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NEBRASKA SUPREME COURT
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22-0892

NEBRASKA SUPREME COURT / COURT of APPEALS

Adam R. Herink
Plaintiff – Appellee & Cross-Appellant,

v.

Bluestem Energy Solutions, LLC
Defendant – Appellant.

Appeal from District Court, Douglas County, Nebraska
Hon. Timothy Burns, Judge

Appellee's Answer Brief
And
Opening Brief On Cross Appeal

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Jurisdictional Statement

1. Appellant Bluestem Energy Solutions LLC filed a timely appeal following a final judgment of the district court on a jury verdict and final rulings on all post-trial motions. T409 The appeal is lodged pursuant to *Neb Rev Stat* §25-1902. This Court's scope of appellate jurisdiction is defined by *Neb Rev Stat* §25-1911. The appeal was filed on the same day the Final Judgment was entered. Mr. Herink cross-appeals.

Statement of the Case

A. Nature of the Case

2. Adam Herink sued his former employer for breach of employment contract after he was terminated without cause. Mr. Herink was entitled be paid for his ownership interest in Bluestem. The Company tendered an unreasonably low price, breaching the contract. T1, 7

3. The case was tried to a jury. It returned a verdict finding a breach of contract and placing the value of Mr. Herink's interest at $2 million. T329-353, Instructions, verdict. Judgment was entered on the verdict. T355, T409 Expert witnesses testified for both sides concerning value. Extensive evidence about the position and goals for the company and its going concern status was presented. Post-trial motions were decided, including an award of interest and costs.T409

B. Issues Actually Decided / How Decided

4. Did Bluestem breach its contract with Herink?

How Decided: The jury found Bluestem breached. T353

5. If so, what was the commercially reasonable fair market value of the ownership interest held by Mr. Herink?

How Decided: The jury's verdict was for $2 million. T353, T355

6. Should costs and prejudgment interest to be awarded?

How Decided: The trial court awarded costs and prejudgment interest. T355

7. If so, how much interest?

How Decided: the trial court awarded costs of $1,316.32 and interest of $79,731.84. It found the interest was set at 1.53% or $30,600 annually or $83.84 per day. T409 This award is the subject of a cross-appeal.

Standard of Review

8. Bluestem's first assigned error asserts that the trial court should have sustained a motion for directed verdict. 625:22-627:5 [upon Plaintiff's rest] renewed upon all rests. 710:19-711:4. Appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Dick v. Koski Prof Group, PC,* 307 Neb 599, 633 (2020). *First Express Services Group, Inc. v. Easter*, 286 Neb 912, 920 (2013).

9. Bluestem's second assigned error alleges error by granting summary judgment on Bluestem's counterclaim for declaratory judgment. The standard of review of an order granting summary judgment is de novo, giving the nonmoving party the benefit of all reasonable inferences. *Avis Rent A Car Sys, Inc. v. McDavid,* 313 Neb 479, 482 (2023).

Appellee's Assignments of Errors

10. The Cross Appeal contains Mr. Herink's assigned errors.

Propositions of Law

11. Declaratory judgment is not an alternative to an action for breach of contract. *Caeli Associates, Inc. v. Firestone Tire & Rubber Co.*, 226 Neb 752, 753-754 (1987).

12. "[T]he existence of a justiciable issue is a fundamental requirement to a court's exercise of its discretion to grant declaratory relief." *U.S. Specialty Ins Co v. D S Avionics Unlimited LLC*, 301 Neb 388, 399 (2018).

13. A motion for directed verdict admits the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. That party is entitled to the benefit of every controverted fact as if resolved in its favor and of every inference deducible from the evidence. *Alpha Wealth Advisors, LLC v. Cook,* 313 Neb 237, 244-45 (2023).

14. The nonmoving party is given the benefit of all evidence and reasonable inferences in his or her favor when considering a motion for directed verdict; the question is whether a party is entitled to judgment as a matter of law. *U.S. Pipeline, Inc. v. Northern Natural Gas Co*, 303 Neb 444, 463 (2019).

Statement of the Facts

Error 1: Bluestem's Directed Verdict Motion Was Correctly Overruled

15. Bluestem Energy Solutions, LLC ("Bluestem") was formed to capitalize on the expanding movement to green energy in the United States and around the world. Jon Crane provided most of the capital. Adam Herink furnished some. Adam became the company's chief operating officer while Crane took the title of President. Crane also operates a separate, substantial construction business. 395:21-396:6. Crane was part time with Bluestem.

16. Herink was employed by Bluestem pursuant to an Executive Employment Agreement, E61, 181:15-184:13. The Employment Agreement incorporates a Unit Purchase and Option Agreement, E62, 182:4-184:13 and also incorporates Bluestem's Second Amended & Restated Operating Agreement,

E63, 183:5-184:13. The disputed language at issue in this case appears in the Operating Agreement, E63.

17. The incorporation provisions are found, in sequence at first, the Employment Agreement, at E61 ¶3B; second, the unit Purchase Agreement incorporates the Second Amended and Restated Operating Agreement. E62, ¶ 1.1 & ¶ 3.3 & Exhibit A. The Operating Agreement provides the Herink shares would be re-purchased by Bluestem in the event of a "mandatory purchase event;" such events included his separation from the Company for any cause, including termination without cause.

18. E63, Article VII, §7.02. The Company was required to purchase the shares, either for cash or at its election on a deferred payment basis when a mandatory purchase event occurred. E63, §702 (b), p.16. The "purchase price and terms" appear at E63 §703, p.17. The purchase price requires that:

> … the Company shall pay the Member a purchase price per Unit equal to the fair market value per Unit as determined by the Manager in his sole discretion, exercised in a commercially reasonable manner. For purposes of this Section 7.03, the determinative date of the fair market value of the Units to be purchased shall be the date of the mandatory operative event…as applicable."

Id.

19. The mandatory purchase date is April 17, 2020. 206:4-207:1 including a Stipulation to this effect.

20. Payment was permitted to be made under §7.03 of E63 either in a single payment on the one-year anniversary of the purchase date, or through a delivery of a promissory note and payment in accord with §7.03 (e) providing that payment could be "by check or in three equal annual installments."

21. Mr. Herink was involuntarily terminated without cause on March 26, 2020. E124. This was followed by an April 17

letter, E125, offering Herink a deficient purchase price for his interest in Bluestem. Jon Crane, Bluestem's majority owner, directed that the offer be made.396:10-397:11.

22. Bluestem operates in four divisions. They are origination, development, finance, & operations and maintenance. 349:5-350:3. The business basic contracts with customers: a Development Services Agreement ("DSA") and a Power Purchase Agreement ("PPA"). 350:4-356:23 (Description by Bluestem vice-president of development, Matt Robinette). Bluestem has employee sharing relations with General Electric and a product testing arrangement with Tesla for battery storage. 360:2-362:1. Bluestem has registrations to do business internationally with foreign governments. E105, 200:24-201:8; 364:17-20.

23. Bluestem's builder is Boyd Jones Construction, which does not bid competitively for Bluestem's work. 362:5-25. Jon Crane owns and manages Boyd Jones. 395:17-396:3. With Herink out, Crane and his wife own 100% of Bluestem. 396:2-9. Bluestem had a business plan and a strategic plan. E 114, E115, 229:9-233:21. Bluestem was audited; three audit reports are in evidence. E 94-96, 224:1-225:13. The company had deals with Koch Industries. 234:17-235:12; E117-118. 236:4-6.

24. Bluestem assembled a team including "senior consultants" or recent retirees from the power industry. This gave rapid credibility and boosted Bluestem's prominence. 156:11-159:12. Bluestem's model allowed it to generate power at about half the price per kilowatt hour as competitors. 162:4-163:5. Herink's pay was increased from $125,000 to $300,000 per year.163:11-164:4.

Jon Crane's Information

25. Jon Crane controlled Bluestem and the decision to buy Herink's member interests. However, Jon Crane recognized

no obligation to either negotiate or establish an objective price for the Bluestem shares. 396:10-397:25.

26. Jon's sole source of information for the offer he made to Herink came from consultation with his brother, Jamie Crane. 443:6-19. His calculation was based on cherry-picked facts and treated Bluestem as dead and inactive, not as a vibrant going concern. Jamie Crane conceded this point. 577:11-586:14.

27. The deficient price was supported by a calculation made by Jamie Crane, brother of Jon Crane, Bluestem's majority owner. E128, 574:1-9. Jamie kept the Bluestem books. 296:25-287:9. Jamie Crane earned an undergraduate degree from the University of Kansas and an MBA at the University of Phoenix. He is not a CPA and does not hold any licenses. 572:12-17.

28. Jamie Crane is director of finance at Bluestem, a position he had held for five years as of the time of trial. 573:18-25. Jamie Crane reports to his brother Jon, 574:1-7.

29. Before Bluestem, Jamie worked as an underwriter and compliance risk officer at Wells Fargo, and before that he was in the crude oil marketing business. 574:15-575:13. Jamie Crane has no experience with any company, except Bluestem in wind or solar energy, or battery energy 575:14-17.

30. Jamie's work for Bluestem is to create financial models for projects to get them financed and to serve as a financing liaison. He has one assistant at Bluestem. 576:1-21. Jamie Crane works with "5 or 6 investors" 577:11-578:2. The investors are principally his brother's construction company, his brother Jon Crane and Jon's wife. *Id*.

31. Jon Crane's sole basis for the amount he offered to pay Mr. Herink was the analysis made by his brother, Jamie. Jamie's evaluation was performed using projects selected by Jon Crane and not the entire array of the company's assets, businesses or prospects. 579:11-580:16. None of the projects

selected were completed. 580:17-24. The analysis was heavily dependent upon a discount rate, i.e., essentially an interest rate. The rate selected impacted the valuation. 492:25-495:2

32. The rate selected was not from a market study but was the rate claimed to be used in financing projects. It was used in the analysis by Jamie Crane to bring future value of cash flows to present value. 581:6-13. There was no consideration given to the future value of the company, its value as a going concern, the impact of these matters on the discount rate, or other multiple variables typically used. 582:13-16. When done correctly, multiple variables are used, including different kinds of contracts, customers, etc. 582:13-21. In fact, Jamie was not told what his valuation exercise would be used for. 447:9-19.

33. Non-operating assets were not considered in valuing Bluestem. 584:19-585:8. No research was performed to understand how to calculate a discount rate before Jamie Crane made his calculation. 585:22-586:4. He ran the calculation on a simple Excel spreadsheet program. 586:7-14.

34. Jamie Crane was not adept at valuation of companies and had not done so previously. Bluestem was in business at the time, and there were others even in the accounting department to do checks, but they were not consulted. 615:1-16.

35. There is a reference in the testimony to the use of Revenue Ruling 59-60. Jamie Crane admitted that while he generally followed it, when it was enacted in 1959 limited liability companies did not exist, and the 62-year-old ruling was written for publicly traded companies not closely held ones. 607:3-608:16. The Revenue Ruling admonishes that a person should adopt a reasonable attitude in recognition of the fact that valuation is not an exact science. 608:12-16. Even according to the 62-year-old Revenue Ruling, is often necessary to have a second valuation or review conducted. 608:17-609:5.

36. The Revenue Ruling includes a list of market factors-- designated as A through H -- to be considered. It provides that goodwill is to be considered. 609:6-612:9. But goodwill was not considered in Mr. Crane's valuation. *Id.* Several of item's A through H were left out as well.

37. Jamie Crane's valuation model did not consider that Bluestem was an operating business, without a business plan to go out of business. 612:10-19. Jamie Crane agreed that valuation is not like a taking a photograph of one float in a parade if what is being valued as an ongoing business. He agreed that he did not consider ongoing business or the going concern value but acknowledged it must be considered. 613:14-615:19.

Herink's Testimony

38. Appellant's contention is that there was no evidence of matters that might have gone into the discretionary judgment of a person making a good faith effort to determine the fair market value of Bluestem. But there was abundant evidence on this issue. From Mr. Herink, for example:

38.1. A two-turbine project at Springview, Nebraska proved profitable, breaking into a new market small municipalities working with NPPD. 147:6-147:6

38.2. The company took over and ran the Nebraska Wind & Solar Conference resulting in obtaining at least two large developments. 147:7-15

38.3. The economics of even a single turbine as compared with a large wind farm were proven, revealing that the small products were much more profitable measuring profit in return on invested dollars. 151:2-17

38.4. Herink learned to sell price point for produced power as a strength that even major power

generators could not match and which the Bluestem model permitted customers to lock in, securing protection against inflation. 152:15-153:24

38.5. Herink and Crane decided Bluestem would dominate the Nebraska market, take success on the road, get projects in other states, and develop a team not dependent on one or two people. It took years, but in November 2019, four months before being terminated without cause, Jon Crane told Mr. Herink of these points "we made it!" 155:5-18

38.6. A team of quality technical support and consulting people was built, including a cadre of recently retired senior executives of public power with high levels of credibility. 156:7-158:11

38.7. A sales team was developed. 158:12-159:12

38.8. A strategic plan was drafted and adopted. 164:25-165:6

38.9. A relationship was developed with international mergers and acquisition experts focused on the energy sector. 165:15-166:4

38.10. Bluestem was actually building and delivering projects; it was not a start up with a website. 166:10-167:3

38.11. They used PhD employee talent and developed amazing data and industry contacts. 170:10-21

38.12. Bluestem was occasionally valued. Herink knew this when he was offered an inadequate amount. 171:21-172:21

38.13. Bluestem developed trade dress including trademarks. 198:17-201:3 & E105, 107, 108,

199:11-215:10 it used marketing materials. E102, 213:8-214:12

39. The company grew in value so rapidly that Mr. Herink could not afford to exercise his options to buy units each time he had a chance to do so even though he knew the value was escalating rapidly. 204:3-13

40. Mr. Crane unilaterally took $1 million out of the company. 197:3-9 Herink took no money out. 196:15-24

41. When Mr. Herink was terminated without cause, a promissory note was tendered. He refused to sign or accept it because the price was deficient, and he knew it. 204:124-208:5; E124, 205:4; E125, 206:11-207:4, E103, E105, E107, E108

Employees

42. Several Bluestem employees were called by Mr. Herink, and each necessarily admitted that Bluestem struggled for a time, but grew and by 2020, was involved in meetings with BP Light Source, a worldwide participant in the green energy sector. 374:1-20.

43. Bluestem presented itself, even when cold calling, as a company that was able to provide prospects with needs or interests for investment in green energy in design, build, and even leasing after construction of wind, solar or battery storage operations. This was explained by Will Crane. 382:10-14.

44. The company was able to provide long-term arrangements, and to permit the customer to largely lock in the cost of energy, providing an advantage that would allow the customer to know that the energy could be generated more cheaply than procuring it from an alternate source. 382-10-384:16.

45. Will Crane described presentations to county board's planning commissions, city councils and power districts. 385:14-386:3.

46. Tax credits were parts of the sales. 386:18–387:11.

47. Will Crane testified pursuant to a subpoena. 387:11-19. He reported to Adam Herink and first met him when Adam worked at Boyd Jones construction and Will Crane was in high school. 387:18-6.

48. Will Crane knew nothing about the company's financial circumstances, financial statements, never had an ownership interest, and never saw the company's tax returns. 389:7-390:9.

49. Will knew the company's business was ongoing. Even in 2020 just before Covid, he attended a sales conference in New Orleans, 392:12–393:2. He attended perhaps a dozen, including conferences in California 2019. 393:6-14.

Jon Crane's Admissions

50. Jon Crane and his wife were Bluestem's sole owners after buying out Herink. 396:2-9. Bluestem bought Herink shares because of an obligation to buy or sell. Crane contends he purchased the shares, even without an agreement on price. 396:7-21.

51. Crane thought it was up to him to set the price in his discretion. 396:17-397:11. According to Crane, valuation and the amount to be paid to Herink was wholly within his discretion, i.e., it was 100% up to him. 396:13-397:25.

52. In 2019, Crane increased Herink's compensation to $300,000. 401:5-17. He signed a unit purchase agreement, as well as the employment agreement, and amended the company's articles, all on Christmas Eve, 2015. E62, E63, 401:18-402:5. The contract contains a provision signed by Mr. Crane as a husband on page 26, giving notice to his wife, and Mr. Herink about the purpose of the contract, and the need for legal services, and to be sure that there was no encumbrance in the event of a divorce. 404:6-406:25.

53. Crane conceded that the contract includes a series of mandatory events initiated by Mr. Herink's departure from the Company, including departure for involuntary termination without cause. 410:3. This meant Herink had to sell, Bluestem had to buy, and Bluestem had to pay. 410:3-411:14.

54. Bluestem has never claimed Herink took material out of the company, breached the contract and therefore the company did not have to buy out shares. 411:15-25.

55. The obligation to purchase was admitted and a Crane acknowledged that the question before the jury was price:

Q. You admit that you are obligated to purchase?
A. Yes.
Q. And you know, the question here is price?
A. Yes.
Q. … do you agree that the issue to be decided here is how much Bluestem has to pay Mr. Herink?
A. That's what he is--that's what is being alleged in the--in your case, yes.
Q. Is that the issue here?
A. Yes?
Q. So you know, the jury has to decide that?
A. Yes.
Q. So you agree, don't you, that the price has to be paid is fair market value?
A. Yes.
Q. You know that that fair market decision for the jury has be made on a commercially reasonable basis.
A. Yes.
Q. And since, Mr. Crane you are not on the jury, you can't have any input into how they decide those issues, can you, because that's up to them?
A. Yes.

412:1-24. Bluestem's Opening Brief the sides overruling its motion for a Directed Verdict as an error in the face of these admissions.

John Agogliati's Testimony

56. Mr. Herink called valuation expert John Agogliati. 469:21-572:21. Agogliati is with Marshall Valuation, a leading valuation company. 470:22-471:16; 475:16-476:25. Agogliati's credentials appear at 477:1-478:18 and E90, 480:2-7.

57. Agogliati is a graduate chemical engineer with a master's degree in finance, who does full-time valuation work across multiple industries and sectors.

58. Agogliati is the author of more than 330 formal reports on value. When he joined his company, it was involved in the analysis of September 11 aftermath claims and his work has included high-profile bankruptcies, and litigation.

59. People in his business do not have licenses like real estate appraisers but do have extensive certifications earned through a combination of testing, education, and experience. 478:18.

60. Agogliati concluded that Jamie Crane's workup relied upon as the basis for the amount offered Mr. Herink to purchase his shares was not performed on a commercially reasonable basis and was not commercially reasonable. 486:13-494:8.

61. Agogliati wrote an initial report correcting Jamie Crane's incorrect work. 535:5-536:22.

62. He testified about commercial reasonableness. 536:23-537:8. He determined that using a commercially reasonable approach the value was between $7 million and $10 million for Mr. Herink's shares. 538:8-25. Agogliati was clear in his first report that he corrected commercially unreasonable valuation steps by Jamie Crane relied upon by his brother to decide what to offer Herink, 549:1-12, 569:22-570:7.

63. Agogliati's first report analyzed the valuation effort of Jamie Crane, and the offer made to Mr. Herink. Agogliati found it was not commercially reasonable in its methods or

conclusions. 473:19-480:8. Agogliati noted many flaws in Crane's offer to buy Herink's Bluestem units including failure to consider all approaches to value… cost, market and income. 480:12-487:10. It must also be commercially reasonable, but Jamie Crane's valuation was not. 487:11-494:12. Jamie's approach did not determine a discount rate in a commercially reasonable manner. 492:25-494:8. Jamie did not consider projects under development, projects under contract, or prospective contracts. 491:21-492:14. He did not consider the time required to develop projects, or the time to reach profit. 492:15-24. Yet, this is what was relied upon by Jon Crane for the offer he made to Mr. Herink. E124; 448:7-21

64. Agogliati was clear that his first report was not a valuation. It was an analysis of deficiencies in the work relied upon to support unacceptable proposal to purchase Mr. Herink's Bluestem interests. 494:9-495:5

65. Bluestem was squarely positioned as a going concern in a "hot industry" with annual growth of 10% or more for at least the leading five years through 2020 with even greater expectations going forward. 498:9-499:19. Agogliati relied on government reports and publicly available materials in large measure, including data from the U.S. Department of Energy. With this data he considered the standard of value and the premise of value concepts. In this case the standard of value was fair market value. There are others like fair value, investment value, liquidation value, etc. 499:20-503:18. The income, market and costs approaches to value were all used. 505:12-507:9

66. Agogliati knew he was dealing with a going concern. This required Agogliati to value the company as a going concern as liquidation would be a totally different premise of value. He did not, and could not, value based on the false premise Bluestem would cease operations. 503:19- 504:10; 505:12-507:9

67. Mr. Agogliati's procedures were well vetted before the jury. It included going concern matters, new growth matters, discount rate, the industry, installed projects, non-operating assets and all other forms of wealth. 507:10- 521:10. He concluded the value of Herink's shares was $7,060,000 to $10,080,000. 527:4-529.6; 542:15-552:13

Motion for Directed Verdict

68. Bluestem moved for directed verdict at the close of the Herink's evidence. This was Bluestem's argument for the Motion (626:3-24):

> …the operating agreement has a specific, mandatory provision on determining the price of fair market value -- fair market value exercised in the sole discretion of the manager in a commercially reasonable manner. The evidence in the case that is presented by the plaintiff excludes the sole discretion of the manager of Bluestem. In anticipating the responding argument from Plaintiff, I anticipate they will say this is a circular argument and the sole discretion of the manager of Bluestem assumed its own conclusion. Now that we are at the proof stage, that argument fails. Plaintiff had every opportunity in a deposition and with Mr. Crane on the stand to examine the issues of discretion and where he exercised it. They could have identified those discretionary decisions and built their fair market value in a commercially reasonable manner based upon those discretionary decisions. They chose not to and their argument to this court and to this jury is the jury chooses the fair market value, excluding the sole discretion of Bluestem's manager. That doesn't follow the contract and, as a matter of law, there should be a directed verdict.

