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REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 11, 2009 and JUNE 17, 2010

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCLXXIX

PEGGY POLACEK

OFFICIAL REPORTER

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By Peggy Polacek, Reporter of the Supreme Court
and the Court of Appeals

For the benefit of the State of Nebraska

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WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice
KENNETH C. STEPHAN, Associate Justice
MICHAEL M. MCCORMACK, Associate Justice
LINDSEY MILLER-LERMAN, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

EVERETT O. INBODY, Chief Judge
JOHN F. IRWIN, Associate Judge
RICHARD D. SIEVERS, Associate Judge
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge
WILLIAM B. CASSEL, Associate Judge

PEGGY POLACEK . . . . . Reporter
LANET ASMUSSEN . . . . . Clerk
JANICE WALKER . . . . . State Court Administrator

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer	Paul W. Korslund	Beatrice
		Daniel E. Bryan, Jr.	Auburn
		Vicky L. Johnson	Wilber
Second	Cass, Otoe, and Sarpy	Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
		David K. Arterburn	Papillion
		Max Kelch	Papillion
Third	Lancaster	Jeffre Cheuvront	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen B. Flowers	Lincoln
		Steven D. Burns	Lincoln
		John A. Colborn	Lincoln
		Jodi Nelson	Lincoln
		Robert R. Otte	Lincoln
Fourth	Douglas	J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Gerald E. Moran	Omaha
		Gary B. Randall	Omaha
		Patricia A. Lamberty	Omaha
		J. Michael Coffey	Omaha
		W. Mark Ashford	Omaha
		Peter C. Bataillon	Omaha
		Gregory M. Schatz	Omaha
		J Russell Derr	Omaha
		James T. Gleason	Omaha
		Thomas A. Otepka	Omaha
		Marlon A. Polk	Omaha
		W. Russell Bowie III	Omaha
		Leigh Ann Retelsdorf	Omaha

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Robert R. Steinke	Columbus
		Alan G. Gless	Seward
		Michael J. Owens	Aurora
		Mary C. Gilbride	Wahoo
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Darvid D. Quist	Blair
		John E. Samson	Fremont
		William Binkard	Dakota City
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Robert B. Ensz	Wayne
		James G. Kube	Madison
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	Mark D. Kozisek	Ainsworth
		Karin L. Noakes	St. Paul
Ninth	Buffalo and Hall	John P. Icenogle	Kearney
		James D. Livingston	Grand Island
		Teresa K. Luther	Grand Island
		William T. Wright	Kearney
Tenth	Adams, Franklin, Harlan, Kearney, Phelps, and Webster	Stephen R. Illingworth	Hastings
		Terri S. Harder	Minden
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John P. Murphy	North Platte
		Donald E. Rowlands	North Platte
		James E. Doyle IV	Lexington
		David Urbom	McCook
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Brian C. Silverman	Alliance
		Randall L. Lippstreu	Gering
		Leo Dobrovolny	Gering
		Derek C. Weimer	Sidney

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven B. Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Robert C. Wester	Papillion
		John F. Steinheider	Nebraska City
		Todd J. Hutton	Papillion
		Jeffrey J. Funke	Papillion
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Mary L. Doyle	Lincoln
		Laurie Yardley	Lincoln
		Jean A. Lovell	Lincoln
		Susan I. Strong	Lincoln
Fourth	Douglas	Stephen M. Swartz	Omaha
		Lyn V. White	Omaha
		Thomas G. McQuade	Omaha
		Edna Atkins	Omaha
		Lawrence E. Barrett	Omaha
		Joseph P. Caniglia	Omaha
		Marcena M. Hendrix	Omaha
		Darryl R. Lowe	Omaha
		John E. Huber	Omaha
		Jeffrey Marcuzzo	Omaha
		Craig Q. McDermott	Omaha
		Susan Bazis	Omaha
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Patrick R. McDermott	David City
		Marvin V. Miller	Wahoo
		Linda S. Caster Senff	Aurora

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	C. Matthew Samuelson	Blair
		Kurt Rager	Dakota City
		Douglas L. Luebe	Hartington
		Kenneth Vampola	Fremont
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Richard W. Krepela	Madison
		Donna F. Taylor	Madison
		Ross A. Stoffer	Pierce
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	Alan L. Brodbeck	O'Neill
		Gary G. Washburn	Burwell
		James J. Orr	Valentine
Ninth	Buffalo and Hall	David A. Bush	Grand Island
		Philip M. Martin, Jr.	Grand Island
		Gerald R. Jorgensen, Jr.	Kearney
		Graten D. Beavers	Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Jack R. Ott	Hastings
		Robert A. Ide	Holdrege
		Michael Offner	Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Kent E. Florom	North Platte
		Kent D. Turnbull	North Platte
		Carlton E. Clark	Lexington
		Edward D. Steenburg	Ogallala
		Anne Paine	McCook
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		G. Glenn Camerer	Gering
		James M. Worden	Gering
		Randin Roland	Sidney
		Russell W. Harford	Chadron

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson	Omaha
	Elizabeth Crnkovich	Omaha
	Wadie Thomas	Omaha
	Christopher Kelly	Omaha
	Vernon Daniels	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Linda S. Porter	Lincoln
	Roger J. Heideman	Lincoln
	Reggie L. Ryder	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert B. O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
Michael P. Cavel	Omaha
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
Ronald L. Brown	Lincoln
J. Michael Fitzgerald	Lincoln
Michael K. High	Lincoln
John R. Hoffert	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 278

LISA ANN ADAMS
SHANNON MARIE AHRENS
JEFFREY STEVEN ARMOUR
BRETT DEREK ATLAS
AUSTIN BURNETT BATALDEN
ROBERT W. BAUER
MONELLE MARIE BEAL
DAVID PATRICK BRODERICK
LESLIE JEAN BUHL
JONATHON BLAKE BURFORD
GARY F. BURKE
MICHAEL WILLIAM CHASE
YOHANCE LATEEF CHRISTIE
KATHERINE JEAN CHUSTON
CAROL ANN CLEAVER
JAMIE COOPER
MARK CAMERON CORD III
MIGGIE ELLEN CRAMBLIT
WILLIAM PATRICK CRAWFORD
JAMES CAREY CREIGH
SARA BETH GREFF DANNEN
SARAH ANN DRESSEL
MITCHELL ERIC EVERS
KATHERINE NICOLE FLICKINGER
LIAM EUGENE GALLAGHER
SEAN WILLIAM GARRIGAN
MICHAEL AKIRA GREENLEE
NICHOLAS EDWARD HALBUR
NICOLE ROSE HANSON
ERIC MARK HARDY
SHAWN GERHARD HEINE
SARAH ANN HINRICHS
JUSTIN DUANE HOCKENBERRY
JOSHUA CHARLES HOWARD
NATHANIEL JAMES JAGGERS
ANGELA DANIELLE JENSEN
CHAD EVERETT JONES
CHRISTOPHER LEE JUFFER
LAURA ANN KARTHAUSER
BRADY WILLIAM KEITH
BRENT MICHAEL KELLY
PETER THOMAS KENNEY
CORY JAMES KERGER
GREGORY DAVID KRATZ
CASEY KENT LARSEN
JACOB RYAN LAUSER
SEAN MICHAEL LAVERY
RICHARD PATRICK LAVIN II
AUDREY MARIE LEE
JAMES G. LISONBEE
BLAKE RANDALL LOPER
SARAH FRANCES MACDISSI
KYLE AUSTIN MARCUM
ANDREW JOHN MARSHALL
KATIE MICHELE MARTENS
RACHEL ANNE MARTIN
KELSEY NICOLE MCCHANE
HEATHER ANNE MCKEE
SCOTT MICHAEL MERTZ
TODD CHANNING MOLVAR
TAMARA THERESA MOSBY
JEREMY RAY MUCKEY-SHIRK
JOANNE ELIZABETH NAJDZIN
RUSSELL JOHN NELSEN
JASON TYLER NICKLA
KIRSTEN ALISSA NYHUS

KEVIN JOSEPH O'CONNELL
JOHN PATRICK OGLESBY
REESE ARVID PEARSON
SHIRLEY PENG
KARL ROBERT PHARES
DIANE ELIZABETH QUIGLEY
JENNIFER REBECCA RACINE
RYAN PATRICK RATIGAN
DAVID JAMES REED
KURTIS BRADFORD REEG
WENDY JOY RIDDER
KRISTIN KAY ROBBINS
TRAVIS RYAN RODAK
JAMES EDGAR ROGERS
KRISTA RIDDICK ROGERS
WILLIAM E. ROONEY III
MATTHEW PAUL SAATHOFF
BRIAN MARSHAL SABATA
JONATHAN SCOTT SEAGRASS
MEGHAN ANN SODORO
NATHAN JOSIAH SOHRIAKOFF
NICHOLAS L. SOWL
RYAN ANDREW STEEN
JACOB MCDANIEL STEINKEMPER
HEATH ALLEN STEWART
KENDRA ANNE STROMMEN
JESSICA SUEYUNG TOK
LAURA ELIZABETH TROSHYNSKI
ROBERT EARL TYRRELL
PATRICIA LYNN VANNOY
DEBORAH MARIE VAUGHAN
HOMERO ESTEBAN VELA
CYNTHIA GRACE WASKOWIAK
JONATHAN JAMES WEGNER
JENNIFER LYNN WELLAN
TODD ALAN WEST
DARIN LEE WHITMER
LAURA KATHRYN WOODS

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No. S-09-304: **Armbruster v. Baird, Holm**. Affirmed. Stephen, J. Miller-Lerman, J., not participating.

No. S-09-360: **State v. Cook**. Affirmed. Stephan, J. Heavican, C.J., and Gerrard, J., not participating.

No. S-09-401: **State v. Carter**. Affirmed. Gerrard, J.

No. S-09-433: **Perez v. Callan**. Reversed and remanded with directions. McCormack, J. Wright, J., not participating.

No. S-09-578: **State v. Griswold**. Affirmed. Connolly, J.

Nos. S-09-707, S-09-717: **Kearney Cty. Bd. of Equal. v. Kaapa Ethanol**. Affirmed. Wright, J.

No. S-09-1130: **In re Interest of Thomas D**. Affirmed. Stephan, J. Gerrard, J., concurring.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-06-1213: **State ex rel. Counsel for Dis. v. Wadman**. Application granted. Brent R. Wadman reinstated as member of Nebraska Bar Association effective April 7, 2010.

No. S-07-119: **State ex rel. Counsel for Dis. v. Wright**. Application granted. Phillip G. Wright reinstated as member of Nebraska Bar Association effective April 7, 2010.

No. S-07-640: **State ex rel. Counsel for Dis. v. Davis**. Respondent is reinstated as a member of the Nebraska State Bar Association.

No. S-09-115: **State ex rel. Counsel for Dis. v. Kleveland**. Respondent having complied with § 3-316, and in accordance with the conditional admission accepted by the court on August 21, 2009, respondent is hereby ordered reinstated to the practice of law in the State of Nebraska, effective November 20, 2009.

No. S-09-401: **State v. Carter**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. S-09-766: **Board of Regents v. University of Neb. at Omaha Ch. Am. Assn. Univ. Prof**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-09-779: **State v. Lee**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-09-865: **State v. Lyle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-09-878: **State v. Escamilla**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-09-936: **State v. Hall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-09-980: **State v. Brox**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-09-1051: **Hall v. Houston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-09-1099: **In re Estate of Gyhra**. Stipulation allowed; appeal dismissed.

No. S-09-1149: **State v. McCain**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-09-1197: **Huber v. Rohrig**. Motion of appellee for summary dismissal sustained. See § 2-107(B)(1).

Nos. S-09-1219, S-09-1220: **State v. Kouma**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-10-145: **State v. Bronson**. Appeal dismissed. See Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. S-10-153: **State v. Rodriguez**. Appeal dismissed. See § 2-107(A)(2). Proper procedure for petitioning for further review of Court of Appeals' decision was not followed. See § 2-102(F).

No. S-10-216: **State v. Palomino-Duque**. Appeal dismissed. See Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-05-1507: **Community Memorial Hospital v. Humboldt Clinic**. Petition of appellant for further review denied on January 21, 2010.

No. A-05-1509: **Community Memorial Hospital v. Humboldt Healthcare**. Petition of appellant for further review denied on January 21, 2010.

No. A-07-1229: **State v. Hausmann**. Petition of appellant for further review denied on December 23, 2009.

No. A-08-211: **Barnett v. Department of Motor Vehicles**, 17 Neb. App. 795 (2009). Petition of appellee for further review denied on January 13, 2010.

No. S-08-588: **Capitol Construction v. Skinner**, 17 Neb. App. 662 (2009). Petition of appellant for further review sustained on December 23, 2009.

No. S-08-806: **Murray v. Neth**, 17 Neb. App. 900 (2009). Petition of appellant for further review sustained on December 23, 2009.

No. A-08-975: **Adams v. Cargill Meat Solutions**, 17 Neb. App. 708 (2009). Petition of appellee for further review denied on December 23, 2009.

No. A-08-1024: **Bartak v. Bartak**. Petition of appellee for further review denied on January 27, 2010.

No. A-08-1041: **Wiegert-Stathes v. American Fam. Mut. Ins. Co**. Petition of appellant for further review denied on January 21, 2010.

No. A-08-1043: **Save Our Hills v. Board of Suprvs., Washington Cty**. Petition of appellant for further review denied on December 10, 2009.

No. A-08-1082: **State v. Bartlett**. Petition of appellant for further review denied on December 16, 2009.

No. A-08-1103: **State v. Gay**, 18 Neb. App. 163 (2009). Petition of appellant for further review denied on January 13, 2010.

No. A-08-1149: **Hurbenca v. Nebraska Dept. of Corr. Servs.**, 18 Neb. App. 31 (2009). Petition of appellant for further review denied on December 16, 2009.

No. A-08-1232: **State v. Sanders**. Petition of appellant for further review denied on December 23, 2009.

No. S-08-1259: **Deviney v. Union Pacific RR. Co.**, 18 Neb. App. 134 (2009). Petition of appellee for further review sustained on January 13, 2010.

No. A-08-1262: **Barrett v. Fabian**. Petition of appellant for further review denied on February 18, 2010.

No. A-08-1293: **State v. Holladay**. Petition of appellant for further review denied on March 17, 2010.

No. A-08-1334: **State v. Wabashaw**. Petition of appellant for further review denied on December 23, 2009.

No. A-09-011: **Fry v. Fry**, 18 Neb. App. 75 (2009). Petition of appellant for further review denied on January 13, 2010.

No. S-09-019: **Bauermeister v. Waste Mgmt. Co**. Petition of appellee for further review sustained on January 21, 2010.

No. A-09-059: **Firstar Fiber v. Outlook Nebraska**. Petition of appellant for further review denied on January 13, 2010.

No. A-09-113: **County of Sarpy v. Courtney, LLC**. Petition of appellant for further review denied on February 3, 2010.

No. A-09-122: **Betts v. Betts**. Petition of appellee for further review denied on December 23, 2009.

Nos. A-09-127 through A-09-129, A-09-227, A-09-228: **In re Interest of Allen G. et al**. Petitions of Tabitha G. for further review denied on January 13, 2010.

No. A-09-163: **Polen v. Polen**. Petition of appellant for further review denied on December 16, 2009.

No. A-09-175: **State v. Biloff**, 18 Neb. App. 215 (2009). Petition of appellant for further review denied on January 21, 2010.

No. A-09-180: **State v. Sinner**. Petition of appellant for further review denied on December 28, 2009, as untimely filed.

No. A-09-181: **State v. Lopez**. Petition of appellant for further review denied on February 3, 2010.

No. A-09-182: **Peterson Land & Livestock v. Gotschall**. Petition of appellant for further review denied on March 24, 2010.

No. A-09-188: **State v. Lopez**. Petition of appellant for further review denied on April 14, 2010.

No. A-09-238: **Cenovic v. Cenovic**. Petition of appellant for further review denied on May 20, 2010.

No. A-09-243: **State v. Graves**. Petition of appellant for further review denied on December 10, 2009.

No. A-09-252: **In re Interest of Alivia H. & Savanah H**. Petition of appellant for further review denied on December 16, 2009.

No. A-09-287: **Mayfield v. Nebraska Pub. Serv. Comm**. Petition of appellant for further review denied on February 18, 2010.

No. A-09-290: **Daugherty v. County of Douglas**, 18 Neb. App. 228 (2010). Petition of appellant for further review denied on April 14, 2010.

No. A-09-290: **Daugherty v. County of Douglas**, 18 Neb. App. 228 (2010). Petition of appellee for further review denied on April 14, 2010.

No. A-09-295: **State v. Montin**. Petition of appellant for further review denied on February 3, 2010.

No. A-09-295: **State v. Montin**. Petition of appellant pro se for further review denied on February 3, 2010.

No. A-09-314: **State v. Rodriguez**, 18 Neb. App. 104 (2009). Petition of appellant for further review denied on December 23, 2009.

No. A-09-322: **Ottaco Acceptance v. Larkin**. Petition of appellant for further review denied on April 14, 2010.

No. A-09-326: **Gloe v. Leaman**. Petition of appellant for further review denied on April 14, 2010.

No. A-09-334: **State v. Jones**. Petition of appellant for further review denied on February 18, 2010.

No. A-09-335: **Dekock v. Dekock**. Petition of appellant for further review denied on December 23, 2009.

No. A-09-338: **State v. Sobey**. Petition of appellant pro se for further review denied on March 10, 2010.

No. A-09-356: **Troia Family Ltd. Partnership v. Kool**. Petition of appellee for further review denied on March 24, 2010.

No. A-09-370: **State v. Slater**. Petition of appellant for further review denied on January 13, 2010.

No. A-09-378: **Sears v. Sears**. Petition of appellant for further review denied on December 10, 2009.

No. S-09-382: **In re Interest of Marcella B. & Juan S.**, 18 Neb. App. 153 (2009). Petition of appellant for further review sustained on January 13, 2010.

No. A-09-403: **State v. Rodriguez**. Petition of appellant for further review denied on January 13, 2010.

No. A-09-406: **State v. Aschenbrenner**. Petition of appellant for further review denied on January 27, 2010.

No. A-09-419: **State v. O'Neal**. Petition of appellant for further review denied on April 14, 2010.

No. A-09-453: **State ex rel. Jacob v. Houston**. Petition of appellants for further review denied on March 10, 2010.

No. A-09-460: **In re Estate of Schademan**. Petition of appellant for further review denied on April 21, 2010.

No. A-09-461: **State ex rel. Bonner v. McSwine**. Petition of appellant for further review denied on May 20, 2010.

No. A-09-482: **State ex rel. Jacob v. Pirsch**. Petition of appellants for further review denied on February 3, 2010.

No. A-09-505: **In re Interest of Nylang M. et al**. Petition of appellant for further review denied on January 27, 2010.

No. A-09-508: **Pflug Bros. Enters. v. Pratt**. Petition of appellant for further review denied on June 9, 2010.

No. A-09-510: **Lugonja v. Chief Industries**. Petition of appellant for further review denied on January 27, 2010.

No. A-09-517: **State v. Rivera**. Petition of appellant for further review denied on January 21, 2010.

No. A-09-518: **State v. Harris**. Petition of appellant for further review denied on December 23, 2009.

No. A-09-519: **State v. Kendall**. Petition of appellant for further review denied on January 13, 2010.

No. A-09-531: **Meadows v. Meadows**, 18 Neb. App. 333 (2010). Petition of appellant for further review denied on May 5, 2010.

No. S-09-532: **Schuette v. Schuette**. Petition of appellant for further review sustained on May 20, 2010.

No. A-09-533: **Werthman v. Werthman**. Petition of appellant for further review denied on January 21, 2010.

No. A-09-537: **State v. Ramirez**, 18 Neb. App. 241 (2010). Petition of appellant for further review denied on February 24, 2010.

Nos. A-09-541, A-09-557: **State v. Craven**. Petitions of appellant for further review denied on March 10, 2010.

No. A-09-560: **Glesmann v. Kolesik**. Petition of appellant for further review denied on March 10, 2010.

No. A-09-566: **State v. Daringer**. Petition of appellant for further review denied on January 10, 2010, as untimely filed.

No. A-09-579: **State v. Tompkins**. Petition of appellant for further review denied on February 18, 2010.

No. A-09-589: **Stoler v. Otis Bed**. Petition of appellant for further review denied on May 5, 2010.

No. A-09-603: **State v. Stoltenberg**. Petition of appellant for further review denied on December 10, 2009.

No. A-09-609: **Maati v. State**. Petition of appellant for further review denied on March 10, 2010.

No. A-09-653: **Gordon Livestock Market v. Pribil**. Petition of appellant for further review denied on February 18, 2010.

No. A-09-654: **Anderson v. Douglas Cty. Bd. of Equal**. Petition of appellant for further review denied on January 27, 2010.

No. A-09-656: **In re Interest of Damion H. & Alexandria J**. Petition of appellant for further review denied on February 24, 2010.

No. A-09-669: **State v. Merheb**. Petition of appellant for further review denied on March 10, 2010.

No. A-09-670: **In re Interest of Christian L.**, 18 Neb. App. 276 (2010). Petition of appellee for further review denied on April 14, 2010.

No. S-09-676: **Village of Wilsonville v. Chambers**. Petition of appellant for further review sustained on December 23, 2009.

No. A-09-683: **State v. Rainey**. Petition of appellant for further review denied on April 7, 2010.

No. A-09-684: **State v. Giles**. Petition of appellant for further review denied on January 27, 2010.

No. S-09-687: **Tolbert v. Omaha Housing Authority**. Petition of appellant for further review sustained on May 12, 2010.

No. A-09-719: **In re Interest of Baby T**. Petition of appellant for further review denied on February 24, 2010.

No. A-09-720: **State v. Rea**. Petition of appellant for further review denied on June 3, 2010.

No. A-09-737: **Faltys v. Department of Motor Vehicles**. Petition of appellant for further review denied on February 18, 2010.

No. A-09-751: **State v. Purdie**. Petition of appellant for further review denied on March 10, 2010.

No. A-09-759: **Bhuller v. Bhuller**. Petition of appellant for further review denied on February 3, 2010.

No. A-09-781: **Menkens v. Morse**. Petition of appellee for further review denied on March 10, 2010.

No. A-09-790: **In re Interest of A.H**. Petition of appellant for further review denied on June 3, 2010.

No. A-09-814: **Norby v. Farnam Bank**. Petition of appellant for further review denied on June 4, 2010.

Nos. A-09-821, A-09-822: **In re Interest of Tauteyana J. et al**. Petitions of appellant for further review denied on April 7, 2010.

No. A-09-838: **Glass Lake v. Hofer**. Petition of appellee for further review denied on May 20, 2010.

No. A-09-855: **State v. Allen**. Petition of appellant for further review denied on June 3, 2010.

No. A-09-859: **Jones v. Jones**. Petition of appellee for further review denied on May 24, 2010. See § 2-102(F)(1).

No. A-09-886: **Widtfeldt v. Holt Cty. Bd. of Equal**. Petition of appellant for further review denied on January 13, 2010.

No. A-09-891: **In re Interest of Nadia S. et al**. Petition of appellant for further review denied on April 21, 2010.

No. A-09-899: **In re Interest of J.P**. Petition of appellant for further review denied on April 14, 2010. See §§ 2-102(F)(3) and 2-107(B)(2).

No. A-09-899: **In re Interest of J.P**. Supplemental petition of appellant for further review denied on April 14, 2010. See, *State v. Williams*, 253 Neb. 619, 573 N.W.2d 106 (1997); *State v. Start*, 229 Neb. 575, 427 N.W.2d 800 (1988).

No. A-09-903: **State v. Valadez**. Petition of appellant for further review denied on April 14, 2010.

No. A-09-920: **Smith v. Colerick**. Petition of appellant for further review denied on May 5, 2010.

No. A-09-926: **State v. Lathrop**. Petition of appellant for further review denied on January 27, 2010.

No. A-09-941: **State v. Pieper**. Petition of appellant for further review denied on December 10, 2009.

No. A-09-945: **Widtfeldt v. Holt Cty. Bd. of Equal**. Petition of appellant for further review denied on December 7, 2009, as premature.

No. A-09-946: **State v. Wecker**. Petition of appellant for further review denied on May 20, 2010.

No. A-09-965: **State v. Zuck**. Petition of appellant for further review denied on May 20, 2010.

Nos. A-09-968 through A-09-971: **State v. Wolfe**. Petitions of appellant for further review denied on May 5, 2010.

No. S-09-972: **State v. Ruffin**. Petition of appellant for further review sustained on January 13, 2010.

No. A-09-986: **State ex rel. Jacob v. Pepperl**. Petition of appellant for further review denied on January 13, 2010.

No. A-09-988: **Buggs v. Houston**. Petition of appellant for further review denied on April 14, 2010.

No. A-09-1001: **State v. Cusatis**. Petition of appellant for further review denied on April 14, 2010.

No. A-09-1002: **State v. Greuter**. Petition of appellant for further review denied on June 3, 2010.

No. A-09-1006: **Abraham v. DMV**. Petition of appellant for further review denied on June 3, 2010.

Nos. A-09-1008, A-09-1009: **State v. Sturgis**. Petitions of appellant for further review denied on May 5, 2010.

No. A-09-1010: **State v. Kellogg**. Petition of appellant for further review denied on March 10, 2010.

No. A-09-1039: **In re Estate of Hue**. Petition of appellant for further review denied on May 5, 2010.

No. A-09-1057: **In re Interest of Bianca H. & Eternity H**. Petition of appellant for further review denied on June 3, 2010.

No. A-09-1090: **In re Interest of Jamin G**. Petition of appellant for further review denied on March 10, 2010.

No. A-09-1132: **State v. Schlick**. Petition of appellant for further review denied on April 14, 2010.

No. A-09-1133: **State v. Adams**. Petition of appellant for further review denied on June 9, 2010.

No. A-09-1154: **State v. Jones**. Petition of appellant for further review denied on May 20, 2010.

No. A-09-1154: **State v. Jones**. Petition of appellant for further review denied on June 3, 2010.

No. A-09-1178: **State v. Hoffman**. Petition of appellant for further review denied on May 20, 2010.

No. A-09-1200: **Rousseau v. Thermo King**. Petition of appellant for further review denied on March 17, 2010.

No. A-09-1213: **In re Interest of Ronnie G. et al**. Petition of appellant Justine F. and cross-appellant Ronald G. for further review denied on February 18, 2010.

No. A-09-1238: **State v. Seaton**. Petition of appellant for further review denied on May 12, 2010.

No. A-09-1257: **Dugan v. County of Cheyenne**. Petition of appellant for further review denied on March 10, 2010.

No. A-09-1273: **Renneke v. Health & Human Servs**. Petition of appellant for further review denied on May 20, 2010.

No. A-10-054: **State v. Abram**. Petition of appellant for further review denied on April 14, 2010.

No. A-10-075: **Equal Opp. Comm. on behalf of Gutierrez v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-076: **Equal Opp. Comm. on behalf of Macias v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-077: **Equal Opp. Comm. on behalf of Mendez v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-078: **Equal Opp. Comm. on behalf of Perez v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-079: **Equal Opp. Comm. on behalf of Quezada v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-080: **Equal Opp. Comm. on behalf of Sancedo v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-081: **Equal Opp. Comm. on behalf of Zamarripa v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-082: **Equal Opp. Comm. on behalf of Placensia v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-083: **Equal Opp. Comm. on behalf of Coronado v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-084: **Equal Opp. Comm. on behalf of Velez v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-085: **Equal Opp. Comm. on behalf of Gonzalez v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-142: **State v. Brown**. Petition of appellant for further review denied on May 5, 2010.

Nebraska Supreme Court

In Memoriam

Justice John T. Grant

Nebraska Supreme Court Courtroom
State Capitol
Lincoln, Nebraska
April 28, 2010
2:00 p.m.

Proceedings before:
SUPREME COURT
Chief Justice Michael G. Heavican
Justice John F. Wright
Justice William M. Connolly
Justice John M. Gerrard
Justice Kenneth C. Stephan
Justice Michael McCormack
Justice Lindsey Miller-Lerman



Justice John T. Grant

Proceedings

CHIEF JUSTICE HEAVICAN: Good afternoon to everyone. The Nebraska Supreme Court is meeting in special session on this 28th day of April, 2010 to honor the life and memory of former Supreme Court Justice John T. Grant and to note his many contributions to the legal profession. I'd like to start this afternoon by introducing my colleagues here on the bench. To my immediate right is Justice John Wright. And to his right is Justice John Gerrard. And to his right is Justice Michael McCormack. To my immediate left is Justice William Connolly. And to his left Justice Kenneth Stephan. And to his left Justice Lindsey Miller-Lerman.

The Court further acknowledges the presence of Judge Grant's family. And I will introduce some of you now and you may stand. First of all Justice Grant's wife, Zella. Thank you. You may remain seated. Also present are Justice Grant's daughter, Martha Bruckner and her husband Bob along with Martha's children, Grant Novak and his wife, Katie, and their children, Maggie and Ben and Kevin Novak and his wife, Dawn. Thank you very much. You may be seated. Son, John P. Grant, his wife, Shari, and their children, Sean Thomas and his fiancée, Anna Paulson. Paul and his wife, Cassie, Kailey and Jennifer. Thank you very much. You may be seated. Daughter Susan Grant and Carolyn Hamilton. Thank you. You may be seated. Son, Joseph Grant and his wife, Mary, and their children, Tom, Dan, Lucy and GiGi. Thank you. You may be seated. Son, Tim Grant and his wife, Teresa, and their children, Chloe, Spenser, Delaney and Jack. Thank you very much. You may also be seated. Justice Grant's sister, Gerry Morgan, and two of her children, John Morgan and Jane Maly. Gerry's husband, Phil, was unable to be present here today. Thank you very much. Are there any other family members that I haven't introduced?

MR. GRANT: Your Honor, if I might there are several of Zella's family here and I'm sorry I apologize for not getting them on the list.

CHIEF JUSTICE HEAVICAN: Thank you. You may go ahead and introduce them, Mr. Grant, if you care to. Sorry about that. We welcome you also.

Also present obviously are former members of the Nebraska Supreme Court and members of the Nebraska Court of Appeals, other members of the judiciary and members of the bar. At this time the Court recognizes former Nebraska Supreme Court Chief Justice C. Thomas White. Justice White is the chairman of the Supreme Court's memorial committee and he will now conduct the proceedings for us today. Good afternoon Mr. Chief Justice White.

CHIEF JUSTICE WHITE: May it please the Court. I thank the Court for this appointment. In memory of a great judge and an old friend we will have a number of speakers and I should like to introduce them in sequence. First I should like to introduce to you Judge D. Nick Caporale, a retired Supreme Court Judge of this Court. Judge Caporale.

CHIEF JUSTICE HEAVICAN: Judge Caporale good afternoon.

JUDGE CAPORALE: May it please the Court as Your Honor as noted we pause the course of our daily living to reflect on the life of a man who devoted almost a decade of his time on earth contributing to the work of this Court. John Thomas Grant was born on October 25, 1920. He died pretty much as he lived, without fuss or fanfare, on January 26th of this year. He soldiered for his country during World War II in the Pacific. He was honorably discharged as a technical sergeant five days before his 25th birthday. He used the G.I. bill to enter Iowa State University I think with the thought of becoming an engineer. But somewhere along the line changed his mind and transferred to Creighton Law School and earned his law degree in 1950. He served a number of years on the Court of Industrial Relations before being appointed to the District Court in and for Douglas County. He was appointed to that bench in 1974 by then Governor Exon. He moved to this Court

in 1983 through appointment by then Governor Bob Kerry. And he served through 1992.

Now what we have just heard will satisfy the Bible statisticians among us but really doesn't tell us anything about the man. And quite frankly, I feel inadequate to do that job with the justice that it deserves because although I knew the man we called Jack for a long time, our contacts were primarily professional. But those were happy encounters for me. And so I am both honored and pleased to be able to reflect on that for a few moments.

When I first started to practice law, more years ago than I like to remember, Jack was a young but well established lawyer and I knew of him but did not know him. In the fullness of time, however, we had the opportunity to lawyer against each other. And what I came to appreciate first of all was that he could find humor in virtually any human condition and in any circumstance. And he used that to defuse awkward situations and really turn them to his client's advantage. Like any good lawyer he mastered the facts. He mastered the law. But unlike some he was insightful, he was courteous, he was respectful and he was easy to get along with. In short, he was the kind of adversary one enjoyed engaging and the kind of adversary that made the practice of law worth doing.

Later, as a district judge, I had the opportunity to try cases before him. And I was happy to learn that he had packed his sense of humor and took it with him to the bench. I recall trying one case before him against a good lawyer who nonetheless was having a little difficulty laying the foundation for a bit of evidence that everybody, including me, in the courtroom knew was ultimately going to get in. But I kept making objections because I enjoyed hearing the word sustained. And of course that didn't happen with great regularity. After a few times Judge Grant called both lawyers to the bench, looked me in the eye and said if I were judge so and so I'd have both of you in jail. Nick, you know that he's going to get that foundation laid so cut it out. So I did. And things moved on. That way he kept a clean record, offended no one and the case moved.

Those who practiced law those eons ago will know who judge so and so was but that's a different topic for a different forum.

Later I joined Jack Grant on the district bench and in fact he was the presiding judge when that occurred. And he discharged that task with the same gracious humility with which he discharged any other task. In the words of Mike Kinney and his recent piece in the Nebraska Lawyer Jack Grant's mantra was "Do it with a kind word." That didn't mean that he didn't get hard things done. He just did it in as gentle a way as could be done.

As time went on we both sat on this bench. And what I think is difficult for many to understand is that though what happens in public in this chamber during oral arguments is important, the more difficult work of the Court takes place in the individual judge's offices and in the consultation room when an opinion written for the Court is tendered and either accepted, revised, rewritten or rejected.

What I recall most about visiting Jack in his office was that he was always gracious. He was always open minded. He listened to what one had to say, but didn't surrender his opinions lightly. He wrote most of his opinions in long hand, standing up at a desk he had designed and built for that purpose. If the thought was that that would keep opinions short, it worked most of the time. Well, maybe just some of them.

In the consultation room too he was thoughtful of other's opinions but fought for his view when he thought that the law required it.

In short Jack Grant was a delight to be around. He was a noble person who took his work seriously but never put on airs for himself. I'm reminded when he was advised that he had won the presidency of the Omaha Bar Association by a single vote his response was well, thank goodness I didn't vote as a gentleman. Contrary to that pronouncement he was a gentleman. And the world is a sadder and poorer place for his absence.

CHIEF JUSTICE WHITE: Justice William Hastings who is ill is unable to appear before the Court. His daughter, Pam Carrier, a former member of the bar of this court will present

his words to memorialize Judge Hastings great good friend, Jack Grant.

CHIEF JUSTICE HEAVICAN: Ms. Carrier: Good afternoon.

MS. CARRIER: Good afternoon. May it please the Court. Both my parents extend their regrets for not being able to be here today. They both were good friends of both Jack and Marian and my mother asked that that relationship be acknowledged as well because of the close relationship she had with the ladies of the Court and the support they provided. I will go ahead and read my dad's comments verbatim if that would please the Court.

"May it please the Court, William C. Hastings, appearing in honor of Judge T. Grant, deceased. Jack Grant was one of my closest friends. We served on the district court, he in Omaha and I in Lincoln, and later both joined this Court. We spent time together at the district judge's meetings and later at several appellant conferences. Jack had a great sense of humor and pretty much was always in great humor himself. The stories as to that are legion. Probably the most quoted had to do with one of his trials. The evidence disclosed that a certain doctor had a venereal disease named after him. And Jack spoke right from the bench, 'Don't you suppose he would rather have had a bridge named after him?' But Jack truly was an educated man whose knowledge and use of the English language were beyond reproach. His opinions were well thought out and crafted with great skill. He was a valuable member of this Court whose kind are always welcomed. He left a great legacy."

CHIEF JUSTICE HEAVICAN: Thank you.

CHIEF JUSTICE WHITE: The next speaker, Your Honor, is Judge Ronald Reagan who served on the district bench with Judge Grant save some miles south.

CHIEF JUSTICE HEAVICAN: Judge Reagan, good afternoon.

JUDGE REAGAN: May it please the Court. When Janet Bancroft emailed me a month or so ago and asked if I was willing to offer some remarks in this memorial, relating in light of Jack Grant's personality that humor be appropriate, I readily accepted and told her I didn't know anything about

Jack Grant that wasn't humorous. Now that wasn't quite true. And since I'm really one generation behind Jack, at least as generations developed in his years, I called his son, John, to make sure it'd be okay if I spoke. John assured me it was as long as I didn't say anything bad and pointed out that his dad had out lived all of his friends of a common age. So the family humor lives on.

I'm not certain I can do justice in verbalizing what remains in my mind an art of Jack Grant. But it's an honor to have an opportunity to try. I feel inadequate in light of some of the remarks that Judge Caporale's made and Judge Hastings sent in. But I think we should all first acknowledge that Jack would take credit for the weather today, laughing about those of us who love golf and can't go out on the course. But he'd also take credit if the weather was bad and he'd opine that that was the only reason for so many in attendance.

I met Jack Grant about 44 years ago. I was a senior in law school working part time in the probation office in Douglas County, regularly playing handball at the YMCA with Jim Castello and Mike Dugan who along with Tom Kelley were partners of Jack Grant. I suppose my Irish heritage and inclination to enjoy a cocktail fostered a connection. But with me it was more than that. I came from a background which could be described as humble at best. And I grew to admire successful people who could accept all human beings as equals. The law firm of Kelley, Grant, Castello and Dugan was the epitome of a blue collar law firm, the exact opposite of a silk stocking law firm. And Jack Grant was the lead example. I can leave it to all in attendance today to use their own definitions of blue collar and silk stocking but I'd wager each knows exactly the thought I'm trying to convey. No memorial for Judge Grant would be complete without some story. And you've already heard the one about the venereal disease and the bridge named after him. My story's not quite that good but I think it shows some other qualities mixed in with his humor.

A year or so before Jack was appointed to the Supreme Court he heard a case that stemmed from a divorce that I tried. The husband, a member of the Air Force, had testified in his divorce case of some personal use of marijuana during

the marriage. His now ex-wife reported this admission to the military authorities and they requested my court reporter to transcribe the testimony. The ex-husband's attorney filed an action to enjoin my court reporter from furnishing the transcript and Judge Grant was assigned to hear the case. When the ex-husband's attorney argued the case involved the complicated privacy issue Judge Grant said it appeared to be a more simple issue. The Air Force contended a service man who used marijuana was unfit for military service. And after a brief pause Judge Grant then announced, "That's a proposition on which I take no position. Booze is my bag."

In concluding it'd be wrong of me to suggest that Jack and I never disagreed on anything and I won't do so. But I do suggest he was witty and wise, friendly and forgiving, caring and compassionate and many other things.

I miss him and I'll always remember him.

CHIEF JUSTICE HEAVICAN: Thank you very much.

CHIEF JUSTICE WHITE: Your Honor, the final speaker is John Grant's son, John, a member of the bar of this Court. Mr. Grant.

CHIEF JUSTICE HEAVICAN: Mr. Grant, good afternoon.

MR. GRANT: Good afternoon. May it please the Court, Chief Justice Heavican, members of the Court, family and friends of John T. Grant. I'm John Paul Grant the oldest and most handsome of John T's three sons. Oh, before I begin I would like to reserve two minutes for rebuttal.

My brother, Joe, and I are both lawyers. And Joe being a black hearted defense lawyer got up and gave a tremendous, tremendous talk at the wake. Myself being primarily a plaintiff's lawyer allowed him to do that so that I wouldn't weep in front of a crowd of people. Now that a couple of months have passed, I'm hopeful that I can get through this without a battling. But I give no guarantees on that issue.

John T. Grant always said we can be serious without being somber. He was a serious man but he was certainly not a somber man. His story, I believe, is absolutely amazing.

My siblings and I have had the distinct advantage of being raised by a father who was intelligent, personable, universally respected, and I suppose you could say connected in society.

Trust me that's a distinct advantage and I'm very, very proud of that and proud of him.

But John T. Grant had no such advantage. Very quickly, and I don't want to bore you with this. He was born in a house in Omaha, Nebraska about 41st and Izard. His father was a plumber and street car conductor. His father wasn't a Supreme Court judge. He was raised primarily by his mother, Mary, who was known as Minnie. And throughout his life whenever he ran into an issue or something he didn't want to do he'd say, "No, I'm not going to do that. Minnie Grant didn't raise a complete idiot."

But he went to high school at Creighton Prep. After high school he went to work for the power company. He said he didn't have enough money to go to college. The war broke out. He joined the army and he spent 30 months overseas landing in Australia. He was on Okinawa when they dropped the atomic bombs on Japan. And he said they were scared to death because they expected severe retaliation from the Japanese. But he returned from all that and with the G.I. bill, as Justice Caporale said, he went to Iowa State because he had been in the engineering department at the Omaha Power Company and thought I'll be an engineer. He told me once he was in the middle of some math examination and he just said to himself, what in the world am I doing here. I don't know anything about numbers. He passed the class but he came immediately back to Omaha and got into the Creighton Law School where he belonged in the first place.

After going through law school, as has been mentioned before, he entered private practice with Tom Kelley and Pinkie Nolze. And with the exception of some very interesting detours in there he practiced law for about 23, 25 years in Omaha. One of those detours was to clerk for an Eighth Circuit Court of Appeals Judge, Judge Joseph William Woodruff. And Judge Woodruff was a wonderful, wonderful influence. He taught him to love the law and to love the lawyers that he worked with. And he was so fond of Judge Joseph William Woodruff that he named his favorite son after him. He also had a couple detours to Northern Natural Gas where he was corporate counsel for them. He'd go to work for them, they wouldn't give him a

raise, he'd leave, he'd go back to private practice. And one of his great sayings in life was always "leave 'em laughin'." And he said he was always proud that when the general counsel of Northern during his days, Shorty Shaw, passed away he was a pallbearer at his funeral. And that just gives credence to his words of leave them laughing.

After one of the side trips to Northern Natural Gas he was lured to Oklahoma City, Oklahoma, of all places, to be the general counsel for City Service Gas Company. That was 1960 and that was the year John F. Kennedy was elected president of the United States. After being general counsel for City Service for about a year he announced to my mother that they were far too far south for an Irish Catholic Democrat and they turned around and he returned to private practice in Omaha. My mother, at least as far as we know, graciously accepted that move and back they came. I always wonder however had he kept that high paying corporate gig whether we would be prorating an entirely different estate today.

He truly loved the practice of law. As I said his first partners were Tom Kelley and Pinky Nolze. Jimmy Castello was later his partner. Mike Dugan. He loved the lawyers he worked with, Dave Blazer, Barton Leary, Duke Schotts, Bob Frazier.

You know when I started practicing law and I lost a case and I was kind of complaining to him he said don't worry about. He said if you haven't lost a case, you haven't tried one. So that was small consolation at the time.

But one time in describing his practice of law he said we would take about anything that walked through the door with open arms. And I don't know about my brother, Joe, but that sounds very familiar to me.

He also said, and I'm going to talk about this a little later, that I really don't think anyone is entitled to have as much joy and fun as I had although I had a lot of weepy moments, losing cases and wondering where your next dollar is coming from. But he loved practicing law and he loved and respected lawyers. He always said I love all the lawyers except the mean ones.

I want to veer off just a little and give you, hopefully, an idea of his sense of humor. When we came back from

Oklahoma City we lived in Westgate which is kind of a subdivision out in west Omaha. And to say the least our yard was not impeccably groomed. But the neighbor across the street had an immaculate, beautiful, green lawn. And one day, one Sunday morning, the neighbors all jumped in the car and went off to church and John T.'s eyes lit up. And he went out and he dug up the biggest, yellowiest dandelion he could find and marched across the street and set it right in the middle of this guy's lawn. He pulled a lawn chair out on the front porch and the guy came back from church and just as he set it up, he looked out his car window and saw that. They rushed in the house, changed his clothes, he comes out with a bucket and a shovel and grass seed and everything else. And he leans over to look at this dandelion and he can see somebody just stuck it in there and he looks up and here's John T. Grant laughing his tail off.

He was our – attempted to be our baseball coach when we were growing up. Somebody asked him what kind of a coach he was. They said we finished every season. I specifically recall one season where we were 0 and 13 but we did finish it.

One of the funniest things about that we had a game scheduled against his good friend, Jack Churchill who is a restaurateur in Omaha and also coached a baseball team. And we probably played Churchill's team two, three years in a row. Never won. The day before the game he had all of our team prepare picket signs and we picketed Jack Churchill's front yard with signs saying Churchill unfair to Grant, never lets us win.

The coaching also changed his vocabulary. He had to pick up the Charlie Brown phrase "good grief" and instead of using the word he would just say not his favorite word.

He tried to coach my sister in softball but he didn't quite get along with the girls very well. They had a scrimmage one day and some girl got a wonderful hit and my sister ran to first base for it. And he said wait, wait, wait, what's going on here. She said well, she's got a date tonight and if she runs her curlers will fall out. He just shook his head and I think that was the end of his softball coaching days.

At some point around 1973 his good friend John Burke apprised him of an opening on the district court bench and

with the perfect analysis that you are fiscally irresponsible persuaded John T. to apply for the bench. Burke told him you're obligated if you get this job to contribute to a pension so you might have something in your later years. And he thought that sounded like a good idea.

He was a great district court judge. I only appeared before him once. It was in the old days when we had to have lump sum settlements approved by the district court. It was a Friday afternoon as I recall. I sure wanted to get the settlement approved and get the dough. But there was not a single judge in the courthouse other than my dad. It's a, you know, it's a simple form. No brainer. Everybody signed off on it. So I asked the defense counsel can we submit it to him. He said sure. So we march into the courtroom and he comes out in his robe and he looks down at my client and he says, "Oh, I'm sorry to see you couldn't afford a lawyer today, sir."

There was some – I've got some question marks after some of these. I know this court is having budget trouble and is worried about continuing judicial education and everything else but when John T. first got on the bench they sent him to Reno to the judge's school as they typically do. And he told me about the second or third day out in Reno he was called to the dean's office. And by this time he'd been a district judge for a couple months and he was probably 55 years old. And he said here I am being called into the dean's office. And the dean wanted to know why he missed class that morning and he said, "I stumbled across a large amount of bad whiskey and I'd rather not discuss it anymore."

The great story about the "wouldn't you rather have a bridge named after him" is one of his favorites. The one that I've always enjoyed is the "thorny discovery dispute" where there was a question of whether the defendants had propounded too many interrogatories. And they argued back and forth. And John T. said, "Well, I'll give you your choice. You can either answer the evens or the odds." And that's his way of pointing out how silly this was. And he said the most amazing thing was these two lawyers from this big firm had to take a break to decide whether they wanted to respond to the evens or the odds. Remember there are some question marks here.

The other one was that there was a, I think it was a domestic relations case, and there was a dispute about someone's inheritance or whatever and the parties were going back and forth and their lawyers are going back and forth. And he finally pronounced from the bench he said, "the only things that my father left me were his last name and a raging thirst for whiskey." And that apparently put an end to the dispute.

He told me after he retired that he could probably not serve today on the district court bench. He said people are just – he so much loved to poke fun in silly situations. He said people are just so sensitive. The complaints to the Court would be voluminous so I probably couldn't do it today.

He handled, as everyone knows some very, very tough cases and did them seriously without being somber. He was elected president of the Omaha Bar Association. And during his brief tenure there one of the things that the Omaha Bar did is convince the Legislature to allow two Supreme Court judges to come from Omaha as opposed to the one as it had been. Shortly thereafter Hale McGowan retired from Beatrice and low and behold John T. Grant is appointed to the Supreme Court. I don't know if there was ever an investigation into a conflict of interest there or not but he was appointed.

He loved his time on the Supreme Court. I know that. He always said it was very, very difficult but he loved the camaraderie and he loved the work.

One of his, no offense to the people from Lincoln, but one of his other great quotes when asked how he enjoyed the move to Lincoln he said, "Well, Marian always loved the move to Lincoln. As far as I was concerned I always thought Lincoln had too many churches and not enough bars." But that was it.

I'm carrying on far too long and boring you. But I've got to relate my favorite opinion of his. And he was dissenting from an opinion that was written by Justice Caporale. And Justice Caporale set out the issue in the case as a Supreme Court Judge should. He said, "The principle issue presented by this appeal is whether the state may interfere in the relationship between a mother and her children by virtue of the former's eccentricity." Now that's how Supreme Court judges speak and write.

In concluding his dissent it was a question of whether the children loved her or whatever. In concluding his dissent he said, "The testimony of the children need not be set out but it may be fairly said that the children do have some love for their mother but they dislike the life she requires them to lead. I believe that the trial court gave appropriate weight to that love. And of course it would be perfectly appropriate to love Don Quixote and yet not be willing to let him rear his children at least until he got through his window phase." That's how John T. Grant wrote.

After he retired he continued to serve this court in special sessions. And he also did two other things that he really loved. He was a huge advocate of professional courtesy for lawyers. And he spoke at seminars and spoke to groups about that. Even had kind of a canned speech that he said, you don't have to be a boar to practice law. But he really stressed to people that you can accomplish the same thing by being nice as opposed to being mean.

He also dipped his hand into mediation. I'll never forget the first mediation he had. He came back to the office and he said we didn't get it settled. I didn't do something right. He felt he was a failure. And he went home that night and he called the lawyers up and he said let's meet again tomorrow morning. They met again tomorrow morning or the next morning, got the whole issue resolved.

I also remember the first time he was going to bill for a mediation. He was going to bill somebody $150. And I said well, let's sit down and take a look at that. And we got the bill squared away to where it was right.

He loved to read and that is reflected in some of these stories and some of the phrases he would have. He gave fine advice to my brother, Joe. He said when we were growing up, he said, "Don't cross against the light, it kills the lawsuit when you get hit." He had just a million of those sayings that were very good and I shouldn't take the time to bore you with those.

There is a, if people haven't seen it, there is an interview with my father that can be found on the Creighton Law School website. And the first several times I watched it after he passed away I just cried like a baby. But the more I watched

it, it perfectly captures the fun that he had in practicing law, in being a trial judge, and in being a Supreme Court judge. So I would encourage people to watch that. In that interview it was conducted by Doc Shugrue, Richard Shugrue. And Shugrue claimed that he had made memories for thousands of men and women that practice law. And his simple response to that was, "I suspect that's because I enjoyed it." And he really did.

Very briefly I've got to give some kudos to two wonderful women that he had in his life. And they are not Martha and Susan. Sorry. My mother, Marian, went through the trials and tribulations of practicing law and moving and shuffling back and forth and everything else. I will never forget the day when she passed away. I was standing next to him in the hospital and he said there goes the love of my life. And it wasn't too long, two or three years later, that he found another love of his life in Zella. And we all owe a great deal of gratitude to Zella for at least trying to keep him in line the last several years. When he was in the hospital he always inquired about how Zella was doing despite all of his issues.

I'm almost there. I think I'll make it. In the interview that he did with Doc Shugrue, and again I encourage people to go take a look at that because it's really good, he talked fondly about the time he spent as a law clerk with Judge Woodruff. And his description of Judge Woodruff in that interview is a perfect description of John T. Grant himself. He said, "Judge Woodruff was a great guy, fun, fun guy, smart, nice, decent, everything else." The same could also be said of John T. Grant. We miss him every day.

On behalf of our entire family we thank you for this opportunity. I also thank Chief Justice White, Justice Caporale, Pam and Judge Reagan for their kind words. I give up. Thank you very much.

CHIEF JUSTICE CAPORALE: Thank you, Mr. Grant.

CHIEF JUSTICE WHITE: May it please the Court this concludes our presentation to you. Thank you for the honor of serving as chair for Judge Grant's memorial.

CHIEF JUSTICE CAPORALE: And thank you Chief Justice White.

I take this final opportunity to note for those present that this entire proceeding has been memorialized by the court. After these proceedings have been transcribed, the text will be uploaded to the Supreme Court's website and copies will be distributed to family members and those of you who have spoken on behalf of Justice Grant. We will also preserve a video record of this event on the Court's website.

On behalf of the Nebraska Supreme Court I extend its appreciation to Former Chief Justice C. Thomas White who chaired the Court's memorial committee. And also again thank you all for all the presenters for presenting here today. This concludes the special ceremonial session of the Nebraska Supreme Court. The Court would encourage any of the participants, family members and friends of Justice Grant to remain in the courtroom for a moment to greet each other and enjoy this occasion. The Court will also come down and mix with you. We are adjourned. Thank you.

(Ceremonial session adjourned at 2:42 p.m.)

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, APPELLEE, V.
JOHN S. WAYS, JR., APPELLANT.
775 N.W.2d 678

Filed December 11, 2009. No. S-09-017.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed in part, and in part vacated.

James L. Beckmann, of Beckmann Law Offices, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

This appeal arises out of a criminal case filed in late October 2008, in Lancaster County District Court, in which John S. Ways, Jr., appellant, was found guilty of criminal contempt of an order which had been entered in a separate previous criminal case. In that case, Ways had been found guilty of pandering and, subsequent to his release from incarceration, ordered on January 31, 2002, to register under the Sex Offender Registration Act (SORA), Neb. Rev. Stat. §§ 29-4001 to 29-4014 (Reissue 2008). On December 4, in the present criminal contempt case, Ways was ordered to serve 54 days

in jail and fined $1,000. In addition to imposing the sentence, the court proceeded to recalculate the timeframe during which Ways would remain subject to SORA registration in connection with the pandering conviction and ordered that, given certain excluded times, Ways was required to register until at least April 9, 2014.

On appeal, Ways challenges the portion of the sentencing order in which the court recalculated his SORA obligations. We agree with Ways that the court was without authority in the criminal contempt case to address the registration requirements arising out of Ways' 1996 conviction for pandering. We therefore vacate that portion of the order addressing the registration requirements and otherwise affirm his sentence.

STATEMENT OF FACTS

In the present appeal from a Lancaster County District Court case, Ways pled no contest to a charge of criminal contempt of court, pursuant to a plea agreement. In an order entered December 4, 2008, the district court sentenced Ways to 54 days in jail and a $1,000 fine. The court also ordered that based on his 1996 conviction for pandering, Ways was subject to the registration requirements of SORA until at least April 9, 2014. A review of events that occurred prior to the conviction and sentence in this case is necessary to understand the December 4, 2008, challenged ruling with respect to Ways' registration requirements under SORA.

Ways was convicted of pandering and began serving his sentence on the conviction in 1996. SORA became operative January 1, 1997, after Ways was sentenced for the 1996 pandering conviction but before he finished serving the sentence. Ways was released from prison on June 24, 1998, but on that date, the Nebraska Department of Correctional Services failed to notify Ways of his registration requirements under SORA.

On October 11, 2001, the district court held a hearing on the State's motion filed in the pandering case to determine Ways' obligations under SORA. The court entered an order dated January 31, 2002, in which it found that because of the pandering conviction, Ways was subject to the registration requirements of SORA. The court ordered that Ways was "to

comply with the requirements of [SORA until June 24, 2008, representing] the remainder of the ten years from his release" on June 24, 1998. Ways appealed the January 31, 2002, order to the Nebraska Court of Appeals. The Court of Appeals affirmed the order in an unpublished decision on February 18, 2003. See *State v. Ways*, 11 Neb. App. cxvi (No. A-02-176, Feb. 18, 2003).

Ways did not thereafter register in compliance with the January 31, 2002, order in the pandering case. Ways was taken into federal custody on May 15, 2003, and remained in custody until July 28, 2008.

On October 31, 2008, the State filed an information in the district court for Lancaster County in the case that gives rise to the current appeal. The information charged Ways with two counts: (1) a violation of SORA for failing to register between July 28 and August 15, 2008, and (2) contempt of court for disobeying the January 31, 2002, order in the pandering case by failing to register between January 31, 2002, and May 15, 2003. Pursuant to a plea agreement, Ways pled no contest to the contempt charge, and the State dropped the other charge and did not file habitual criminal charges.

At the plea and sentencing hearing held December 4, 2008, Ways argued that the January 31, 2002, order in the pandering case set a date certain of June 24, 2008, for the end of his registration requirement under SORA and that therefore his obligation to register ended on that date. Contrary to Ways' urging in the present contempt case, the court determined in its December 4 sentencing order that Ways' obligation to register under SORA based on the 1996 pandering conviction should extend until at least April 9, 2014.

In making its determination in the December 4, 2008, order, the court stated that Ways should get credit for fulfilling the registration requirement for the period from his release until the Court of Appeals' affirmance of his SORA obligations, i.e., June 24, 1998, through February 18, 2003. The court stated, however, that Ways should get no credit for the period of February 18, 2003, through December 4, 2008, "because of non-compliance, incarceration or both." The court therefore ordered that Ways should get credit for having completed

55 months and 25 days of the 10-year registration requirement and that because of the time remaining on the 10-year period, Ways was "ordered to continuously register under [SORA] until at least April 9, 2014."

Ways appeals the portion of the December 4, 2008, order regarding his SORA obligations.

ASSIGNMENTS OF ERROR

Ways asserts that the district court erred in its December 4, 2008, order when it concluded that Ways was subject to SORA registration requirements for any time after June 24, because the January 31, 2002, order in the pandering case set a date certain of June 24, 2008, upon which his registration would end. In the alternative, Ways asserts that the district court lacked authority to issue SORA-related rulings in the present criminal contempt case.

STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Head*, 276 Neb. 354, 754 N.W.2d 612 (2008).

ANALYSIS

Because we find it to be dispositive, we first address Ways' assertion that the portion of the December 4, 2008, order regarding Ways' SORA obligations in the criminal contempt case was an improper exercise of authority by the district court. We conclude that the district court lacked authority in the criminal contempt case to address issues regarding SORA registration requirements arising from Ways' conviction in the separate earlier criminal case of pandering.

The present case regarding criminal contempt was a separate action and not part of the action in which Ways was convicted of pandering. The information in the present case, filed in late October 2008, charged Ways with two counts: failure to register under SORA and criminal contempt for disobeying the January 31, 2002, order in the pandering case ordering Ways to register. The information put Ways on notice of the charges against him. See *State v. Kennedy*, 251 Neb. 337, 557 N.W.2d

33 (1996) (information setting forth specific acts constituting offense gives adequate notice to defendant). The count of failure to register was dismissed as part of a plea agreement, and Ways pled guilty to criminal contempt. Notwithstanding the limited scope of the present case, in its sentencing order of December 4, 2008, the court exceeded the sentencing necessary to dispose of the criminal contempt identified in the information and addressed issues regarding registration requirements related to the pandering case.

Issues regarding the duration of Ways' registration requirements related to the 1996 pandering conviction were collateral to the present case, which was limited to the issue of criminal contempt. Ways pled guilty to contempt because he disobeyed the January 31, 2002, order in the pandering case to register between that date and May 15, 2003, a period during which Ways was subject to registration. The present case was not the appropriate forum to raise and address issues pertaining to further calculations regarding the period of time during which Ways remained subject to registration. Instead, any request for modification or clarification of orders regarding registration requirements which stemmed from Ways' pandering conviction should have been raised and addressed by a proceeding in the separate criminal action in which Ways was convicted of pandering.

In its brief on appeal, the State urges us to affirm the district court's order of December 4, 2008, in all respects. The State argues that to the extent the court erred by addressing the registration issue in this case, the error was invited by Ways, who raised the issue by a letter requesting the court to issue an order that his registration requirement had ended on June 24. The record shows that the State had also corresponded with the court providing its calculations, culminating in the suggestion that Ways was subject to SORA registration until April 9, 2014. However, as we have concluded, the court did not have authority to address the issue of the duration of remaining registration in the present case, and the parties cannot confer such authority on the court through their agreement. See, similarly, *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003). We therefore conclude that the portions of the December 4, 2008,

sentencing order in which the court addressed the registration requirements related to Ways' 1996 pandering conviction should be vacated.

CONCLUSION

In this criminal contempt case, we conclude that the district court was without authority to enter an order regarding the duration of Ways' SORA registration requirement, which was a consequence of his conviction for pandering in a separate criminal action. We therefore vacate that portion of the sentencing order of December 4, 2008, which orders Ways to register until at least April 9, 2014, and affirm the remainder of the sentencing order.

AFFIRMED IN PART, AND IN PART VACATED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
MARCUS L. HUDSON, APPELLANT.
775 N.W.2d 429

Filed December 11, 2009. No. S-09-130.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
3. **Evidence: Appeal and Error.** Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve.
4. **Convictions: Evidence: Appeal and Error.** A conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
5. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.

6. **Conspiracy: Hearsay: Evidence.** The purpose of requiring independent evidence to establish a conspiracy is to prevent the danger of hearsay evidence being lifted by its own bootstraps, i.e., relying on the hearsay statements to establish the conspiracy and then using the conspiracy to permit the introduction of what would otherwise be hearsay testimony in evidence.
7. **Verdicts: Juries: Appeal and Error.** In a harmless error review, an appellate court looks at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial was surely unattributable to the error.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Scott C. Sladek for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and SIEVERS, Judge.

WRIGHT, J.

I. NATURE OF CASE

Marcus L. Hudson was convicted by a jury of first degree murder, use of a firearm to commit a felony, and possession of a firearm by a felon. Hudson appeals, claiming that the evidence was insufficient and that the trial court erred in allowing testimony as a hearsay exception pursuant to Neb. Rev. Stat. § 27-801(4)(b) (Reissue 2008).

II. SCOPE OF REVIEW

[1-4] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009). Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve

conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *Id*. Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve. *Id*. A conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *Id*.

[5] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

III. FACTS

On May 24, 2005, Verron Jones was talking to a friend in the driveway of a house on Fontenelle Boulevard in Omaha, Nebraska. Gunshots were fired, and Jones was hit by one of the gunshots. He died as a result.

