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CREDIT BUREAU SERVICES, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. EXPERIAN INFORMATION SOLUTIONS, INC., AN OHIO CORPORATION, APPELLEE AND CROSS-APPELLANT.

828 N.W.2d 147

Filed March 22, 2013. No. S-12-107.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
3. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.

Appeal from the District Court for Dodge County: GEOFFREY C. HALL, Judge. Affirmed.

Jonathan L. Rubin, of Rubin, P.L.L.C., and Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy, Nick & Placek, for appellant.

Michael F. Coyle and Patrick S. Cooper, of Fraser Stryker, P.C., L.L.O., and Thomas Demitrack, Brian K. Grube, Meir Feder, and David Cooper, of Jones Day, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Credit Bureau Services, Inc. (CBS), brought this case against Experian Information Solutions, Inc. (Experian), alleging that Experian sought to drive CBS out of business in violation of Neb. Rev. Stat. § 59-805 (Reissue 2010), which is a provision of Nebraska's antitrust act, known as the Junkin Act. See Neb. Rev. Stat. §§ 59-801 to 59-831 (Reissue 2010). After a jury trial, the district court for Dodge County entered judgment on a jury verdict in favor of Experian and against CBS. CBS appeals, claiming that the district court erred when it gave jury instruction No. 5 and refused CBS' competing proposed jury instruction. Experian cross-appeals, claiming

that the district court erred when it overruled Experian's motion for directed verdict. Given the elements of § 59-805 which we explain below, we determine that the district court erred when it overruled Experian's motion for directed verdict. Although our reasoning differs from that of the district court, the entry of judgment in favor of Experian was correct and we affirm.

STATEMENT OF FACTS

Experian is one of three nationwide repositories of consumer credit information. These three companies gather and store consumer credit information on a nationwide basis and sell that information either to end users, such as banks, or to resellers which sell the information to end users. CBS was a reseller of specialized credit reports to the mortgage industry and is located in Fremont, Nebraska. As a general matter, a report referred to as a "Tri-merge report," which combines data from the three companies, is required by some lenders, including federal lenders.

CBS began purchasing credit reports from Experian in the 1990's. In 2000, Experian imposed a minimum purchase requirement of $250 per month. Because CBS had a low volume of transactions, it moved its business to an Experian affiliate that did not impose a minimum purchase requirement. In 2003, Experian purchased the consumer credit operations of its affiliate and began servicing CBS again. In 2004, Experian informed CBS that it would impose a minimum purchase requirement of $1,000 per month. CBS then moved its business to another Experian affiliate. In 2007, Experian purchased the consumer credit operation of that affiliate and resumed serving CBS in February 2007. In 2011, Experian completed the buy-out of its last remaining affiliate.

As noted, CBS resumed purchasing data from Experian in February 2007 and continued to do so until October 2008, when Experian dropped CBS as a customer because of CBS' past-due balance. CBS asserted that the past-due balance arose after Experian had imposed a new minimum purchase requirement of $5,000 per month. CBS contends that the increased minimum purchase requirement by Experian was part of a plan

to "thin the ranks of smaller credit reporting agencies" and that CBS was a victim of the plan. Brief for appellant at 14. CBS asserted that the plan was successful because in 2000, there were more than 400 local and regional credit reporting resellers nationwide, and by December 2011, there were only 60 nationwide and none in Nebraska.

CBS filed this civil action against Experian in the district court under § 59-821, which provides:

> Any person who is injured in his or her business or property by any other person or persons by a violation of sections 59-801 to 59-831 . . . may bring a civil action in the district court in the county in which the defendant or defendants reside or are found . . . .

CBS alleged that Experian violated § 59-805, which provides:

> Every person, corporation, joint-stock company, limited liability company, or other association engaged in business within this state which enters into any contract, combination, or conspiracy or which gives any direction or authority to do any act for the purpose of driving out of business any other person engaged therein . . . shall be deemed guilty of a Class IV felony.

