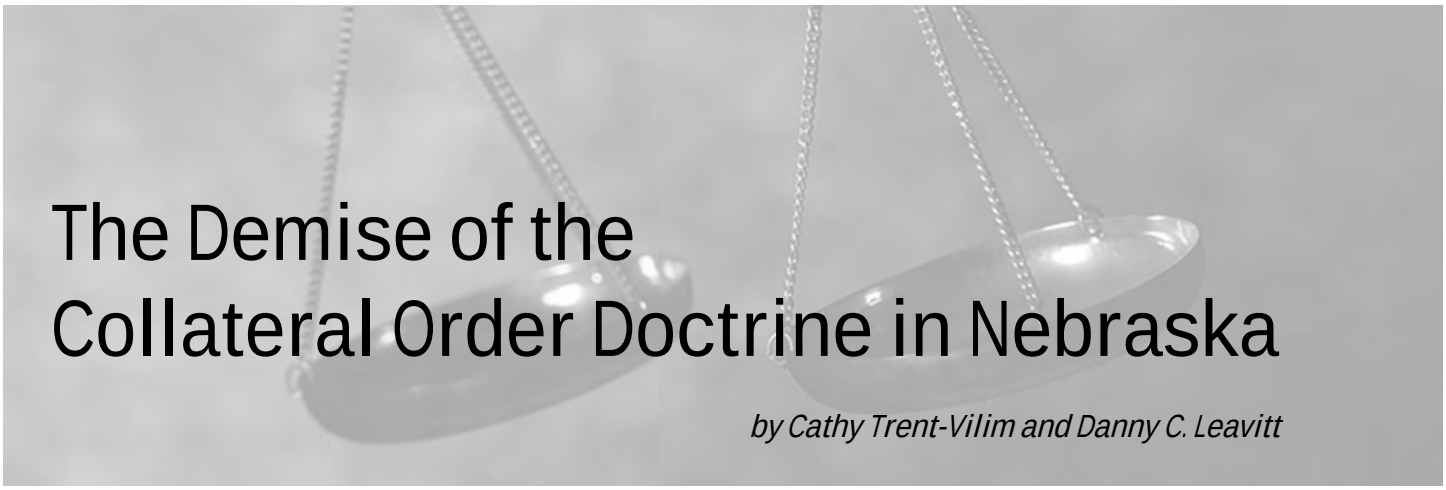

The Demise of the Collateral Order Doctrine in Nebraska

by Cathy Trent-Vilim and Danny C. Leavitt

The Nebraska Supreme Court is cleaning house. Within the past few years, it has overruled or disapproved several of its prior opinions, both civil and criminal.[1] One area where the Court has especially been taking its prior jurisprudence to task is in the area of appellate jurisdiction. The number of appeals being dismissed for lack of jurisdiction has noticeably increased, because the order from which appeal was taken failed to satisfy the final order requirement found in Neb. Rev. Stat. §§ 25-1902 and 25-1911. As part of the uptick of dismissals, the Court has recently overruled or disapproved caselaw in which it had construed Nebraska law to permit certain interlocutory appeals. This includes the collateral order doctrine. In this article we try to shed light on the recent changes dealing with collateral orders and the future of the collateral order doctrine in Nebraska.

Discussion of the Final Order Requirement and Collateral Order Doctrine in Nebraska

The Nebraska appellate courts have relied on the plain language of the final order statute, found at Neb. Rev. Stat. § 25-1902, when determining whether appellate jurisdiction exists. That statute requires an order to be final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.[2]

The Supreme Court of Nebraska has allowed for an exception to the final order requirement, permitting interlocutory appeals. For an interlocutory appeal to be reviewed on appeal, it must be founded in a statute—appellate jurisdiction granted from the Legislature. But what if an issue ruled on at the trial court but collateral to the underlying action is appealed? Enter the collateral order doctrine.