A few days before the shooting, Will McDonald agreed to buy 2 ounces of cocaine for Hudson. McDonald was given $1,950 by Hudson to purchase the cocaine from McDonald's uncle, Anthony Nokia. McDonald added $300 of his own money to buy another one-half ounce of cocaine, which he planned to resell.

At Nokia's house, McDonald laid the money on a bed. Two men unknown to McDonald came in and handed McDonald a bag that looked like it contained "a bunch of eight balls." McDonald and Nokia wanted to check the quality of the cocaine. Nokia loaded his pipe with part of the drugs, but the pipe would not "fir[e]." As McDonald turned to inquire about the drugs, one of the men showed a gun and told McDonald they were taking the money. The men ran outside and left in a Chevrolet Blazer.

Nokia told McDonald one of the men was Jones. McDonald retrieved his 9-mm handgun. He then met Hudson and told him about the robbery. Hudson was furious. McDonald told Hudson that Jones was one of the men. McDonald obtained Jones' telephone number and gave it to Hudson. McDonald heard Hudson call the number and tell the person who answered to return the

money. McDonald also gave Hudson the telephone number of Jones' stepfather, Nathaniel Long.

Hudson and McDonald went to Long's home. Long had previously purchased crack cocaine from Hudson. Hudson told Long that Jones had robbed him of $2,500. Hudson pulled a gun from under his shirt and asked Long the whereabouts of Jones. Long called Jones, and Hudson grabbed the telephone. Hudson said, "[W]hen I see your [expletive] ass, I'm going to kill your [expletive] ass." Long offered to get Hudson the money in a couple of days.

Hudson told Long he would kill Jones as soon as he saw him rather than wait for the money. Hudson also threatened to kill Long and everyone who lived in Long's house. As Hudson and McDonald started to leave, Hudson pulled out his gun and told Long to tell Jones that Hudson had "50 shots for him."

Hudson and McDonald spent several evenings looking for Jones. Meanwhile, Hudson told Robert Sessions that Jones had robbed McDonald of $2,000 of Hudson's money. At about 1 a.m. on May 24, 2005, Hudson called Sessions and told him that Hudson had found Jones. Hudson, McDonald, and Sessions got into a car, with McDonald driving. All three had guns. McDonald saw Jones and pointed him out. Jones was talking to a woman while standing next to a car parked in a driveway. Hudson told McDonald to stop about a half block away. Hudson and Sessions got out and walked toward the house. When they were about two houses away, Sessions heard Hudson put the clip in his gun and a bullet in the chamber. Hudson then pushed Sessions out of the way and started shooting. Hudson fired between 10 and 20 shots. Sessions ran away and did not look back.

After Hudson and Sessions got out of the car, McDonald drove down the street and parked in a driveway. He heard shots fired, and when they stopped, he drove slowly back down the street. He heard his name and saw Hudson come out of the bushes and get in the back of the car. Hudson said he did not know where Sessions was and told McDonald to "[g]et out of here." Hudson told McDonald, "I shot [Jones] out his shoes." Hudson and McDonald returned to the house where they had met earlier. Sessions returned later.

Police found Jones on the ground across the street from the driveway. The first police officer to respond reported that Jones was nonresponsive and that his breathing was shallow. The officer saw no visible injury, but noticed that Jones' shoes were missing. A shoe was found in the street about 10 to 15 feet away. Jones died later at a hospital.

McDonald testified that on June 21, 2005, he was driving a car with his cousin Shenika Johnson and Sessions. They were stopped by police for having fictitious license plates. There was a gun in the glove box, so when the officer asked for insurance papers, McDonald sped off. A high-speed chase followed, during which Sessions threw the gun out of the car. The car crashed into a fence, and McDonald and Sessions got out and ran away. Johnson was taken to police headquarters.

McDonald was later arrested. He agreed to testify against Hudson in exchange for the dismissal of use of a weapon, terroristic threats, and habitual criminal charges. He was convicted of being a felon in possession of a weapon. Sessions was also eventually arrested and agreed to testify.

Over Hudson's objections, Johnson testified to telephone conversations she heard between Hudson and McDonald. Her testimony is further detailed later in this opinion.

Crime scene technicians testified that they examined 12 spent casings from a 9-mm weapon. The casings were found in the same driveway where Jones was discovered. There was also an unfired 9-mm round on the sidewalk nearby. The coroner testified that Jones died from a single gunshot wound to the chest that perforated the left lung and caused bleeding into the chest cavity.

Hudson was convicted and sentenced to life in prison for the murder conviction, 10 to 20 years in prison for the use of a firearm conviction, and 5 to 10 years in prison for possession of a firearm. He was given credit for 609 days served, to be credited against the use of a firearm conviction. All sentences are to be served consecutively.

IV. ASSIGNMENTS OF ERROR

Hudson assigns two errors: (1) The trial court erred in allowing hearsay testimony from Johnson under an exception to the

hearsay rule for statements made by a coconspirator pursuant to § 27-801(4)(b), and (2) there was insufficient evidence to support the convictions.

V. ISSUES PRESENTED

1. Coconspirator Exception to Hearsay

Hudson argues that the trial court committed reversible error when it allowed the State to offer testimony by Johnson under the coconspirator exception to the hearsay rule, § 27-801(4)(b). "'[B]efore the trier of facts may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of the conspiracy must be shown by independent evidence. . . .'" *State v. Gutierrez*, 272 Neb. 995, 1018, 726 N.W.2d 542, 565 (2007), quoting *State v. Bobo*, 198 Neb. 551, 253 N.W.2d 857 (1977). The question is whether the State established the existence of a conspiracy between Hudson and McDonald that would permit the admission of Johnson's testimony regarding a conversation between Hudson and McDonald that Johnson overheard. We examine the evidence presented prior to the time Johnson's statements were admitted.

(a) Evidence Presented at Trial

(i) Sessions' Testimony

Sessions, who had met Hudson and McDonald in prison, testified prior to Johnson. Sessions testified that Hudson told him that McDonald had set up a deal to buy drugs from Jones using Hudson's money. McDonald was robbed of $2,000 of Hudson's money. Sessions said that Jones and another person robbed McDonald at gunpoint. Hudson told Sessions that he was going to beat up Jones because Hudson wanted his money back.

Sessions stated that on May 24, 2005, Hudson called and said that he and McDonald had found Jones. Hudson told Sessions to come to a house on Larimore Avenue. When Sessions got to the house, Hudson and McDonald were sitting on the front porch, drinking a bottle of gin. The three got into a car, and McDonald drove. All three had weapons: Sessions had a .22-caliber semiautomatic pistol, Hudson

had a "TEC-9" with a 50-round clip, and McDonald had a 9-mm handgun.

Sessions testified that McDonald pointed to a man on the street and identified him as Jones. Hudson told McDonald to stop the car about half a block away, and McDonald pulled into a driveway. Hudson and Sessions got out of the car and approached the house. They had their weapons with them. Sessions saw Jones standing next to his car with a female. Hudson got behind Sessions and told him to keep walking. Sessions heard Hudson put the clip in his gun and a bullet in the chamber. When they were about one driveway from Jones, Hudson pushed Sessions out of the way and started shooting at Jones.

Sessions said he had his weapon in his hand, but he froze and did not fire any shots. As soon as the first shots were fired, Sessions saw Jones let go of the woman, spin around, and try to run. He lost a shoe as soon as he hit the driveway. Hudson walked up to Jones and "was shooting at him the whole time." Sessions believed Hudson fired between 10 and 20 shots. Sessions ran away, and when he returned to the house on Larimore Avenue, Hudson and McDonald were on the porch. Sessions then got into his car and went home.

In a few days, Sessions went to the house where Hudson was staying. Hudson, McDonald, and Sessions talked about the shooting. Hudson had the TEC-9 handgun on a stool. He said he had cleaned it with bleach and was going to get rid of it. He told McDonald and Sessions that if they talked to anyone about the shooting, he would kill them, and that if he was in jail, he would find someone to kill them.

Sessions said Hudson continued to call him every day. Sessions stated that within a month of the shooting, Hudson told him that Hudson and McDonald had previously gone to Jones' house and threatened Jones' stepfather with a gun. According to Sessions, Hudson had talked to Jones on the telephone and "they were threatening each other."

Sessions was arrested for drug trafficking in Nevada in May 2006. He first talked to Omaha police in September 2006 after the prosecutor's office agreed that he would not face any charges based on his statement. The prosecuting attorney

in Nevada was told that Sessions was cooperating. All of Sessions' testimony was received without objection before Johnson testified.

(ii) Johnson's Testimony

Johnson testified to a conversation she overheard between Hudson and McDonald regarding a drug deal. Hudson argues it was reversible error to allow the testimony.

Johnson stated that she was aware McDonald was involved in buying drugs, but she claimed she did not know at the time that McDonald had a weapon. When Johnson began to testify about the drug deal, Hudson objected on the basis of hearsay. The State argued that it had established a prima facie case through Sessions that Hudson and McDonald had purchased drugs and that Johnson's statements would be in furtherance of the conspiracy. The trial court sustained the objection. Johnson then testified that she had become aware that McDonald was looking to "'re-up,'" which meant to buy drugs to resell. Johnson said McDonald told her where he obtained the money to buy the drugs and where he was going to buy more drugs.

Johnson testified that she heard McDonald on the telephone with Hudson. She was asked what she heard McDonald say. Hudson's hearsay objection was overruled, and he was granted a continuing objection. Johnson testified she heard McDonald say that he was going to get Hudson's money and put it with McDonald's money to buy more drugs. Johnson said McDonald left to get the money from Hudson and then came back and got her. She rode with McDonald to "Tony's" (Nokia's) house to purchase the drugs. Johnson thought Nokia had set up the transaction.

At Nokia's house, Johnson stayed in the living room on the first floor and Nokia and McDonald went upstairs. At some point, two men arrived and went upstairs. After some time had passed, the two men came down and left quickly. McDonald and Nokia came down 5 or 10 minutes later. Johnson could see that McDonald was angry. She and McDonald left. Johnson drove while McDonald made a telephone call to Hudson. Johnson heard McDonald tell Hudson he had been "jacked" or

robbed of Hudson's money. McDonald and Johnson drove back to the house where McDonald was staying.

On the day of the shooting, Johnson went with McDonald to a house on Larimore Avenue so McDonald could talk to Hudson. Less than an hour after they arrived, Hudson and McDonald left. Johnson stayed to watch television, but later fell asleep. She woke up when Hudson "bust[ed] through the back door," went to the sink, and vomited. Johnson heard Hudson say that "he got that boy. He made him run up out his shoes." Johnson also saw Sessions at the house that night. Johnson did not ask McDonald any questions because she did not want to know what had happened. She saw on the news the next day that Jones had been murdered.

Johnson later learned that McDonald had been charged with terroristic threats. She did not visit him in jail, but she talked to him on the telephone. He told her to go to the police and tell the truth.

(b) Analysis

We find no merit to Hudson's argument that Johnson's testimony should not have been allowed as an exception to the hearsay rule under § 27-801(4)(b)(v). The rule provides that a statement is not hearsay if it is "'offered against a party and is . . . (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.'" See *State v. Hansen*, 252 Neb. 489, 498, 562 N.W.2d 840, 848 (1997). "To be admissible, the statements of the coconspirator must have been made while the conspiracy was pending and in furtherance of its objects." *Id.* "The coconspirator exception to the hearsay rule is applicable regardless of whether a conspiracy has been charged in the information or not." *Id.*

In this case, Hudson and McDonald conspired to purchase illegal drugs for resale. In the course of that transaction, their money was stolen. They conspired to get their money back, and that plan resulted in Jones' being shot. Johnson testified to conversations she heard between Hudson and McDonald related to their plan to purchase drugs. The conspiracy was pending at the time and in furtherance of its objectives. Johnson testified that she heard McDonald on the telephone with Hudson and that

McDonald said he was going to get Hudson's money and put it with his to buy more drugs.

Sessions' testimony was offered at trial prior to Johnson's testimony. Sessions testified that McDonald had used Hudson's money to buy drugs and that the money had been taken by Jones. Sessions had been told by Hudson that McDonald arranged the drug transaction that resulted in the robbery. Hudson stated he planned to beat up Jones to get his money back. Sessions was with Hudson on the night of the murder and testified to the events surrounding it. Thus, Sessions' testimony established the conspiracy to purchase drugs using Hudson's money and Hudson's plans to get his money back from Jones.

[6] The purpose of requiring independent evidence to establish a conspiracy is "'to prevent the danger of hearsay evidence being lifted by its own bootstraps, i.e., relying on the hearsay statements to establish the conspiracy, and then using the conspiracy to permit the introduction of what would otherwise be hearsay testimony in evidence.'" *State v. Gutierrez*, 272 Neb. 995, 1018, 726 N.W.2d 542, 565 (2007), quoting *State v. Bobo*, 198 Neb. 551, 253 N.W.2d 857 (1977). In this case, Sessions' testimony established the conspiracy before Johnson's hearsay testimony was offered.

Hudson argues that Johnson's testimony was inadmissible because Sessions did not testify the drugs were for Hudson. We disagree. Prior to Johnson's testimony about the conversations she heard between Hudson and McDonald, she stated she was aware McDonald was involved in buying drugs and that he planned to "'re-up,'" that is, to use money to buy more drugs and resell them. Sessions testified that McDonald used Hudson's money to buy the drugs and that McDonald was robbed. It is reasonable to infer that Hudson furnished the money to buy the drugs and that McDonald was part of this conspiracy. At the time Johnson's statements were admitted, evidence had been received establishing the conspiracy between Hudson and McDonald to purchase drugs. Johnson then testified about statements made by McDonald to Hudson.

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009). Sessions' testimony provided prima facie evidence of an agreement between Hudson and McDonald to purchase drugs. Johnson had personal knowledge of that agreement. The agreement led to the botched drug deal, which in turn led to the shooting of Jones. The statements made by McDonald that were overheard by Johnson were admissible as those of a coconspirator, and the trial court did not abuse its discretion in overruling Hudson's objection to them.

[7] If there was any error in the admission of Johnson's testimony, it was harmless. In a harmless error review, an appellate court looks at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial was surely unattributable to the error. *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008), *cert. denied* 555 U.S. 1109, 129 S. Ct. 914, 173 L. Ed. 2d 127 (2009). The evidence described above established that the verdict was surely unattributable to the admission of Johnson's testimony. Even if McDonald's statements had not been admitted through Johnson's testimony, the jury would have reached the same verdict of guilty.

2. Sufficiency of Evidence

Following Johnson's testimony, the coroner testified that Jones died from a single gunshot wound to the chest, which perforated his lung and caused bleeding into the chest cavity. Other witnesses testified about cellular telephone records and physical evidence. Jones' stepfather testified as to the threats made by Hudson. McDonald testified about the drug deal, the events of the night of the murder, and the visit to Jones' stepfather's home. Hudson did not testify or offer any evidence.

Hudson and McDonald believed that Jones was one of the people who took their money during a drug transaction. Hudson threatened Jones' stepfather and his family and stated

that he wanted to hurt Jones. Hudson, McDonald, and Sessions drove around looking for Jones. When Jones was sighted outside a house on Fontenelle Boulevard, Hudson told McDonald to stop the car. Hudson and Sessions, who were both armed, walked toward the driveway of the house where Jones was standing with a woman. Sessions heard Hudson load his gun. Hudson pushed Sessions out of the way and began shooting at Jones. Hudson told both McDonald and Sessions that he had shot Jones.

Hudson argues that the testimony of McDonald and Sessions lacked credibility because they were both felons. Sessions met Hudson while incarcerated, and McDonald met Hudson through men he had met in prison. Both made agreements with the State that resulted in lesser charges against them. The jury heard and observed the witnesses and returned a verdict of guilty.

When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009). Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *Id.* Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve. *Id.* The evidence, viewed and construed most favorably to the State, is sufficient to support the convictions.

VI. CONCLUSION

There was no error in the admission of Johnson's testimony. The evidence was sufficient to support the convictions. The judgment of the district court is affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

GLENN T. HOLSAPPLE, JR., APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, A DELAWARE CORPORATION, APPELLEE.

776 N.W.2d 11

Filed December 11, 2009. No. S-09-152.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Federal Acts: Railroads: Negligence: Liability: Damages.** Under the Federal Employers' Liability Act, railroad companies are liable in damages to any employee who suffers injury during the course of employment when such injury results in whole or in part due to the railroad's negligence.
4. **Federal Acts: Railroads.** To be entitled to the protection of the Federal Employers' Liability Act, an injured employee must be acting within the scope of his or her employment at the time of the injury.
5. **Federal Acts: Railroads: Courts.** Scope of employment under the Federal Employers' Liability Act is broadly construed by the federal courts and has been interpreted to encompass acts incidental to employment.
6. **Federal Acts: Railroads: Words and Phrases.** Under the Federal Employers' Liability Act, course and scope of employment includes not only actual service, but also those things necessarily incident thereto, such as going to and from the place of employment.
7. **Federal Acts: Railroads.** In determining whether an employee going to and from work is performing an act necessarily incident to the employment, courts distinguish "traversing" cases from "commuter" cases.
8. ____: ____. In traversing cases, courts have generally held that the employee is acting with the course and scope of employment. In traversing cases, an employee (1) is exposed to risks not confronted by the general public (2) as a result of his or her commute and (3) is injured within close proximity of his or her jobsite (4) while attempting to return to or leave the jobsite (5) within a reasonable time before or after the workday is over.
9. ____: ____. Employer liability in traversing cases does not depend on whether the employer owns or has control over the premises where the employee is injured. Rather, an employee is acting within the course and scope of his or her employment if the employee is injured while traversing across premises which his or her employer has either explicitly or implicitly encouraged the employee to use when going to or returning from work.
10. ____: ____. In commuter cases, courts generally conclude that the Federal Employers' Liability Act does not provide coverage. In commuter cases, (1) the

employee is injured a significant distance from his or her jobsite while commuting to or from the jobsite and (2) the employee is not in any greater danger or exposed to any greater risks than any other member of the commuting public. The Federal Employers' Liability Act is not designed to protect workers from the risks of commuting to which all employees of any employer are exposed.

11. **Federal Acts: Railroads: Liability.** Where an employer knows and implicitly encourages its employees to traverse another's property nearby to get to and from the jobsite, that employer cannot avoid liability under the Federal Employers' Liability Act simply by reason of the fact that it does not own the property.

Appeal from the District Court for Douglas County: W. RUSSELL BOWIE III, Judge. Reversed and remanded for further proceedings.

Christopher J. Moreland, Robert T. Dolan, and Robert E. Dolan, of Yaeger, Jungbauer & Barczak, P.L.C., and John J. Higgins for appellant.

John M. Walker and David J. Schmitt, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Glenn T. Holsapple, Jr., brought this action under the Federal Employers' Liability Act (FELA) for a knee injury he allegedly sustained in the course of his employment. The injury occurred when Holsapple stepped into a hole while walking through an alleyway from a parking lot owned by Union Pacific Railroad Company (UP) to the UP yard office where he reported for work. The district court granted UP's motion for summary judgment, concluding that Holsapple's injury occurred outside the scope of his employment. Holsapple appealed. We transferred the appeal to our docket in accordance with our statutory authority to regulate caseloads of the appellate courts of this state.

BACKGROUND

The facts surrounding the sequence and location of Holsapple's injury are undisputed. Holsapple is employed by

UP as a railroad conductor. He works on a rotating pool; when Holsapple's name reaches the top of the list, he is called into work. When Holsapple is called into work, he must report to the yard office to receive his paperwork and assignment. Holsapple's shift officially starts once he has reported to the yard office and has received his assignment.

On April 14, 2006, Holsapple was called into work and instructed to report to the Marysville, Kansas, yard office no later than 10:30 p.m. Holsapple explained that it takes him approximately 5 minutes to drive from home to work and that he parks wherever he can find a parking spot. There are three parking lots and street parking available for UP employees. UP lets its employees decide where to park. The UP parking lots are not open to the public and are reserved solely for UP employees. Pictures in the record show that the lots are marked with signs stating, "Private Roadway No Trespassing Union Pacific R.R."

On the night Holsapple was injured, he parked in what he referred to as the "east lot." The east lot is owned by UP. The east lot is bisected by an alleyway that runs east to west and serves as both the entrance and exit driveway to the parking lot. The yard office is located on the west end of the alleyway. In order to get to the yard office from the east lot, employees must walk through either the parking lot or the alleyway and then cross the street on the west side of the lot.

The alleyway is owned by the city of Marysville as evidenced by a survey conducted by the vice president of a Marysville engineering and surveying company. UP was aware that its employees routinely traversed the alleyway to get from the east lot to the UP yard office. Additionally, UP has marked the alleyway as private property. Signs posted marking the alleyway state: "Private Roadway No Trespassing Union Pacific R.R." UP denies that it has control over the alleyway or that it has a responsibility to make sure the alleyway is safe for travel. Other than the signs marking the alleyway as a private roadway, there is no evidence in the record establishing that UP had an agreement with Marysville for its employees to use the alleyway or that UP had agreed to indemnify Marysville. It was, however, UP and not the city of Marysville that

repaired the hole in the alleyway after the accident that caused Holsapple's injury.

Holsapple's injury occurred while he was walking from the east lot to the yard office to report for duty. Holsapple testified that he parked his car, exited the car, and started to walk through the alleyway toward the yard office. As he was walking through the alleyway, he stepped into a hole. Holsapple's injury occurred approximately 15 minutes before he was scheduled to report to the yard office.

Holsapple maintains that his injury occurred in the course and scope of his employment and that therefore, the FELA applies. Holsapple testified that he thought the injury occurred "on company property because it was a company parking lot." Holsapple also stated, "I was also on duty because I was going to work. The only reason I was there because I was going to work . . . ." UP maintains that Holsapple's injury occurred outside the course and scope of his employment and is thus not covered under the FELA. UP's argument is based on the fact that Holsapple had not picked up his paperwork from the yard office. UP maintains that this is when an employee's shift begins. UP also relies on the fact that Holsapple's injury occurred at 10:15 p.m., 15 minutes before he was required to report for duty.

Holsapple brought suit against UP under the FELA, alleging that he was injured while performing a duty necessarily incident to his employment. Holsapple further alleged that his injuries were caused, in whole or in part, by UP's negligence in violation of the FELA. The court granted UP's motion for summary judgment and dismissed Holsapple's cause of action under the FELA, concluding that Holsapple was not within the course and scope of his employment at the time of his injury. The court reasoned that Holsapple's injury occurred before he was to report for duty and before he picked up his paperwork at the yard office. Additionally, the court noted that his injury occurred in the alleyway owned by the city of Marysville, not UP. The court also relied on the fact that Holsapple chose his means of transportation and where to park. Thus, the court concluded that Holsapple was not acting within the course and scope of his employment. Holsapple brought this appeal.

ASSIGNMENT OF ERROR

Holsapple argues the court erred in finding that he was not acting in the course and scope of his employment with UP at the time of his injury.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1]

[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[2]

ANALYSIS

As a preliminary matter, we will address the proper standard of review. The underlying facts surrounding how and when Holsapple's injury occurred are undisputed. As such, the only issue for the summary judgment motion was the legal effect of those facts. The question is whether under those facts, Holsapple was acting within the course and scope of employment for purposes of the FELA. We hold that this presents a question of law.[3]

[3-6] This case presents the question of whether an employee is acting in the course and scope of employment while walking from a company parking lot and through public property on the way into work. This is an issue of first impression for our court. We have explained that under the FELA, railroad companies are liable in damages to any employee who suffers injury

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[1] *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008).

[2] *Id.*

[3] See, *Rogers v. Chicago & North Western Transp. Co.*, 947 F.2d 837 (7th Cir. 1991); *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997). See, also, *Keovorabouth v. Industrial Com'm*, 222 Ariz. 378, 214 P.3d 1019 (Ariz. App. 2009); *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998).

during the course of employment when such injury results in whole or in part due to the railroad's negligence.[4] To be entitled to the protection of the FELA, an injured employee must be acting within the scope of his or her employment at the time of the injury.[5] Scope of employment under the FELA is broadly construed by the federal courts[6] and has been interpreted to encompass acts incidental to employment.[7] Course and scope of employment includes not only actual service, but also those things necessarily incident thereto, such as going to and from the place of employment.[8]

[7-9] In determining whether an employee going to and from work is performing an act necessarily incident to the employment, cases from other jurisdictions distinguish "traversing" cases from "commuter" cases.[9] In traversing cases, courts have generally held that the employee is acting within the course and scope of employment.[10] In traversing cases, an employee (1) is exposed to risks not confronted by the general public[11] (2) as a result of his or her commute and (3) is injured within close proximity of his or her jobsite[12] (4) while attempting to

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[4] *McNeel v. Union Pacific RR. Co., supra* note 1.

[5] *Wilson v. Chicago, Milwaukee, St. Paul, & Pac. R.*, 841 F.2d 1347 (7th Cir. 1988); *Moore v. Chesapeake & O. Ry. Co.*, 649 F.2d 1004 (4th Cir. 1981); *Betoney v. Union Pacific R. Co.*, 701 P.2d 62 (Colo. App. 1984). See 45 U.S.C. § 51 et seq. (2006).

[6] *Erie R. R. Co. v. Winfield*, 244 U.S. 170, 37 S. Ct. 556, 61 L. Ed. 1057 (1917); *Ponce v. Northeast Illinois Regional Commuter R.R.*, 103 F. Supp. 2d 1051 (N.D. Ill. 2000).

[7] *Erie R. R. Co. v. Winfield, supra* note 6; *Schneider v. National R.R. Passenger Corp.*, 854 F.2d 14 (2d Cir. 1988); *Sassaman v. Pennsylvania R. Co.*, 144 F.2d 950 (3d Cir. 1944); *Ponce v. Northeast Illinois Regional Commuter R.R. Corp., supra* note 6. See *Cudahy Co. v. Parramore*, 263 U.S. 418, 44 S. Ct. 153, 68 L. Ed. 366 (1923).

[8] See, *Erie R. R. Co. v. Winfield, supra* note 6; *Virginian Ry. Co. v. Early*, 130 F.2d 548 (4th Cir. 1942).

[9] *Caillouette v. Baltimore & Ohio Chicago Terminal R.*, 705 F.2d 243 (7th Cir. 1983).

[10] See *Ponce v. Northeast Illinois Regional Commuter R.R., supra* note 6.

[11] See *Caillouette v. Baltimore & Ohio Chicago Terminal R., supra* note 9.

[12] See *Carter v. Union Railroad Company*, 438 F.2d 208 (3d Cir. 1971).

return to or leave the jobsite[13] (5) within a reasonable time before or after the workday is over.[14] Employer liability in traversing cases does not depend on whether the employer owns or has control over the premises where the employee is injured.[15] Rather, an employee is acting within the course and scope of his or her employment if the employee is injured while traversing across premises which his or her employer has either explicitly or implicitly encouraged the employee to use when going to or returning from work.[16]

[10] In commuter cases, courts generally conclude that the FELA does not provide coverage.[17] In commuter cases, (1) the employee is injured a significant distance from his or her jobsite and while commuting to or from the jobsite[18] and (2) the employee is not in any greater danger or exposed to any greater risks than any other member of the commuting public.[19] These courts hold that the FELA is not designed to protect workers from the risks of commuting to which all employees of any employer are exposed.[20]

In rejecting Holsapple's argument that he was acting within the course and scope of his employment at the time of his injury, the district court relied on *Sassaman v. Pennsylvania R. Co.*,[21] *Metropolitan Coal Company v. Johnson*,[22] and *Getty v.*

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[13] See *Erie R. R. Co. v. Winfield, supra* note 6.

[14] See *Carter v. Union Railroad Company, supra* note 12.

[15] See, *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 83 S. Ct. 1667, 10 L. Ed. 2d 709 (1963); *Kooker v. Pittsburgh & Lake Erie Railroad Co.*, 258 F.2d 876 (6th Cir. 1958); *Chicago Great Western Railway Company v. Casura*, 234 F.2d 441 (8th Cir. 1956).

[16] See *Empey v. Grand Trunk Western R. Co.*, 869 F.2d 293 (6th Cir. 1989). See, also, *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 48 S. Ct. 221, 72 L. Ed. 507 (1928); *Carter v. Union Railroad Company, supra* note 12.

[17] *Caillouette v. Baltimore & Ohio Chicago Terminal R., supra* note 9.

[18] See *Schneider v. National R.R. Passenger Corp., supra* note 7.

[19] *Caillouette v. Baltimore & Ohio Chicago Terminal R., supra* note 9.

[20] See, *Ponce v. Northeast Illinois Regional Commuter R.R., supra* note 6; *Caillouette v. Baltimore & Ohio Chicago Terminal R., supra* note 9.

[21] *Sassaman v. Pennsylvania R. Co., supra* note 7.

[22] *Metropolitan Coal Company v. Johnson*, 265 F.2d 173 (1st Cir. 1959).

Boston and Maine Corporation.[23] The facts of those cases are distinguishable from the facts in the case at bar.

In *Sassaman v. Pennsylvania R. Co.*,[24] a railroad worker was injured when he stepped off one of his employer's trains, 9 miles from the jobsite, while returning home from work. The trains were open to the general public as a mode of transportation. The employee's injury occurred far away from his jobsite. Nevertheless, the injured employee insisted that the FELA applied because he was still on his employer's premises when he was injured. The court disagreed:

> [T]he condition which makes possible a claim for injuries suffered as in the course of employment but which are actually received on premises away from the employee's place of employment is the fact that the employee must, of necessity, traverse such other premises in order to reach or depart from the place of the discharge of his duties.[25]

The court explained that the deciding fact was not whether the employee was injured on employer property. To illustrate, the court noted that if an employee is injured while on property adjacent to employer property, but his or her employer has knowledge and consents to the use of the adjacent property, then the employee is discharging a duty incident to his employment and the FELA would apply.[26] In *Metropolitan Coal Company v. Johnson*,[27] employing the rationale in *Sassaman*, the court held that an employee possessing a free pass and injured while commuting to work aboard an express train owned by his employer, but open to the public, was not within the scope of employment. The court reasoned that although the employee was on his employer's premises when injured, he was not on a part of the premises which was necessary for him to reach work. Further, the court stressed that while riding

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[23] *Getty v. Boston and Maine Corporation*, 505 F.2d 1226 (1st Cir. 1974).

[24] *Sassaman v. Pennsylvania R. Co., supra* note 7.

[25] *Id.* at 953.

[26] *Sassaman v. Pennsylvania R. Co., supra* note 7.

[27] *Metropolitan Coal Company v. Johnson, supra* note 22.

on the passenger train, the employee was not exposed to any greater hazards than any of the other passengers who were not employees.

The employee in *Getty v. Boston and Maine Corporation*[28] was likewise injured while riding a commuter train owned by his employer but open to the public. However, the employee in *Getty* tried to distinguish his case by arguing that recently fallen snow made any alternative mode of transportation to work impossible. In other words, the employee argued that he was compelled to ride his employer's train due to inclement weather and that therefore, the FELA applied. In rejecting this argument, the court reasoned that the employee's decision to use his employer's train to get to work did not stem directly from a specific requirement of his job or from a specific understanding between himself and his employer regarding his mode of transportation.[29] In conclusion, the court stated, "We perceive no reason why he should receive favored treatment simply because he happened to be employed by the operator of the public conveyance."[30]

Unlike the facts of this case, all three of the aforementioned cases involve a situation where an employee is injured a great distance from his jobsite by means of one of his employer's passenger trains. We find the traversing cases more applicable to the facts of this case. For instance, in *Erie R. R. Co. v. Winfield*,[31] the U.S. Supreme Court applied the traversing rule where an employee was struck and killed by a switch engine shortly after he had put his engine away for the night and was crossing the carrier's yard on his way home. The Court held that in leaving the carrier's yard at the close of his day's work, the employee was engaged in a "necessary incident of his day's work" and was, thus, discharging a duty of his employment.[32]

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[28] *Getty v. Boston and Maine Corporation, supra* note 23.

[29] *Id.*

[30] *Id.* at 1228.

[31] *Erie R. R. Co. v. Winfield, supra* note 6.

[32] *Id.*, 244 U.S. at 173.

Following this reasoning, the court in *Morris v. Pennsylvania R. Co.*[33] noted that the deceased employee was acting within the course and scope of his employment when killed on his employer's property shortly before he was to report for work.

In *Caillouette v. Baltimore & Ohio Chicago Terminal R.*,[34] the Seventh Circuit Court of Appeals held that a switchman employed by the railroad was within the course and scope of employment when he tripped over wires while crossing his employer's premises to report for duty. The court explained that the employee "had to, of necessity, cross some part of the worksite to reach the place where he was to report" to work.[35] Central to the court's conclusion that the employee was injured in the course and scope of his employment was the fact that he was injured in an area not open to the public and was thus subjected to dangers beyond those experienced by the general commuting public.[36]

In *Carter v. Union Railroad Company*,[37] a Union Railroad Company (Union Railroad) employee was injured on his way into work while traversing property owned by another corporation. Union Railroad was aware that its employees routinely traversed this property. The property owner had, in fact, entered into an agreement with Union Railroad whereby Union Railroad was given permission for its employees to traverse the property in exchange for Union Railroad's agreement to indemnify the property owner. Union Railroad did not, however, have any authority or control over the property. Nor did it bear any responsibility for maintaining the property. In concluding that the FELA applied, the court said: "While the parking lot used and the property crossed by [the employee] belonged to [another], the use thereof by railroad employees was within the expectations and intentions of the railroad. [Union Railroad] went to great lengths to make the parking lot available to its

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[33] *Morris v. Pennsylvania R. Co.*, 187 F.2d 837 (2d Cir. 1951).

[34] *Caillouette v. Baltimore & Ohio Chicago Terminal R., supra* note 9.

[35] *Id.* at 246.

[36] *Id.*

[37] *Carter v. Union Railroad Company, supra* note 12.

employees."[38] The court went on to conclude that the FELA imposes a nondelegable duty to use reasonable care to furnish a safe place to work.[39] Further, the court held that this duty extends beyond the employer's premises to property which employees are encouraged or required to use and which a third person, rather than the employer, has a primary obligation to maintain.[40]

Although no Nebraska decision has considered whether an employee is acting within the course and scope of employment for purposes of applying the FELA, we have considered whether an employee is acting within the course and scope of employment for workers' compensation purposes. In *La Croix v. Omaha Public Schools*,[41] the plaintiff was encouraged by her employer to park in a parking lot not owned by the employer and to use a shuttle service supplied by the employer to get to her work premises. While on her way to board the shuttle bus, the plaintiff fell in the parking lot and was injured. We held that by encouraging employees to park in the lot and providing transportation to the workplace from the lot, the employer created a condition under which its employees would necessarily encounter hazards while traveling to the premises where they work. We concluded that there was a distinct and causal connection between the employer's sponsoring of the parking lot and the plaintiff's injury. Because of this causal connection, we concluded the plaintiff's injury arose out of and in the course of her employment.

In a case arising under the Utah Workmen's Compensation Act, the court in *Bountiful Brick Co. v. Giles*[42] provided a useful discussion of the scope of employment. The court stated:

> [E]mployment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the

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[38] *Id.* at 210.

[39] *Id.*

[40] *Carter v. Union Railroad Company, supra* note 12.

[41] *La Croix v. Omaha Public Schools, supra* note 3.

[42] *Bountiful Brick Co. v. Giles, supra* note 16.

> work is to be done. If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment as much as though it had happened while the employee was engaged in his work at the place of its performance.[43]

Although *Bountiful Brick Co.* was decided under Utah's workers' compensation laws, it has been cited with approval by several other courts in the FELA context and is instructive.[44]

We conclude that Holsapple was injured while in the course and scope of his employment. At the time of his injury, Holsapple was within close proximity to the yard office. His injury occurred while he was on his way to report for duty and occurred shortly before he was scheduled to report for duty. It was a necessary incident of the workday for Holsapple to walk from his car to the yard office to report for duty.

[11] In walking from his car to report for duty, Holsapple was exposed to dangers and risks not shared by the general public. The alleyway was not open to the general public. UP strategically placed signs restricting the use of the alleyway to UP employees. Further, UP was fully aware that its employees routinely traversed the alleyway to and from the east lot. Not only was UP fully aware that its employees routinely traversed the alleyway, but UP has restricted the access to the alleyway to UP employees as evidenced by the signs. And in doing so, UP has effectively encouraged its employees to use the alleyway. There is a distinct causal connection between UP's encouraging its employees to traverse the alleyway and Holsapple's injury. As already discussed, where an employer knows and implicitly encourages its employees to traverse another's property nearby to get to and from the jobsite, that employer cannot avoid liability under the FELA simply by reason of the fact that it does not own the property. For these reasons, we conclude

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[43] *Id.*, 276 U.S. at 158.

[44] See *Caillouette v. Baltimore & Ohio Chicago Terminal R., supra* note 9.

that the district court should not have granted summary judgment in favor of UP.

CONCLUSION

Based on the facts of this case, we conclude that the principles set forth in the commuter cases are not applicable. Rather, we conclude that the facts of this case fit within the traversing line of cases and that therefore, Holsapple's injury occurred within the course and scope of his employment for purposes of the FELA. As such, UP was not entitled to judgment as a matter of law. We reverse the summary judgment entered in UP's favor and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ANNE UNDERHILL, APPELLANT, V. SHILOH HOBELMAN, APPELLEE.

776 N.W.2d 786

Filed December 18, 2009. No. S-09-150.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
4. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

Gary J. Nedved and Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellant.

Travis P. O'Gorman, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

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

PER CURIAM.

NATURE OF CASE

The sole issue in this appeal is whether an amendment to Neb. Rev. Stat. § 54-601 (Reissue 2004), which inserted the word "injuring" to the list of recoverable actions, expands the statute's coverage to include damages caused by a dog's playful or mischievous behavior. Anne Underhill filed a complaint against Shiloh Hobelman, seeking damages for injuries she sustained when Hobelman's dog ran into her knee, causing her to fall. Underhill appeals the district court's order granting partial summary judgment in favor of Hobelman. The district court concluded that Hobelman was not strictly liable pursuant to § 54-601 for Underhill's injuries, because the dog was not acting maliciously. We affirm the decision of the district court.

BACKGROUND

The facts of this case are undisputed. Underhill and Hobelman are friends. On December 31, 2005, Underhill went to meet Hobelman at his dormitory room so that the two could go out for dinner. Underhill parked her car and, as she was walking toward Hobelman's dormitory room, she saw Hobelman's mother walking Brady, Hobelman's golden retriever. Brady has been trained to assist Hobelman with his day-to-day tasks, and Brady responds to both verbal commands and hand gestures. Brady recognized Underhill and began wagging his tail. Because Underhill was familiar with Brady, Hobelman's mother let him off his leash to greet Underhill.

Once Brady was off the leash, he started running toward Underhill. Underhill testified at her deposition that Brady was not running at her in a threatening manner and that he did not display any intent to harm her. However, Brady was running very fast and he ran into Underhill's left knee, causing her to lose her balance and fall. As a result of this fall, Underhill

suffered injuries to her knee, which required surgery. Because Underhill could no longer afford her medical bills, she filed suit against Hobelman.

Underhill filed suit against Hobelman, asserting two theories of recovery: strict liability pursuant to § 54-601 and negligence. Underhill subsequently dismissed her cause of action for negligence. Underhill's main argument on appeal is that the amendment to § 54-601 inserting the word "injuring" to the list of recoverable damages expands the scope of coverage to include damages caused from a dog's playful or mischievous behavior.

The district court concluded that the amendment to § 54-601 was not intended to expand coverage from injuries sustained from a dog's playful or mischievous conduct. In so concluding, the district court explained that it is bound by the doctrine of vertical stare decisis and that thus, it relied on previous case law interpreting § 54-601 to exclude from its coverage the playful and mischievous acts of dogs. Underhill appealed, and we granted her petition to bypass the Nebraska Court of Appeals.

ASSIGNMENT OF ERROR

Underhill alleges, restated and consolidated, that the district court erred in granting partial summary judgment in favor of Hobelman, concluding that Hobelman was not strictly liable pursuant to § 54-601 because his dog was acting playfully and not maliciously.

STANDARD OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom

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[1] *Erickson v. U-Haul Internat.*, 278 Neb. 18, 767 N.W.2d 765 (2009).

the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.[2]

[3] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[3]

ANALYSIS

This appeal turns on our application of § 54-601, which provides in relevant part that

> the owner or owners of any dog or dogs shall be liable for any and all damages that may accrue (1) to any person . . . by reason of having been bitten by any such dog or dogs and (2) to any person . . . by reason of such dog or dogs killing, wounding, injuring, worrying, or chasing any person or persons.

In *Donner v. Plymate*,[4] we reasoned that "the Legislature was fully aware of the need for protection from the intentional, deliberate, and purposeful acts of dogs and as a result restricted [§ 54-601] to those acts manifesting such qualities." As a result, we held that § 54-601 excluded strict liability for damages caused by "playful and mischievous acts of dogs."[5]

Underhill does not argue that our holding in *Donner* was incorrect. Rather, Underhill argues that 1992 Neb. Laws, L.B. 1011, abrogated our holding in *Donner* by adding the word "injuring" to the list of harms that could support liability. We agree with the general presumption that the Legislature, in adopting an amendment, intended to make some change in the existing law and that we should give effect to that change.[6] But the legislative record does not support Underhill's interpretation of L.B. 1011.

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[2] *Id.*

[3] *Metropolitan Comm. College Area v. City of Omaha*, 277 Neb. 782, 765 N.W.2d 440 (2009).

[4] *Donner v. Plymate*, 193 Neb. 647, 649-50, 228 N.W.2d 612, 614 (1975).

[5] *Id.* at 650, 228 N.W.2d at 614. Accord *Holden v. Schwer*, 242 Neb. 389, 495 N.W.2d 269 (1993).

[6] See *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994).

Instead, the legislative record makes clear that L.B. 1011 was prompted by a court decision in which an injured person had been unable to recover for a broken hip that had allegedly been caused by a dog, because it was not a "wound" within the meaning of § 54-601.[7] The purpose of L.B. 1011 was to expand the scope of § 54-601 to include "internal damages even if there are no external damages caused by the owner's dog."[8] It did not address *Donner*, either implicitly or explicitly.

[4] When we judicially construe a statute and that construction fails to evoke an amendment, we presume that the Legislature has acquiesced in our determination of its intent.[9] And we presume that when we have construed a statute and the same statute is substantially reenacted, the Legislature gave to the language the significance we previously accorded to it.[10] Nothing in the plain language of L.B. 1011, or its legislative history, rebuts the presumption that the Legislature acquiesced to our holding in *Donner* and reenacted § 54-601 without affecting that holding. We find no merit to Underhill's assignment of error.

CONCLUSION

Relying on our holding in *Donner*, the district court correctly granted summary judgment for Hobelman. The judgment of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

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[7] See, generally, Agriculture Committee Hearing, L.B. 1011, 92d Leg., 2d Sess. (Jan. 28, 1992).

[8] Introducer's Statement of Intent, L.B. 1011, Agriculture Committee, 92d Leg., 2d Sess. (Jan. 28, 1992).

[9] See *Lagemann v. Nebraska Methodist Hosp.*, 277 Neb. 335, 762 N.W.2d 51 (2009).

[10] See *Brown v. Kindred*, 259 Neb. 95, 608 N.W.2d 577 (2000).

MCCORMACK, J., dissenting.

I respectfully dissent.

This appeal turns on our application of § 54-601, which was revised in 1992 and provides in relevant part that

> the owner or owners of any dog or dogs shall be liable for any and all damages that may accrue (1) to any person . . . by reason of having been bitten by any such dog or dogs and (2) to any person . . . by reason of such dog or dogs killing, wounding, injuring, worrying, or chasing any person or persons.

Prior to 1992, the word "injuring" was not in the statute. Given the current plain and unambiguous language of § 54-601, I would impose liability where a person was injured by a dog without regard to the intent of the dog at the moment of impact. Thus, in the instant case, I would reverse.

Donner v. Plymate,[1] upon which the district court relied, was decided in 1975 under the 1961 version of the statute, which did not include the word "injuring." At issue in *Donner* was whether the statute then in effect supported liability when a plaintiff was hurt by a dog that was simply being playful. In *Donner*, we noted that prior to passage of § 54-601 at common law, a plaintiff suing a dog owner for damage inflicted by a dog was required to prove that the dog owner had knowledge of the dangerous propensities of the dog.[2] In other words, every dog was entitled to "'one free bite.'"[3] However, § 54-601 created a cause of action based upon strict liability on the part of a dog owner and we have consistently referred to § 54-601 as a strict liability statute.[4]

In *Donner*, we stated that the enactment of § 54-601 "removed the common law restriction of proving scienter or knowledge of the dangerous propensities of dogs, but only as it applied to the actions of dogs specified in the statute."[5] We then discussed the statutory terms then in effect, which created strict liability for damages inflicted by a dog that was biting,

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[1] *Donner v. Plymate*, 193 Neb. 647, 228 N.W.2d 612 (1975).

[2] See, e.g., *Netusil v. Novak*, 120 Neb. 751, 235 N.W. 335 (1931).

[3] See *State v. Ruisi*, 9 Neb. App. 435, 442, 616 N.W.2d 19, 26 (2000), *disapproved on other grounds, State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

[4] See, e.g., *Kenney v. Barna*, 215 Neb. 863, 341 N.W.2d 901 (1983); *Paulsen v. Courtney*, 202 Neb. 791, 277 N.W.2d 233 (1979).

[5] *Donner v. Plymate, supra* note 1, 193 Neb. at 649, 228 N.W.2d at 614.

"killing, wounding, worrying, or chasing" a person or domestic animal.[6] We examined the definitions of those terms, each of which we determined implied an aggressive act by the dog. We therefore concluded that when the words which were then present in the statute were read together, they impliedly excluded playful and mischievous acts of dogs.[7]

The language upon which we based our holding in *Donner* and subsequent cases was amended by 1992 Neb. Laws, L.B. 1011. Evidently, the Legislature found § 54-601 wanting and expanded the scope of § 54-601 to include liability for a dog's "injuring" of a person or domestic animal. We are now asked to examine and apply the language of § 54-601 as it was revised in 1992 to the facts of this case, which facts the parties agree involve an injury to Hobelman by a dog not acting viciously.

As an initial matter, we note that to "injure" someone simply means to "do physical harm or damage."[8] Thus, unlike the language we relied upon in *Donner*, injure does not imply intent, aggression, or malice on the part of the dog. In fact, the word "injury" is commonly used in law to describe the physical consequences of an accident,[9] and the phrase "accidental injury" is regularly used and understood.[10]

We are aware that forms of the word "injuring" are used in other state statutes dealing with dogs harming humans. The courts in other states commonly conclude that where the word "injure" is included in the statute, strict liability is imposed without reference to the malice of the dog. In *Boitz v. Preblich*,[11] the court stated that "[t]he statutory language

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[6] *Id.* at 650, 228 Neb. at 614.

[7] *Id.*

[8] Concise Oxford American Dictionary 460 (2006).

[9] See, e.g., Neb. Rev. Stat. §§ 48-101 and 48-151(4) (Reissue 2004).

[10] See, e.g., *Busch v. Omaha Pub. Sch. Dist.*, 261 Neb. 484, 623 N.W.2d 672 (2001).

[11] *Boitz v. Preblich*, 405 N.W.2d 907, 910 (Minn. App. 1987). See, similarly, *Fifer v. Dix*, 234 Wis. 2d 117, 608 N.W.2d 740 (Wis. App. 2000); *Meunier v. Ogurek*, 140 Wis. 2d 782, 412 N.W.2d 155 (Wis. App. 1987).

[injuries] does not indicate a limitation to vicious attacks" and that "injuries inflicted by a dog outside the scope of a vicious attack are not, as a matter of law, excluded from coverage under the statute."

In *Donner*, we reasoned that the actions listed in § 54-601 then in effect implied that our strict liability statute did not apply to playful or mischievous acts of dogs. Whatever may have been the merits of this court's reasoning in *Donner*, that reasoning is not applicable to the amended language of § 54-601, the plain language of which permits recovery for accidental injuries.

As noted, at common law, a dog owner was liable if he or she knew of a dog's "vicious or *mischievous* propensities" and failed to protect others from injury.[12] Section 54-601 removed the common-law restriction of proving the owner's knowledge of the dog's propensities. Considering a similar development, the Florida Supreme Court observed in a dogbite case that "'the subject [Florida] statute modified the common law, in that it makes the dog owner the insurer against damage by his dog with certain exceptions'" and that the statute "'supersedes the common law, only in those situations covered by the statute.'"[13]

By the addition of "injuring," the current plain and unambiguous statutory language implies no distinction based upon whether the plaintiff's injury resulted from hostile or playful behavior on the part of the dog. The 1992 amendment to this strict liability statute added an additional situation which was covered by the statute and one which is not implicitly aggressive. Under § 54-601, liability will be imposed by reason of a dog injuring a person. As the court stated in *Fifer v. Dix*,[14] "it is not our role to create exceptions to the operation of a strict liability statute by 'implication or statutory construction.'" As

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[12] *Netusil v. Novak, supra* note 2, 120 Neb. at 754, 235 N.W. at 337 (emphasis supplied).

[13] *Donner v. Arkwright-Boston Manufacturers Mut.*, 358 So. 2d 21, 24 (Fla. 1978).

[14] *Fifer v. Dix, supra* note 11, 234 Wis. 2d at 125, 608 N.W.2d at 744.

the court stated in *Meunier v. Ogurek*,[15] the liability of "dog owners depends on the terms of the statute, not on judge-made law." The current terms of § 54-601 do not require the court, or the trier of fact, to make the difficult evaluation of a dog's intent in inflicting injury,[16] although the trier of fact may be asked to decide whether the dog was provoked,[17] or whether the plaintiff was aware of the dog's propensities and assumed the risk of injury.[18] But those issues have not been presented in this appeal.

I conclude that the district court erred in entering summary judgment based upon this court's decision in *Donner* and not the plain language of the current version of § 54-601. And I would therefore reverse the judgment of the district court and remand the cause for further proceedings.

MILLER-LERMAN, J., joins in this dissent.

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[15] *Meunier v. Ogurek, supra* note 11, 140 Wis. 2d at 786, 412 N.W.2d at 156.

[16] *Holden v. Schwer*, 242 Neb. 389, 495 N.W.2d 269 (1993) (White, J., dissenting).

[17] *Paulsen v. Courtney, supra* note 4.

[18] See *Corley v. Hubbard*, 129 Neb. 38, 260 N.W. 551 (1935).

VIRGINIA SINSEL, MOTHER AND NEXT FRIEND OF HEIDI SINSEL, A MINOR CHILD, APPELLEE AND CROSS-APPELLANT, V. LINDA OLSEN, PARENT AND NEXT FRIEND OF JACOB OLSEN, A MINOR CHILD, AND JACOB OLSEN, APPELLANTS AND CROSS-APPELLEES.

777 N.W.2d 54

Filed December 24, 2009. No. S-09-003.

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

3. **Parent and Child.** The parent-child relationship is a special relationship that can require parents in some circumstances to control the conduct of their child.
4. **Parent and Child: Liability.** Parents can be liable for failing to exercise reasonable care to prevent injury to others only when their child has a dangerous habit of causing harm to others and the parents know of the child's habitual, dangerous propensity.
5. **Negligence: Parent and Child: Liability.** Parents are not liable for negligent supervision where the record lacks any evidence indicating the parents were aware the child was prone to commit the particular act or course of conduct which led to the plaintiff's injury.

Appeal from the District Court for Kearney County: STEPHEN R. ILLINGWORTH, Judge. Reversed and vacated in part, and cause remanded for further proceedings.

Betty L. Egan and Richard C. Gordon, of Walentine, O'Toole, McQuillan & Gordon, for appellants.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, and Bryan S. McQuay, of Person & McQuay, for appellee.

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

PER CURIAM.

NATURE OF THE CASE

Virginia Sinsel, mother and next friend of Heidi Sinsel, sued the appellants, Jacob Olsen, a minor, and his mother, Linda Olsen. Sinsel claimed Jacob was negligent in throwing fireworks at Heidi and injuring her. She also claimed that Olsen was negligent in failing to supervise him. The district court overruled Olsen's motion for a directed verdict regarding Sinsel's claim of negligent supervision. The jury returned separate verdict forms, awarding Sinsel $50,000 for Jacob's negligence and $75,000 for Olsen's negligence.

The issues are whether the court erred in failing to (1) find, as a matter of law, that the evidence was insufficient to show Olsen's negligent supervision and (2) instruct the jury to allocate negligence between Olsen and Jacob for Heidi's noneconomic damages.

BACKGROUND

Facts Relevant to Claim of Jacob's Negligence

On July 4, 2005, Jacob, who was then age 15, attended a fireworks display in Minden, Nebraska; Olsen did not accompany him. He brought his own fireworks and, at some point, threw fireworks toward a group of teenagers, injuring Heidi. Heidi was sitting in a golf cart with friends when she was struck by particles from the fireworks that Jacob had thrown. The particles burned Heidi on her chest and neck. The injury left a small scar on her chest.

Facts Relevant to Negligent Supervision Claim

To support her negligent supervision claim, Sinsel presented evidence of Jacob's behavior problems after his parents separated, his conflicts with Olsen, and Olsen's difficulty in controlling his behavior.

Jacob's parents separated in 2002, and divorced in 2004. During their separation, Olsen had custody of Jacob during the week. In January 2004, when he was age 13, the police responded to a call at a middle school basketball game because Jacob had displayed a pocketknife while engaging in name-calling with students from another school. Olsen grounded Jacob for 2 weeks.

When Jacob was 14, his father cosigned on a loan so Jacob could purchase a pickup. Jacob paid for his pickup by working for his father's feedlot company. Olsen, however, did not allow Jacob to drive on his school driving permit unless she was with him because she was concerned that he would not drive safely or would drive to places other than school. But in August 2004, Jacob drove his pickup to school and had an accident in the parking lot. The other driver claimed that Jacob backed his pickup into her vehicle; he denied it. According to Jacob, the other vehicle had a scratched bumper and the police could not determine that he had backed his pickup into the other vehicle.

Olsen admitted that Jacob had been a rebellious teenager and made bad decisions. She and Jacob had had arguments over his behavior problems, some of which had become physical. In October 2004, Olsen confronted Jacob about driving his

pickup to a place she had told him not to go, but he had left while she was still at work. When Olsen tried to take his keys away, he pushed or shoved her, causing her to fall and hit the back of her head. She got up and slapped him. Jacob went to his father's house, and his father called the police.

Later, in May 2005, one of Jacob's teachers wrote on his progress report that his behavior and attitude needed monitoring. Also, a teacher had previously told Olsen during a parent conference that Jacob had behavior problems. Olsen testified that she tried to monitor Jacob closely to make him behave, do his homework, and be at home. Jacob stated that Olsen made him do many chores.

Jacob testified that Olsen occasionally permitted him to go out alone. About a week before Heidi was injured, Olsen allowed Jacob to go out unsupervised for an hour or two. During this time, someone reported to the police that Jacob, while a passenger in another minor's vehicle, was throwing fireworks out the window into a residential yard. A police officer issued him a warning but did not contact Olsen. Olsen was not aware that Jacob had obtained fireworks or that he had thrown them into a residential yard until the night of July 4, 2005—when officers came to her house to tell her Heidi had been burned.

Pretrial Proceedings and Jury's Awards

Before trial, the court sustained Sinsel's motion for partial summary judgment, finding that Jacob was negligent as a matter of law. It overruled Olsen and Jacob's motions for summary judgment. The court did not instruct the jury to allocate negligence between Olsen and Jacob. On separate verdict forms, the jury returned an award for Sinsel against Jacob for $50,000 and against Olsen for $75,000.

ASSIGNMENTS OF ERROR

Olsen and Jacob assign, restated, that the court erred in overruling their motion for directed verdict on the negligent supervision claim, failing to properly instruct the jury on the allocation of negligence, and entering judgment on an excessive verdict.

On cross-appeal, Sinsel assigns that the court erred in assessing prejudgment interest using the rate in effect on the day of the judgment.

STANDARD OF REVIEW

[1] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.[1]

[2] Whether a jury instruction is correct is a question of law, which we independently decide.[2]

ANALYSIS

Jacob's Negligence Was Not Reasonably Foreseeable

[3] Under the Restatement (Second) of Torts,[3] the parent-child relationship is a special relationship that can require parents in some circumstances to control the conduct of their child.

Section 315 of the Restatement provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.[4]

The parent-child relation is a special relationship under § 315(a).[5] Section 316 of the Restatement provides:

> A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from

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[1] *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008).

[2] See *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007).

[3] See Restatement (Second) of Torts § 315 (1965).

[4] *Id.* at 122.

[5] See *id.*, comment *c*.

> intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
>
> (a) knows or has reason to know that he has the ability to control his child, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control.[6]

[4,5] Relying on these provisions, we concluded in *Popple v. Rose*,[7] that a parent can have a duty to warn third persons of their child's past conduct to protect them from harm in limited situations. But we recognized that parents are not liable for failing to control their children's conduct to prevent injury to others in the same way owners are responsible for harboring a vicious animal. And we specifically stated that courts have "refused to impose liability in situations where the child was generally incorrigible, heedless, or vicious."[8] We held that parents can be liable for failing to exercise reasonable care to prevent injury to others only when their child has a dangerous habit of causing harm to others and the parents know of the child's "habitual, dangerous propensity."[9] In contrast, parents are not liable for negligent supervision where the record lacks any evidence indicating the parents were aware the child was prone to commit the particular act or course of conduct which led to the plaintiff's injury.[10]

In *Popple*, the evidence showed that the parents knew their son had a history of physically violent behavior. But they did not know he had a habitual propensity to commit a sexual assault or sexual abuse. We concluded that the parents had no duty to warn of an unknown dangerous sexual propensity. This reasoning tracks the comments to the Restatement's § 316 and decisions from other jurisdictions.

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[6] Restatement, *supra* note 3, § 316 at 123-24.

[7] *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998).

[8] *Id.* at 9, 573 N.W.2d at 770.

[9] See *id.* at 10, 573 N.W.2d at 771.

[10] See *id.*

Comment *a.* to § 316 provides that parents are responsible for their child's conduct if they have the ability to control it.[11] But comment *b.* clarifies that

> [t]he duty of a parent is only to exercise such ability to control his child as he in fact has at the time when he has the opportunity to exercise it and knows the necessity of so doing. The parent is not under a duty so to discipline his child as to make it amenable to parental control when its exercise becomes necessary to the safety of others.[12]

So parents who have the ability to restrain or correct their child have a duty to do so when their child's conduct is posing an obvious danger to others in their presence. And we recognize that some courts have held that parents can be liable for failing to take steps to correct or restrain a child's conduct when they know the child has a dangerous habit that is likely to cause injury to others.

For instance, in *Popple*,[13] we discussed a case in which the father knew his 7-year-old child habitually struck other children in the face with a stick but had encouraged, rather than restrained, this behavior, thus condoning the act.[14] We discussed another case in which the court held that the parents could be liable for failing to warn a babysitter that their 4-year-old child had a habit of violently attacking and throwing himself against other people.[15] But we did not apply this line of cases in *Popple* because the plaintiff could not show foreseeability: the parents did not know of any dangerous sexual propensity. Consistent with our discussion in *Popple*, other courts have generally held that the child must have a habit of wrongdoing which gives the parent reason to know with some specificity of a present opportunity and need

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[11] Restatement, *supra* note 3, § 316, comment *a.*

[12] *Id.*, comment *b.* at 124.

[13] *Popple, supra* note 7.

[14] See *Norton v. Payne*, 154 Wash. 241, 281 P. 991 (1929).

[15] See *Ellis v. D'Angelo*, 116 Cal. App. 2d 310, 253 P.2d 675 (1953). See, also, *Condel v. Savo*, 350 Pa. 350, 39 A.2d 51 (1944).

to restrain the child to prevent some imminently foreseeable harm.[16]

For example, the Alaska Supreme Court affirmed summary judgment for the parents against a negligent supervision claim. There, the defendant's 17-year-old son murdered two other boys with a stolen gun during a verbal altercation.[17] The boy had been emotionally disturbed since childhood, and when he was 15, he had shot another boy in the hand with a stolen gun and been placed on probation. Five months before the murders, but unknown to his parents, he and his friends had beaten another boy with a bat and a cane at a party. But at the time of the murders, the evidence showed nothing that should have led the parents to foresee a specific need to keep their son from hurting someone.

The court noted that many courts have recognized that parents have diminished ability and opportunity to control the conduct of their older children. It agreed that parents could have an opportunity to control a child even if they were not present at the precise moment that a tort occurs. And it agreed that the parents were on general notice of the child's dangerous propensities. But it held that a plaintiff must show more than the parents' general knowledge of a child's dangerous propensity.[18]

Here, Jacob's past rebellious conduct did not show a habitual dangerous propensity that would have put Olsen on notice that Jacob would throw fireworks at others. And clearly, a child's "fender bender" in a school parking lot would not alert parents that their child might negligently harm others with fireworks. Similarly, Olsen's physical altercation with Jacob in October 2004 was in response to her attempt to discipline him by taking

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[16] See, *Dinsmore-Poff v. Alvord*, 972 P.2d 978 (Alaska 1999); *Gissen v. Goodwill*, 80 So. 2d 701 (Fla. 1955); *Norton, supra* note 14.

[17] See *Dinsmore-Poff, supra* note 16.

