavit. See Neb. Rev. Stat. § 25-1332 (Reissue 2008). Thus, for a variety of reasons, we conclude that there is no issue of material fact as to whether the corporate claimant, 3RP Operating, is entitled to be paid for operating fees or for costs advanced for the operation of the Carlson wells. The district court was clearly correct in granting the receiver's motion for summary judgment, and we affirm the grant of summary judgment to the receiver.

That said, the claim filed by 3RP Operating asserts as a "second basis" for payment that "under the legal theory of quantum meruit, the claimant [3RP Operating] should have and recover the reasonable costs of operating this well." But, there simply is no evidence that the corporation was ever the operator of the well so as to entitle it to payment under either a contract or a quantum meruit theory. With that said, the record does contain evidence that Rita, her husband, or both individually have done work to operate the well, but there is

no claim before us, or filed with the receiver to our knowledge on their behalf as individuals, for compensation for operating the oil wells. We merely acknowledge that there is such evidence and make no ruling, or further comment, about any entitlement to payment either or both of them may have as individuals.

Did District Court Err by Entering, as Part of Its Decision on Motion for Summary Judgment, Orders on Matters Which Were not Part of Summary Judgment Proceeding?

This brings us to the fact that when the trial court granted the summary judgment on December 30, 2010, its order also stated, "Since other orders of the Court were awaiting a new Judge [insofar as the previous trial judge was not being retained in office following the 2008 general election,] those matters shall now be addressed by this Court." The court then makes the following orders, which we summarize:

1. 3RP Operating, within 5 days, shall withdraw as operator of both Carlson wells on the records of the NOGCC, and failure to comply results in the "officers[']or managing agents[' being] in contempt of the Orders of this Court."

2. After such withdrawal, the receiver shall post his bond (we assume this to mean an operator's bond) and place his name as "Operator to the Carlson wells."

3. The receiver shall commence oil production and maintain a complete record of all earnings and expenditures.

4. After the "Receiver is producing oil, the Referee shall then proceed . . . with the sale of the Carlson Wells as previously ordered and directed."

5. "The Receiver shall endeavor to fulfill all duties previously set out by this Court's Orders as expeditiously as possible."

6. "All restraining and other orders of this Court are continued and all parties are Ordered to not inhibit the fulfillment of those Orders."

[14] The intervenor, 3RP Operating, assigns error to the entry of these "extraneous orders" asserting (in the assignment of error itself) that such were not addressed in the summary judgment motion, no hearing was had, no evidence was

introduced, and no notice was provided that such matters would be addressed by the court. However, there is absolutely no argument in support of this assignment of error in the intervenor's brief. The requirement of the appellate courts is clear that to be considered by the court, an error must be both assigned and specifically argued in the brief of the party claiming error. See *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007). That was not done here, and we do not address the orders Nos. 2, 3, and 5 summarized above. Additionally, and equally important, it is apparent that the district court's orders summarized above as Nos. 1, 4, and 6 are not "directions" to the receiver that fall within the ambit of appealable orders under § 25-1090. Accordingly, even if there had been argument of this assignment of error, we would not have jurisdiction of those three orders under our analysis of § 25-1090 as set forth in the section on jurisdiction.

Was It Error for Trial Court to Determine Receiver Had Standing, When Receiver Was Acting Without Posting Bond Required by § 25-1084 (Reissue 2008)?

This issue was addressed by the trial court in a journal entry of May 20, 2011, on the receiver's motions that raised three issues upon which he sought the court's guidance—one of which was "[D]oes the receiver need additional bonding?" The trial court referenced the order now on appeal in this case and the "extra" orders contained therein, which we detailed in the foregoing section of our opinion. The district court referred to the order of April 2, 2007, by the previous trial judge in which the current receiver was appointed and orders were made regarding disposition of certain funds held by the clerk of the district court, and in that order, the court said that of such funds, the clerk was to retain $1,000 for the "bond of the Receiver as heretofore ordered." That order is part of our record, and it appears that such amount was retained by the clerk.

The trial court's May 20, 2011, order also recited that when the first receiver was appointed via an order of May 2, 2003, the court said "consistent with the stipulation of the counsel for both parties, that the receiver may serve without

the necessity of posting bond." The district court found that such waiver was not permissible under § 25-1084 and that the receiver had to comply with that section. Therefore, the court decreed that if the parties could not agree on the appropriate bond by June 1, 2011, the receiver should notice the matter for hearing. The supplemental transcript in this case shows that a "receiver's bond" was issued to the receiver on July 8 in the sum of $10,000.

The intervenor's argument is that given that the receiver had in excess of $40,000 in his possession, he should have had a bond. We cannot disagree, but the intervenor, 3RP Operating, is not a party to this case and, by virtue of the summary judgment which we have affirmed, has no financial interest in the estate or what remains of this case. In short, the intervenor does not make any argument telling us how this error in the proceedings caused it prejudice, and no other party complains about the matter in this appeal. Accordingly, we find no prejudice to the intervenor or any other ground for any relief to the intervenor on this basis.

CONCLUSION

After our exhaustive review of this voluminous record, we find that we have jurisdiction of this appeal under § 25-1090 and that the district court properly granted summary judgment to the receiver, Huff, and against the intervenor corporation, 3RP Operating.

AFFIRMED.

HEATHER NELSON, APPELLANT, V. NEIL WARDYN AND SELENA WARDYN, APPELLEES.

820 N.W.2d 82

Filed May 8, 2012. No. A-11-655.

1. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given to their testimony.
2. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.