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Leslie J. Berkshire et al., on behalf of themselves and on behalf of Berkshire Partnership, LP, appellees, v. Richard N. Berkshire, appellant, and Andrew R. Berkshire et al., interested parties, appellees.

___ N.W.3d ___

Filed October 9, 2026. No. S-24-633.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Motions to Dismiss: Appeal and Error.** A district court's denial of a motion to dismiss is reviewed de novo.
3. **Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
5. **Torts: Equity.** A breach of fiduciary duty is a tort claim that lies in equity.
6. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
7. **Equity: Evidence: Appeal and Error.** In an appeal of an equity action, where credible evidence is in conflict on a material question of fact, an appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and their manner of testifying and accepted one version of the facts rather than another.

8. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
9. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
10. **Jurisdiction: Judgments: Final Orders: Appeal and Error.** To determine whether it has jurisdiction, an appellate court looks to Neb. Rev. Stat. §§ 25-1911 (Reissue 2016) and 25-1912 (Cum. Supp. 2024). Together, these statutes generally prescribe that for an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a judgment or decree rendered or from a final order.
11. **Judgments: Final Orders: Words and Phrases.** A "judgment rendered," as required by Neb. Rev. Stat § 25-1911 (Reissue 2016), is a final determination of the rights of the parties in an action, which is set forth by the court in a single, signed written document stating all of the relief granted or denied in an action.
12. **Rules of the Supreme Court: Pleadings: Jurisdiction.** A party may challenge the court's subject matter jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(1) (rev. 2025) by presenting either a facial challenge or a factual challenge.
13. ____: ____: ____. In a facial challenge under Neb. Ct. R. Pldg. § 6-1112(b)(1) (rev. 2025), the party asserts the allegations of the complaint are insufficient to establish the court's jurisdiction over the subject matter of the case. When a facial challenge is presented, the court will look only to the complaint to determine whether the plaintiff has sufficiently alleged a basis of subject matter jurisdiction.
14. ____: ____: ____. In a factual challenge under Neb. Ct. R. Pldg. § 6-1112(b)(1) (rev. 2025), the party asserts there is no jurisdiction over the subject matter of the case notwithstanding the allegations of the complaint. When a factual challenge is presented, the court may consider and weigh evidence outside of the pleadings to answer the jurisdictional question.
15. **Trial: Evidence: Appeal and Error.** To preserve a claimed error in admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence.
16. **Trial: Evidence.** An objection to the admission of evidence is generally not timely unless it is made at the earliest opportunity after the ground for the objection becomes apparent.
17. **Limitations of Actions: Pleadings: Waiver.** The statute of limitations is an affirmative defense that is waived if the defendant fails to plead it.

18. **Partnerships: Records: Accounting.** A managing partner having exclusive control of a partnership business not only controls production, sales, and distribution of products but is responsible for keeping all records and books of account, and he or she is required to account to the partnership for any benefit or profit derived from any transaction connected with the formation, operation, or liquidation of the partnership or from any use by him or her of its property.
19. **Corporations: Accounting: Proof.** Although the burden is ordinarily upon the party seeking an accounting to produce evidence to sustain the accounting, when another person is in control of the books and has managed the business, that other person is in the position of a trustee and must make a proper accounting.
20. **Attorney Fees.** Attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Bradley A. Boyum, of Boyum Law Firm, for appellant.

Brian S. Koerwitz and Eric W. Knutson, of Peetz Koerwitz & Lafleur, P.C., L.L.O., for appellees Leslie J. Berkshire et al.

FUNKE, C.J., CASSEL, STACY, PAPIK, FREUDENBERG, BERGEVIN, and VAUGHN, JJ.

FUNKE, C.J.

I. INTRODUCTION

This appeal raises a number of questions regarding jurisdiction, ownership interests in a partnership, damages for breach of fiduciary duty, and related matters. For the reasons set forth below, we conclude that we have jurisdiction over the appeal and all matters raised in it. We also conclude that the district court did not err in ruling that Richard N. Berkshire (Rick) no longer has an ownership interest in Berkshire Partnership, LP, in requiring Rick to pay damages for his breach of fiduciary duties while he was the managing

partner of Berkshire Partnership, or in other regards. As such, we affirm the order of the district court.

II. BACKGROUND

1. Parties and Properties Involved

Rick, Leslie J. Berkshire, and Laurie B. Meyers are all children of Joanne Berkshire and Robert H. Berkshire (Bob). Paul Meyers is Laurie's husband. The other named parties are the grandchildren of Joanne and Bob.

Berkshire Partnership was formed in 1988 and converted into a limited partnership in 2005. Its original general partners were Bob, Rick, Leslie, and Laurie. At least some of the partnership interests of Bob and Laurie were later transferred, and limited partners were added. However, this appeal centers primarily on Rick, Leslie, and Laurie.

Rick was the managing partner of Berkshire Partnership from its inception, although Bob remained involved in the partnership's operations until his death in February 2011. Before Bob died, the family would meet each year around Christmas to review financial matters. However, those meetings ceased after Bob's death, and Leslie and Laurie would subsequently testify that they did not receive any "annual updates" or "year-end summaries" for the years between 2010 and 2015. They eventually received information covering the 2010 through 2015 period in 2016, and they received information about 2016 and 2017 in 2018. The information they ultimately received was, in their opinion, "disorganized" and incomplete. This factor, coupled with certain withdrawals that Rick made from Joanne's accounts, over which he then had power of attorney, contributed to his removal as the managing partner in 2019. Rick was replaced by Paul, who was added as a general partner through an assignment and transfer of membership interest from Laurie, although Rick disputed the validity of the assignment and his replacement.

Berkshire Partnership owned between 85 and 100 percent of Berkshire Family Building, LLC. Angela Burmeister

also owned an interest in Berkshire Family Building during the relevant time period. An operating agreement, dated December 31, 2009, stated that "[t]he initial [m]anager and [p]resident" of Berkshire Family Building "shall be [Rick] (who is [m]anaging [p]artner of . . . Berkshire Partnership)." Rick retained his role as the "the managing member" or the "represent[ive of] the managing member" of Berkshire Family Building until Paul replaced him in February 2019. However, subsequently, at the trial in the present matter, Rick would describe himself, Burmeister, and Laurie as "the management company" of Berkshire Family Building.

As relevant here, Berkshire Family Building owned a commercial building and two residential buildings located in Omaha, Nebraska. The law firm of Berkshire & Burmeister, P.C., was a tenant of the commercial building. Bob, Rick, and Laurie were all partners in Berkshire & Burmeister at various times.

Rick was also personally involved in other business ventures that invested in real estate. Those ventures included RBS, LLC; RBS Management, LLC; and RBS 3, LLC. Bill Rafael was Rick's friend and partner in several ventures. Rafael owned and operated Great Deal, LLC.

In addition, Rick was the trustee of the Robert H. Berkshire Trust (RHB Trust). As discussed below, on September 27, 2019, Joanne, Leslie, and Laurie filed a complaint against Rick in the county court for Douglas County, Nebraska, alleging that he had breached his fiduciary duties as the trustee of the RHB Trust.

2. Initial Complaint and Motion to Dismiss

Several months later, on January 13, 2020, Leslie, Laurie, Paul, Joanne, Lauren K. Meyers, and Jacob Meyers (collectively the appellees) filed suit against Rick and four interested parties in the district court for Douglas County on behalf of themselves and Berkshire Partnership, alleging that Rick had breached his fiduciary duties as managing partner of the

partnership. Among other things, the appellees alleged that Rick had failed to keep and maintain complete records for the partnership, reduced his interest in the partnership by his undisclosed redemption of partnership shares for distributions that he made to himself, commingled partnership funds with his own funds or the funds of third parties, used partnership assets for his own pecuniary interests to the partnership's detriment, and refused to provide an accounting or financial records for the partnership and its assets. The appellees sought an accounting, monetary damages, and attorney fees, as well as a declaration that Paul is the duly elected manager of Berkshire Partnership.

On May 15, 2020, Rick filed a motion to dismiss the present case due to the complaint that Joanne, Leslie, and Laurie had previously filed in county court regarding the RHB Trust. Rick claimed that as a result of the earlier filing, the county court had jurisdiction over the present matter because Berkshire Partnership was "part of the trust estate during the time frame" of the accountings requested in the complaint regarding the trust.

On June 26, 2020, the district court issued an order overruling Rick's motion to dismiss on the ground that the county court does not have jurisdiction "over all of the property potentially involved here." The district court reasoned that "while some of the [RHB] Trust Estate may be involved in this case, there is likely other property involved that is not in the [RHB] Trust Estate."

As discussed below, Rick would later file other motions to dismiss on this basis, and he would renew his motion to dismiss at the trial.

3. Amended Complaint, Rick's "Response," and His Subsequent "Answer"

On July 27, 2020, with the leave of the court, the appellees filed an amended complaint adding Rick, in his capacity as trustee of the RHB Trust, as an interested party. Otherwise, the

amended complaint raised the same allegations and requested the same relief as the original complaint.

Shortly thereafter, on September 1, 2020, Rick filed a "Response to Complaint," in which he admitted or denied the allegations of "the [c]omplaint," by which he apparently meant the original complaint. (The total number of paragraphs in the response corresponds to that in the original complaint, and not that in the amended complaint.) The response did not raise any affirmative defenses.

The appellees then moved for partial summary judgment in their favor and against Rick on their claim that Paul was the duly elected managing partner of Berkshire Partnership. The district court ruled in the appellees' favor, and Rick does not assign any error to that ruling on appeal.