Sections 59-805 and 59-821 are part of Nebraska's antitrust act, known as the Junkin Act. See §§ 59-801 to 59-831.

A 4-day jury trial was conducted. During trial, CBS called a total of six witnesses, one of whom testified by written deposition, and two of whom appeared by video deposition. CBS submitted and the court received 37 exhibits. The video evidence is not in the record. CBS essentially attempted to prove that Experian engaged in a plan called Project Green, which had among its objectives driving out resellers. CBS points to the fact that after Experian increased the minimum purchase requirement as a part of Project Green, 160 resellers canceled their business with Experian.

After CBS rested its case, Experian moved for directed verdict, which the district court denied. Experian called one witness, and it submitted and the court received 42 exhibits. Experian attempted to establish that it increased its charges for the purpose of improving data security and compliance with the Fair Credit Reporting Act. See 15 U.S.C. § 1681 et

seq. (2006). After Experian rested its case, it again moved for directed verdict, which the district court denied.

A jury instruction conference was conducted in which the district court rejected several of CBS' proposed instructions. The district court instructed the jury in this case on its understanding of the elements of § 59-805 with its jury instruction No. 5. The court rejected CBS' proposed jury instruction No. 12. The court gave commonplace instructions on evidence, both circumstantial and direct.

On December 16, 2011, the case was submitted to the jury at 6:30 p.m. and the jury returned a verdict in favor of Experian at 7:50 p.m. On January 4, 2012, the district court entered judgment on the jury's verdict for Experian.

The district court's order filed January 19, 2012, granted, in part, Experian's motion to alter or amend judgment. In this order, the district court modified its January 4 order, stating that CBS shall pay Experian's taxable costs in the amount of $3,921.57. On February 8, the district court entered an order overruling CBS' amended motion for new trial. CBS appeals, and Experian cross-appeals.

ASSIGNMENTS OF ERROR

CBS assigns, restated, that the district court erred when it (1) gave jury instruction No. 5 and (2) failed to instruct the jury consistent with CBS' proposed jury instruction No. 12.

On cross-appeal, Experian assigns, restated, that the district court erred when it denied Experian's motion for directed verdict.

STANDARDS OF REVIEW

[1] Statutory interpretation presents a question of law. *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013).

[2] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 807 N.W.2d 170 (2011).

[3] Whether a jury instruction is correct is a question of law, which an appellate court independently decides. *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012).

ANALYSIS

In this case, the district court provided the jury with jury instruction No. 5, which set forth the district court's description of the elements the jury was required to find in order to find in favor of CBS on its claim under § 59-805. CBS claims on appeal that the district court prejudicially erred when it gave instruction No. 5, because it misstated the law under § 59-805. CBS' motion for new trial encompassed this claimed error, so CBS effectively contends that the district court erred when it denied CBS' motion for new trial. On cross-appeal, Experian claims that the district court erred when it denied its motion for directed verdict made at the close of the evidence. We agree with Experian that the district court erred when it denied Experian's motion for directed verdict, and therefore we do not reach CBS' assertion that instruction No. 5 misstated the law and comment only that a proper jury instruction on the elements of § 59-805 should comport with our discussion of § 59-805 in this opinion.

Elements of § 59-805.

We have not previously enumerated the elements of a cause of action based on the allegation that a defendant acted with the purpose of driving the plaintiff out of business under § 59-805. Section 59-805 provides:

> Every person, corporation, joint-stock company, limited liability company, or other association engaged in business within this state which enters into any contract, combination, or conspiracy or which gives any direction or authority to do any act for the purpose of driving out of business any other person engaged therein . . . shall be deemed guilty of a Class IV felony.

The balance of the statute is in the alternative and refers to competition and underselling, and thus it is not applicable to this case. See *Pierce Co. v. Century Indemnity Co.*, 136 Neb. 78, 285 N.W. 91 (1939).