[18] Accord, e.g., *Parsons v. Smithey*, 109 Ariz. 49, 504 P.2d 1272 (1973); *Barth v. Massa*, 201 Ill. App. 3d 19, 558 N.E.2d 528, 146 Ill. Dec. 565 (1990); *Wells v. Hickman*, 657 N.E.2d 172 (Ind. App. 1995); *Barrett v. Pacheco*, 62 Wash. App. 717, 815 P.2d 834 (1991); *Nielsen v. Spencer*, 287 Wis. 2d 273, 704 N.W.2d 390 (Wis. App. 2005).

away his pickup. This altercation did not indicate that Jacob might negligently harm others if permitted to attend a fireworks display. We agree that Jacob's display of a pocketknife in the 2004 dispute with other students who had called him names exhibited poor judgment. But it was not indicative of the conduct that injured Heidi.

We conclude that all of the previous incidents of Jacob's misconduct failed to show that Jacob had a dangerous, habitual propensity that made his throwing fireworks at Heidi imminently foreseeable. We hold that Olsen did not have a duty to confine him to the house to prevent an unforeseeable act. To hold otherwise would require parents to pull an unending 24-hour guard duty because of their child's past incorrigible or careless behavior. Sinsel points us to no case holding that parents have this duty, and such a rule would be neither reasonable nor consistent with the Restatement's comments. Although Jacob's conduct the week before the fireworks display indicated that he would obtain fireworks without permission and could not be trusted to responsibly use them, the evidence showed that Olsen did not know of his earlier conduct before July 4, 2005. We conclude that the district court erred in failing to direct a verdict for Olsen on Sinsel's claim of negligent supervision.

The Court Erred in Failing to Instruct Jury to Allocate Fault

As noted, the court did not instruct the jurors to allocate negligence between Olsen and Jacob. Instead, the court gave the jurors separate verdict forms for Olsen and Jacob. On the first form, they found "for the plaintiff and against the defendant Linda Olsen and assess damages at $75,000.00." On the second form, they found "for the plaintiff and against the defendant Jacob Olsen and assess damages at $50,000."

Olsen argues that the court erred in failing to instruct the jury to allocate negligence between Olsen and Jacob. Sinsel argues that Olsen did not object to the jury instructions or offer an alternative.

Because we have concluded that a verdict should have been directed for Olsen, whether the jury was properly instructed

regarding allocation of damages may, at first glance, appear moot. But we conclude that we must examine this issue to determine the effect of our holding with respect to Olsen on both Sinsel and Jacob.

The elements of damage submitted to the jury included Heidi's alleged past and future disfigurement, pain, and suffering. Under Nebraska's comparative negligence statutes, these constitute "noneconomic damages." Where, as here, there was no claim that multiple defendants acted as a part of a common enterprise or plan,

> the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence, and a separate judgment shall be rendered against that defendant for that amount.[19]

This provision contemplates a process by which the finder of fact determines the total noneconomic damages suffered by the plaintiff as the result of injuries proximately caused by the negligence of multiple defendants; then, it allocates a portion of the total to each defendant "in direct proportion to that defendant's percentage of negligence."[20]

In this case, however, the court instructed the jury to determine the "nature and extent" of damages caused by the negligence of each named defendant without reference to the total noneconomic damages sustained by Heidi or the "percentage of negligence" attributable to Jacob and Olsen. Thus, we cannot conclude from the record that the jury determined the total damages to be $125,000, the sum of its verdicts against Jacob and Olsen, and we do not reach the issue of whether a verdict in this amount would be excessive. We note, however, that in denying the motion for new trial, the district court expressed concern that portions of Sinsel's closing argument, to which no objection was made, "appealed to passion and

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[19] Neb. Rev. Stat. § 25-21,185.10 (Reissue 2008). See, also, *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999).

[20] § 25-21,185.10.

prejudice of the jury rather than reason and logic." We share that concern.

But the record does establish that the jury found Heidi's damages to be at least $50,000, for which it found Jacob liable, and we conclude that this amount is not excessive. Having established her entitlement to a judgment for $50,000, fairness requires that Sinsel should have an opportunity to accept it in satisfaction of her claim as an alternative to a new trial.[21] Accordingly, we remand the cause and direct that Sinsel shall have 10 days from the spreading of the mandate in the district court to file acceptance of a remittitur for all amounts in excess of $50,000. If that occurs, the judgment shall draw interest from the date the remittitur is accepted. If Sinsel does not elect to accept the remittitur, the district court shall conduct a new trial limited to determining the nature, extent, and amount of Heidi's damages caused by Jacob's negligence.

We also vacate the award of prejudgment interest and do not reach the issues raised by the cross-appeal, because at this point, Sinsel has not obtained a judgment exceeding her pretrial settlement offer pursuant to Neb. Rev. Stat. § 45-103.02 (Reissue 2004).

CONCLUSION

We reverse and vacate the judgment against Olsen and the award of prejudgment interest and remand the cause for further proceedings consistent with this opinion regarding Sinsel's claim against Jacob.

REVERSED AND VACATED IN PART, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

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[21] See, *Kirby v. Liska*, 217 Neb. 848, 351 N.W.2d 421 (1984); *McMillan Co. v. Nebraska E. G. & T. Coop., Inc.*, 192 Neb. 744, 224 N.W.2d 184 (1974).

STATE OF NEBRASKA, APPELLEE, V. STEPHEN E. FRANCE, APPELLANT.

776 N.W.2d 510

Filed December 24, 2009. No. S-09-101.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
3. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
4. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
5. **Criminal Law: Mental Competency.** The test of responsibility for crime is a defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act.
6. **Criminal Law: Insanity: Time.** For an insanity defense, the insanity must be in existence at the time of the alleged criminal act.
7. **Insanity: Proof.** A defendant who pleads that he or she is not responsible by reason of insanity has the burden to prove the defense by a preponderance of the evidence.
8. **Verdicts: Insanity: Appeal and Error.** The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding.
9. **Witnesses: Juries: Appeal and Error.** The credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review.
10. **Evidence: Appeal and Error.** Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve.
11. **Self-Defense.** Self-defense is a statutorily affirmative defense in Nebraska.
12. ____. To successfully assert the claim of self-defense, one must, inter alia, have a reasonable and good faith belief in the necessity of using force.
13. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** Ordinarily, when an appellate court judicially construes a statute and that construction fails to evoke an amendment, it is presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Affirmed.

Corey A. Burns for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Stephen E. France appeals his convictions and sentences for first degree murder and use of a weapon to commit a felony. France asserts that the jury erred in rejecting his insanity defense and in failing to find that he acted in self-defense. He also asserts that the district court for Dawson County erred by instructing the jury that to find France acted in self-defense, the jury must find that he "reasonably" believed deadly force was necessary to defend himself. We affirm France's convictions and sentences.

STATEMENT OF FACTS

France was charged with first degree murder and use of a weapon to commit a felony in connection with the December 18, 2007, stabbing death of Dwayne R. Morrison. France and Morrison were coworkers at a haymill in Gothenburg, Nebraska. The two frequently argued with one another, particularly in the week prior to Morrison's death. On the morning of December 18, France and Morrison had a physical altercation in which France stabbed Morrison with a knife. Morrison died from his injuries, which included three deep stab wounds to the chest, with one stab penetrating the heart.

After charges were filed against France, the court granted France's motion for a psychological evaluation pursuant to Neb. Rev. Stat. § 29-1823 (Reissue 2008). Dr. Bruce Gutnik conducted a psychiatric evaluation and concluded that France was suffering from mental illness and was not competent to stand trial. Based on Gutnik's report, the court, on March 24, 2008, found that France was not then competent to

stand trial but that there was a substantial probability he would become competent to stand trial within the foreseeable future. The court ordered France committed to the Lincoln Regional Center for appropriate treatment until his disability was removed. On August 8, the court determined, based on the opinion of Dr. Klaus Hartmann, that France was competent to stand trial.

France thereafter filed a notice of intent to rely upon a defense that he was not responsible by reason of insanity. The court granted the State's motion to require France to be examined by Hartmann to determine France's sanity at the time of Morrison's killing.

At trial, the State presented the testimony of coworkers of France and Morrison who testified regarding the animosity between the two. Jason Edgins testified that approximately 4 days before Morrison's death, he heard France say that he would like to kill Morrison. Edgins also testified that the day before his death, Morrison told Edgins he feared for his life and was going to the police to get a restraining order against France, because France had threatened to kill Morrison and his family.

Another coworker, Donald Friesenborg, testified that he heard France say "maybe half a dozen times" that he was going to kill Morrison. Two days before Morrison's death, France confronted Friesenborg at his home, because Morrison's wife had said that Friesenborg wanted France to quit his job. Friesenborg denied having made a remark regarding France's job and suggested that Morrison's wife was trying to agitate France. France told Friesenborg that Morrison abused his children and that "somebody ought to kill him." France also told Friesenborg he suspected that Morrison had sabotaged machinery at work, and France said, "I'm going to stab and kill that SOB." Morrison told Friesenborg the day before he was killed that France had threatened to kill Morrison and his family and that he planned to get a restraining order against France.

A third coworker, Tony Cañas, testified that France and Morrison argued and threatened each other on a daily basis the week prior to Morrison's death. During such arguments,

Cañas heard France threaten to kill Morrison. Cañas also heard France on the telephone telling Morrison he was going to kill Morrison and his family. Two days before Morrison was killed, France told Cañas that he blamed Morrison for a fire in the mill the night before and that he was trying to borrow a gun from another coworker in order to kill Morrison.

Cañas testified that on the morning of December 18, 2007, Morrison arrived early for his daytime shift, while Cañas and France were finishing a nighttime shift. Cañas was walking toward the back door of the mill when he saw Morrison stumble out the door and fall to the ground. Cañas then saw France come through the door, straddle Morrison, and stab Morrison in the chest with a knife. France kicked Morrison and said, "I told you I was going to kill you, you son of a bitch." Cañas did not see Morrison make any movement after he fell to the ground. France went back into the building, and Cañas called the 911 emergency dispatch service.

Deputy Sheriff Greg Gilg was the first law enforcement officer to arrive at the mill. Gilg saw Morrison's body and then saw France come out of the building with his hands held up and out. France was covered in "blood from head to toe." Gilg handcuffed France and secured him inside Gilg's patrol car. Gilg examined Morrison's body and determined that he was dead. After other officers arrived, Gilg placed France under arrest and took him to a hospital. A physician's assistant at the hospital determined that France had a cut on the back of his head that required stitches. Gilg heard France tell the physician's assistant that he and Morrison got into a fight and that Morrison got France down on the ground and bashed France's head into the concrete. Gilg observed other cuts and bruises on France's body, but France did not require medical attention beyond the stitches to the head. During the trip to the hospital, France told Gilg that Morrison "was basically bugging him so much that he was tired of his crap."

The pathologist who conducted the autopsy on Morrison's body testified that Morrison's death was caused by "deeply penetrating stab wounds of the trunk or torso." The wounds included three stabs to the chest caused by a knife, including one stab that went through the heart. The pathologist noted

other injuries to Morrison's body, including cuts, bruises, and abrasions to the face, head, arms, hands, and legs. The pathologist opined that the injuries were contemporaneous to the stab wounds and were consistent with being defensive wounds.

France testified in his own defense. France admitted stabbing Morrison but asserted that it was in self-defense. France described various instances of conflict with Morrison over a period of years that the two had worked together. In particular, France described a machine malfunction and a fire that occurred in the mill during the week prior to December 18, 2007. France asserted that Morrison was to blame for both incidents. France did not immediately confront Morrison about the incidents but told coworkers that Morrison was to blame. France admitted that he told coworkers that Morrison "ought to be killed," but asserted he did not mean it literally and did not expect anyone to take it seriously. On December 16, France received a call from Morrison and his wife in which Morrison confronted France about France's comments that Morrison should be killed. In that call and in subsequent calls between the two on December 16, Morrison told France that coworkers wanted France to quit his job at the mill and that Morrison was going to have France arrested for making terroristic threats. France testified that Morrison called him names and threatened him; he denied that he threatened Morrison or his family. France initially testified that he did not remember telling Friesenborg he wanted to stab and kill Morrison, but on cross-examination, he admitted he told Friesenborg he was going to kill Morrison. France also admitted that he tried to borrow a gun from a coworker but instead got a knife from the same coworker; he testified that he wanted a weapon to defend himself against Morrison.

According to France, he worked the night shift on the evening of December 17, 2008. He brought the knife with him "just in case [Morrison] came in and was acting real bad or anything or wanted to hit me." France feared Morrison because of threats that Morrison had made and because Morrison was younger and larger than France. Toward the end of his shift, on the morning of December 18, France was in the

mill office filling out reports when Morrison walked into the office and told France, "I'm going to break your nose." France told Morrison that he wanted to settle their differences, but Morrison came at France with his fists in the air. France testified he did not run from Morrison because he had a bad knee and did not think he could escape. France pulled out the knife, Morrison grabbed France by the hand that was holding the knife, and the two wrestled. Morrison got France down on the floor, grabbed his hair, and banged his head on the floor. France did not remember clearly, but thought he stabbed Morrison while Morrison was on top of him. Morrison got up and said he was going to his car to go home, and France followed him to the door. France admitted on cross-examination that he stabbed Morrison again after he fell to the ground outside the building. France went back into the mill office and washed the blood off his hands. When law enforcement arrived at the mill, France "put [his] hands up in the air and went out and met them."

Gutnik also testified in France's defense. Gutnik diagnosed France as having schizophrenia and schizoid personality disorder. Gutnik opined that France's mental illness amplified his animosity toward Morrison, that France believed that he had to defend himself against Morrison, and that France felt that he had done the right thing by killing Morrison, because he acted in self-defense. Gutnik also opined that at the time France killed Morrison, France suffered from a mental illness and did not understand the nature and consequences of his action and did not understand the difference between right and wrong.

The State called Hartmann as a rebuttal witness. Hartmann agreed with Gutnik's opinion that France had a mental illness but differed as to whether France knew right from wrong. Hartmann opined that at the time France killed Morrison, France knew what he was doing, knew what the consequences would be, and knew that it was wrong.

The court instructed the jury on the insanity defense and on self-defense. In the self-defense instruction, the court instructed that France acted in self-defense if, inter alia, he "reasonably believed that his use of deadly force was

immediately necessary to protect him against death or serious bodily harm."

The jury found France guilty of first degree murder and use of a weapon to commit a felony. By their guilty verdicts, the jury rejected France's defenses of insanity and self-defense. The court sentenced France to life imprisonment without parole on the murder conviction and to imprisonment for 15 to 20 years on the weapon conviction, with the sentences to be served consecutively.

France appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

France asserts that the jury erred by (1) failing to find that he was legally insane at the time he killed Morrison and (2) failing to find that he acted in self-defense. With respect to the self-defense jury instruction, France asserts that the district court erred by instructing the jury that he must have "reasonably" believed that deadly force was necessary to defend himself against Morrison.

STANDARDS OF REVIEW

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009).

[2-4] Whether jury instructions given by a trial court are correct is a question of law. *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id*. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the

questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id.*

ANALYSIS

The Jury Did Not Err in Rejecting France's Insanity Defense.

France first claims that the jury erred by failing to find that he was legally insane at the time he killed Morrison. We read France's assignment of error as asserting a claim that he established his insanity defense and that there was insufficient evidence to support the jury's rejection of his insanity defense. Having reviewed the record, we reject France's claim of error.

[5-8] Nebraska follows the *M'Naghten* rule as to the defense of insanity. The test of responsibility for crime is a defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. *State v. McGhee*, 274 Neb. 660, 742 N.W.2d 497 (2007). For an insanity defense, the insanity must be in existence at the time of the alleged criminal act. *Id.* A defendant who pleads that he or she is not responsible by reason of insanity has the burden to prove the defense by a preponderance of the evidence. *Id.* The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding. *Id.*

Gutnik testified in France's defense that in his opinion, at the time France killed Morrison, he suffered from a mental illness and did not understand the nature and consequences of his action or understand the difference between right and wrong. Gutnik testified that France thought he had done the right thing by killing Morrison, because he believed he was defending himself at the time of the killing. To the contrary, Hartmann testified in rebuttal that in his opinion, at the time France killed Morrison, France knew what he was doing, knew what the consequences would be, and knew that it was wrong.

[9,10] The credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review. *Banks, supra*. Any conflicts in

the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve. *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009). The jury apparently believed Hartmann's testimony over Gutnik's. By rejecting France's insanity defense, the jury determined that France failed to carry his burden of establishing insanity.

The record contains sufficient evidence for the jury to have found that France was not insane at the time he killed Morrison. France's assignment of error regarding the insanity defense is without merit.

The District Court Did Not Err by Instructing That France Needed to Reasonably Believe That Self-Defense Was Necessary, and the Jury Did Not Err in Rejecting France's Claim of Self-Defense.

France next asserts that the jury erred by failing to find that he acted in self-defense when he killed Morrison. We read France's assignment of error as asserting the argument that he established his claim of self-defense and that there was insufficient evidence to support a finding that he did not act in self-defense. France also claims that the district court erred when it instructed the jury that in order to find that France acted in self-defense, it must find that he "reasonably" believed that deadly force was necessary to defend himself. We conclude that the court did not err in so instructing the jury, and having reviewed the record, we find no error in the jury's determination that France did not act in self-defense.

[11] Self-defense is a statutorily affirmative defense in Nebraska. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006). Neb. Rev. Stat. § 28-1409 (Reissue 2008) provides:

> (1) . . . [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> . . . .
>
> (4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious

> bodily harm, kidnapping or sexual intercourse compelled by force or threat . . . .

[12] We have repeatedly stated that to successfully assert the claim of self-defense, one must, inter alia, have a reasonable and good faith belief in the necessity of using force. See, *Iromuanya, supra*; *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). In the present case, the court instructed the jury consistent with such precedent. The court instructed the jury that based on the evidence, it should find France acted in self-defense if, inter alia, he "reasonably believed that his use of deadly force was immediately necessary to protect him against death or serious bodily harm."

France argues that the court erred by instructing that he must have "reasonably" believed deadly force was necessary, because § 28-1409 requires only that "the actor believes that such force is necessary" and does not require that such belief be reasonable. He asserts that this court improperly read a reasonableness requirement into the statute in *State v. Eagle Thunder*, 201 Neb. 206, 266 N.W.2d 755 (1978).

This court rejected the same argument in *State v. Stueben*, 240 Neb. 170, 481 N.W.2d 178 (1992). We noted in *Stueben* that the reasonable belief requirement appeared to have originated in *Housh v. State*, 43 Neb. 163, 61 N.W. 571 (1895), and that the requirement was read into § 28-1409 after its enactment. This court stated in *Stueben*:

> Though there is justification for the position that a simple, honest belief is all that is required by § 28-1409, which has its origin in the Model Penal Code, this court, since it was not specifically required to abandon the reasonable belief standard, declined to do so in a series of cases following the adoption of the statute. See, *State v. Brown*, 235 Neb. 374, 455 N.W.2d 547 (1990); *State v. Graham*, 234 Neb. 275, 450 N.W.2d 673 (1990); *State v. Cowan*, 204 Neb. 708, 285 N.W.2d 113 (1979); *State v. Eagle Thunder*, 201 Neb. 206, 266 N.W.2d 755 (1978).

> The Legislature has adhered to our construction for 20 years, and we are not constrained to abandon it now.

240 Neb. at 174, 481 N.W.2d at 182.

[13] We note that in the 17 years since *Stueben*, we have reiterated the reasonable belief requirement, see *Iromuanya, supra*; *Faust, supra*; and *Urbano, supra*, and the Legislature has not acted to amend § 28-1409 in response to such continued construction. Ordinarily, when an appellate court judicially construes a statute and that construction fails to evoke an amendment, it is presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent. *Lagemann v. Nebraska Methodist Hosp.*, 277 Neb. 335, 762 N.W.2d 51 (2009). We conclude that a reasonable belief that force is necessary is required to successfully assert a self-defense claim. Therefore, the court did not err by instructing that France must have reasonably believed that deadly force was necessary to establish his claim of self-defense.

France had the initial burden of going forward with evidence of self-defense; after he did so, the State had the burden to prove that he did not act in self-defense. See, *Urbano, supra*; *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997). With regard to sufficiency of the evidence, we note that although France testified that he acted in self-defense, there was also evidence from which the jury could have found that he planned to kill Morrison, contradicting his claim of self-defense. Such evidence included testimony by coworkers that in the days prior to the killing, France made threats to Morrison that he was going to kill him and that France told coworkers he wanted to or was going to kill Morrison and was going to borrow a gun to do so. One coworker, Cañas, testified that he saw France stab Morrison in the chest with a knife after Morrison had fallen to the ground and that France kicked Morrison and said, "I told you I was going to kill you, you son of a bitch." In addition, France testified that after he initially stabbed Morrison, Morrison got up and said he was going to go home. France admitted that he followed Morrison to the door and that he stabbed Morrison in the chest after Morrison had fallen to the ground on his way out of the building. From such evidence, the

jury could reasonably conclude that France had planned to kill Morrison and that the killing was not in self-defense.

The credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review. *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009). Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve. *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009). Because it found France guilty, the jury apparently disbelieved France's assertion that he acted in self-defense. Further, there was sufficient evidence to support a finding that France did not act in self-defense, and we will not reassess the jury's finding on appeal. France's assignments of error regarding self-defense are without merit.

CONCLUSION

We conclude that the district court did not err in its self-defense instruction and that given the evidence, there was no error in the jury's findings that France was not legally insane and that he was not acting in self-defense when he killed Morrison. We therefore affirm France's convictions and sentences.

AFFIRMED.

COPPLE CONSTRUCTION, L.L.C., APPELLEE AND CROSS-APPELLEE, V. COLUMBIA NATIONAL INSURANCE COMPANY, APPELLANT AND CROSS-APPELLEE, AND TYSON FRESH MEATS, INC., APPELLEE AND CROSS-APPELLANT.

776 N.W.2d 503

Filed December 24, 2009. No. S-09-267.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law.
4. **Judgments: Appeal and Error.** In reviewing questions of law, an appellate court resolves the question independently of the lower court's conclusion.
5. **Property: Appurtenances: Words and Phrases.** The term "fixture" refers to a chattel which is capable of existing separately and apart from realty, but which, by actual annexation and appropriation to the use or purpose of the realty with the intention of making it a permanent accession thereto, becomes a part of the realty.
6. **Property: Appurtenances: Intent.** To determine whether an item constitutes a fixture requires an appellate court to look at three factors: (1) actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the realty with which it is connected; and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold.

Appeal from the District Court for Dakota County: WILLIAM BINKARD, Judge. Reversed and remanded with directions.

Jerald L. Rauterkus and Sara A. Lamme, of Erickson Sederstrom, P.C., for appellant.

Daniel B. Shuck, of Shuck Law Firm, for appellee Tyson Fresh Meats, Inc.

Paul D. Lundberg, of Lundberg Law Firm, for appellee Copple Construction, L.L.C.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Copple Construction, L.L.C., brought a declaratory judgment action against Columbia National Insurance Company (Columbia) asserting a claim for coverage under a policy of insurance issued by Columbia. Tyson Fresh Meats, Inc. (Tyson), was subsequently added as a necessary party. The district court granted summary judgment for Copple Construction. It later granted Copple Construction's motion for attorney fees, but denied Tyson's. Columbia appeals, and Tyson cross-appeals.

FACTS

Copple Construction is owned and operated by Jerry Copple. Although Copple Construction does work for other clients, its main client is Tyson. On April 26, 2006, a Tyson employee contacted Copple Construction to have it repair two small holes in a polyethylene tarp which acted as a lagoon cover at a wastewater treatment plant in Dakota City, Nebraska, owned by Tyson. The lagoons and corresponding covers are large; Copple testified that they are about the size of a football field. The cover itself is secured to the edges of the lagoon by pulling the sides of the cover into an anchor trench in the ground and filling that trench with concrete. Under these covers, methane gas is created by the anaerobic breakdown of the materials from the wastewater. That methane is collected, "scrubbed," and used as fuel for boilers at the plant.

Upon arriving at Tyson, Copple and his employee, William Babb, were escorted to the areas in need of patching—holes of approximately three-fourths of an inch to an inch at both lagoons 9 and 11. The hole at lagoon 11 was patched without incident. Copple and Babb then moved on to the hole in the cover at lagoon 9. Copple began the preliminary steps necessary to patch the hole, including cleaning the area and cutting the patch. He also began heating a hot-air blower to fuse the patch to the cover. The blower was making strange noises, so Copple used his knife to scrape the tip of the blower. A fire erupted from the blower. The fire destroyed about one-third of the tarp covering lagoon 9. According to Tyson, costs related to the replacement of the tarp are $340,147.83.

Copple Construction filed a claim for coverage under a general liability policy issued by Columbia. Columbia denied Copple Construction's claim. Copple Construction then filed a suit requesting a declaratory judgment that the loss was covered under the policy.

Copple Construction filed a motion for summary judgment, which Tyson joined. Columbia filed a cross-motion for summary judgment. Initially, the district court denied both motions, but later granted Copple Construction's motion to reconsider, concluding that no policy exclusion operated to deny coverage. The district court later granted Copple Construction's request

for attorney fees, but denied Tyson's. Columbia appeals, and Tyson cross-appeals.

ASSIGMENTS OF ERROR

On appeal, Columbia assigns, restated and renumbered, that the district court erred in (1) finding that exclusion I(A)(2)(j)(5) did not apply; (2) finding that exclusion I(A)(2)(j)(6) did not apply; (3) concluding that the policy's total pollution exclusion, I(A)(2)(f), did not apply; (4) granting Copple Construction's and Tyson's motions for summary judgment while denying its own; (5) relying upon the testimony of an agent employed by the agency which sold Copple Construction the policy of insurance; and (6) awarding Copple Construction attorney fees.

On cross-appeal, Tyson argues that the district court erred in not awarding it attorney fees.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[2]

[3,4] The interpretation of an insurance policy is a question of law.[3] In reviewing questions of law, an appellate court resolves the question independently of the lower court's conclusion.[4]

ANALYSIS

Is Coverage Excluded By Policy?

On appeal, Columbia assigns that the district court erred by not finding that coverage under Copple Construction's policy

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[1] *Rickerl v. Farmers Ins. Exch.*, 277 Neb. 446, 763 N.W.2d 86 (2009).

[2] *Id.*

[3] *Id.*

[4] *Id.*

of insurance was excluded under three different policy exclusions: the business risk exclusions of I(A)(2)(j)(5) and (6), and the total pollution exclusion of I(A)(2)(f).

Since we conclude that business risk exclusion I(A)(2)(j)(5) excludes insurance coverage for Copple, it is not necessary to address Columbia's assignments of error with regard to the other exclusions of the policy. Exclusion I(A)(2)(j)(5) provides that "[t]his insurance does not apply to . . . [t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations."

As an initial matter, there does not seem to be any dispute that Copple and Babb were performing operations within the meaning of the exclusion. A review of the record confirms this: Copple and Babb had clearly begun their work at the time of the fire, as the leak had been prepped and the hot-air blower was being heated. Still at issue, however, is whether the property damage at issue was to "[t]hat particular part of real property" within the meaning of the exclusion.

[5] We turn first to the question of whether the tarp was real property. To answer this, we must determine whether the cover was a fixture. A fixture is defined by Black's Law Dictionary as

> [p]ersonal property that is attached to land or a building and that is regarded as an irremovable part of the real property . . . . Historically, personal property becomes a fixture when it is physically fastened to or connected with the land or building and the fastening or connection was done to enhance the utility of the land or building.[5]

And this court has further defined fixture as "a chattel which is capable of existing separate and apart from realty . . . but which, by actual annexation and appropriation to the use or purpose of the realty with the intention of making it a permanent accession thereto, becomes a part of the realty."[6]

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[5] Black's Law Dictionary 713 (9th ed. 2009).

[6] *Fuel Exploration, Inc. v. Novotny*, 221 Neb. 17, 22, 374 N.W.2d 838, 842 (1985).

[6] This court has held that to determine whether an item constitutes a fixture requires this court to look at three factors: (1) actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the realty with which it is connected; and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold.[7] This third factor is generally regarded as the most important factor when determining whether an item is a fixture.[8]

The polyethylene tarp in question was stretched across an individual lagoon. The lagoon itself is about the size of a football field and edged with an anchor trench about 4 feet deep by 2 feet wide. The edge of the tarp was placed into the anchor trench, and concrete was poured over it to hold it in place. According to a Tyson employee who works at the wastewater plant, the tarps, which act as lagoon covers, are never removed and there is no process for doing so.

Considering the first factor as set forth above, given that the tarp is placed into a trench and weighed down with concrete, we conclude that the tarp was annexed to the real property. As to the second factor, the part of the realty to which the tarp was connected is a wastewater lagoon, and the tarp was acting as a cover for that lagoon. Finally, it seems clear that it was Tyson's intent that the tarp become a permanent part of the property, given that the covers are never removed and there is no procedure for doing so. We conclude that the tarp was a fixture and, therefore, real property.

The second question facing this court is whether the property damage in question, in this case the fire, was to "[t]hat particular part" on which Copple was "performing operations." On appeal, Columbia argues that the cover is what was destroyed by the fire, thus the property damage in question was to "[t]hat particular part." Copple Construction, however, argues that it was hired to repair a small hole in a much larger tarp, that Copple and Babb were directed to an area about 4

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[7] *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989).

[8] *Id.*

feet by 4 feet, and that this smaller area was "[t]hat particular part" at issue.

In *Vinsant Elec. Contr. v. Aetna Cas. & Sur.*,[9] the insured was hired to install two circuit breakers in a switchboard. During the installation, the switchboard caught fire and was destroyed. The court determined that even though the switchboard was clearly made of different parts, it was nevertheless "'clearly a unit of property within itself, self-contained and a single item.'"[10] As such, the damage was excluded under an exclusion similar to the one at issue in this case.

And in *Jet Line Services, Inc. v. American Employers Insurance Co.*,[11] the insured was hired to clean out a fuel tank. While cleaning the bottom of the tank, there was an explosion. The insured argued that the occurrence was covered, but the court disagreed:

> [T]he words "that particular part of any property . . . on which operations are being performed" refers to the entire tank and not just to the bottom of the tank that [the insured's] personnel were cleaning at the moment of the explosion. [The insured] was retained to clean the entire tank, and it was the entire tank on which operations were being performed within the meaning of the policy language.[12]

Like the courts in *Vinsant Elec. Contr.* and *Jet Line Services, Inc.*, we conclude that it is not possible to segregate the tarp at issue into smaller sections for the purposes of determining on what part of the tarp Copple was "performing operations." As a practical matter, such an approach is unworkable. We therefore conclude that it was the entire tarp upon which operations were being conducted within the meaning of the policy exclusion.

We conclude that the policy exclusion set forth in I(A)(2)(j)(5) is applicable and precludes coverage for the

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[9] *Vinsant Elec. Contr. v. Aetna Cas. & Sur.*, 530 S.W.2d 76 (Tenn. 1975).

[10] *Id.* at 77.

[11] *Jet Line Services, Inc. v. American Employers Insurance Co.*, 404 Mass. 706, 537 N.E.2d 107 (1989).

[12] *Id.* at 711, 537 N.E.2d at 111.

occurrence at issue in this case. The district court erred in finding otherwise.

Remaining Assignments of Error and Cross-Appeal

In addition to its argument regarding I(A)(2)(j)(5), Columbia also argues the applicability of two other policy exclusions. But because we have found that coverage is excluded under I(A)(2)(j)(5), we need not reach Columbia's arguments with respect to these other exclusions.

Columbia also argues that the district court erred in admitting the testimony of the agent employed by the agency which sold Copple Construction the policy of insurance. Given our resolution of this appeal, we also decline to reach this assignment of error.

Finally, Columbia assigns that the district court erred in awarding Copple Construction attorney fees. Given that we conclude that there was no coverage under the policy issued by Columbia, we agree that it was error to do so.

On cross-appeal, Tyson contends that the district court erred in not awarding it attorney fees. Again, given our conclusion that there was no coverage, we find Tyson's argument without merit.

CONCLUSION

We conclude that the district court erred in finding coverage under the policy of insurance issued to Copple Construction by Columbia and in granting Copple Construction's motion for summary judgment. Accordingly, we reverse the judgment and remand the cause to the district court with directions to enter judgment in favor of Columbia.

Reversed and remanded with directions.

Heavican, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
HERCHEL HAROLD HUFF, APPELLANT.
776 N.W.2d 498

Filed December 24, 2009. No. S-09-286.

1. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
3. **Lesser-Included Offenses: Jury Instructions.** In the context of jury instructions, one offense is a lesser-included offense of another if the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense.
4. **Double Jeopardy: Statutes: Proof.** In a double jeopardy analysis, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or one is whether each provision requires proof that the other does not.
5. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
6. ____. While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the clause does not prohibit the State from prosecuting a defendant for multiple offenses in a single prosecution.
7. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct—although such correctness is based on a ground or reason different from that assigned by the trial court—an appellate court will affirm.

Appeal from the District Court for Furnas County: JAMES E. DOYLE IV, Judge. Affirmed and remanded for further proceedings.

Charles D. Brewster and Jonathan R. Brandt, of Anderson, Klein, Swan & Brewster, and Richard Calkins for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

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

STEPHAN, J.

Following a fatal motor vehicle accident, Herchel Harold Huff was charged with four criminal offenses, including

manslaughter and motor vehicle homicide. After pleading guilty to manslaughter, Huff filed a plea in bar alleging that his continued prosecution on the motor vehicle homicide charge would constitute double jeopardy. Huff appeals from an order of the district court for Furnas County denying the plea in bar. We affirm, but for reasons different from those upon which the district court based its decision.

BACKGROUND

The accident occurred in rural Furnas County on October 3, 2007. A deputy sheriff who encountered Huff at the scene detected a strong odor of alcohol and arrested him. Huff admitted that he had been the driver of a vehicle involved in the accident, and this fact was confirmed by another person at the accident scene. Kasey Jo Warner died at the scene of the accident.

In an amended information, Huff was charged with motor vehicle homicide, predicated on third-offense driving under the influence,[1] and manslaughter,[2] which according to the information was predicated on the unlawful act of "operating a motor vehicle . . . carelessly or without due caution so as to endanger a person or property." Huff was also charged with refusal to submit to a chemical test[3] and tampering with a witness.[4] He pled guilty to the manslaughter charge and not guilty to the remaining charges. The court deferred sentencing on the manslaughter conviction until after the resolution of the remaining three charges.

Huff then filed a plea in bar in which he alleged that because he had been found guilty on the manslaughter charge, prosecution on the motor vehicle homicide charge would subject him to double jeopardy in violation of his state and federal constitutional rights. He requested that the motor vehicle homicide charge be dismissed. After conducting an evidentiary hearing,

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[1] See Neb. Rev. Stat. § 28-306(1) and (3)(c) (Reissue 2008).

[2] See Neb. Rev. Stat. § 28-305 (Reissue 2008).

[3] See Neb. Rev. Stat. §§ 60-6,197 (Reissue 2004) and 60-6,197.03(6) (Supp. 2007).

[4] See Neb. Rev. Stat. § 28-919 (Reissue 2008).

the district court determined that manslaughter and motor vehicle homicide are not the "same offense" for double jeopardy purposes and denied the plea in bar. Huff filed this timely appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[5]

ASSIGNMENT OF ERROR

Huff's sole assignment of error is that the district court erred in denying his plea in bar and "allowing his continued prosecution for Motor Vehicle Homicide after a previous conviction for Involuntary Manslaughter."

STANDARD OF REVIEW

[1,2] Issues regarding the grant or denial of a plea in bar are questions of law.[6] On a question of law, an appellate court reaches a conclusion independent of the court below.[7]

ANALYSIS

Huff's plea in bar raises a colorable double jeopardy claim, and we therefore have jurisdiction over this interlocutory appeal.[8] We have previously examined the relationship between the offenses of manslaughter and motor vehicle homicide. Most recently, in *State v. Wright*,[9] we determined that when a defendant is charged with manslaughter, he or she is not entitled to have the jury instruction on the elements of motor vehicle homicide, because it is not a lesser-included offense of manslaughter. *Wright* overruled prior cases holding to the contrary. But *Wright* reaffirmed that where death results unintentionally from the operation of a motor vehicle, a prosecutor is free to choose whether to charge motor vehicle homicide or

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[5] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[6] *State v. Jackson*, 274 Neb. 724, 742 N.W.2d 751 (2007).

[7] *State v. Claussen*, 276 Neb. 630, 756 N.W.2d 163 (2008).

[8] See, Neb. Rev. Stat. § 29-1817 (Reissue 2008); *State v. Williams*, 278 Neb. 841, 774 N.W.2d 384 (2009); *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990).

[9] *State v. Wright*, 261 Neb. 277, 622 N.W.2d 676 (2001).

manslaughter, notwithstanding the fact that substantially different criminal penalties may be imposed depending upon which crime is charged.[10]

[3,4] The prosecutor in this case avoided the choice by charging Huff with both offenses. The question that Huff asks us to decide is not whether one is a lesser-included offense of the other for purposes of jury instruction, but, rather, whether they are the same offense for purposes of double jeopardy. While both issues require a comparison of statutory elements, the applicable legal principles are not identical. In the context of jury instructions, one offense is a lesser-included offense of another if the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense.[11] In a double jeopardy analysis, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or one is whether each provision requires proof that the other does not.[12] Here, involuntary manslaughter includes three statutory elements: (1) causing death, (2) unintentionally, (3) while in the commission of an unlawful act.[13] Motor vehicle homicide includes four statutory elements: (1) causing death, (2) unintentionally, (3) while engaged in the operation of a motor vehicle, (4) in violation of the law.[14] Huff argues that the two offenses are one for purposes of double jeopardy, because while motor vehicle homicide includes an element not included in the offense of involuntary manslaughter, i.e., operation of a motor vehicle, all of the elements of involuntary manslaughter are included in the offense of motor vehicle homicide, and thus

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[10] See, also, *State v. Brouillette*, 265 Neb. 214, 655 N.W.2d 876 (2003) (Stephan, J., concurring); *State v. Burnett*, 254 Neb. 771, 579 N.W.2d 513 (1998); *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986), *disapproved on other grounds, State v. Wright, supra* note 9.

[11] See *State v. Sinica*, 277 Neb. 629, 764 N.W.2d 111 (2009).

[12] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *State v. Dragoo*, 277 Neb. 858, 765 N.W.2d 666 (2009).

[13] § 28-305.

[14] § 28-306.

it cannot be said that *each* offense includes an element that the other does not.

[5] But there is a threshold issue regarding the point at which the constitutional safeguard against double jeopardy attaches. The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[15] Huff argues that this is a second prosecution for the same offense after conviction. The State counters that because both charges were included in the same information, along with other charges, there is only one prosecution, and no potential double jeopardy issue arises unless and until Huff is convicted of motor vehicle homicide and sentenced for that offense and the manslaughter offense for which he has already been convicted.

[6] The State bases its argument on our 2006 decision in *State v. Humbert*.[16] In that case, the defendant was charged with two misdemeanor and four felony offenses arising from an alleged episode of domestic violence occurring over a period of several hours. The defendant pled no contest to the misdemeanor charges and then filed a plea in bar alleging that prosecution on two of the felony charges would constitute double jeopardy. Based upon the principles articulated by the U.S. Supreme Court in *Ohio v. Johnson*,[17] we concluded there was no present violation of the Double Jeopardy Clause: "Double jeopardy protects a defendant against cumulative punishments for convictions on the same offense; however, it does not prohibit the State from prosecuting a defendant for multiple offenses in a single prosecution."[18]

Huff argues that his case is distinguishable from *Humbert*, because that case involved multiple charges resulting from a series of related events, whereas in this case, both the

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[15] *State v. Dragoo, supra* note 12.

[16] *State v. Humbert*, 272 Neb. 428, 722 N.W.2d 71 (2006).

[17] *Ohio v. Johnson*, 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984).

[18] *State v. Humbert, supra* note 16, 272 Neb. at 434, 722 N.W.2d at 76.

manslaughter and motor vehicle homicide charges arise from the single act of unlawful operation of a motor vehicle resulting in a death. But Huff makes no attempt to distinguish *Johnson*, upon which our holding in *Humbert* was based. *Johnson* involved a state prosecution in which the defendant was charged in a single indictment with murder, involuntary manslaughter, aggravated robbery, and grand theft, arising from a single shooting death. He pled guilty to the involuntary manslaughter and grand theft charges, and then sought dismissal of the murder and aggravated robbery charges on the ground that continued prosecution would violate his rights under the Double Jeopardy Clause. Characterizing this argument as "apparently based on the assumption that trial proceedings, like amoebae, are capable of being infinitely subdivided, so that a determination of guilt and punishment on one count of a multicount indictment immediately raises a double jeopardy bar to continued prosecution on any remaining counts,"[19] the Supreme Court rejected it and concluded that the Double Jeopardy Clause did not prohibit continued prosecution on the murder and aggravated robbery charges. The homicide charges in *Johnson*, like the manslaughter and motor vehicle homicide charges in this case, arose from the same alleged act.

We conclude that this appeal is controlled by *Humbert* and *Johnson.* This case does not involve successive prosecutions, but, rather, a single prosecution involving multiple charges, only one of which has been resolved by a plea. The State has not had an opportunity to prosecute Huff on the remaining charges, and it is not prevented by the Double Jeopardy Clause from doing so.[20] If Huff is eventually convicted and sentenced on the motor vehicle homicide charge, he can then, but only then, assert a double jeopardy claim based upon alleged multiple punishments for the same offense.[21]

[7] Where the record adequately demonstrates that the decision of a trial court is correct—although such correctness is

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[19] *Ohio v. Johnson, supra* note 17, 467 U.S. at 501.

[20] See, *Ohio v. Johnson, supra* note 17; *State v. Humbert, supra* note 16.

[21] See *State v. Humbert, supra* note 16.

based on a ground or reason different from that assigned by the trial court—an appellate court will affirm.[22] Here, the district court was correct in overruling the plea in bar, but it should have done so under the principles of *Humbert* and *Johnson* instead of addressing the merits of a double jeopardy claim which does not yet exist. We express no opinion as to whether the district court was correct in concluding that involuntary manslaughter and motor vehicle homicide are not the "same offense" for purposes of a double jeopardy analysis.

CONCLUSION

For the reasons discussed, we affirm the order of the district court overruling Huff's plea in bar and remand for further proceedings.

AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.

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[22] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

R & D PROPERTIES, LLC, APPELLANT, V. ALTECH CONSTRUCTION CO., DEFENDANT AND THIRD-PARTY PLAINTIFF, AND THUNN CONSTRUCTION, INC., THIRD-PARTY DEFENDANT, APPELLEES.

776 N.W.2d 493

Filed December 24, 2009. No. S-09-289.

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 for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
3. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
4. **Statutes.** To the extent there is a conflict between two statutes on the same subject, the specific statute controls over the general statute.
5. **Statutes: Legislature: Public Policy.** It is the Legislature's function through the enactment of statutes to declare what is the law and public policy.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Reversed and remanded with directions.

Gregory C. Scaglione and Brenda George, of Koley Jessen, P.C., L.L.O., for appellant.

Michael W. Pirtle and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellee Altech Construction Co.

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

HEAVICAN, C.J.

FACTUAL BACKGROUND

The underlying dispute in this case involves the construction of an office building in the "Altech Business Park" in southwest Omaha, Nebraska. R & D Properties, LLC (R & D), plaintiff, entered into a contract with Altech Construction Co. (Altech) for the construction. The building was completed, and R & D leased space in the building to various tenants. A tenant complained about a musty odor in its space, and eventually, mold growth was discovered in that space. R & D alleges that the mold was caused by excessive moisture in the building, which was in turn caused by defects in the design or construction of the building.

R & D sued Altech and Design Associates, Inc., the building architect, on several theories of recovery, including breach of warranty, negligence, and fraudulent misrepresentation. R & D pled damages composed of damage to the building, costs of retaining contractors to assess and repair the building, general damages, prejudgment interest, administrative costs, attorney fees, and litigation expenses.

Altech filed a third-party complaint against Thunn Construction, Inc., a subcontractor on the project. Altech alleged that the deficiencies alleged by R & D were caused by Thunn Construction's work on the foundation and masonry of the building, and that Thunn Construction had agreed to indemnify Altech for claims and damages assessed against Altech by reason of its work. Altech also filed a cross-complaint against Design Associates. But the district court granted Design Associates' motion for summary judgment with respect to R & D, and Altech dismissed its cross-complaint against Design Associates without prejudice. Thus, two

claims remained: R & D against Altech, and Altech against Thunn Construction.

The case went to a jury trial on R & D's claim against Altech. The jury returned a verdict for R & D in the amount of $520,303.32. Altech filed a motion for judgment notwithstanding the verdict, remittitur, or a new trial. Specifically, Altech argued that the court had erred in permitting the jury to consider evidence of interest paid by R & D on loans used to pay for the costs of repairing the building. Altech claimed that such damages were not recoverable under Nebraska law and that R & D had not pled that element of damages in its complaint.

The district court agreed with Altech that R & D's alleged interest damages were disclosed late. The court also concluded that interest paid on borrowed funds could not be recovered as damages for breach of contract, at least not above the statutory judgment rate. And because the determination of damages was intertwined with the extent of damage to the building and the necessity of all the repairs to the building, the court ordered a new trial on all issues. R & D appeals. We granted R & D's petition to bypass. We reverse the decision and remand the cause to the district court.

ASSIGNMENTS OF ERROR

On appeal, R & D assigns that the district court erred in (1) granting Altech's motion for new trial and vacating the judgment in favor of R & D and (2) overruling R & D's application for an award of prejudgment statutory interest and costs and vacating such requested award. Alternatively, R & D argues that the trial court erred in (1) not reducing R & D's judgment by $94,395.97 to $425,907.35 to adjust for the reduction in interest and (2) not limiting the new trial to the issue of damages.

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.[1]

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[1] *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009).

[2] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.[2]

[3] An appellate court reviews questions of law independently of the lower court's conclusion.[3]

ANALYSIS

Jurisdictional Issue.

Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.[4] And this case first presents a jurisdictional issue, as Altech's third-party claim against Thunn Construction is still outstanding.

The jurisdictional issue in this case presents a conflict between Neb. Rev. Stat. §§ 25-1315(1) and 25-1315.03 (Reissue 2008). Section 25-1315(1) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In this case, the order granting a new trial was not certified as a final judgment under § 25-1315(1). Altech argues that as a

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[2] *Lacey v. State*, 278 Neb. 87, 768 N.W.2d 132 (2009).

[3] *Anderson v. Houston*, 277 Neb. 907, 766 N.W.2d 94 (2009).

[4] *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

result, the order is not appealable until Altech's claim against Thunn Construction is disposed of.

R & D disagrees and relies on § 25-1315.03, which provides:

> An order entering judgment [notwithstanding the verdict] or granting or denying a new trial is an appealable order. The time for and manner of taking such appeal shall be as in an appeal from a judgment, decree, or final order of the district court in a civil action. On appeal from an order granting a new trial, upon a review of an order denying a new trial in the action in which such motion was made, or on appeal from the judgment, the appellate court may order and direct judgment to be entered in favor of the party who was entitled to such judgment.

R & D argues that § 25-1315.03 takes precedence here, such that the order granting Altech a new trial is appealable despite the fact that the judgment was not certified under § 25-1315(1).

[4] To the extent there is a conflict between two statutes on the same subject, the specific statute controls over the general statute.[5] In this case, we have two statutes dealing with the finality and appealability of the order of a district court. The subject matter of § 25-1315.03 is limited to orders entering a judgment notwithstanding the verdict or granting or denying a new trial; we are presented with an order granting a new trial. On the other hand, § 25-1315(1) contains no language with regard to orders such as this. We therefore conclude that § 25-1315(1) is of more general applicability and that § 25-1315.03 is more specific. The more specific statute, § 25-1315.03, controls in this case. As such, the order of the district court granting a new trial is final and appealable.

Recoverability of Interest Paid as Damages.

On appeal, R & D argues that the district court erred in concluding it was not entitled to recover, as an element of damages, the interest it paid on funds it borrowed to make

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[5] *Sack v. Castillo*, 278 Neb. 156, 768 N.W.2d 429 (2009).

repairs to its property during the pendency of this litigation. This court has never addressed whether interest paid on borrowed funds can be recovered as damages, though the issue has previously been presented to us.[6] On that previous occasion, we declined to reach the issue because we found that the proof presented regarding damages in that case was deficient. We find no such deficiency in this case and thus are squarely presented with whether such interest is recoverable. We conclude that because the Legislature has seen fit to provide for prejudgment interest in Neb. Rev. Stat. § 45-103.02 (Reissue 2004), the type of recovery sought by R & D in this case is not permitted.

[5] In support of its argument that it should be entitled to recover the interest paid on borrowed funds, R & D contends that "[w]ithout an award of the interest expense, [R & D] is not made whole or compensated for losses it sustained."[7] But the purpose behind prejudgment interest statutes is to "ensure that an injured party is fully compensated."[8] It is the Legislature's function through the enactment of statutes to declare what is the law and public policy.[9] Where a mechanism with the specific purpose of fully compensating a litigant exists, we decline to provide a remedy beyond that established by the Legislature. We therefore conclude that the district court did not err in concluding it had erred when it initially admitted the evidence relating to the interest paid. We note that this conclusion is consistent with other jurisdictions that for various reasons have reached this same result.[10]

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[6] See *Union Ins. Co. v. Land and Sky, Inc.*, 253 Neb. 184, 568 N.W.2d 908 (1997).

[7] Brief for appellant at 16.

[8] *Milwaukee v. Cement Div., National Gypsum Co.*, 515 U.S. 189, 195, 115 S. Ct. 2091, 132 L. Ed. 2d 148 (1995).

[9] *In re Trust Created by Nixon*, 277 Neb. 546, 763 N.W.2d 404 (2009).

[10] *Cencula v. Keller*, 180 Ill. App. 3d 645, 536 N.E.2d 93, 129 Ill. Dec. 409 (1989); *Parkside Mobile Estates v. Lee*, 294 N.W.2d 327 (Minn. 1980). But see, *St. Paul Structural Steel v. ABI Contracting*, 364 N.W.2d 83 (N.D. 1985) (decided under Minnesota law); *Metropolitan Transfer v. Design Structures*, 328 N.W.2d 532 (Iowa App. 1982).

Though we conclude the district court was correct in determining that the interest evidence was inadmissible, we agree with R & D that the district court erred in granting a new trial. In its motion for remittitur, Altech requested that the verdict be reduced by $93,780.54; R & D now stipulates that the interest costs were actually $94,395.97. Given this agreement, we conclude that Altech's motion for remittitur should have been granted and that R & D's judgment should have been reduced by $94,395.97 to $425,907.35.

Prejudgment Interest.

Finally, R & D argues that it is entitled to prejudgment interest on the judgment, less the interest erroneously admitted. Section 45-103.02(1) provides that

> interest as provided in section 45-103 shall accrue on the unpaid balance of unliquidated claims from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the entry of judgment if all of the following conditions are met:
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> (a) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;
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> (b) The offer is made not less than ten days prior to the commencement of the trial;
>
> (c) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and
>
> (d) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first.

A review of the record demonstrates that R & D complied with all of the requirements of § 45-103.02(1). As such, R & D is entitled to an award of prejudgment interest. We remand this cause to the district court for a determination of that prejudgment interest.

CONCLUSION

As an initial matter, we conclude that this court has jurisdiction over this appeal under § 25-1315.03. We also conclude

that the district court was correct in concluding the interest paid on the money borrowed by R & D was not recoverable. However, we conclude that the district court erred in granting a new trial on all issues and instead should have granted Altech's motion for remittitur. Finally, we conclude that R & D was entitled to prejudgment interest on the jury award less the amount of the remittitur. We therefore reverse the district court's grant of a new trial and remand the cause with directions to grant Altech's motion for remittitur and to calculate prejudgment interest.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating in the decision.

IN RE INTEREST OF CHANCE J., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ANDREW J., APPELLANT.

776 N.W.2d 519

Filed December 31, 2009. No. S-08-962.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.
3. **Parental Rights: Abandonment: Words and Phrases.** For purposes of Neb. Rev. Stat. § 43-292(1) (Reissue 2008), "abandonment" is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.
4. **Parental Rights: Abandonment: Intent.** In determining whether parental rights should be terminated based on abandonment, the question of abandonment is largely one of intent, to be determined in each case from all the facts and circumstances.
5. **Parental Rights: Abandonment: Proof.** To prove abandonment in determining whether parental rights should be terminated, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities.

6. **Parental Rights: Abandonment: Intent: Proof: Time.** Whether a parent has abandoned a child within the meaning of Neb. Rev. Stat. § 43-292(1) (Reissue 2008) is a question of fact and depends upon parental intent, which may be determined by circumstantial evidence. The time period for abandonment in this section is determined by counting back 6 months from the date the juvenile petition was filed.
7. **Marriage: Paternity: Presumptions: Proof.** Children born to the parties in a marriage are presumed legitimate until proved otherwise or decreed otherwise by the court.
8. **Parental Rights: Abandonment: Paternity.** In determining whether parental rights should be terminated based on abandonment, paternal uncertainty based on physical appearance of a child or suspicions of infidelity is not just cause or excuse for abandoning a child born into wedlock, especially when there are ample means to verify one's paternity.
9. **Parental Rights: Juvenile Courts.** Reasonable efforts to reunify the family are required under the juvenile code only when termination of parental rights is sought under Neb. Rev. Stat. § 43-292(6) (Reissue 2008).
10. **Parental Rights: Proof.** A court may not properly deprive a parent of the custody of his or her minor child unless the State affirmatively establishes that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and SIEVERS, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, VERNON DANIELS, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Patrick A. Campagna and Justin A. Roberts, Senior Certified Law Student, of Lustgarten & Roberts, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, Jennifer Chrystal-Clark, and Carolyn H. Curry, Senior Certified Law Student, for appellee.

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

GERRARD, J.

NATURE OF CASE

This is an action to terminate the parental rights of Andrew J., the biological father of Chance J. The juvenile court terminated Andrew's parental rights pursuant to Neb. Rev. Stat.

§ 43-292(1), (2), and (9) (Reissue 2008). A divided panel of the Nebraska Court of Appeals reversed the judgment of the juvenile court, holding that the State failed to present sufficient evidence to support a finding by clear and convincing evidence that Andrew's parental rights should be terminated based on abandonment. The court also determined that reasonable reunification efforts were required and that termination of Andrew's parental rights was not in Chance's best interests.[1] On further review, we conclude that the juvenile court did not err in terminating Andrew's parental rights and reverse the judgment of the Court of Appeals.

BACKGROUND

Andrew's Marriage and Birth of Chance J.

Andrew and Miranda J., Chance's mother, were married in Omaha, Nebraska, on February 6, 2002. They left Nebraska and moved to Kentucky in 2004. Eventually, they separated because Miranda was prostituting and using drugs. Less than a year after their separation, Andrew received a telephone call informing him that Miranda was pregnant and scheduled to give birth in California. Andrew traveled from Kentucky, where he lived, to California for the birth.

In April 2006, Miranda gave birth to Chance. Andrew testified that after Chance was born, the hospital room atmosphere was "awkward," because Andrew is African-American, but when a nurse brought the baby to him, "the baby was white, had blue eyes, and red hair." Miranda asked what was wrong and, when she saw Chance, indicated that Chance must have been "'a trick's baby.'" Andrew testified that once he saw Chance, he did not believe that Chance was his son and made no further effort to try and determine whether he was Chance's father. At the termination hearing, Andrew was asked whether it concerned him that Chance was with a woman who he knew had a history of prostitution and drug use, and he replied that yes, "anybody with Miranda has always concerned me." Andrew left the hospital and returned to Kentucky.

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[1] See *In re Interest of Chance J.*, 17 Neb. App. 645, 768 N.W.2d 472 (2009).

Chance J. in Foster Care

In June 2007, the State initiated juvenile proceedings against Miranda alleging that Chance came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2006). Chance was removed from Miranda's home and placed in foster care, and eventually, Miranda's parental rights were terminated. When juvenile proceedings were first initiated, Chance was placed with a licensed foster parent for approximately 6 months. At Andrew's termination hearing, the first foster parent testified that when she received Chance, he was not developmentally "up to par." She testified that Amy Watson, the Department of Health and Human Services (DHHS) caseworker, told her Andrew was Chance's father, but that in the 6 months of placement in that foster home, there were no visitations and no contact from Andrew.

Chance was then transferred to a second foster home, where he has remained. Chance's second foster mother testified that she believed Chance was developmentally delayed when he came to her home and that, at 18 months old, Chance was barely walking, was unable to communicate, and "just sat there." She described Chance as not interacting well, including not wanting to be held or touched. The second foster mother was concerned about Chance's behavior and quit her job to stay at home with him, explaining that Chance was afraid to be at daycare. She took Chance to a pediatric specialist to test for autism and also to the Munroe-Meyer Institute in Omaha, which specializes in providing services and support for persons with genetic disorders and developmental disabilities. The foster mother also initiated testing with Omaha Public Schools and secured services for Chance, such as early childhood development and speech therapy. The service providers come to Chance's second foster home and also to Chance's daycare to work with him daily. She testified that Chance is still "delayed," but has adjusted well, and is now walking, talking, and riding bikes.

Chance's second foster mother explained that Chance has had no visitation with Andrew and has not received any form of contact from him. In late July 2008, the foster mother was instructed that Chance would be having visitation with

Andrew, but the visitation never took place and she was never contacted.

Andrew's Contact With DHHS

When Miranda and Chance first became involved in juvenile proceedings, a DHHS initial assessment worker, Kris Kircher, was assigned to Chance. At Andrew's termination hearing, Kircher testified that from the earliest involvement with DHHS, Miranda had consistently informed her that Andrew was Chance's father. Kircher, through Miranda, child support databases, and federal and state departments of corrections Web sites, was able to find three addresses for Andrew. On June 4, 2007, Kircher sent one letter to each of the three addresses, via certified mail, informing Andrew that he was the alleged father of Chance and that a juvenile case had been filed. The letters were on DHHS letterhead and included the case docket number, Miranda's name, and contact telephone numbers. They advised Andrew to contact an attorney and that a petition to terminate his "parental rights may be filed, due to abandonment." One of the three letters was sent to Andrew at an address on "Richland Drive" in Bowling Green, Kentucky. Andrew testified that he resided at that address during this time, but received no such letter. No evidence was adduced that the letters had been received or returned. Kircher explained that she did not attempt to contact Andrew by telephone, although she was present at a visitation when Miranda claimed to be on the telephone with Andrew discussing Chance.

Shortly thereafter, the case was transferred to a second DHHS caseworker, Watson, who testified that she also was involved in the process of locating Andrew. Watson explained that in such a case where a parent's whereabouts are unknown, she first checks to see what the initial assessment worker has completed and then conducts her own investigation, which includes looking for addresses and telephone numbers, talking with family members, and Internet research. Watson testified that when she received Chance's file, she reviewed the letters Kircher had sent out a couple of weeks before and doublechecked all current addresses within the child support system, the DHHS computer programs, and the Nebraska and

Kentucky child support systems. Watson also talked to all possible relatives, as well as Miranda. Watson testified that she knew Andrew was Chance's legal father from the marriage certificate of Andrew and Miranda. According to Watson, she did not initially send out letters to Andrew because Kircher had recently done so.

Miranda supplied Watson with a telephone number for Andrew, and Watson testified that immediately after she received the case, she tried to contact Andrew "[s]everal times" and then again "every couple of months" until February 2008. On February 1, Watson sent Andrew two letters, one again going to the Richland Drive address in Bowling Green. Watson testified that on February 14, she received a voice mail from Andrew stating that he had received her letter and providing a new contact telephone number. Watson called Andrew at the newly provided number and left him a lengthy message, with court dates and telephone numbers, but did not actually talk to Andrew until March 4.

During the conversation on March 4, 2008, Andrew told Watson that he did not believe Chance was his son because of how Chance looked at birth. Watson explained to Andrew that under Nebraska law, because he and Miranda were married at the time of Chance's birth, he was presumed to be Chance's legal father. Watson testified that Andrew explained that he had not seen Chance since birth, but had talked with Miranda "'all the time'" about Chance and how he looked. Andrew told Watson, again, that he did not think Chance was his, but would "take him" if Chance was his child. Watson gave Andrew several referrals for DNA testing and several contact numbers for herself, as well as child support agencies. Andrew did not ask to have any contact with Chance at that time, but continued to maintain contact with Watson over the following months. In April 2008, genetic testing was completed, indicating that Andrew was Chance's father.

Juvenile Proceedings

On February 14, 2008, the State filed a supplemental petition alleging that Chance was within the meaning of §§ 43-247(3)(a) and 43-292(1), (2), and (9), by virtue of abandonment by

Andrew for reason of no contact or support in the previous 6 months, and that it was in the best interests of Chance that Andrew's parental rights be terminated. The hearing on the supplemental petition was held on August 4, 2008.

Watson testified that she believed it was in Chance's best interests that Andrew's parental rights be terminated. Watson explained that in making such a determination, she uses several factors, such as legal reasons, efforts to locate and work with the parent, services done voluntarily and services ordered, length of time in foster care, permanency options and the care the child is currently receiving, and the long-term emotional, social, educational, and psychological needs of the child. Watson testified that in Chance's case, Chance "has been able to get stable, permanent, love, affection, the education, the speech development, the occupational and physical therapy development that he's needed, and is in a permanent option at this point."

Andrew testified in his own behalf. Andrew testified that he still lives in Bowling Green and has been employed with the "Lincoln Way Agency" for 1 year. Andrew testified that he was not previously married, but does have three older children in their twenties that he raised on his own, after their mother left them in his care. Andrew testified that he was still legally married to Miranda and that Miranda did not keep in contact with him after Chance's birth and Andrew's return to Bowling Green. Specifically, Andrew maintained that he had no contact with Miranda until May 2008, even though there was testimony presented that Andrew had told Watson he had spoken with Miranda in the months prior to the petition's being filed. Andrew further explained that the February 1, 2008, letter from Watson was the first contact he had with DHHS concerning Andrew. Andrew testified that he was never informed that he could send cards, letters, or gifts to Chance and was never offered any type of visitation.

The juvenile court entered an order determining that Chance was a child within the meaning of §§ 43-247(3)(a) and 43-292(1), (2), and (9) and that it was in the best interests of Chance that Andrew's parental rights be terminated. Andrew appealed. The Court of Appeals reversed the order of

the juvenile court. The Court of Appeals found that the evidence was insufficient to prove that Andrew's parental rights should be terminated. The court also determined that reasonable efforts to reunify the father and son were required and that termination of Andrew's parental rights was not in Chance's best interests.[2] The State filed a petition for further review, which we granted.

ASSIGNMENTS OF ERROR

In its petition for further review, the State assigns that the Court of Appeals erred in reversing the juvenile court's determinations that (1) the State proved by clear and convincing evidence that Andrew abandoned Chance, (2) reasonable efforts to reunify the family were not required, and (3) termination of Andrew's parental rights was in Chance's best interests.

STANDARD OF REVIEW

[1,2] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.[3] However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.[4]

ANALYSIS

Statutory Grounds for Termination of Parental Rights

[3] The State first argues that the Court of Appeals erred in concluding that there was not clear and convincing evidence that Andrew abandoned Chance under § 43-292(1) and (9). In relevant part, § 43-292 provides:

> The court may terminate all parental rights between the parents . . . and [a] juvenile when the court finds such action to be in the best interests of the juvenile and it

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[2] See *id.*

[3] *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009).

[4] *Id.*

> appears by the evidence that one or more of the following conditions exist:
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> (1) The parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition.

For purposes of § 43-292(1), "abandonment" is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.[5]

[4-6] The question of abandonment is largely one of intent, to be determined in each case from all the facts and circumstances.[6] To prove abandonment, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities.[7] Whether a parent has abandoned a child within the meaning of § 43-292(1) is a question of fact and depends upon parental intent, which may be determined by circumstantial evidence.[8] The time period for abandonment in this section is determined by counting back 6 months from the date the juvenile petition was filed.[9]

In this case, the supplemental petition was filed on February 14, 2008. The crucial time period for our analysis, therefore, is August 14, 2007, through February 14, 2008. The record clearly shows that Andrew had no contact with Chance during this 6-month time period. In fact, Andrew's only pre-petition contact with Chance, ever, was immediately following his birth in April 2006. Both foster mothers and the two DHHS workers involved testified that Andrew had no contact with Chance during the relevant 6-month period, or at any time before or after

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[5] *In re Interest of Dustin H. et al.*, 259 Neb. 166, 608 N.W.2d 580 (2000).

[6] See *id.*

[7] See *In re Interest of B.A.G.*, 235 Neb. 730, 457 N.W.2d 292 (1990).

[8] *In re Interest of Dustin H. et al., supra* note 5.

[9] *In re Interest of Dezziny C.*, 15 Neb. App. 179, 723 N.W.2d 652 (2006).

the 6-month period. Andrew himself admitted to having no pre-petition contact with Chance after April 2006. In addition, Andrew has not provided Chance any financial support and has not provided any cards, gifts, or letters to Chance. In short, the evidence shows a complete abandonment of parental rights and responsibilities.

Given these undisputed facts, the question before us is whether Andrew had just cause or excuse to withhold his presence, care, love, protection, maintenance, and the opportunity for the display of parental affection of Chance. Andrew argues that he had just cause or excuse, because prior to genetic testing, he believed that he was not Chance's father.

In agreeing with Andrew, the Court of Appeals relied on *In re Interest of Dylan Z.*,[10] in which it had held that a father's lack of contact with his minor child was directly attributable to his lack of knowledge that he was the child's father. In that case, the Court of Appeals concluded that the father's failure to connect with his child was due to just cause and excuse, because DHHS and the protection safety worker made no attempts to contact the father during the relevant 6-month period.[11]

[7] *In re Interest of Dylan Z.*, however, dealt with a significantly different set of circumstances than the situation in the present case. First, Dylan's parents were not married or in a relationship at the time of Dylan's birth. Here, Andrew and Miranda were, even at the time of the hearing on Andrew's parental rights, still legally married. It has long been the law that children born to the parties in a marriage are presumed legitimate until proved otherwise or decreed otherwise by the court.[12] But more importantly, in *In re Interest of Dylan Z.*, Dylan's alleged father was not present at Dylan's birth. Here, Andrew was informed of the birth and traveled to California to witness it.

[8] Andrew testified that after seeing Chance shortly after his birth, Andrew did not believe the child was his. The Court

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[10] *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707 (2005).

[11] See *id.*

[12] Neb. Rev. Stat. § 42-377 (Reissue 2008).

of Appeals concluded that there was nothing in the record to indicate that Andrew had actual knowledge that Chance was his child until the genetic testing was completed in April 2008, and therefore, Andrew could not have intentionally abandoned Chance because he did not know Chance was his child. We conclude, however, that paternal uncertainty based on physical appearance of a child or suspicions of infidelity is not just cause or excuse for abandoning a child born into wedlock, especially when there are ample means to verify one's paternity.

In fact, "just cause or excuse" for a parent's failure to maintain a relationship with a minor child has generally been confined to circumstances that are, at least in part, beyond the control of the parent.[13] But there is nothing in the record in this case indicating that Andrew did not have the means or opportunity to confirm his suspicions that Chance was not his child, at the hospital, or anytime thereafter. Andrew concedes that he did not try to ascertain his paternity or assert any parental interest in Chance, despite the fact that Chance was born of his marriage to Miranda. Only after the State filed a petition to terminate his rights, nearly 3 years after Chance was born, did Andrew attempt to take any responsibility for Chance. The obligations of parenthood cannot be set aside that easily, based on nothing more than mere physical appearance or unconfirmed suspicions. We will not set the bar so low for responsible parental involvement.

We conclude, based on our de novo review of the record, that Andrew has intentionally withheld from Chance, without just cause or excuse, his presence, care, love, protection, maintenance, and opportunity for the display of parental affection. Furthermore, the physical appearance of a child or suspicions

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[13] See, *In re Morris*, 892 So. 2d 739 (La. App. 2005); *S. K. L. v. Smith*, 480 S.W.2d 119 (Mo. App. 1972). See, e.g., *In re Interest of Sunshine A. et al.*, 258 Neb. 148, 602 N.W.2d 452 (1999); *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992); *In re Interest of K.M.S.*, 236 Neb. 665, 463 N.W.2d 586 (1990); *In re Interest of B.A.G., supra* note 7. Compare, e.g., *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

of infidelity is not just cause or excuse for abandoning a child born into wedlock. The Court of Appeals erred in concluding that Andrew did not abandon Chance. Because we have concluded that Andrew abandoned Chance within the meaning of § 43-292(1), we need not address Andrew's conduct under § 43-292(9).

Reasonable Efforts Not Required

[9] In a related argument, the State contends that the Court of Appeals erred in concluding that reasonable efforts to reunify Andrew and Chance were required. We agree that the Court of Appeals erred in this regard. Reasonable efforts to preserve and reunify a family are required when the State seeks to terminate parental rights under § 43-292(6). But in *In re Interest of Hope L. et al.*,[14] we recently reaffirmed our holding that reasonable efforts to reunify the family are required under the juvenile code *only* when termination is sought under § 43-292(6), not when termination is based on other grounds.[15] Here, termination was not sought under § 43-292(6); it was sought under § 43-292(1), (2), and (9), and we have affirmed the court's finding of abandonment under § 43-292(1). Therefore, after a proper finding of abandonment, it was not necessary for the State to make reasonable efforts to reunify this father and child.

Best Interests of Chance J.

Having concluded that the State met its burden to show the requisite statutory grounds under § 43-292, we move next to the question of whether the termination of Andrew's parental rights is in the best interests of Chance. The State argues that the Court of Appeals erred in reversing the juvenile court's finding that termination of Andrew's parental rights was in the best interests of Chance. Again, we agree.

[10] A court may not properly deprive a parent of the custody of his or her minor child unless the State affirmatively

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[14] *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

[15] See, *id.*; *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002).

establishes that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.[16] It is always the State's burden to prove by clear and convincing evidence that the parent is unfit and that the child's best interests are served by his or her continued removal from parental custody.[17] We have noted that the term "unfitness" is not expressly used in § 43-292, but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the child's best interests.[18]

The evidence establishes that Andrew has forfeited his parental rights relating to Chance and that termination of Andrew's parental rights is in the best interests of Chance. First, the record clearly shows that Andrew's only pre-petition contact with Chance, ever, was immediately following his birth in April 2006. Andrew has not provided Chance any financial support and has not provided any cards, gifts, or letters to Chance. Andrew's failure to contact Chance, let alone parent him, has caused Chance to be placed in foster care for more than 3½ years.

Chance also has several special needs, including developmental delays that require significant time and appropriate services. Evidence presented at the termination hearing indicates that Chance's second foster mother has provided appropriate care and that the foster home is a suitable placement for Chance. When Chance first came to live with the second foster parent, he was barely walking, was unable to communicate, and "just sat there." In less than a year, Chance has improved. Andrew testified that he was unaware Chance had special needs until hearing the second foster mother's testimony, but thought he could get services for Chance, because "in every state of the United States there is [sic] all types of services for kids with needs." Andrew's lack of knowledge about Chance's needs, and Andrew's unpreparedness to provide for them, demonstrates

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[16] *Id.*

[17] *Id.*

[18] See *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007).

the consequences of a willful failure to be involved with his son's life.

In addition, Watson testified that in her opinion, it was in Chance's best interests that Andrew's parental rights be terminated. In making that determination, Watson considered Andrew's lack of involvement, Chance's special needs, and the stability of Chance's current situation. Watson placed great emphasis on the fact that Chance has been able to get stable, permanent love and affection; education; speech development; and the occupational and physical therapy that he has needed. While the availability of better circumstances for Chance is in no way dispositive, the attention provided to Chance in his foster home provides a persuasive contrast with Andrew's failure to do the same and demonstrates the value to Chance of stability. We conclude Andrew forfeited his parental rights concerning Chance and terminate Andrew's parental rights.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the Court of Appeals, and remand the cause to the Court of Appeals with directions to affirm the judgment of the juvenile court.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
ERICK FERNANDO VELA, APPELLANT.
777 N.W.2d 266

Filed January 8, 2010. No. S-07-138.

1. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, regarding which the Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.
2. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
3. **Pretrial Procedure: Appeal and Error.** The trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion.
4. **Statutes: Constitutional Law: Sentences.** Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which

purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.

5. **Constitutional Law: Appeal and Error.** The Nebraska Supreme Court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.
6. **Constitutional Law: Statutes.** Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto.
7. **Appeal and Error: Words and Phrases.** Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
8. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.
9. **Jury Instructions: Appeal and Error.** Absent plain error indicative of a probable miscarriage of justice, the failure to object to a jury instruction after it has been submitted for review precludes raising an objection on appeal.
10. **Appeal and Error.** Consideration of plain error occurs at the discretion of an appellate court.
11. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
12. **Jury Instructions: Appeal and Error.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.
13. **Aiding and Abetting: Proof.** Under Nebraska law, a person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he or she were the principal offender. Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Mere encouragement or assistance is sufficient.
14. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
15. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
16. **Judgments: Appeal and Error.** In making the determination as to factual questions, an appellate court does not reweigh the evidence or resolve conflicts in the

evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.

17. **Criminal Law: Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Mental Competency: Records.** When a defendant in a capital sentencing proceeding places his or her mental health at issue either by asserting mental retardation as a basis for precluding the death penalty pursuant to Neb. Rev. Stat. § 28-105.01(2) (Reissue 2008) or by asserting mental illness as a mitigating circumstance pursuant to Neb. Rev. Stat. § 29-2523(2)(g) (Reissue 2008), there is good cause under Neb. Rev. Stat. § 83-178(2) (Reissue 2008) for the prosecution to obtain access to the defendant's mental health records in the possession of the Department of Correctional Services.
18. **Criminal Law: Sentences: Death Penalty: Mental Competency: Pleadings.** When a defendant files a verified motion to preclude imposition of the death penalty on the basis of mental retardation pursuant to Neb. Rev. Stat. § 28-105.01(4) (Reissue 2008), the trial court has inherent authority to grant a motion by the State to have the defendant evaluated by a mental health professional of the State's choosing.
19. **Statutes.** When considering a statute's meaning, it is appropriate for a court to consider the evil and mischief attempted to be remedied, the objects sought to be accomplished, and the scope of the remedy to which its terms apply and to give the statute such an interpretation as appears best calculated to effectuate the design of the legislative provisions.
20. **Sentences: Death Penalty: Appeal and Error.** In a capital sentencing proceeding, the Nebraska Supreme Court conducts an independent review of the record to determine if the evidence is sufficient to support imposition of the death penalty.
21. **Constitutional Law: Death Penalty: Judgments: Evidence: Appeal and Error.** In challenges to the constitutionality of a method of execution, the Nebraska Supreme Court determines whether the trial court's conclusions are supported by substantial evidence.
22. **Constitutional Law: Crime Victims: Sentences.** Victim impact information may be considered in sentencing a convicted murderer, because just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his or her family.
23. ____: ____: ____. Victim family members' characterizations and opinions about the crime, the defendant, or the appropriate sentence may not be received in evidence.
24. **Sentences: Aggravating and Mitigating Circumstances: Proof.** There is no burden of proof with regard to mitigating circumstances. However, because the capital sentencing statutes do not require the State to disprove the existence of mitigating circumstances, the risk of nonproduction and nonpersuasion is on the defendant.
25. **Sentences: Death Penalty: Appeal and Error.** Under Neb. Rev. Stat. § 29-2521.03 (Reissue 2008), the Nebraska Supreme Court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review. This review requires the court to compare the aggravating and mitigating circumstances with those present in other cases in which a district court imposed the death penalty. The purpose of such review is to ensure that the sentence imposed

in a case is no greater than those imposed in other cases with the same or similar circumstances.

Appeal from the District Court for Madison County: PATRICK G. ROGERS, Judge. Affirmed.

James R. Mowbray, Jeffery A. Pickens, and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, and Mark D. Albin, of Albin Law Office, for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN, Judge.

STEPHAN, J.

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I. INTRODUCTION

On September 26, 2002, Erick Fernando Vela and two other armed men walked into a bank in Norfolk, Nebraska. In less than a minute, they shot and killed four bank employees and one customer. Vela was apprehended and eventually pled guilty to five counts of first degree murder and five counts of use of a weapon to commit a felony. The district court for Madison County accepted his pleas and found him guilty of all 10 offenses.

Because the State sought the death penalty, an aggravation hearing was conducted before a jury to determine whether one

or more of the alleged aggravating circumstances existed. The jury determined that five statutory aggravating circumstances existed for each of the murders.

Vela moved to have electrocution as a means of execution declared unconstitutional. His motion was overruled.

Vela then filed motions to preclude the imposition of the death penalty under a Nebraska statute which provides that "the death penalty shall not be imposed upon any person with mental retardation."[1] The district court granted the State's motion to have Vela examined by its chosen expert with respect to his allegation that he was a person with mental retardation. Vela filed an interlocutory appeal which, on March 23, 2005, in case No. S-04-1324, we summarily dismissed based upon our determination that the order was not final and appealable. Following remand, the district court conducted an evidentiary hearing and determined that Vela had not proved that he was a person with mental retardation as defined by applicable Nebraska statutes and overruled his motion to preclude imposition of the death penalty. We dismissed Vela's interlocutory appeal from that order.[2]

A sentencing hearing was conducted before a three-judge panel. After receiving evidence, the panel found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Vela to death for each of the five counts of first degree murder.

The cause before us is Vela's automatic direct appeal from the sentencing order.[3] Vela has assigned numerous errors by the district court. We shall address them in three separate groups, corresponding to the stage of district court proceedings to which they relate: the aggravation hearing, the mental retardation hearing, and the sentencing proceedings. Additional facts will be set forth where pertinent to our discussion and analysis.

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[1] See Neb. Rev. Stat. § 28-105.01(2) (Reissue 2008).

[2] *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006).

[3] See Neb. Rev. Stat. § 29-2525 (Reissue 2008).

II. AGGRAVATION HEARING

1. Background

The original information filed against Vela on October 31, 2002, charged five counts of first degree murder and five counts of use of a weapon to commit a felony, but did not include notice of aggravating circumstances. The third amended information filed on June 9, 2003, charged the same offenses and included a notice of aggravating circumstances with respect to each murder count.[4] Each notice used the statutory language defining the aggravating circumstance[5] but did not include more specific factual allegations. In particular, the notices did not specifically allege that the State intended to establish a "substantial prior history of serious assaultive or terrorizing criminal activity"[6] by proving that Vela, prior to the bank murders, committed the first degree murder of Travis Lundell. Vela pled guilty to the charges in the third amended information.

Upon accepting Vela's guilty pleas, the trial court scheduled a hearing before a jury to determine whether any of the aggravating circumstances alleged by the State existed. At the time Vela committed the murders in September 2002, Nebraska's capital sentencing statutes provided that the sentencing judge or panel would determine the existence of any aggravating circumstances which could warrant imposition of the death penalty.[7] But in November 2002, the Nebraska Legislature, meeting in special session, enacted L.B. 1,[8] which amended Nebraska's capital sentencing statutes. L.B. 1 was enacted in response to the holding of the U.S. Supreme Court in *Ring v. Arizona*,[9] decided on June 24, 2002. In *Ring*, the Supreme

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[4] See Neb. Rev. Stat. § 29-1603(2) (Reissue 2008).

[5] See Neb. Rev. Stat. § 29-2523 (Reissue 2008).

[6] See § 29-2523(1)(a).

[7] See Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1995 & Cum. Supp. 2002).

[8] 2002 Neb. Laws, L.B. 1, Third Spec. Sess.

[9] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

Court held that, other than the finding of a prior conviction, the determination of aggravating circumstances in a capital case must be made by a jury unless waived by the defendant. The amendments made by L.B. 1 became effective on November 23, 2002,[10] approximately 7 months before Vela entered his guilty pleas.

Prior to the scheduled aggravation hearing, Vela filed a motion alleging that the death sentence could not constitutionally apply to him because L.B. 1 was ex post facto legislation. Vela also filed a motion which sought, inter alia, to prohibit the submission of aggravating circumstance (1)(a) to the jury on the ground that the information had not alleged the specific acts upon which the State based the existence of this aggravating circumstance. The district court overruled both motions.

At the commencement of the aggravation hearing, the parties stipulated that Vela shot and killed Lisa Bryant; that Jorge Galindo shot and killed Lola Elwood; and that Jose Sandoval shot and killed Jo Mausbach, Evonne Tuttle, and Samuel Sun. Throughout the aggravation trial, Vela objected to evidence and testimony concerning the actions of Sandoval and Galindo. He argued that such evidence was irrelevant because aggravating circumstances could not be based on aiding and abetting liability. The district court overruled the objections.

(a) Bank Murders

Much of what transpired on the morning of September 26, 2002, was photographed by the bank's surveillance cameras. Recorded video and several time-stamped still-frame photographs from the surveillance system were received into evidence during the aggravation hearing. The photographic evidence showed that at 8:44:56 a.m., Galindo, followed by Vela and then Sandoval, entered the bank through its front door. Sandoval walked straight ahead to the teller counter, where he shot bank employees Sun and Mausbach and bank customer Tuttle at close range. Tuttle sustained a penetrating gunshot wound to the head and another gunshot wound which entered the back of her left hand. Sun sustained two penetrating gunshot

[10] § 29-2519(2)(e).

wounds to his head and another which entered his neck and passed through his chest. Blood from the wounds filled Sun's air passages, causing his death by asphyxiation, described by the pathologist who performed the autopsy as a "horrible-type of death" occurring over a period of several minutes. Mausbach sustained a gunshot wound to the head. Like Sun, she died from asphyxiation resulting from blood filling her air passages over a period of several minutes.

After entering the bank, Galindo immediately approached the private office of Elwood, which was located off the bank lobby to his left as he entered the building. Bank employees Cheryl Cahoy and Susan Staehr were seated in the office, meeting with Elwood. As Galindo approached the office, Cahoy heard a gunshot and an unidentified male voice ask if the alarm had been pulled. Cahoy heard more gunshots and ducked her head. As she did so, she heard Elwood scream. When she looked up, she saw Elwood slumped over in her chair. Elwood sustained two gunshot wounds which penetrated her lungs and heart, and a third gunshot wound to the right side of her abdomen. Neither Cahoy nor Staehr was injured.

After entering the bank, Vela immediately proceeded to Bryant's private office, located off the bank lobby to Vela's right as he entered the building. Surveillance photographs show that he entered Bryant's office by 8:45:06 a.m. and exited the office at 8:45:27 a.m. Bryant's body was found lying behind her desk. She was shot at close range; one bullet penetrated her left hand as it was held up and then entered her neck. Another bullet fractured her right femur and lodged in her thigh. Bryant died from asphyxiation caused by blood from the neck wound entering her air passages, causing her to struggle for air over a period of several minutes.

Bank customer Micki Koepke arrived at the bank at approximately 8:45 a.m. As she entered the building, she saw Sandoval at the teller counter. At 8:45:29 a.m., Galindo fired at Koepke from where he stood in the doorway of Elwood's office. The bullet entered and exited Koepke's upper right shoulder, and she ran to her vehicle and called the 911 emergency dispatch service. The shots Galindo fired at Koepke also struck a fast-food restaurant across the street from the bank.

Vela, Sandoval, and Galindo left the bank about 45 seconds after they entered. A witness who observed Vela shortly after he left the bank testified that he was smiling. The three men forcibly entered an occupied home near the bank. Vela put a gun to the head of one resident, and the men demanded and received car keys belonging to another resident. They obtained the keys and escaped in the stolen vehicle without injuring any of the occupants of the home. They were apprehended and taken into custody shortly thereafter.

Vela pled guilty to burglary, robbery, and use of a firearm to commit a felony in connection with this incident. Sandoval and Galindo were tried, convicted, and sentenced to death on each of five counts of first degree murder and related weapons charges; we recently affirmed Galindo's convictions and sentences,[11] and Sandoval's direct appeal is pending by this court. Gabriel Rodriguez, who participated in the attempted bank robbery but was not in the bank when the shots were fired, was convicted of five counts of first degree murder and related weapons charges and sentenced to life imprisonment.[12]

(b) Lundell Murder

Lundell was reported missing on August 20, 2002. By letter dated January 21, 2003, the prosecutor notified Vela's counsel that if "Vela wishes to discuss the disappearance and strangulation murder of . . . Lundell, we are available to listen to whatever he wishes to disclose." In a second letter dated March 11, 2003, the prosecutor advised Vela's counsel that he intended to use the Lundell murder at the "aggravation stage" of Vela's trial. On March 17, Galindo led investigators to a rural area of Madison County, Nebraska, where the body of Lundell was recovered from a shallow grave.

At the aggravation hearing held in September 2003, the State presented evidence, over Vela's continuing objection, of his involvement in the death of Lundell, in order to establish the aggravating circumstance that Vela had a "substantial prior

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[11] See *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009).

[12] *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

history of serious assaultive or terrorizing criminal activity."[13] Lundell's severely decomposed body was found wrapped in a comforter held together by strapping tape beneath approximately 3 feet of earth. A bandanna scarf was tied around the mouth and knotted in the back of the neck. The feet were bound together by a fabric strap and string. A forensic pathologist who performed an autopsy testified that the state of decomposition was consistent with burial in a moist grave since August 2002. Due to the extent of internal and external decomposition, the cause of death could not be determined.

Lundell's mother testified that in August 2002, he had been living in a Norfolk apartment with Sandoval and two other persons. He normally contacted her at least once every 2 weeks, but she last heard from him on August 15. At that time, he was 19 years old. Lundell regularly wore a watch which he had purchased in about May 2002, but it was not found on his body or at the site of the exhumation, and his mother did not find it among his personal belongings at his apartment. Vela was wearing a watch at the time of his arrest on September 26; it was taken by law enforcement personnel and stored with his personal property. Lundell's mother identified this watch as belonging to Lundell.

Several persons who had been incarcerated with Vela after his arrest for the bank murders testified that he admitted his involvement in the killing of Lundell. One witness testified that after seeing a television news account of the discovery of Lundell's body, Vela told him that he strangled Lundell because he had stolen marijuana from Sandoval and was giving information to the police. Vela also told this witness that the killing was a test to determine if he had the courage required to kill people in the bank. Vela told this witness that Sandoval and another person were involved with him in the Lundell murder and that they wrapped Lundell's body in a blanket and took it away in the trunk of a vehicle.

Another former cellmate testified that Vela told him about a "boy" whom he, Galindo, and Sandoval had killed and buried. The witness testified that Vela told him that he strangled the

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[13] See § 29-2523(1)(a).

boy with a wire while Galindo was holding his legs. According to this witness, Vela told him they killed the boy because he owed money to Vela and Sandoval. Vela also told the witness that he had taken a watch from the boy "because he liked it." Vela described the watch as silver with a blue face. Another person who was acquainted with Vela both in and out of jail testified that he admitted involvement in the Lundell murder but did not "end it."

Also received in evidence at the aggravation trial was a letter which Vela wrote to his family while in jail, but did not send. In the letter, Vela stated that he was involved in Lundell's death and that he was sorry about it, but that "if I wouldn't do it they would of kill[ed] me and I couldn't escape from them and I was ashame[d] to ask [for] help."

At the conclusion of the aggravation hearing, the district court instructed the jury on five aggravating circumstances.[14] The instructions generally followed the NJI2d Crim. 10.1 model instruction for jury aggravation proceedings. With respect to aggravating circumstance (1)(a), the "substantial prior history of serious assaultive or terrorizing criminal activity," the court gave an instruction which included all the elements of the first degree murder of Lundell. The instructions defined premeditation, but did not define "malice." The court did not instruct on the lesser-included offenses of first degree murder as part of the aggravator.

The jury returned a verdict finding all five aggravators existed for each of the five murders. The district court overruled Vela's motion for new trial.

(c) Discovery Requests

In May 2006, more than 2½ years after the jury's determination of aggravating circumstances, Vela filed a motion requesting leave to take the depositions of five persons who had been convicted in federal criminal proceedings. Vela argued that the depositions were needed to determine whether the discretion of the lead prosecutor in his case had been "burdened by a conflict of interest created by [the prosecutor's] alleged involvement"

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[14] § 29-2523(1)(a), (b), (d), (e), and (f).

in a criminal conspiracy involving some of the convicted felons.[15] Vela's motion alleged that two of the witnesses who testified for the State at his aggravation hearing were linked to the alleged conspiracy. The district court denied the motion to take the depositions, determining that there had been no showing that the proposed depositions would be relevant or material to the proceedings involving Vela.

2. Assignments of Error

Vela assigns, restated and renumbered, that the district court erred in the following:

1. Denying his motion to prohibit any jury aggravation trial because L.B. 1 is ex post facto legislation, in violation of article I, § 10, of the U.S. Constitution and article I, § 16, of the Nebraska Constitution.

2. Receiving evidence at the aggravation trial concerning the Lundell homicide and submitting aggravator (1)(a) to the jury, in violation of his right to notice under the 6th and 14th Amendments to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, and in denying his motion for new trial on these grounds.

3. Failing to define the term "malice" in its jury instruction on aggravator (1)(a), in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution and article I, § 3, of the Nebraska Constitution.

4. Failing to instruct on the lesser-included offenses of first degree murder in its jury instruction on aggravator (1)(a), in violation of Neb. Rev. Stat. § 29-2027 (Reissue 2008), the 8th and 14th Amendments to the U.S. Constitution, and article I, §§ 3 and 9, of the Nebraska Constitution.

5. Failing to identify and define the crime for which Vela was allegedly trying to conceal the identity of the perpetrator with regard to aggravating circumstance (1)(b), in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution and article I, § 3, of the Nebraska Constitution.

6. Receiving evidence concerning the actions of Vela's codefendants and by instructing the jury that the alleged

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[15] Brief for appellant at 53.

aggravating circumstances could be based upon liability as an aider and abettor, in violation of the 8th and 14th Amendments to the U.S. Constitution; article I, § 9, of the Nebraska Constitution; and the language of § 29-2523.

7. Failing to grant his motion to take additional depositions and recuse the Madison County Attorney, in violation of Neb. Rev. Stat. §§ 25-1233 and 29-1917 (Reissue 2008) and the 6th and 14th Amendments to the U.S. Constitution.

3. Standard of Review

[1] The constitutionality of a statute is a question of law, regarding which the Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.[16]

[2] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.[17]

[3] The trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion.[18]

4. Analysis and Resolution

(a) Ex Post Facto Claim

[4,5] Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.[19] This court ordinarily construes Nebraska's ex post

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[16] *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *State v. Diaz*, 266 Neb. 966, 670 N.W.2d 794 (2003).

[17] *State v. Schmidt*, 276 Neb. 723, 757 N.W.2d 291 (2008); *State v. Moore*, 276 Neb. 1, 751 N.W.2d 631 (2008).

[18] *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

[19] *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004); *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

facto clause to provide no greater protections than those guaranteed by the federal Constitution.[20]

As noted above, L.B. 1 changed the procedure by which the existence of aggravating circumstances is determined in a first degree murder case. Prior to its passage, the existence of statutory aggravating circumstances necessary to warrant imposition of the death penalty was determined by the sentencing judge or three-judge panel.[21] L.B. 1 changed prior law by requiring that a jury determine the existence of aggravating circumstances, unless a jury is waived by the defendant.[22]

We have previously rejected claims that L.B. 1 constituted ex post facto legislation with respect to the imposition of the death penalty for first degree murders committed before its enactment. *State v. Gales* (*Gales I*)[23] was an appeal from two death sentences imposed in 2001 for first degree murders committed in 2000. It was pending before this court at the time of the *Ring* decision and the Legislature's subsequent enactment of L.B. 1. The defendant in *Gales I* objected to the State's request that the matter be remanded for sentencing pursuant to L.B. 1, arguing that L.B. 1 constituted a substantive change in the law which could not be applied retroactively without violating the constitutional prohibition of ex post facto legislation. We held that the change which required a jury instead of a judge or panel of judges to determine the existence of aggravating circumstances was procedural in nature and remanded the cause to the district court for resentencing. On remand, in *State v. Gales* (*Gales II*),[24] the defendant was again sentenced to death after a jury determined the existence of multiple aggravating circumstances, and this court affirmed those sentences on direct appeal.

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[20] *State v. Worm, supra* note 19.

[21] § 29-2522.

[22] L.B. 1, § 11 (presently codified at § 29-2520(2) (Reissue 2008)).

[23] *Gales I, supra* note 19.

[24] *Gales II, supra* note 16.

Subsequently, in *State v. Mata* (*Mata I*),[25] we rejected a similar claim. As in *Gales I*, the defendant in *Mata I* committed first degree murder and was sentenced to death before the *Ring* decision and the enactment of L.B. 1. On direct appeal, we affirmed the conviction, but pursuant to our holding in *Gales I*, we vacated the death sentence and remanded the cause for resentencing on the charge of first degree murder. On remand, in *State v. Mata* (*Mata II*),[26] the defendant was once again sentenced to death after a jury determined the existence of aggravating circumstances. In deciding his appeal from that sentence, we rejected a claim that L.B. 1 constituted ex post facto legislation, because *Ring* rendered unconstitutional the death penalty statutes which were in effect at the time of the murder. Relying upon the reasoning of *Dobbert v. Florida*,[27] we concluded that "mere procedural changes to comply with new constitutional rules do not disadvantage a defendant or impose additional punishment even if the procedures in effect when the defendant committed the offense are later declared unconstitutional."[28]

Vela argues that his case is distinguishable from *Gales II*, *Mata II*, and *Dobbert*, because he committed first degree murder *after* the decision in *Ring* and *before* the enactment of L.B. 1. He contends that *Ring* "effectively invalidated Nebraska's death penalty scheme" and that his crimes were committed "during the period in which Nebraska had no effective death penalty."[29]

Vela's factual premise is correct, but his legal conclusion is not. As we recently noted in *State v. Galindo*,[30] the death penalty did not disappear from Nebraska law during the approximately

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[25] *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[26] *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[27] *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977).

[28] *Mata II, supra* note 26, 275 Neb. at 16-17, 745 N.W.2d at 246.

[29] Brief for appellant at 72.

[30] *State v. Galindo, supra* note 11.

5-month period between the decision in *Ring* and the enactment of L.B. 1. Before, during, and after that period, Nebraska statutes provided that the maximum penalty for first degree murder was death.[31] Before he entered the bank on the morning of September 26, 2002, the existence of those statutes gave Vela fair warning of the penalty which the State of Nebraska would seek to impose on him if he were convicted of first degree murder.[32]

[6] L.B. 1 did not aggravate the crime of first degree murder or change the quantum of punishment for its commission. As we have written in *Gales I*, *Mata I*, and *Galindo*, L.B. 1 changed only the procedures for determining whether the death penalty is to be imposed in an individual case. L.B. 1 simply reassigned the responsibility for determining the existence of aggravating circumstances from judges to juries in order to comply with the new constitutional rule announced in *Ring*. We specifically held in *Gales I* and reaffirmed in *Mata I* and *Galindo* that the change was procedural, not substantive.[33] "Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*."[34]

In this case, as in *Dobbert*, "not only was the change in the law procedural, it was ameliorative"[35] both in its intent[36] and operation. L.B. 1 guaranteed a defendant's Sixth Amendment right, recognized for the first time in *Ring*, to have a jury determine whether there were aggravating circumstances which would warrant imposition of the death penalty. It also specifically recognized a defendant's right to waive a jury determination of the alleged aggravating circumstances and have that determination made instead by a panel of three judges.[37]

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[31] Neb. Rev. Stat. §§ 28-105 and 28-303 (Reissues 1998 & 2008).

[32] See *Dobbert v. Florida, supra* note 27.

[33] *Gales I, supra* note 19; *Mata I, supra* note 25; and *State v. Galindo, supra* note 11.

[34] *Dobbert v. Florida, supra* note 27, 432 U.S. at 293.

[35] *Id.*, 432 U.S. at 294.

[36] See § 29-2519(2)(b).

[37] See § 29-2520(3).

Nor do we find merit in Vela's argument that L.B. 1 specifically targeted him and others involved in the Norfolk bank murders and was, therefore, ex post facto legislation. While individual senators and witnesses made references to the Norfolk bank cases during Judiciary Committee hearings on L.B. 1, the Introducer's Statement of Intent clearly stated that the bill was introduced to "set[] forth procedural modifications to Nebraska's existing statutory first degree murder sentencing process in response to the U.S. Supreme Court decision in *Ring v. Arizona*."[38] This legislative intent was specifically codified in § 29-2519(2)(e), which also states that it is the Legislature's intent that the provisions of L.B. 1 "shall apply to *any* murder in the first degree sentencing proceeding commencing on or after November 23, 2002." (Emphasis supplied.) The language of the statute itself plainly expresses the Legislature's intent that it should apply broadly to all capital sentencing proceedings after the date of enactment, and we will not consider isolated comments made during a committee hearing to narrow this intent.[39]

(b) Notice of Aggravating Circumstance (1)(a)

L.B. 1 did not alter the substantive nature of the statutory aggravating circumstances, one or more of which must be proved by the State beyond a reasonable doubt before the death penalty may be considered for a defendant found guilty of first degree murder.[40] But it did establish a new procedure requiring the State to include a "notice of aggravation" in any information charging first degree murder in which the death penalty was sought:

> Any information charging a violation of section 28-303 and in which the death penalty is sought shall contain a notice of aggravation which alleges one or more aggravating circumstances, as such aggravating circumstances are

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[38] 97th Leg., 3d Spec. Sess. (Nov. 12, 2002).

[39] See, *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995) (Caporale, J., concurring); *Nuzum v. Board of Ed. of Sch. Dist. of Arnold*, 227 Neb. 387, 417 N.W.2d 779 (1988).

[40] See *Gales I, supra* note 19.

> provided in section 29-2523. . . . It shall constitute sufficient notice to describe the alleged aggravating circumstances in the language provided in section 29-2523.[41]

Vela pled guilty to the five counts of first degree murder alleged in the third amended information, each of which included a notice of aggravation alleging six aggravating circumstances, including that specified in § 29-2523(1)(a): "[t]he offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial prior history of serious assaultive or terrorizing criminal activity." Vela now argues that he was denied due process, because the State did not specifically allege that it intended to prove his involvement in the Lundell murder in order to establish a "substantial prior history of serious assaultive or terrorizing criminal activity."

Our pre-*Ring*/L.B. 1 jurisprudence clearly held that "[t]he State is not constitutionally required to provide the defendant with notice as to which particular aggravating circumstance or circumstances the State will rely upon in pursuing the death penalty,"[42] because the specific delineation of the aggravating circumstances in the statutes constitutes sufficient notice to a defendant charged with first degree murder. In *State v. Palmer*,[43] we reaffirmed our prior holdings that notice of aggravating circumstances was not constitutionally required, because at the sentencing phase of a first degree murder trial, "the then-convicted defendant is not entitled to all of the same rights accorded one merely accused of a crime but not yet convicted."

These decisions are squarely in line with those of other jurisdictions, including cases decided after *Ring*. For example, in *State v. Hunt*,[44] the Supreme Court of North Carolina held

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[41] § 29-1603(2)(a).

[42] *State v. Reeves*, 234 Neb. 711, 742, 453 N.W.2d 359, 379 (1990), *vacated and remanded on other grounds* 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409. See, also, *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, Mata II, supra* note 26.

[43] *State v. Palmer*, 224 Neb. 282, 306, 399 N.W.2d 706, 724 (1986).

[44] *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003).

that the statute defining 11 aggravating circumstances which could support a capital sentence provided constructive notice sufficient to satisfy due process. It held that in the absence of a statute requiring the state to allege specific aggravating circumstances in the indictment, "due process does not require that short-form murder indictments state the aggravators or even allude to the statutory provision in which they are enumerated."[45] In reaching this conclusion, the court specifically noted that "*Ring* does not require that aggravating circumstances be alleged in state-court indictments."[46] Similarly, in *State v. Steele*,[47] the Supreme Court of Florida held that *Ring* did not require modification of its prior holdings that the State was not required to provide notice to the defendants of the statutory aggravating factors it intended to prove. It concluded that "[w]hether to require the State to provide notice of alleged aggravators is within the trial court's discretion."[48] Likewise, in *Thacker v. State*,[49] the Oklahoma Court of Criminal Appeals held that even after *Ring*, statutory aggravating circumstances need not be included in an indictment or information in a capital murder prosecution, because constitutionally sufficient notice was provided by the statute which specified the aggravating circumstances which could be considered in the sentencing process.

Vela relies heavily upon *Goodloe v. Parratt*[50] in support of his argument that his due process rights were violated when the State did not specifically allege his involvement in the Lundell murder as the basis for the existence of the aggravating circumstance defined by § 29-2523(1)(a). *Goodloe* is a federal habeas corpus case in which a defendant challenged his conviction in a Nebraska state court for operation of a motor vehicle to avoid arrest. The Eighth Circuit Court of Appeals held that the

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[45] *Id.* at 277, 582 S.E.2d at 606.

[46] *Id.* at 274, 582 S.E.2d at 604.

[47] *State v. Steele*, 921 So. 2d 538 (Fla. 2005).

[48] *Id.* at 543.

[49] *Thacker v. State*, 100 P.3d 1052 (Okla. Crim. App. 2004).

[50] *Goodloe v. Parratt*, 605 F.2d 1041 (8th Cir. 1979).

defendant's due process right to reasonable notice of the charge against him was violated because (1) the information did not allege the specific offense for which he allegedly fled arrest, which the court considered an essential element of the flight charge, and (2) while the defendant was initially given actual notice of the underlying offense, the prosecutor changed his theory midtrial and argued that the defendant had fled to avoid arrest for another offense, without giving prior notice to the defendant. The court reasoned that under these circumstances, the defendant "was not given fair and reasonable notice of the offense charged and the case against which he had to prepare a defense; the result was a fundamentally unfair trial that requires the conviction be set aside."[51]

Goodloe does not support Vela's notice argument for several reasons. First, it addresses the requirement of notice in the context of the original criminal charge, not a sentence aggravator which comes into play only if the defendant is convicted of the charged offense. Also, *Goodloe* involved a failure to notify the defendant of an essential element of an offense, but aggravating circumstances as set forth in Nebraska's capital sentencing scheme are not "essential elements" of first degree murder.[52] And, as noted in *Goodloe*, actual notice can satisfy any due process deficiency in a charging document. We conclude that the notice of aggravation included in the third amended information in this case was sufficient, because it described the alleged aggravating circumstances in the language provided in § 29-2523(1)(a).[53] We further note that months before the aggravation hearing in this case, the prosecutor gave Vela and his counsel written notice that he would use Vela's involvement in the Lundell murder to prove aggravating circumstances, and he subsequently provided Vela's counsel with police reports and other investigative materials pertaining to that crime.

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[51] *Id.* at 1047.

[52] See *Mata II, supra* note 26. See, also, *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

[53] See § 29-1603(2)(a).

For completeness, we note that the comment to the NJI2d Crim. 10.1 model instruction states, without citation of authority, that "[t]he State should . . . be required to specify in advance which crimes it is relying on to prove that the defendant has a substantial prior history of serious assaultive or terrorizing criminal activity." While this may be viewed as good practice, we do not hold on the facts of this case that it was constitutionally required. And, as noted above, the prosecutor did inform Vela's counsel in advance that he intended to use Vela's involvement in the Lundell murder as proof of an aggravating circumstance.

In summary, we conclude that the district court did not err in receiving evidence of Vela's involvement in the Lundell murder as proof of the aggravating circumstance defined by § 29-2523(1)(a) or in denying Vela's motion for new trial insofar as it was based on an allegation that the State had failed to provide adequate notice with respect to this aggravating circumstance.

(c) Jury Instruction: Malice

At the close of the evidentiary phase of the aggravation hearing, the district court instructed the jury that in order to find the "substantial prior history of serious assault or terrorizing criminal activity" aggravating circumstance, it must find beyond a reasonable doubt that Vela "did in fact commit the offense of Murder in the First Degree of . . . Lundel[l]." The court instructed the jury that the elements of this offense were that Vela killed Lundell, that he did so "purposely and with deliberate and premeditated malice," and that he "did so on or after August 15, 2002, in Madison County, Nebraska." In a separate instruction entitled "Definitions Applicable to First Degree Murder," the court defined the terms "Deliberate," "Premeditation," and "Intent," but did not define "malice." Although Vela submitted written objections to the jury instructions, he did not object on the ground that they did not include a definition of malice, and he did not request an instruction including this definition. Vela contends on appeal that the failure of the district court to instruct the jury on the definition of malice constitutes plain error.

[7-10] Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[54] In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.[55] Absent plain error indicative of a probable miscarriage of justice, the failure to object to a jury instruction after it has been submitted for review precludes raising an objection on appeal.[56] Consideration of plain error occurs at the discretion of an appellate court.[57]

Vela relies on *State v. Myers*[58] in support of his contention that the failure to define "malice" in the jury instructions constituted plain error. In that case, this court held that failure to define a legal term of art used in a jury instruction can constitute plain error. Vela argues that "malice" is a legal term of art meaning "'that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse.'"[59]

In the years since *Myers* was decided, the U.S. Supreme Court has held that even a failure to submit an entire element of a criminal offense or a sentencing factor to a jury is not structural error automatically requiring reversal, but can be

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[54] *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *Mata I, supra* note 25.

[55] *Id.*

[56] *State v. Greer*, 257 Neb. 208, 596 N.W.2d 296 (1999); *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994).

[57] *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[58] *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[59] Brief for appellant at 80, quoting *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995). Accord *State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994).

subject to a harmless error analysis. In *Neder v. United States*,[60] the Court held that "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Then, in *Washington v. Recuenco*,[61] the Court held that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." Based upon *Recuenco*, we recently held that the standard for determining whether failure to submit a sentencing factor to a jury constitutes harmless error is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of a sentencing factor.[62]

Unlike *Myers*, in this case, the jury instructions alleged to constitute plain error were not given in the guilt phase of a murder trial, but, rather, were given after a hearing to determine the existence of aggravating circumstances which would permit the imposition of the death penalty for the five murders for which Vela had already been convicted. Thus, the issue was not whether Vela should be convicted and punished for the murder of Lundell, but, rather, whether his involvement in the Lundell murder established a "substantial prior history of serious assaultive or terrorizing criminal activity."[63] And the alleged deficiency in the jury instruction did not involve the failure to submit an entire element of the uncharged Lundell murder by which the State sought to prove the aggravating circumstance described in § 29-2523(1)(a), but, rather, the deficiency was a failure to define a single word used in one of the elements. And, contrary to Vela's argument, we find no evidence in the record suggesting the absence of malice in the form of legal justification or excuse for the Lundell killing. We conclude that any error in not defining the term "malice" in the jury instructions would not be of a "nature that to leave

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[60] *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

[61] *Washington v. Recuenco*, 548 U.S. 212, 222, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

[62] *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009).

[63] See § 29-2523(1)(a).

it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process" so as to constitute plain error.[64] Accordingly, we do not reach the merits of the claimed deficiency in the jury instruction to which no exception was taken in the district court.

(d) Jury Instruction: Lesser-Included Offenses

Vela argues that the district court erred in not instructing the jury on lesser-included offenses of first degree murder. He relies in part on § 29-2027, which provides that "[i]n all trials for murder," the jury shall ascertain whether the verdict is "murder in the first or second degree or manslaughter."

As we have noted, Vela was not on trial for the murder of Lundell. Vela's involvement in the Lundell murder was simply the evidence by which the State sought to prove aggravating circumstance § 29-2523(1)(a), a "substantial prior history of serious assaultive or terrorizing criminal activity" prior to the five murders for which he had been convicted. While lesser degrees of homicide or other offenses against the person might well establish the existence of this aggravating circumstance, in this case, the State elected to prove that Vela had committed a prior, uncharged first degree murder. Had the State not met its burden of proof for first degree murder, it would have failed to prove this aggravating circumstance.

[11] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[65] Vela could hardly have been prejudiced by the failure of the court to give an instruction which would have effectively lightened the State's burden by allowing the jury to find the existence of the aggravating circumstance on the basis of "lesser" crimes than first degree murder.

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[64] See *State v. Molina, supra* note 54, 271 Neb. at 528, 713 N.W.2d at 447.

[65] *State v. Welch*, 275 Neb. 517, 747 N.W.2d 613 (2008); *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

(e) Jury Instruction: "Other Crime"

The State alleged the aggravating circumstance defined by § 29-2523(1)(b): "The murder was committed in an effort to conceal . . . the identity of the perpetrator of such crime." Vela contends that his due process rights were violated because in instructing the jury, the district court did not identify the "crime" for which Vela was allegedly trying to conceal the identity of the perpetrator.

[12] Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.[66] In a preliminary instruction given at the beginning of the aggravation hearing, the district court instructed the jury as follows:

> Nature of the case. This is a criminal case in which the defendant, . . . Vela, has pled guilty to five counts of murder in the first degree and thereupon found guilty. You must now determine if one or more of the following aggravating circumstances are true or not true as to . . . Vela for each count, to wit:
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> . . . .
>
> Two, the murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime.

In instruction No. 3, given at the close of the aggravation hearing, entitled "Burden of Proof," the jury was instructed that it was to determine if one or more of the five listed aggravating circumstances "are true or not true as to . . . Vela for each count of murder." The facts necessary to establish the aggravating circumstance defined by § 29-2523(1)(a) were listed first and made specific reference to Vela's alleged involvement in the Lundell murder. The facts necessary to establish the aggravating circumstance defined by § 29-2523(1)(b) were listed second and included no reference to the Lundell murder. The jury completed five verdict forms, one for each count of first degree murder. Reading the jury instructions and verdicts together, we

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[66] *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007); *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

conclude that they clearly refer to the bank murders, and not to the Lundell murder, as Vela suggests in his brief. We find no merit in this assignment of error.

(f) Jury Instruction: Aiding and Abetting

During the aggravation proceeding, Vela repeatedly objected to evidence regarding the acts committed by Galindo and Sandoval. He argued that their actions could not be imputed to him for the purpose of applying the aggravating circumstances. Vela also objected to the following jury instruction given at the close of the aggravation hearing:

> [Vela] can be guilty of an aggravator even though he personally did not commit the act involved in the crime so long as he aided someone else to commit it. [Vela] aided someone else if:
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> (1) [Vela] intentionally encouraged or intentionally helped another person to commit the aggravator; and
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> (2) [Vela] intended that an aggravator be committed; or [Vela] knew that the other person intended to commit, expected the other person to commit the aggravator; and
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> (3) the aggravator in fact was committed by that other person.

Although Vela concedes that an aiding and abetting theory could properly be used to prove the aggravating circumstance involving the Lundell murder, he argues that its use with respect to the other aggravating circumstances which involved the bank murders deprived him of individualized consideration for the death penalty and therefore violated his rights under the 8th and 14th Amendments to the U.S. Constitution; article I, § 9, of the Nebraska Constitution; and § 29-2523.

The only authority cited by Vela in support of this argument is *Lockett v. Ohio*.[67] In that case, the U.S. Supreme Court addressed the concept of individualized consideration for the death penalty in the context of mitigating circumstances. The Court held that "in all but the rarest kind of capital case," the 8th and 14th Amendments require that the sentencer "not be

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[67] *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[68] The court further recognized "the need for individualized consideration as a constitutional requirement in imposing the death sentence."[69] Applying these principles, the Court held Ohio's death penalty statute to be unconstitutional, because it required imposition of the death penalty unless at least one of three specific statutory mitigating circumstances existed and did not permit consideration of a defendant's comparatively minor role in the offense. *Lockett* did not address the concept of aider/abettor liability in the context of aggravating circumstances used to determine eligibility for the death penalty.

Two U.S. Supreme Court cases decided subsequent to *Lockett* bear more directly on this issue. In *Enmund v. Florida*,[70] the defendant had driven the getaway car from the scene of a robbery gone awry, in which two persons were killed. He was convicted of felony murder and sentenced to death. The question addressed by the Supreme Court was "whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life."[71] The Court noted that the focus in imposing the death penalty must be on the defendant's culpability, "not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'"[72] The Court remanded the cause for further proceedings to determine whether the defendant "intended or contemplated that life would be taken."[73]

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[68] *Id.*, 438 U.S. at 604 (emphasis in original).

[69] *Id.*, 438 U.S. at 605.

[70] *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

[71] *Id.*, 458 U.S. at 787.

[72] *Id.*, 458 U.S. at 798, quoting *Lockett v. Ohio, supra* note 67.

[73] *Id.*, 458 U.S. at 801.

The *Enmund* holding was expanded in *Tison v. Arizona*.[74] In that case, the defendants had participated in a prison breakout and a kidnapping. The codefendants had brutally murdered the kidnapped family. The question addressed by the Court was whether the defendants, after being convicted of felony murder, could be constitutionally sentenced to death under the Eighth Amendment based on their conduct "leading up to and following" the murders.[75] Under a sentencing scheme substantially similar to Nebraska's, the sentencing judge found statutory aggravators, including that the murders were committed for pecuniary gain and were especially heinous. The sentencing judge specifically found that the statutory mitigator of relatively minor participation was not met. Noting that the defendants' conduct was more directly linked to the murders than was that of the getaway driver in *Enmund*, the Court held:

> [R]eckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.[76]

Thus, the Court held that the culpability requirement of *Enmund* is satisfied where there is "major participation in the felony committed, combined with reckless indifference to human life."[77]

Relying on the reasoning of *Tison*, the Supreme Court of Connecticut concluded in *State v. Peeler*[78] that the Eighth Amendment does not forbid the use of accessorial liability to prove aggravating factors which are a prerequisite to the imposition of the death penalty. The court wrote that "[b]y

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[74] *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987).

[75] *Id.*, 481 U.S. at 138.

[76] *Id.*, 481 U.S. at 157-58.

[77] *Id.*, 481 U.S. at 158.

[78] *State v. Peeler*, 271 Conn. 338, 857 A.2d 808 (2004).

explicitly recognizing the trial court's finding of aggravating factors established through principles of accessorial liability, and thereafter concluding that an accessory could be sentenced to death, the Supreme Court in *Tison* implicitly concluded that the [E]ighth [A]mendment permitted the use of accessorial liability to prove aggravating factors."[79] The *Peeler* court also noted that "we can conceive of no reason why a statutory scheme that requires a jury to evaluate aggravating factors need face a more stringent requirement under the [E]ighth [A]mendment when principles of accessorial liability are being used to prove those aggravating factors rather than the commission of the crime itself."[80] The court concluded that any Eighth Amendment concern was sufficiently addressed by the sentencing body's ability to give effect to mitigating circumstances, which presumably included minimal participation in the crime.

Tennessee and Oklahoma courts have reached similar conclusions. The Tennessee case[81] involved a woman who hired another to kill her husband. The husband was brutally murdered with a tire iron. She argued that the exceptionally heinous nature of the crime could not be imputed to her as an aggravator, as she had no involvement in the actual act and did not dictate the method of the killing. The court noted that the *Enmund-Tison* holdings addressed only whether a nontriggerman could be sentenced to death and did not expressly address whether the conduct of a triggerman could be used to aggravate the sentence of the nontriggerman. Examining the plain language of the Tennessee aggravation statute, the court concluded that the language of the aggravator related to the heinous nature of the murder itself, not the defendant's action, and thus applied to the defendant. In affirming the death sentence, the court implicitly held that the Eighth Amendment did not prohibit the use of vicarious criminal liability principles in proving the existence of aggravating circumstances. Similarly, the

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[79] *Id.* at 444, 857 A.2d at 876.

[80] *Id.* at 445, 857 A.2d at 876.

[81] *Owens v. State*, 13 S.W.3d 742 (Tenn. Crim. App. 1999).

Court of Criminal Appeals of Oklahoma has held, "If criminal liability can attach for a codefendant's act that a defendant has aided and abetted, liability for an aggravating circumstance can also attach for a codefendant's act that a defendant has aided and abetted."[82]

[13] Under Nebraska law, "[a] person who aids, abets, procures, or causes another to commit any offense may be prosecuted *and punished* as if he were the principal offender."[83] Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed.[84] No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime.[85] Mere encouragement or assistance is sufficient.[86] Nebraska's capital sentencing statutes account for the teaching of *Enmund* and the wide range of conduct that can constitute aiding and abetting by specifying, as a mitigating circumstance, that the defendant "was an accomplice in the crime committed by another person and his or her participation was relatively minor."[87] But as one of three armed men who entered the bank and began shooting, Vela clearly exhibited the degree of moral culpability required by *Tison*, in that he was a major participant in all five of the bank murders and exhibited a reckless indifference to human life. We conclude that the district court did not err in receiving evidence of the actions of Galindo and Sandoval and in instructing the jury that those actions could be considered in its determination of the existence of aggravating circumstances which would make Vela eligible to receive the death penalty.

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[82] *Selsor v. State*, 2 P.3d 344, 353 (Okla. Crim. App. 2000).

[83] Neb. Rev. Stat. § 28-206 (Reissue 2008) (emphasis supplied).

[84] *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 724 N.W.2d 727 (2007); *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003).

[85] *Id.*

[86] *Id.*

[87] § 29-2523(2)(e).

(g) Motion for Discovery

Vela assigns error in the denial of his motion to take the depositions of various individuals purportedly involved in a federal criminal investigation, including two witnesses who testified at his aggravation hearing. Discovery in a criminal case is, in the absence of a constitutional requirement, controlled by either a statute or a court rule.[88] Section 29-1917(1) provides that except under circumstances not pertinent to this case, "the prosecuting attorney or the defendant may request the court to allow the taking of a deposition of any person other than the defendant who may be a witness in the trial of the offense." Section 29-1917(1) further provides that the court "may order the taking of the deposition when it finds the testimony of the witness: (a) [m]ay be material or relevant to the issue to be determined at the trial of the offense; or (b) [m]ay be of assistance to the parties in the preparation of their respective cases." A criminal defendant is not entitled, as a matter of right, to a deposition pursuant to this statute.[89] The party seeking the deposition "must make a factual showing to the court that the deponent's testimony alternatively satisfies the statutory conditions."[90] If the requisite showing is made, a deposition taken pursuant to this statute "may be used at the trial by any party solely for the purpose of contradicting or impeaching the testimony of the deponent as a witness."[91]

We agree with the district court that Vela did not make the factual showing required by § 29-1917. In addition, Vela's motion to take depositions was filed long after the aggravation hearing had been concluded. Thus, depositions of the two persons who had testified at the aggravation hearing could not have been used to contradict or impeach their testimony, because that testimony was long concluded when the motion seeking depositions was filed. And we note that at least one of those witnesses was cross-examined about his pending criminal cases

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[88] *State v. Pieper*, 274 Neb. 768, 743 N.W.2d 360 (2008).

[89] *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991).

[90] *Id.* at 836, 472 N.W.2d at 718.

[91] § 29-1917(4).

and the favorable treatment he had received from the prosecutor in exchange for his testimony. For all of these reasons, we conclude that the district court did not abuse its discretion in denying Vela's posttrial motion to take depositions.

III. MENTAL RETARDATON PROCEEDINGS

1. Background

(a) Legal Context

In 1989, the U.S. Supreme Court held in *Penry v. Lynaugh*[92] that while mental retardation was a factor which may lessen a defendant's culpability for a capital offense, the execution of persons with mental retardation was not categorically precluded by the Eighth Amendment's prohibition of cruel and unusual punishment. Thirteen years later, in *Atkins v. Virginia*,[93] the Court abrogated its prior holding. It concluded that on the basis of "'evolving standards of decency,'" the Eighth Amendment prohibited the execution of persons with mental retardation.[94] In reaching this conclusion, the Court specifically noted that in the 13-year period since its *Penry* decision, several states, including Nebraska, had adopted legislation prohibiting the execution of persons with mental retardation.

The Nebraska legislation enacted in 1998 provides: "Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with mental retardation."[95] The statute further provides that as used therein, "mental retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be

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[92] *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

[93] *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

[94] *Id.*, 536 U.S. at 313, quoting *Trop v. Dulles*, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958).

[95] § 28-105.01(2).

presumptive evidence of mental retardation."[96] After a finding that aggravating circumstances exist, a defendant may file a verified motion requesting a ruling that the death penalty be precluded because of mental retardation.[97] The court is then required to conduct an evidentiary hearing, and if it finds "by a preponderance of the evidence, that the defendant is a person with mental retardation, the death sentence shall not be imposed."[98]

(b) Motions

After the jury returned its verdict finding the existence of five aggravating circumstances on each count of first degree murder and the court denied Vela's motion to declare electrocution to be an unconstitutional method of execution, Vela filed a verified motion and an amended motion to preclude imposition of the death sentence on the ground that he was a person with mental retardation. In response, the State filed a motion to require Vela to submit to an evaluation and testing by the State's expert for the purpose of addressing issues raised by his allegation that he is a person with mental retardation. Vela objected to the motion on the ground that such an evaluation is not specifically authorized by any statute. The district court granted the State's motion and overruled Vela's objections, reasoning that it had inherent discretionary power to order the evaluation after Vela placed the question of mental retardation at issue. The order permitted the State's expert to "personally assess the defendant and perform certain tests on the defendant in order to determine whether the testing completed by [Vela's expert] was reliably administered." After Vela's interlocutory appeal from this order was summarily dismissed by this court for lack of a final, appealable order, he filed written objections and moved for reconsideration of the district court's prior order permitting the evaluation. The district court overruled this motion.

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[96] § 28-105.01(3).

[97] § 28-105.01(4).

[98] *Id.*

After the aggravation hearing but before Vela filed his motion to preclude imposition of the death penalty on the ground of mental retardation, the prosecutor filed a motion seeking access to confidential records pertaining to Vela which were in the possession of the Nebraska Department of Correctional Services. The motion was filed pursuant to Neb. Rev. Stat. § 83-178 (Reissue 2008), which provides in part that confidential records "shall not be subject to public inspection except by court order for good cause shown." In the motion, the prosecutor represented that the records were believed to contain information relevant to the scheduled mitigation hearing. Vela objected to the release of any medical and psychological records and indicated that he was not waiving any privilege. The district court granted the motion and ordered the State to provide Vela with copies of the records obtained pursuant to the motion.

Approximately 1 year later, the prosecutor filed a second motion to obtain prison records pursuant to § 83-178. In this motion, the prosecutor sought various records, including "medical, psychiatric and psychological records since October 1, 2004" on the ground that the records were "believed to contain relevant information to the issue of rebuttal evidence at the mental retardation hearing . . . and to the issue of rebuttal evidence at any future mitigation hearing, pending the determination on the mental retardation issue." Vela filed written objections to this motion, asserting that the records were privileged and that the State had not shown good cause for their release. After conducting a hearing, the district court entered an order permitting the State to obtain some of the requested records. However, the court determined that § 83-178 did not authorize the release of a prisoner's "personal medical, psychiatric and psychological" records maintained by the Department of Correctional Services and denied the motion as to such records. Apparently, some medical records were obtained by the prosecutor and reviewed by two of the State's experts after entry of the initial order but before entry of the second order. The district court overruled Vela's objection to one expert's testimony regarding the records he reviewed.

(c) Mental Retardation Hearing

We are aware that a social stigma exists with respect to the phrase "mental retardation." Expert testimony in the record before us acknowledged this, but further established that it remains an appropriate and professionally accepted designation of a specific clinical diagnosis. We use the phrase in this clinical sense.