In 1997 the Supreme Court of Nebraska ruled in *Richardson v. Griffiths*[3] that exceptions outside the plain language of § 25-1902 were reviewable as interlocutory appeals. In *Richardson*, a home purchaser alleged she had conversations with a member

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of a law firm that was later hired by the vendors in a purchase agreement gone bad. The purchaser moved to disqualify the vendor's attorney, and the trial court did so, finding that, although the attorney's involvement was "peripheral and would not appear to be substantial[,]" the totality of the evidence supported disqualification. At the time the vendors appealed the trial court's ruling, the case had not proceeded to trial.

On appeal from the order disqualifying counsel, the *Richardson* court concluded the trial court's order was nonfinal. Yet it went on to adopt the collateral order doctrine—later referred to as the *Richardson* exception—as an exception to the final order requirement. The collateral order doctrine provides that an interlocutory order is immediately appealable if it (1) finally decides an important matter (2) that is separate and distinct from the merits and (3) is effectively unreviewable at the end of the litigation.[4]

The court reasoned the exception was appropriate because *Maddocks v. Rocker*,[5] a Massachusetts case cited just two years earlier in a Supreme Court of Nebraska opinion,[6] concluded interlocutory review of a collateral issue regarding attorney disqualification protects the client's interests. The *Richardson* court determined delaying the collateral issue would not protect the vendor's interests in the counsel of their own choosing and the time and expense associated with hiring a new attorney. The collateral order doctrine in Nebraska was effectively born.

The (Ostensible) Death of the Collateral Order Doctrine: *Heckman v. Marchio*

But the collateral order doctrine's life was short-lived. In 2017, just twenty years after the *Richardson* opinion, the Supreme Court of Nebraska was again faced with an interlocutory appeal concerning the disqualification of counsel.

In *Heckman v. Marchio*,[9] a putative father motioned the trial court to disqualify the mother's attorney. The trial court granted the motion, and the mother filed a motion to reconsider, which the trial court denied. The mother then appealed. But before she could get to the merits of the case, she had to show the Supreme Court of Nebraska had jurisdiction based on the order granting the disqualification of her attorney. The *Richardson* decision had been relied on in at least eight other occasions, so the mother presumably thought she could establish appellate jurisdiction.

But the Court went a different way. First, the Court penned the foundation and constitutional underpinnings for appellate jurisdiction in Nebraska. Citing numerous cases in Nebraska, the Court reiterated that appellate jurisdiction is "purely statutory." Not only is it then a question of jurisdiction—it's a matter of separation of powers between the Legislature and the Court. The Court explained that an appellant must satisfy the statutory requirements to procure jurisdiction. By analogy, it reasoned, the Court has no power to fix the time for an appeal when the Legislature already had done so, and in the context of final orders, the Legislature had already acted in § 25-1902, leaving the Court without power.[10] The Court thus refused to engage in "judicial legislation."[11]

Second, the Court took issue with the *Richardson* exception in some of the following ways:

- The *Richardson* court failed to provide any statutory authority for the purported exception.
- The *Richardson* court's citation of the Massachusetts case failed to analyze how the exception fits within § 25-1902. In effect, the Court's rationale relied, in part, on the negative-implication cannon of statutory interpretation ("The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)").[12] In other words, the use of the Legislature's express use of the three categories in § 25-1902 from which an appeal can be taken, implies the exclusion of an appeal for any other reason, collateral or otherwise.
- The *Richardson* court failed to mention the U.S. Supreme Court disallowed interlocutory appeals from orders disqualifying counsel in civil cases, specifically holding that such orders do not fall within the collateral order doctrine.[13]
- A commentator noticed the Richardson court usurped legislative authority but mentioned the Legislature acquiesced[14] by failing to amend § 25-1902, thereby justifying the use of the collateral order doctrine moving forward.[15] But the Heckman court rejected this justification, concluding there has been no interpretation of § 25-1902 (in applying the collateral order doctrine) in which the Legislature could be said to have acquiesced.

The *Heckman* court ultimately overturned *Richardson*. In doing so, it reasoned that principles of stare decisis didn't serve the broader, sounder doctrine of eliminating inconsistency.[16] In effect, the Court reasoned stare decisis is not a justification for perpetuating a mistake.[17]

The court's holding in *Heckman*—and its underlying rationale—seemed to be the death knell for the collateral order doctrine in Nebraska.

Resurrecting the Collateral Order Doctrine: *D.M. v. State*

Although *Heckman* seemingly signaled the demise of the collateral order doctrine in Nebraska, the Court of Appeals took a more optimistic view. Less than a year after the Supreme Court decided *Heckman*, the Court of Appeals faced an appeal

reliant on the collateral order doctrine. Only this time, instead of attorney disqualification, the issue was the trial court's denial of a qualified immunity motion to dismiss a lawsuit brought under 42 U.S.C. §1983.[18]

Because jurisdiction is the first question to be answered before taking up the merits of an appeal, the court first had to determine whether it existed. Addressing this question, the court first acknowledged that an order denying a motion to dismiss is not a final order.[19] However, that did not end the court's inquiry. It had to consider whether the collateral order doctrine conferred appellate jurisdiction. The court properly noted that in federal courts, the collateral order doctrine provides grounds for an interlocutory appeal of certain orders denying a motion to dismiss on the basis of qualified immunity.[20] This factor, the court found, made *Heckman* distinguishable and allowed the appeal to proceed on an interlocutory basis.

Besides this federal precedent, the D.M. court also noted that the Nebraska Supreme Court had recently permitted interlocutory review of a qualified immunity question in *Carney v. Miller*.[21] As the D.M. court explained, *Heckman* "did not specifically overrule *Carney*."[22] The Court of Appeals thus read *Heckman* narrowly and concluded that the collateral order doctrine remained a viable basis for appellate jurisdiction. "[*Heckman*] did not abrogate the collateral order doctrine with respect to appeals involving qualified immunity which present purely questions of law[.]"[23]

Carney, however, suffered from the same defect that led to *Richardson*'s overruling: treating the collateral order doctrine as an "exception" to the final order rule without any constitutional or statutory authority.[24] Perhaps strategically, the Court of Appeals did not endeavor to resolve this dilemma. Having decided that the collateral order doctrine survived *Heckman*, the court proceeded to the merits of the qualified immunity issue.

What Remains After *Heckman* and *D.M.*: The Outlook of the Collateral Order Doctrine in Nebraska

While the Court of Appeal remained optimistic about the future of the collateral order doctrine, *Heckman* likely set the stage for the doctrine's ultimate demise (barring any legislative action to the contrary). If the *Heckman* court was correct, and the Nebraska Supreme Court's adoption of the collateral order doctrine in the first instance amounted to "judicial legislation,"[25] narrowly construing the judicial legislation is of no import. If the Court "should not have adopted the *Richardson* exception to the final order rule as a means to provide appellate jurisdiction "where none would otherwise exist,"[29] it does not matter how broadly or narrowly one reads *Heckman*. Adopting the collateral order doctrine was an *ultra vires* act, so any application of the doctrine will be as well.[27]

Since *D.M.*, the Nebraska Supreme Court has since driven yet another nail into the coffin of the collateral order doctrine. In April 2018, the Court decided *E.D. v. Bellevue Pub. Sch. Dist.*.[28] Rather than qualified immunity, the issue was sovereign immunity in a §1983 action. The trial court denied Bellevue Public School's motion to dismiss a lawsuit brought by a former student who alleged she had been subjected to nonconsensual sexual contact with a teacher. The school district appealed. Surprisingly, the Court of Appeals diverged from its holding in *D.M.* and dismissed the appeal under Neb. Ct. R. App. P. § 2-107(A)(2), finding the ruling on the motion to dismiss was not a final, appealable order.[29] The school district moved for reconsideration, which the Court of Appeals granted and reinstated the appeal.[30] The Supreme Court then removed the case to its own docket.

The Supreme Court made quick work of jurisdiction, finding it to be lacking. In doing so, the Court overruled its 2011 decision in *StoreVisions v. Omaha Tribe of Nebraska*.[31] Clarifying *Heckman*'s scope, the Court held that while *Heckman* dealt with attorney disqualification, "we also disavowed *Richardson* based on the lack of statutory authority for the decision."[32] Thus, "[w]hile our holding in *Heckman* was limited to overruling *Richardson* and our use of the *Richardson* exception, our reasoning therein is directly at odds with our continued application of the collateral order doctrine to an interlocutory order denying sovereign immunity."[33] Though the court was selective and precise in its language, finding *Heckman* to be "at odds with" interlocutory review of *sovereign immunity* orders, it is difficult to imagine a scenario in which the collateral order doctrine survives, irrespective of the underlying issue. No amount of creative legal gerrymandering will be able to fill the statutory gap the Court has concluded exists.

The Practical and Legal Effect the Collateral Order Doctrine's Absence in Nebraska

Looking to the totality of Nebraska jurisprudence addressing the collateral order doctrine, its abolition is likely to have a variety of practical and legal effects. Some of those effects may not be felt for years or decades to come. Although it may be difficult to predict the impact of *Heckman*, *D.M.* and *E.D.*, some predictions are more apparent.

Take, for example, qualified immunity. With no statutory basis supporting the adoption of the collateral order doctrine, *D.M.*'s time is likely fleeting. The fact that federal courts allow interlocutory review of qualified immunity denials does not create jurisdiction under Neb. Rev. Stat. § 25-1902. This procedural disparity between state and federal courts is significant. Qualified immunity, and the right to seek immediate appellate review, are important quills in the quivers of § 1983

defendants. Consequently, a § 1983 defendant sued in state court, who would otherwise be content to stay there, may give serious consideration to removing the action to federal court in order to ensure his or her right to appeal an adverse qualified immunity ruling. Otherwise, he or she will forever forfeit the right to obtain interlocutory review on this issue. Even though § 1983 is a federal statute, the U.S. Supreme Court has already held that the Supremacy Clause is not grounds to compel a state to review qualified immunity on an interlocutory basis where appellate jurisdiction would otherwise be lacking under state law.[34]

Attorney disqualification is another area where the loss of the collateral order doctrine may lead to incongruent results. With interlocutory appeal no longer a viable option, is there *any* recourse? The answer: it depends. Under existing caselaw, parties for whom a disqualification motion has been *denied* may seek mandamus relief.[35] However, for those litigants whose attorneys have been disqualified, mandamus is not an option. As the Court explained in *Trainum v. Sutherland Assoc.*,[36]

> The exception adopted in *Richardson* was necessary because where the order sought to be reviewed is an order granting disqualification, mandamus is not an appropriate remedy. The general rule is that mandamus is not a preventive remedy but essentially a coercive writ, one that commands performance of a duty and not desistance therefrom. Thus, the appellants in *Richardson* could not bring an original action for mandamus to compel the district court to vacate its order of disqualification. However, to allow the district court's disqualification order to stand, without allowing an immediate avenue for appellate review, would have prejudiced the rights of the party whose counsel had been disqualified.

In other words, "mandamus can be used to compel the lower court to disqualify counsel (do something)—but it cannot be used to prevent the lower court from disqualifying counsel (do not do something)."[37]

Heckman, of course, held that appellate review of an order compelling disqualification *can* be adequately remedied by an appeal of the entire case, because "[a]ll that is required is a 'willing[ness] even when necessary to set aside verdicts—even when they result from lengthy civil proceedings.'"[38] Yet if having one's attorney improperly disqualified can be adequately reviewed on an appeal of the merits after trial, and if mandamus is inapplicable where disqualification has been ordered, parties who fail at getting another party's attorney disqualified have greater rights and remedies than parties who have been deprived of counsel of their choosing. In the former situation, the party whose motion to disqualify was *denied* could file a writ of mandamus and potentially obtain interlocutory review; in the latter scenario, however, the party against whom the motion was *granted* would have to complete the case with different counsel and then, if he or she succeeds on appeal, do it all over again with the original attorney.[39]

This outcome, however, does not comport with the Court's historical treatment of the loss of one's attorney. As it once observed,[40]

> We are also mindful that disqualification can wreak considerable havoc on a party's efforts to resolve its dispute. At a minimum, the practical effect is that a party must seek and find new counsel; furthermore, a party may be substantially prejudiced because its new attorney must litigate against an opposing counsel who inarguably is more familiar and more facile with the case. At the worst, a litigant can use a motion for disqualification as a technique for harassment and delay.