The language of § 59-805 establishes the elements which a plaintiff such as CBS must prove. The elements relating to the form of company, engaging in business, presence in Nebraska, and contract, combination, or conspiracy are fairly obvious. However, we must determine the contours of the elements represented by the phrase in § 59-805 requiring the doing of "any act for the purpose of driving out of business any other person engaged therein." In construing § 59-805, we recognize that it is a part of the Junkin Act, and therefore we look to the Junkin Act as a whole. Section 59-829 of the Junkin Act is known as the harmonizing statute. Section 59-829 provides that when a provision of the Junkin Act is the same or similar to the language of a federal antitrust law, the courts of this state in construing such section or chapter shall follow the construction given to the federal law by federal courts. However, we note that § 59-805 is unusual among state statutes and there is no federal equivalent statute. Compare: § 59-801 equates to Sherman Act § 1 (restraint of trade), and § 59-802 equates to Sherman Act § 2 (antimonopoly). See 15 U.S.C. § 1 et seq. (2006).

In *Pierce Co. v. Century Indemnity Co., supra*, we analyzed the predecessor statute of § 59-805 in a case where the plaintiff brought an action against the defendants to recover for damages for an alleged conspiracy to drive the plaintiff out of business. In *Pierce Co.*, we noted that the predecessor statute to § 59-805 was located in article 8 and that

> Article 8 is entitled "Unlawful Restraint of Trade" and is patterned after the antitrust laws of the federal government, i.e., the Sherman [Act] and [the] Clayton [Act], with the exception that the Nebraska law is broader and provides protection against commerce (intrastate) as such, and in addition provides that any attempt to drive another person (corporation) out of business is unlawful.

136 Neb. at 80, 285 N.W. at 93-94.

Like its predecessor statute, § 59-805 is located in article 8, currently entitled "Unlawful Restraint of Trade." *Pierce Co.* is instructive because we noted therein that the Legislature patterned Nebraska's antitrust laws after the federal antitrust laws, except that Nebraska's law is broader in the sense that

it protects intrastate commerce and contains § 59-805, which makes it unlawful to drive another entity out of business. In this regard, we note that unlike certain areas of federal antitrust law which limit complaints to competitors, it has been determined that § 59-805 applies to complaints between a producer and a supplier. See *Oak Grove Farm Ltd. Partnership v. ConAgra Inc.*, 105 F. Supp. 2d 1064, 1067 (D. Neb. 2000) (interpreting § 59-805 of Nebraska law and stating that "giving the words of the statute their ordinary meaning and reading all portions of the statute together to make them consistent, . . . § 59-805 applies to contracts entered into between a producer and a supplier").

In this case, we must specifically consider the phrase in § 59-805 which prohibits the giving of "any direction or authority to do *any act* for the purpose of driving out of business any other person engaged therein." (Emphasis supplied.) Both parties agree that despite the language of § 59-805, the expression "any act" cannot mean "all acts" tending to drive another out of business, because such an interpretation would be too broad. We must give the expression "any act" a sensible construction. See *State v. Magallanes*, 284 Neb. 871, 824 N.W.2d 696 (2012).

In *Hompes v. Goodrich Co.*, 137 Neb. 84, 288 N.W. 367 (1939), we stated that a person may do business with whomsoever he or she desires, and that a person may likewise refuse business relations with any person whomsoever, whether the refusal is based on reason, whim, or prejudice. In *Ploog v. Roberts Dairy Co.*, 122 Neb. 540, 543, 240 N.W. 764, 765 (1932), we stated that it is "'elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern.'" (Quoting *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 F. 46 (2d Cir. 1915).) Accordingly, despite the expression "any act" in § 59-805, the statute cannot logically include all acts of the defendant which have the effect of driving an entity out of business. As discussed below, the act must be intended to drive an entity out of business.

In determining which types of acts of a defendant are included under § 59-805, we turn to a case from the Idaho Supreme Court, which analyzed a statute similar to § 59-805. In *Woodland Furniture, LLC v. Larsen*, 142 Idaho 140, 124 P.3d 1016 (2005), the Idaho Supreme Court initially determined that Idaho's unfair competition statute which was in effect when the plaintiff filed its complaint applied to the case although it had since been repealed. Similar to Nebraska's § 59-805, the former version of the Idaho statute "prohibited any person engaged in business in Idaho from 'enter[ing] into any contract, combination or conspiracy . . . for the purpose of driving out of business any other person engaged therein.'" 142 Idaho at 146, 124 P.3d at 1022.