There are two generally accepted "clinical models" for mental retardation. One is stated in a reference entitled "Diagnostic and Statistical Manual of Mental Disorders," published by the American Psychiatric Association.[99] We will refer to this model as the "DSM-IV-TR." The other model is contained in a reference entitled "Mental Retardation: Definition, Classification, and Systems of Supports," published by the American Association on Mental Retardation.[100] We will refer to this model as the "AAMR."

At the mental retardation hearing, Vela's counsel offered into evidence the 4th edition of the DSM-IV-TR and the 10th edition of the AAMR "for the legal purposes of statutory interpretation." Vela's counsel noted that § 28-105.01 utilized "definitions of mental retardation that do not have ordinary, common meaning. They are vague, ambiguous in that way." The court received both volumes in evidence.

The DSM-IV-TR lists the diagnostic criteria for mental retardation as "[s]ignificantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test" and "[c]oncurrent deficits or impairments in present adaptive functioning" in at least two of the areas of "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety."[101] Adaptive functioning is defined by the DSM-IV-TR as "the person's effectiveness in meeting the standards expected for his or her

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[99] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. text rev. 2000).

[100] American Association on Mental Retardation: Definition, Classification, and Systems of Supports (10th ed. 2002).

[101] DSM-IV-TR, *supra* note 99 at 49.

age by his or her cultural group."[102] The DSM-IV-TR also requires the onset of both prongs of mental retardation before 18 years of age. The AAMR defines mental retardation in substantially the same manner. According to its publication, mental retardation is "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18."[103]

Two common tests for measuring intelligence quotient (IQ) are the Wechsler Adult Intelligence Scale, third edition, for adults (WAIS-III) and the Stanford-Binet. While both are generally accepted as reliable for assessing IQ, the WAIS-III is used more frequently. In addition, Wechsler's Abbreviated Scale of Intelligence (WASI) is a generally accepted screening instrument for intelligence, but it is not accepted as a comprehensive evaluation of intelligence. The WASI is capable of determining whether or not there is a probability that a person has mental retardation, but it is not used to determine the degree or classification of mental retardation.

Three IQ tests were administered to Vela at the request of his counsel. James Cole, Ph.D., a clinical forensic psychologist, administered the WASI on July 13, 2003, for the purpose of determining "[w]hether or not there was any probability" that Vela was a person with mental retardation. On the WASI, Vela had a full-scale IQ score of 87, with a confidence interval of 84 to 91. His performance IQ score was 95, with a confidence interval of 90 to 100; and his verbal IQ score was 82, with a confidence interval of 78 to 87. Based on these results, Cole testified that he could conclude with a high degree of psychological certainty that Vela's IQ was not less than 75 and that he was not a person with mental retardation. Cole did not test for malingering, because he concluded that Vela "clearly would not have been faking or exaggerating symptoms of mental retardation in order to provide the performance that would result in a full-scale IQ of 87." Cole concluded with a reasonable degree of psychological certainty that Vela's IQ

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[102] *Id.*

[103] AAMR, *supra* note 100 at 1.

score fell within "the average or low average range." When he interviewed Vela for approximately 1 hour 15 minutes prior to administering the WASI, Cole detected no history of serious mental or emotional problems.

The second IQ test was administered by psychologist Anne Jocelyn Ritchie, Ph.D. and J.D., at the request of Vela's counsel. Ritchie evaluated Vela on November 14 and December 7, 2003, and administered the WAIS-III. Vela obtained a verbal score of 75, with a confidence level of 71 to 81; a performance score of 78, with a confidence level of 73 to 86; and a full-scale IQ score of 75, with a confidence level of 71 to 80, meaning that with 95-percent confidence, Vela's full-scale IQ fell between 71 and 80. Ritchie was not able to administer one subtest of the WAIS-III because Vela could not reliably sequence the alphabet, but she testified that otherwise, the test was administered according to the publisher's protocol. Prior to administering the WAIS-III, Ritchie administered symptom validity tests to Vela. These tests generally measure whether the subject is putting forth his or her best effort on the test. Based upon these tests and her administration of the WAIS-III, Ritchie did not regard Vela's effort on the test as inadequate.

Ritchie testified that Vela's full-scale score of 75 on the WAIS-III was an accurate measure of his intellectual functioning on the day the test was given. She agreed that mental retardation could be diagnosed in a person with an IQ as high as 75 if there were sufficient limitations in adaptive behavior, but she was not requested by Vela's counsel to conduct tests for adaptive behavior deficits and did not do so.

Wayne C. Piersel, Ph.D., a psychologist trained in school psychology, was retained by Vela's counsel for the purpose of determining whether or not Vela was a person with mental retardation. Piersel examined Vela on July 9 and 10, 2004. Prior to the examination, Piersel was provided with copies of Cole's evaluation, Ritchie's evaluation, Vela's school transcripts, and reports of interviews of persons who were acquainted with Vela. Piersel administered the fifth edition of the Stanford-Binet IQ test. Vela attained a score of 56 on the verbal portion of the test, a score of 79 on the nonverbal portion, and a full-scale score of 66. Piersel testified that there are no symptom

validity tests designed for the purpose of detecting malingering on an IQ test. He stated that nothing in the AAMR, the DSM-IV-TR, the Stanford-Binet, the WASI, or the WAIS-III requires symptom validity testing. Piersel noted, however, that he had no reason to suspect that Vela was not cooperating or giving his best effort.

Piersel administered other tests to Vela, including the "Vineland Adaptive Behavior Scales," which the clinical models consider an appropriate test for measuring a subject's adaptive behaviors. Piersel used Vela's older sister as his "informant" for this test. Based on the information Vela's sister provided, Piersel opined that Vela had significant impairment in the adaptive behavior areas of communication, home living, social/interpersonal skills, self-direction, and functional academic skills. It was Piersel's opinion to a reasonable degree of certainty that Vela was a person with mild mental retardation.

On cross-examination, Piersel testified that he had no reason to question the administration of the WASI by Cole or the WAIS-III by Ritchie. He admitted that it was statistically improbable that Vela's true scores on the WASI or the WAIS-III would fall below 70. He further admitted that it would be "unlikely" for Vela to obtain a valid IQ score of 70 or below on the Stanford-Binet after scoring a 75 on the WAIS-III and that the probability of a random variance between the WAIS-III score of 75 and the Stanford-Binet score of 66 was less than 5 percent.

Piersel further acknowledged the significance of the variance between Vela's score of 56 on the verbal portion of the Stanford-Binet and his score of 79 on the nonverbal portion, and he agreed that there was only a "one in a thousand" chance that such a variance could occur randomly. The publisher's manual for the Stanford-Binet states that when a significant variance between the two scores occurs, "'examiners should be cautious'" of using the full-scale score to measure IQ and that where the "'examinee's background is influenced by factors such as communication disorders, learning disabilities, autism or non-English background, the [nonverbal score] may be the better indicator of global cognitive potential.'" The manual

further states that users of the Stanford-Binet should be "'cautious in interpreting low full-scale IQ scores that may reflect conditions other than low intellectual ability. Low scores may be due to cultural and language differences, high anxiety or depression, extreme distractibility, or refusal to relate to the examiner and testing situation.'" Nevertheless, Piersel insisted that Vela's full-scale score of 66 on the Stanford-Binet was a "representative score."

Chad Buckendahl, Ph.D., an expert in psychometrics, testified for the State. He explained that psychometrics is the integration of cognitive measurement and statistics and involves the interpretation of test scores and ensuring the validity of such interpretations. He explained two concepts used in psychometrics: "standard error of measurement" and "standard error of estimate." The standard error of measurement is used in comparing an individual's scores on the same test. The standard error of estimate is used when comparing an individual's score on one test to the same individual's score on another test.

The manuals for the administration of the Stanford-Binet and the WAIS-III tests contain the relevant standard errors of measurement and estimate calculations. Based on these calculations, Buckendahl testified that the statistical probability of Vela's scoring an 87 on the WASI but having his true score be 70 or below is about 1 in 500 million. Buckendahl acknowledged, however, that the WASI is a screening instrument which is not intended for use as a substitute for more comprehensive measures of intelligence, such as the WAIS-III. But with respect to Vela's full-scale score of 75 on the WAIS-III, Buckendahl opined that on the basis of the published calculations, there is only a 1.7 percent chance that Vela's true full-scale score could be 70 or lower. Buckendahl further testified that Vela's verbal test results generally declined from the first test administration to the most recent test administration, a phenomenon which he viewed as "unlikely." Vela's nonverbal scores, however, showed an initial slight decline and then remained fairly stable above 70.

Leland Zlomke, Ph.D., a clinical psychologist with specialized training in forensic psychology, also testified for the State.

He had been requested by the State to conduct an evaluation of Vela in mid-2004, at which time he reviewed the reports of Cole, Ritchie, and Piersel. He also reviewed writings and drawings produced by Vela while in prison and spoke with jail personnel about him. Based upon the medicolegal context of the determination of Vela's claimed mental retardation and what Zlomke perceived as a discrepancy between Vela's most recent test results and the level at which he appeared to actually function, Zlomke concluded that a comprehensive forensic evaluation was indicated. Zlomke testified that a primary goal of forensic psychological assessment is the detection of symptom invalidity, which includes malingering.

Zlomke met with Vela and Vela's attorneys on two occasions. The attorneys denied Zlomke's request to administer a test designed to measure adaptive behavior. Zlomke testified that the WASI administered by Cole was an appropriate screening assessment for mental retardation and testified that based on Vela's full-scale score of 87 on the WASI, it would be "extremely unlikely, if not virtually impossible, for . . . another score without confounding variables to fall below 75 or 70 to 75." Zlomke identified malingering as one form of a "confounding variable."

Zlomke deemed significant the variance between Vela's scores on the verbal and nonverbal portions of the Stanford-Binet, as well as the variances between the Stanford-Binet scores and Vela's previous IQ test scores. In his opinion, the differences between Vela's scores on the WASI, the WAIS-III, and the Stanford-Binet "far exceed" clinical expectations and required a determination of confounding variables which could account for the variances. Zlomke was able to rule out medical incidents or injury and drug use as possible confounding variables.

Zlomke also considered malingering as a potential confounding variable which could explain the variance in Vela's test scores. He testified that the DSM-IV-TR lists four diagnostic predicates to consider when determining if malingering exists in a testing situation. These include a medicolegal context of presentation, a marked discrepancy between the person's claimed stress or disability and the objective findings, a lack

of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen, and the presence of antisocial personality disorder. Zlomke testified that with a reasonable degree of certainty, he found all four predicates were met with respect to Vela. Zlomke further opined that Vela did not meet the criteria for mental retardation and that it is a "virtual certainty" that Vela's IQ is greater than 75.

Ari Kalechstein, Ph.D., a neuropsychologist with forensic experience, also testified as a witness for the State. In preparation for his testimony, he reviewed the reports of Cole, Ritchie, and Piersel, as well as other materials, including police reports. Kalechstein also was present to hear the testimony of witnesses who preceded him at the mental retardation hearing. Kalechstein was asked by the State to determine whether Vela was a person with mental retardation and to provide an explanation for the variances in Vela's IQ test scores.

Kalechstein testified that clinicians generally utilize criteria published in DSM-IV-TR in diagnosing mental retardation. In the process of conducting a differential diagnosis, he concluded that there was only a 1-in-500 chance that the downward shift in Vela's IQ scores in the tests administered by Cole, Ritchie, and Piersel occurred by chance. In his opinion, the decline in IQ scores was caused by either malingering, a learning disability, or depression. Kalechstein opined that Piersel did not adequately consider the issue of malingering. He concluded that all four factual predicates for malingering, as stated in the DSM-IV-TR, existed with respect to Vela and that Vela met the diagnostic criteria for malingering. Kalechstein opined with a reasonable degree of psychological certainty that Vela did not meet the diagnostic criteria for mental retardation as stated in the DSM-IV-TR.

Both parties submitted evidence related to Vela's adaptive behaviors. Vela's father and sister testified that he was developmentally delayed in many activities. Vela's mother left the family home when he was approximately 2 years old, and his older sister raised him as though he were her son. Vela needed assistance bathing until he was approximately 10 years old. He needed help dressing until after age 12, and was older than 12 before he could tie his own shoes. He learned to ride a bike at

age 10, and he never learned to tell time. Vela never learned to drive a car, never had a checking or savings account, and never learned to budget money. As a teenager, he could not buy his own clothes or food, and had no chores in the household because he was incapable of performing them.

Vela attended public schools in California. He was walked to elementary school every day. In the 10th grade, he was able to take a bus to high school, but otherwise never used public transportation. One of Vela's elementary school teachers testified that he was "special," "very sweet," and "needy." His academic performance was very low compared to other students, and even in fourth grade, he continued to have incontinence issues at school. His elementary school teachers gave him extra help and modified his work, as he could not do the work expected of his classmates. One teacher described him as obedient, "always smiling," and "a follower." He did not interact with other children and had no friends.

While attending public schools, Vela received services under a California special education program known as the resource special program (RSP). Silvia DeRuvo, a special education resource specialist and president of the "California Association of Resource Specialists and Special Education Teachers," testified that RSP is the first level of special education in California and involves less than 50 percent of a student's class time. DeRuvo described the assessment process, including IQ testing, by which students are placed in RSP. Students who are determined to have a learning disability are eligible for RSP. DeRuvo defined a learning disability as an average IQ of 89 to 110, accompanied by a discrepancy between ability and achievement. DeRuvo testified that special education assessment records are destroyed after 5 years, so the records pertaining to Vela's periodic assessments were no longer in existence. However, from other available school records, DeRuvo determined that Vela had had several assessments and was found to have a learning disability. Accordingly, he received RSP services in several subjects at various times during his school attendance, beginning in the sixth or seventh grade. DeRuvo testified that it is the practice of California public schools to provide students with the level of support and learning

opportunity which is appropriate for their individual needs and that RSP would not provide sufficient support for a child with mental retardation.

Piersel tested Vela for adaptive behavior issues based on information he received from Vela's sister. The Vineland Adaptive Behavior Scales test performed by Piersel indicated that Vela had limitations in adaptive behavior in the areas of communication, home living, social/interpersonal skills, self-direction, and functional academics. Utilizing two third-party informants who were acquainted with Vela for 2 to 3 months prior to his arrest, Zlomke administered a standardized test known as Scales of Independent Behavior-Revised to assess Vela's adaptive behavior. As a result of this testing, Zlomke concluded that while Vela had limitations in certain adaptive skill areas, his overall adaptive behavior was appropriate for his age.

The State presented evidence of Vela's ability to adapt to procedures and conditions within the prison system.

(d) Order

In an order filed on May 3, 2006, the district court overruled Vela's motion to preclude imposition of the death penalty because of mental retardation. The court found that Vela failed to prove that Piersel reliably administered the test which resulted in a full-scale IQ of 66, and it thus concluded that Vela was not entitled to the statutory presumption of mental retardation. The district court found that Vela's score of 75 on the WAIS-III, considered in light of the standard error of measurement, could be considered as subaverage general intellectual functioning for purposes of diagnosing mental retardation. However, it found that the evidence did not establish at least two significant limitations in adaptive behavior by a preponderance of the evidence. The district court thus concluded that Vela was not a person with mental retardation. This court dismissed Vela's interlocutory appeal, based upon our determination that the disposition of Vela's motion to preclude the death penalty was not a final, appealable order.[104]

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[104] *State v. Vela, supra* note 2.

2. Assignments of Error

Vela assigns, restated and renumbered in part, that the district court erred in the following:

1. Granting the State's motion to obtain Vela's medical and psychological records maintained by the Nebraska Department of Correctional Services and by allowing testimony based upon such records.

2. Granting the State's motion for an independent evaluation and testing and by receiving testimony and evidence derived from such evaluation and testing, in violation of the 5th and 14th Amendments to the U.S. Constitution and article I, § 12, of the Nebraska Constitution.

3. Finding that Vela failed by a preponderance of the evidence to establish that the full-scale IQ score of 66 obtained on the Stanford-Binet test administered by Piersel was not entitled to the statutory presumption of mental retardation.

4. Not basing its finding that Vela had significant subaverage general intellectual functioning at least in part on the Stanford-Binet test administered by Piersel.

5. Requiring Vela to prove he had significant limitations in adaptive functioning rather than deficits in adaptive behavior, in violation of § 28-105.01(3) and the distribution of powers provision of article II, § 1, of the Nebraska Constitution.

6. Failing to find that Vela had deficits in adaptive behavior.

7. Finding that the imposition of the death penalty was not precluded because of mental retardation, in violation of § 28-105.01(2), the Eighth Amendment to the U.S. Constitution, and article I, § 9, of the Nebraska Constitution.

3. Standard of Review

[14] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[105]

[15] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the

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[105] *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009); *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009).

Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[106]

[16] In making the determination as to factual questions, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.[107]

The trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion.[108]

4. Analysis and Resolution

(a) Access to Department of Correctional Services' Records

Vela argues that the district court erred in initially granting, without limitation, the prosecutor's motion for access to his medical file maintained by the Nebraska Department of Correctional Services. His two-pronged argument is (1) that no statute permits this form of discovery in a criminal action and (2) that such records are privileged pursuant to Neb. Rev. Stat. § 27-504 (Reissue 1995).

Vela bases the first prong of his argument on *State v. Kinney*,[109] where we recognized that discovery in a criminal case is generally controlled by either a statute or court rule and that "'[i]n Nebraska, the prosecution has not been granted a right of discovery except as permitted by the court, with limitations clearly defined by statute.'" We held in *Kinney* that based upon these principles, the trial court erred in requiring a defendant to produce his trial exhibits and disclose his potential out-of-state witnesses to the State before trial.

The discovery issue arises in this case in a markedly different context. Vela's guilt had been determined by the acceptance

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[106] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008); *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

[107] *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000).

[108] *State v. Jackson, supra* note 18.

[109] *State v. Kinney*, 262 Neb. 812, 816, 635 N.W.2d 449, 452 (2001), quoting *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998).

of his guilty pleas, and the only remaining issue was whether he would be sentenced to life imprisonment or death for his crimes. That determination depended in part upon the resolution of Vela's assertion that he was a person with mental retardation and therefore could not be executed pursuant to § 28-105.01(2). While the statutory proceeding in which this determination is made is a part of the criminal action,[110] it is decidedly civil in nature. The defendant must file a verified motion "requesting a ruling that the penalty of death be precluded" on the basis of mental retardation, and bears the burden of proving the existence of mental retardation by a preponderance of the evidence.[111] In this unique circumstance, we conclude that general principles applicable to discovery in the guilt phase of a criminal case are not controlling.

Contrary to Vela's claim, his medical and mental health records maintained by the Department of Correctional Services were not privileged after he filed his verified motion to preclude the death penalty based upon mental retardation. There is no physician-patient privilege as to "communications relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he or she relies upon the condition as an element of his or her claim or defense."[112] A substantially similar rule applies to communications between psychologists and their patients.[113]

[17] The State's motion for access to medical and psychological records maintained by the Department of Correctional Services was filed pursuant to § 83-178, which governs access to confidential inmate records. The statute clearly contemplates that medical records are included in its scope.[114] The statute provides that confidential records "shall not be subject to public inspection except by court order for good cause shown."[115]

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[110] *State v. Vela, supra* note 2.

[111] § 28-105.01(4).

[112] § 27-504(4)(c).

[113] See Neb. Rev. Stat. § 38-3131(3)(f) (Reissue 2008).

[114] See § 83-178(2) and (6).

[115] § 83-178(2).

We hold that when a defendant in a capital sentencing proceeding places his or her mental health at issue either by asserting mental retardation as a basis for precluding the death penalty pursuant to § 28-105.01(2) or by asserting mental illness as a mitigating circumstance pursuant to § 29-2523(2)(g), there is good cause under § 83-178(2) for the prosecution to obtain access to the defendant's mental health records in the possession of the Department of Correctional Services. Accordingly, the district court did not err in permitting access to such records in this case and in overruling Vela's objection to testimony of the State's expert based in part upon his review of those records.

(b) Independent Evaluation

Vela correctly notes that there is no specific statutory authority for the independent medical examination ordered by the district court and conducted by Zlomke. The question before us is whether the district court erred in concluding that it had inherent discretionary authority to order the examination. In reaching its conclusion, the district court reasoned by analogy from our opinion in *State v. Simants*,[116] in which we held that a district court had inherent authority to grant the State's motion for an independent medical evaluation of a person who had been found not guilty by reason of insanity on six counts of first degree murder. The State requested the examination in preparation for an annual review to determine whether continued confinement was warranted. The applicable statute[117] specified that the court was to conduct an evidentiary hearing as a part of the review but did not specifically authorize an independent medical evaluation at the request of the State. We concluded that "[t]he means for determining the acquittee's sanity, as in determining a defendant's competency to stand trial, should be discretionary with the court."[118] We reasoned in part that because the statute contemplated an evidentiary hearing on the question of the acquittee's mental

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[116] *State v. Simants*, 245 Neb. 925, 517 N.W.2d 361 (1994).

[117] Neb. Rev. Stat. § 29-3703(1) (Reissue 1989).

[118] *State v. Simants, supra* note 116, 245 Neb. at 930, 517 N.W.2d at 364.

status, the record should not be limited to the evidence offered on behalf of the acquittee and "[t]he State should be allowed to submit additional evidence since the court, as trier of fact, is not required to take the opinion of an expert as binding."[119] We wrote:

> As stated in *Ake v. Oklahoma*, 470 U.S. 68, 81, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985): "Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." If necessary, the factfinder must resolve differences in opinion within the psychiatric profession on the basis of all the evidence offered by each party.[120]

Vela argues that *Simants* is inapposite because it involved a civil commitment proceeding in which the primary concern was protection of the public. He contends that *State v. Woods*[121] provides a closer analogy. In that case, we held that the district court lacked authority to order a defendant to make a pretrial disclosure of her alibi witnesses because Nebraska's notice-of-alibi statute[122] did not impose this requirement. Because *Woods* involved a question of pretrial discovery in a noncapital case, we do not find it to be controlling on the issue presented here.

Other jurisdictions have recognized the inherent authority of a trial court to order an independent examination at the request of the government when a defendant in capital sentencing proceedings has placed his or her mental health at issue. For example, in *State v. Reid*,[123] the Supreme Court of Tennessee held that such authority existed even in the absence of a specific statute or rule, because an independent

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[119] *Id.* at 931, 517 N.W.2d at 365.

[120] *Id.*

[121] *State v. Woods, supra* note 109.

[122] See Neb. Rev. Stat. § 29-1927 (Reissue 2008).

[123] *State v. Reid*, 981 S.W.2d 166 (Tenn. 1998).

psychiatric examination was essential to afford the State the right to rebut expert psychiatric evidence offered by the defendant as a mitigating factor to be weighed against imposition of the death penalty. Arizona courts have held that "'once a defendant notifies the state that he intends to place his mental condition at issue during the penalty phase of a capital trial, a trial judge has discretion to order the defendant to submit to a mental examination by an expert chosen by the state or the court.'"[124] In *U.S. v. Allen*,[125] the Eighth Circuit Court of Appeals stated:

> There is no doubt that a district court has the authority to order a defendant who states that he will use evidence from his own psychiatric examination in the penalty phase of a trial to undergo a psychiatric examination by a government-selected psychiatrist before the start of the penalty phase.

We have found only one case, *People v. Lee*,[126] which holds that a trial court may not order an independent evaluation in these circumstances in the absence of specific authority conferred by statute or court rule.

[18] We extend the reasoning of *Simants* to the issue before us here and hold that when a defendant files a verified motion to preclude imposition of the death penalty on the basis of mental retardation pursuant to § 28-105.01(4), the trial court has inherent authority to grant a motion by the State to have the defendant evaluated by a mental health professional of the State's choosing. By providing for an evidentiary hearing on the issue of mental retardation and requiring the defendant to prove the diagnosis by a preponderance of the evidence, the Legislature clearly contemplated adversarial testing of any such claim. Our recognition in *Simants* that mental health professionals can reach conflicting opinions regarding a diagnosis

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[124] *State v. Carreon*, 210 Ariz. 54, 68-69, 107 P.3d 900, 914-15 (2005), quoting *Phillips v. Araneta*, 208 Ariz. 280, 93 P.3d 480 (2004).

[125] *U.S. v. Allen*, 247 F.3d 741, 773 (8th Cir. 2001), *vacated on other grounds* 536 U.S. 953, 122 S. Ct. 2653, 153 L. Ed. 2d 830 (2002).

[126] *People v. Lee*, 196 Ill. 2d 368, 752 N.E.2d 1017, 256 Ill. Dec. 775 (2001).

is clearly illustrated by the record in this case. The identification of mental retardation is a diagnosis requiring the exercise of clinical judgment, and as Vela's own expert acknowledged, it is sometimes difficult for even mental health professionals to distinguish a person with mild mental retardation from one who does not have the condition. Piersel explained that because the identification of mental retardation requires the exercise of clinical judgment, "on occasion, two people can take the same information, especially when the individual is very close to a particular line or particular cutoff, and reach different opinions." Given the significance of the diagnosis of mental retardation in the context of capital sentencing, the importance of meaningful adversarial testing cannot be overstated.

Moreover, the State's interest in an independent evaluation goes beyond the adversarial testing of a capital defendant's claim of mental retardation. Under the unequivocal language of § 28-105.01(2) and the constitutional rule established by *Atkins v. Virginia*,[127] the State is prohibited from executing a person with mental retardation. It follows that the State must have a means of independently confirming a capital defendant's assertion that he or she is such a person. We conclude that a district court has inherent authority to provide that means in the form of an independent evaluation when requested by the State.

Relying upon *Estelle v. Smith*,[128] Vela argues that the independent examination ordered by the district court violated his privilege against compulsory self-incrimination guaranteed by the federal and state Constitutions. In *Estelle*, the U.S. Supreme Court held that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him in a capital sentencing proceeding."[129] However, this court and others have indicated that when a criminal defendant places his or her mental condition at issue, the State may use the results of a court-ordered

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[127] *Atkins v. Virginia, supra* note 93.

[128] *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).

[129] *Id.*, 451 U.S. at 468.

evaluation at trial without violating the defendant's constitutional privilege against self-incrimination.[130] Vela's constitutional claim is without merit.

For these reasons, we conclude that the district court did not err in granting the State's motion for an independent evaluation of Vela and in receiving the testimony of Zlomke with respect to that examination at the mental retardation hearing.

(c) Presumption of Mental Retardation

Section 28-105.01(3) provides in part: "An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation." Vela contends that the district court erred in determining that because the Stanford-Binet was not reliably administered by Piersel, the full-scale IQ score of 66 did not meet the statutory presumption.

The district court found that the Stanford-Binet score of 66 was not obtained on a reliably administered test for three reasons. First, it concluded that the statistical probability of Vela's validly obtaining the score after the scores he obtained on the prior IQ tests was "remote." The testimony of multiple experts supports this finding. Second, the court concluded that Piersel did not address the issue of malingering in a meaningful manner. Again, substantial evidence supports this, as at least two experts testified to the evidence of malingering and Piersel's ineffective evaluation of this issue. Third, the court concluded that Piersel failed to follow the published Stanford-Binet protocol, because he reported the full-scale score even though there was significant variation between the verbal and nonverbal scores. Again, several experts testified that this was not proper protocol. Overall, there is substantial evidence in the record to support the district court's finding that the Stanford-Binet score of 66 was not obtained on a "reliably administered" test, and there is no clear error in the court's finding on this issue.

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[130] See, *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984); *State v. Carreon, supra* note 124; *Centeno v. Superior Court*, 117 Cal. App. 4th 30, 11 Cal. Rptr. 3d 533 (2004); *State v. Reid, supra* note 123.

(d) Finding That Vela Is Not Person With Mental Retardation

Vela argues that the district court erred in finding that because he is not a person with mental retardation, the death penalty is not precluded. He contends that this finding violates both his statutory rights under § 28-105.01(2) and his constitutional right not to be subjected to cruel and unusual punishment under the 8th and 14th Amendments to the U.S. Constitution and article I, § 9, of the Nebraska Constitution.

(i) Intellectual Functioning

Both § 28-105.01(3) and the clinical models which are referenced in *Atkins*[131] and included in this record identify significant limitations in intellectual functioning as a component of mental retardation. The district court considered only Vela's full-scale IQ scores on the WAIS-III and the Stanford-Binet in determining whether his level of intellectual functioning was "significantly subaverage."[132] As discussed above, the district court disregarded the Stanford-Binet score after finding that the test was not reliably administered by Piersel. However, the court found that Vela's full-scale score of 75 on the WAIS-III should be considered, in light of the standard error of measurement, to include a "range between 75 and 70." The court determined that based on the WAIS-III score, the diagnostic criterion of "significantly subaverage general intellectual functioning" had been established.

Both parties take issue with the court's reasoning on this point. Vela argues that the court also should have taken into account his score on the Stanford-Binet in reaching this conclusion. But as we have noted, the record supports the finding of the district court that the Stanford-Binet was not reliably administered.

The State argues that although the district court properly "relied upon an unchallenged IQ score of 75, which is the highest possible score professionally considered to possibly raise a

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[131] *Atkins v. Virginia, supra* note 93.

[132] See § 28-105.01(3).

question of mental retardation,"[133] it should not have considered the range of scores produced by the standard error of measurement when determining whether Vela had established that he had significantly subaverage general intellectual functioning. Because, as explained below, we agree with the district court that Vela failed to show deficits in his adaptive behavior and thus is not a person with mental retardation, we decline to address the State's argument.

(ii) Adaptive Behavior

The second component of Nebraska's statutory definition of mental retardation in the context of capital sentencing is "deficits in adaptive behavior" which exist concurrently with the significantly subaverage intellectual functioning.[134] The clinical models use similar but not identical definitional language when referencing this component of the test. The AAMR states: "Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills."[135] The DSM-IV-TR states:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B).[136]

For completeness, we note that both clinical models include as a third component that onset must occur before the age of 18. This component is not included in Nebraska's statutory definition.[137] Piersel testified that trauma to the head can produce symptoms of mental retardation and that if the injury occurs

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[133] Brief for appellee at 38.

[134] § 28-105.01(3).

[135] AAMR, *supra* note 100 at 1.

[136] DSM-IV-TR, *supra* note 99 at 41.

[137] See § 28-105.01.

before the age of 18, a diagnosis of mental retardation is appropriate. However, if the individual is older than 18 when the injury occurs, the condition would not be diagnosed as mental retardation, but, rather, "in terms of some organic damage to [the] central nervous system."

The district court concluded that Vela "did not by [a] preponderance of the evidence establish at least two significant limitations in adaptive functioning as set out in Criterion B of the definition of mental retardation as found in [the DSM-IV-TR]." Vela argues that § 28-105.01(3) does not use the adjective "significant" with respect to "adaptive behavior" and that therefore, "the district court impermissibly and in violation of its constitutional authority modified the statutory [definition] and increased . . . Vela's burden by requiring him to prove that his limitations or deficits in adaptive behavior were *significant.*"[138]

This argument stands in sharp contrast to Vela's position with respect to the clinical models at the mental retardation hearing. In offering the AAMR in evidence and arguing for its admissibility, Vela's counsel argued that it was a "learned treatise" which he would refer to in the examination of his expert witnesses. Counsel continued:

> But another reason why I want to offer [the AAMR] is because you, and perhaps our appellate courts, are going to have to interpret our statutes. There are terms of art in our statutes, [§] 28-105.01, with regard to the definitions of mental retardation that do not have ordinary, common meaning. They are vague, ambiguous in that way. I think in order for you, and perhaps an appellate court, to understand and interpret the statutes, you need authority to do that.
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> . . . [The AAMR] is dedicated to the definitions, classifications of mental retardation. So I want you to have [the AAMR] for that purpose.

Shortly thereafter, counsel stated that he was offering the DSM-IV-TR and the AAMR "to the court for the legal purposes of statutory interpretation." Both volumes were received in

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[138] Brief for appellant at 103.

evidence. In his closing argument, counsel stated that because the "two elements" of mental retardation were not defined by § 28-105.01, it was appropriate for the court to use the AAMR and the DSM-IV-TR clinical models "to give meaning to our statutory elements."

In its order, the district court determined that the phrases "'subaverage intellectual functioning'" and "'limitations in adaptive behavior'" used in § 28-105.01(3) were not "plain, direct, and unambiguous." Accordingly, the court concluded that it could look to the clinical models for definitions of these terms. Thus, having first offered the clinical models as authoritative source references for interpreting and applying Nebraska's statutory definition of mental retardation, which he claimed to be ambiguous, Vela assigns error to the fact that the district court did precisely as he requested. This bears the earmarks of the doctrine of "invited error," which holds that a defendant in a criminal case may not take advantage of an alleged error which the defendant invited the trial court to commit.[139] But given that this is a capital appeal, we choose not to apply the doctrine here, and we proceed to the question of whether § 28-105.01(3) requires consideration of deficits in adaptive behavior in a manner which differs from current clinical models.

Mental retardation is a clinical diagnosis. The U.S. Supreme Court noted in *Atkins v. Virginia*[140] that while definitions of mental retardation in state laws prohibiting the execution of mentally retarded persons are not identical, they generally conform to the clinical definitions set forth in the DSM-IV-TR and the AAMR. The Nebraska statute uses but does not define two key diagnostic criteria of mental retardation: "significantly subaverage general intellectual functioning" and "deficits in adaptive behavior."[141] To understand what these terms mean, how they are measured, and how they are to be considered in diagnosing mental retardation, clinical expertise is not only

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[139] See, e.g., *State v. Molina, supra* note 54.

[140] *Atkins v. Virginia, supra* note 93.

[141] § 28-105.01(3).

helpful, but essential. Supplied with nothing more than the language of the statute, it would be impossible for a lay finder of fact to reach any meaningful determination of whether a convicted defendant with an IQ in the low 70's is a person with mental retardation.

Vela presented the clinical models and the expert testimony of Piersel to help the fact finder in this case. Piersel testified that the DSM-IV-TR was a generally accepted model of the definitions and diagnostic criteria for mental disorders, including mental retardation. He testified directly from the DSM-IV-TR in describing the various classifications of mental retardation characterized by IQ scores deemed to be "'subaverage.'" He testified that the DSM-IV-TR established the cutoff points for the various classifications and established 75 as the highest IQ score which could support a diagnosis of mental retardation. Reading directly from the DSM-IV-TR, Piersel testified that "'it is possible to diagnose mental retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.'" Piersel also testified that the DSM-IV-TR specified the various skills which should be identified and evaluated in the assessment of adaptive behavior and stated that he considered those skills in his evaluation of Vela's adaptive behavior. Based upon that evaluation, he expressed his opinion that Vela had "significant" limitations or impairments in 5 of the 10 skills listed in the DSM-IV-TR. The district court found otherwise.

Vela now argues that under § 28-105.01(3), deficits in adaptive behavior need not be clinically significant in order to be diagnostic of mental retardation. At least one court has interpreted similar statutory language differently. In *Phillips v. State*,[142] the Supreme Court of Florida interpreted a statute that exempted persons with mental retardation from execution. Like Nebraska's, the Florida statute defined "mental retardation" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior."[143] The court affirmed the trial court's finding that the defendant failed

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[142] *Phillips v. State*, 984 So. 2d 503 (Fla. 2008).

[143] Fla. Stat. Ann. § 921.137(1) (West 2006).

to prove the second prong of this definition, concluding that a defendant must fit within the clinical diagnosis of "'significant limitations in adaptive functioning in at least two . . . skill areas'" in order to meet the statutory requirement of "deficits in adaptive behavior."[144]

[19] When considering a statute's meaning, it is appropriate for a court to consider the evil and mischief attempted to be remedied, the objects sought to be accomplished, and the scope of the remedy to which its terms apply and to give the statute such an interpretation as appears best calculated to effectuate the design of the legislative provisions.[145] As we noted in Vela's prior appeal, both § 28-105.01(2) and the Eighth Amendment prohibit the execution of persons with mental retardation "because of what the U.S. Supreme Court describes as a 'widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty.'"[146] Given this purpose, we can understand why the Legislature chose to omit age of onset from the definition of mental retardation in § 28-105.01(3). For example, if a defendant has clinically significant subaverage intellectual functioning and deficits in adaptive behavior as a result of a traumatic brain injury, the age of onset would have no relevance to the question of relative culpability for a crime committed after the injury. But we can conceive of no reason why the Legislature would have intended to preclude the death penalty for persons with clinically *insignificant* deficits in adaptive behavior. We conclude that the district court did not err in construing § 28-105.01(3) in a manner consistent with the clinical models to require a showing of significant deficits in adaptive behavior in order to establish that Vela was a person with mental retardation.

The district court's finding that Vela failed to prove significant deficits in adaptive behavior is supported by substantial

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[144] *Phillips v. State, supra* note 142, 984 So. 2d at 511.

[145] *State v. Portsche*, 261 Neb. 160, 622 N.W.2d 582 (2001).

[146] *State v. Vela, supra* note 2, 272 Neb. at 292, 721 N.W.2d at 636, quoting *Atkins v. Virginia, supra* note 93.

evidence. The Vineland Adaptive Behavior Scales test administered by Piersel was based on information Piersel received from Vela's sister. Although the results showed deficits in five adaptive behaviors, the accuracy of the information provided by Vela's sister was significantly challenged during the cross-examination of Piersel, and he acknowledged the possibility that the sister's reliability as a reporter could be affected because she had the same motivation for secondary gain as Vela himself. Zlomke administered a modified adaptive behavior test based on interviews with Vela's acquaintances and concluded that Vela fell within the average range of adaptive functioning.

In addition to the conflicting results from the adaptive behavior tests, there was also evidence that Vela had demonstrated normal adaptive behavior in several areas. Vela's middle school records reflect mostly grades of C, with A's and B's in some subjects and D's and F's in others. Testimony established that he was thought to have a learning disability and received special education services for that diagnosis, but he was never placed in an academic program designed for students with mental retardation.

There was evidence that Vela had been employed by a trucker to assist in finding addresses for pickups and deliveries, and that while so employed, he was well-liked, responsive, hard-working, friendly, and talkative. While so employed, Vela was responsible in part for planning the routes and the order of deliveries or pickups, and when problems occurred, he would communicate with the trucking company's dispatcher to get an address correction or additional instructions.

Correctional employees testified regarding Vela's behaviors in prison. Vela selected books from the prison book cart and subscribed to other publications. He followed football and subscribed to a boxing magazine. He kept his living area clean and communicated clearly with correctional officers and other prisoners. A case manager testified that Vela submitted numerous written communications, known as kites, to prison officials, requesting such services as haircuts, library privileges, law library visits, and telephone calls. The case manager testified that for a brief period, Vela stopped communicating through

kites on the advice of his lawyers, and that in one of the conversations she had had with Vela, he told her that "he wasn't the smartest or the quickest, but he wasn't mentally retarded." Another correctional officer testified that he heard Vela say that he wanted to be labeled as mentally retarded "so he could be with his family for a long time."

The district court did not err in concluding that Vela failed to prove clinically significant deficits in adaptive behavior which would support a diagnosis of mental retardation.

IV. SENTENCING PROCEEDINGS

1. Background

After the jury returned its verdict finding the existence of aggravating circumstances and before filing his motion to preclude the death penalty on the ground of mental retardation, Vela filed a motion to declare electrocution as a means of execution unconstitutional. The district court conducted an evidentiary hearing and overruled the motion.

After the district court denied Vela's motion to preclude imposition of the death penalty on the ground of mental retardation, a panel of three district judges designated by this court pursuant to § 29-2521(1)(a) convened a hearing to receive evidence relevant to sentencing and to determine the sentences to be imposed.

(a) Vela's Evidence

Vela was born in California on October 10, 1980, the youngest of three children. He grew up in a neighborhood where violent crime, gang activity, and drug trafficking were commonplace. Vela's mother left the family home when he was approximately 2 years old. As a child, Vela was cared for by his father but primarily by his sister, the oldest of the three children. When Vela's mother left the home, an uncle who was a drug dealer came to live with the family. When Vela was a teenager, he reestablished communication with his mother.

Vela's sister was approximately 7 years old when her mother left the home. When she was 14, she moved out of the family home to a residence about two blocks away, but she maintained daily contact with her family, including Vela. Later, Vela's

sister moved back to the family home with a man she later married. On two occasions during his teenage years, Vela lived in Mexico, first with his grandparents and later with his sister and her family.

Vela left school during the ninth grade and did not receive any further education. For approximately 3 years, he worked as a trucker's helper, as noted above. When Vela was in his late teens, his sister learned that he was drinking alcohol and using drugs. Concerned by this, Vela's sister decided that he should move to Madison, Nebraska, to live with his father, who had recently moved there from California to take a job at a meat-packing plant. Vela arrived in Madison in July 2002.

Family members described Vela as a "good kid" and as a simple, nonviolent person with a childlike personality. One described him as a "big, little kid." Family members stated that Vela was quiet and respectful, but that he was a "follower" who was always looking for approval and was easily influenced by others. Family members stated that the bank murders were completely inconsistent with Vela's character and personality. Two persons who worked with Vela in California gave similar statements.

There was evidence that Vela had been beaten by Sandoval and others after he had disclosed plans to rob the bank to another person. Vela offered and the court received an affidavit and deposition of Galindo, who stated that he became acquainted with Vela in the summer of 2002 and introduced him to Sandoval, Rodriguez, and others. In the affidavit, Galindo stated that Vela was "slow" and "a follower" and that he always did what others told him to do. Galindo stated that it was Sandoval's idea to rob the bank and that Galindo asked Vela to participate. He stated that Vela was scared and did not want to rob the bank but that Sandoval told him he was obligated.

The court also received portions of statements and testimony given by Sandoval in which he described Vela's involvement in the crimes in a similar fashion. Sandoval was described by one of his former teachers and a former school principal as a student with a "charismatic personality" who "always had a following" and was a "natural-born leader."

After his arrest for the bank murders, Vela told members of his family to look for a letter he had left for them in his father's apartment. The letter was found and turned over to the Madison County sheriff's office. It was in an envelope on which Vela had written the date "9/22/02" and an instruction that it was not to be opened until October 10, 2003. The letter states in part, "I dont know when but my death will come because I got in something real bad! Im sorry Dad it was just [a] bad choice to come to Nebraska." The letter further instructed Vela's family members that if they wished to avenge his death, they should come to a bar in Madison and ask for Galindo, "Baby Joe," and "Smiley." The parties stipulated that "Baby Joe" was Sandoval and that "Smiley" was Rodriguez.

Vela reoffered and the court received certain evidence which had been received during the mental retardation hearing. He also offered certified copies of sentencing orders in two unrelated first degree murder cases from another district court, in support of his argument that the notice of aggravating circumstances in his case was inadequate and for the purposes of proportionality review. The presiding judge sustained the State's relevance objections to both exhibits.

(b) State's Evidence

(i) Rebuttal

The State presented evidence to rebut Vela's mitigation evidence. This included affidavits from several correctional officers who had observed Vela during his incarceration. They stated that Vela was able to communicate clearly, that he did not appear to be a follower, and that he was fully capable of making his own decisions. One described him as "out spoken" and "able to influence other inmates." Another described him as "a very good manipulator." A case manager at the Lincoln Correctional Center who for a period of time had daily contact with Vela stated that based upon her observations, "while I do not feel that he is a leader, nor do I think that he is a blind follower. I do not see him as being conscripted into making decisions. I have never seen him taken advantage of."

The State presented letters which Vela had written from prison. In a letter to a female friend, he mentioned that when

he was 12 years old, he and his 15-year-old brother were involved with a gang in California. There was evidence that while in custody following his arrest for the bank murders, Vela asked a cellmate to tattoo a five-pointed crown on his left breast, and the cellmate did so with a staple, a pencil, and ink. Sandoval and Galindo also had five-pointed crowns tattooed on their chests. There was also evidence that prison officials confiscated a pair of Vela's shoes on which the five-pointed crown had been drawn and that he kissed the crown prior to surrendering the shoes. A Nebraska correctional officer who is involved in tracking gang members within correctional institutions testified that the five-pointed crown is a symbol of a gang known as the Latin Kings and that the symbol is an "immediate identifier" which identifies the person displaying it as a member of the Latin Kings. A person who was incarcerated with Vela in Madison gave a sworn statement in which he said that Vela told him that when he came to Nebraska from California, he got involved with Sandoval, Rodriguez, and others who were Latin Kings because he "liked the way they were doing things." There was other evidence linking Vela to street gangs in California and the Latin Kings in Nebraska.

Persons fluent in the Spanish language who reviewed recorded telephone conversations between Vela and members of his family after the bank murders stated in affidavits that they did not hear Vela express remorse for the victims or their families in any of the conversations. A cellmate told law enforcement officers that Vela had an autographed newspaper photograph of himself sent to the cellmate's wife and that Vela told him that Vela's face was the last thing that Bryant, the woman whom he shot, ever saw.

On September 19, 2002, 7 days before the bank murders, Vela and Sandoval were stopped and questioned by a Nebraska State Patrol trooper as they walked along a road south of Norfolk. The trooper did a pat-down search which revealed a loaded 9-mm handgun in the waistband of the jeans Vela was wearing. Vela identified himself as "Fernando Vela" and claimed that he found the weapon and intended to sell it. The weapon was seized, and Vela was charged with false reporting and carrying a concealed weapon. He was transported to

the Madison County jail and released within days; Sandoval was not held. There is evidence that the weapon which Vela was carrying at the time of his arrest was one of several which had been stolen by Sandoval and Galindo in a burglary. Law enforcement officers did not know this at the time of Vela's arrest and subsequent release prior to the bank murders. Other weapons stolen in the burglary were used in the bank murders.

Kalechstein, the neuropsychologist who testified for the State at the mental retardation hearing, was recalled and testified during the sentencing hearing. He reiterated his opinion that Vela is not a person with mental retardation and does not have a cognitive disorder. The State offered certain portions of the record from the aggravation hearing for the purpose of rebutting Vela's mitigation evidence, and it was received for that purpose.

(ii) Victim Impact Testimony

Prior to this hearing, Vela had filed a motion seeking to preclude the sentencing panel from considering "victim impact statements" submitted by family members of the murder victims which were included in the presentence investigation report. By order of the presiding judge, these statements were placed in a sealed envelope. When the State announced at the sentencing hearing that it would present testimony of family members for the purpose of establishing victim impact, Vela objected and argued that such testimony was not permitted at a capital sentencing hearing. The presiding judge overruled the objection but cautioned the prosecutor to confine the examination to personal attributes of the decedents and the effect of the deaths on the families.

Five family members of the murder victims testified over Vela's continuing objection. Vela moved to strike one response to a question on direct examination because it was not within the restrictions established by the court. With the State's concurrence, that response was stricken.

(c) Sentencing Order

In its sentencing order, the panel noted that it had not reviewed the sealed victim impact statements which were

included in the presentence investigation report and that it disregarded any portion of the victim impact testimony "which may have included characterizations and opinions about the crimes of [Vela] and what the appropriate sentence should be."

The sentencing panel found that no statutory mitigating circumstances applied to Vela. It specifically found that Vela was not the "master planner . . . or in fact the leader" of the attempted bank robbery and that Sandoval was in fact the leader. But the panel further found that Vela "willingly and knowingly participated in the attempted robbery resulting in five murders." Accordingly, the panel concluded that the mitigating circumstance described in § 29-2523(2)(b) did not exist, because Vela's "willingness to follow the lead of . . . Sandoval does not constitute a finding that he submitted to unusual pressure or influence or that he was under the domination of another person." The panel found that the mitigating circumstance described in § 29-2523(2)(e), that the "offender was an accomplice in the crime committed by another person and his . . . participation was relatively minor," did not exist, reasoning that Vela "entered the bank at the same time as the other two co-defendants with a loaded handgun, fully knowing the plan, prepared to shoot and materially participated in the execution of these crimes." Likewise, the panel found that the evidence did not establish the existence of the statutory mitigating circumstances described in § 29-2523(2)(a), (c), (d), (f), and (g).

The panel determined that four nonstatutory mitigating factors were established: Vela pled guilty, he had a disadvantaged upbringing, his intellectual functioning is borderline, and he was a follower of a charismatic leader. The panel concluded that the evidence did not establish remorse as a mitigating factor.

In its comparative analysis of aggravating and mitigating circumstances pursuant to § 29-2522, the panel first noted that because its members did not agree as to the weight which should be given to the jury's determination that each murder "'was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality

and intelligence,'" it would exclude this aggravating circumstance from its weighing analysis. In considering the remaining aggravating and mitigating circumstances, the panel gave the greatest weight to the jury's finding that Vela had a "substantial prior history of serious assaultive or terrorizing criminal activity" as shown by his involvement in the murder of Lundell, stating that this factor "is of such a magnitude . . . it alone is dispositive and outweighs all of the non-statutory mitigating circumstances." The panel gave great weight to the aggravating circumstance specified in § 29-2523(1)(f), that Vela "knowingly created a great risk of death to at least several persons." The panel gave some weight to the aggravating circumstance specified in § 29-2523(1)(b), that "[t]he murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime," and some weight to § 29-2523(1)(e), that "[a]t the time the murder was committed, the offender also committed another murder." The panel concluded beyond a reasonable doubt that the four nonstatutory mitigating circumstances it found to exist did not approach or exceed the weight which the panel gave to the four aggravating circumstances considered in its analysis.

Pursuant to § 29-2522(3), the sentencing panel then considered whether a sentence of death would be "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." It first sustained the State's objection to Vela's offer of sentencing orders from two other cases. After reviewing an array consisting of opinions of this court in cases where a death sentence was imposed, the panel concluded that sentencing Vela to death would not be excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The panel sentenced Vela to the penalty of death on each of his five convictions for first degree murder and to 48 to 50 years' incarceration on four of the five related convictions for use of a firearm to commit a felony. He was sentenced to 50 to 50 years' incarceration on the firearm conviction related to Bryant. All the firearm sentences were to be served consecutively.

2. Assignments of Error

Vela assigns, restated and renumbered in part, that the presiding judge and the sentencing panel erred in the following:

1. Allowing victim impact testimony at the sentencing determination hearing, in violation of § 29-2521(3) and Neb. Rev. Stat. § 29-2261(1) (Reissue 2008).

2. Refusing his offer of cases for proportionality review.

3. Finding that mitigating circumstance (2)(b) did not apply, in violation of the 8th and 14th Amendments to the U.S. Constitution and article I, § 9, of the Nebraska Constitution.

4. Finding that mitigating circumstance (2)(e) did not apply, in violation of the Eighth Amendment to the U.S. Constitution and article I, § 9, of the Nebraska Constitution.

5. Denying his amended motion to declare electrocution as a method of administering the death penalty unconstitutional, in violation of the 8th and 14th Amendments to the U.S. Constitution and article I, § 9, of the Nebraska Constitution.

3. Standard of Review

[20] In a capital sentencing proceeding, the Nebraska Supreme Court conducts an independent review of the record to determine if the evidence is sufficient to support imposition of the death penalty.[147]

[21] In challenges to the constitutionality of a method of execution, the Nebraska Supreme Court determines whether the trial court's conclusions are supported by substantial evidence.[148]

4. Analysis and Resolution

(a) Victim Impact Testimony

Vela contends that he was prejudiced by both the sealing of the victim impact statements included in the presentence investigation report and the panel's decision not to review those statements but to allow live victim impact testimony.

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[147] *Gales II, supra* note 16.

[148] *Mata II, supra* note 26.

This argument is based upon the interplay between several Nebraska statutes.

Presentence investigations are governed by § 29-2261. This statute contains a specific provision stating that presentence investigation reports shall include any written statements submitted to the county attorney and the probation officer by a victim of the crime.[149] This provision stems from the Nebraska Crime Victims Reparations Act,[150] which at the time Vela was sentenced, conferred certain rights upon crime victims, including a "right to make a written or oral impact statement to be used in the probation officer's preparation of a presentence investigation report concerning the defendant" and the right "to submit a written impact statement at the sentencing proceeding or to read his or her impact statement submitted pursuant to subdivision 1(d)(iv)."[151] Section 29-2261(1) provides that in a capital sentencing proceeding where aggravating circumstances have been found to exist, the court shall not commence the sentencing proceeding "without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation." Section 29-2261(6) provides that a "court may permit inspection of the [presentence investigation] report or examination of parts thereof by the offender or his or her attorney . . . whenever the court finds it is in the best interest of a particular offender."

Section 29-2521 governs sentencing proceedings in first degree murder cases where one or more aggravating circumstances have been found to exist. This statute provides that after receipt of the presentence investigation report ordered pursuant to § 29-2261, the court shall "hold a hearing to receive evidence of mitigation and sentence excessiveness or disproportionality."[152] At this hearing, "[e]vidence may be

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[149] § 29-2261(3)(a) and (b).

[150] Neb. Rev. Stat. § 81-1801 et seq. (Reissue 2008).

[151] Neb. Rev. Stat. § 81-1848(1)(d)(iv) and (vii) (Reissue 2008). See, also, *State v. Galindo, supra* note 11.

[152] § 29-2521(3).

presented as to any matter that the presiding judge deems relevant to (a) mitigation . . . and (b) sentence excessiveness or disproportionality."[153]

Vela contends that by sealing the victim impact statements contained in the presentence investigation report, the district court deprived him of a statutory right to review such statements and that the error was compounded by the court's receipt of victim impact testimony which, Vela argues, was not permissible under § 29-2521. The State responds that this argument places form over substance and that there was no prejudicial error.

We cannot discern from the record why the sentencing panel employed the procedure that it did. To the extent that it may have been concerned about whether its consideration of written victim impact statements would violate Vela's Sixth Amendment right to confrontation, that issue was resolved by our recent decision in *State v. Galindo*,[154] in which we concluded that the decision of the U.S. Supreme Court in *Crawford v. Washington*[155] did not change the established principle that Sixth Amendment rights are inapplicable to a sentencing proceeding.

[22] Despite the procedural irregularity with respect to victim impact information received by the sentencing panel in this case, we conclude that there was no prejudicial error. It is undisputed that victim impact information may be considered in sentencing a convicted murderer, because "'just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'"[156] The capital sentencing statutes authorize the sentencing panel to consider "[a]ny evidence at the sentencing determination proceeding which the presiding

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[153] *Id.*

[154] *State v. Galindo, supra* note 11.

[155] *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[156] *Payne v. Tennessee*, 501 U.S. 808, 825, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), quoting *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987) (White, J., dissenting).

judge deems to have probative value . . . ."[157] We recently held in *Galindo* that victim impact statements are admissible in evidentiary hearings conducted pursuant to § 29-2521(3) notwithstanding the fact that the statute does not make specific reference to them.[158]

[23] There is a substantive limitation on the admissibility of victim impact information: Victim family members' characterizations and opinions about the crime, the defendant, or the appropriate sentence may not be received in evidence.[159] Vela makes no argument that such information was received in this case. It is clear from the record that he was made aware of the properly considered victim impact information before he was sentenced, and he even had an opportunity to cross-examine the witnesses who presented the information, notwithstanding the fact that he had no constitutional right do so. Accordingly, we find no reversible error in the manner in which the sentencing panel received the victim impact information.

(b) Mitigator (2)(b)

Vela argues that the sentencing panel erred in not finding the existence of the mitigating circumstance described by § 29-2523(2)(b), that "[t]he offender acted under unusual pressures or influences or under the domination of another person." He contends that this error violated his rights under the Eighth Amendment.

[24] There is no burden of proof with regard to mitigating circumstances.[160] However, because the capital sentencing statutes do not require the State to disprove the existence of mitigating circumstances, the risk of nonproduction and nonpersuasion is on the defendant.[161] In this case, the sentencing panel accepted Vela's argument to the extent that it found that Vela was "not the master planner of this attempted robbery or in fact the leader." But based upon other evidence in the record,

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[157] § 29-2521(2).

[158] *State v. Galindo, supra* note 11.

[159] See *State v. Bjorklund, supra* note 42.

[160] *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990).

[161] *Id.*; *State v. Reeves, supra* note 42.

the panel found that Vela "willingly and knowingly participated in the attempted robbery resulting in five murders." This evidence included the fact that Vela had several opportunities to separate himself from the plan to rob the bank, yet did not do so, and that he acted alone in shooting Bryant. The panel also noted that Vela "has demonstrated his ability to think and act independently in communications he has made since his arrest, as well as in his guilty pleas over the objections of his counsel." These findings are supported by the record, and the sentencing panel therefore did not err in concluding that the mitigating circumstance described in § 29-2523(2)(b) did not exist.

(c) Mitigator (2)(e)

Vela also assigns that the sentencing panel erred in not finding the existence of the mitigating circumstance described in § 29-2523(2)(e): "[t]he offender was an accomplice in the crime committed by another person and his or her participation was relatively minor." Vela concedes that this mitigating circumstance would not apply to the murder of Bryant, but argues it should have been applied with respect to the victims shot and killed by Sandoval and Galindo.

The sentencing panel found that "Vela entered the bank at the same time as [Sandoval and Galindo] with a loaded handgun, fully knowing the plan, prepared to shoot and materially participated in the execution of these crimes." The record fully supports this conclusion and would not support a characterization of Vela's role in the death of each victim as "relatively minor." The sentencing panel did not err in concluding that this mitigating circumstance did not exist.

(d) Proportionality Review by Sentencing Panel

One of the factors which the sentencing panel was required by statute to consider in determining Vela's sentence was "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[162] Vela assigns error to the

[162] See § 29-2522(3).

refusal of the sentencing panel to consider sentencing orders in two cases in which the defendants received life sentences, and in considering only cases in which the death sentence was imposed for purposes of proportionality review.

We rejected a similar argument in *State v. Galindo*,[163] reaffirming our prior cases[164] holding that proportionality review by the sentencing body entails consideration only of other cases in which the death penalty has been imposed. We reach the same conclusion here.

(e) De Novo Proportionality Review

[25] Under Neb. Rev. Stat. § 29-2521.03 (Reissue 2008), this court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review.[165] This review requires us to compare the aggravating and mitigating circumstances with those present in other cases in which a district court imposed the death penalty.[166] The purpose of such review is to ensure that the sentences imposed in the present appeal are no greater than those imposed in other cases with the same or similar circumstances.[167] In conducting our de novo proportionality review, we have considered relevant cases in which the death penalty was imposed, including those cited in our proportionality review in *Gales II*,[168] and cases decided since that opinion, including *State v. Hessler*,[169] *Mata II*,[170] and *State v. Galindo*.[171] Of this array, we affirmed death sentences

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[163] *State v. Galindo, supra* note 11.

[164] *State v. Bjorklund, supra* note 42; *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

[165] See, *Mata II, supra* note 26; *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

[166] *Id.*

[167] See *id.*

[168] *Gales II, supra* note 16.

[169] *State v. Hessler, supra* note 165.

[170] *Mata II, supra* note 26.

[171] *State v. Galindo, supra* note 11.

in nine cases involving multiple murder victims,[172] four cases involving murders committed in connection with a robbery,[173] and two cases in which the defendants had committed previous homicides.[174] All three of these factors are present in this case.

Obviously, *Galindo* is the most comparable of these cases. In *Galindo*, as in this case, a jury found the existence of five aggravating circumstances, including § 29-2523(1)(a). The jury's finding of that aggravating circumstance was based on Galindo's involvement in the prior murder of Lundell, in which Vela was also involved. This case differs from *Galindo* in that Vela's sentencing panel did not consider the exceptional depravity aggravator found by the jury because it disagreed as to the amount of weight it should be given. Also, the sentencing panel in this case found three nonstatutory mitigating factors which were not found in *Galindo.* But in our view, these differences are not so substantial as to require that Vela receive lesser sentences than Galindo.

Based upon our de novo review, we conclude that the four aggravating circumstances considered by the sentencing panel far outweigh the mitigating circumstances and that the imposition of the death penalty on each of the five counts of first degree murder for which Vela was convicted is not disproportionate or excessive when compared with previous cases involving the same or similar circumstances.

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[172] *Id.*; *Gales II, supra* note 16; *State v. Lotter, supra* note 164; *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *disapproved on other grounds, State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000); *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984); *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *disapproved on other grounds, State v. Reeves, supra* note 42.

[173] *State v. Palmer, supra* note 43; *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), *disapproved on other grounds, State v. Palmer, supra* note 43; *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977).

[174] *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001); *State v. Victor, supra* note 160.

(f) Method of Execution

Vela assigns error to the order of the district court denying his motion to declare electrocution as a method of implementing the death penalty unconstitutional. The order was entered prior to our opinion in *Mata II*.[175] In accordance with our opinion therein, we find merit in this assignment of error.

V. CONCLUSION

For the foregoing reasons, we find no merit in any of Vela's assignments of error except the assignment challenging electrocution as the method of execution. But for the reasons discussed in *Mata II*,[176] the constitutional infirmity in this method of execution does not require that we disturb the death sentences imposed in this case. Because we find no error in the imposition of those sentences and further conclude on de novo review that they are not disproportionate or excessive, we affirm.

AFFIRMED.

HEAVICAN, C.J., not participating.

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[175] *Mata II, supra* note 26.

[176] *Id.*

CONNOLLY, J., dissenting.

I dissent from the majority's opinion that adds the words "significant limitations" to the adaptive behavior component of the statutory definition of mental retardation. Why quibble over two words? Because by adding these words to the statutory definition, the majority opinion has imposed a higher burden of proving mental retardation than the Legislature's standard.

This is the first time that we have had the opportunity to interpret Neb. Rev. Stat. § 28-105.01(3) (Reissue 2008). The majority characterizes mental retardation as a clinical diagnosis and concludes that we should incorporate standard diagnostic criteria into § 28-105.01(3). That may be appropriate in other circumstances—but not here. The U.S. Supreme Court has left to the states "'the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution'"

of mentally retarded criminals.[1] Clearly, mental retardation as defined in § 28-105.01(3) is Nebraska's legal standard for that purpose, not a clinical diagnosis. I believe that the issue is one of statutory interpretation and that the majority's interpretation ignores the Legislature's intent.