Subsequently, on September 30, 2022, apparently without seeking or obtaining leave from the district court or the consent of the appellees, Rick filed an "[a]nswer to Amended Complaint and Counterclaim." In that "[a]nswer," Rick admitted or denied the allegations in the appellees' amended complaint but did not allege any affirmative defenses. In his counterclaim, Rick asked that Laurie's power of attorney over Joanne's affairs be revoked and that Laurie be surcharged for the "amount of extra [f]ederal [e]state [t]ax" to be paid due to her "careless actions." Rick also sought an accounting for Laurie's actions while she had power of attorney over Joanne's estate, as well as an accounting for Berkshire Partnership since Paul took over as manager.

4. Discovery

As relevant here, the appellees were ordered to "designate expert witnesses, if any, including curriculum vitae, and the subject matter about which each such expert [was] expected to testify" by December 7, 2022, unless otherwise agreed upon by the parties. All discovery on such experts, including depositions, was ordered to be completed by February 7, 2023. However, subsequently, on February 21, the court granted the

parties' joint motion to continue deadlines and gave them 100 days from the date of the court's order to "complete the discovery of expert witnesses, the identification of exhibits and witnesses, and filing of dispositive pre-trial motions."

The appellees disclosed their expert, Justin Korth, the tax director at Lutz and Company, by December 7, 2022. The disclosure specifically stated:

> Korth will provide testimony concerning the financial records and record keeping of the Berkshire Partnership. He will provide testimony concerning his investigation of the accounting records, bank statements, distributions, income, expenses, assets, liabilities, and debts for Berkshire Partnership and how those relate to the respective interests or liabilities of partners of the Berkshire Partnership. He is expected to provide testimony concerning distributions or expenditures or other financial activity that are unrelated to Berkshire Partnership or for which no adequate explanation is available.

One week later, on December 14, Rick moved to have the case dismissed in part due to the appellees' alleged failure to comply with the Nebraska Court Rules of Discovery in Civil Cases. However, that motion did not reference any concerns about discovery as to Korth specifically, and the record on appeal reflects no hearing or order on the motion. The appellees would subsequently claim in their brief on appeal that Rick withdrew the motion. But that withdrawal is also lacking from the record before us.

Korth did not "issue[]" the written report about which he would subsequently testify at the trial until August 30, 2023. Korth's report was shared with Rick's counsel on the next day. However, as noted below, that was less than 1 month before the trial.

5. Evidence and Events at Trial

A bench trial was held from September 26 to 29, 2023. The resulting record is extensive. Insofar as Rick does not

challenge the district court's conclusion that he breached his fiduciary duties, our discussion centers upon the evidence of Rick's ownership interest in Berkshire Partnership and the damages for his breach of his fiduciary duties—both matters that Rick does contest. We also highlight events at the trial relevant to the issues raised in this appeal. Additional information will be discussed later in the opinion as it relates to our analysis of the parties' arguments. Our discussion of the evidence is informed by the parties' briefs and by our own de novo review of the record on appeal. Insofar as there may be additional evidence in the record that supports Rick's arguments, but that was not cited by him in his briefs, we would note that an appellate court ordinarily does not scour the record in search of facts that might support an appellant's claim.[1]

(a) Berkshire Partnership's Capital Accounts

The evidence showed that the partners in Berkshire Partnership had "capital accounts" that reflected "how many units of interest [they] had." Under the heading "Capital: . . . Units of Partnership Interest," the partnership agreement stated that "[o]n any given date, the value of a [u]nit of [p]artnership interest shall be determined by dividing the total net asset value of the [p]artnership by the number of all [g]eneral and [l]imited [p]artnership [u]nits of [i]nterest outstanding."

There was also evidence regarding Rick's capital account, in particular, some of which was expressed in dollars and not units. Partnership tax returns prepared by a certified professional accountant showed that Rick's "[e]nding capital account" was between -$414,939 and -$758,178 in each year from 2011 to 2017, and there was evidence that in September 2017, the accountant told Rick that "distributions over the years from credit card charges reflected as draws . . . have created [a] significant negative capital balance." Korth's report similarly showed that Rick had "fully liquidated his

[1] *State v. Wood*, 310 Neb. 391, 966 N.W.2d 825 (2021).

share of the partnership assets due to distributions leading up to and including 2005" and that his capital account was -$798,659 as of December 31, 2019. As such, Korth said that Rick was not entitled to any share in the partnership's equity growth between 2005 and 2019, even though he had continued to take distributions from the partnership. Korth also said that Rick had no ownership left in the partnership and owed it $798,659.

Rick, in contrast, testified that the tax returns from 2011 to 2017 had all been mistaken and that he corrected the error when he prepared the partnership's 2018 tax return. The 2018 partnership tax return showed that Rick had a "[b]eginning capital account" of $130,147 and an "[e]nding capital account" of $224,548. Rick testified similarly that Korth was mistaken in concluding that Rick "[went] negative in 2005," as well as in other aspects of Korth's analysis of the capital accounts. Instead, Rick pointed to "balance sheets" he had maintained that showed that as of 2019, he had 76 units of interest in Berkshire Partnership with a net value of $224,548. Rick also disputed the accountants' treating his credit card charges and other money borrowed from the partnership's margin account as distributions. Instead, Rick maintained that no distribution occurred until the shares of stock that were one of the primary assets of the partnership were sold to pay off the amounts owed on the margin account.

(b) Rent and Other Debt Owed by Berkshire & Burmeister

There was evidence of money owed to Berkshire Family Building by Berkshire & Burmeister that had not been paid. Korth's report noted $334,869 in unpaid rent between the 2014 lease year and the 2018 lease year, based on a lease that Korth said showed that Berkshire & Burmeister owed Berkshire Family Building $10,000 per month in rent. However, Korth conceded that there were several versions of the lease agreement among the documents he reviewed. Korth

also noted a loan of $36,000 from Berkshire Family Building to Berkshire & Burmeister that he concluded had been forgiven without authorization, because it was removed from the relevant tax returns without any documentation that it had been forgiven or paid.

Paul testified similarly that based upon his review of the general ledger for Berkshire Family Building, Berkshire & Burmeister paid no rent between June 14, 2016, and February 27, 2018. Paul also noted that there were two versions of the 2015 lease. Both versions were signed by Rick as "[m]anager" of Berkshire Family Building and "[m]anaging [p]artner" of Berkshire & Burmeister and called for the law firm to pay Berkshire Family Building $10,000 per month in rent. However, one version of the lease gave Berkshire & Burmeister a credit of $2,000 per month for managing Berkshire Family Building's commercial building, while the other version did not. The parties stipulated that Rick presented the version of the lease that did not include the $2,000 monthly credit to a bank when he took out a loan of $975,000 on behalf of Berkshire Family Building in 2015.

Rick again disputed the accuracy of Korth's report. As to the 2015 lease, Rick said that in practice, regardless of what the written documents specified, Berkshire & Burmeister paid $8,000 a month in rent and managed Berkshire Family Building's commercial building. Rick also said that the unpaid rent in and after 2016 was due to Laurie's decision to wind down her law practice. Rick maintained that as of result of that decision, the firm was "short . . . the amount that Laurie wasn't bringing in" and "just didn't pay the rent." According to Rick, he discussed the matter with Burmeister and Laurie and concluded that it did not make sense to take money out of Berkshire Partnership to pay Berkshire & Burmeister on Laurie's behalf so that the law firm could then pay the rent to Berkshire Family Building, because it was "just a big circle of money."

(c) Cash and ATM Withdrawals From Berkshire Family Building

The general ledger for Berkshire Family Building showed $199,793.26 in cash and ATM withdrawals during a 2½-year period between 2011 and 2014. Paul testified that he had talked to Rick about these withdrawals and learned that the withdrawals had been made by an individual whom Rick had hired to work on the buildings owned by Berkshire Family Building. According to Paul, Rick said that he gave one of Berkshire Family Building's ATM cards to this individual and that "some" of the ATM withdrawals during that period were for "gambling at the casinos and things of that nature."

Rick did not dispute the amount of withdrawals or that those withdrawals had been made by an individual using an ATM card that Rick had given to him. However, Rick disputed that he "did not monitor [that individual's] actions." Rick said that he monitored those actions, but that his monitoring was not "enough to prevent this fraud." Rick also maintained that the individual had performed work on Berkshire Family Building's properties. According to Rick, the individual "screwed [him]," but "[n]ot a dime of it ever came back to [him]."

(d) Unreported Transfers From Berkshire Family Building

Korth's report identified $1,291,326.97 in "questionable transfers" from Berkshire Family Building between 2013 and 2017, many of which involved Rick's "friends and business partners." Leslie and Paul also testified about several such transfers. Leslie described a $975,000 loan taken out on behalf of Berkshire Family Building by Rick that "coincide[d] with" money transferred out to Rafael, Great Deal, and RBS "in large amounts." Paul testified similarly about multiple transfers, ranging from $15,000 to $95,000 in amount, from Berkshire Family Building to Rafael, Great Deal, RBS Management, or unrecorded payees. Paul said

there were no documents showing the payees had performed work or received a loan from Berkshire Family Building, and the amounts involved exceeded that reasonably owed for work on the corporation's commercial and residential properties. Paul also noted that the items did not "show[] up" in the corporation's general ledger, where one would expect to find the "costs and expenses of a business." However, Paul conceded that several transfers noted in Korth's report appeared to have been valid and were not being questioned by the appellees. Paul also conceded that it was "possible" the payees had worked on the properties.

On the other hand, Rick and a person who had assisted him in managing the properties owned by Berkshire Family Building said that some transfers reflected work that Rafael and others performed for which there had been no invoices. Rick also said that other transfers reflected loans that he made to Rafael or others which had been repaid, but for which there was no documentation. Rick and the person who had assisted him in managing the properties both stated that such documentation was not necessarily to be expected, and Rick, in particular, complained that the appellees kept asking ever more questions, including questions about transactions prior to Bob's death.