Construing the Idaho statute similar to Nebraska's § 59-805, the Idaho Supreme Court stated the statute requires as an element that the defendant intend to drive the plaintiff out of business. The Idaho Supreme Court reasoned that

> [the] statute requires a claimant to show a purpose to drive another out of business, reflecting the notion that unfair competition laws were enacted to protect competition, not competitors. . . . [The statute] strikes the balance between free competition and fair competition by offering relief only where a company can show *a competitor's intent to drive the company out of business*, rather than simply an intent to compete.

142 Idaho at 146, 124 P.3d at 1022 (emphasis supplied). Because of an absence of evidence to support the plaintiff's claim that the defendant had an intent to drive the plaintiff out of business, the Idaho Supreme Court affirmed the trial court's judgment in favor of the defendant under the Idaho statute.

We agree with the reasoning of the Idaho Supreme Court, and determine that the phrase in § 59-805 which prohibits a defendant from doing "any act for the purpose of driving out of business" means that the prohibited act must be done with the purpose to drive the plaintiff out of business. Section 59-805 protects competition, not competitors; it is directed at unfair competition. See *Woodland Furniture, LLC, supra*.

The statute reaches intentional predatory conduct which has no purpose other than to drive another entity out of business. In this regard, we note that we have previously considered intent and recognized that intent under the Junkin Act may be proved by circumstantial evidence. See *Hompes v. Goodrich Co.*, 137 Neb. 84, 288 N.W. 367 (1939) (stating that alleged overt acts may in themselves be lawful, but evidence as whole may show that intent of alleged wrongdoer is to accomplish result prohibited by statute). Thus, in order for the plaintiff to succeed on a claim under § 59-805, the plaintiff must show that the defendant intended to drive the plaintiff out of business.

Experian contends that for a defendant to drive a plaintiff "out of business" as that phrase is used in § 59-805, the plaintiff's business must no longer be in operation. Experian asserts, "[t]he phrase 'out of business' has a well-understood meaning: that the company no longer operates." Brief for appellee at 17. Experian argues that "out of business" cannot refer to just a portion of the plaintiff's business or a line of business, because such a definition of business would be too narrow. We generally agree.

Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning. *State v. Parks*, 282 Neb. 454, 803 N.W.2d 761 (2011). When § 59-805 was enacted, and today, the ordinary meaning of the phrase "out of business" would be a complete cessation of business operations. Under § 59-805, for liability to attach, the plaintiff must show that the defendant acted with the purpose that plaintiff's business should cease. See *State, ex rel. Spillman v. Interstate Power Co.*, 118 Neb. 756, 226 N.W. 427 (1929) (describing concept of destroying another entity's business) (superseded by statute on other grounds as stated in *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995)). In sum, in order for a plaintiff to successfully bring a claim that a defendant drove it out of business under § 59-805, the plaintiff must show that the defendant is a person, corporation, joint-stock company, limited liability company, or other association which is engaged in business within Nebraska and that the defendant gives any

direction or authority to do any act with the intent and for the purpose of driving the plaintiff out of business.

Cross-Appeal: The District Court Erred When It Denied Experian's Motion for Directed Verdict.

In its cross-appeal, Experian argues that its motion for directed verdict made at the close of CBS' case and renewed at the close of all the evidence should have been sustained, because CBS failed to prove that Experian engaged in an "act" for the purpose of driving CBS out of business under § 59-805 and CBS failed to prove its lost profits with reasonable certainty. We find merit to Experian's assignment of error on cross-appeal regarding "driving out of business."