I understand the majority's concern that the standard is difficult to apply unless it is tied to a clinical definition. But I do not believe it is our role to second-guess the Legislature's decision to enact a definition of mental retardation that is broader than a clinical definition. The Legislature had valid reasons to do so, as will be discussed later. Nor do I believe that the statutory standard is impossible to apply. Thus, I conclude that the trial court erred in judicially imposing a higher standard than the Legislature's, by adding the "significant limitations" standard that the Legislature specifically rejected.

It is for the Legislature to declare what is the law and public policy.[2] If a statute's language is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.[3] It is not within a court's province to read a meaning into the statute that is not there.[4] The majority opinion has done that.

Section 28-105.01(3) clearly does not impose the "significant limitations" standard. It provides that "mental retardation means significantly subaverage general intellectual functioning existing concurrently *with deficits* in adaptive behavior." (Emphasis supplied.) Nothing in this statute allows the State to execute a person who has subaverage intellectual functioning but fails to show *significant limitations* in adaptive behavior. I agree that a judge could apply neither the intellectual function standard nor the adaptive behavior standard without the

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[1] *Atkins v. Virginia*, 536 U.S. 304, 317, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

[2] See *State v. Barranco*, 278 Neb. 165, 769 N.W.2d 343 (2009).

[3] See *State ex rel. Lanman v. Board of Cty. Commissioners*, 277 Neb. 492, 763 N.W.2d 392 (2009).

[4] See, *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008); *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007).

aid of clinical expertise. But that would be true regardless of whether the Legislature had chosen to require a showing of "significant limitations" or "deficits" in adaptive behavior. And the Legislature's decision to deviate from the clinical definition in promulgating a legal standard of mental retardation was not dependent upon whether clinical expertise would be needed for these determinations.

The majority opinion, however, states that "we can conceive of no reason why the Legislature would have intended to preclude the death penalty for persons with clinically *insignificant* deficits in adaptive behavior." The majority is implicitly concluding that it must construe the statute as incorporating the clinical criteria because the plain language of the statute would lead to an absurd result otherwise. But the statute's plain language does not lead to an absurd result. It does not follow that because the Legislature has not required "significant limitations" in adaptive behavior, persons with insignificant deficits would evade the death penalty. In short, there is a range of diminished adaptive behavior between "significant limitations" and "deficits" that does not include "insignificant deficits." Further, I believe the majority's framing of the issue obscures valid concerns that support the Legislature's definition.

The majority concedes that the Legislature has deviated from the clinical definition of mental retardation by omitting another important diagnostic criterion: § 28-105.01(3) omits the clinical requirement that the onset of mental retardation must have occurred before the age of 18. But the majority concludes that this deviation—removing the age of onset—is justified because the Legislature's legal standard would include criminals who may have less culpability for their crimes because they sustained a traumatic brain injury after age 18. While I disagree with the majority's implicit substitution of its judgment for the Legislature's, I would point out that by omitting the requirement of "significant limitations" in adaptive behavior, the Legislature's legal standard similarly ensures that persons who are less culpable for their crimes because they have mild mental retardation are not executed.

The majority concludes that the district court did not err in construing § 28-105.01(3) in a manner consistent with

clinical models. In other words, the majority affirms the court's incorporation of the "significant limitations" standard from the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR).[5] The DSM-IV-TR describes persons with mild mental retardation, who account for 85 percent of all persons with mental retardation.[6] It provides that the IQ level of these persons ranges from 50 to about 70,[7] and states that persons in this range used to be referred to as "educable":

> As a group, people with this level of Mental Retardation typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level. During their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.[8]

This description clearly would not preclude a mental retardation diagnosis just because a person possesses some academic or vocational skills or because a person can live independently. Neither are low skills inconsistent with the U.S. Supreme Court's description of persons who are less culpable and less deterrable than the "average murderer" for ensuring that only the most deserving of execution are put to death:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process

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[5] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. text rev. 2000).

[6] *Id.* at 43.

[7] See *id.* at 42.

[8] *Id.* at 43.

> information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.[9]

The Court concluded that

> [i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.[10]

For similar reasons, the Court has determined that juveniles cannot be classified among the worst offenders and that their "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."[11] Thus, even if some persons with mild mental retardation can function on the level of a teenager with about sixth-grade academic skills, as the DSM-IV-TR description indicates, that would not mean that their culpability warrants the death penalty.

I believe these descriptions of mild mental retardation and diminished culpability refute the majority's implicit conclusion that the Legislature intended a court to use the "significant limitations" standard for evaluating diminished adaptive behavior despite the Legislature's omitting that standard from the statute. Given these descriptions, the Legislature could have reasonably concluded that the "significant limitations" standard

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[9] *Atkins, supra* note 1, 536 U.S. at 318.

[10] *Id.*, 536 U.S. at 319.

[11] *Roper v. Simmons*, 543 U.S. 551, 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

could be interpreted in a way that would exclude criminals with mild mental retardation from § 28-105.01's ambit because they had low-level functioning. Here, for example, under its significant limitations standard, the district court rejected Piersel's conclusion that Vela had mild-to-moderate mental retardation because Vela had the ability to write a message and read, had not been placed in a program for grade school students with mental retardation, was able to hold a low-skill job, and was able to function in a penitentiary environment. But none of the court's factual findings were necessarily inconsistent with the DSM-IV-TR description of mild mental retardation.

Further, the Legislature obviously was not concerned about matching diagnostic criteria point for point. For example, the majority points out that under the DSM-IV-TR, "it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior."[12] And the DSM-IV-TR also provides, "Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning."[13] Yet, I assume the majority would not conclude that these clinical diagnostic statements demonstrate that the Legislature has incorrectly enacted a presumption of mental retardation for persons with an IQ below 70. It appears to me that the Legislature's presumption of mental retardation for a person with an IQ under 70 shows that it did not intend § 28-105.01(3) to mirror the DSM-IV-TR.

One more point, and I am done. To the extent there is any ambiguity about the Legislature's intent—and the trial court found that there was—the legislative history shows that the omission of a "significant limitations" standard was intentional.

The Legislature enacted § 28-105.01 in 1998. At the Judiciary Committee hearing, a witness informed the committee that it was relying on an older definition of mental retardation and asked the committee to consider the newer 1992 definition from the American Association on Mental

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[12] See DSM-IV-TR, *supra* note 5 at 41-42.

[13] *Id.* at 42.

Retardation.[14] That definition included the term "substantial limitations." It provided:

> "Mental retardation means *substantial limitations* in present functioning. It is characterized by significantly sub-average intellectual functioning (an IQ of approximately 70-75 or below) existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self direction, health and safety, functional academics, leisure and work. Mental retardation manifests before age 18."[15]

Another witness informed the Judiciary Committee that its definition was inconsistent with other federal and state definitions.[16] For example, for determining whether an applicant is entitled to residential care, Neb. Rev. Stat. § 83-381(1) (Reissue 2008) provides that a "[p]erson with mental retardation means any person of subaverage general intellectual functioning which is associated with a *significant impairment* in adaptive behavior." (Emphasis supplied.)

But there was also evidence that supported the committee's decision to reject the clinical definition. Exhibits presented showed that persons with mental retardation attempt to hide their disability.[17] And much of the testimony emphasized that the persons with mental retardation had been executed even in states that included "mental defect" as a mitigating circumstance in death penalty cases, as Nebraska does.[18]

The 1998 Judiciary Committee hearing and exhibits show that the Legislature was aware that its stated definition was different from the 1992 definition from the American Association on Mental Retardation and other state and federal definitions. Yet, it clearly rejected the standard used in other contexts and

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[14] See Judiciary Committee Hearing, 95th Leg., 2d Sess. 85, 93 (Feb. 13, 1998).

[15] See *id.*, exhibit 23 (emphasis supplied). Accord *Atkins, supra* note 1 (quoting definition).

[16] See Judiciary Committee Hearing, *supra* note 14 at 90.

[17] See *id.*, exhibits 1 & 23.

[18] Judiciary Committee Hearing, *supra* note 14 at 86, 88.

intentionally adopted a less stringent test for the "adaptive skills" component of the definition for determining whether to put a person to death.

I believe that the district court's adoption of the "significant limitations" standard for adaptive behavior impermissibly increased Vela's burden of proving mental retardation under § 28-105.01(3). The court's alteration of the statutory standard was inconsistent with both the plain language of the statute and its legislative history, and invaded the Legislature's prerogative to set policy and declare the law. I would reverse the district court's order that found Vela was not mentally retarded and remand the cause for a determination from the present record whether Vela was mentally retarded under the standard set forth in § 28-105.01(3).

Deutsche Bank National Trust Company, as Trustee, under the Pooling and Servicing Agreement dated as of September 1, 2002, Morgan Stanley Dean Witter Capital I Inc., Trust 2002-NC4, by and through its loan servicing agent, Litton Loan Servicing, LP, appellee, v. Max D. Siegel and Angela M. Siegel, husband and wife, appellants, and Platte Valley State Bank & Trust Company, Trustee and beneficiary, appellee.

777 N.W.2d 259

Filed January 8, 2010. No. S-08-1314.

1. **Jurisdiction: Appeal and Error.** Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision.
2. **Judicial Sales.** It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and will not be reviewed except for manifest abuse of such discretion.
3. **Principal and Agent.** A power of attorney authorizes another to act as one's agent.
4. **Principal and Agent: Words and Phrases.** Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent of the other to so act.

5. ____: ____. In the relationship of principal and agent, an agent's actual authority is the power to act on the principal's behalf in accordance with the principal's consent to the agency.
6. **Partition: Judicial Sales.** Generally, an upset bid following a judicial sale and before a final confirmation should be considered only when it affords convincing proof that the property was sold at an inadequate price and that a just regard for the rights of all concerned and the stability of judicial sales permits its acceptance.
7. **Foreclosure: Appeal and Error.** When a defendant requests a stay of sale pursuant to Neb. Rev. Stat. § 25-1506 (Reissue 2008), the defendant is precluded from appealing from the foreclosure decree.
8. **Foreclosure: Waiver: Appeal and Error.** A request for a stay of sale is a waiver of any prior error in the proceedings.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Michael J. Synek for appellants.

Eric H. Lindquist, P.C., L.L.O., and Harvey B. Cooper, of Abrahams, Kaslow & Cassman, L.L.P., for appellee Deutsche Bank National Trust Company.

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

WRIGHT, J.

NATURE OF CASE

Deutsche Bank National Trust Company (Deutsche Bank), by and through its loan servicing agent, Litton Loan Servicing, LP (Litton), sought judicial foreclosure of real estate owned by Max D. Siegel and Angela M. Siegel. The district court confirmed a judicial sale of the property, and the Siegels appeal.

SCOPE OF REVIEW

[1] Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision. *Gilbert & Martha Hitchcock Found. v. Kountze*, 275 Neb. 978, 751 N.W.2d 129 (2008).

[2] It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and will

not be reviewed except for manifest abuse of such discretion. *Michelson v. Wagner*, 170 Neb. 28, 101 N.W.2d 498 (1960).

FACTS

The Siegels owned residential real estate in Buffalo County, Nebraska. On June 11, 2002, they refinanced their home loan in a consumer credit transaction by executing an adjustable rate note to New Century Home Mortgage, secured by a deed of trust on the real estate. New Century Home Mortgage assigned the note in blank to Deutsche Bank, as trustee, under the "Pooling and Servicing Agreement Dated as of September 1, 2002, Morgan Stanley Dean Witter Capital I, Inc., Trust 2002-NC4." New Century Home Mortgage also assigned the deed of trust to Deutsche Bank. Litton was Deutsche Bank's loan servicer.

The Siegels defaulted on the note by failing to pay installments due on May 1, 2005, and thereafter. Pursuant to the terms of the note, the balance of the loan was accelerated and was due and payable in full. Litton notified the Siegels of the acceleration and filed a complaint on behalf of Deutsche Bank seeking judicial foreclosure of the Siegels' right, title, lien, and equity of redemption in the real estate under the deed of trust.

In November 2006, the Siegels hired an auditing firm to determine if Litton violated the Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq. (2006). They sought leave to file a counterclaim based on alleged TILA violations, but the district court denied their request. On March 13, 2007, the Siegels informed Deutsche Bank of their intent to rescind the loan transaction, based on the alleged TILA violations.

On March 21, 2007, the district court entered a decree of foreclosure. It also granted Deutsche Bank's motion for summary judgment, determined that the Siegels owed $174,538.26 on the note, and appointed a master commissioner to sell the real estate. Upon the Siegels' motion, the court stayed the order of sale for 9 months pursuant to Neb. Rev. Stat. § 25-1506 (Reissue 2008).

The master commissioner conducted a public sale of the property on November 4, 2008. Deutsche Bank's bid of $154,050

was the only bid submitted. Deutsche Bank moved for confirmation of the sale, and a hearing was held for that purpose. The Siegels offered evidence that the property had been appraised at $206,000 and an affidavit of Brett Weis, who stated that if he had been aware of the judicial sale of the property, he would have placed a bid to purchase the property for a sum greater than $154,050. On December 1, Deutsche Bank increased its bid from $154,050 to $206,000.

At the hearing on confirmation of the sale, the district court concluded that nothing in the evidence indicated the property was not sold for fair value under the circumstances and conditions of the public sale. It determined there was no evidence that a subsequent sale would realize an amount greater than the original sale price or the appraised value. The court accepted Deutsche Bank's subsequent bid of $206,000, but stated that it did so for the protection of the Siegels and not because it believed the original bid did not represent the fair market value of the property. Accordingly, the court confirmed the sale of the property to Deutsche Bank for $206,000. The Siegels appeal.

ASSIGNMENTS OF ERROR

The Siegels allege, summarized and restated, that the Buffalo County District Court lacked jurisdiction to conduct the confirmation of sale proceedings and that the court erred in confirming the judicial sale and failing to find that the Siegels rescinded the transaction prior to confirmation of the sale.

ANALYSIS

Real Party in Interest and Jurisdiction

The Siegels claim that the district court did not have jurisdiction because Litton did not have authority to commence this action or to act on behalf of Deutsche Bank and, therefore, was not the real party in interest. They assert that Deutsche Bank should have brought the claim in its own behalf.

Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision. *Gilbert & Martha Hitchcock Found. v. Kountze*, 275 Neb. 978, 751 N.W.2d

129 (2008). The record shows that Litton had authority to bring the foreclosure action against the Siegels on behalf of Deutsche Bank. Accordingly, this assignment of error is without merit.

Deutsche Bank was a party to the "Pooling and Servicing Agreement" (PSA), which designated Deutsche Bank as trustee and authorized a servicer to initiate foreclosure proceedings on behalf of Deutsche Bank. The Siegels asked for information in the PSA in discovery requests. At Deutsche Bank's request, the district court entered a protective order to keep the documents confidential, and Deutsche Bank then filed the PSA with the court on February 22, 2007.

The PSA became part of the district court's file at the time of Deutsche Bank's filing. The court took judicial notice of the entire court file on two occasions. On November 24, 2008, at the hearing on Deutsche Bank's motion to confirm the sale of the real estate, the court stated that it would take judicial notice of all of the pleadings, the court file, attachments contained thereto, and all exhibits. The November 24 hearing was continued to December 1, at which time Deutsche Bank's attorney stated, "Judge, I first want to confirm that you have taken judicial notice of your entire file . . . ." The court responded, "Well, if I haven't, I will." The PSA was filed with this court as a second supplemental transcript pursuant to Deutsche Bank's request on October 20, 2009.

The PSA contains a section titled "Administration and Servicing of Mortgage Loans," which provides: "[T]he Servicer in its own name or in the name of a Subservicer is hereby authorized and empowered by the Trustee [Deutsche Bank] to institute foreclosure proceedings or obtain a deed-in-lieu of foreclosure so as to convert the ownership of such properties . . . on behalf of the Trustee." To carry out these powers, the PSA states: "[T]he Trustee hereby grants to the Servicer, and this Agreement shall constitute, a power of attorney to carry out such duties including a power of attorney to take title to Mortgaged Properties after foreclosure on behalf of the Trustee." An employee of Litton stated in her affidavit that Litton was the servicer for Deutsche Bank.

[3-5] A power of attorney authorizes another to act as one's agent. *First Colony Life Ins. Co. v. Gerdes*, 267 Neb. 632, 676 N.W.2d 58 (2004). Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent of the other to so act. *Equilease Corp. v. Neff Towing Serv.*, 227 Neb. 523, 418 N.W.2d 754 (1988). In the relationship of principal and agent, an agent's actual authority is the power to act on the principal's behalf in accordance with the principal's consent to the agency. *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 443 N.W.2d 596 (1989).

The PSA granted power of attorney to Litton and created an agency relationship between Litton and Deutsche Bank. As Deutsche Bank's agent, Litton acted within the scope of its authority in bringing this action against the Siegels. Litton had the authority to commence the action in Deutsche Bank's name pursuant to the power of attorney and agency agreement. This arrangement is not improper. The PSA authorizes Litton to initiate foreclosure proceedings on behalf of Deutsche Bank; therefore, the district court properly concluded that it had jurisdiction to decide this case.

Judicial Sale of Real Estate

The Siegels next claim that the district court should have ordered a resale of the property and that the court improperly accepted Deutsche Bank's second bid of $206,000 after the judicial sale.

Nebraska law provides that a court shall confirm a judicial sale if the court is satisfied that the sale "has in all respects been made in conformity to the provisions of [chapter 25 of the Nebraska Revised Statutes] and that the said property was sold for fair value, under the circumstances and conditions of the sale, or, that a subsequent sale would not realize a greater amount." Neb. Rev. Stat. § 25-1531 (Reissue 2008). It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and will not be reviewed except for manifest abuse of such discretion. *Michelson v. Wagner*, 170 Neb. 28, 101 N.W.2d 498 (1960).

The hearing to confirm the judicial sale of the property took place on two different days. On the first day, the Siegels offered an appraisal that valued the property at $206,000. On the second day, they offered Weis' affidavit stating his willingness to bid an unknown amount greater than $154,050 at a resale. They claim this is evidence that the sale price was inadequate and that a subsequent sale would realize a greater amount.

Whether the court should confirm a judicial sale is determined on the facts of each case. Evidence that another party who did not bid at the original judicial sale would pay more for the property is not sufficient to prevent the court from confirming the sale. In *Kleeb v. Kleeb*, 210 Neb. 637, 316 N.W.2d 583 (1982), property was sold at judicial sale to a purchaser for $181,440. After the sale, an anonymous bidder offered an "upset bid" of $189,540, good for 1 day only. The court determined that the amount of the new offer was not a substantial increase and that there was no evidence that a new sale could start at the point of the upset bid, which was only open for that day. It confirmed the judicial sale. On appeal, this court affirmed the decision of the trial court and stated that the court was well within its discretion in refusing to set aside the alleged upset bid made by the unknown party, particularly because there was no evidence that a resale would result in a higher price.

In the present case, the district court was within its discretion to refuse to order a resale based on the Siegels' evidence. Weis' affidavit does not indicate how much he would bid if there were a resale, and there is no evidence that his theoretical bid would be substantially more than Deutsche Bank's bid of $154,050. The court was within its discretion in declining to speculate that Weis or any other bidder would pay significantly more than $154,050 at a resale.

[6] The Siegels characterize Deutsche Bank's second bid of $206,000 as an upset bid and claim that it should not have been accepted and that the district court should have held a resale instead. Generally, an upset bid following a judicial sale and before a final confirmation should be considered only when it affords convincing proof that the property was sold at an inadequate price and that a just regard for the rights of all

concerned and the stability of judicial sales permits its acceptance. *Destiny 98 TD v. Miodowski*, 269 Neb. 427, 693 N.W.2d 278 (2005) (citing *Kleeb v. Kleeb, supra*). However, when the upset bid is offered by the original bidder, it is not error for the court to allow the bidder to increase his bid at the hearing for confirmation of the sale if the property owner is not injured. See *Gordon State Bank v. Hinchley*, 117 Neb. 211, 220 N.W. 243 (1928).

In *Gordon State Bank*, following the judicial sale, the court stated its opinion that the winning bid was not a fair value for the real estate. The winning bidder increased its bid, and the court confirmed the sale. On appeal, we noted that with respect to a judicial sale, the court may exercise its discretion. Considering that the appellants were not prejudiced and that any error was in their favor, we determined the court did not err in allowing the bidder to increase his bid at the hearing for confirmation of the sale.

Deutsche Bank was the only bidder at the sale and the only party to offer a subsequent bid. The amount of the second bid, $206,000, was equal to the Siegels' proffered appraisal value of the property. In accepting the upset bid, the district court stated: "Solely for the protection of the defendants, and not because the court believes the original bid offer by the plaintiff does not represent fair value of the property, the court will accept the subsequent bid of the plaintiff of $206,000.00 for the property." The Siegels have not offered any evidence that the property was not sold for fair value under the circumstances or that a subsequent sale would have realized an amount greater than $206,000. Rather, the court's acceptance of Deutsche Bank's increased bid was in conformity with the value of the property asserted by the Siegels.

Typically, the concern regarding acceptance of upset bids is that the practice would render judicial sales meaningless because bidders could skip the judicial sale and place their bids with the court right before the confirmation hearing. *Michelson v. Wagner*, 170 Neb. 28, 101 N.W.2d 498 (1960). Here, this is not a concern because the upset bidder was Deutsche Bank, which merely outbid itself. There were no other bidders. The second bid matched the property value asserted by the Siegels

and was a significant benefit to them. The district court did not abuse its discretion in accepting Deutsche Bank's second bid of $206,000 and confirming the sale.

Truth in Lending Act

Lastly, the Siegels allege that the district court erred in failing to find that they rescinded the loan transaction based on Deutsche Bank's alleged unspecified TILA violations. Because the Siegels received a stay of sale, this assignment of error is waived.

Prior to the foreclosure decree, the Siegels sought leave to file a counterclaim based on alleged TILA violations. The district court denied the motion. Subsequently, the Siegels informed Deutsche Bank of their intent to rescind the loan based on TILA violations. Nonetheless, the district court entered a decree of foreclosure.

[7,8] After the foreclosure decree was entered, the Siegels requested and were granted a 9-month stay of sale in accordance with § 25-1506. When a defendant requests a stay of sale pursuant to § 25-1506, the defendant is precluded from appealing from the foreclosure decree. *Production Credit Assn. of the Midlands v. Schmer*, 233 Neb. 785, 448 N.W.2d 141 (1989); *Federal Farm Mtg. Corporation v. Ganser*, 145 Neb. 589, 17 N.W.2d 613 (1945); *Ohio Nat. Life Ins. Co. v. Baxter*, 139 Neb. 648, 298 N.W. 530 (1941); *Carley v. Morgan*, 123 Neb. 498, 243 N.W. 631 (1932); *Ecklund v. Willis*, 42 Neb. 737, 60 N.W. 1026 (1894); *McCreary v. Pratt*, 9 Neb. 122, 2 N.W. 352 (1879). A request for a stay of sale is also a waiver of any prior error in the proceedings. *Id.* The unspecified TILA violations alleged by the Siegels occurred prior to the order of foreclosure and prior to their request for a stay of sale. Accordingly, the Siegels' claims regarding TILA violations are waived.

CONCLUSION

We conclude that the district court had jurisdiction over the parties, as Litton properly brought this action on behalf of Deutsche Bank, and that the court did not abuse its discretion in confirming the judicial sale of the Siegels' property.

Because the Siegels stayed the judicial sale of their property, their claims relating to TILA violations were waived. Accordingly, we affirm the district court's confirmation of the judicial sale.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. BART A. CHAVEZ, RESPONDENT.

776 N.W.2d 791

Filed January 8, 2010. No. S-09-643.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

Respondent, Bart A. Chavez, was admitted to the practice of law in the State of Nebraska on September 8, 1992, after having been previously admitted to the practice of law in the State of Kansas. Respondent is also admitted to the practice of law before the U.S. immigration courts and the Board of Immigration Appeals. At all times relevant, respondent was engaged in the private practice of law in Omaha, Nebraska, with the primary focus of his practice being immigration matters.

On July 1, 2009, the Office for the Counsel for Discipline of the Nebraska Supreme Court filed a motion for reciprocal discipline pursuant to Neb. Ct. R. § 3-321. The motion stated that on August 21, 2008, the bar counsel for the U.S. Department of Justice Executive Office for Immigration Review (EOIR) filed a notice of intent to discipline respondent. In April 2009, respondent and the EOIR entered into a settlement agreement agreeing to resolve the disciplinary allegations against respondent. On May 4, 2009, respondent received a public censure

from the EOIR for having engaged in contumelious or otherwise obnoxious conduct while representing a client before an immigration court.

In its motion for reciprocal discipline, the Counsel for Discipline alleges that the conduct described in the EOIR's notice of intent to discipline constituted a violation of the following provisions of the Nebraska Rules of Professional Conduct: Neb Ct. R. of Prof. Cond. §§ 3-504.4 (respect for rights of third persons) and 3-508.4 (misconduct). Therefore, the Counsel for Discipline asked this court to impose an appropriate disciplinary sanction.

On July 1, 2009, respondent filed a conditional admission under Neb. Ct. R. § 3-313, in which he knowingly did not challenge or contest the facts set forth in the motion for reciprocal discipline and waived all proceedings against him in connection therewith in exchange for a stated form of consent judgment of discipline outlined below. Upon due consideration, the court approves the conditional admission.

FACTS

In summary, the notice of intent to discipline filed by the bar counsel for the EOIR stated that on July 13, 2006, respondent entered his appearance as counsel of record for Sindiso Luphahla in the "*Matter of Sindiso Luphahla*, A 98 495 843," a case before the Elizabeth, New Jersey, immigration court. The matter was transferred to the Dallas, Texas, immigration court, where respondent entered an appearance as counsel of record.

On July 19, 2007, Luphahla filed a motion for continuance with the Dallas court stating that respondent was "not able to come to court" for a hearing on August 3. On July 21, immigration Judge Deitrich H. Sims issued an order denying Luphahla's motion stating that insufficient grounds existed for continuing the case.

On July 23, 2007, respondent filed a motion to withdraw as counsel in the Luphahla matter. Judge Sims entered an order denying respondent's motion to withdraw on July 24. Respondent filed a second motion to withdraw on July 30. Immigration Judge James A. Nugent denied the second motion.

At the request of Judge Nugent, Dallas immigration court administrator Barbara Baker called respondent to inform him of the denial of his request to withdraw. According to the allegations in the motion for reciprocal discipline, respondent became very upset and angry with Baker and engaged in a confrontational conversation with her using offensive language directed at Baker, Judge Sims, and the court. Toward the end of the call, respondent then asked Baker to relay his request for the hearing with Judge Nugent on August 3, 2007, to be held telephonically.

Baker informed Judge Nugent of respondent's request for a telephonic hearing, at which time Judge Nugent orally denied the request. Baker called respondent to inform him of Judge Nugent's denial, and respondent engaged in a second confrontational conversation with Baker, again using offensive language directed at Baker and the court.

On August 1, 2007, respondent called the court and asked for Baker and engaged in a third confrontational conversation with Baker using offensive and disrespectful language directed at Baker and the court. Respondent failed to appear at the August 3 hearing.

In the motion for reciprocal discipline, the Counsel for Discipline alleges that the conduct described in the EOIR's notice of intent to discipline constituted a violation of §§ 3-504.4 and 3-508.4.

ANALYSIS

Section 3-313 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent

> knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to his conditional admission, respondent knowingly does not challenge the allegations in the motion for reciprocal discipline conditioned on the receipt of the following discipline: that respondent be publicly reprimanded and that he pay all costs in this case.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the motion for reciprocal discipline, which we now deem to be established facts, and we further find that respondent violated §§ 3-504.4 and 3-508.4. Respondent has waived all additional proceedings against him in connection herewith, and upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated §§ 3-504.4 and 3-508.4 and that respondent should be and hereby is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

Esteban Perez, a minor child, brought by his natural mother and next friend, Reyna Guido, et al., appellants, v. Sandra Stern, appellee.

777 N.W.2d 545

Filed January 15, 2010. No. S-07-904.

1. **Summary Judgment.** Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
5. **Attorney and Client: Parties.** A lawyer owes a duty to his or her client to use reasonable care and skill in the discharge of his or her duties, but ordinarily this duty does not extend to third parties, absent facts establishing a duty to them.
6. **Attorney and Client: Parties: Negligence: Liability.** Evaluation of an attorney's duty of care to a third party is founded upon balancing the following factors: (1) the extent to which the transaction was intended to affect the third party, (2) the foreseeability of harm, (3) the degree of certainty that the third party suffered injury, (4) the closeness of the connection between the attorney's conduct and the injury suffered, (5) the policy of preventing future harm, and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession.
7. **Attorney and Client: Parties: Intent.** The starting point for analyzing an attorney's duty to a third party is determining whether the third party was a direct and intended beneficiary of the attorney's services.
8. **Attorney and Client: Parties: Negligence: Intent.** An attorney's agreement with a client determines the scope of the attorney's duty to a third-party beneficiary; the duty to use due care as to the interests of the intended beneficiary must arise out of the attorney's agreement with the client.
9. **Attorney and Client: Informed Consent.** An attorney may limit the scope of his or her representation by obtaining the informed consent of his or her client.
10. **Attorney and Client.** A person who is adverse to an attorney's client cannot be a beneficiary of the attorney's retention.
11. **Attorney and Client: Parties: Conflict of Interest.** A duty from an attorney to a third party will not be imposed if that duty would potentially conflict with the duty the attorney owes his or her client.
12. **Attorney and Client: Conflict of Interest.** An attorney is ethically obliged to inform his or her client when conflicts of interest are apparent.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Steven H. Howard, of Dowd, Howard & Corrigan, L.L.C., for appellants.

Robert M. Slovek and Kathryn E. Jones, of Kutak Rock, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

NATURE OF CASE

Appellant Reyna Guido filed legal malpractice claims against appellee, Sandra Stern, on behalf of herself, her two children, and the estate of Domingo Martinez. Guido had hired Stern to prosecute a wrongful death claim against persons alleged to be responsible for Martinez' death. Stern filed the complaint, but it was not served within 6 months of filing, so the case was dismissed. Almost 3 years later, Guido filed these legal malpractice claims. The district court granted Stern's motion for summary judgment, finding that the malpractice claims were barred by the statute of limitations.

The issue in this case is whether Stern owed an independent duty to the children, as Martinez' statutory beneficiaries, to exercise reasonable care in prosecuting the underlying wrongful death claim, permitting the children to bring individual malpractice claims for which the statute of limitations had been tolled because of their minority. For the reasons that follow, we conclude that Stern owed a duty to the children and reverse the court's judgment against their claims.

FACTS

Guido is the mother of two minor children. Martinez, the children's father, died after he was run over by a car on July 8, 2001. Martinez was the victim of a hit-and-run accident.

Guido, as personal representative of Martinez' estate, retained Stern to file a wrongful death lawsuit. On July 8, 2003, Stern

filed a wrongful death complaint in the district court. But Stern admits that she never perfected service of the complaint, and because the complaint was not served within 6 months of filing, the case was dismissed by operation of law.[1] The district court formalized the dismissal on May 7, 2004.

Stern never contacted Guido, and eventually Guido hired a new attorney. Guido's new attorney sent Stern a letter dated December 5, 2005, requesting Guido's client file. After several more letters, the client file was finally delivered on February 6, 2006. On February 6, 2007, Guido filed these legal malpractice claims against Stern on behalf of herself, the children, and the estate. Guido alleged that the wrongful death claim expired as a result of Stern's failure to timely perfect service of the complaint. Stern moved for summary judgment on the ground that the malpractice claims were barred by the 2-year statute of limitations for professional negligence.[2] Before the court ruled on the motion, Guido voluntarily dismissed her individual claim, but maintained claims as personal representative of the estate and next friend of the children.

The district court found that the malpractice claims accrued on May 7, 2004, when the wrongful death claim was dismissed. The court found that the estate's claim against Stern was time barred. In response to Guido's argument that the children's minority tolled the statute of limitations with respect to them, the court found that because the children could not have brought the underlying wrongful death claim in their own names,[3] the statute of limitations for the legal malpractice claims was not tolled by reason of the children's minority. The court granted summary judgment in favor of Stern and dismissed the complaint.

ASSIGNMENTS OF ERROR

Guido assigns, consolidated and restated, that the district court erred in granting Stern's motion for summary judgment

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[1] See, Neb. Rev. Stat. § 25-217 (Reissue 2008); *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000).

[2] See Neb. Rev. Stat. § 25-222 (Reissue 2008).

[3] See Neb. Rev. Stat. § 30-810 (Reissue 2008).

on her affirmative defense of the statute of limitations and, specifically, determining that the children had no independent standing to sue Stern and that Stern owed no independent duty to the minor children to protect their rights and interests.

We note that neither Guido's assignments of error nor the argument in her appellate brief challenges the district court's dismissal of Guido's claims as an individual and as personal representative of Martinez' estate. Therefore, those aspects of the court's judgment will be affirmed.

STANDARD OF REVIEW

[1,2] Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law.[4] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.[5]

[3,4] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.[6] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[7]

ANALYSIS

The issue in this case is whether Stern owed an independent duty to the children, as Martinez' next of kin, to timely prosecute the underlying wrongful death claim. Guido argues that Stern committed legal malpractice when Stern breached her duty to timely prosecute the wrongful death claim against the underlying tort-feasors, and that because Stern owed an independent duty to the children, the statute of limitations is

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[4] *In re Estate of Ronan*, 277 Neb. 516, 763 N.W.2d 704 (2009).

[5] *Harvey v. Nebraska Life & Health Ins. Guar. Assn.*, 277 Neb. 757, 765 N.W.2d 206 (2009).

[6] *Swanson v. Ptak*, 268 Neb. 265, 682 N.W.2d 225 (2004).

[7] *Id.*

tolled on their legal malpractice claims. Stern, on the other hand, argues that because the children never had their own claims for relief in the underlying wrongful death action, they lack standing to bring professional negligence claims against Stern.

We agree with Guido that if the children have malpractice claims against Stern, the statute of limitations on those claims has been tolled by the children's minority.[8] In order to have claims for professional negligence against Stern, the children must prove (1) Stern's employment, (2) Stern's neglect of a reasonable duty to the children, and (3) that such negligence was the proximate cause of damages to the children.[9] In this appeal, Stern's employment to prosecute the wrongful death claim is undisputed, and damages are not yet at issue—the dispositive question is whether Stern owed the children a legal duty.

[5] In Nebraska, a lawyer owes a duty to his or her client to use reasonable care and skill in the discharge of his or her duties, but ordinarily this duty does not extend to third parties, absent facts establishing a duty to them.[10] Guido argues first that the children had an attorney-client relationship with Stern. Guido's contention that Stern was the attorney for the children is, however, contrary to the well-established principle that when an attorney is employed to render services for an estate, he or she acts as attorney for the personal representative.[11] Although the minor children would have benefited from a successful wrongful death claim, there are no facts in this record to establish an attorney-client relationship between Stern and the minor children.

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[8] See, Neb. Rev. Stat. § 25-213 (Reissue 2008); *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006); *Sacchi v. Blodig*, 215 Neb. 817, 341 N.W.2d 326 (1983).

[9] See *Borley Storage & Transfer Co. v. Whitted*, 265 Neb. 533, 657 N.W.2d 911 (2003).

[10] *Swanson, supra* note 6.

[11] *Id.*; *In re Estate of Wagner*, 222 Neb. 699, 386 N.W.2d 448 (1986).

But that does not end our analysis. Contrary to Stern's suggestion, we have never said that privity is an absolute requirement of a legal malpractice claim. Instead, we have said that a lawyer's duty to use reasonable care and skill in the discharge of his or her duties *ordinarily* does not extend to third parties, *absent facts establishing a duty to them.*[12] On the facts of this case, we conclude, as have other courts to have addressed this issue in the context of a wrongful death action,[13] that the facts establish an independent legal duty from Stern to Martinez' statutory beneficiaries.

[6,7] Although we have often said that an attorney's duty may extend to a third party if there are facts establishing a duty,[14] we have not articulated specific standards to guide the determination of whether such a duty exists. The substantial majority of courts to have considered that question have adopted a common set of cohesive principles for evaluating an attorney's duty of care to a third party, founded upon balancing the following factors: (1) the extent to which the transaction was intended to affect the third party, (2) the foreseeability of harm, (3) the degree of certainty that the third party suffered injury, (4) the closeness of the connection between the attorney's conduct and the injury suffered, (5) the policy of preventing future harm, and (6) whether recognition of liability under the circumstances would impose an undue burden on the

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[12] *Swanson, supra* note 6.

[13] See, e.g., *DeLuna v. Burciaga*, 223 Ill. 2d 49, 857 N.E.2d 229, 306 Ill. Dec. 136 (2006); *Oxendine v. Overturf*, 973 P.2d 417 (Utah 1999); *Leyba v. Whitley*, 120 N.M. 768, 907 P.2d 172 (1995); *Brinkman v. Doughty*, 140 Ohio App. 3d 494, 748 N.E.2d 116 (2000); *Jenkins v. Wheeler*, 69 N.C. App. 140, 316 S.E.2d 354 (1984); *Baer v. Broder*, 86 A.D.2d 881, 447 N.Y.S.2d 538 (1982).

[14] See, e.g., *Swanson, supra* note 6; *Bauermeister v. McReynolds*, 253 Neb. 554, 571 N.W.2d 79 (1997); *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995); *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994); *Landrigan v. Nelson*, 227 Neb. 835, 420 N.W.2d 313 (1988); *Lilyhorn v. Dier*, 214 Neb. 728, 335 N.W.2d 554 (1983); *St. Mary's Church v. Tomek*, 212 Neb. 728, 325 N.W.2d 164 (1982); *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980).

profession.[15] And courts have repeatedly emphasized that the starting point for analyzing an attorney's duty to a third party is determining whether the third party was a direct and intended beneficiary of the attorney's services.[16]

We agree. Under Nebraska law, an attorney's professional misconduct gives rise to a tort action for professional negligence;[17] the factors discussed above are effectively a fact-specific iteration of the basic risk-utility principles that we have generally relied upon in determining the scope of a tort duty.[18] And when an attorney is retained specifically to advance the interests of third parties, absent countervailing circumstances, it makes no sense to conclude that the attorney owes no duty to those parties to advance their interests competently. We decline to exalt form over substance when the purpose of the attorney's retention was clear to both the attorney and the client.

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[15] See *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961). See, also, *McIntosh Cty. Bank v. Dorsey & Whitney*, 745 N.W.2d 538 (Minn. 2008); *Calvert v. Scharf*, 217 W. Va. 684, 619 S.E.2d 197 (2005); *Watkins Trust v. Lacosta*, 321 Mont. 432, 92 P.3d 620 (2004); *Harrigfeld v. Hancock*, 140 Idaho 134, 90 P.3d 884 (2004); *In re Estate of Drwenski,* 83 P.3d 457 (Wyo. 2004); *Paradigm Ins. Co. v. Langerman Law Offices*, 200 Ariz. 146, 24 P.3d 593 (2001); *Blair v. Ing*, 95 Haw. 247, 21 P.3d 452 (2001); *Leyba, supra* note 13; *Donahue v. Shughart, Thompson & Kilroy, P.C.*, 900 S.W.2d 624 (Mo. 1995) (en banc); *Trask v. Butler*, 123 Wash. 2d 835, 872 P.2d 1080 (1994); *Pizel v. Zuspann*, 247 Kan. 54, 795 P.2d 42 (1990); *Jenkins, supra* note 13.

[16] See, *McIntosh Cty. Bank, supra* note 15; *Calvert, supra* note 15; *Friske v. Hogan*, 698 N.W.2d 526 (S.D. 2005); *In re Estate of Drwenski, supra* note 15; *Leak-Gilbert v. Fahle*, 55 P.3d 1054 (Okla. 2002); *MacMillan v. Scheffy*, 147 N.H. 362, 787 A.2d 867 (2001); *Blair, supra* note 15; *Oxendine, supra* note 13; *Leyba, supra* note 13; *Donahue, supra* note 15; *Trask, supra* note 15; *Flaherty v. Weinberg*, 303 Md. 116, 492 A.2d 618 (1985); *Needham v. Hamilton*, 459 A.2d 1060 (D.C. 1983); *Pelham v. Griesheimer*, 92 Ill. 2d 13, 440 N.E.2d 96, 64 Ill. Dec. 544 (1982); *Norton v. Hines*, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975). See, generally, 1 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 7:8 (2009).

[17] See *Swanson, supra* note 6.

[18] See, e.g., *Hughes v. Omaha Pub. Power Dist.*, 274 Neb. 13, 735 N.W.2d 793 (2007).

[8,9] Those balancing factors also support a number of important, specific limitations on liability in attorney malpractice cases. First, the attorney's agreement with the client determines the scope of the attorney's duty to a third-party beneficiary; the duty to use due care as to the interests of the intended beneficiary must arise out of the attorney's agreement with the client.[19] An attorney may limit the scope of his or her representation by obtaining the informed consent of his or her client.[20] For example, it has been held that the attorneys for the decedent's heirs in a wrongful death action owed no duty to the decedent's mother, where the personal representative specifically told the attorneys and the mother that he did not want them to represent her.[21]

[10] Second, a person who is adverse to the attorney's client cannot be a beneficiary of the attorney's retention; almost universally, courts have not found a duty to a client's adversary in litigation.[22] For instance, the attorney hired by a child seeking placement outside his mother's home owed no duty to the mother to advise her of the consequences of juvenile court proceedings.[23]

Third, an attorney's knowledge that the representation could injure or benefit an identified person will not, without more, create a duty to that person.[24] Foreseeability cannot be the sole basis for finding a duty, although a court should not find a duty where foreseeability is absent.[25] For example, it was held that an attorney for a husband in a divorce action was not liable to

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[19] See, *Harrigfeld, supra* note 15; *Leyba, supra* note 13; *Pizel, supra* note 15.

[20] See Neb. Ct. R. of Prof. Cond. § 3-501.2(b) (rev. 2008).

[21] See *Oxendine, supra* note 13.

[22] See, *Donahue, supra* note 15; *Lamare v. Basbanes*, 418 Mass. 274, 636 N.E.2d 218 (1994); *Bowman v. John Doe*, 104 Wash. 2d 181, 704 P.2d 140 (1985).

[23] See *Bowman, supra* note 22.

[24] *Burger v. Pond*, 224 Cal. App. 3d 597, 273 Cal. Rptr. 709 (1990).

[25] See, *Leak-Gilbert, supra* note 16; *Paradigm Ins. Co., supra* note 15; *Norton, supra* note 16.

the client's second wife for emotional distress suffered when the divorce was set aside due to the attorney's negligence, because the second wife was an incidental but not an intended beneficiary of the divorce.[26]

[11,12] Finally, a duty to a third party will not be imposed if that duty would potentially conflict with the duty the attorney owes his or her client, most often because the third party's interests conflict with the client's.[27] In fact, an attorney is ethically obliged to inform his or her client when such conflicts of interest are apparent.[28] For example, it has been held that an attorney representing an heir in a wrongful death action owes no duty to other heirs when the different heirs may have conflicting interests in the recovery.[29] It has also been held that an attorney for the personal representative of an estate owed no duty to the beneficiaries of the estate where there was a risk that the beneficiaries' interests could conflict.[30] And it was held that an attorney for a spouse in a divorce action did not owe a separate duty to the couple's children, because the children's interests could compromise the attorney's representation of the client's interests.[31]

Such concerns are not implicated here. We acknowledge that the general rule limiting an attorney's duty to his or her client serves several important interests, as it preserves an attorney's loyalty to and advocacy for the client, limits the scope of an attorney's duty, and protects attorney-client confidentiality.[32] And imposing a duty on attorneys toward beneficiaries of

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[26] See *Burger, supra* note 24.

[27] See, *Oxendine, supra* note 13; *Lamare, supra* note 22.

[28] See Neb. Ct. R. of Prof. Cond. §§ 3-501.4 and 3-501.7.

[29] See, *Oxendine, supra* note 13; *Rhone v. Bolden*, 270 Ga. App. 712, 608 S.E.2d 22 (2004).

[30] See *Trask, supra* note 15.

[31] See *Rhode v. Adams*, 288 Mont. 278, 957 P.2d 1124 (1998).

[32] See, e.g., *In re Estate of Drwenski, supra* note 15; *Chem-Age Industries, Inc. v. Glover*, 652 N.W.2d 756 (S.D. 2002).

whom they are unaware could risk dampening their zealous advocacy on behalf of clients.[33]

But if a third party is a direct beneficiary of an attorney's retention, such that the end and aim of the attorney's representation is to affect the third party, then the interests favoring privity are not threatened by recognizing an attorney's duty to a third party whose interests he or she was actually hired to represent.[34] When an attorney's duty to a third party is limited to transactions intended to directly benefit the third party, it properly serves to prevent nonclients who receive only incidental or downstream benefits from holding the attorney liable.[35] And it is entirely in keeping with the fiduciary and ethical duties attorneys owe their clients to require an attorney, who has been informed of the client's intent to benefit a third party, to exercise reasonable care and skill in that regard.

We conclude that the well-settled principles set forth above provide appropriate guidance for us to determine whether the facts of any given case establish a duty to a third party, and to evaluate the scope of that duty. These principles permit injured parties to pursue claims where the basis for an attorney's duty was clear, while preserving client authority and the interests and responsibilities associated with the attorney-client relationship. And although we have not expressly stated these principles before today, our cases have been consistent with them.

For instance, we have held that an attorney who prepared a decedent's will owed no duty to any particular alleged beneficiary of the will.[36] Similarly, we have held that an attorney acting as the personal representative of an estate owed no duty to nonbeneficiaries of the estate to secure a gratuitous agreement from the beneficiaries to share their inheritance.[37] We have also

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[33] See, *McIntosh Cty. Bank, supra* note 15; *Noble v. Bruce*, 349 Md. 730, 709 A.2d 1264 (1998).

[34] See *McIntosh Cty. Bank, supra* note 15.

[35] See, *id.*; *Blair, supra* note 15; *Donahue, supra* note 15.

[36] See, *Lilyhorn, supra* note 14; *St. Mary's Church, supra* note 14.

[37] See *Swanson, supra* note 6.

held that the attorney for a joint venture owed no duty to three individual partners that was separate from the duty owed to the joint venture as a whole.[38] And we have held that an attorney owed no duty to the guarantors of leases which the attorney's clients defaulted on,[39] and that an attorney for a debtor owed no duty to a creditor based on allegedly defective collateral for the debt.[40] In none of those instances was it alleged that the "end and aim" of the attorney's retention was to benefit the third party alleging a duty. And in each of those instances, imputing a duty to the third party could have created conflicting loyalties to adverse or different parties.

The same cannot be said here. Courts to have considered the question have generally concluded that policy considerations weigh in favor of recognizing an attorney's duty to a decedent's next of kin in a wrongful death action.[41] We agree. In this case, it is clear that the children were direct and intended beneficiaries of the transaction. Stern was certainly aware of Guido's intent to benefit the children.

In fact, under Nebraska's wrongful death statute, there could be no other purpose to Stern's representation. A wrongful death claim is brought in the name of the decedent's personal representative "for the exclusive benefit" of the decedent's next of kin.[42] The personal representative's sole task is to distribute any recovery in accordance with the statute, to the discrete and identifiable class of beneficiaries that the Legislature has specifically designated. Under § 30-810, the only possible purpose of an attorney-client agreement to pursue claims for wrongful death is to benefit those persons specifically designated as statutory beneficiaries.[43] The very nature of a wrongful

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[38] See *Bauermeister, supra* note 14.

[39] See *Landrigan, supra* note 14.

[40] See *Ames Bank, supra* note 14.

[41] See, *DeLuna, supra* note 13; *Oxendine, supra* note 13; *Leyba, supra* note 13; *Brinkman, supra* note 13; *Jenkins, supra* note 13; *Baer, supra* note 13.

[42] § 30-810.

[43] See, *Oxendine, supra* note 13; *Leyba, supra* note 13.

death action is such that a term is implied, in every agreement between an attorney and a personal representative, that the agreement is formed with the intent to benefit the statutory beneficiaries of the action.[44]

Furthermore, concerns weighing against a finding of duty are not present in this case. Stern's potential duty to the children would not go beyond the duty owed to and specified by Guido.[45] Nor is there any evidence that a legal duty to the children would have interfered with Stern's duty to Guido, because there is nothing in the record in this case to suggest that the interests of Guido and the children were not aligned. At no time has Stern reported or alleged a conflict of interest. Finally, policy considerations favor a finding of tort duty. Stern was not helping her client, Guido, when she failed to perfect service. An ultimate finding of liability would not discourage vigorous representation; in fact, potential liability under circumstances such as these would encourage zealous advocacy of wrongful death claims.

In this case, we conclude that Stern owed a duty to the children, as direct and intended beneficiaries of her services, to competently represent their interests. To hold otherwise would deny legal recourse to the children for whose benefit Stern was hired in the first place. For those reasons, we find merit to Guido's assignment of error and conclude that the district court erred in entering judgment against the minor children.

CONCLUSION

As explained above, the facts of this case establish that Stern owed a legal duty to Martinez' minor children to exercise reasonable care in representing their interests. Therefore, they have standing to sue Stern for neglecting that duty, and their claims against Stern were tolled by their minority. The district court erred in concluding that their claims were time barred. We affirm the court's dismissal of Guido's individual claim and its determination that the estate's claim against Stern

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[44] See *id.*

[45] See *Leyba, supra* note 13.

was time barred. But with respect to the children, this cause is reversed and remanded for further proceedings to fully adjudicate Guido's claims on behalf of the children in light of any asserted defenses.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MILLER-LERMAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
PATRICK W. SCHROEDER, APPELLANT.
777 N.W.2d 793

Filed January 15, 2010. Nos. S-07-972, S-07-973.

1. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion.
2. **Criminal Law: Trial.** A motion for a separate trial is addressed to the sound discretion of the trial court, and its ruling on such motion will not be disturbed in the absence of a showing of an abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law which an appellate court reviews independently of the trial court's determination.
5. **Venue: Juror Qualifications: Presumptions.** A court will not presume unconstitutional partiality because of media coverage unless the record shows a barrage of inflammatory publicity immediately prior to trial, amounting to a huge wave of public passion or resulting in a trial atmosphere utterly corrupted by press coverage.
6. **Venue: Juror Qualifications.** Under most circumstances, voir dire examination provides the best opportunity to determine whether a court should change venue.
7. **Trial: Joinder.** There is no constitutional right to a separate trial.
8. ____: ____. Whether offenses are properly joined involves a two-stage analysis in which it is determined first whether the offenses are related and properly

joinable and second whether an otherwise proper joinder was prejudicial to the defendant.

9. **Trial: Joinder: Evidence: Appeal and Error.** A defendant is not considered prejudiced by a joinder where the evidence relating to both offenses would be admissible in a trial of either offense separately.
10. **Homicide: Intent.** Premeditation of the killing is not an element of felony murder.
11. **Homicide: Intent: Proof.** While proof of motive is not an element of first degree murder, any motive for the crime charged is relevant to intent.
12. **Criminal Law: Intent: Proof.** When motive is particular to the defendant and is not shared with the general public, it is circumstantial proof that the defendant, and not someone else, is the perpetrator.
13. **Criminal Law: Prosecuting Attorneys.** Where a set of facts is sufficient to constitute the violation of one of several crimes, the prosecutor is free to choose under which crime he or she will seek a conviction.
14. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
15. **Miranda Rights: Waiver: Self-Incrimination.** Whether or not a suspect initially waived his or her right to remain silent, the suspect retains the right to cut off questioning.
16. **Miranda Rights: Police Officers and Sheriffs: Self-Incrimination.** A suspect must articulate the desire to cut off questioning with sufficient clarity that a reasonable police officer under the circumstances would understand the statement as an invocation of the right to remain silent.

Appeals from the District Court for Pawnee County: DANIEL E. BRYAN, JR., Judge. Affirmed.

James R. Mowbray and Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Patrick W. Schroeder was convicted of first degree felony murder, use of a deadly weapon to commit a felony, and forgery in the second degree. The forgery was charged in a separate

indictment, but was consolidated with the other charges for trial. The charges relate to the death and robbery of Kenneth F. Albers on April 14, 2006, and a forged check written on Albers' account and deposited into Schroeder's account 3 days before the murder. Schroeder argues that he could not receive a fair trial 40 miles away from where a first trial resulted in a hung jury, that his confessions and incriminating evidence found as a result of the confessions were inadmissible, that the joinder of the forgery and first degree murder charges impermissibly presented the jury with evidence of premeditation when he was not charged with premeditated murder, and that the jury should have been instructed on lesser-included offenses. For the reasons set forth below, we affirm.

BACKGROUND

Albers lived alone on a farmstead just outside of Pawnee City, Nebraska. At approximately 6:45 a.m. on Friday, April 14, 2006, a farmhand arrived at Albers' house to report for work. Albers could not be found. There was blood in the house, primarily located between Albers' bedroom and a hall closet. Law enforcement was contacted and later discovered an empty lockbox inside the hall closet. The key to the lockbox was still in the lock, and the key and the edge of the lockbox were covered in Albers' blood. More blood was found on the ground inside a machine shed near the house. Albers' body was eventually discovered at the bottom of a well located on the farmstead. A pathologist testified that the cause of death was multiple blows to the head by a blunt instrument.

Schroeder's Arrest and Confession

Schroeder had worked for Albers from May 2002 until Schroeder was fired in August 2002. On April 11, 2006, a check written on Albers' account, made out to Schroeder for the sum of $1,357, had been deposited into Schroeder's bank account. On April 13, the day before Albers' death, Albers had signed an affidavit reporting that he had neither signed nor authorized the check.

A witness said that at approximately 6:20 a.m. on April 14, 2006, she saw a red pickup parked alongside the highway near Albers' farmstead. At approximately 7:20 a.m., Schroeder

pulled his wife's red pickup into the gas station across the street from his house and gave the owner $1,000 in cash to pay an outstanding balance on his account. The station owner testified that while Schroeder had always made payments in cash, he had never received a payment from Schroeder over $50. It had been a significant period of time since Schroeder had made any payments at all.

Schroeder was arrested on the evening of April 14, 2006, on a charge of forgery. At the time of his arrest, Schroeder was carrying $1,700 in cash. Schroeder was first interviewed by Investigator Joel Bergman on April 15 at 9 p.m. in the Otoe County jail. Bergman informed Schroeder of his *Miranda* rights, and Schroeder waived those rights. Bergman initially told Schroeder that he was being questioned about the forgery, but Schroeder brought up Albers' murder, which he claimed he had heard about while watching the news. He asked Bergman about the truth of news reports that he was a person of interest in the investigation of Albers' murder. Bergman confirmed that those reports were true.

Bergman asked Schroeder for ideas as to who might be responsible for the crime. He also asked Schroeder to clarify some facts, especially the amount of cash that Schroeder had spent recently. Schroeder asserted that he had sold some calves to Albers and that the check was legitimate. Schroeder seemed surprised when Bergman informed him that Albers had reported the check as a forgery. Schroeder claimed the cash he had been spending came from his family's savings. Schroeder appeared confident and ridiculed Bergman for attempting to seek an explanation for every penny Schroeder had recently spent.

Schroeder suggested to Bergman other possible suspects for Albers' murder. He claimed he was possibly being framed. Apparently eager to prove his innocence, Schroeder volunteered to take a polygraph examination. Bergman responded: "I appreciate the offer for the polygraph . . . it's something we're trying to get set up . . . to . . . let you have that opportunity . . . to prove that you didn't have anything to do with it." Otoe County does not have a polygraph machine.

When Bergman returned to the theme of Schroeder's expenditures, gently implying that it was suspicious that Schroeder had had $3,000 "floating around" in the past 2 days, all in "hundies," Schroeder became angry and indignant. Schroeder replied, "So what? So? That's the end of this conversation. I'm done." Bergman later testified that he understood this statement to mean Schroeder "was done talking to [him] for the time being" and that he intended to honor Schroeder's request.

Bergman said "okay." But he added a "wrap up type statement": "Well, [Albers] was killed for his money. We know that." Bergman later testified that he wanted to explain "why [he had been] asking the questions [he] was asking." Schroeder responded to Bergman's wrap-up statement by saying, "For what? A fucking check? Is that what you're saying or what?" Bergman stated that no, he meant the cash at Albers' home.

Schroeder shook his head, said something inaudible, and the tone of the conversation again relaxed. The interview appeared to be over. Schroeder and Bergman prepared to leave the interview room. As they did so, Bergman asked Schroeder whether he was still willing to take the polygraph. Schroeder said "yeah," and Bergman said they would get it set up. Bergman asked if Schroeder had any further questions, to which Schroeder responded that he wanted to know when he would be going to court on the forgery charge, and the two left.

Schroeder's first polygraph examination was on April 17, 2006, in Lincoln. Before administering the test, the examiner, Investigator David Heidbrink, went over Schroeder's *Miranda* rights with him. Schroeder signed both a rights advisory form and a waiver and release form. Heidbrink explained that it was important that the test be taken of Schroeder's own free will. Schroeder affirmed that it would be. Heidbrink informed Schroeder he could stop the questioning at any time. He further explained that Schroeder had a right to counsel, and when Schroeder specifically asked if he needed an attorney, Heidbrink told him that was "entirely up to [Schroeder]."

When Schroeder admitted that he had only slept 3 hours the night before, Heidbrink expressed concern that this might affect the examination, but they proceeded. During the examination, Schroeder denied any involvement in the murder, but he admitted to the forgery. The tests were ultimately inconclusive as to whether he was being truthful. Heidbrink informed Schroeder that because the results were inconclusive, he could retake the examination if he wanted to. Schroeder questioned Heidbrink about whether the examination was truly inconclusive or whether they were just trying to get him to admit to more. When he was satisfied with Heidbrink's explanation, Schroeder agreed to retake the examination the following day.

Before the second polygraph examination, Heidbrink again reviewed Schroeder's *Miranda* rights with him. Schroeder again signed a waiver of his *Miranda* rights and also a polygraph examination release form. During the examination, Schroeder repeated the limited admission he had made the day before.

After the test, Bergman joined Heidbrink to inform Schroeder that the results showed he was being deceptive. In this post-polygraph interview, Heidbrink explained: "[F]or some reason either you're holding back on us and not being completely truthful or maybe it's a possibility you didn't actually do this, but you were there." Heidbrink explained further: "I mean, I don't know, it's something we're gonna have to talk about." Bergman expressed sympathy for Schroeder's financial situation and also his belief that Schroeder knew something about what had happened on April 14, 2006. Without further prompting, Schroeder agreed to tell the investigators "everything" on the condition that they first give him a chance to meet with his wife. They agreed.

As Bergman and Heidbrink tried to get in touch with Schroeder's wife to arrange the meeting, they engaged in smalltalk with Schroeder and discussed picking up food on the way to meet his wife. Unsolicited, Schroeder asked the investigators what kind of charges he might be facing. When they informed Schroeder that they did not know until they knew more about what happened, Schroeder admitted that the

murder "wasn't self defense." During this time, Schroeder also revealed where the rest of the money was hidden in his wife's pickup and commented, "I probably said more than I probably should have without a lawyer, but oh well, I did what I did, now I'll pay for it."

Schroeder was taken to the Pawnee County sheriff's office to meet with his wife. After the meeting with his wife, Schroeder gave the investigators a detailed confession to the crimes. Schroeder explained that "[i]n a certain sense," the forged check and the subsequent murder were connected to each other. Schroeder explained he was "tired of pinching pennies." He had brought a change of clothing on the day of the murder and robbery, because he knew that if he and Albers met face-to-face, "there was going to be problems." Schroeder did not wear a mask. Schroeder described in detail how he had rung the doorbell at Albers' home and how, when Albers came to the door, Schroeder hit him in the head with a nightstick and demanded that Albers open the lockbox. Albers went to his bedroom to retrieve his keys from a pants pocket, opened the lockbox, and handed Schroeder the money. Schroeder then directed Albers to walk out to the machine shed, where Schroeder killed him.

Schroeder first stated that he led Albers to the machine shed because he wanted to get Albers away from any telephone. He started to repeatedly hit Albers in the head when Albers turned toward him, and he did not "know if [Albers] was coming at [him] or what." Schroeder said he knew at that moment he was going to have to kill Albers.

But later during the same interview, Schroeder admitted he went to Albers' home that Friday with the intention of killing him. He explained he had formed this intent on the prior Tuesday or Wednesday, when he realized that Albers would discover the forged check and might file charges against him. He did not know at the time of the murder that Albers had already disavowed the check.

During his confessions, Schroeder told investigators where they could find Albers' stolen checkbook. He also told them where to find the bloodstained nightstick, $100 bills, an envelope of money, and clothing that Schroeder was wearing during

the murder. Investigators found all of the items. The bloodstains matched Albers' DNA.

Venue and Voir Dire

Schroeder was originally tried in the district court for Pawnee County. But on March 28, 2007, the jury deadlocked and the court declared a mistrial. Both the prosecution and the defense requested a change of venue for the retrial. The district court agreed that a fair and impartial trial could no longer be had in Pawnee County. The court ordered the venue moved to the district court for Richardson County, located in Falls City, Nebraska, approximately 40 miles by road from Pawnee City.

The defense did not object to the new venue until the day of voir dire, when counsel argued that the move was not sufficiently far away. The court overruled the objection. The court also denied defense counsel's motions for supplemental jury questionnaires and individual voir dire. The court did agree to consider individual voir dire as needed. Ultimately, four jurors were questioned individually. As a result, the court dismissed two of those jurors for cause. The other two questioned were eliminated through the use of Schroeder's peremptory challenges. None of the jurors that Schroeder specifically challenged for cause served on the jury, although he made a general objection to the venire.