Herink offered one sentence of argument in response. The motion for directed verdict was overruled. 627:2-5. The motion was renewed at the close of all evidence and overruled without

argument. 710:21-711:1. Assigned Error 1 has no merit. The trial court properly denied the motion for a directed verdict.

Error 2: Post-Verdict Summary Judgment on Counterclaims

69. Bluestem's Amended Counterclaim T231 requested declaratory judgment and specific performance. Herink answered T2, 41 the declaratory judgment claim asserting that a) *Neb Ct R Plead* § 6-1112b(6) failure to state a claim, and b) an alternate serviceable remedy was available and c) declaratory judgment is unavailable for advisory opinions or where a controversy is ripe for resolution with a conventional remedy.

70. Herink answered the specific performance claim T242 asserting a) a § 6-1112b(6) defense, b) specific performance is not enforceable in an action at law involving whether the contract was breached, and c) specific performance is not available where an essential element of a contract must be determined. In this case, the element to be determined was the price to be paid for Herink's shares.

71. The Motion for Summary Judgment T362 was filed by Mr. Herink after the jury returned its Verdict T353 in his favor and the Court entered Judgment on the Verdict. T355 It was heard concurrently with Herink's Motion to Tax Costs and Award Prejudgment Interest. T357 Mr. Herink's Statement of Undisputed Facts T365 laid out that since the case had been tried to the jury and decided by the jury there was no longer any basis to grant relief in favor of the Defendant on any facet of its Counterclaim. Herink briefed the issues. T372 Bluestem also filed a two-page brief opposing summary judgment on its Counterclaim. T398 Bluestem claimed that summary judgment was sought on the doctrine of claim preclusion which was not pled in the Answer. T399

72. The proceedings on the motion for summary judgment are quite brief. 746:18-748:14. Neither party argued the Motion. Neither party argued the merits orally. Herink filed a brief along with his summary judgment motion and statement of undisputed facts. T362-398. The Motion was filed to "clean up the counterclaims" after judgment and trial. 748:4-10.

73. Herink offered as evidence E161, his lawyer's Affidavit; E162, Bluestem's Cross-claim; E163, Herink's Answer; E164, the Jury Instructions given to the trial jury; and E165 the Judgment on the Verdict entered prior to the hearing [and subsequently modified in response to Herink's motion to alter and amend and include prejudgment interest and costs]. There were no objections to the exhibits. The record hints that an exhibit was offered by Bluestem but the reference to E166, read carefully, discloses that it was offered on the interest and costs issue heard at the same hearing as the motion for summary judgment.

74. The trial court sustained the summary judgment motion and dismissed Bluestem's counterclaim. T410

Summary of Argument

75. **Error 1**. Bluestem complains that the trial court overruled its motion for a directed verdict. However, substantial evidence concerning value and valuation was given to establish that a) the offer to purchase Mr**.** Herink's shares was not commercially reasonable, and b) Bluestem's CEO, Mr. Crane admitted the jury had to decide the value, and c) Mr. Herink, company employees and Mr. Herink's expert adduced substantial evidence of fair market and commercially reasonable methods to determine it. There was no doubt that a jury issue was presented.

76. A reasonable person did differ with Mr. Crane who claimed that he alone could decide the value of Bluestem shares

and could do so unilaterally. In addition, professional appraisal methods were presented by an expert witness, and substantial evidence of value was presented by Mr. Herink as well as company employees. The first assignment of error is without merit because there was no viable basis to sustain the motion for directed verdict Bluestem presented to the trial court.

77. **Error 2.** The trial court dismissed Bluestem's counterclaim seeking a declaratory judgment and specific performance of its contract with Herink. It did so after trial, after judgment on verdict, and at the time of ruling on all remaining matters in the case. The trial court sustained Herink's Summary Judgment Motion which was filed after judgment on the verdict. The trial of the case decided the issues between the parties.

78. There was nothing left to be decided on the counterclaims and the remedies sought were not available. The counterclaim lost whatever justiciability it had, if any, and the claims it asserted were precluded by the judgment in the case. The trial court ruled correctly.

Argument

Asserted Error 1: Error 1: Bluestem's Directed Verdict Motion Was Correctly Overruled

79. Bluestem complains that its motion for directed verdict should have been sustained. The overruled motion 626:3-24 contends that the evidence of the plaintiff "excludes the sole discretion of the manager of Bluestem" and addressed the commercial reasonableness of the manner in which the price was determined and the fair market value of price but not the sole discretion of the manager. *Id.*

80. The response was a reference to the fact that after expert evidence was presented there was no additional argument. 627:2-3

81. The facts, recited above, demonstrate substantial evidence that a) the methods used to ascertain the amount and terms offered to Mr. Herink by Bluestem were not arrived at in a commercially reasonable or professional manner. Furthermore, b) the price offered was not commercially reasonable. Admissions, affirmative evidence from involved witnesses, and expert evidence supported Mr. Herink's case. There was ample evidence upon which the jury could decide against Bluestem on liability for breach of contract and of for hearing in the amount of the verdict, and indeed for more.

82. A motion for directed verdict admits the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. That party is entitled to the benefit of every controverted fact as if resolved in its favor and of every inference deducible from the evidence. *Alpha Wealth Advisors, LLC v. Cook,* 313 Neb 237, 244-45 (2023).

83. Directed verdicts are proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, which is to say, where an issue should be decided as a matter of law. *Id.* Certainly, as Mr. Crane readily admitted in his testimony, the amount to be paid to Mr. Herrick was up to the jury.

84. *Alpha Wealth Advisors, LLC v. Cook,* 313 Neb 237, 244-45 (2023), affirmed a directed verdict where an employer attempted to assert a lost profits claim based upon a personal injury to an employee. The Court observed that the loss in a case involving an invasion of a personal right, such as a personal injury, belongs to the injured party alone. The decision was on standing grounds. No such grounds are present here.

85. The nonmoving party is given the benefit of all evidence and reasonable inferences in his or her favor when considering a motion for directed verdict; the question is whether a party is entitled to judgment as a matter of law. *U.S. Pipeline, Inc. v. Northern Natural Gas Co*, 303 Neb 444, 463 (2019). Also, *Doe v. Zedek,* 255 Neb 963, 696 (1999)(moving party claimed no proof of causation), and *Ethanair Corp. v. Thompson,* 252 Neb 245, 561 NW2d 225 (1997).

86. The party against whom a directed verdict is made is entitled to the benefit of every inference which can be reasonably drawn from the evidence. If any evidence will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *U.S. Pipeline, Inc., supra.*

87. Herink urges the Court to conclude that Bluestem's Error 1 has no merit.

Asserted Error 2: Bluestem's Declaratory Judgment & Specific Performance Claims Were Correctly Dismissed After Trial by Summary Judgment.

88. Bluestem's second Assigned Error asserts that summary judgment should not have been granted for Herink on Bluestem's Counterclaim.

89. This error is not discussed in the Statement of Facts nor argued in the Argument in Bluestem's Opening Brief.

90. "An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court…" *State v. Vanderford*, 312 Neb 580, 598 (2022). Accord, *Nebraska Republican Party v. Shively,* 311 Neb 160,175 (2022). Without argument, review is limited to error plainly evident from the record. *Id.*

91. Bluestem's Amended Counterclaim T231 requested declaratory judgment and specific performance. Herink answered T241 the declaratory judgment claim asserting that: a) *Neb Ct R Plead* § 6-1112b(6) failure to state a claim, and b) an alternate serviceable remedy was available and c) declaratory judgment is unavailable for advisory opinions or where a matter is ripe for decision with a conventional remedy.

92. Herink answered the specific performance claim T242 asserting a) a § 6-1112b(6) defense, b) specific performance is not enforceable in an action at law involving whether the contract was breached, and c) specific performance is not available where an essential element of a contract must be determined. In this case, the element to be determined was the price to be paid for Herink's shares.

93. The Motion for Summary Judgment T362 was filed by Mr. Herink after the jury returned its Verdict T353 in his favor and the Court entered Judgment on the Verdict. T355 It was heard concurrently with Herink's Motion to Tax Costs and Award Prejudgment Interest. T357

94. The proceedings on the motion for summary judgment are brief. 746:18-748:14. Neither party argued the merits orally. Herink filed a brief along with his motion and statement of undisputed facts. T362-398. Counsel for Herink filed the Motion to "clean up the counterclaims" after judgment on the verdict and trial. 748:4-10. The evidence consisted of the pleadings, jury instructions, verdict and judgment entered in the case before the summary judgment motion was filed.

95. The trial court sustained the summary judgment motion and dismissed Bluestem's counterclaim. T410 The ruling was correct. Bluestem lost the issues it attempted to relitigate in its claim for declaratory judgment.

Declaratory Judgment.

96. Bluestem's first counterclaim sought declaratory judgment. Declaratory judgment is a remedy with a limited scope.

97. *Neb Rev Stat* § 25-21,149 authorizes declaratory judgments. The remedy is available only where there is a "question of construction or validity arising under" a contested contract in a contract action. *Neb Rev Stat* § 25-21,150.

98. Ordinarily, declaratory judgment is not an available remedy when "another equally serviceable remedy has been provided by law." *Cain v. Lymber,* 306 Neb 820, 830-831 (2020) (mandamus remedy); *Caeli Associates, Inc. v. Firestone Tire & Rubber Co.*, 226 Neb 752, 753-754 (1987) (breach of contract remedy).

99. A "party cannot seek a declaratory judgment which is merely advisory." *Myers v. Nebraska Inv. Council*, 272 Neb 669, 683 (2006).

100. Whether declaratory judgment was ever an appropriate remedy for any aspect of this case is doubtful. Once the judgment had been rendered following a week of trial to a jury, there were no ambiguities to be resolved, no declarations to be made and there was no relief to be had on the declaratory judgment counterclaim. The trial court correctly dismissed the counterclaim by sustaining Herink's motion for summary judgment.

Specific Performance

101. The second counterclaim sought specific performance. Bluestem complains the argument made by Herink included claim preclusion which had not been pled in his pretrial Answer as an affirmative defense. Herink's argument was that the judgment in the case, which came after his Answer gave rise to claim preclusion. Certainly, it is true that claim preclusion was

not pled in Mr. Herink's Answer. This is because the Answer came in the progression of things—*before* trial and judgment on a jury verdict.

102. After trial and judgment on the verdict the very claim which is the subject of the specific performance request had been precluded by the jury verdict. *Trausch v. Hagemeier,* 313 Neb 538, 552 (2023); *Hara v. Reichert,* 287 Neb 577 (2014).

103. After the verdict and entry of Judgment the Court could not render a contradictory Judgment. At a minimum the initial Judgment made the lingering counterclaims moot.

> An action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action. A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive.

Nesbitt v. Frakes, 300 Neb 1, 5 (2018). The Counterclaim issues ceased to have any viability when judgment on the merits was entered. No justiciable issue remained as the Counterclaim issues were resolved. "[T]he existence of a justiciable issue is a fundamental requirement to a court's exercise of its discretion to grant declaratory relief." *U.S. Specialty Ins Co v. D S Avionics Unlimited LLC*, 301 Neb 388, 399 (2018).

104. The remedy or theory of specific performance was discussed in detail in *Langemeier v. Urwiler Oil & Fertilizer, Inc.*, 265 Neb 827, 834 (2003). The Court held that your specific performance is not generally demandable as a matter of absolute legal right but is addressed to the legal discretion of the court. It will not be granted where enforcement of the contract would be unjust. *James J. Parks Co. v. Lakin,* 206 Neb 184 (1980); *Tedco Development Corp. v. Overland Hills, Inc.,* 200 Neb 748 (1978).

Bluestem could not expect specific performance after it lost its case. A party seeking specific performance must show his or her right to the relief sought, including proof that the party is ready, able, and willing to perform all obligations under the contract. *Id.*

105. The right to specific performance may be lost by abandonment of the contract and by conduct inconsistent with the right to relief. *James J. Parks Co. v. Lakin, supra; Sofio v. Glissmann,* 156 Neb 610 (1953).

106. Mr. Herink submits that the right to specific performance was also lost when the trial occurred, and the case was decided on its merits on breach of contract theory. Appellant's contention would, if found to be meritorious, require conduct of a second trial and disregard of the first case.

107. There was no error – plain or otherwise, in the trial court's order sustaining Herink's Motion for Summary Judgment on Bluestem's Counterclaim for declaratory judgment after the issues had been tried and resolved by the jury.

Conclusion

108. The Court is urged to reject Bluestem's assigned errors and declined to grant relief on its appeal and to turn its attention to Herink's cross-appeal.

/s/ David A. Domina, #11043
Appellee Herink's lawyer

BRIEF ON CROSS-APPEAL

No. 22-0892

Nebraska Supreme Court / Court of Appeals

Adam Herink
Plaintiffs – Appellee,
v.
Bluestem Energy Solutions
Defendant – Appellant.

Appeal from District Court, Douglas County, Nebraska
Hon. Timothy Burns Judge

Brief on Cross Appeal

Of Plaintiff-Appellee Adam Herink

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Jurisdictional Statement

1. See Answer Brief P. 4.

Statement of the Case

A. Nature of the Case

1. See Answer Brief P. 4.

B. Issues Actually Decided / How Decided

2. See Answer Brief P. 4.

3. Should costs and prejudgment interest to be awarded?

How Decided: The trial court awarded costs and prejudgment interest.

4. If so, how much interest?

How Decided: the trial court awarded costs of $1,316.32 and interest of $79,731.84. It found the interest was set at 1.53% or $30,600 annually or $83.84 per day. This award is the subject of this cross-appeal.

Standard of Review

2. Prejudgment interest awards are reviewed de novo. *McGill Restoration, Inc. v. Lion Place Condominium Ass'n,* 309 Neb 202, 242 (2021).

3. An award of costs is reviewed for abuse of discretion. *Credit Management Services, Inc. v. Jefferson*, 209 Neb 664, 665 (2015).

Assignments of Errors

Error 1: The trial court erred when it determined that the rate of **prejudgment** interest should be 1.53%, and not 12% as provided by *Neb Rev Stat* § 45-104.

Error 2: The trial court erred when it determined the **post-judgment** rate of interest at its erroneously established contract rate of 1.53% and not at the rate of 5.981%

representing the rate published on the website of the Nebraska Supreme Court effective October 2022.

Propositions of Law

4. *Neb Rev Stat* § 45-104 and *Weyh v. Gottsch,* 303 Neb 280, 317 (2019) make prejudgment interest recoverable in breach of contract cases.

5. A party who has breached a contract cannot take advantage of the breach. *First Mid America, Inc. v. Palmer,* 197 Neb 224, 230 (1976).

6. A party may not breach a contract and recover benefits under it as well. *Sechovec v. Harms*, 187 Neb 70, 187 NW2d 296 (1971) *Waldo v. Lockhard*, 101 Neb 797, 165 NW2d 154 (1917).

7. Litigation expenses "are not recoverable costs unless provided for by statute or a uniform course of procedure." *Millard Gutter Co. v. American Family Ins. Co.*, 300 Neb 466, 478-79 (2018).

8. Prejudgment interest is governed by *Neb Rev Stat* § 45-104.

9. Post judgment interest is governed by *Neb Rev Stat* § 45-103; rates are posted by the Court Administrator on the Judicial Branch website.

Statement of the Facts

10. Mr. Herink's cross-appeal is focused on a narrow part of the record dealing with interest and costs. 746:1-752:25 and E161, 166. Herink's summary judgment motion on Bluestem's Counterclaim was also considered in these eight pages of the Bill of Exceptions.

11. Costs were not disputed. 750:7-8 & 752:1023. It was offered. Bluestem had no objection to the costs requested or awarded. Herink briefed the costs and interest issues. T381-390

Bluestem filed and Objection T392 and an opposing Brief. T392-395.

12. The interest dispute is about the rate of interest. Bluestem and the trial court applied a 1.53% rate derived from a reference document available under one payment option available upon purchase of Herink shares by Bluestem. The reference document is a publication of the IRS. E166. This is the argument Bluestem made orally to the trial court:

> As to the interest, we spelled that out in our objection and the cases cited therein. There are two components of interest here, prejudgment and post judgment.
>
> The contract that was sued upon had an interest rate identified in it, Exhibit 166 provides you with that interest rate; I understand Mr. Herink's argument that a prior material breach would, in some instances, apply but it doesn't apply here. Both the prejudgment interest statute and the post judgment interest statute provide for those statutory rates to be in the absence of an agreement. When there is an agreement, that agreement rate governs, and we have cited cases that enforce the agreed rate, not the statutory rate. Think of the -- the statute says "gap fillers"; there's no gap that needs to be filled here. There is an agreed-upon interest rate, it's spelled out in both the prejudgment and post judgment. The Aurora case that's cited in relation to post judgment is probably the clearest example. It's a short, three-page case that very succinctly addresses that, and we have done our calculation based on that.

750:9-751:3

13. The trial court's judgment, based on the verdict of the jury, determined the value of Herink's interest in Bluestem at $2,000,000. This amount became due April 17, 2020. E124. This

was the undisputed date when Bluestem tendered its deficient offer for his interests.

14. Herink's claim is for money due on a written instrument, specifically E61-63. He is entitled to prejudgment interest under *Neb Rev Stat* § 45-104. Bluestem agrees. The dispute is over the interest rate.

15. Herink contends:

15.1. the contract documents do not establish the interest rate and

15.2. the rate advanced by Bluestem is from a contract provision allowing the buyer the option to pay cash or with a promissory note and three installment payments as the buyer might choose. Thus the rate is not a contract rate and it came into existence as part of Bluestem's act of contractual breach.

15.3. if the rate is found in the contract contrary to Herink's position, Bluestem may not claim benefit from the contract Bluestem breached.

Herink contends that Bluestem's breach of contract precludes it from claiming an interest benefit to which it was entitled only by performing the contract and cannot enjoy after breach.

16. The document offered by Bluestem to establish the rate, E166, derived from a reference in the contract. But, E 166 did not exist until the day the contract was breached, and it is a material part of that decision. The interest rate is not separately stated as a contractual provision. An interest rate is a possible option that might be exercised in certain circumstances contemplated by the contract, but that decision was unilateral with Bluestem, not bilateral with both parties.

17. Herink contends the trial court erred by using an interest rate less than 12% per annum, the amount provided by

law. He also claims that the trial court erred by not imposing post-judgment interest at the rate required for judgments rendered at the time the final judgment in this case was entered.

18. Herink's case is based upon his Executive Employment Agreement. E61. It incorporates the Unit Purchase Agreement in ¶ 3(b) but does not state an interest rate on amounts owed by Bluestem to Herink. The Unit Purchase Agreement, E62, identifies the original ownership interests.

19. Herink acquired additional units before exercising the first of the options provided in the Purchase Agreement. Herink acknowledged his units were subject to restrictions, E62 ¶ 3.3, and that those restrictions were contained in the Company Operating Agreement including, specifically Article VII. *Id § 3.3.* The UPA contains no interest rate.

20. The Second Amended and Restated Operating Agreement, E63, defines the term "interest" but the definition refers to a member's shares of profits and losses of the company, and not to a rate earned on funds owed. E63 ¶ 1.09, 1873

21. The Operating Agreement provides for capital accounts, allocations and distributions in Article V. There was no evidence of any withdrawals of capital by Mr. Herink. Mr. Crane withdrew $1 million during the months preceding Herink's termination. 196:15-197:6.

22. Mr. Herink was terminated on March 26, 2020. The Company's offer was extended to him April 17, 2020 within the thirty-day period following the date of Notice of Termination. Thus, April 17 became the operative date for interest to be paid. (E81 termination; E82 letter offering inadequate price.)

23. Termination even without cause, triggered mandatory sale by Herink but optional purchase terms for Bluestem. The purchase provisions allow Bluestem to elect, at the time, to either pay the purchase price in cash or tender a

promissory note. But Mr. Herink's contract and the documents do not include a note. They include only the option that one might come into existence at a future date. E63, §7.03 (b)&(e).

24. When Bluestem tendered performance it delivered a promissory note. The amount tendered was so deficient it constituted a breach of contract. The interest rate was 1.53%. The jury found this tender constituted a failure of performance or breach of contract by Bluestem.

25. This interest rate does not appear in E63, the Operating Agreement as a contractual number. It is part of an optional purchase method. E63, provides that if a Note is used:

> "the Promissory Note shall bear interest on the unpaid principal balance at an interest rate per annum equal to the Applicable Federal Rate for Mid-term Obligations, as published by the Internal Revenue Service for the month of Mandatory Operative Event…."

E63, ¶ 7.03.

26. Finally, the Judgment (T409) uses the 1.53% rate for post judgment interest as well as prejudgment interest. Mr. Herink contends the post judgment rate should be 5.81% and not 1.53%. The relevant rate posted on this Court's website for the date of judgment is 5.81%.

Summary of Argument

27. **Pre-Judgment Interest.** The trial court erred when it chose the wrong rate for *prejudgment* interest. Prejudgment Interest is due in this suit for breach of a written contract pursuant to *Neb Rev Stat* § 45-104 and *Weyh v. Gottsch,* 303 Neb 280, 317 (2019). The rate is 12% per annum under § 45-104. It is not the rate that would have been paid if the document tendered as inadequate performance would have been accepted. Bluestem

cannot claim benefits of a contract it breached to reach the lower interest rate imposed by the trial court.

28. The interest calculation commences on the undisputed date of April 17, 2020. (206:4-22) It should be at the rate of 12% per annum or $657.5342 /day. The conclusion date is the date of the Judgment, November 4, 2022. (T355). The calculation is: **930 days x $657.5342 / day = $611,506.80.**

29. **Post Judgment Interest.** The trial court erred when it chose the wrong rate for *post-judgment* interest. The rate should be 5.891%, the rate posted on Judicial Branch website pursuant to *Neb Rev Stat* § 45-103 for the November 2022 Judgment date. The rate should not be 1.53% as determined by the trial court because, again, Bluestem cannot claim benefits of a contract it breached to reach the lower interest rate imposed by the trial court.

30. The Judgment should be $2,611,506.80. At **5.891%** the per diem accrual on that sum is **$421.49.**

Argument

Error 1: The Prejudgment Interest Rate Was Erroneously Set.

31. Mr. Herink seeks to reverse the trial court's decision to set the interest rate at 1.53% per annum and require interest at 12%. The trial court found, and the parties agree, that a) prejudgment interest is due, and b) it commenced to accrue on April 17, 2020 when Bluestem breached the contract by failure to pay Herink a fair market value for his member equity.

32. Interest is due pursuant to *Neb Rev Stat* § 45-104 and *Weyh v. Gottsch,* 303 Neb 280, 317 (2019). The trial court set the rate at the amount Bluestem offered in its deficient payment proposal to Herink – the one the jury found was a breach of contract. Having lost on price, one element of Bluestem's April 17

tender, Bluestem now seeks to prevail on the second element – the interest rate. The two were part of one deficient payment proposal; they were and are inseparable. (E82).

33. Herink urges the Court to conclude that one who breaches a contract cannot claim benefits or advantages under the contract it breached if doing so provides benefits to the breaching party. He contends a party may not breach a contract and recover benefits under it as well. *Sechovec v. Harms*, 187 Neb 70, 187 NW2d 296 (1971) *Waldo v. Lockhard*, 101 Neb 797, 165 NW2d 154 (1917), cited by *Knight v. City of Fort Calhoun*, 2009 WL 210-5708 (Neb App A-08-1101 2009). *In re Country World Casinos, Inc.*, 181 F3d 1146 (10th Cir 1999) (a party who is the first to violate the terms of a contract cannot claim its benefits); 17A Am Jur 2d *Contracts* § 589 (Westlaw Updated Feb 2023); 70 CJS Contracts § 760 (Westlaw Updated Feb 2023)

34. The Nebraska Supreme Court recognized in 1923, 100 years ago, that:

> The rule is well settled that a party to a contract cannot take advantage of his own act of omission to escape liability thereon….

Householder v. Nispel, 111 Neb 156 *1 (1923)(Good, J.).

35. Judge Good quoted his Kansas Supreme Court counterpart "in the leading case of *Dill v. Pope,* 29 Kan 289":

> "A party to a contract who prevents the performance of any condition can neither claim benefit nor escape liability from the failure of such condition. * * * The rule is clear and well settled, and founded in absolute justice, that no party to a contract can either prevent performance by another of any of its conditions, or, on the other hand, disable himself from complying with any condition, and derive any benefit or escape any liability thereby."

Householder v. Nispel, 111 Neb 156 *1 (quoting *Dill v. Pope).*

36. The Supreme Court retouches this bedrock principle of contract law from time to time. A party who has breached a contract cannot take advantage of the breach. *First Mid America, Inc. v. Palmer,* 197 Neb 224, 230 (1976).

> This rule is based on the maxim one cannot profit from or escape liability for his own wrongdoing, but application of such maxim requires demonstration that the promisor took deliberate steps to impede occurrence of the condition precedent. *Omaha Public Power Dist. v. Employers' Fire Ins Co.,*[327 F2d 91 (8th Cir 1964)].

Keystone Bus Lines, Inc. v. ARA Services, Inc., 214 Neb 813, 816 (1983). The rule applies to agents who breach fiduciary duties. *Mischke v. Mischke,* 253 Neb 439,453 (1997). An insurer who fails to comply with a policy cannot claim policy benefits. *Saif v. Atlantic States Ins Co,* 29 Neb App 442 (2021).

37. The 1.53% interest rate advanced by Bluestem appears in the promissory note Bluestem tendered to hearing in an effort to compel him to accept about 20% of the value of his ownership interest in exchange for that interest. The price was a deferred price, so the interest rate was a material and indistinguishable element. Time and money are interchangeable in a commercial context in most settings because life is finite; the finite term of life inherently constrains the period of productivity available to one.

38. Herink requests that the district court's interest award be affirmed but modified to correct the amount. He requests that the interest calculation commence on the undisputed date of April 17, 2020 at the rate of 12% per annum or $657.5342 /day. (206:4-22) The conclusion date is the date of the Judgment, November 4, 2022. (T355). The calculation is: **930 days x $657.5342 / day = $611,506.80.**

39. Herink's claim is for money due on "[a] written instrument," specifically E61-63. Accordingly, Herink is entitled to prejudgment interest as provided by *Neb Rev Stat* § 45-104 at the statutory rate of 12% per annum as a matter of law. The interest calculation is mandatory. *Neb Rev Stat* § 45-104:

> Unless otherwise agreed, interest shall be allowed at the rate of twelve percent per annum on money due on any instrument in writing, or on settlement of the account from the day the balance shall be agreed upon, on money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due and withheld by unreasonable delay of payment.

40. The mandatory nature of the statute is elucidated by *Weyh v. Gottsch*, 303 Neb 280 (2019). The governing statute is *Neb Rev Stat* § 45-104, requiring a 12% interest rate. The start date for the calculation under the *Weyh* rule is "the time that the money is wrongfully withheld." 303 Neb 315. In this case, the start date is the date of breach, April 17, 2020. (E124).

41. The prejudgment interest calculation must end on the day the Court's Final Judgment is entered. At that point, the statutory post judgment interest rate applies. The current judgment interest rate is 5.981%.

42. The doctrine of prior breach often precludes an action by the breaching party to enforce a term of the breached contract against the opposing party. The Nebraska Supreme Court addressed this issue in *Dick v. Koski Professional Group, P.C.*, 307 Neb 599, 651, 950 NW2d 321, 361 (2020). The Court held:

> The "prior material breach" doctrine upon which KPG relies applies when a contract contemplates an exchange of performances between the parties, and the doctrine holds that one party's failure to perform allows the other party to

> cease its own performance. In order to constitute a possible prior material breach, the obligation upon which a plaintiff has sued in the breach of contract claim must have been dependent upon the other thing that the plaintiff was to do and failed to do. In other words, prior material breach is based on the principle that where performances are to be exchanged under an exchange of promises, each party is entitled to the assurance that he will not be called upon to perform his remaining duties ... if there has already been an uncured material failure of performance by the other party.

Dick v. Koski, Id., quoting 2 RESTATEMENT (SECOND) OF CONTRACTS § 237 comment *b.* at 217 (1981).

43. A party who commits a material breach of a contract cannot enforce the contract. In this case, Bluestem is the breaching party. Yet, it seeks the benefit of the contract's optional interest provision - a provision Bluestem chose to use as part of its acts of breach. E124; E125; E166

44. In 2022, the Supreme Court wrote:

> A material breach is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract. *Siouxland Ethanol v. Sebade Bros.*, 290 Neb 230, 859 NW2d 586 (2015). *Dietzel Enterprises, Inc. v. J. A. Wever Construction, L.L.C.*, 312 Neb 426, 443, 979 NW2d 517, 531 (2022).

Dietzel Enterprises quoted this basic rule:

> A material breach will excuse the nonbreaching party from its performance of the contract.

Siouxland Ethanol, LLC v. Sebade Brothers, LLC, 290 Neb 230, 236, 859 NW2d 586, 592 (2015).

45. The Nebraska Supreme Court has held for at least 42 years that: "As a general rule, a party cannot maintain an action on a contract without prior substantial compliance on his part." *Mills v. Denny Wiekhorst Excavating, Inc.,* 206 Neb 443, 445, 293 NW2d 112, 113, (1980). A party who has failed to perform or refused to do so is unable to maintain a claim or procure a benefit under the contract it breaches. Id. *Chadd v. Midwest Franchise Corp*, 226 Neb 502, 507, 412 NW2d 453,457 (1987).

46. Bluestem was the first and only party to breach Herink's employment agreement. The rule that the party guilty of the first breach is not entitled to enforce the contract is well established. *Profit Pet v. Arthur Dogswell, LLC*, 603 F3rd 308 (6th Cir 2010). Also see *Argentinis v. Gould* 592 A2d, 378 (Conn 1991); *Horton v. Horton*, 487 SE2d 200 (Va 1997). When one party to a contract commits the first material breach of that contract, it cannot seek to enforce the provisions of the contract against the other party. 17 Am Jur 2d *Contracts* § 589, citing *A House Mechanics, Inc. v. Massey*, 124 NE3d 1257 (Ind App 2019).

47. Nebraska is in accord with other states. For examples, see *Chrysler International Corp. v. Cherokee Export Co*., 134 F3d 738, 742 (6th Cir. 1988)(Michigan law); *Fireman's Fund Ins Co v. Steele St Ltd*, (D Colo 2019); *St. Jude Medical S.C., Inc. v. Tormey*, 779 F3d 894, 899 (8th Cir. 2015); Jackson v. Rich, 499 P2d 279, 280 (Utah 1972); *Mathews v PHH Mortg Corp*, 724 SE2d 196,198 (Va 2012).

48. Bluestem cannot claim the advantage of a lower interest rate under the very contract it breached. The interest rate used should be 12% per annum. The interest calculation commences April 17, 2020 (206:4-22) The conclusion date is the date of the Judgment, November 4, 2022. (T355). The calculation is: $2 million x 12% = $240,000 /yr, ÷ 365 days = $$657.5342 /day. **930 days x $657.5342 / day = $611,506.80. The judgment**

should be the principal plus prejudgment interest or the total of $2,611,506.80.

Error II. The Post Judgment Interest Rate Should Be Corrected to 5.891%.

49. The post judgment rate is 5.891%. It applies to the total principal and interest or $2,611,506.80. The trial court incorrectly used 1.53% as the post judgment rate.

50. The 1.53% rate cannot stand for all the reasons argued concerning Error 1. *Weyh* mandates that the prejudgment interest rate continues until the judgment is entered. Then, the post-judgment law applies.

51. *Neb Rev Stat* § 45-103 provides in relevant part:

> For decrees and judgments rendered on and after July 20, 2002, interest on decrees and judgments for the payment of money shall be fixed at a rate equal to two percentage points above the bond investment yield…. The State Court Administrator shall distribute notice of such rate and any changes to it…. This interest rate shall not apply to:
>
> ***
>
> (2) An action founded upon an oral or written contract in which the parties have agreed to a rate of interest other than that specified in this section.

52. The trial court erred when it chose the wrong rate for *post-judgment* interest. The rate should be 5.891%, the rate posted on the Supreme Court website pursuant to *Neb Rev Stat* § 45-103 for the November 2022 Judgment date. The rate should not be 1.53% as determined by the trial court because, again, Bluestem cannot claim benefits of a contract it breached to reach the lower interest rate imposed by the trial court.

53. The Judgment should be $2,611,506.80 after correction to include prejudgment interest. At 5.891% the per diem accrual on this amount is **$421.49.** Any contrary conclusion creates the risk of an impetus to breach a contract to gain the benefit of an interest rate at odds with the circumstances of the victim of breach.

Conclusion

54. Mr. Herink requests that the Court modify the judgment to $ 2,611,506.80, finding that the prejudgment interest rate is 12% per annum. He asks the court to impose post judgment interest at 5.891%, the post judgment rate under *Neb Rev Stat* § 45-104. The Court is urged to affirm the judgment of $1,316.32 for costs in the trial court, and award costs on appeal to Mr. Herink. Finally, Mr. Herink again urges the Court to reject Bluestem's appeal.

/s/ David A. Domina, #11043
Cross-Appellant's Lawyer

Certificate of Compliance

This Brief complies with Neb S Ct R § 2-103, including typeface, all and consists of 11,139 words including cover page, table of contents, and table of authorities as well as signature blocks, but excludes certificates. It was prepared using Microsoft WORD computer software.

/s/ David A. Domina

Certificate of Service

I am a Nebraska lawyer and certify that on March 6, 2023 I:

☒ Served the foregoing by filing with the Court using the Nebraska Judicial Branch "Justice" Efiling system which sent notice to counsel of record when accepted and filed.

☒ Served a copy by email on opposing counsel as follows:

William F. Hargens, Esq. whargens@mcgrathnorth.com

Patrick Pepper, Esq. ppepper@mcgrathnorth.com

/s/ *David A. Domina*

Certificate of Service

I hereby certify that on Monday, March 06, 2023 I provided a true and correct copy of this *Brief of Appe Herink With Cross Appeal* to the following:

Bluestem Energy Solutions, LLC represented by Donald R. Rison (27225) service method: Electronic Service to **drison@mcgrathnorth.com**
Bluestem Energy Solutions, LLC represented by Lauren R Goodman (24645) service method: Electronic Service to **lgoodman@mcgrathnorth.com**
Bluestem Energy Solutions, LLC represented by Maryl Christina Sattler (25869) service method: Electronic Service to **maryl@employmentlawnebraska.com**
Bluestem Energy Solutions, LLC represented by Patrick D Pepper (23228) service method: Electronic Service to **ppepper@mcgrathnorth.com**
Bluestem Energy Solutions, LLC represented by William F Hargens (16578) service method: Electronic Service to **whargens@mcgrathnorth.com**

Signature: /s/ Domina,David,A (11043)