Given the serious implications of a litigant having his or her attorney disqualified, the Supreme Court's about-face in *Heckman*, coupled with existing mandamus jurisprudence precluding review, are cause for concern.

Instead, perhaps the Court will reconsider its position on how "coercion" and "prevention" are construed. In some respects, they are two sides of the same mandamus coin. From the trial court's point of view, and practically speaking, a mandate from the Court instructing the trial court to enter an order disqualifying an attorney is no more "coercive" than an order from the Court instructing the trial court to vacate its order compelling disqualification.

In fact, the Nebraska Supreme Court has exercised its mandamus powers to reach precisely this result. In *State ex rel. Stivrins v. Flowers*,[41] the Nebraska Supreme Court directed the trial court to vacate its order compelling a witness to answer certain deposition questions after concluding the questions were covered by the attorney-client privilege. It is unclear why compelling a trial court to vacate its order disqualifying counsel should be treated differently—particularly where regulation of attorneys in the State of Nebraska is vested in the Supreme Court[42] and courts "have a duty to maintain confidence in the legal system and protect and enhance the attorney-client relationship in all its dimensions."[43]

Finally, the Court may want to re-evaluate the extent to which legislative acquiescence applies. In *Heckman*, the Court rejected the notion that the Nebraska Legislature's failure to legislatively overrule *Richardson* amounted to legislative acquiescence:[44]

> in applying the *Richardson* exception, we have never purported to interpret a statute as allowing for an interlocutory appeal. Thus, there has been no interpretation of any statute in which the Legislature could be characterized to have acquiesced. Quite to

> the contrary, this court admitted that the disqualification order "d[id] not meet any of the definitions of a final order." Nonetheless, without citing any statute, we baldly proclaimed an exception.

The Nebraska Supreme Court in *Richardson*, however, was no bolder (or balder) in its proclamation than was the U.S. Supreme Court when it adopted the collateral order doctrine.

In *Cohen v. Beneficial Indus. Loan Corp.*,[45] the U.S. Supreme Court spent only a few short paragraphs addressing the appealability of the order before it. The Court acknowledged the order was not "final" within the meaning of 28 U.S.C. § 1291.[46] Nevertheless, the Court pointed out that § 1292 allows appeals from certain interlocutory orders.[47] After a brief discussion of cases in which interlocutory appeal is *not* permitted, the Court went on to proclaim that the appeal in question fell into "that small class" of cases "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[49] With a wave of its judicial wand, the Court concluded that it had "long given this provision of the statute this practical, rather than a technical, construction."[50] And with that, the federal collateral order doctrine was born.

Similarly, in *Richardson*, the Nebraska Supreme Court cited and discussed §§ 25-1902 and 25-1911. As did the *Cohen* court, the *Richardson* court concluded the order was not "final" and did not meet any of the requirements under the interlocutory appeal statutes. Citing a "practical" rather than "technical" interpretation of the statutes, the Court developed the collateral order doctrine. For decades after *Cohen*, Congress acquiesced in the Supreme Court's interpretation.[51] When it finally acted, rather than reigning in the Court or "restoring clarity through statute,"[52] Congress instead delegated all authority to define "final" to the Court as part of the Court's rule-making powers.[53] If Congress's failure to act can be considered Congressional acquiescence, why shouldn't the Nebraska Legislature's decision not to "restore clarity through statute" be treated as anything other than legislative acquiescence? Doing so would allow the collateral order doctrine to live on in Nebraska jurisprudence.

Conclusion

Much has changed to the collateral order doctrine in the recent past. From *Richardson* to *Heckman* and from *D.M.* to *E.D.*, the net upshot of the collateral order doctrine in Nebraska is this: it's dead. And to the extent it is still kicking, the practical and legal effects in the context of attorney disqualification, qualified immunity, or legislative acquiescence portend its ultimate and total demise, barring a legislative amendment to Nebraska's final order requirement.

Endnotes

1 *See, e.g., Fidler v. Life Care Ctrs. of Am., Inc.*, 301 Neb. 724, - - N.W.2d - -(November 30, 2018), overruling *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993), and disapproving *Gutchewsky v. Ready Mixed Concrete Co.*, 219 Neb. 803, 366 N.W.2d 751 (1985); *A. Hirsh, Inc. v. National Hair Co.*, 210 Neb. 397, 315 N.W.2d 236 (1982); and *Fanning v. Richards*, 193 Neb. 431, 227 N.W.2d 595 (1975); State v. Britt, 293 Neb. 381, 881 N.W.2d 818 (2016), disapproving language in *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007); *In re Adoption of Madysen S. (Nicole K. v. Jeremy S.)*, 293 Neb. 646, 879 N.W.2d 34 (2016), overruling *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010), and disapproving *In re Guardianship of T.C.W.*, 235 Neb. 716, 457 N.W.2d 282 (1990); *State v. Warner*, 290 Neb. 954, 863 N.W.2d 196 (2015), disapproving *State v. Bourke*, 237 Neb. 121, 464 N.W.2d 805 (1991). These are but a few examples of cases where the Nebraska Supreme Court has disapproved of or explicitly overruled precedent in the past four years.

2 *See Cullinane v. Beverly Enterprises-Nebraska, Inc.*, 300 Neb. 210, 912 N.W.2d 774 (2018).

3 251 Neb. 825, 560 N.W.2d 430 (1997), overruled by *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017).

4 *See* John P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239, 297 (2001) (citing *Cunningham v. Hamilton County*, 527 U.S. 198, 204 (1999); *Swint v. Chambers County Comm'n*, 514 U.S. 35, 43 (1995)).

5 403 Mass. 592, 531 N.E.2d 583 (1988).

6 *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995).

7 *Richardson, supra* note 4, at 831.

8 The use of the term "collateral order doctrine" was not actually used in Richardson. The term was officially used in Jacob North Printing Co. v. Mosley, 279 Neb. 585, 779 N.W.2d 596 (2010).

9 296 Neb. 458, 894 N.W.2d 296 (2017).

10 *Id.* at 462.

11 *Id.* at 466–67.

12 Bryan A. Gardner, Antonin Scalia, *Reading Law: The Interpretation of Legal Texts*, 107 (2012).

13 *Richardson-Merrill Inc. v. Killer*, 472 U.S. 424, 105 S.Ct. 2757 (1985).

14 "Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent." *Heckman, supra* note 10, at 465.

15 Lenich, *supra* note 4, at 308.

16 *Heckman, supra* note 9, at 466–67 (concluding "remaining true to an intrinsically sounder doctrine better serves the values of stare decisis than following a more recently decided case inconsistent with the decisions that came before it.").

17 *Id.*

18 *D.M. v. State*, 25 Neb. App. 596, 911 N.W.2d 621 (2018).

19 *Id.* at 603 (citing *Hallie Mgmt Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006)).

20 *Id.* at 604 (citing *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534 (1991)). Interlocutory appeal is only allowed, however, if the question of qualified immunity is one of law. If factual disputes must be resolved before qualified immunity can be determined, interlocutory appeal is not permitted. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985) (order denying a claim of qualified immunity on summary judgment is immediately appealable, to the extent it turns on an issue of law).

21 *Carney v. Miller*, 287 Neb. 400, 842 N.W. 2d 782 (2014). *See also, Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007) (providing a lengthy discussion of the collateral order doctrine

and applying the doctrine to review a trial court's denial of summary judgment to the defendant based on qualified immunity).

[22] *D.M., supra* note 18, at 604.

[23] *Id*. at 605.

[24] *Heckman, supra* note 9, at 463 (citing *Richardson* and commenting, "We did not, however, provide any statutory authority for the purported [collateral order] exception.").

[25] *Id*. at 466.

[26] *Id*. at 464.

[27] *See, e.g., Travelers Indem. Co. v. Wamsley (In re Estate of Evertson)*, 295 Neb. 301, 307, 889 N.W.2d 73, 79 (2016) ("A court action taken without subject matter jurisdiction is void."); *U.S. v. Harwell*, 448 F.3d 707, 715 (4th Cir. 2006) ("[A]ny action by a court without subject matter jurisdiction is 'ultra vires' and therefore void.").

[28] *E.D. v. Bellevue Pub. Sch. Dist.*, 299 Neb. 621, 909 N.W.2d 652 (2018).

[29] *Id*. at 624.

[30] *Id*.

[31] 281 Neb. 238, 795 N.W.2d 271 (2011).

[32] *E.D., supra* note 28, at 627.

[33] *Id*.

[34] *Johnson v. Fankell*, 520 U.S. 911, 916–17, 117 S. Ct. 1800 (1997) ("While some States have adopted a similar 'collateral order' exception when construing their jurisdictional statutes, we have never suggested that federal law compelled them to do so. Indeed, a number of States employ collateral order doctrines that reject the limitations this Court has placed on § 1291.7 Idaho could, of course, place the same construction on its Appellate Rule 11(a)(1) as we have placed on § 1291. But that is clearly a choice for that Court to make, not one that we have any authority to command.")

[35] *See, e.g., State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997); *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994); *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993); and *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990).

[36] 263 Neb. 778, 783, 642 N.W.2d 816 (2002).

[37] Lenich, *supra* note 4, at 306 n. 288.

[38] *Heckman*, *supra* note 9, at 468.

[39] *See Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 297, 673 N.W.2d 558, 565 (2004) (dismissing appeal of case where a motion to disqualify had been denied, finding instead that mandamus was the appropriate method for obtaining interlocutory review. "[O]riginal actions for mandamus, and not interlocutory appeals, [are] the appropriate method of review for denials of motions to disqualify.").

[40] *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 852, 540 N.W.2d 318, 326 (1995).

[41] *State ex rel. Stivrins v. Flowers*, 273 Neb. 336, 729 N.W.2d 311 (2007).

[42] *See In re Integration of the Nebraska State Bar Association*, 133 Neb. 283, 275 N.W. 265 (1937) (The right to define and regulate the practice of law belongs to the Judicial Department of state government.).

[43] *Stivrins, supra* note 41, at 344.

[44] *Heckman, supra* note 9, at 465.

[45] *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221 (1949).

[46] *Id*. at 545 (stating "[i]t is obvious that, if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable."). 28 U.S.C. § 1291 provides: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title."

[47] *Id*. At the time Cohen was decided, the U.S. Supreme Court was interpreting the initial version of 28 U.S.C. § 1292 enacted in 1948. At that time, the statute provided, in part: The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;(3) Interlocutory decrees of such district courts . . . .determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed; (4) Judgments in civil actions for patent infringement which are final except for accounting."

Today, § 1292 provides, in part: (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property; (3) Interlocutory decrees of such district courts . . . .determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed. (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . . ."

[48] Such cases include "even fully consummated decisions" that are but "steps toward final judgment in which they will merge." *Cohen, supra* note 44, at 546.

[49] *Id*.

[50] *Id*.

[51] Dodson, Scott. *The Complexity of Jurisdictional Clarity*, 97 Va. L. Rev. 1, 42 (2011) ("Congress has acquiesced in the Court's interpretation of 'final'. . . .).

[52] *Id*.

[53] *See* 28 U.S.C. § 2072(c) ("Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.").