Trial

The court denied defense counsel's motion to suppress Schroeder's confessions. It also denied his motion to suppress all evidence seized from Schroeder's person, possession, and residence found as a result of the confessions. The district court determined that Schroeder had exercised his right to terminate the first interrogation. It suppressed any comments made by Schroeder during the first interrogation after he invoked his right to cut off questioning. Nevertheless, the court found that the admission of subsequent interviews did not violate Schroeder's Fifth Amendment rights.

The court also denied Schroeder's request to sever the forgery charge and the felony murder and use of a deadly weapon charges. The defense argued that by joining the forgery and

felony murder charges, the State was able to present prejudicial evidence of premeditation even though it had chosen not to charge Schroeder with premeditated murder. The court concluded that the forgery and the robbery were two acts "connected together or constituting parts of a common scheme or plan by [Schroeder] against [Albers]." The court further found that Schroeder had failed to sustain his burden to prove he would be prejudiced by the consolidation, because the evidence relating to the forgery would have been admissible in a separate trial for felony murder.

The court denied Schroeder's alternative motion to instruct the jury on the lesser-included offenses of premeditated murder. It also denied Schroeder's request that it instruct on unlawful-act manslaughter as a lesser-included offense of felony murder. The court did instruct the jury, "Any evidence you have received in regards to forgery must be considered by you only in respect to the forgery count and no other count before you." The court further instructed that the jury could only use Schroeder's statements to police if it first found, beyond a reasonable doubt, that those statements were made freely and voluntarily. Despite Schroeder's argument that he had been set up and that the confessions were coerced, the jury found Schroeder guilty on all counts.

ASSIGNMENTS OF ERROR

Schroeder asserts that the trial court (1) erroneously failed to suppress evidence that was the product of interrogations conducted after Schroeder had invoked his right to cut off questioning, (2) erroneously consolidated the felony murder and forgery charges into a single trial, (3) failed to properly instruct the jury on lesser-included offenses, and (4) erroneously failed to change venue.

STANDARD OF REVIEW

[1] A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion.[1]

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[1] *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009).

[2] A motion for a separate trial is addressed to the sound discretion of the trial court, and its ruling on such motion will not be disturbed in the absence of a showing of an abuse of discretion.[2]

[3] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[3]

[4] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*,[4] we apply a two-part standard of review. With regard to historical facts, we review the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which we review independently of the trial court's determination.[5]

ANALYSIS

VENUE

We first address Schroeder's argument that the trial court erred in failing to grant a change of venue from Richardson County. Schroeder does not challenge any particular juror that sat for his trial, as no juror that Schroeder individually challenged actually sat on the jury. Instead, Schroeder argues that pretrial publicity made all the jurors inherently unreliable in their attestations of impartiality. He also argues that the trial court did not handle the voir dire with the thoroughness warranted by the publicity.

[5] In *Irvin v. Dowd*,[6] the U.S. Supreme Court held that the overwhelming negative publicity against the defendant should

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[2] *State v. Montgomery*, 182 Neb. 737, 157 N.W.2d 196 (1968).

[3] *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[5] *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[6] *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

have mandated a change of venue not just to a county adjoining the county in which the murders had occurred, but to a county geographically far enough removed to be untainted by the publicity. We have said that the court is not limited in granting a change of venue to an adjoining county when the showing of prejudice is equally or sufficiently strong as to the adjoining county.[7] But a court will not presume unconstitutional partiality because of media coverage unless the record shows a barrage of inflammatory publicity immediately prior to trial, amounting to a huge wave of public passion or resulting in a trial atmosphere utterly corrupted by press coverage.[8] We agree with the trial court that the evidence provided by Schroeder did not demonstrate the type of "invidious or inflammatory"[9] coverage that could create such a presumption of prejudice—much less the pervasiveness.[10]

In support of the motion for change of venue, Schroeder offered three articles from the Lincoln Journal Star, one article from the Omaha World-Herald, one duplicate article run in the Beatrice Daily Sun, and a printout of online commentary to the Lincoln Journal Star article. He did not provide any evidence of the extent to which these publications circulated in Pawnee County or Richardson County. Three of the articles described a posttrial confrontation between Albers' youngest son and the single juror who had remained unconvinced of Schroeder's guilt. The son had accused the holdout juror of simply wanting a moment of fame. The second article described the expense the county would incur as a result of two trials.

The articles outlined the trial evidence against Schroeder and also mentioned his previous convictions for theft and escape. The online commentary consisted of various members of the public either criticizing the holdout juror or reproaching others for making assumptions about a trial for which they were not present.

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[7] See *Gandy v. Estate of Bissell*, 81 Neb. 102, 115 N.W. 571 (1908).

[8] *Id.*

[9] *Murphy v. Florida*, 421 U.S. 794, 801 n.4, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).

[10] See *State v. Galindo, supra* note 1. Compare *Irvin v. Dowd, supra* note 6.

While these articles and the online commentary are not entirely favorable, they do not raise concerns of public passion against Schroeder within the meaning of *Irvin v. Dowd*.[11] Mostly, they reflect that Albers' family believed Schroeder was guilty—a fact that could have been guessed regardless. That a previous jury was unable to unanimously find Schroeder guilty is at least as favorable to him as prejudicial. And certainly, five articles failed to demonstrate the publicity was so widespread to have corrupted the mind of all potential jurors—particularly when there was no evidence of the extent to which that publicity reached the community in question.

[6] Under most circumstances, voir dire examination provides the best opportunity to determine whether a court should change venue.[12] The majority of the jurors questioned for Schroeder's trial did have some knowledge of the crime. In addition, the venire was made aware that there had been a mistrial. The majority of the jurors questioned, however, did not appear to have particularly extensive exposure to facts of the crime or the particular facts relating to the mistrial. More importantly, 37 of the 50 potential jurors stated that they had never expressed or held an opinion as to whether Schroeder was guilty of the crimes charged. Of the 13 who had formed some opinion of Schroeder's guilt, 5 affirmed quite readily that that opinion could be set aside. The trial court excused the remaining eight jurors when they expressed even the slightest doubt in their ability to set aside that opinion.

We disagree with Schroeder that the voir dire of these jurors was somehow inadequate. The jurors were questioned about whether they had formed any opinion as to Schroeder's guilt and whether they had heard any reports about the crimes. If they had heard anything, the jurors were questioned as to the source of their information. After this group voir dire was complete, an off-the-record discussion was had between the attorneys and the court and the court called back in four of the potential jurors for individualized questioning. There is

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[11] See *Irwin v. Dowd, supra* note 6.

[12] See, *State v. Galindo, supra* note 1; *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

no evidence that the court refused to individually examine any specified juror over whom defense counsel had special concerns.

A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of that discretion. Due process does not require that a defendant be granted a change of venue whenever there is a "'reasonable likelihood'" that prejudicial news prior to trial would prevent a fair trial.[13] Rather, a change of venue is mandated when a fair and impartial trial "cannot" be had in the county where the offense was committed.[14] We find no abuse of discretion in the trial court's conclusion that a fair and impartial trial could be had in Richardson County.

JOINDER

[7] We next address Schroeder's assertion that the charges of forgery and felony murder should not have been tried together. The joinder or separation of the charges for trial is governed by the principles of Neb. Rev. Stat. § 29-2002 (Reissue 2008).[15] There is no constitutional right to a separate trial.[16]

[8] Section 29-2002 states in relevant part:

> (1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
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> . . . .
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> (3) If it appears that a defendant or the state would be prejudiced by a joinder of offenses in an indictment, information, or complaint or by such joinder of offenses in separate indictments, informations, or complaints for

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[13] *State v. Bradley*, 236 Neb. 371, 383, 461 N.W.2d 524, 535 (1990) (emphasis omitted). See Neb. Rev. Stat. § 29-1301 (Reissue 2008).

[14] § 29-1301. Accord *State v. Bradley, supra* note 13.

[15] See *State v. Hilding*, 278 Neb. 115, 769 N.W.2d 326 (2009).

[16] *State v. Clark*, 228 Neb. 599, 423 N.W.2d 471 (1988).

> trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires.

Whether offenses are properly joined involves a two-stage analysis in which it is determined first whether the offenses are related and properly joinable and second whether an otherwise proper joinder was prejudicial to the defendant.[17]

The forgery and the felony murder offenses were properly joinable because they were "connected together" and "constitut[ed] parts of a common scheme or plan."[18] In this case, as the trial court noted, there was a continuing scheme by Schroeder to deprive Albers of the liquid assets that Schroeder knew Albers possessed. Not only that, but one crime led to the other. They are logically connected. Schroeder estimated the amount of time it would take for the forged check to clear, and he decided to finish the job before that happened. Schroeder decided to enter Albers' home, steal the cash he kept there, and then hide both crimes by killing Albers.

Schroeder argues that the forgery was unduly prejudicial to the murder charge because it demonstrates premeditation. According to Schroeder, the "key" to his argument is the fact that the State elected to prosecute the murder charge under the sole theory of felony murder and not also under a theory of premeditated murder.[19] In effect, Schroeder argues the State forfeited its right to present evidence of premeditation.

We note, first, that the jury was instructed not to consider the evidence of the forgery as evidence of any other charge. Second, the evidence of premeditation was not inexorably tied to the forgery charge. Schroeder's confession that he went to Albers' house intending to kill him would not simply have disappeared had the forgery not been tried in a consolidated trial.

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[17] See *State v. Hilding, supra* note 15.

[18] See § 29-2002(1).

[19] Brief for appellant at 28.

[9] In any event, a defendant is not considered prejudiced by a joinder where the evidence relating to both offenses would be admissible in a trial of either offense separately.[20] If the felony murder charge had been tried separately, the admissibility of the forgery to prove the subsequent felony murder would have been governed by Neb. Rev. Stat. § 27-404(2) (Reissue 2008). Section 27-404(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This statutory list of permissible purposes for admission of evidence of other crimes, wrongs, and bad acts is not exhaustive, and the purposes set forth in the statute are illustrative only.[21]

The evidence relating to the stolen, forged check would not have been admissible to show Schroeder's propensity for thievery or crime. The prior forgery does, however, properly illustrate Schroeder's motive, intent, plan, knowledge, and identity and an absence of mistake or accident for the crime of felony murder. The evidence relating to the forgery illustrated that Schroeder was feeling under pressure to come up with money to pay his bills and that he had chosen to target Albers. Furthermore, he did not want to get caught after cashing Albers' check. It was not coincidental that Albers was robbed and killed only 3 days after the forged check was deposited into Schroeder's account. Schroeder admitted that he went to Albers' house with the intent to kill Albers to cover up the forgery. In short, evidence of the forgery would have been admissible for a proper purpose in a felony murder trial, regardless of joinder.

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[20] See, *State v. Garza*, 256 Neb. 752, 592 N.W.2d 485 (1999); *State v. Greer*, 7 Neb. App. 770, 586 N.W.2d 654 (1998), *affirmed in part and in part reversed on other grounds* 257 Neb. 208, 596 N.W.2d 296 (1999).

[21] See *State v. Egger*, 8 Neb. App. 740, 601 N.W.2d 785 (1999).

[10-12] Schroeder is correct in arguing that the connection between the two crimes also supports the inference that Schroeder premeditated Albers' murder. And premeditation of the killing is not an element of felony murder.[22] Nevertheless, it does not follow that all evidence suggesting premeditation is improper and irrelevant in a case tried solely on the theory of felony murder. The forgery illustrates Schroeder's motive to commit felony murder. We have said that while proof of motive is not an element of first degree murder, any motive for the crime charged is relevant to intent.[23] And intent, while not an element of felony murder, is still relevant to illustrate the circumstances of the crime. Moreover, the identity of the defendant as the perpetrator of the crime is always relevant in a case such as this, where the defendant claims no involvement in the crime. When, as in this case, motive is particular to the defendant and is not shared with the general public, it is also circumstantial proof that the defendant, and not someone else, is the perpetrator.[24] For example, in *State v. Ruyle*,[25] where the defendant was charged with felony murder by arson of the victim's apartment building, we held that not only were the defendant's prior threats to "'torch'" the intended victim's apartment admissible at trial, but so were his prior statements threatening to shoot the intended victim. We explained that those threats explained the defendant's motive and the

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[22] See, *Hopkins v. Reeves*, 524 U.S. 88, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998); *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982). See, also, e.g., *Chance v. Garrison*, 537 F.2d 1212 (4th Cir. 1976).

[23] See *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

[24] See, e.g., *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002). See, also, e.g., *Hernandez v. Cepeda*, 860 F.2d 260 (7th Cir. 1988); *United States v. Stumes*, 549 F.2d 831 (8th Cir. 1977), *abrogated on other grounds, Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984); *State v. Hubbard*, 37 Wash. App. 137, 679 P.2d 391 (1984), *reversed on other grounds* 103 Wash. 2d 570, 693 P.2d 718 (1985). Compare, *People v. Holt*, 37 Cal. 3d 436, 690 P.2d 1207, 208 Cal. Rptr. 547 (1984); *In re L.R.*, 84 S.W.3d 701 (Tex. App. 2002).

[25] *State v. Ruyle*, 234 Neb. 760, 768, 452 N.W.2d 734, 739 (1990).

facts surrounding the incident. The trial court in the present case did not abuse its discretion in concluding that joinder was proper.

Lesser-Included Offenses

[13] Alternatively, Schroeder argues that because the State operated under a de facto theory of premeditated murder, the trial court was obliged to instruct the jury on the lesser-included offense of premeditated murder. Other than a citation to the general proposition that a trial judge must instruct the jury on all pertinent law of the case,[26] Schroeder does not reference any legal authority for this argument. On the other hand, a long line of cases hold that as a general matter, felony murder is not divisible into lesser degrees of homicide.[27] Our cases also hold that where a set of facts is sufficient to constitute the violation of one of several crimes, the prosecutor is free to choose under which crime he or she will seek a conviction.[28] We find no reason in this appeal to depart from precedent. The State chose to seek a conviction on the theory of felony murder. It chose to take the risk of submitting to the jury only one means of finding Schroeder guilty of first degree murder. While Schroeder may have been deprived of lesser-included offense instructions, he was granted the possibility of acquittal if the proof of the robbery was found inadequate, regardless of whether the jury believed that Schroeder had killed Albers. However unlikely this benefit might be under the particular facts of this case, we are unconvinced due process is violated when a trial court fails to instruct on lesser-included offenses of a crime not charged.

Schroeder also argues that the jury should have been instructed on unlawful-act manslaughter as a lesser-included offense of felony murder. Schroeder explains that larceny and theft are lesser-included offenses of robbery and that manslaughter is

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[26] See *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

[27] See, e.g., *State v. Banks, supra* note 22; *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008); *State v. Bjorklund, supra* note 22; *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86 (1999).

[28] See, e.g., *State v. Wright*, 261 Neb. 277, 622 N.W.2d 676 (2001).

a lesser-included offense of murder. And theft is not one of the possible predicate felonies for felony murder.[29] While this argument is novel, even assuming unlawful-act manslaughter is technically a lesser-included offense of felony murder, no such instruction was warranted by the facts of this case. Schroeder has failed to show how the evidence would support an acquittal of felony murder while supporting a conviction of unlawful-act manslaughter.

[14] A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.[30] A person commits robbery if, with the intent to steal, he or she forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property.[31] The various crimes of theft, previously known as larceny, embezzlement, false pretense, and the like, do not contain this element of violence or fear.[32] They are otherwise similar insofar as the victim is deprived of his or her possessions.

The evidence is overwhelming that Albers was deprived of his possessions while subjected to violence and fear. Puddles of blood and his blood on the lockbox and its key demonstrate that Albers was injured as a means to force him to hand over his money. No evidence or argument was presented that the crime was otherwise. Such a crime was not a mere theft.[33] Because there was no rational basis for finding that Schroeder had committed theft but had not committed robbery, no instruction involving simple theft was warranted.

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[29] Neb. Rev. Stat. § 28-303 (Reissue 2008).

[30] *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

[31] Neb. Rev. Stat. § 28-324 (Reissue 2008).

[32] Neb. Rev. Stat. §§ 28-509 to 28-518 (Reissue 2008).

[33] See *State v. Ruggles*, 183 W. Va. 58, 394 S.E.2d 42 (1990).

Invocation of Right to Remain Silent

Finally, we address Schroeder's argument that the trial court erred in failing to suppress his confessions and the physical evidence obtained as a result of those confessions. The motion was based on Schroeder's right to remain silent.

There is no dispute that Schroeder was interrogated while in police custody. Schroeder does not deny that prior to the first interview, he had initially waived his *Miranda* rights. Schroeder's argument is that law enforcement failed to scrupulously honor his clear invocation of his right to cut off questioning once the interview began. Because the facts surrounding the alleged invocation are recorded in the videotape and are not in dispute, this presents a question of law.[34]

[15] The U.S. Supreme Court has explained that whether or not the suspect initially waived his or her right to remain silent, the suspect retains the right to cut off questioning.[35] The police are restricted to scrupulously honoring that right once it is invoked.[36] In contrast, when a defendant does not invoke his or her *Miranda* rights, an examination of whether those rights were scrupulously honored is not necessary.[37] We conclude that Schroeder did not clearly and unequivocally communicate that he wished all further questioning to cease.[38] Therefore, the authorities did not violate Schroeder's *Miranda* rights when they conducted subsequent interviews in connection with the polygraph examinations.

[16] The suspect must articulate the desire to cut off questioning with sufficient clarity that a reasonable police officer under the circumstances would understand the statement as an invocation of the right to remain silent.[39] An officer should

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[34] See *State v. Rogers, supra* note 5.

[35] See *id.* (citing cases).

[36] *Id.*

[37] *State v. Adams*, 127 N.J. 438, 605 A.2d 1097 (1992). See, also, *State v. Rogers, supra* note 5.

[38] See *id.*

[39] See *id.* See, also, *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

not have to guess when a suspect has changed his or her mind and wishes the questioning to end.[40] In other words, while the suspect does not have to "'speak with the discrimination of an Oxford don,'"[41] ambiguous or equivocal statements that *might* be construed as invoking the right to silence do not require the police to discontinue their questioning.[42] In determining whether there has been a clear invocation, we review the totality of the circumstances surrounding the statement in order to assess the words in context.[43]

As we noted in *Rogers*, where the suspect's reference to silence is qualified by a temporal element like "'now'" or "'at this time,'" courts generally conclude that the statement is equivocal.[44] In this case, Schroeder told Bergman that it was "the end of *this conversation*." (Emphasis supplied.)

But Schroeder relies on the fact that in *Rogers*, we held that an unqualified "'I'm done,'" combined with "'I'm not talking no more,'" was a clear invocation of the right to remain silent.[45] We find Schroeder's statements are distinguishable. As already noted, Schroeder's statement was not unqualified. His statement, "I'm done," cannot be extricated from his statement immediately preceding it. The prior statement qualified that what he was "done" with was simply "this conversation." We have never held that any utterance of "I'm done," no matter what the surrounding circumstances or other statements, will be construed as cutting off all further questioning.

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[40] See *id.*

[41] *Davis v. United States, supra* note 39, 512 U.S. at 459.

[42] See *id.*

[43] See, e.g., *State v. Rogers, supra* note 5; *People v. Arroya*, 988 P.2d 1124 (Colo. 1999).

[44] See *State v. Rogers, supra* note 5, 277 Neb. at 66, 760 N.W.2d at 59. See, also, e.g., *State v. Ganpat*, 732 N.W.2d 232 (Minn. 2007); *Com. v. Leahy*, 445 Mass. 481, 838 N.E.2d 1220 (2005); *State v. Sabetta*, 680 A.2d 927 (R.I. 1996); *State v. Holcomb*, 213 Or. App. 168, 159 P.3d 1271 (2007); *State v. Bieker*, 35 Kan. App. 2d 427, 132 P.3d 478 (2006). See, also, *U.S. v. Rodriguez*, 518 F.3d 1072 (9th Cir. 2008); *State v. Markwardt*, 306 Wis. 2d 420, 742 N.W.2d 546 (Wis. App. 2007).

[45] *State v. Rogers, supra* note 5, 277 Neb. at 70, 760 N.W.2d at 61-62.

And it is of no small import that part of the context of the alleged invocation is Schroeder's prior request for a polygraph. We conclude that a reasonable police officer faced with a suspect's statement that "this conversation" is done, after the suspect had volunteered to take a polygraph examination as soon as one could be set up, would believe that the suspect wanted only to end the current conversation. To the extent that a reasonable police officer *might* believe that "this conversation" referred more broadly to all future discussion of the same topic, the statement is, at the most, ambiguous. We also note that for the most part, Bergman followed the "good police practice"[46] of asking clarifying questions. Bergman asked Schroeder whether he still wanted to take a polygraph examination. Schroeder indicated that he did.

In reality, by saying he was done with the conversation, Schroeder made a "limited" invocation of the right to remain silent: he exercised his right to control the duration of the interrogation. The U.S. Supreme Court has held that suspects have the right to control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.[47] And in *Connecticut v. Barrett*,[48] the Court held that a suspect had chosen to exercise a "limited" invocation of his Fifth Amendment right to counsel when he had agreed to waive that right as to any oral statement, but had demanded that an attorney be present for any written statement. The Court explained that "*Miranda* gives the defendant a right to choose between speech and silence, and [the defendant in *Barrett*] chose to speak."[49] The Court stated further that to interpret the suspect's statements as a broader invocation for all purposes would be a "disregard of the [statements'] ordinary meaning."[50]

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[46] *Davis v. United States, supra* note 39, 512 U.S. at 461.

[47] *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975).

[48] *Connecticut v. Barrett*, 479 U.S. 523, 530, 107 S. Ct. 828, 93 L. Ed. 2d 920 (1987). See, also, *State v. Holcomb, supra* note 44; *State v. Gascon*, 119 Idaho 932, 812 P.2d 239 (1991); *State v. Uraine*, 157 Ariz. 21, 754 P.2d 350 (Ariz. App. 1988).

[49] *Connecticut v. Barrett, supra* note 48, 479 U.S. at 529.

[50] *Id.*, 479 U.S. at 530.

Other courts have applied this reasoning to find a "limited" or "selective" invocation of the right to remain silent—applicable only to certain times or certain subjects.[51] But any statements made during the conversation after Schroeder wished to end it were suppressed by the trial court.

The continuing questioning of Schroeder during and after[52] his polygraph examinations was not in violation of Schroeder's right to remain silent. The trial court did not err in denying Schroeder's motion to suppress those statements.

CONCLUSION

The trial court did not err in denying Schroeder's motions to change venue, sever the charges, suppress, and instruct on lesser-included offenses. We affirm.

AFFIRMED.

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[51] See, e.g., *Arnold v. Runnels*, 421 F.3d 859 (9th Cir. 2005); *State v. Adams, supra* note 37.

[52] See *Wyrick v. Fields*, 459 U.S. 42, 103 S. Ct. 394, 74 L. Ed. 2d 214 (1982).

STATE OF NEBRASKA, APPELLEE, V.
TERRY J. SELLERS, APPELLANT.
777 N.W.2d 779

Filed January 15, 2010. No. S-08-434.

1. **Trial: Appeal and Error.** The responsibility for conducting a trial in an orderly and proper manner for the purpose of ensuring a fair and impartial trial rests with the trial court, and its rulings in this regard will be reviewed for an abuse of discretion.
2. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.

5. **Trial.** When there are outbursts of emotion in the courtroom, it is within the sound discretion of the trial court to deal with them in such a manner as to best preserve the judicial atmosphere and ensure a fair and impartial trial for the defendant.
6. **Appeal and Error.** Absent plain error, an issue not raised to the trial court will not be considered by the Nebraska Supreme Court on appeal.
7. **Trial: Motions for Mistrial: Waiver: Appeal and Error.** When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
8. **Appeal and Error: Words and Phrases.** Plain error is error of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
9. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
10. **Judgments: Appeal and Error.** When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
11. **Jury Instructions: Testimony: Appeal and Error.** A defendant is entitled to a cautionary instruction on the weight and credibility to be given to the testimony of an alleged accomplice, and the failure to give such an instruction is reversible error.
12. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
13. **Jury Instructions.** In construing an individual jury instruction, the instruction should not be judged in artificial isolation but must be viewed in the context of the overall charge to the jury considered as a whole.
14. **Jury Instructions: Appeal and Error.** Absent plain error indicative of a probable miscarriage of justice, the failure to object to a jury instruction after it has been submitted for review precludes raising an objection on appeal.
15. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
16. **Trial: Evidence: Appeal and Error.** A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion.
17. **Evidence.** Evidence which is not relevant is not admissible.
18. **Evidence: Words and Phrases.** Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
19. **Rules of Evidence.** Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), evidence may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

20. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
21. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
22. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
23. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Clarence E. Mock and Denise E. Frost, of Johnson & Mock, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

GERRARD, J.

I. NATURE OF CASE

Terry J. Sellers was convicted of two counts of first degree murder, one count of attempted murder, and three counts of use of a deadly weapon to commit a felony in connection with those charges. Sellers appeals, arguing that the district court failed to properly instruct the jury and that his counsel was ineffective in failing to object to those jury instructions. Sellers also asserts that the court erred in refusing to allow the admission of evidence seized during the arrest of a State's witness and in overruling his motion for mistrial after alleged misconduct by a prosecution witness and her

attorney at trial. Finding no error, we affirm Sellers' convictions and sentences.

II. BACKGROUND

Viewing the evidence in a light most favorable to the State, as we must, the prosecution witnesses generally testified that Sellers and Taiana Matheny engaged in a scheme whereby Matheny would lure men to secluded locations so that she and Sellers could rob and murder them. The State's evidence indicated that over the course of about 4 days in late February 2005, Sellers and Matheny successfully robbed and shot to death two men, Kevin Pierce and Victor Ford, and robbed and unsuccessfully attempted to murder another, DaWayne Kearney.

Sellers and Matheny were arrested after their confrontation with Kearney went awry. Sellers was charged with two counts of first degree murder for the deaths of Pierce and Ford, one count of attempted murder of Kearney, and three counts of use of a deadly weapon to commit a felony in connection with those charges. Matheny testified against Sellers at trial pursuant to a plea agreement, and her testimony was the foundation of the State's case against Sellers. Sellers, who also testified at trial, denied Matheny's accounts of the killings.

Sellers was convicted of all charges. He was sentenced to life imprisonment for the murders of Pierce and Ford, 40 to 50 years' imprisonment for the attempted murder of Kearney, 50 to 50 years' imprisonment each for use of a weapon to commit the Pierce and Ford murders, and 40 to 50 years' imprisonment for use of a weapon to commit the Kearney felony. The sentences were to be served consecutively. Sellers has appealed through new counsel. Other facts relevant to the specific issues raised on appeal will be set forth below as necessary.

III. ASSIGNMENTS OF ERROR

Sellers assigns, renumbered and restated, that (1) the trial court erred in denying Sellers' motions for mistrial and for a jury instruction, after prejudicial conduct by a prosecution witness and her attorney during trial; (2) the trial court erred in giving jury instruction No. 22; (3) the trial court erred in giving jury instruction No. 24; (4) the trial court erred in refusing to permit Sellers to adduce evidence of two handguns

seized from the residence where Kearney was arrested; and (5) Sellers received ineffective assistance of counsel at trial, because his counsel failed to object to jury instructions Nos. 22 and 24.

IV. ANALYSIS

1. District Court Did Not Err in Overruling Motion for Mistrial

Sellers first asserts the district court erred in failing to grant him a mistrial, or a jury instruction, because of prejudicial acts and statements by Matheny and her counsel at trial. Specifically, Sellers argues that his trial was tainted by Matheny's weeping and vomiting during her testimony and by an attorney-client objection voiced by Matheny's attorney from the gallery.

(a) Standard of Review

[1-3] The responsibility for conducting a trial in an orderly and proper manner for the purpose of ensuring a fair and impartial trial rests with the trial court, and its rulings in this regard will be reviewed for an abuse of discretion.[1] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.[2] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[3]

(b) Matheny's Conduct During Testimony

(i) Background

Matheny testified generally that the killing of Pierce was the end result of a sequence of events that began when she met Pierce at a gas station, flirted with him, and got his telephone number. Later that night, Matheny, Sellers, and Sellers' cousin, Terrell Thorpe, went to an apartment complex where Matheny

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[1] *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

[2] *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009).

[3] *State v. Lykens*, 271 Neb. 240, 710 N.W.2d 844 (2006).

had arranged to meet Pierce. While waiting for Pierce to arrive, Sellers asked Matheny if she was afraid of guns and she replied no. Matheny also testified that while waiting for Pierce to arrive, Sellers stated that "somebody was going to die that night." When Pierce arrived, Matheny exited her vehicle and walked Pierce around the building to where Sellers and Thorpe were waiting. Sellers and Thorpe rushed Pierce, put him on the ground between the garage and a Dumpster, and went through his pockets. Matheny testified that Sellers told her to go through Pierce's pockets. But Matheny was unable to get into the pockets, so she removed Pierce's pants and shoes. Sellers knelt down next to Pierce's head and gave Matheny a glove. Sellers placed a gun at the base of Pierce's head. Matheny testified that Sellers placed her hand, with the gun, at the base of Pierce's head. She pulled the trigger.

During Matheny's testimony about the killing of Pierce, Matheny cried a great deal and, unexpectedly, vomited into a trash can. Shortly after Matheny vomited, the court took a recess "so that [Matheny] can compose herself and get cleaned up, and the jury has — is in their jury room." At that point, Sellers' counsel made a motion for mistrial, outside the presence of the jury, arguing that Matheny's conduct was "highly prejudicial to [Sellers], and it was done in front of the jury." Sellers' counsel pointed out that Matheny "[has] been weeping out loud during most of her — the second part of the testimony." Sellers' counsel noted that unlike Matheny's testimony at trial, in her previous statements to police, "nothing of this nature, crying, carrying on, ever happened." Sellers' counsel asserted that the jury was "quite distressed" by Matheny's conduct. The court overruled the motion for mistrial.

Sellers then requested a jury instruction, before testimony resumed, which would admonish the jury that it was to disregard Matheny's conduct and that no sympathy for witnesses should enter into its deliberations. The court also overruled that request, stating that the jury would be instructed during the instruction phase that "sympathy or prejudice or bias shall not be a part of [its] deliberations or consideration." Sellers argued that the end-of-trial instruction was insufficient, but the jury was instructed as set forth above.

(ii) Analysis

[4] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.[4] Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters provide examples of events which may require the granting of a mistrial.[5]

[5] We have reviewed episodes of emotion during trial on several occasions. In *Wamsley v. State*,[6] we recognized that when there are outbursts of emotion in the courtroom, it is within the sound discretion of the trial court to deal with them in such a manner as to best preserve the judicial atmosphere and ensure a fair and impartial trial for the defendant. In that case, a rape prosecution, we held that the defendant was deprived of a fair trial because of the cumulative effect of prejudicial acts and statements at trial.

The prejudicial acts in *Wamsley* included emotional outbursts by the victim and her father and improper conduct of a county attorney expressing his personal opinions in argument to the jury. Some of the victim's outbursts were heard throughout the floor of the courthouse on which the courtroom was located. And at one point during the victim's cross-examination, her father rose from the audience and stated, "'That's enough,'" and then proceeded to the witness stand and assisted the victim down from the stand.[7] The trial court took no action. The trial court later overruled a motion for mistrial and did not admonish the jury to disregard the outbursts. We held that the defendant in *Wamsley* was denied a fair and impartial trial, noting that sympathy for the victim and hostility toward the defendant could have been alleviated by, among other things, rebukes to those who violated

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[4] *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006).

[5] *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005), citing *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991).

[6] *Wamsley v. State*, 171 Neb. 197, 106 N.W.2d 22 (1960).

[7] *Id.* at 205, 106 N.W.2d at 27.

established rules of conduct and admonishing the jury to disregard such incidents and to return a dispassionate verdict based solely on the evidence before it.

By contrast, in *State v. Scott*,[8] we examined whether an elderly witness' tearful conduct prejudiced a criminal defendant charged with shooting that witness and killing her husband. In *Scott*, the witness stumbled while leaving the witness stand and began to weep because of an injury to her leg. We affirmed the trial court's decision to overrule the defendant's motion for mistrial, noting that the witness had shown no emotion during her testimony and that her weeping was the result of her stumbling and hurting her leg, not her testimony. Unlike *Wamsley*, the *Scott* court admonished the jury not to consider the incident, because it had no bearing on the guilt or innocence of the defendant. We concluded that refusing to declare a mistrial did not warrant reversal.

Guided by these principles, we conclude that Matheny's conduct was not ground for mistrial. In the present case, there is nothing in the record indicating that Matheny's weeping during portions of her testimony or her sudden illness had any bearing on the guilt or innocence of Sellers. While the trial court did not admonish the jury immediately following the incidents of emotion, the jury was instructed both before and after trial not to let sympathy or prejudice influence its verdict. Although it would have been advisable for the court to admonish the jury after Matheny's emotional testimony, its failure to immediately do so was not so untenable or unreasonable so as to constitute an abuse of discretion under these circumstances.

(c) Attorney-Client Objection

Sellers points to a second incident he claims tainted the trial—an attorney-client objection by Matheny's counsel voiced from the gallery.

(i) Background

On cross-examination, Matheny was asked why she waived her speedy trial rights. Matheny responded by invoking her

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[8] *State v. Scott*, 200 Neb. 265, 263 N.W.2d 659 (1978).

attorney-client privilege. After Sellers' counsel asked the judge to compel Matheny to answer, Matheny's attorney objected, from the gallery, "Judge, I don't believe he can." Questioning continued, and Matheny testified that she waived a speedy trial on advice of counsel. Matheny's counsel then stated, "[S]he's just testified about my advice to her which is privileged." Sellers' counsel then moved to strike Matheny's counsel's statements, because "[h]e's not a party to this case." The judge overruled the motion to strike. After a brief sidebar, the judge excused the jury and a hearing was held. After the hearing, the court allowed Matheny to assert the privilege.

(ii) Analysis

[6,7] The record reveals that following the attorney-client objection, Sellers' counsel moved to strike Matheny's counsel's statements but did not move for a mistrial. Absent plain error, an issue not raised to the trial court will not be considered by this court on appeal.[9] Furthermore, when a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial.[10] One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.[11] Here, Sellers moved to strike Matheny's counsel's statements, but he did not move for mistrial based upon those remarks. As a result, he has waived any error that may have resulted from those remarks.

Sellers also makes passing reference to other allegedly disruptive behavior during the trial, but did not assign error to any of the court's decisions in that regard, so we will not consider other alleged disruptions. On the issues presented in Sellers' brief, we conclude that the district court did not abuse its discretion in overruling Sellers' motion and we find this assignment of error to be meritless.

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[9] *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

[10] *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

[11] *Id.*

2. District Court Did Not Err in Giving Jury Instruction No. 22

Sellers next argues that the district court erred in giving jury instruction No. 22.

(a) Background

Two informal jury instruction conferences were held off the record, and one formal conference was conducted on the record. Neither the State nor Sellers objected to the jury instructions ultimately given to the jury. Jury instruction No. 22, regarding accomplice testimony, provided:

> There has been testimony from Taiana Matheny, a claimed accomplice of the Defendant. You should closely examine her testimony for any possible motive she might have to testify falsely. You should hesitate to convict the Defendant if you decide that Taiana Matheny testified falsely about an important matter and that there is no other evidence to support her testimony.

[8] As a threshold matter, we note that because Sellers did not object to instruction No. 22, or any jury instruction for that matter, the issue on appeal is whether the instruction given was so deficient as to constitute plain error, which we have defined as error of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.[12] Sellers waived his right to complain regarding instruction No. 22, and, for the following reasons, we conclude there was no plain error requiring reversal.

(b) Standard of Review

[9,10] Whether jury instructions given by a trial court are correct is a question of law.[13] When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[14]

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[12] *State v. Greer*, 257 Neb. 208, 596 N.W.2d 296 (1999).

[13] *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009).

[14] See *Iromuanya, supra* note 1.

(c) Analysis

[11] Sellers initially argues that the use of the term "claimed accomplice" in instruction No. 22 created a sort of judicial finding that Matheny was an accomplice to Sellers, and that such a finding was prejudicial to Sellers. However, a defendant is clearly entitled to a cautionary instruction on the weight and credibility to be given to the testimony of an alleged accomplice, and the failure to give such an instruction is reversible error.[15] The comment to NJI2d Crim. 5.6 states that "NJI2d Crim. 5.6 does not define 'accomplice.'" The comment, however, appropriately makes clear that whenever a judge decides that the evidence supports a conclusion that a witness is an accomplice, then the cautionary instruction is appropriate and should be given. This is because any alleged accomplice testimony should be examined more closely by the trier of fact for any possible motive that the accomplice might have to testify falsely.

Contrary to Sellers' assertion, instruction No. 22 does not create a finding that Matheny was an accomplice to Sellers. Rather, instruction No. 22 provides in plain English that Matheny was a "claimed accomplice"—nothing more, nothing less. Instruction No. 22 does not create any type of presumption or a judicial finding that Matheny was an accomplice to Sellers; rather, it is a cautionary instruction, favorable to the accused, regarding the weight and credibility to be given to the testimony of a claimed accomplice.

Sellers also argues that instruction No. 22 is plainly erroneous because it deviated from the pattern instruction. In this case, the district court modified the pattern instruction by omitting the last sentence of NJI2d Crim. 5.6, which provides, "In any event, you should convict the defendant only if the evidence satisfies you beyond a reasonable doubt of (his, her) guilt." Sellers argues that instruction No. 22 is plainly erroneous because before a jury could "hesitate to convict" Sellers using Matheny's testimony, jurors had to find that Matheny "testified falsely about an important matter and that there is no other evidence to support her testimony."

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[15] See *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001).

[12] However, all the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.[16] Although it would have been preferable for the district court to use the Nebraska jury instruction in its entirety, we certainly cannot say that the failure to do so under the circumstances of this case constituted such a plain error that to leave it uncorrected would result in damage to the integrity or fairness of this trial.

[13] In construing an individual jury instruction, the instruction should not be judged in artificial isolation but must be viewed in the context of the overall charge to the jury considered as a whole.[17] Here, in addition to jury instruction No. 22, instruction No. 21 instructed the jury members that they were "the sole judges of the credibility of the witnesses and the weight to be given to their testimony." The jury was also instructed that the State was required to prove each and every element of the offense charged beyond a reasonable doubt and that otherwise, the jury was to find Sellers not guilty. In sum, jury instruction No. 22 did not misstate the law and when it is read in conjunction with the other jury instructions, there exists no instructional plain error requiring reversal.

3. District Court Did Not Err in Giving Jury Instruction No. 24

Sellers next argues that the trial court erred in giving jury instruction No. 24, which dealt with evidence gathered during an arrest of Kearney after he repeatedly failed to appear for trial.

(a) Background

(i) Attempted Killing of Kearney

According to Matheny, the sequence of events that led to the attempted murder of Kearney and Sellers' arrest began when, at Sellers' direction, Matheny introduced herself to Kearney,

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[16] *State v. Schmidt*, 276 Neb. 723, 757 N.W.2d 291 (2008).

[17] See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

flirted with him, and exchanged telephone numbers with him. According to Matheny, Sellers wanted to rob Kearney because he was a drug dealer and had money.

The following evening, Sellers and Matheny retrieved a handgun from Thorpe and drove to an apartment complex. Matheny arranged to have Kearney meet her there. Matheny testified that when Kearney pulled into the apartment complex, Sellers exited Matheny's car and hid behind a tree. Kearney parked next to Matheny's car. Matheny got into Kearney's car and talked with him briefly. They exited Kearney's car, and as they started walking toward the apartment building, Sellers approached Kearney and put the gun to his head.

Kearney and Sellers started fighting, and Kearney wrested the gun away from Sellers. The gun fired twice during the struggle. At some point in the fight, Sellers asked for Matheny's help, so Matheny dug her fingernails into Kearney's eyes. Matheny and Kearney testified that Sellers had a knife and stabbed Kearney repeatedly, until Kearney stopped moving. Kearney testified that eventually, he "played . . . dead." Lying face down, Kearney could hear and feel Matheny and Sellers going through his pockets and removing his rings. At that time, someone yelled "about the cops," so Matheny and Sellers ran to Matheny's vehicle and drove out of the parking lot.

Sellers' account of that night is different from that of Matheny and Kearney. Sellers testified that he and Matheny went to the apartment complex to meet Kearney to buy some marijuana. Sellers testified that after he asked Kearney for some marijuana, "it got crazy." According to Sellers, Kearney pulled out a gun and fired it. Sellers testified that he ran from Kearney but doubled back because he did not want to leave Matheny alone with Kearney. A fight ensued. Sellers grabbed his pocketknife and started "swinging wildly." Sellers and Kearney fell to the ground, and Kearney "rolled on top" of Sellers. Sellers testified that Matheny pulled Kearney off and that Sellers and Matheny then ran to the car.

When Kearney was found by police, he was screaming, "They tried to kill me. They tried to kill me." Kearney was transported to the hospital by ambulance. A gun was found at

the scene within arm's length of Kearney. The Omaha Police Department crime laboratory determined that the bullets that killed Pierce and Ford had been fired from that gun. A short time after Matheny and Sellers fled the scene, Omaha police stopped Matheny's car and arrested Matheny and Sellers. Matheny's coat appeared to have blood on it, and Sellers also had bloodstains on his clothing. Sellers had a knife in his pocket with what appeared to be blood on it, a small amount of marijuana, and $217 in cash.

(ii) Arrest of Kearney

After numerous unsuccessful attempts to serve Kearney with a subpoena to testify in the instant trial, Kearney was arrested on capias at the home of Jeremiah Brodie. Brodie and a woman named Stenette Sturdivant were also detained. During the arrest and a subsequent search of Brodie's residence, Omaha police officers found handguns, ammunition, marijuana, and cash. Brodie was charged with being a felon in possession of a firearm and possession of marijuana with intent to deliver, and Sturdivant was charged with possession of stolen firearms and possession of marijuana with intent to deliver. Kearney was not charged with any offense. Omaha police officer Dave Bianchi testified that Kearney was not charged, because "I didn't believe we had any evidence against him," explaining that Sturdivant admitted the guns were hers and that there was no evidence Kearney was in possession of the guns or of the marijuana.

The State filed a motion in limine to exclude evidence regarding the marijuana, firearms, and failure to charge Kearney with any crime. The district court ruled that Sellers could question Kearney as to what benefit, if any, he may have received on a plea agreement and why Kearney was not arrested in regard to the marijuana and cash. The court refused, however, to allow the jury to hear evidence of the guns and ammunition found during Kearney's arrest. And the court gave jury instruction No. 24, which provided:

> Evidence of marijuana and money located at [Brodie's residence in] Omaha, Nebraska, was received only for the limited purpose of the credibility of DaWayne Kearney

> and for no other purpose. You may consider this evidence only for the limited purpose and for no other.

(b) Analysis

[14] Sellers argues that the district court erred in giving jury instruction No. 24. However, absent plain error indicative of a probable miscarriage of justice, the failure to object to a jury instruction after it has been submitted for review precludes raising an objection on appeal.[18] Because Sellers did not object to instruction No. 24, and concedes as much, the issue on appeal is whether the instruction given was so deficient as to constitute plain error, which we have defined as error of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.[19]

Sellers argues that instruction No. 24 negated the logical inference that Kearney was a drug dealer, which was relevant and consistent with Sellers' testimony that he met with Kearney to buy marijuana, not to rob and kill him. Instruction No. 24, Sellers contends, was plainly erroneous, and it prejudiced Sellers' ability to present a complete defense to the charges of robbery and attempted first degree murder of Kearney.

Instruction No. 24, however, did not foreclose Sellers' ability to argue that Kearney was a drug dealer. Sellers was permitted to question Kearney as to the drugs and money found at Brodie's residence and about any agreement Kearney made with the State. The evidence regarding the drugs and money found during Kearney's arrest was admissible for the purpose of determining who was truthfully describing the events of the evening of the altercation—Sellers or Kearney. Moreover, the court gave two jury instructions regarding self-defense. Instruction No. 24 did not preclude the jury from considering Sellers' version of the confrontation with Kearney. Under these circumstances, it was not plain error to instruct the jury as the trial court did.

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[18] *Greer, supra* note 12.

[19] *Id.*

4. District Court Did Not Err in Excluding Evidence of Handguns

In a related argument, Sellers contends that the district court abused its discretion when it excluded evidence of the two handguns found when Kearney was arrested.

(a) Standard of Review

[15,16] When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[20] A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion.[21]

(b) Analysis

As noted above, Sellers argues that the court should have admitted evidence of the handguns found at the scene of Kearney's arrest. Sellers argues that this evidence supported his theory that Kearney was the aggressor and not Sellers. Had the jury been permitted to learn of the guns found when Kearney was arrested, Sellers argues, the jury could logically infer that Kearney was familiar with and possessed guns. Sellers also contends that the presence of guns obtained at Kearney's arrest is consistent with and would lend support to Sellers' defense that on the night of the altercation with Kearney, Kearney brought a gun and fired it at Sellers.

[17-19] Evidence which is not relevant is not admissible.[22] Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[23] Under Neb. Evid. R. 403,[24] however, evidence may be excluded if its probative value is substantially

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[20] *Japp v. Papio-Missouri River NRD*, 273 Neb. 779, 733 N.W.2d 551 (2007).

[21] See *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

[22] Neb. Rev. Stat. § 27-402 (Reissue 2008).

[23] Neb. Rev. Stat. § 27-401 (Reissue 2008).

[24] Neb. Rev. Stat. § 27-403 (Reissue 2008).

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.[25]

Here, we conclude that the minimal probative value of the evidence of handguns at the time of arrest was outweighed by the danger of unfair prejudice or confusion of the issues. There was no proof linking Kearney to the handguns found during his arrest. In fact, Bianchi testified that Kearney was not charged in connection with the handguns found at the Brodie residence, because there was not "any evidence against [Kearney]." Bianchi stated:

> The guns we had placed in [Brodie's and Sturdivant's] hands. We could not place the guns in [Kearney's] possession at all. One of the guns, where it was located, unless he was up in the bedroom might not even known [sic] about it. But even if he did know about it, that didn't mean he was possessing them. He didn't live there.

Because there was no direct connection between Kearney and the handguns recovered during his arrest, we conclude that there was little or no probative value to the handgun evidence, and any minimal probative value would be outweighed by the danger of unfair prejudice. The district court did not abuse its discretion in excluding this evidence.

5. Record Insufficient to Address Ineffective Assistance of Counsel

Sellers next claims that he received ineffective assistance of counsel when his trial counsel did not object to instructions Nos. 22 and 24.

(a) Standard of Review

[20,21] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[26] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[27] With regard to the questions of counsel's

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[25] *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

[26] *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

[27] *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[28] an appellate court reviews such legal determinations independently of the lower court's decision.[29]

(b) Analysis

[22,23] To prevail on a claim of ineffective assistance of counsel under *Strickland*,[30] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[31] Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question.[32]

We conclude that the record is not sufficient to address Sellers' claim of ineffective assistance of counsel. Even though we have found no plain error with reference to instructions Nos. 22 and 24, Sellers has not had a full evidentiary opportunity to present the alleged deficiencies of counsel for failing to object to the instructions. Conversely, there certainly could have been valid strategic reasons for Sellers' trial counsel to withhold objections to one or both of instructions Nos. 22 and 24. Without the benefit of a more complete record, we decline to evaluate Sellers' claim of ineffective assistance of counsel.

V. CONCLUSION

For the foregoing reasons, we find no merit to Sellers' assignments of error and affirm the judgment of the district court.

AFFIRMED.

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[28] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[29] *Moyer, supra* note 27.

[30] *Strickland, supra* note 28.

[31] *State v. Jones*, 274 Neb. 271, 739 N.W.2d 193 (2007).

[32] *Id.*

CITY OF FALLS CITY, NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA MUNICIPAL POWER POOL, A NEBRASKA NONPROFIT CORPORATION, APPELLANT AND CROSS-APPELLEE, J. GARY STAUFFER ET AL., APPELLEES AND CROSS-APPELLANTS, CENTRAL PLAINS ENERGY PROJECT, APPELLEE, CROSS-APPELLEE, AND CROSS-APPELLANT, AND AMERICAN PUBLIC ENERGY AGENCY, INTERVENOR-APPELLEE.

777 N.W.2d 327

Filed January 15, 2010. No. S-08-1184.

1. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and gives weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
3. **Governmental Subdivisions: Taxation.** The purpose of the Interlocal Cooperation Act, pursuant to Neb. Rev. Stat. § 13-802 (Reissue 2007), is to permit local governmental units to make the most efficient use of their taxing authority and other powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities.
4. **Political Subdivisions: Contracts.** Neb. Rev. Stat. § 13-802 (Reissue 2007) of the Interlocal Cooperation Act allows a political subdivision to enter into a contract to form an interlocal agency that will act on its behalf.
5. **Governmental Subdivisions: Statutes.** An interlocal agency, as a creature of statute, is bound by the statute creating it and has only the rights and remedies granted to it under the statute.
6. **Governmental Subdivisions: Contracts.** Under Neb. Rev. Stat. § 13-804(6) (Reissue 2007), a joint entity created under the Interlocal Cooperation Act is subject to the control of its members in accordance with the agreement.
7. **Governmental Subdivisions: Public Officers and Employees: Public Purpose.** Public entities serve the public good, as do public officials.
8. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties.
9. **Municipal Corporations: Words and Phrases.** A distinguishing feature of a municipal or quasi-municipal corporation, or interlocal agency, is that it is not only a body corporate but also a body politic, the components of which, the

corporators, are endowed with the right to exercise in their collective capacity a portion of the political power of the state.

10. **Municipal Corporations: Corporations: Public Purpose.** Profit-seeking entities operate under different principles than does a municipal or quasi-municipal corporation or interlocal agency, which may act for a broader political purpose, seemingly in disregard of the best fiscal interests of the entity.
11. **Municipal Corporations: Corporations: Public Officers and Employees: Appeal and Error.** Interlocal agencies entrusted with a duty to the public at large are not judged under the same principles governing private, for-profit corporations. And when a decision has been entrusted to the discretion of a public officer or board, that decision will not ordinarily be reviewed by the courts.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded with directions.

Daniel E. Klaus and David J.A. Bargen, of Rembolt Ludtke, L.L.P., for appellant.

James P. Fitzgerald and James G. Powers, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees J. Gary Stauffer et al.

Robert W. Mullin and David S. Houghton, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., and Douglas E. Merz, of Weaver & Merz, for appellee City of Falls City.

James M. Bausch and Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee Central Plains Energy Project.

Bartholomew L. McLeay and Heather H. Anschutz, of Kutak Rock, L.L.P., for intervenor-appellee American Public Energy Agency.

W. Scott Davis and Amanda A. Dutton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for amicus curiae National Public Gas Agency.

William F. Austin, of Erickson Sederstrom, P.C., for amicus curiae League of Nebraska Municipalities.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

HEAVICAN, C.J.

INTRODUCTION

Nebraska Municipal Power Pool (NMPP) appeals from a final judgment granted by the Lancaster County District Court in favor of the City of Falls City, Nebraska (Falls City). J. Gary Stauffer, John Harms, Evan Ward (collectively individual defendants), and Central Plains Energy Project (CPEP), defendants-appellees, have cross-appealed. Falls City cross-appeals. The American Public Energy Agency (APEA) settled its suit, and its claims are no longer a part of this case. We reverse the decision of the district court and remand the cause with directions to dismiss.

FACTS

NMPP was created in 1975 as a nonprofit corporation with the purpose of idea generation, research, analysis, administration, and the creation of other entities to carry out these activities. NMPP has a 16-member board of directors made up of representatives from the participating municipalities. Falls City is a member of NMPP.

The first entity created by NMPP in 1981 was the Municipal Energy Agency of Nebraska (MEAN), under the Municipal Cooperative Financing Act, see Neb. Rev. Stat. §§ 18-2401 to 18-2485 (Reissue 2007 & Cum. Supp. 2008). NMPP created MEAN in order to obtain efficient sources of electricity for participating communities. The National Public Gas Agency (NPGA) was created in 1991 by NMPP in order to secure natural gas for the participating municipalities. NPGA is an interlocal agency created under the Interlocal Cooperation Act, see Neb. Rev. Stat. §§ 13-801 to 13-827 (Reissue 2007 & Cum. Supp. 2008). NPGA is governed by a board of directors made up of a representative from each of the NPGA-member municipalities, including Falls City. Both MEAN and NPGA require their members to also be members of NMPP.

NMPP provides all the strategic planning and staffing services for NPGA and MEAN. Other than an executive director, who is employed jointly by NPGA and MEAN, neither

organization has employees. NMPP's budgeting process is administered through a joint operating committee, which consists of representatives from NMPP, NPGA, and MEAN. At the beginning of each year, the amount of time each NMPP employee will devote to a particular organization is estimated and expenses are then allocated among the organizations.

In 1995, NMPP, NPGA, and MEAN created APEA, another interlocal agency. APEA was intended to finance bonds through which natural gas was purchased. APEA remained separate from the joint operating committee and had its own staff, but sometimes utilized NMPP staff for various projects.

APEA issued bonds and purchased gas through a series of "prepays." A prepay involves the purchase of a large supply of natural gas to be delivered in the future. The goal is to purchase a large amount of natural gas at a lower price than index, or market, price. The bonds used to pay for the gas are tax exempt as long as municipal entities purchase the gas later. As the gas is delivered and paid for by the end user, the proceeds are used to repay the principal and interest on the bonds.

In addition to these entities, the individual defendants involved all work with or are involved with NMPP, NPGA, or APEA in some capacity. Stauffer joined NMPP as deputy executive director in 2003, then became executive director of NPGA and MEAN in April 2005. The executive director is an employee of NPGA and MEAN and has a joint employment contract with NMPP, NPGA, and MEAN. Harms is employed by NMPP, and his role is in purchasing and delivering natural gas to communities; Harms is also the chief operating officer of NPGA. Harms' salary expense is totally allocated to NPGA. Ward began employment with APEA as a consultant, then as executive vice president. Ward's role was in bond financing. He became the director of capital strategies of NMPP in 2003, and he served NPGA in the same capacity.

From the record, it is undisputed that there were personal conflicts between Roger Mock, president of APEA, and Stauffer, Harms, and Ward. There was also a controversy as to whether APEA should continue to run independently. In September 2004, the joint operating committee, NPGA, and MEAN's executive committee brought APEA under the

direction of the executive director of NMPP. Three months later, those orders were rescinded and APEA resumed its independent operations.

It is also undisputed that in the summer of 2004, one of the contracted gas suppliers notified APEA, NMPP, and NPGA that it would be unable to deliver gas. Stauffer testified that the supplier's failure to deliver gas led to a need to restructure the revenue stream for NPGA. The supplier's failure to deliver ultimately led to a $50-million settlement with NPGA. NPGA still needed to find a reliable supply of gas for its participating municipalities, however.

NPGA did have other prepays, but the existing gas prepays were structured so that the amount of gas purchased increased over time. As the amount of gas purchased increased, so too did the amount of surplus gas that had to be resold, although up to the date of the trial, NPGA had always been able to sell the surplus gas. The sale of the extra gas allowed NPGA to cover its operating costs, and one of NPGA's biggest buyers for surplus gas was Metropolitan Utilities District (MUD).

When the board of directors for NPGA met in December 2004, the gas supplier's projects had been terminated and Harms recommended that the board restructure its gas portfolio. Harms also recommended that NPGA take the necessary time to explore all options, because NPGA had enough gas reserves to do so. In addition, Harms and Ward gave a presentation to the board about the alternatives to a prepay structure for obtaining natural gas; this same presentation was later given to a number of entities that might be willing to partner with NPGA. The record is unclear as to whether Harms included information about CPEP at all the presentations.

In February 2005, Mock, president of APEA, presented a potential prepay to the NPGA board. The prepay spanned 10 years, and Mock believed that gas could be purchased at 10 cents below index. Mock also believed that the terms of that agreement would mirror the terms of a 2003 agreement between NPGA and APEA. Harms and Ward recommended against accepting APEA's offer, informing the board that there were other, more competitive sources of gas. NPGA declined APEA's offer. A few months later, Harms held a workshop

for the NPGA directors, wherein he argued that a 20-year prepay had price advantages over a 10-year prepay. Harms also suggested that a prepay structure which allowed NPGA to purchase only the gas its members required would be more efficient and that NPGA was currently required to buy more gas than it could use under the terms of the APEA deal. After that workshop, Mock again proposed the 10-year prepay, which the board again rejected.

At the NPGA board meeting in May 2005, the NPGA considered proposals from APEA and the Goldman Sachs Group, Inc. Harms recommended against the APEA prepay once again, because he felt NPGA had more gas than it could use, but suggested accepting the offer from the Goldman Sachs Group if NPGA chose to do a prepay, because its discount was greater. A director of NPGA then moved to accept APEA's proposal, but the vote failed after legal counsel for NMPP stated that the proposed prepay might violate new Internal Revenue Service regulations.

Harms held a workshop for NPGA board members on April 24, 2006, stating in a memorandum to the members that he wanted to discuss CPEP and the value of becoming a member of CPEP. Whereas APEA bought large quantities of gas and then resold unused portions, CPEP's goals were to purchase just the amount required by the participants of the project at the lowest possible price. At the workshop, Harms recommended that NPGA consider membership in CPEP, because it could benefit from being a buyer, particularly if it partnered with MUD. As a partner with MUD, NPGA would benefit from MUD's large volume purchases to get a better rate. Harms presented two options: administer the program and/or buy gas as a member. The board took no formal action at that time.

The Falls City City Council authorized Falls City to bring suit against the individual defendants, NMPP, and CPEP shortly after the April 24, 2006, meeting. Falls City did not disclose its decision to sue at that time, and Falls City's representative continued to attend board meetings of NPGA. Falls City later filed suit on October 27, 2006.

Meanwhile, the option of joining CPEP was again brought to NPGA's attention at a meeting in July 2006, but no formal

action was taken. At that meeting, the NPGA board spent much of its time discussing withdrawing from APEA. A month later, Harms informed the NPGA board of directors that MUD and the Cedar Falls, Iowa, utility district, as members of CPEP, were planning to do a 20-year prepay transaction. No formal action was taken by the NPGA board at that time. MUD and Cedar Falls later completed the prepay transaction at a highly competitive price. The NPGA and MEAN boards of directors decided to withdraw from APEA in August 2006.

NPGA completed its withdrawal from APEA on February 26, 2007. NPGA, MEAN, and APEA entered into a written agreement governing NPGA and MEAN's withdrawal, as well as the disposition of the entities' equity in APEA. APEA was allowed to retain approximately $3.5 million in equity. APEA was also allowed to keep the prior claim it had filed against Stauffer and Ward, but was required to pay NPGA and MEAN 85 percent of any recovery. NPGA released NMPP and its individual officers from all claims, however.

In its complaint, Falls City claimed that NMPP had breached its contract with NPGA and its individual members. Falls City alleged that Stauffer, Harms, and Ward, along with others, violated their fiduciary duties to NPGA by investigating the possibility of forming a new entity, CPEP. Falls City claimed that the formation of CPEP violated the individual defendants' responsibilities to the individual members of NPGA, including Falls City. Falls City further alleged that the individual defendants took APEA's proprietary prepay information and utilized it in CPEP's business plan, that they conspired to deprive APEA and NPGA of business opportunities, and that the conspiracy resulted in damages to Falls City. Falls City cited the possible prepay presented to the NPGA board in February 2005 by Mock as the lost business opportunity.

NMPP argues that the NPGA board was aware of its investigation into alternatives to natural gas prepays and that the investigation was authorized. NMPP and the individual defendants insisted that the boards had been informed of the possibility of creating CPEP and that rejecting the APEA prepay was a business decision. NMPP and the individual defendants claimed that Falls City did not have standing to sue in its own

right as a member of NPGA, or on behalf of NPGA, and that the Interlocal Cooperation Act did not grant Falls City the right to sue. The individual defendants argued they were protected by the Political Subdivisions Tort Claims Act as employees of a political subdivision and that the release signed between NPGA and APEA applied to them and to NMPP.

After a bench trial, the district court dismissed two of the individual defendants. The district court also found that Falls City had failed to prove the breach of contract claim against NMPP and dismissed that claim. The district court entered judgment in favor of Falls City and against Stauffer, Harms, and Ward on its claim of breach of fiduciary duty and its claim of conspiracy. Falls City received a damage award for $628,267.90, and the district court entered an injunction against Stauffer, Harms, and Ward precluding them from participating in any of CPEP's prepaid gas activities. The district court also required NMPP to disgorge payments from CPEP for the performance of services for CPEP.

ASSIGNMENTS OF ERROR

NMPP assigns, consolidated and restated, that the district court erred in (1) finding that Falls City had legal standing to sue, (2) finding that the individual defendants were not exempt under the Political Subdivisions Tort Claims Act, (3) finding that the legal release signed by NPGA did not release NMPP and the individual defendants, (4) finding that there was a conspiracy among the individual defendants and NMPP to breach their fiduciary duty, (5) finding that NPGA and Falls City were damaged by NMPP's actions, and (6) exceeding the scope of its authority by entering an injunction against NMPP and the individual defendants.

The individual defendants assign in their cross-appeal, consolidated and restated, that the district court erred in (1) finding that a member of an interlocal agency has the right to sue on behalf of the interlocal agency and (2) awarding damages to Falls City.

CPEP assigns in its cross-appeal that the district court erred in declining to hold that the February 26, 2007, withdrawal agreement effectively barred the claims asserted by Falls City.

In its cross-appeal, Falls City assigns that the district court erred in (1) finding that sovereign immunity bars its action against CPEP, (2) finding that Falls City did not adequately prove its contract claim against NMPP, (3) finding that Falls City cannot bring a derivative claim on behalf of NPGA, and (4) limiting Falls City's damages to a 5-year period of time.