(e) Withdrawals From Berkshire Partnership

Korth's report also identified $270,932.95 in "unreported transfers" from Berkshire Partnership to other persons or entities, including Rafael and Berkshire & Burmeister. Laurie testified similarly regarding two such transactions, one of which involved Rafael, although the appellees stipulated that two other transactions totaling $8,643.67 were legitimate expenses. Korth testified that he used the term "unreported" to mean that there was no "'explanation for these transfers, and they do not appear to be for amounts owed by Berkshire Partnership for business purposes.'" Korth also testified that he had relied on written documentation in preparing his

report and that he did not ask Rick or the appellees about specific transactions.

Rick prepared an "[a]nalysis" of Korth's report. In that analysis, Rick claimed that "many of the transfers" Korth noted here were "clearly . . . allocated as reductions to partners." Rick also testified that the transfer to Berkshire & Burmeister could "possibly . . . have been paid back or offset back against something," because "[he], Laurie, and [Bob] weren't bringing in income in the amount that was probably necessary for [them], as partners of the firm." Rick testified similarly regarding another transfer related to a timeshare that Joanne had extended, which he had "taken off the balance sheet because it literally had no value." However, Rick conceded that there was not a single transaction listed in this portion of Korth's report that Rick could not have found on his own in the records of the financial institution at which Berkshire Partnership had accounts.

(f) Other Relevant Events at Trial

At the close of the appellees' case in chief, Rick orally renewed his motion to dismiss for lack of subject matter jurisdiction. Rick argued, summarized, that the RHB Trust was intertwined with the present matter due to the nature of the appellees' claims, the evidence presented, and the similarity in the relief sought. Rick also asserted that the matter did not have to be specifically tied to the RHB Trust insofar as it was tied to Bob's estate and that "[t]he intent is to manage the [RHB] Trust according to the [e]state, according to [Bob's] wishes." Rick claimed that the appellees were straying from Bob's wishes "with all of this." In addition, Rick argued that the RHB Trust was involved because he had "even[ed] everything out in different ways, sometimes with the [t]rust." The appellees countered that the claims and evidence in this case were limited to Berkshire Partnership. Rick's motion was overruled.

6. Closing Arguments

After the close of evidence, the parties submitted briefs to the district court setting forth their closing arguments. As relevant here, Rick again asserted that the district court lacked subject matter jurisdiction because of the complaint that Joanne, Leslie, and Laurie had previously filed in the county court regarding the RHB Trust. Rick also raised issues with the specificity of the appellees' pleadings, the statute of limitations for an action in equity for an accounting, the district court's jurisdiction over "matters relating to [f]ederal [t]ax issues," and the fact that Berkshire Family Building and Berkshire & Burmeister were not parties to the lawsuit, among other things.

Joanne died after briefs were filed and while the matter was under advisement.

7. January 18, 2024, Order and Parties' Subsequent Filings

On January 18, 2024, the district court issued an order that generally ruled in favor of the appellees and against Rick. The court began by rejecting Rick's statute of limitations defense because the appellees' complaint "is not barred by the statute of limitations on its face" and Rick did not "attempt to plead the statute of limitations as a defense."

The court then found that Rick had "repeatedly breached his fiduciary duties" and was liable to Berkshire Partnership for the following amounts:

- $214,869 in uncollected rent from Berkshire & Burmeister;
- $199,793.26 in improper cash and ATM withdrawals from Berkshire Family Building;
- $1,014,960.18 in "unreported transfers" from Berkshire Family Building; and
- $253,645.61 in direct withdrawals from Berkshire Partnership.

The court also found that Rick had a capital account balance of -$798,659, which he must repay to Berkshire Partnership.

Further, the court found that "[b]y having a negative capital account, Rick no longer own[ed] any interest" in the partnership.

However, the court declined the appellees' request for guidance on "whether and in what amount" alleged gifts that Joanne made while Rick had power of attorney over her accounts should be reported to the Internal Revenue Service (IRS). The court said that any guidance it might provide on that matter would amount to an advisory opinion because the court does not have jurisdiction over the matter.

In concluding, the court expressly stated that its order was "not a final [o]rder for purposes of appeal" and that it retained jurisdiction of the case to determine whether the appellees were entitled to attorney fees.

Subsequently, on January 29, 2024, the appellees filed a motion seeking $189,973.24 in attorney fees and costs. In the motion, the appellees alleged that Neb. Rev. Stat. § 67-425(1) (Reissue 2018) allows a partnership to maintain an action against a partner for breach of a partnership agreement or for violating a duty to the partnership. The appellees further alleged that claims under § 67-425(1) have been "deemed to be derivative in nature, giving rise to fees under" Neb. Rev. Stat. § 67-291 (Reissue 2018).

Rick disputed that this was a derivative suit. Rick also argued that the appellees' request for attorney fees failed to distinguish between work on successful claims and work on unsuccessful claims, as he maintained was required under a prior opinion of this court.

Later still, on May 14, 2024, Rick requested specific findings of fact on 90 separate matters related to the January 18 order.

8. Orders of June 4 and July 26, 2024, and Rick's Appeal

The district court filed an order on June 4, 2024, in which it rejected Rick's arguments and awarded the appellees the

full amount of attorney fees and costs they had sought. The June 4 order summarized the findings of the January 18 order but did not expressly purport to be a final order.

Then, after a hearing, the district court filed an order on July 26, 2024, overruling Rick's request for specific findings of fact. In so doing, the court stated that its January 18 order "had sufficient and specific findings of fact relevant to the entry of judgment." The court also stated that to the extent Rick's request for specific findings of fact is "construed as a motion to alter or amend, that is likewise overruled." The court concluded: "Counsel for both parties have confirmed that there are no other matters for the [c]ourt to decide. This [o]rder, in addition to the [c]ourt's [o]rder issued January 18, 2024, and the [c]ourt's [o]rder on [the appellees'] Motion for Attorney Fees issued June 4, 2024, are hereby final, appealable orders."

Rick filed a notice of appeal on August 23, 2024, challenging the district court's orders of January 18, June 4, and July 26. While the appeal was pending, Rick filed a motion asking us to take judicial notice of an order that the county court filed first on April 24, 2025, and then again on October 24, 2025, in the proceedings regarding the RHB Trust. Rick claimed the order showed that "[t]he two cases [are] clear[ly] intertwined and should have been litigated together." We deferred our decision on Rick's motion for judicial notice until plenary submission of the appeal.

III. ASSIGNMENTS OF ERROR

Rick assigns, summarized and reordered, that the district court erred in overruling his motion to dismiss for lack of subject matter jurisdiction; admitting certain evidence; finding that he waived the statute of limitations; concluding that he had a negative capital account balance of $798,659, which he must repay to Berkshire Partnership; concluding that he has no further interest in the partnership; finding him liable to the partnership for a total of $1,683,268.05 in damages for his breach

of his fiduciary duties; awarding attorney fees to the appellees; and overruling his motion for specific findings of fact.

IV. STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[2]

[2] A district court's denial of a motion to dismiss is reviewed de novo.[3]

[3,4] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.[4] A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[5]

[5-7] We have previously opined that a breach of fiduciary duty is a tort claim that lies in equity.[6] On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.[7] However, in an appeal of an equity action, where credible evidence is in conflict on a material question of fact, an appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and their manner of testifying and accepted one version of the facts rather than another.[8]

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[2] *Nebraska Firearms Owners Assn. v. City of Lincoln*, 319 Neb. 723, 24 N.W.3d 891 (2025).

[3] *Denali Real Estate v. Denali Custom Builders*, 302 Neb. 984, 926 N.W.2d 610 (2019).

[4] *State v. Price*, 320 Neb. 1, 26 N.W.3d 70 (2025).

[5] *Id*.

[6] *Noel v. Pathology Med. Servs.*, 320 Neb. 92, 26 N.W.3d 196 (2025).

[7] *Goldie v. McNeil & Co. Builders*, 321 Neb. 84, 32 N.W.3d 626 (2026).

[8] *Id*.

[8] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.[9]

V. ANALYSIS

1. Jurisdiction

[9] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[10] In this case, the parties have raised several jurisdictional issues that we must address before we reach the merits of the appeal. Two of those issues pertain to Rick's counterclaims and the timeliness of his appeal. Two other issues pertain to the district court's exercise of subject matter jurisdiction over the case or specific matters within the case. Where the lower court lacks subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, we, too, would lack the power to determine the merits of the claim, issue, or question presented to the lower court.[11] Rick also raises several other jurisdictional issues as secondary arguments supporting specific assignments of error, which we discuss later in the opinion. Ultimately, for the reasons set forth below, we conclude that we have jurisdiction over this appeal and all the issues raised in it.

(a) Absence of Ruling on Rick's Counterclaims

After Rick filed his notice of appeal, an order to show cause was issued asking the parties to address the fact that the district court's orders of January 18, June 4, and July 26, 2024, did not dispose of all claims as to all the parties or expressly direct the entry of a final judgment as to one or more but fewer than all of the claims or parties under Neb. Rev. Stat. § 25-1315(1) (Reissue 2016). In response to that order, Rick

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[9] *SID No. 596 v. THG Development*, 315 Neb. 926, 2 N.W.3d 602 (2024).

[10] *Martens v. BB's Childcare*, 321 Neb. 335, 34 N.W.3d 393 (2026).