We have stated that a directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. *Lesiak v. Central Valley Ag Co-op*, 283 Neb. 103, 808 N.W.2d 67 (2012) (quoting *American Central City v. Joint Antelope Valley Auth.*, 281 Neb 742, 807 N.W.2d 170 (2011)). As stated above, on a claim that a defendant drove the plaintiff out of business under § 59-805, the plaintiff must show that the defendant gave direction or authority to act with the intent and for the purpose of driving the plaintiff out of business. Also as stated above, § 59-805 applies to the business relationship at issue, which in this case involves Experian's providing data for resale by CBS. See *Oak Grove Farm Ltd. Partnership v. ConAgra Inc.*, 105 F. Supp. 2d 1064 (D. Neb. 2000).

Experian argues that CBS did not provide evidence Experian engaged in an act which violated § 59-805 and that therefore, the district court erred when it did not grant Experian's motion for directed verdict. In the present case, evidence was adduced at trial regarding Experian's Project Green. As part of Project Green, Experian increased the minimum monthly purchase requirement for mortgage-related purchases. CBS contends that Experian implemented Project Green in order to drive out of business a number of the resellers such as CBS who could be viewed collectively as competitors of Experian's

largest reseller customer, "First American." CBS explains that Experian's ultimate motivation behind Project Green was to take steps to avoid dilution of the "Tri-merge norm" in the retail market for mortgage credit reports. That is, by implementing Project Green, First American would prosper as a reseller and Experian could prevent the entry of First American or another fourth repository into the wholesale market for mortgage credit information.

Experian argues that CBS' assertions regarding Project Green are based on speculation and have no factual support in the evidence presented by both CBS and Experian. Experian presented evidence that the increased fees it charged CBS associated with Project Green were designed specifically to further secure Experian's data, reduce the risk of any mishandling of Experian data by resellers and their customers, and ensure reseller compliance with Experian's policies. Experian also contends that the evidence shows that the reduction in the number of resellers is a collateral outcome of its heightened effort to comply with various reporting statutes. Experian argues that the increased charges were not for the purpose of driving CBS out of business. Experian contends that because CBS failed to show that Experian engaged in an act in violation of § 59-805, the district court erred when it did not grant its motion for directed verdict.

Given the evidence admitted at trial, we determine that on this record, reasonable minds could not differ and there is not more than one conclusion which can be drawn from the evidence. Based on the evidence, it cannot be concluded that Experian acted with the sole intent to drive CBS out of business. We find merit to Experian's cross-appeal and determine that the trial court erred when it overruled Experian's motion for directed verdict.

CONCLUSION

We determine that the district court erred when it overruled Experian's motion for directed verdict. We need not reach the remaining assignments of error on appeal and cross-appeal, except to comment that a jury instruction on the elements of § 59-805 should comport with the analysis set forth in this

opinion. Although our reasoning differs from that of the district court, the entry of judgment in favor of Experian was not error. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DONTAVIS McCLAIN, APPELLANT.
827 N.W.2d 814

Filed March 22, 2013. No. S-12-256.

1. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
2. **Trial: Expert Witnesses: Pretrial Procedure: Notice.** A challenge to the admissibility of evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), should take the form of a concise pretrial motion. It should identify, in terms of the *Daubert* and *Schafersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case.
3. **Trial: Evidence: Appeal and Error.** To preserve a challenge on appeal to the admissibility of evidence on the basis of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), a litigant must object on that basis and the objection should alert the trial judge and opposing counsel as to the reasons for the objections to the evidence.
4. **Motions to Suppress: Confessions: Constitutional Law: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, whether based on a claimed violation of the Fourth Amendment or on its alleged involuntariness, an appellate court applies a two-part standard of review. Regarding historical facts, the appellate court reviews the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which the appellate court reviews independently of the court's determination.
5. **Confessions: Police Officers and Sheriffs.** Interrogation necessarily includes elements of psychological pressure which are meant to elicit a confession. The question is whether the techniques used are so coercive as to overbear the suspect's will.
6. **Jury Instructions: Appeal and Error.** Whether a court's jury instructions were correct is a question of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination of the court below.
7. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve