vehicle. We must liberally construe Dobrovolny's complaint in his favor and construe Dobrovolny's factual allegations in the light most favorable to him. After reviewing the record de novo, we conclude that Dobrovolny has stated a claim for strict liability against Ford and that the trial court erred in dismissing Dobrovolny's complaint. Therefore, we reverse the trial court's order dismissing Dobrovolny's complaint and remand Dobrovolny's action for further proceedings.

## CONCLUSION

For the reasons set forth above, we conclude that the trial court erred in dismissing Dobrovolny's complaint, and therefore, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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## DOUGLAS K. GENGENBACH, APPELLANT, V. HAWKINS MFG., INC., AND TIMOTHY HOCK, APPELLEES.

785 N.W.2d 853

Filed July 13, 2010. No. A-09-1226.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.
3. **Summary Judgment: Records: Appeal and Error.** The only issue which will be considered on appeal of a summary judgment, absent the bill of exceptions, is the sufficiency of the pleadings to support the judgment.
4. **Deceptive Trade Practices: Injunction.** Under Nebraska's Uniform Deceptive Trade Practices Act, injunctive relief granted for the copying of an article is limited to the prevention of confusion or misunderstanding as to source.
5. **Appeal and Error.** To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeal from the District Court for Phelps County: TERRI S. HARDER, Judge. Affirmed.

Chad M. Neuens, of Neuens, Mitchell & Freese, P.L.L.C., and Bryan S. McQuay, of Person & McQuay Law Office, for appellant.

Jeffrey M. Cox, of Dier, Osborn & Cox, P.C., and Dennis L. Thomte, of Thomte Patent Law Office, L.L.C., for appellees.

MOORE and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

In the district court, the inventor of a farm implement sought damages and injunctive relief against a manufacturer which first shared profits from the sale of the inventor's device and later, after the initial arrangement ended, produced and sold a slightly different product solely for its own profit. On appeal, the inventor first attacks the district court's partial summary judgment declaring as unenforceable oral agreements purportedly limiting the manufacturer's ability to sell the modified implement. Because we do not have a bill of exceptions for the summary judgment hearing, we cannot address this issue. The inventor also challenges the court's refusal, after a bench trial, to enjoin sale of the modified implement pursuant to the Uniform Deceptive Trade Practices Act (UDTPA). See Neb. Rev. Stat. § 87-301 et seq. (Reissue 2008 & Supp. 2009). Because the UDTPA does not authorize an injunction to prevent copying, we affirm.

## BACKGROUND

Douglas K. Gengenbach designed a farm implement which attached to the corn head of a combine and served the purpose of making it easier for farmers to harvest downed corn. In very basic terms, the implement had an axle to which rotating metal paddles were attached and the paddles helped feed the corn plants into the combine.

In about 1999, Gengenbach found a manufacturer to make this implement. In 2000, Gengenbach applied for a patent for this device, which he named a "Sweeper Apparatus for a Corn Head Attachment." Gengenbach's relationship with the initial

manufacturer soured, and in 2005, Gengenbach reached an oral agreement to have Hawkins Mfg., Inc. (Hawkins), make his device. Timothy Hock, president of Hawkins, agreed that Hawkins and Gengenbach would split the profits from the sale of the device, that Hawkins would provide a yearly accounting of the profits, and that upon the termination of the agreement, Hawkins would no longer manufacture the device. Hawkins marketed the device as the "DG Paddle Reel." Gengenbach helped Hawkins market and make improvements to the product while it was manufactured by Hawkins.

According to Gengenbach, Hock was resistant to providing Gengenbach with an accounting of the 2006 profits, and this led to a new agreement. Gengenbach claimed that on January 17, 2007, Hock agreed that Hawkins would pay Gengenbach $80,000 to compensate him for 2006 profits and would provide Gengenbach with 30 to 40 DG Paddle Reels at a little more than "cost."

Gengenbach requested the manufacture of one DG Paddle Reel in April 2007 but made no further orders. According to Gengenbach, he did not make any further requests because by the time that most farmers would purchase a DG Paddle Reel, which was in July, August, or September, Hawkins was already marketing and selling Gengenbach's product as Hawkins' own.

In 2007, Hawkins began to manufacture and sell a product named the "Hawkins Corn Reel." Although it was nearly identical to the DG Paddle Reel, Hawkins did not provide Gengenbach with a portion of the profits. According to Hock, the only differences between the two products are that the new paddles contained two additional braces and that the space between the main paddle and bolt holes was changed. Hock opined that these changes did not make the product safer or operate better. Hawkins filed a lawsuit for noninfringement of Gengenbach's patent in federal district court, which action resulted in a settlement. In the settlement, the parties agreed that the Hawkins Corn Reel did not infringe on Gengenbach's patent.

As a result of Hawkins' manufacturing the Hawkins Corn Reel, Gengenbach found a new manufacturer and developed an

improved version of his product, which is marketed as a "Crop Sweeper." This product was improved from the DG Paddle Reel in a number of ways, including that the paddles have a new design and are plastic, the machine is partially made of lighter weight metal, and the machine has an improved positioning mechanism.

In September 2007, Gengenbach filed a complaint in the district court for Phelps County, Nebraska, alleging several causes of action against Hawkins and Hock, including three relating to breach of oral contract and another for an injunction under the UDTPA. In the complaint, Gengenbach based his breach of contract action on allegations that in 2005, Hawkins agreed that it would never manufacture the DG Paddle Reel after the termination of the agreement, and that in 2007, Hawkins agreed that its existing inventory would be used only to make DG Paddle Reels for Gengenbach's orders. Hawkins and Hock filed a motion for summary judgment, and Gengenbach filed a motion for partial summary judgment.

The district court granted Hawkins' and Hock's summary judgment motion as to many causes of action, including the breach of contract action. In the summary judgment order, the district court found that as a matter of law, the agreements which Gengenbach sought to enforce were not enforceable. As noted above, we do not have a bill of exceptions which contains the evidence adduced at the summary judgment hearing.

At a bench trial, the parties tried the three remaining causes of action, including Gengenbach's request for an injunction under the UDTPA. In its judgment, the district court found for Hawkins and Hock on the remaining causes of action.

Gengenbach timely appeals.

## ASSIGNMENTS OF ERROR

Gengenbach assigns, restated, that the district court erred in (1) determining that the 2005 and 2007 agreements between Hawkins and himself were unenforceable as a matter of law in terms of space, time, and prohibited conduct; (2) determining that Hawkins has not breached the 2007 agreement; and (3) determining that Gengenbach was not entitled to an injunction

prohibiting Hawkins from manufacturing, marketing, and selling the Hawkins Corn Reel.

## STANDARD OF REVIEW

[1] An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

## ANALYSIS

*Oral Contracts.*

Gengenbach's first two assignments of error pertain to the district court's decision to grant Hawkins' and Hock's summary judgment motion and thereby dismiss Gengenbach's causes of action based on oral contract. The district court's decision was based on the evidence adduced at a summary judgment hearing.

[2,3] Because Gengenbach has not provided us with a bill of exceptions for this hearing, we cannot review these assigned errors. It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors. *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009). The only issue which will be considered on appeal of a summary judgment, absent the bill of exceptions, is the sufficiency of the pleadings to support the judgment. *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002). The pleadings are sufficient to support the judgment, and therefore, these assigned errors are without merit.

*Nebraska's UDTPA.*

Gengenbach next argues that the district court erred in denying his request for an injunction under the UDTPA. However, we conclude that under the UDTPA, the district court could not have granted Gengenbach the relief that Gengenbach now assigns the district court erred in failing to grant him.

Section 87-302 explains what constitutes a deceptive trade practice. We note that § 87-302 was amended in 2008; however,

the revision does not affect our analysis, and for simplicity, we cite to the current version of the statute, which provides, in pertinent part, as follows:

> (a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she:
>
> . . . .
>
> (2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> (3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another.

In Gengenbach's appellate brief, he specifically assigned that the district court erred in failing to grant him an injunction which barred Hawkins "from manufacturing, marketing[,] and selling the Hawkins Corn Reel," and Gengenbach supports this assignment with an argument based on the UDTPA.

[4] However, the UDTPA does not permit the relief specifically sought by Gengenbach's assignment of error. The relief a party may obtain upon proving the existence of a deceptive trade practice, which is limited, is as follows:

> A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. . . . *Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source*.

§ 87-303(a) (emphasis supplied). A comment to the uniform act, from which act Nebraska's UDTPA is derived, provides further insight regarding the reason why relief is limited in the case where an article is copied. The comment states that "[a]mong the principles governing the scope of injunctions against misleading trade identification [is the principle of] state disability to enjoin the copying of articles because of the preemptive operation of the Federal patent and copyright laws." Unif. Deceptive Trade Prac. Act § 3, comment, 7A (part I) U.L.A. at 305 (1999).

We conclude that under the UDTPA, the district court could only grant an injunction to prevent confusion or misunderstanding regarding the product's source—but not to prevent the copying of a product. Therefore, we cannot reverse the district court's decision based on Gengenbach's present argument—that he was entitled to an injunction under the UDTPA to prevent Hawkins from continuing to produce and sell a product that was, with slight, inconsequential modifications, a copy of the DG Paddle Reel.

[5] We decline to consider whether Gengenbach may have been entitled to some other injunctive relief under the UDTPA, as both his assignment of error and his argument of the assigned error were specifically directed to an injunction to prohibit Hawkins from manufacturing, marketing, and selling the Hawkins Corn Reel. To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Obad v. State*, 277 Neb. 866, 766 N.W.2d 89 (2009).

## CONCLUSION

Because Gengenbach has not provided a record sufficient to address his assigned errors regarding the district court's partial summary judgment refusing to enforce his oral contracts with Hawkins, we do not address these matters. The UDTPA does not authorize the injunctive relief which Gengenbach's assigned error specifically addresses, and we do not consider whether the UDTPA would entitle Gengenbach to other relief because we decline to consider errors not specifically assigned and argued. We therefore affirm the judgment of the district court.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.