[11] See, e.g., *Hauxwell v. Middle Republican NRD*, 319 Neb. 1, 21 N.W.3d 34 (2025).

argued that we lacked jurisdiction over the appeal because the district court never disposed of his counterclaims. The appellees argued, among other things, that Rick abandoned his counterclaims because he failed to raise them at the trial and did not object at the hearing on July 25, when the district court stated that there was "nothing further pending before the [c]ourt."

[10,11] To determine whether it has jurisdiction, an appellate court looks to Neb. Rev. Stat. §§ 25-1911 (Reissue 2016) and 25-1912 (Cum. Supp. 2024).[12] Together, these statutes generally prescribe that for an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a judgment or decree rendered or from a final order.[13] A "judgment rendered," as required by § 25-1911, is a final determination of the rights of the parties in an action, which is set forth by the court in a single, signed written document stating all of the relief granted or denied in an action.[14] Final orders are defined in Neb. Rev. Stat. § 25-1902 (Cum. Supp. 2024), which currently recognizes four categories of final orders.[15] In addition, as noted above, § 25-1315(1) permits a trial court to certify an otherwise interlocutory order as a final, appealable judgment under specified circumstances.[16]

Rick's claim that we lack jurisdiction because the district court did not rule on his counterclaims would appear to be premised on the view that (1) the district court's June 4, 2024, order was not a final order and (2) the July 26 order did not render a judgment because it did not dispose of his counterclaims or certify a final judgment pursuant to § 25-1315 as to any claim. We agree with the first of those premises for

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[12] *WRK v. Wiegert*, 320 Neb. 822, 30 N.W.3d 832 (2026).

[13] *Id*.

[14] *Elbert v. Keating, O'Gara*, 319 Neb. 390, 22 N.W.3d 671 (2025).

[15] *WRK, supra* note 12.

[16] See *id*.

the reasons set forth in the following section of this opinion. However, we disagree with the second premise.

Rick filed his "Response to Complaint" on September 1, 2020. Although not expressly denominated as such, this filing was an answer. A court looks to the substance of a pleading, and not its caption, to determine its nature,[17] and Rick's response was an answer because it admitted or denied the allegations of the appellees' original complaint. Then, 2 years later, Rick essentially filed an amended answer. However, nothing in the record before us suggests that Rick sought or obtained leave of the court or the appellees' consent before doing so, as required under Neb. Ct. R. Pldg. § 6-1115(a) (rev. 2025) when a pleading is amended outside a 30-day window, which is not applicable here. In such circumstances, courts in other jurisdictions have concluded that the amended pleading is a nullity and without legal effect.[18] We agree with those courts. As such, we conclude that the failure to resolve Rick's counterclaims does not preclude the July 26, 2024, order from rendering a judgment for the reasons set forth below.

(b) Timeliness of Rick's Appeal

The appellees, in turn, claim that we lack jurisdiction because Rick did not timely appeal the June 4, 2024, order. The appellees argue that the June 4 order was a final order because it "dispose[d] of the whole merits of the case and [left] nothing for further consideration of the court."[19] Relatedly,

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[17] See, e.g., *Johnson v. Knox Cty. Partnership*, 273 Neb. 123, 728 N.W.2d 101 (2007).

[18] See, e.g., *U.S. ex rel. Mathews v. HealthSouth Corp.*, 332 F.3d 293 (5th Cir. 2003); *Hoover v. Blue Cross and Blue Shield of Alabama*, 855 F.2d 1538 (11th Cir. 1988). See, also, 6 Charles Alan Wright et al., Federal Practice and Procedure § 1484 at 685 (3d ed. 2010) ("[i]n general, if an amendment that cannot be made as of right is served without obtaining the court's leave or the opposing party's consent, it is without legal effect and any new matter it contains will not be considered unless the amendment is resubmitted for the court's approval").

[19] Brief for appellees at 5.

the appellees argue that Rick's request for specific findings of fact, which was still pending when the June 4 order was issued, cannot be seen to have tolled the time for filing an appeal, because that request was not timely filed and because in the request, Rick did not seek to alter or amend the January 18 order.

While we agree with the appellees that Rick's motion for specific findings of fact was untimely, as we explain below, we do not agree that the June 4, 2024, order was a final order.[20] The appellees assert that the June 4 order was a final order because it resolved the question of attorney fees, which they claim was all that was left unresolved in the January 18 order. However, at the hearing on the appellees' motion for attorney fees, the parties agreed to set Rick's motion for specific findings of fact for a hearing at a later date. As such, they clearly contemplated that there was something further for the court to consider.[21]

Instead, the July 26, 2024, order rendered a judgment for purposes of Neb. Rev. Stat § 25-1301(2) (Cum. Supp. 2024).[22] Section 25-1301(2) provides that "[r]endition of a judgment is the act of the court, or a judge thereof, in signing a single written document stating all of the relief granted or denied in an action." Here, the district court rendered a judgment in the July 26 order by signing a single written document stating that (1) the appellees' claims had been decided, (2) Rick's request for specific findings of fact was overruled, and (3) there were no pending posttrial motions or other matters to be decided. As such, Rick's appeal was timely because it was filed within 30 days of the date when the judgment was rendered.[23]

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[20] See, e.g., *WRK, supra* note 12.

[21] See, e.g., *In re Estate of Scaletta*, 312 Neb. 953, 981 N.W.2d 568 (2022) (to be final, order must dispose of whole merits of case; when no further action of court is required to dispose of pending cause, order is final).

[22] See, e.g., *Elbert, supra* note 14.

[23] See § 25-1912(1) (party in civil matter must file notice of appeal within 30 days of entry of judgment, decree, or final order being challenged).

We need not address the merits of Rick's claim that his request for specific findings of fact amounted to a motion for a new trial and tolled the time for him to appeal. An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.[24]

(c) District Court's Jurisdiction Over Case

In his first assignment of error, Rick also raises a jurisdictional issue in that he claims that the district court erred in overruling his motion to dismiss for lack of subject matter jurisdiction. As noted above, if that claim were correct, we, too, would lack jurisdiction to reach the merits of this appeal.

Rick argues, summarized, that under the precedents of this court regarding the jurisdiction of the county courts and the district courts over estates and trusts cited by him,[25] the county court had jurisdiction over this matter. Rick asserts that the county court "first acquired subject matter jurisdiction over all the entities/assets involved in this matter" when a petition was filed in 2012 to determine the inheritance tax on Bob's estate.[26] Rick then asserts that the county court "reacquired" subject matter jurisdiction in 2019 when Joanne, Leslie, and Laurie filed their complaint seeking an accounting of the RHB Trust.[27] The appellees disagree, claiming that the district court properly exercised jurisdiction because this case concerned Berkshire Partnership, and not the RHB Trust or Bob's estate.

[12-14] As we have previously explained, a party may challenge the court's subject matter jurisdiction under Neb. Ct. R.

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[24] See, e.g., *Schmuecker v. Lancaster County*, 321 Neb. 623, 36 N.W.3d 185 (2026).

[25] See, *Washington v. Conley*, 273 Neb. 908, 734 N.W.2d 306 (2007); *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003); *In re Estate of Chaney*, 232 Neb. 121, 439 N.W.2d 764 (1989); *In re Estate of Kentopp. Kentopp v. Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980).

[26] Brief for appellant at 16.

[27] *Id*.

Pldg. § 6-1112(b)(1) (rev. 2025) by presenting either a facial challenge or a factual challenge.[28] In a facial challenge, the party asserts the allegations of the complaint are insufficient to establish the court's jurisdiction over the subject matter of the case.[29] When a facial challenge is presented, the court will look only to the complaint to determine whether the plaintiff has sufficiently alleged a basis of subject matter jurisdiction.[30] In a factual challenge, the party asserts there is no jurisdiction over the subject matter of the case notwithstanding the allegations of the complaint.[31] When a factual challenge is presented, the court may consider and weigh evidence outside of the pleadings to answer the jurisdictional question.[32]

In this case, the record before us on appeal makes it difficult to determine whether Rick's challenge was a facial or factual one. Rick references one specific ruling by the district court when arguing this assignment of error in his brief on appeal. However, the record reflects several other written or oral motions to dismiss based, at least in part, on subject matter jurisdiction. The record does not reflect any hearings that might have been held in connection with several of the motions and, thus, does not show whether Rick offered any evidence in connection with those motions. As the appellant, it was incumbent upon Rick to supply a record that supports his appeal,[33] but even assuming we were to consider all of Rick's motions to dismiss in the manner most favorable to him, as factual challenges, we see no error by the district court.

Rick is correct that the appellees amended their complaint to name him in his capacity as trustee of the RHB Trust as an interested party. However, the amended complaint makes

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[28] *Bleich v. Bleich*, 312 Neb. 962, 981 N.W.2d 801 (2022).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] See, e.g., *State v. Mielak*, 321 Neb. 542, 35 N.W.3d 798 (2026).

clear that this was done to address the possibility that the RHB Trust "holds an interest in the [p]artnership."

The remainder of the evidence to which Rick points in his brief on appeal similarly fails to support his assertion that this case "primarily concerns trust administration."[34] The "trust account bank statements"[35] purportedly in exhibit 80 were not offered or admitted into evidence by the parties (at least not under that exhibit number). The "Robert H. Berkshire Trust" agreement in exhibit 136 was offered into evidence by Rick and admitted over the appellees' objections in connection with Rick's testimony that he acted in accordance with Bob's wishes to "minimize[] the total income and estate tax burden" on his family. And the portion of the transcript cited by Rick ("T75") contains nothing to show that the "entities involved in this matter were formed and were part of [Bob's] estate plan" and that those "entities and assets were listed" on the inventory of Bob's estate,[36] as Rick claims.

Rick's reply brief also points to the order that the county court filed first on April 24, 2025, and then on October 24, in the proceedings regarding the RHB Trust, as evidence that the county court had jurisdiction. Rick claims this order "demonstrate[es] the intrinsic link" between this matter and "trust administration"[37] and effectively changed his capital account. In its order, the county court said that one-third of a $1,950,191.16 payment that Rick, as the trustee, made to pay off a loan that Berkshire Family Building owed to a third party was made without authority and "should be assessed" against Rick. Rick takes this to mean he was "credit[ed]" with $650,000 toward his capital account.

We decline Rick's request to take judicial notice of this order. As a general matter, we agree with courts in other

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[34] Brief for appellant at 20.

[35] *Id*.

[36] *Id*.

[37] Reply brief for appellant at 6.

jurisdictions that have expressed concerns about taking judicial notice on appeal of events that occurred *after* the judgment was rendered below.[38] It is difficult to maintain that the trial court erred in reaching a decision based on evidence that was never presented to it.[39] We also do not understand the order in question to show that this matter involves the RHB Trust or Bob's estate. Nor would the order have any relevant effect upon Rick's capital account balance insofar as the loan and payment apparently occurred after 2005, and for the reasons set forth below, we agree with the district court's conclusion that by 2005, Rick no longer owned an interest in Berkshire Partnership.[40]

Finally, as to Rick's argument that the district court erred when it exercised jurisdiction without determining whether it had jurisdiction over specific assets and properties, any error here is immaterial insofar as we review de novo the denial of a motion to dismiss. The same is true of Rick's argument that there was no legal or factual support for the district court's claim that the county court may lack jurisdiction over some assets.

(d) District Court's Jurisdiction to Rule on Timing of Distributions From Capital Accounts

In arguing another of his assignments of error, Rick claims that the district court "lacked jurisdiction to specify the timing of the partnership distribution secured by the partnership margin account for accounting and tax purposes."[41] Rick's

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[38] See, e.g., *State v. Vetter*, 934 N.W.2d 543 (N.D. 2019); *State v. Rivas*, 233 Conn. App. 506, 340 A.3d 1118 (2025); *TEPOA v. McGovern*, 239 Ariz. 52, 366 P.3d 111 (Ariz. App. 2016).

[39] See, e.g., 29 Am. Jur. 2d *Evidence* § 45 (2019) (recognizing that taking judicial notice on appeal may undermine trial court's factfinding authority).

[40] See, e.g., *State ex rel. Douglas Cty. Sch. Dist. No. 66 v. Ewing*, 319 Neb. 663, 24 N.W.3d 861 (2025) (declining to take judicial notice on appeal where case can be resolved without doing so).

[41] Brief for appellant at 34.

argument here is not a model of clarity. As we understand it, his argument appears to be that in determining his capital account balance, the district court made determinations about when distributions occurred that, insofar as they implicate "federal tax liabilities" or "accounting treatments under federal tax law," are within the exclusive jurisdiction of the IRS and the federal courts.[42] The appellees argue that the district court has the power to determine the "ownership interests of general partners in a partnership,"[43] as it did here.

We agree with the appellees that Rick's argument, to the extent that we understand it, is without merit. In arguing otherwise, Rick relies on the opinion of the Nebraska Court of Appeals in *In re Estate of Tizzard*.[44] In *In re Estate of Tizzard*, the Court of Appeals found that the trial court had erred, in relevant part, in ordering the personal representative of the estate to file an amended federal tax form containing specific information.[45] The Court of Appeals reasoned that because the pronouncements of a state court on the nature of a payment are not binding on the IRS' treatment of money under federal law, the trial court's order was merely advisory and did not resolve the issue that concerned the appellee.[46] As such, the Court of Appeals concluded that the trial court should not have attempted to exercise its judicial power because there was no justiciable issue.[47]

We do not view the order here as being like that in *In re Estate of Tizzard* because the order here does not direct that specific information be entered on a federal tax form. The order here does not purport to directly "determine [the] federal taxability" of anything, unlike the order in *In re Estate*

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[42] *Id.* at 35.

[43] Brief for appellees at 28.

[44] *In re Estate of Tizzard*, 14 Neb. App. 326, 708 N.W.2d 277 (2005).

[45] *Id.*

[46] *Id.*

[47] *Id.*

of Tizzard.[48] The order here may have tax implications, but those implications are the result of decisions about Rick's "legal interests" in the partnership that *In Re Estate of Tizzard* and the cases cited therein expressly recognize as matters of state law.[49]

We take a similar view of Rick's apparent argument that the district court did not have jurisdiction to "treat margin borrowing as distributions in contravention of the IRS [r]ules and [r]egulations because this is a federal tax issue."[50] This argument appears to be related to Rick's claim that federal law preempts the district court from "[d]ictating [t]ax [c]onsequences."[51] However, even assuming that federal law did control here, federal preemption is not inherently jurisdictional.[52] There have been cases where substantive issues governed by federal law were litigated in Nebraska courts.[53]

Rick's remaining arguments about this assignment of error are not jurisdictional but instead raise alleged issues with the evidence and the district court's reasoning. Specifically, Rick argues that Korth failed to address alternative tax treatments, among other things; that the appellees did not present the

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[48] See *id*. at 333, 708 N.W.2d at 284.

[49] See *id*. at 334, 708 N.W.2d at 284 ("*United States v. Mitchell*, 403 U.S. 190, 91 S. Ct. 1763, 29 L. Ed. 2d 406 (1971) (state law creates legal interests, but federal statute determines when and how they shall be taxed); . . . *Pahl v. C.I.R.*, 150 F.3d 1124 (9th Cir. 1998) (holding that courts look to federal law to determine what interest creates tax liability, but look to state law to determine whether taxpayer has requisite interest)").

[50] Brief for appellant at 11.

[51] *Id*. at 37.

[52] See, e.g., *Southwest Airlines Pilots v. Boeing Co.*, 704 S.W.3d 832 (Tex. App. 2022).

[53] See, e.g., *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008) (federal law governs substantive issues in Federal Employers' Liability Act claims litigated in state courts pursuant to concurrent jurisdiction); *In re Estate of Myers*, 256 Neb. 817, 594 N.W.2d 563 (1999) (fair market value is present value as determined under Internal Revenue Code and its applicable regulations).

evidence necessary to accurately calculate his capital account; and that his purported repayment of the margin loans after the distribution must be considered. Those arguments are without merit for the reasons set forth below.

2. Korth's Report Vis-a-Vis Appellees' Pleadings

Rick claims that the district court "erred in allowing [the appellees] to enter evidence supporting issues that were not specifically pled."[54] Rick's argument here concerns Korth's report, which Rick claims raised issues, particularly regarding his capital accounts and pre-2011 transactions, that were not "specifically pled"[55] and that he did not become aware of until shortly before trial. As such, Rick argues that he was deprived of the opportunity to defend himself. Rick also complains that Korth's report "contained little to no reference to statutes, case law, tax regulations or any other principle" upon which Korth relied and that there was no "supporting documentation" that would have allowed him to attempt to reproduce Korth's results.[56] The appellees argue that Rick's sole objection to Korth's report at that trial was on hearsay grounds and that Rick waived the objection by cross-examining Korth about the report. The appellees also claim that Rick was aware of the relevant issues before receiving Korth's report due to their complaint and their discovery requests.

[15,16] Rick's assignment of error here concerns the admission of evidence, specifically Korth's report. However, to preserve a claimed error in admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence.[57] An objection to the admission of evidence is generally not timely unless it is made

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[54] Brief for appellant at 23.

[55] *Id.*

[56] *Id.* at 24.

[57] *Richardson v. Children's Hosp.*, 280 Neb. 396, 787 N.W.2d 235 (2010).

at the earliest opportunity after the ground for the objection becomes apparent.[58] In this case, Rick did not timely object to Korth's report on any ground related to the specificity of the appellees' complaint. Instead, counsel for Rick said only: "I guess right now the main objection is hearsay." As such, Rick failed to preserve this claimed error.

However, because the issue recurs in connection with Rick's other assignments of error, we note that in arguing that his capital accounts, pre-2011 transactions, and other matters were not "specifically pled" by the appellees,[59] Rick relies on a statute that was repealed in 2002[60] and two opinions concerned with the pre-2002 statutes.[61] Rick also argues that Neb. Ct. R. Pldg. § 6-1108 (rev. 2025) "stresses the necessity for specificity."[62] Rick is correct that § 6-1108 does require a pleading that states a claim for relief to contain specific information as to special damages and interest. Otherwise, § 6-1108(a) requires only that a claim for relief contain, in relevant part, "a short and plain statement of the claim showing that the pleader is entitled to relief" and a demand for the relief sought.

Under that standard, the appellees' amended complaint gave Rick fair notice of the claims asserted against him, including the period covered.[63] Although the complaint did not specifically use the phrase "capital account," it alleged that Rick had reduced his interest in Berkshire Partnership "due to his prior,

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[58] *In re Interest of Ashley W.*, 284 Neb. 424, 821 N.W.2d 706 (2012).

[59] Brief for appellant at 23.

[60] See 2002 Neb. Laws, L.B. 876, § 92 (repealing Neb. Rev. Stat. § 25-804 (Reissue 1995)).

[61] See, *Kubik v. Kubik*, 268 Neb. 337, 683 N.W.2d 330 (2004); *Christianson v. Educational Serv. Unit No. 16*, 243 Neb. 553, 501 N.W.2d 281 (1993).

[62] Brief for appellant at 23.

[63] See, e.g., *Ramaekers v. Creighton University*, 320 Neb. 478, 28 N.W.3d 57 (2025); *Evans v. Freedom Healthcare*, 311 Neb. 336, 972 N.W.2d 75 (2022); *Schmid v. Simmons*, 311 Neb. 48, 970 N.W.2d 735 (2022).

undisclosed redemption of partnership shares for distributions that he made to himself." The complaint also raised a claim regarding a purported $1 million loan that Berkshire Partnership made to Berkshire Family Building during the construction of the commercial building, which occurred prior to 2011. The complaint's allegations regarding Rick's commingling of funds, use of partnership assets for his own pecuniary interests, self-dealing, and failure to account to the partnership for certain profits, as well as the request for an accounting, similarly sufficed to make him aware of his potential liability for uncollected rent and financial misappropriation.

Rick's remaining arguments about the admission of Korth's report, had they been preserved for appeal, would go primarily to the weight of the evidence and not its admissibility, as discussed below.

3. Waiver of Statute of Limitations

Rick claims that the district court erred in concluding that he waived the statute of limitations by failing to raise it in his answer. Rick argues that insofar as the appellees' complaint did not adequately notify him of the issues with the pre-2016 transactions raised in Korth's report, he properly and timely raised the statute of limitations "on August 31, 2023."[64] Rick also argues that even if the statute of limitations were waived, "claims arising from transactions before 2016 should have been dismissed as time-barred."[65] The appellees counter that the district court properly concluded that Rick waived the statute of limitations because he did not raise it in his answer, among other things.

[17] The statute of limitations is an affirmative defense that is waived if the defendant fails to plead it.[66] Generally, this means that the statute of limitations is waived if it is not

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[64] Brief for appellant at 27.

[65] *Id*.

[66] *Schuemann v. Timperley*, 314 Neb. 298, 989 N.W.2d 921 (2023).

pled in a preanswer motion or in the answer.[67] However, there are certain exceptions to this general rule. For example, an answer could be amended under § 6-1115(a)(2) to raise the statute of limitations,[68] or the statute of limitations could be tried with the express or implied consent of the parties.[69]

Given the record before us, we see no error in the district court's conclusion that Rick waived the statute of limitations. As both the district court and the appellees note, Rick did not raise the statute of limitations in either his "Response to Complaint" or his "Answer to Amended Complaint and Counterclaim" (which is, in any event, a nullity for the reasons set forth above). There is nothing in the record before us to show that he sought leave of the court or the appellees' consent to amend his answer under § 6-1115(a)(2). In fact, the record before us contains no indication of the filing or hearing on August 31, 2023, in which Rick claims he raised the statute of limitations.

There was a motion to continue filed on September 6, 2023, in which Rick sought an opportunity to depose Korth. However, that motion did not mention the statute of limitations, and if there was a hearing on the motion, it is not part of the record on appeal. Moreover, at the trial, when counsel for the appellees stated that the transactions in question occurred between 2011 and 2019, counsel for Rick said that it was "fine" "if you want to keep them within that range." Counsel for Rick did then complain about Korth's report's including transactions prior to 2011. However, both before

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[67] See, e.g., John P. Lenich, Nebraska Civil Procedure § 12:13 (2026) (collecting cases).

[68] See *id*.

[69] See, e.g., *Khaitov v. Greater Omaha Packing Co.*, 319 Neb. 932, 25 N.W.3d 739 (2025) (recognizing affirmative defense may be tried by express or implied consent of parties). See, also, § 6-1115(b)(2) ("[w]hen an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings").

and after voicing that complaint, counsel for Rick adduced evidence, including from Rick himself, regarding transactions that occurred more than 4 years before the complaint was filed and even prior to Bob's death in 2011. As such, we view Rick to have waived the statute of limitations.[70]

In arguing otherwise, Rick attempts to rely upon an opinion of this court wherein we recognized that a plaintiff could estop a defendant from claiming the statute of limitations by asserting the defendant had fraudulently concealed pertinent information.[71] Rick seems to suggest that, by analogy, he should be seen to have timely asserted the statute of limitations because the appellees "took affirmative steps to conceal the true nature of [the] lawsuit until they delivered" Korth's report.[72] However, that argument ignores the fact that fraud must be specifically pled and that in the case upon which Rick relies, the plaintiff's complaint alleged that the defendants had fraudulently concealed material facts.[73] There was nothing similar in the pleadings here.

Rick also argues (1) that he was prevented from raising the statute of limitations due to the appellees' failure to specifically plead their claims, (2) that the appellees failed to conduct discovery fairly to the extent that they did not make Korth's report available to Rick until shortly before the trial, and (3) that even if the statute of limitations was waived, any claims regarding transactions prior to 2016 were time barred. The first of those arguments is without merit for the reasons set forth above, while the second would not require the exclusion of Korth's report or testimony for the reasons stated below. As to the third argument regarding the purported time bar, Korth cites no authority to support the view that the court could find certain of the appellees' claims time barred

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[70] Cf. *Khaitov, supra* note 69.

[71] *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005).

[72] Brief for appellant at 27.

[73] *Andres, supra* note 71.

even if Rick waived the statute of limitations. Rick's argument here may be tied to his view that the statute of limitations is jurisdictional. However, the failure to comply with a statute of limitations is generally not an issue of subject matter jurisdiction,[74] and with the exception of res judicata or claim preclusion, "a court cannot raise an unpled affirmative defense sua sponte."[75]

4. Other Issues With Korth's Report and Testimony

Rick claims that the district court erred in admitting testimony and evidence that was not timely submitted by the appellees and that "did not relate to the specific claims of the complaint."[76] This argument again concerns Korth's report, as well as Korth's testimony at the trial, both of which Rick claims should not have been admitted for these and other reasons. The appellees argue that Korth's report and his testimony were properly admitted.

To the extent that Rick's argument here concerns the admission of evidence, he failed to preserve the argument for the reasons set forth above. As noted, Rick's sole objection to the admission of Korth's report was on hearsay grounds. Rick also objected to Korth's testimony several times, but none of those objections were based on the grounds that Rick raises in his brief on appeal. To be sure, during his cross-examination of Korth and, later, during Rick's case in chief, both counsel for Rick and Rick himself did complain about when they received Korth's report and its inclusion of transactions that occurred more than 4 years before the complaint was filed or before Bob's death. However, such complaints are no substitute for counsel's objecting or moving to strike specific testimony.

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[74] *Benjamin M. v. Jeri S.*, 307 Neb. 733, 950 N.W.2d 381 (2020).

[75] Lenich, *supra* note 67, § 12:13 at 679.

[76] Brief for appellant at 28.

The outcome would be the same even if Rick's claims had been properly preserved. We have already explained the issues with Rick's argument that the appellees did not specifically plead the capital accounts and other matters covered in Korth's report and testimony. We take a similar view of Rick's claim that the matters addressed in Korth's reports and testimony were not "[p]roperly . . . [a]ddressed in [d]iscovery."[77] As the appellees note, there were multiple discovery requests concerning the general partners' capital accounts, the credit card charges incurred against the margin account over the past 10 years, rent paid by Berkshire & Burmeister, specific transactions dating back to at least 2011, and other matters.

Rick's argument that Korth's report and testimony were inadmissible because of various issues with them is equally unavailing. Rick is correct that in other cases, where the parties have properly raised the issue, evidence has been excluded because it was not timely disclosed or for other reasons.[78] However, Rick points to nothing in the record to show that any of the purported issues with Korth's report and testimony were properly raised with the district court except the joint motion to continue, which is discussed below. Both Rick and his counsel complained of the late disclosure of Korth's report and the inclusion of matters purportedly outside the statute of limitations at the trial, but such complaints are no substitute for a motion in limine, a motion to strike, a motion to sanction, or another similar motion. As such, the various issues that Rick raises with Korth's report and testimony go to their credibility. The district court expressly found Korth

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[77] Brief for appellant at 32.

[78] See, e.g., *Eddy v. Builders Supply Co.*, 304 Neb. 804, 937 N.W.2d 198 (2020); *McNeel v. Union Pacific RR. Co., supra* note 53; *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005); *Kinney v. H.P. Smith Ford*, 266 Neb. 591, 667 N.W.2d 529 (2003); *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001); *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987). But see *Putnam v. Scherbring*, 297 Neb. 868, 902 N.W.2d 140 (2017).

to be credible and Rick to be "largely not credible." Under the standard of review noted above, we give deference to that determination.

The parties did file a joint motion to continue after receiving Korth's report, in which it was noted that Korth's report had just been issued and that Rick wished to depose Korth. However, insofar as the district court overruled that motion without a hearing, we cannot say it abused its discretion in so doing. Rick does not point to any request for a hearing on this motion that he made. The motion was filed 20 days before trial. Korth and the subject of his testimony had already been disclosed to Rick. And there is nothing in the record on appeal to suggest that Rick sought to depose Korth prior to the issuance of his report.[79]

Rick also asserts several times in his brief on appeal that the late disclosure of Korth's report violated his due process rights. However, beyond a couple of citations to cases that generally mention fairness,[80] Rick leaves us to "speculate about the reasoning" behind this claim.[81] We decline to do so. As we have previously explained, an appellant must provide both "argument and authority in support of an advocated position," or else "speculation is unavoidable."[82]

Finally, as to Rick's argument that Korth had a conflict of interest because Korth worked with Paul at Lutz & Company, Rick cites no case law to show that this was a conflict, and there is nothing in the record before us to suggest that he filed a motion to disqualify Korth. Evidence that Paul and Korth worked at the same firm was adduced at the trial,

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[79] See, e.g., *Eddy, supra* note 78 (although continuance is ordinarily one of proper methods for dealing with claim that there has been failure to disclose in timely manner, plaintiff did not show good cause to continue trial, given defendant's answer and discovery requests).

[80] See, e.g., *Eddy, supra* note 78; *Paulk, supra* note 78.

[81] *Bohaty v. Briard*, 219 Neb. 42, 46, 361 N.W.2d 502, 505 (1985).

[82] *Id*.

with the apparent implication that this was cause for concern. However, such evidence is no substitute for a motion to disqualify.

5. Specific Rulings Regarding Rick's Capital Account

Rick claims that the district court erred in ruling that the value of his capital account was -$798,659, that he must repay that amount to Berkshire Partnership, and that by having a negative capital account, he no longer had an ownership interest in Berkshire Partnership. Rick primarily argues, summarized, that the district court should have relied on the evidence he presented, which showed that he had "positive units of interest" until 2019,[83] and not Korth's report, which Rick claims had multiple defects. The appellees argue that there was no error here and that the district court simply found Korth's analysis of Berkshire Partnership's capital accounts to be "more accurate and more credible" than the evidence presented by Rick.[84]

As noted earlier in the opinion, there was conflicting evidence at the trial regarding Rick's capital account. The appellees presented documents prepared by two different certified professional accountants that showed Rick had long had a negative capital account balance. They also presented evidence about the effect that having a negative capital balance had on a general partner's ownership interests under the partnership agreement. Rick, in turn, presented evidence showing that as of 2019, he had 76 units of interest in Berkshire Partnership, with a net value of $224,548. Rick also presented evidence that his borrowing against the margin account was not a distribution. When the evidence is in conflict, as was the case here, we give deference to the district court's determinations regarding the credibility of the witnesses. The district court

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[83] Brief for appellant at 40.

[84] Brief for appellees at 33.

found Korth's analysis to be "the most accurate description" it had of the general partners' capital accounts and, as such, credible. Rick, in contrast, was found not to be credible. We also note that even one of Rick's own exhibits showed that he had negative units of ownership at various dates.

Rick also argues that the court's ruling is "contrary to the [p]artnership [a]greement."[85] However, outside of a brief reference to the provisions of the partnership agreement regarding units of ownership, he does not explain his reasoning here. While we review the record de novo, such review does not extend to speculating about arguments that a party fails to make.[86]

Rick's remaining arguments primarily concern the statute of limitations, the late disclosure of Korth's report, and other issues with Korth's report. Those arguments are without merit for the reasons set forth above.

Rick also asserts that the appellees failed to provide the "evidence necessary to make accurate calculations of [c]apital [a]ccounts."[87] That argument is based on a mistaken view of who had the burden of proof as to that issue, as discussed below.

6. UNCOLLECTED RENT FROM BERKSHIRE & BURMEISTER

Rick claims that the district court erred in ruling that he was liable to Berkshire Partnership for $214,869 in unpaid rent owed to Berkshire Family Building by Berkshire & Burmeister. Rick admits that "rent was not paid."[88] However, he argues that he should not have been required to pay damages in an amount equivalent to the unpaid rent, primarily because Laurie's "actions and decisions" were the reason the

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[85] Brief for appellant at 39.

[86] See, e.g., *Bohaty, supra* note 81.

[87] Brief for appellant at 17.

[88] *Id.* at 42.

rent was not paid,[89] and that her "unclean hands" should preclude her recovering damages here.[90] Rick also argues that he was not the sole manager of either Berkshire Family Building or Berkshire & Burmeister and that neither of those entities is a party to this lawsuit. The appellees argue that the evidence supported awarding Berkshire Partnership $214,869 in damages for the unpaid rent.

We see no error here. Under Nebraska law, a partner owes the partnership and the other partners duties of loyalty and care and must discharge his or her duties to the partnership and the other partners under the Uniform Partnership Act of 1998 and the partnership agreement consistently with the obligation of good faith and fair dealing.[91] The "fiduciary duties incident to the partnership relation" are "even more acute" for managing partners,[92] as the district court noted. As relevant here, failure to collect rent has been recognized by this and other courts to constitute a breach of fiduciary duty, particularly where a partner exercises control over a property without providing any relevant information about it.[93]

That was essentially the situation here. Rick admits he failed to collect rent, and he provided Leslie and Laurie with only late and incomplete information about Berkshire Partnership and Berkshire Family Building, as noted above and explained below. Rick does argue, in essence, that he did not have sole control of Berkshire Family Building or Berkshire & Burmeister. Rick testified to that effect at the trial, stating

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[89] *Id*.

[90] *Id*. at 44.

[91] Neb. Rev. Stat. § 67-424(4) (Reissue 2018).

[92] 59A Am. Jur. 2d *Partnership* § 278 at 395 (2015).

[93] See, e.g., *In re Estate of Forgey*, 298 Neb. 865, 906 N.W.2d 618 (2018); *Patten v. Torosian*, No. F087603, 2025 WL 1273514 (Cal. App. May 1, 2025) (unpublished opinion); *Matter of Estate of Robinson*, No. 80110-4-I, 2020 WL 4284707 (Wash. App. July 27, 2020) (unpublished opinion listed at 13 Wash. App. 2d 1138 (2025)).

that he, Laurie, and Burmeister were "the management company of Berkshire Family Building" and that Burmeister was also a managing partner of Berkshire & Burmeister. However, there was evidence to the contrary, particularly as to Berkshire Family Building. Its operating agreement named Rick as "[t]he initial [m]anager and [p]resident," and Rick alone signed the relevant lease agreements as "[m]anager" of Berkshire Family Building and "[m]anaging [p]artner" of Berkshire & Burmeister. There was also conflicting evidence about the costs that Laurie's winding down of her law practice may have imposed on Berkshire & Burmeister.

The fact that Berkshire Family Building and Berkshire & Burmeister were not named as parties is immaterial. In his brief on appeal, Rick cites a case in which we found that jurisdiction was lacking due to the absence of an indispensable party to the controversy,[94] with the apparent implication that such was the case here. However, that case involved a quiet title action.[95] It was not an action for breach of fiduciary duty, as was the case here, and we are aware of no authority that holds that all parties with whom a partner engaged in allegedly improper transactions must be a party to a lawsuit for the partner to be held liable for breach of fiduciary duty. Further, we note that the district court did not enter a judgment against Berkshire & Burmeister for unpaid rent. Had it done so, our analysis may have differed.

7. Improper Cash and ATM Withdrawals From Berkshire Family Building

Rick claims that the district court erred in ordering him to pay $199,793.26 in damages to Berkshire Partnership for improper cash and ATM withdrawals from Berkshire Family Building. Rick raises various arguments in support of this

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[94] See *Midwest Renewable Energy v. American Engr. Testing*, 296 Neb. 73, 894 N.W.2d 221 (2017).

[95] See *id.*

claim, including the argument that the damages were unwarranted because (1) "there was no evidence that [he] personally had anything to do with the withdrawal[s]"; (2) the appellees "provided no evidence regarding [the withdrawals], other than [Korth's] categorizing them as 'improper'"; and (3) the "expenditures" could have been for the construction or renovation of one of the residential properties owned by Berkshire Family Building.[96] The appellees disagree.

[18,19] We again see no error. Rick's arguments to the contrary seem to be premised, in part, on a misunderstanding of his fiduciary duties as a managing partner and of who has the burden of proof in a case such as this. As we have previously explained, a managing partner having exclusive control of a partnership business not only controls production, sales, and distribution of products but is responsible for keeping all records and books of account, and he or she is required to account to the partnership for any benefit or profit derived from any transaction connected with the formation, operation, or liquidation of the partnership or from any use by him or her of its property.[97] Relatedly, albeit in a somewhat different context, we have explained that although the burden is ordinarily upon the party seeking an accounting to produce evidence to sustain the accounting, when another person is in control of the books and has managed the business, that other person is in the position of a trustee and must make a proper accounting.[98]

In other words, it was Rick, and not the appellees, who had the burden to account for the withdrawals here, and to the extent that there was no evidence of the purpose of those withdrawals, that defect is chargeable to Rick and not the appellees. However, we also note the evidence here showed that a

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[96] Brief for appellant at 45.

[97] *Essay v. Essay*, 175 Neb. 689, 123 N.W.2d 20 (1966).

[98] *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

person to whom Rick had given a Berkshire Family Building ATM card ran up $199,793 in charges over a 2½-year period and that those expenses were not clearly shown to have been for business purposes. Rick testified that he did not personally benefit from these withdrawals, but he conceded that he did not monitor the individual closely "enough to prevent this fraud." Rick also admitted in his deposition that he never tried to recover the funds.

A similar mistake underlies Rick's arguments that the award of damages was improper, because insofar as Laurie was awarded damages "only for the reason that she was a manager" of Berkshire Family Building, (1) Burmeister was also owed damages, but is not a party to the case, and (2) none of the other appellees should recover any damages, because they were not managers of or partners in Berkshire Family Building.[99] The damages in question were awarded to Berkshire Partnership for Rick's breach of his fiduciary duty to the partnership, and not to Laurie as a purported manager or partner of Berkshire Family Building.

As to Rick's remaining arguments, we have previously found there to be no merit to the arguments that (1) Berkshire Family Building is not a party to this suit, (2) Laurie and Burmeister were also managers of Berkshire Family Building, and (3) the transactions in question occurred outside the statutory limitation period.

8. Unreported Transfers From Berkshire Family Building

Rick claims that the district court erred in awarding Berkshire Partnership $1,014,960.18 in damages for "unreported transfers" from Berkshire Family Building. Rick argues that the damages were unwarranted because, among other things: (1) the transfers were actually reported insofar as Korth was able to identify them; (2) the complaint claims that

[99] Brief for appellant at 45.

Rick failed to account to Berkshire Partnership for income received from Berkshire Family Building, but the appellees failed to prove there was any such income; and (3) Laurie, as a manager of Berkshire Family Building, was responsible for any failure here and had ample opportunities to discover why no income was being paid to Berkshire Partnership. The appellees argue primarily that the evidence supported the district court's ruling.

We agree with the appellees that the evidence supported the conclusion that Rick was liable to Berkshire Partnership for $1,014,960.18 in damages due to "unreported transfers." Starting at trial and continuing through his brief on appeal, Rick has raised issues with the word "unreported" that miss the mark. Ultimately, whatever label is applied to these transactions, the evidence showed that there was no documentation of the sort that one would expect with payments or loans that, combined, totaled over $1 million, especially when many of those payments or loans involved businesses in which Rick or his friends had interests. Rick and his witness did testify that work was performed that was not invoiced and that loans were made without promissory notes. But Rick, as the managing partner, had the burden of accounting for these transfers and failed to do so in any meaningful fashion.

We take a similar view of Rick's claim that, in essence, Laurie is equally responsible. There was conflicting evidence as to whether Rick was the sole manager of Berkshire Family Building, as noted above. There was also conflicting evidence as to Laurie's access to Berkshire Partnership's financial records. In a nutshell, while certain documents may have been available to Laurie on a shared computer drive at the law firm, there was no evidence the other general partners had access to that drive. Also, the evidence showed that certain documents were not available to Leslie and Laurie**.** For that reason, among others, Rick's reliance on the proposition that "[a] defrauded party must be diligent and prudent in his

effort to detect the fraud and means of knowledge thereof are equivalent to knowledge" is inapplicable here.[100]

Rick's remaining argument, that Berkshire Family Building is not a party to this action, is without merit for the reasons set forth above.

9. Direct Withdrawals From Berkshire Partnership

Rick claims that the district court erred in awarding Berkshire Partnership $253,645.61 in damages for direct withdrawals from the partnership. Rick argues that the award was unwarranted because the withdrawals were "reflected in the accountings which [Korth] had available to him" and in Rick's own accountings.[101] As such, Rick seems to suggest that there was no issue with the withdrawals. Rick also raises issues with Korth's report, among other things. The appellees argue that the evidence supported the award of $253,645.61 in damages for direct withdrawals from the partnership.

Once more, we see no error here. As Korth's testimony made clear, the issue with these withdrawals was not that the amounts and dates of the withdrawals could not be identified. Instead, Korth testified that there was "'no explanation'" for the transfers and that "'they do not appear to be for amounts owed by Berkshire Partnership for business purposes.'" In his brief on appeal, Rick identifies the purpose of all these withdrawals except for the two withdrawals that the appellees stipulated were legitimate expenses. Rick asserts that insofar as Korth "claimed he could not figure out what the expenditures were for," the appellees failed to meet their burden of proof, "especially given the fact that [Korth] included 2 expenditures that he readily admitted were incorrect."[102] However, as explained above, it was Rick, and not the

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[100] *Id.* at 10 (citing *Abels v. Bennet*, 158 Neb. 699, 64 N.W.2d 481 (1954) (dispute over deed)).

[101] Brief for appellant at 47.

[102] *Id.* at 48.

appellees, who had the burden to account for these withdrawals and show that they were for business purposes.

Rick also argues that he did not get Korth's report until shortly before trial and that the report "contained hundreds of line-item transactions out of thousands which occurred over the previous 14 years."[103] The first of these arguments is without merit for the reasons set forth above. As to the second, had Rick performed his duties as managing partner over the years, it would have been much easier for him to explain the nature of particular transactions.

That leaves only Rick's claim that because Berkshire Partnership had limited cash assets, the only way he could have withdrawn over $200,000 from the partnership was by borrowing against the margin account. As such, he claims that the district court's ruling here effectively requires him to "pay twice" for the same withdrawals that counted against him in the court's ruling on his capital accounts.[104] However, Rick cites nothing in the record before us on appeal to show that the amounts in question were actually counted against him twice.

10. Attorney Fees

Rick claims that the district court erred in awarding attorney fees to the appellees. Relying on a statute[105] that addresses the award of attorney fees in judicial proceedings "involving the administration of a trust" and an opinion[106] of this court construing that statute, Rick argues that the appellees should not have been awarded attorney fees because he gave them "access to all accounting information" before they filed suit.[107]

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[103] *Id.* at 47.

[104] *Id.* at 49.

[105] See, Neb. Rev. Stat. § 30-3893 (Reissue 2016).

[106] *In re Rolf H. Brennemann Testamentary Trust*, 288 Neb. 389, 849 N.W.2d 458 (2014).

[107] Brief for appellant at 38.

The appellees argue that the district court did not err in awarding them attorney fees, because they generally prevailed on their claims, which were "derivative in nature."[108] As such, the appellees claim that they were entitled to attorney fees under § 67-291 and our opinions construing that statute.[109]

[20] As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.[110] Customarily, attorney fees are awarded only to prevailing parties or assessed against those who file frivolous suits.[111]

We agree with the district court that the appellees generally prevailed here, even if they did not succeed on every claim, as Rick argues. The question is whether a statute provides for attorney fees. Insofar as Rick relies on § 30-3893 in arguing that the district court erred in awarding attorney fees, we disagree. Rick's argument is premised on the view that this proceeding was a proceeding "involving the administration of a trust."[112] However, that view is incorrect for the reasons set forth above. As such, Rick's sole argument as to why the district court erred in awarding attorney fees is inapposite.

Before the district court, Rick did argue that the appellees were not entitled to attorney fees under § 67-291 because this was not a derivative action and because the appellees did not distinguish between the fees associated with successful claims and those associated with unsuccessful claims, as Rick argues is required under a prior opinion of this court.[113] Rick does not renew that argument on appeal. As such, we

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[108] Brief for appellees at 30.

[109] See, e.g., *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012).

[110] *Beatty v. Poitier*, 319 Neb. 56, 21 N.W.3d 295 (2025).

[111] *Mann v. Mann*, 316 Neb. 910, 7 N.W.3d 845 (2024).

[112] See § 30-3893.

[113] See *Fitzgerald, supra* note 109.

decline to review it.[114] An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error,[115] and Rick failed to argue any error related to the district court's conclusion that this was a derivative action.

11. Request for Specific Findings of Fact

Rick claims that the district court erred in overruling his request for specific findings of fact. Rick argues that this appeal "could have been avoided" if that request had been granted and the district court had made the factual findings he sought.[116] The appellees argued that the district court did not err in overruling Rick's request for specific findings of fact because the request was untimely.

We agree with the appellees that there was no error here because Rick's request was untimely. We have long opined that in a case tried to the court without a jury, such as this one, a motion for specific findings of fact pursuant to Nebraska statute[117] must be made before the final submission of the case to the court.[118] "[F]inal submission" is a legal term of art, denoting that the matter has been submitted for a verdict.[119] The final

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[114] See, e.g., *State v. Lowman*, 308 Neb. 482, 954 N.W.2d 905 (2021) (court limiting its analysis of claim that evidence was insufficient to support verdict to argument concerning machete's being concealed weapon because that was only argument raised in brief on appeal); *Adair Holdings v. Johnson*, 304 Neb. 720, 936 N.W.2d 517 (2020) (similar); *In re Claims Against Pierce Elevator*, 291 Neb. 798, 868 N.W.2d 781 (2015) (similar).

[115] *State v. Lopez*, 321 Neb. 118, 32 N.W.3d 868 (2026).

[116] Brief for appellant at 50.

[117] See Neb. Rev. Stat. § 25-1127 (Reissue 2016).

[118] See, e.g., *Cullinane v. Beverly Enters. - Neb.*, 300 Neb. 210, 912 N.W.2d 774 (2018); *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991); *In re Estate of Wiley*, 150 Neb. 898, 36 N.W.2d 483 (1949); *State, ex rel. Sorensen, v. Mitchell Irrigation District*, 129 Neb. 586, 262 N.W. 543 (1935); *Ross v. Barker*, 58 Neb. 402, 78 N.W. 730 (1899).

[119] See Black's Law Dictionary 747 (10th ed. 2014).

submission of this case occurred no later than December 8, 2023, when Rick's posttrial brief containing his closing arguments was filed with the district court. However, Rick did not make his request for specific findings of fact until May 14, 2024, over 5 months after the filing of his posttrial brief.

Also, even if Rick's motion had been timely, its overruling "could not be error in an equity case that would require a reversal and retrial."[120] While the findings of fact and conclusions of law Rick sought could have been helpful to us, their absence, even when requested, cannot be prejudicial because we review claims of breach of fiduciary duty de novo.[121] In addition, for the sake of completeness, we note that we have previously ruled that the relevant statute does not obligate the trial court to "answer specific interrogatories propounded to it by a litigant," like those Rick presented to the district court.[122] Instead, it obligates the trial court to "make such specific findings of fact as the trial court concludes are appropriate and necessary to resolve the action."[123]

VI. CONCLUSION

We conclude that we have jurisdiction over this appeal, and all matters raised in it, and that Rick's claims are without merit. As such, we affirm the order of the district court.

Affirmed.

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[120] See *In re Estate of Wiley, supra* note 118, 150 Neb. at 914, 36 N.W.2d at 493. See, also, *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986) (conclusions of fact and law are mandatory when requested in law action, but are merely helpful in equity actions because appellate court reviews record de novo and reaches conclusions independent of trial court).

[121] See *In re Estate of Wiley, supra* note 118.

[122] *Lindgren v. City of Gering*, 206 Neb. 360, 371, 292 N.W.2d 921, 927 (1980).

[123] *Id*.