STANDARD OF REVIEW

[1] In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and gives weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[1]

[2] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.[2]

ANALYSIS

The determinative issue in this case is whether Falls City has standing to bring this suit in its own behalf and on behalf of NPGA. In its order, the district court stated that "Falls City cannot bring an action on behalf of other members of NPGA" but that Falls City could "acquir[e] for its own benefit remedies for breaches of duties owed to NPGA." The district court stated that "each member of NPGA is a separate political subdivision of the State of Nebraska and there ha[d] not been a lawful delegation to Falls City to act on behalf of the other members." Therefore, Falls City could not bring suit on behalf of the others. The district court determined that "the purpose of the [interlocal] agreement is to permit Falls City to exercise its power and authority." The district court also stated that "the relationships established by interlocal agreements are not

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[1] *ProData Computer Servs. v. Ponec*, 256 Neb. 228, 590 N.W.2d 176 (1999).

[2] *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

delegations of authority and power by the individual member, but a cooperative and joint exercise of powers possessed by the individual members." While we agree that an interlocal agreement creates the opportunity for a cooperative and joint exercise of powers, it also necessarily involves a delegation of authority.

[3] The purpose of the Interlocal Cooperation Act is "to permit local governmental units to make the most efficient use of their taxing authority and other powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities."[3] Under § 13-804(2), any two or more public agencies may enter into agreements with one another for joint or cooperative action under the Interlocal Cooperation Act. An interlocal agreement must specify its duration, general organization, and purpose, among other things.[4]

> In the event that an agreement made pursuant to this section creates a joint entity, such joint entity shall be subject to control by its members in accordance with the terms of the agreement; shall constitute a separate public body corporate and politic of this state, exercising public powers and acting on behalf of the public agencies which are parties to such agreement; and shall have power (a) to sue and be sued, (b) to have a seal and alter the same at pleasure or to dispense with its necessity, (c) to make and execute contracts and other instruments necessary or convenient to the exercise of its powers, and (d) from time to time, to make, amend, and repeal bylaws, rules, and regulations . . . .[5]

[4,5] The district court's decision in this case rests on the assumption that Falls City could not enter into a contract that would prevent Falls City from later suing to protect its own interests or to exercise its powers. However, the Interlocal Cooperation Act allows a political subdivision to enter into a

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[3] § 13-802.

[4] § 13-804(3).

[5] § 13-804(6).

contract to form an interlocal agency that will act on its behalf. And an interlocal agency, as a creature of statute, is bound by the statute creating it and has only the rights and remedies granted to it under the statute.[6]

[6] Under § 13-804(6), a joint entity created under the Interlocal Cooperation Act is subject to the control of its members *in accordance with the agreement*. The question then becomes whether Falls City is allowed to bring suit as a member of an interlocal agency under the agreement Falls City signed. Under the bylaws of NPGA, the business and affairs of NPGA are to be managed by the board of directors. As a charter member, Falls City had a representative on the board of directors and the right to cast a vote. The bylaws authorize the executive director to enter into any contracts or instruments to which he or she is authorized by the board of directors. If NPGA is dissolved, the assets are to be converted to cash and distributed to members in good standing. As a charter member, Falls City is to receive 18.762 percent of the equity balance should NPGA be dissolved.

The interlocal agreement, as signed by Falls City, recites that "[t]he Participants desire to study and evaluate on a continuing basis the benefits that may result to the Participants and their residents from the coordination of gas resources and facilities"; "to enter into an interlocal agreement pursuant to which the Participants, among other objectives, will cooperate mutually to assure an economical supply of firm or interruptible gas to meet their respective local requirements"; and "to create a joint entity to exercise public powers and to act on the behalf of the Participants for the purposes set forth in such interlocal agreement." One of the purposes of the NPGA was to "attain maximum practicable economy to the Participants." The interlocal agreement also lists the privileges and powers granted to an interlocal agency under the Interlocal Cooperation Act, such as the power to sue and be sued, to have a seal and alter the same, to make and execute contracts and other instruments, and to make and amend its bylaws.

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[6] See *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002).

No case law exists as to whether a member of an interlocal agency may bring a suit under these circumstances, but as previously noted, an interlocal agency is a creature of statute.[7] The interlocal statutes do not speak directly to this issue, but the plain language of the statute allows a public entity to join an interlocal agency in order to provide services and/or meet obligations.[8] The interlocal agreement signed by Falls City gave NPGA the power to sue and be sued but says nothing about the ability of its members to sue on behalf of NPGA, or in its own behalf. In fact, the interlocal agreement gives power and authority to make such decisions to the board of directors, which included a representative from Falls City. Under the interlocal agreement, Falls City had one vote on the board and the option to withdraw from NPGA if it was unhappy with the decisions that were made. The record demonstrates that the board of directors made a policy decision when it chose to turn down the offered prepay and explore other alternatives. Nothing in the interlocal agreement would allow a participant to sue on behalf of NPGA.

[7,8] In addition, we note that Falls City is essentially asking that NPGA be treated as a private corporation when it is an interlocal agency and is more akin to a quasi-municipal corporation. Nebraska has recognized various limited-purpose entities as quasi-municipal corporations, such as building commissions,[9] sanitary and improvement districts,[10] school districts,[11] and reclamation districts.[12] Quasi-municipal corporations are public entities, and public entities serve the public good, as

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[7] See, e.g., *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002); *Kosmicki v. State, supra* note 6.

[8] See *Roggasch v. Region IV Ofc. of Developmental Dis.*, 228 Neb. 636, 423 N.W.2d 771 (1988).

[9] *Dwyer v. Omaha-Douglas Public Building Commission*, 188 Neb. 30, 195 N.W.2d 236 (1972).

[10] *Rexroad, Inc. v. S.I.D. No. 66*, 222 Neb. 618, 386 N.W.2d 433 (1986).

[11] *School Dist. No. 8 v. School Dist. No. 15*, 183 Neb. 797, 164 N.W.2d 438 (1969).

[12] *Nebraska Mid-State Reclamation District v. Hall County*, 152 Neb. 410, 41 N.W.2d 397 (1950).

do public officials.[13] In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties,[14] in this case, NPGA.

[9-11] We note that the character of an interlocal agency such as NPGA, like that of a quasi-municipal corporation, "is twofold—in the exercise of its governmental functions, as a subdivision of the government, and as a private corporation, enjoying powers and privileges conferred for its own benefit."[15] A distinguishing feature of a municipal or quasi-municipal corporation, or interlocal agency, is that "it is not only a body corporate but also a body politic, the components of which, the corporators, are endowed with the right to exercise in their collective capacity a portion of the political power of the state."[16] As such, profit-seeking entities operate under different principles than does a municipal or quasi-municipal corporation or interlocal agency, which may act for a broader political purpose, seemingly in disregard of the best fiscal interests of the entity. Interlocal agencies entrusted with a duty to the public at large are not judged under the same principles governing private, for-profit corporations. And when a decision has been entrusted to the discretion of a public officer or board, that decision will not ordinarily be reviewed by the courts.[17]

In its brief, Falls City asks that we apply corporate law, even while asserting that NPGA is not a corporation. Essentially, Falls City has asked to be treated as though it is a shareholder bringing a derivative lawsuit. As a member of an interlocal

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[13] See *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987).

[14] *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006).

[15] 1 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 60 at 389 (perm. ed., rev. vol. 2006).

[16] 1 Eugene McQuillin, The Law of Municipal Corporations § 2.07.10 at 145 (John H. Silvestri & Mark S. Nelson eds., rev. 3d ed. 1999). See, also, *Kennelly v. Kent County Water Authority*, 79 R.I. 376, 89 A.2d 188 (1952); *Matthews v. Wenatchee Heights Water*, 92 Wash. App. 541, 963 P.2d 958 (1998).

[17] See, *Mtr. of Duallo Realty v. Silver*, 32 Misc. 2d 539, 224 N.Y.S.2d 55 (1962); *Jones v. Hospital*, 1 N.C. App. 33, 159 S.E.2d 252 (1968).

agency, however, Falls City delegated the power and responsibility of providing natural gas to its citizens to NPGA. In this case, Falls City does not have standing to sue because neither NMPP nor the individual defendants owed it any fiduciary duties.

We find that neither the Interlocal Cooperation Act nor the agreement Falls City signed when it joined NPGA granted Falls City the right to bring suit against NMPP or the individual defendants. NPGA is a public body, and its duties are owed to the public. Therefore, Falls City did not have standing to bring this cause of action and the action must be dismissed. Because Falls City did not have standing to bring this claim, we need not address the other assignments of error or the cross-appeals filed by either the individual defendants or CPEP.

CONCLUSION

As an interlocal agency, NPGA is a creature of statute, and Falls City is a member of the interlocal agency. Falls City signed the interlocal agreement giving the board of directors of NPGA power to make business decisions on its behalf. Neither the Interlocal Cooperation Act nor the agreement gives Falls City standing to sue NMPP or the individual defendants. We therefore find that Falls City had no right to bring this cause of action, and we reverse, and remand to the district court with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT and MILLER-LERMAN, JJ., not participating.

PHILIP PIERCE ET AL., APPELLANTS, V. PAUL DROBNY, PRESIDENT OF THE BOARD OF EDUCATION OF KNOX COUNTY SCHOOL DISTRICT #0583, ET AL., APPELLEES.

777 N.W.2d 322

Filed January 15, 2010. No. S-09-400.

1. **Rules of the Supreme Court: Pleadings.** Dismissal under Neb. Ct. R. Pldg. § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

2. **Pleadings: Appeal and Error.** An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.
3. ____: ____. When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.
4. **Public Meetings: Voting.** The Open Meetings Act is generally applicable to public meetings at which policies are usually adopted by committees, and those policies are usually not subject to a public election.
5. **Trial: Voting: Appeal and Error.** One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong. Similarly, one cannot wait on the outcome of an election to decide whether to complain about a preliminary error.
6. **Voting.** Once an election has been held, challenges to its outcome are properly limited to matters that could compromise the accuracy of the results.
7. **Schools and School Districts: Voting: Bonds.** Neb. Rev. Stat. § 10-707 (Reissue 2007), generally described, requires certification under oath of the procedures and results of a bond election. It does not require certification of the preliminary proceedings that led to the election, including the school board vote that called for it.

Appeal from the District Court for Knox County: ROBERT B. ENSZ, Judge. Affirmed.

Thomas H. DeLay, of Jewell, Collins, DeLay, Flood & Doele, for appellants.

John F. Recknor and Randall Wertz, of Recknor, Wertz & Associates, and Mark D. Fitzgerald, of Fitzgerald, Vetter & Temple, for appellees.

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

MCCORMACK, J.

NATURE OF CASE

Philip Pierce, along with several other Knox County School District residents (collectively referred to as "the Residents") filed a complaint against Knox County School District No. 0583, its board of education, and Paul Drobny in his capacity as the president of the board (collectively referred to as "the School Board"), alleging violations of the Open Meetings Act (OMA)[1] with respect to the issuance of school bonds. The

[1] Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2008).

School Board moved to dismiss the complaint, claiming that it failed to state a claim upon which relief could be granted. The court granted the School Board's motion to dismiss, and the Residents perfected this appeal. The issue presented in this appeal is whether the Residents waived their claims by failing to challenge the election that approved the bond issue.

BACKGROUND

The Residents alleged in their complaint that the School Board substantially violated the OMA by holding secret meetings, without notice, agenda, or public participation. They alleged that these secret meetings occurred before the passage of any resolution and that at the meetings, facility reviews were discussed, new construction was discussed and reviewed, and bond issues were discussed and voted upon as the preferred funding for the construction of new school buildings. Then, on August 20, 2008, the School Board publicly met and passed a resolution which authorized a special election for the issuance of bonds for the construction of a new school.

Although the Residents were presumably aware of the alleged violations during the preliminary stages leading to the resolution, they did not file any action against the School Board and instead waited to see if the bonds would pass in the public election. On November 4, 2008, an election was held at which the electors voted in favor of issuing bonds for the new school construction. However, no bonds have actually been issued yet.

The Residents filed their complaint on January 22, 2009. The complaint did not plead a claim under the election contest statutes. Instead, the Residents asked for an order under the OMA declaring the August 20, 2008, resolution void. Their claim would have been timely under the OMA.[2]

But in their complaint, the Residents further alleged that the November 4, 2008, vote in favor of the bonds was a direct result of the illegal secret meetings of the School Board and was, like the August 20 resolution, also void. Based on that allegation, the district court concluded that the Residents' suit

[2] See § 84-1414.

was simply an election contest[3] and that because the Residents did not file suit within the time period specified by the election contest statutes, their complaint was untimely. Further, the court explained that a judgment voiding the resolution would be merely advisory, as the election had been held and the bond issue adopted.

Accordingly, the district court dismissed the complaint without leave to amend. The Residents appealed. We moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[4]

ASSIGNMENTS OF ERROR

The Residents argue, consolidated and restated, that the district court erred in dismissing the complaint with prejudice because (1) the facts pleaded in the complaint establish violations of the OMA, and a declaration as such would not constitute an advisory opinion; (2) the court's failure to allow the Residents an opportunity to amend was an abuse of discretion; and (3) the Residents have a legally cognizable interest in enforcing the relief provided by the OMA.

STANDARD OF REVIEW

[1-3] Dismissal under Neb. Ct. R. Pldg. § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.[5] An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.[6] When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.[7]

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[3] See Neb. Rev. Stat. § 32-1101 (Reissue 2008).

[4] Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[5] *Crane Sales & Serv. Co. v. Seneca Ins. Co.*, 276 Neb. 372, 754 N.W.2d 607 (2008).

[6] *Id.*

[7] *Id.*

ANALYSIS

The Residents assert that the district court erred in dismissing their complaint without leave to amend for failure to state a claim. They maintain that this suit is not an election contest and that to the extent their complaint indicated they were attempting an election contest, they should be allowed to strike it. Instead, the Residents explain, they seek an order under § 84-1414 voiding the August 20, 2008, resolution to submit the issue through a public election.

But the Residents do not clearly explain how they would benefit from such an order now that the election has been held. They indicate that they might next seek an order enjoining the issuance of the bonds. The Residents maintain that passing a valid resolution to submit the bond issue to the electors is a mandatory condition precedent to a vote upon issuance of bonds and that because the resolution was allegedly based on information obtained in violation of the OMA, no bonds may be issued.

At the outset, we find little merit to the Residents' attempts to characterize their claim as a challenge to a bond issue instead of as a challenge to the election at which the bond issue was approved. The Residents' goal may be to prevent the issuance of the bonds, but they seek to enjoin it based on an alleged defect in the preliminary stages in the process leading up to the election. The real question in this case is whether, once an election takes place, a challenge under the OMA to preliminary stages leading up to the election is effectively subsumed by the election contest provisions of Neb. Rev. Stat. §§ 32-1101 through 32-1117 (Reissue 2008). We hold that an election contest is the exclusive remedy under such circumstances and that a separate challenge under the OMA does not exist once the issue is voted upon by the public.[8]

A similar issue was addressed by this court in *Eriksen v. Ray*.[9] In *Eriksen*, we held that an election contest under

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[8] See, *Eriksen v. Ray*, 212 Neb. 8, 321 N.W.2d 59 (1982); *Murphy v. Holt County Committee of Reorganization*, 181 Neb. 182, 147 N.W.2d 522 (1966).

[9] *Eriksen v. Ray, supra* note 8.

§ 32-1101 was the exclusive method to challenge a school reorganization once that reorganization was voted upon in a public election. The taxpayers in *Eriksen* alleged that in the preliminary stages leading up to the election, the county superintendent had failed to give notice of the filing of the maps and the statement of a proposed plan calling for a merger, as required by the school organization and reorganization statutes.[10] The proposed plan eventually led to a resolution calling for a bond election asking the voters whether bonds should be issued for a new elementary school in conjunction with a reorganization plan. The electors approved the bond and its corresponding reorganization plan.

We explained that it was the election that actually caused the reorganization to take place. While the voters could have brought an appropriate action before the election was held, once the election had been held, absent evidence of fraud or evidence that a voter was prevented from expressing his or her free will at the poll, "preliminary requirements concerning the giving of notice . . . or the manner in which the election is to be held, are merely directory and not jurisdictional."[11] In other words, we reasoned that after an election has been held, only challenges directed at the fairness of the election remained cognizable.

Thus, we explained that although a taxpayer might be able to bring other appropriate statutory actions before an election is held, the election contest statutes provide the exclusive method to challenge the action once an election has taken place. To hold otherwise, we said, would thwart the goals of § 32-1101 and its limited statute of limitations "designed specifically for the purpose of attempting to provide certainty to government and to determine as quickly as possible whether in fact the will of the people is to be carried out."[12] We concluded: "Regardless of how [the taxpayers] may choose to characterize their action in the instant case, it was indeed a suit to contest the special

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[10] See *id.*

[11] *Id.* at 13, 321 N.W.2d at 63.

[12] *Id.* at 15, 321 N.W.2d at 63.

election and as such should have been brought as an election contest . . . ."[13]

[4] We have never before specifically addressed the relationship of the election contest statutes to actions under the OMA. As the Residents point out, the OMA sets forth an action to void a resolution, an action that is arguably more specific than that brought by the taxpayers in *Eriksen* under the declaratory judgment act.[14] Nevertheless, we find much of the same reasoning applies. The OMA is generally applicable to public meetings at which policies are usually adopted by committees, and those policies are usually not subject to a public election.[15] But § 32-1101 provides that "[s]ections 32-1101 to 32-1117 *shall* apply to contests of any election" and that such contests encompass "any proposition submitted to a vote of the people." (Emphasis supplied.) We reasoned in *Eriksen* that it is the nature of the relief sought, not the underlying defect alleged, that determines whether the election contest statutes are implicated. The relief sought here is clearly the undoing of the effect of the election. And, as *Eriksen* suggests, the election contest statutes are the only statutory means for doing so.

[5,6] And, as pointed out in *Eriksen*, there are also particular public policy reasons to limit challenges to election results to the election contest provisions. We have often said that one cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong.[16] Similarly, one cannot wait on the outcome of an election to decide whether to complain about a preliminary error. We conclude that once an election has been held, challenges to its outcome are properly limited to matters that could compromise the accuracy of the results.

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[13] *Id.* at 14, 321 N.W.2d at 63.

[14] See, Neb. Rev. Stat. § 25-2001 (Reissue 2008); § 84-1414; *Eriksen v. Ray, supra* note 8.

[15] See, *Marks v. Judicial Nominating Comm.*, 236 Neb. 429, 461 N.W.2d 551 (1990); *Eriksen v. Ray, supra* note 8; *Murphy v. Holt County Committee of Reorganization, supra* note 8.

[16] See, e.g., *Mooney v. Gordon Memorial Hosp. Dist.*, 268 Neb. 273, 682 N.W.2d 253 (2004).

Thus, while the Residents have filed a timely claim under the OMA, they have failed to state a claim upon which relief can be granted. The relief they ultimately seek is the invalidation of the election results, and the only statutory means for invalidating an election is found in §§ 32-1101 through 32-1117.

[7] In their reply brief, the Residents also argue that they are challenging the postelection ability of the School Board to certify the bonds under Neb. Rev. Stat. § 10-707 (Reissue 2007). Contrary to the Residents' suggestion, we find this statute wholly inapplicable to the process leading to the resolution to hold an election. Section 10-707, generally described, requires certification under oath of the procedures and results of a bond election. It does not require certification of the preliminary proceedings that led to the election, including the school board vote that called for it. We express no view on whether the inability to comply with § 10-707 might, under other circumstances, warrant judicial relief. It is sufficient to say that in this case, the Residents' allegations do not implicate the requirements of § 10-707.

We agree with the district court that the Residents have no remedy under the OMA or any other statutory provisions which they argue might be applicable. Amendment of the complaint would not cure this defect. Therefore, we find no merit to any of the Residents' assignments of error.

CONCLUSION

We conclude that the Residents' complaint was properly dismissed without leave to amend for failure to state a claim. The judgment of the district court is affirmed.

AFFIRMED.

DONNA BAMFORD AND DONNA BAMFORD AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JAMES W. BAMFORD, DECEASED, APPELLEE AND CROSS-APPELLANT, V. BAMFORD, INC., A NEBRASKA CORPORATION, APPELLEE, AND JEFFREY L. ORR, TRUSTEE, ET AL., APPELLANTS AND CROSS-APPELLEES.

777 N.W.2d 573

Filed January 22, 2010. No. S-09-060.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law. When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.
4. **Corporations.** Neb. Rev. Stat. § 21-2067 (Reissue 2007) provides generally that one or more shareholders of a corporation may create a voting trust, which confers on the trustee the right to vote or otherwise act for them.
5. ____. A voting trust becomes effective when the first shares subject to the trust are registered in the trustee's name.
6. ____. A voting trust involves the transfer of a shareholder's rights arising from the shares to a trustee, who is authorized to vote the shares in the shareholder's place, while the legal title to the shares remains with the shareholder.
7. ____. Three criteria generally are recognized for a voting trust: (1) The voting rights of the stock are separate from the other attributes of ownership, (2) the voting rights granted are intended to be irrevocable for a definite period of time, and (3) the principal purpose of the grant of voting rights is to acquire voting control of the corporation.
8. **Statutes: Legislature: Public Policy.** It is the function of the Legislature, through the enactment of statutes, to declare what is the law and public policy of this state.
9. **Contracts: Public Policy.** A contract which is clearly contrary to public policy is void.
10. **Corporations: Contracts: Time.** In order to be valid, a voting trust agreement must, by its terms, be limited to a period of 10 years or less, or it must be clear from the terms and provisions of the agreement that the voting trust will terminate in 10 years or less.
11. **Corporations: Contracts.** An appointment made irrevocable under Neb. Rev. Stat. § 21-2060(4) (Supp. 2009) is revoked when the interest with which it is coupled is extinguished.

12. **Corporations: Statutes.** Although Neb. Rev. Stat. § 21-2060(4) (Supp. 2009) lists several examples of "appointments coupled with an interest," these examples are not exhaustive and other arrangements may also be held to be "coupled with an interest."
13. **Corporations: Words and Phrases.** A power coupled with an interest is a power or authority to do an act, accompanied by or connected with an interest in the subject or thing itself upon which the power is to be exercised, the power and interest being united in the same person.
14. **Corporations.** For a proxy to be coupled with an interest, the power to vote stock should be beneficial to the proxyholder. Simply being compensated for being the proxyholder is not sufficient.
15. ____. The necessary interest of the proxyholder is a proprietary incentive, or comparable security need, to maximize the overall welfare of the corporation so that abuse of the power is rendered highly unlikely.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Shawn D. Renner, Kevin J. Schneider, Keith T. Peters, and Bren H. Chambers, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellants.

Michael L. Johnson, of Leininger, Smith, Johnson, Baack, Placzek & Allen, for appellee.

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

GERRARD, J.

NATURE OF CASE

James W. Bamford founded Bamford, Inc. (Corporation), and served as its president until his death. Before his death, James executed the Bamford Irrevocable Voting Trust (Trust) which transferred all of the voting rights of his Corporation stock to the Trust and specified him as the sole voting trustee until his death. James retained all the other incidents of stock ownership. The Trust named successor trustees that did not include Donna Bamford, James' wife. And the Trust was to continue as long as either James or Donna was alive. In other words, the Trust was meant to permit Donna to inherit the stock, but prevent her from voting it.

After James died, ownership of his stock was transferred to Donna, and Donna filed this action against the Corporation,

seeking to void or revoke the Trust. There are two primary issues on appeal: first, whether the Trust is invalid because it could extend for more than 10 years,[1] and second, whether the Trust was effective as a grant of an irrevocable proxy.[2]

FACTS

James founded the Corporation, a heating and air-conditioning contractor, in 1971, and served as president until he died in 2005. Donna is James' surviving spouse and worked for the Corporation from the 1970's until 2004, when she had an argument with another longtime employee, Tom Davolt. Charles Bamford, the son of James and Donna, worked as an independent contractor for the Corporation and has served as a director since July 1996. Charles, at James' request, asked Donna not to return to work after the argument. Shortly after, Donna's employment was terminated.

In August 2004, James told Jeffrey Orr, legal counsel for James and the Corporation, that James was worried about the longevity and continued success of the Corporation. James expressed concern that if Donna obtained control of the Corporation, she would fire key people because she felt she had been mistreated when her job was eliminated. Orr discussed options with James, including "transferring the stock, gifting the stock to the kids," or creating a voting trust. Based on those discussions, Orr prepared the Trust, to which the voting rights for all of James' shares in the Corporation would be transferred. James executed the Trust on October 15, 2004.

The Trust specified that James would remain the sole voting trustee until his death. It designated Davolt and Orr as successor trustees, with Charles and James Votaw, the Corporation accountant, to replace Davolt or Orr, respectively, if they were unable to serve. The Trust provided that Donna receive a salary equal to her 2004 salary plus an annual adjustment based on the Consumer Price Index. At the time the Trust was created, James owned 798 shares of stock in the Corporation and Davolt owned 25 shares. James' shares were evidenced by

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[1] See Neb. Rev. Stat. § 21-2067(2) (Reissue 2007).

[2] See Neb. Rev. Stat. § 21-2060(4) (Supp. 2009).

stock certificate No. 2, on which a note was affixed stating that the "stock certificate is subject to the rights and restrictions granted to the Bamford Irrevocable Voting Trust."

After James' death in June 2005, Orr, as personal representative of James' estate, issued an instrument of distribution of personal property to Donna. The document transferred all of James' shares of the Corporation stock to Donna. The county court for Buffalo County appointed Donna as special administrator of James' estate in order to maintain an action challenging the validity of the Trust.

On June 16, 2006, Donna sent the trustees and the Corporation a notice of invalidity, revocation, or termination of the Trust and demand for reissuance of her shares of the Corporation stock. On October 12, Donna filed this declaratory judgment action on behalf of herself and as the special administrator of James' estate against the Corporation, Orr, Charles, Votaw, and Davolt (collectively the Trustees). Davolt's shares of the Corporation were repurchased by the Corporation on May 11, 2007, and Davolt retired on April 1, 2008. Davolt died on June 9, and this action was revived against his personal representative.

Donna's complaint sought a declaration that, among other things, the Trust was void or, in the alternative, revocable. Both sides filed motions for summary judgment. The district court sustained Donna's motion for summary judgment and denied the Trustees' motion. The court found that because the Trust would not necessarily terminate within 10 years, it was void and of no force or effect. In the alternative, the court determined that to the extent the Trust was a proxy, it was not irrevocable, such that Donna as the shareholder had the right to revoke or terminate the Trust, and had done so. The district court also ordered the Corporation to issue or reissue stock certificates demonstrating that all outstanding shares of the Corporation stock held by James have been transferred to Donna.

ASSIGNMENTS OF ERROR

The Trustees assign that the district court erred in holding that (1) the Trust is void because the trust document does not

expressly limit its duration to 10 years and (2) the Trust is not effective as an irrevocable proxy.

On cross-appeal, Donna assigns, restated, that the district court erred in (1) failing to find the trust is illegal and void because it failed to comply with the registration and notice requirements of § 21-2067; (2) finding that James was not the sole beneficiary of the trust and that therefore, it was not invalid under the principle of merger; and (3) failing to hold that a voting trust intended to take effect upon death is void and, to the extent that the trust was a proxy, that it was revoked by James' death.

STANDARD OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[3]

[3] The meaning of a statute is a question of law.[4] When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.[5]

ANALYSIS

[4,5] Section 21-2067 provides generally that one or more shareholders of a corporation may create a voting trust, which confers on the trustee the right to vote or otherwise act for them.[6] The voting trust becomes effective when the first

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[3] *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

[4] *Harvey v. Nebraska Life & Health Ins. Guar. Assn.*, 277 Neb. 757, 765 N.W.2d 206 (2009).

[5] *Curran v. Buser*, 271 Neb. 332, 711 N.W.2d 562 (2006).

[6] § 21-2067(1).

shares subject to the trust are registered in the trustee's name.[7] Importantly, as will be discussed later, a voting trust "shall be valid for not more than ten years after its effective date" unless extended by the parties to it.[8]

[6] A voting trust has been described as a device whereby persons owning stock with voting powers divorce the voting rights from the ownership, retaining the ownership to all intents and purposes and transferring the voting rights to trustees in whom the voting rights of all depositors in the trust are pooled.[9] Thus, a voting trust involves the transfer of a shareholder's rights arising from the shares to a trustee, who is authorized to vote the shares in the shareholder's place, while the legal title to the shares remains with the shareholder.[10]

[7] Although statutes regulating voting trusts vary somewhat in their requirements for a valid voting trust, three criteria generally are recognized for a voting trust: (1) The voting rights of the stock are separate from the other attributes of ownership, (2) the voting rights granted are intended to be irrevocable for a definite period of time, and (3) the principal purpose of the grant of voting rights is to acquire voting control of the corporation.[11] In this case, the Trust document itself clearly separates the voting rights of the Bamford stock from the other attributes of ownership, assigning James' voting rights to the Trust while James retained "all other incidents of ownership." The Trust was also expressly irrevocable. And it was clear that the purpose of the Trust was to acquire voting control of the Corporation, at the time of execution and after James' death.

In other words, the Trust was plainly a voting trust subject to the voting trust statute. And because it was, it was subject to the provision that unless extended, a voting trust is valid for no

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[7] § 21-2067(2).

[8] § 21-2067(2) and (3).

[9] *Oceanic Exploration Co. v. Grynberg*, 428 A.2d 1 (Del. 1981).

[10] *In re Guardianship of Lombardo*, 86 Ohio St. 3d 600, 716 N.E.2d 189 (1999).

[11] *Jackson v. Jackson*, 178 Conn. 42, 420 A.2d 893 (1979).

more than 10 years after its effective date. We now turn to the effect of that provision.

Trust Is Void Because It Does Not Expressly Limit Its Duration to 10 Years

The Trustees contend, contrary to the district court's conclusion, that § 21-2067(2) limits the duration of a voting trust to 10 years by operation of law, but does not require that the voting trust document itself contain an express limitation of 10 years. There is no dispute that, at least potentially, the terms of the trust would permit it to continue for a period exceeding 10 years. The question, then, is whether the effect of § 21-2067(2) is to terminate the Trust after 10 years, barring an extension, or whether the Trust was invalid from its inception.

In *Christopher v. Richardson*,[12] the Pennsylvania Supreme Court addressed that question. The issue in *Christopher* was the validity of a voting trust that had been entered into in connection with dealings between a company and its creditors. The trust had no defined duration, but was to remain "'in full force and effect until all percentage payments . . . have been paid in full.'"[13] The Pennsylvania voting trust statute in effect at that time stated that two or more shareholders could "'transfer their shares to any corporation or person for the purpose of vesting in the transferee or transferees all voting or other rights pertaining to such shares *for a period not exceeding ten years*.'"[14]

The Pennsylvania Supreme Court stated that the statute was a declaration of public policy and explained that in order to be valid, a voting trust agreement must, by its terms, be limited to a period of 10 years or less, or it must be clear from the terms and provisions of the agreement that the voting trust will terminate in 10 years or less.[15] Applying that principle, the court concluded that because the voting trust, by its terms,

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[12] *Christopher v. Richardson*, 394 Pa. 425, 147 A.2d 375 (1959).

[13] *Id.* at 427-28, 147 A.2d at 376 (emphasis omitted).

[14] *Id.* at 427, 147 A.2d at 376, citing 1933 Pa. Laws 364 (emphasis supplied).

[15] *Christopher, supra* note 12.

could remain in effect for a period exceeding 10 years, it was void.[16]

On the other hand, the Trustees rely on *Lloyd v. McDiarmid*,[17] a 1937 case in which the Ohio Court of Appeals suggested that a statutory 10-year limitation on the irrevocability of voting trusts was read into the voting trust agreement. In that case, a voting trust was to continue until the death of the trustor and the sale of the stock by the successor trustees, which was to occur "if possible" within 5 years of the trustor's death. The Ohio Court of Appeals reasoned that the statutory limitation supplemented the agreement, finding "nothing in the language of the agreement necessarily indicating an intention to go beyond the statute."[18]

[8,9] We find the Pennsylvania Supreme Court's reasoning more persuasive, and more applicable to this case. It is the function of the Legislature, through the enactment of statutes, to declare what is the law and public policy of this state.[19] And a contract which is clearly contrary to public policy is void.[20] Section 21-2067 provides that a voting trust agreement cannot, absent an extension, extend longer than 10 years. And contrary to the Ohio Court of Appeals' reasoning in *Lloyd*, the Trust document in this case clearly *does* indicate an intention to go beyond the statute, as its clear intent is to ensure that Donna *never* exercise shareholder voting rights, regardless of how long she survives James. To interpret the Trust to self-terminate after 10 years would be to, in effect, reform the Trust in a manner that is inconsistent with its provisions and purpose.

[10] Therefore, we conclude that in order to be valid, a voting trust agreement must, by its terms, be limited to a period of 10 years or less, or it must be clear from the terms and provisions of the agreement that the voting trust will terminate in 10

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[16] *Id.*

[17] *Lloyd v. McDiarmid*, 60 Ohio App. 7, 19 N.E.2d 292 (1937).

[18] *Id.* at 12, 19 N.E.2d at 294.

[19] *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009).

[20] See *Millennium Solutions v. Davis*, 258 Neb. 293, 603 N.W.2d 406 (1999).

years or less.[21] Because the Trust, by its terms, may remain in effect for a period exceeding 10 years, it is void as against the public policy expressed in § 21-2067(2).

Trust Is Not Effective Despite Violation of § 21-2067(2)

In a related argument, the Trustees argue that even if the Trust is not valid as a voting trust, it was still an effective conveyance of James' voting rights. In other words, the Trustees contend that the Trust is an effective conveyance of James' voting rights apart from § 21-2067, because, according to the Trustees, § 21-2067 is not the exclusive means for creating a voting trust. The Trustees suggest that where a trust is created for purposes unrelated to those served by a voting trust statute, the trust can be enforced even though it does not strictly comply with the statute.

In support of their argument, the Trustees cite a Delaware case, *Oceanic Exploration Co. v. Grynberg*,[22] in which the court upheld a purchase agreement that included an assignment of voting rights, despite the fact that it did not comply with the requirements of the Delaware voting trust statute. The court observed that the voting trust statute was intended to regulate agreements by stockholders, but was not intended to be all inclusive in the sense that it was designed to apply to every set of facts in which voting rights are transferred to trustees. Rather, the court explained that a voting trust is a stockholder-pooling arrangement with the criteria that voting rights are separated out and irrevocably assigned for a definite period of time to voting trustees for control purposes while other attributes of ownership are retained by the depositing stockholders.[23]

In *Oceanic Exploration Co.*, the court held that the test of whether an arrangement is a voting trust which must comply with the statutory requirements to be valid is whether the

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[21] See § 21-2067(2).

[22] *Oceanic Exploration Co., supra* note 9.

[23] See *id.*

arrangement is sufficiently close to the purpose of the statute as to warrant being subject to the statute. The court noted many aspects of the agreement that were inconsistent with the purpose of the statute, including that the agreement at issue in that case was an internal corporate reorganization with many aspects besides the assignment of voting rights, which had been substantially performed by the parties, and that the final contract was not among the shareholders but was an agreement between the majority shareholder group and the corporation itself. Therefore, the court concluded that the Delaware statute did not govern the validity of the agreement.[24]

But the reasoning of *Oceanic Exploration Co.* does not apply in this case, even if we assume, without deciding, that § 21-2067 may not be the exclusive means under Nebraska law for crafting an assignment of voting rights. Here, as discussed above, the Trust fell squarely within the traditional criteria for a voting trust, including the purposes for which the Trust was created. Simply put, if § 21-2067 does not apply to the Trust in this case, it does not apply to anything. Contrary to the Trustees' suggestion, § 21-2067 does not create a "safe harbor"[25] for voting trusts—it clearly imposes substantive limitations on the provisions of such agreements. We cannot agree with the Trustees' contention that the voting trust statute does not apply to the facts here. Such an interpretation would lead to an absurd result and render § 21-2067 meaningless. Therefore, we conclude that the Trustees' first assignment of error is without merit.

Trust Is Not Irrevocable Proxy

The Trustees next contend that even if the Trust is ineffective as a voting trust, it complies with § 21-2060(4), which allows shareholders to create irrevocable proxies. The Trustees contend that the Trust created a proxy and that the proxy is coupled with one or more interests, so it is irrevocable.

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[24] See *id.*

[25] Brief for appellants at 16.

[11] Section 21-2060 provides that shareholders may vote in person or by proxy and establishes the basic rules for appointing a proxy. Section 21-2060(4) provides:

> An appointment of a proxy shall be revocable by the shareholder unless the appointment form or electronic transmission conspicuously states that it is irrevocable and the appointment is coupled with an interest. Appointments coupled with an interest shall include the appointment of:
>
> (a) A pledgee;
>
> (b) A person who purchased or agreed to purchase the shares;
>
> (c) A creditor of the corporation who extended it credit under terms requiring the appointment;
>
> (d) An employee of the corporation whose employment contract requires the appointment; or
>
> (e) A party to a voting agreement created under section 21-2068.

And an appointment made irrevocable under § 21-2060(4) is revoked when the interest with which it is coupled is extinguished.[26] We note that § 21-2060 was amended in 2009; the revision does not affect our analysis, and we cite to the current version of the statute for simplicity and convenience.

Here, the first requirement—that the appointment form conspicuously state that it is irrevocable—is met. The Trustees contend that the appointment was also coupled with an interest. They concede that any interest Davolt had was extinguished, with either his retirement or his death. And they do not argue that Orr or Votaw has been irrevocably appointed as a proxy. Instead, the Trustees rely on Charles, who they contend has interests in "preserving the [C]orporation from Donna's vengeance and in seeing that [Donna] received income during her lifetime," and as a director of the company and an independent contractor.[27]

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[26] § 21-2060(6).

[27] Brief for appellants at 18-19.

There are several potential problems with the Trustees' argument. To begin with, it is not clear that the Trust could operate as a proxy to James, given that he owned the stock for which the "proxy" was purportedly given. A proxy is "[o]ne who is authorized to act as a substitute for another";[28] to describe someone as giving a proxy to himself is somewhat contradictory, and it is questionable whether James' "proxy" could be said to be coupled with an interest when he was the shareholder and had no interest that could be jeopardized by the cancellation of the proxy.[29] We also note that § 21-2060(6) provides that an irrevocable proxy is "revoked," not merely made revocable, when the interest with which it was coupled is extinguished—raising some question as to whether the proxy, even if initially irrevocable, survived James and Davolt. But for purposes of this analysis, we assume that the Trust effectively operates to appoint Charles as a proxy and that the appointment would be irrevocable if coupled with an interest. Our analysis is narrowly limited to whether Charles had an interest within the meaning of the statute.

[12,13] Although § 21-2060(4) lists several examples of "[a]ppointments coupled with an interest," these examples are not exhaustive and other arrangements may also be held to be "coupled with an interest."[30] In that regard, § 21-2060(4) incorporates the common-law test, based on principles of agency law, for whether an appointment is coupled with an interest.[31] Generally, a power coupled with an interest is a power or authority to do an act, accompanied by or connected with an interest in the subject or thing itself upon which the power is to be exercised, the power and interest being united in the same person.[32] Another common example of a proxy coupled with

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[28] Black's Law Dictionary 1346 (9th ed. 2009).

[29] See *State ex rel. Breger v. Rusche*, 219 Ind. 559, 39 N.E.2d 433 (1942).

[30] See 2 Model Business Corporation Act Ann. § 7.22, official comment at 7-129 (4th ed. 2008).

[31] See, *id.*; *Zollar v. Smith*, 710 S.W.2d 155 (Tex. App. 1986).

[32] *State ex rel. Everett Etc. v. PAC. Etc.*, 22 Wash. 2d 844, 157 P.2d 707 (1945).

an interest is to afford the proxyholder security or reimbursement because the agent has parted with something of value, or incurred obligations, for the stockholder.[33]

[14,15] In other words, for the proxy to be coupled with an interest, the power to vote stock should be beneficial to the proxyholder. Simply being compensated for being the proxyholder is not sufficient.[34] The rationale for the requirement that the interest be in the proxyholder is the need to protect the corporation. The necessary interest of the proxyholder is a proprietary incentive, or comparable security need, to maximize the overall welfare of the corporation so that abuse of the power is rendered highly unlikely.[35]

The specific circumstances included in § 21-2060(4) illustrate that principle. It has also been held, for example, that an appointment was coupled with an interest when two shareholders, whose combined shares were more than a majority of the issued stock, granted one another irrevocable proxies in order that their control of the corporation would survive either's death.[36] It has also been held that the former majority shareholder of a corporation, who received an irrevocable proxy when he sold his stock, had a sufficient interest in remaining chief executive officer of the corporation to support irrevocability.[37] And it has been held that a proxy was coupled with an interest when the proxyholder was a part owner and investor in the corporation.[38]

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[33] See, *Pan American Petroleum Corp. v. Cain*, 163 Tex. 323, 355 S.W.2d 506 (1962), *overruled on other grounds, Day & Co. v. Texland Petroleum*, 786 S.W.2d 667 (Tex. 1990); *Deibler v. The Chas. H. Elliott Co.*, 368 Pa. 267, 81 A.2d 557 (1951); *Ecclestone v. Indialantic, Inc.*, 319 Mich. 248, 29 N.W.2d 679 (1947); *State ex rel. Everett Etc., supra* note 32; *Rusche, supra* note 29; *Haft v. Haft*, 671 A.2d 413 (Del. Ch. 1995).

[34] See *Pan American Petroleum Corp., supra* note 33. See, also, *Sjogren v. Clark*, 106 Neb. 600, 184 N.W. 159 (1921); *Homan v. Redick*, 97 Neb. 299, 149 N.W. 782 (1914).

[35] See *Zollar, supra* note 31.

[36] See *State ex rel. Everett Etc., supra* note 32.

[37] See *Haft, supra* note 33.

[38] See *Zollar, supra* note 31.

By contrast, it was held that a proxy was not coupled with an interest when given as security for an underlying obligation that did not actually belong to the proxyholder.[39] We held, in *Homan v. Redick*,[40] that an agent did not have a power coupled with an interest simply because he received an office, rent free, as part of the compensation for his services. It has also been determined that a proxyholder who had been hired to both vote and sell the stock did not have an interest in the stock, as there was nothing to suggest that his right to reimbursement was jeopardized by the cancellation of his right to vote the stock, as distinguished from his contract as agent to sell it.[41] And it was held that investments and liabilities incurred by a proxyholder's relatives did not rise to the level of being an interest coupled with the appointment of the proxy.[42]

When those holdings are considered collectively, it is clear that Charles' asserted interests in this case do not rise to the level required for a proxy to be irrevocable. The suggestion that Charles has an interest in securing Donna's salary fails for two reasons. First, Donna is a collateral party—her interest is not Charles'.[43] And second, there is nothing to suggest that Donna's interest would be jeopardized by revocation of the proxy, because Donna is the shareholder and presumably capable of voting the shares herself in her own interest.[44] Charles' status as a director and independent contractor, while closer to the mark, also falls short of a direct proprietary interest in the Corporation.[45] And his purported general interest in "preserving the [C]orporation" is plainly insufficient.

In short, we have been unable to find any authority—and the Trustees do not direct us to any—supporting a finding that Charles' purported appointment as a proxy was coupled with

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[39] See *McKelvie v. Hackney*, 58 Wash. 2d 23, 360 P.2d 746 (1961).

[40] See *Homan, supra* note 34.

[41] See *Rusche, supra* note 29.

[42] See *Zollar, supra* note 31.

[43] See *id.*

[44] See *Rusche, supra* note 29.

[45] Compare *Zollar, supra* note 31.

a sufficient interest to render it irrevocable. We conclude that § 21-2060(4) does not operate to create an irrevocable proxy under these circumstances, and find no merit to the Trustees' second and final assignment of error.

Cross-Appeal

On cross-appeal, Donna makes three basic arguments: (1) The district court erred in holding that the registration and notice requirements of § 21-2067 were substantially complied with and full technical compliance is unnecessary; (2) James was the sole beneficiary of the Trust, and therefore, the Trust is invalid; and (3) the Trust is void because it was intended to take effect upon death. Our resolution of the Trustees' assignments of error is dispositive of this appeal, and therefore, we need not address Donna's assignments of error on cross-appeal.

CONCLUSION

Based on the foregoing reasons, we affirm the district court's order granting Donna's motion for summary judgment and denying the Trustees' motion for summary judgment.

Affirmed.

Wright, J., not participating.

State of Nebraska ex rel. Amanda M., appellee, v. Justin T., defendant and third-party plaintiff, appellee, and Amanda M., third-party defendant, appellant.

777 N.W.2d 565

Filed January 22, 2010. No. S-09-138.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
2. **Statutes.** Statutory interpretation is a question of law.
3. **Divorce: Child Custody.** Neb. Rev. Stat. § 42-364 (Reissue 2008) of the dissolution of marriage statutes requires that in dissolution cases, if the parties do not agree to joint custody in a parenting plan, the trial court can award joint custody if it specifically finds that it is in the best interests of the child or children.
4. **Statutes: Appeal and Error.** Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded for further proceedings.

D. Brandon Brinegar, of Ross, Schroeder & George, L.L.C., for appellant.

Jack W. Besse, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellee Justin T.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

In this paternity action subject to the Parenting Act, the district court for Buffalo County awarded the appellant, Amanda M., and the appellee, Justin T., joint legal and physical custody of their minor child, Cloe T. Neither parent sought imposition of joint custody. At issue in this case is whether the trial court, in a paternity case, can properly award joint legal and physical custody of a minor child where neither parent has requested joint custody, without first holding an evidentiary hearing specifically on the issue of joint custody. Amanda, who sought sole custody, appeals. We conclude that the joint custody order was error, and we reverse the district court's judgment and remand the cause for further proceedings.

STATEMENT OF THE FACTS

Amanda and Justin are the parents of Cloe. The parents were in a relationship for approximately 2 years. Their relationship ended when Cloe was around 9 months old. Amanda also has two other children. Prior to the relationship's end, Justin contends, he spent significant time with Cloe and Amanda's other children.

Since Cloe's birth, Amanda has been Cloe's primary caregiver. After the parents separated, Justin had weekly visitation with Cloe, which visits were supervised by Amanda.

Because Amanda is receiving state assistance, on August 26, 2008, the State of Nebraska filed a complaint under Neb. Rev.

Stat. §§ 43-1401 through 43-1408 (Reissue 2008) to establish paternity and seek child support on behalf of Amanda and against Justin.

In response, Justin filed an answer and third-party complaint, seeking additional visitation with Cloe and adding Amanda as a third-party defendant. Justin did not seek sole or joint legal or physical custody of Cloe. Amanda responded to Justin's answer and also filed a cross-claim seeking sole custody of Cloe and the court's permission to remove Cloe from Nebraska so that Amanda could attend nursing school in Texas. Justin objected to the request for removal. Amanda argued that the move was necessary because in Nebraska, there is a 2-year waiting list for the nursing program she intends to pursue.

The trial court held a hearing over the course of 2 days. In a journal entry filed on January 8, 2009, the court awarded the parties joint physical and legal custody, granted Amanda permission to remove Cloe from Nebraska upon the condition that she first demonstrate to the court that she is enrolled in an educational program in Texas, directed Amanda to return Cloe to Nebraska upon completion of the educational program in Texas, established a visitation schedule to be in effect prior to Amanda's move to Texas, established a visitation schedule to be in effect after Amanda's return from Texas, ordered Justin to pay child support, and ordered Justin to reimburse Amanda for a portion of the daycare and health care expenses that she pays. Amanda appeals from this order.

ASSIGNMENTS OF ERROR

Amanda claims, inter alia, that the trial court erred in (1) awarding joint legal and physical custody of Cloe without making a specific finding that joint legal and physical custody was in Cloe's best interests and (2) awarding joint legal and physical custody when neither party sought or agreed upon joint custody, in violation of Amanda's right to due process. Because our resolution of these assignments of error results in further proceedings in this case, we do not address additional assignments of error claimed by Amanda.

STANDARDS OF REVIEW

[1,2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *Allen v. Immanuel Med. Ctr.*, 278 Neb. 41, 767 N.W.2d 502 (2009). Statutory interpretation is a question of law. *Id.*

ANALYSIS

The Parenting Act Does Not Require the Trial Court to Make a Specific Finding That Joint Custody Is in the Best Interests of the Child.

Our analysis of Amanda's first assignment of error requires us to explain the interplay between the Parenting Act found in chapter 43 of the Nebraska Revised Statutes and the dissolution of marriage statutes found in chapter 42 as these acts apply to the issues in this case. In its order, the trial court awarded the parties joint legal and physical custody but did not make a specific finding that this arrangement was in Cloe's best interests.

[3] For her first assignment of error, Amanda relies on Neb. Rev. Stat. § 42-364 (Reissue 2008), regarding custody in the context of marital dissolution, and claims that the trial court erred in ordering joint legal and physical custody in the absence of an explicit finding that joint legal and physical custody was in Cloe's best interests. Section 42-364 of the dissolution of marriage statutes requires that in dissolution cases, if the parties do not agree to joint custody in a parenting plan, the trial court can award joint custody if it specifically finds that it is in the best interests of the child or children.

Justin responds by arguing that because chapter 42 governs cases of marital dissolution, and this is an action under chapter 43 to establish paternity under the Parenting Act, the requirement in § 42-364 that a court make a specific finding of best interests before awarding joint custody is inapplicable. Although the preferred practice is for a court to declare the best interests of the child in custody decisions, given the plain language of the Parenting Act, we agree with Justin that the district court did not err when it did not make a specific finding of best interests in this case.

As an initial matter, we must determine whether the Parenting Act controls this case. We conclude that it does. Neb. Rev. Stat. § 43-2924 (Reissue 2008) of the Parenting Act provides:

> (1) The Parenting Act shall apply to proceedings or modifications filed on or after January 1, 2008, in which parenting functions for a child are at issue (a) under Chapter 42, including, but not limited to, proceedings or modification of orders for dissolution of marriage and child custody and (b) under sections 43-1401 to 43-1418. . . .
>
> (2) The Parenting Act does not apply in any action filed by a county attorney or authorized attorney pursuant to his or her duties under section 42-358, 43-512 to 43-512.18, or 43-1401 to 43-1418, the Income Withholding for Child Support Act, the Revised Uniform Reciprocal Enforcement of Support Act before January 1, 1994, or the Uniform Interstate Family Support Act for purposes of the establishment of paternity and the establishment and enforcement of child and medical support. . . . If both parents are parties to a paternity or support action filed by a county attorney or authorized attorney, the parents may proceed with a parenting plan.

The proceedings in this case were initiated by a complaint filed by the State pursuant to §§ 43-1401 through 43-1408, which allow recovery of child support for a child born out of wedlock when paternity of the child's father is established. Under § 43-2924(2), quoted above, such proceedings for establishing paternity are excluded from the Parenting Act unless certain conditions are met. Those conditions were met in this case.

In his answer to the complaint, Justin requested increased visitation and brought Amanda into the action as a third-party defendant. Amanda responded and sought sole custody. Joinder was allowed. Both parents became parties to the action, see § 43-2924(2), and the proceeding became one in which custody and parenting functions were at issue under § 43-1401. The Parenting Act applies, see § 43-2924(1), and subjects the parents to a parenting plan, see § 43-2924(2).

Having determined that the Parenting Act governs this case, we now turn to the requirements that the Parenting Act imposes on the trial court with respect to issues relative to parenting functions. Neb. Rev. Stat. § 43-2929 (Reissue 2008) lists the numerous issues which the parenting plan must resolve. For purposes of the instant case, we limit our discussion to the issues of custody. In this regard, § 43-2929 states:

> (1) . . . When a parenting plan has not been developed and submitted to the court, the court shall create the parenting plan in accordance with the Parenting Act. A parenting plan shall serve the best interests of the child pursuant to sections 42-364 and 43-2923 and shall:
>
> (a) Assist in developing a restructured family that serves the best interests of the child by accomplishing the parenting functions; and
>
> (b) Include, but not be limited to, determinations of the following:
>
> (i) Legal custody and physical custody of each child.

[4] Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Rohde v. City of Ogallala*, 273 Neb. 689, 731 N.W.2d 898 (2007).

In this case, the parents acknowledge that no parenting plan was presented to the court. Thus, based on the language of § 43-2929 and given the fact that custody became an issue in this case, the trial court was required to develop a parenting plan which "shall serve the best interests of the child." See § 43-2929(1). In developing a parenting plan, the trial court was required to determine, inter alia, the "[l]egal custody and physical custody" of Cloe. See § 43-2929(1)(b)(i). See, also, *Bhuller v. Bhuller*, 17 Neb. App. 607, 767 N.W.2d 813 (2009) (holding, in dissolution action subject to Parenting Act, that when trial court did not resolve visitation issues as required under § 43-2929, order was not final, appealable order).

In requiring the creation of a parenting plan, § 43-2929(1) states that the parenting plan "shall serve the best interests of the child pursuant to sections 42-364 and 43-2923." Section 42-364 of the dissolution of marriage statutes does not explicitly list factors to consider when determining best

interests, but, instead, refers to Neb. Rev. Stat. § 43-2923 (Reissue 2008), which does list the best interests factors. Section 43-2923 provides:

> The best interests of the child require:
>
> (1) A parenting arrangement and parenting plan or other court-ordered arrangement which provides for a child's safety, emotional growth, health, stability, and physical care and regular and continuous school attendance and progress for school-age children;
>
> (2) When a preponderance of the evidence indicates domestic intimate partner abuse, a parenting and visitation arrangement that provides for the safety of a victim parent;
>
> (3) That the child's families and those serving in parenting roles remain appropriately active and involved in parenting with safe, appropriate, continuing quality contact between children and their families when they have shown the ability to act in the best interests of the child and have shared in the responsibilities of raising the child;
>
> (4) That even when parents have voluntarily negotiated or mutually mediated and agreed upon a parenting plan, the court shall determine whether it is in the best interests of the child for parents to maintain continued communications with each other and to make joint decisions in performing [such] parenting functions as are necessary for the care and healthy development of the child. If the court rejects a parenting plan, the court shall provide written findings as to why the parenting plan is not in the best interests of the child; and
>
> (5) That certain principles provide a basis upon which education of parents is delivered and upon which negotiation and mediation of parenting plans are conducted. Such principles shall include: To minimize the potentially negative impact of parental conflict on children; to provide parents the tools they need to reach parenting decisions that are in the best interests of a child; to provide alternative dispute resolution or specialized alternative dispute resolution options that are less adversarial for the child and the family; to ensure that the child's voice is heard

> and considered in parenting decisions; to maximize the safety of family members through the justice process; and, in cases of domestic intimate partner abuse or child abuse or neglect, to incorporate the principles of victim safety and sensitivity, offender accountability, and community safety in parenting plan decisions.

We take the foregoing statutory requirements together and apply them to this paternity case involving a custody issue where no parenting plan was submitted. Although we disapprove of the joint custody order, as discussed below, we conclude that the trial court correctly developed a parenting plan which was intended to serve the best interests of Cloe and included a custody provision. In developing the parenting plan, the trial court was required to consider the best interests factors listed in § 43-2923. In contrast to the language of § 42-364 of the dissolution of marriage statutes, the Parenting Act does not explicitly require that the court make a specific finding that joint custody is in the best interests of the child when ordering joint custody in a paternity case.

In this case, the parenting plan created by the court followed the criteria set forth by the Legislature and there is no evidence or argument that the best interests of Cloe did not guide the trial court's decision in its award of custody. Although it is preferable to make a finding that the best interests of the child dictate the result, it is not error under the Parenting Act in a paternity case to fail to make a specific finding of best interests. Thus, although we find error with respect to the joint custody order for due process reasons explained below, we conclude that Amanda's first argument, claiming that the trial court erred when it did not make a specific finding that joint custody was in the best interests of Cloe, is without merit.

Due Process Requires That When Neither Party Has Requested Joint Custody, the Trial Court Shall Hold a Hearing Before Awarding Joint Custody.

For her second assignment of error, Amanda claims that the trial court violated her right to due process of law by awarding joint custody without first holding a hearing on the issue.

In response, Justin argues that the trial court was not required to hold a hearing on the matter of joint custody. Justin reasons that the language in the Parenting Act which instructs the trial court to create a parenting plan including a custody determination, in the absence of a plan's being presented to the court, is sufficient notice that joint custody may be awarded after the hearing on the initial pleadings.

We do not agree with Justin's analysis and instead conclude that before awarding parents joint custody of a minor child, due process requires that the trial court hold a hearing on the issue. Because the court failed to do so, the joint custody determination was error, and we reverse, and remand for further proceedings.

In considering Amanda's second assignment of error, we again turn to the language of the Parenting Act. Section 43-2929(1) states that a parenting plan "shall serve the best interests of the child pursuant to sections 42-364 and 43-2923." Because the language of § 43-2929 states that the best interests of the child shall be considered under both §§ 42-364 and 43-2923, we conclude that our due process jurisprudence regarding joint custody under § 42-364 is incorporated into parenting plan orders entered under the Parenting Act. Accordingly, we refer to our decision in *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007), decided under § 42-364, for guidance in this case.

In *Zahl*, both parents in a marital dissolution action sought sole custody of the minor child. After holding a general custody hearing, the court awarded the parties joint legal and physical custody. The father appealed, arguing that the court was required to hold an evidentiary hearing directed to the issue of joint custody before awarding joint custody. We agreed with the father. We held that when a court has determined that joint physical custody is, or may be, in a child's best interests but neither party has requested joint custody, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody. *Id.*

In considering the father's argument in *Zahl*, we observed that

> [g]enerally, procedural due process requires parties whose rights are to be affected by a proceeding to be given timely notice, which is reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker.

273 Neb. at 1052, 736 N.W.2d at 373.

In determining that the parties in *Zahl* had not received adequate due process, we noted that joint physical custody must be reserved for cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction and will provide a stable atmosphere for the child to adjust to, rather than perpetuating turmoil or custodial wars. *Id.* Therefore, because the factual inquiry for awarding joint custody was substantially different from that for an award of sole custody, without notice that joint custody would be considered, the parties in *Zahl* did not receive adequate due process in preparing for the hearing on custody and were entitled to a new hearing. *Id.*

Based on the principles established in *Zahl*, we conclude that in a paternity case subject to the Parenting Act where neither party has requested joint custody, if the court determines that joint custody is, or may be, in the best interests of the child, the court shall give the parties notice and an opportunity to be heard by holding an evidentiary hearing on the issue of joint custody.

In this case, the hearing held by the trial court did not satisfy the requirements of due process. Prior to the hearing, based on the pleadings, Justin had merely sought increased visitation with Cloe and Amanda had sought sole custody. Neither parent had requested joint custody. Therefore, the evidence the parties presented, or were prepared to present, at the trial was

substantially different from the evidence that would be used to advocate or contest a ruling of joint custody.

Because the court failed to hold a hearing that satisfied the requirements of due process, the trial court's award of joint custody was error. Accordingly, we reverse the district court's judgment and remand the cause for further proceedings.

CONCLUSION

This case is subject to the Parenting Act. Because the parents in this paternity case where custody was an issue did not present the trial court with a parenting plan, the court did not err by creating a parenting plan, which included a determination regarding the custody of the child. Under the plain language of the Parenting Act, the court in a paternity case is not required to make a specific finding that joint custody, if properly awarded, is in the best interests of the minor child. On a record such as this, where neither party has requested joint custody, if the court determines that joint custody, is, or may be, in the best interests of the child, due process requires that the court hold a hearing on the matter before entering an order awarding joint custody under the Parenting Act. The district court failed to hold a hearing, and the joint custody order was error. Therefore, the district court's judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WILLARD TEADTKE AND LOLA TEADTKE, HUSBAND AND WIFE, AS TRUSTEES OF THE WILLARD AND LOLA TEADTKE TRUST, APPELLEES AND CROSS-APPELLANTS, V. E.D. HAVRANEK, ALSO KNOWN AS EDDIE DEAN HAVRANEK, AND KAREN K. HAVRANEK, HUSBAND AND WIFE, APPELLANTS AND CROSS-APPELLEES, AND TOWN OF LYNCH, BOYD COUNTY, NEBRASKA, ALSO KNOWN AS LYNCH TOWNSHIP, ET AL., APPELLEES.

777 N.W.2d 810

Filed January 22, 2010. No. S-09-165.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the trial court.
2. **Easements: Adverse Possession: Equity: Jurisdiction: Appeal and Error.** A suit to confirm a prescriptive easement is one grounded in the equitable jurisdiction of the district court and, on appeal, is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the appellate court will consider that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Costs: Appeal and Error.** The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion.
4. **Statutes: Equity: Jurisdiction.** Where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before one may resort to equity.
5. **Equity: Words and Phrases.** An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
6. **Easements: Adverse Possession: Highways: Time.** To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land.
7. **Easements: Adverse Possession: Proof.** To prove a prescriptive right to an easement, all the elements of prescriptive use must be generally established by clear, convincing, and satisfactory evidence.
8. **Easements: Adverse Possession.** The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. Such use must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, for the full prescriptive period.
9. **Easements: Adverse Possession: Presumptions.** Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time

sufficient to acquire an easement by adverse user, the use will be presumed to be under claim of right.

10. **Adverse Possession: Presumptions: Proof.** If a person proves uninterrupted and open use for the necessary period without evidence to explain how the use began, the presumption is raised that the use is adverse and under claim of right, and the burden is on the owner of the land to show that the use was by license, agreement, or permission.
11. ____: ____: ____. The presumption of adverse use and claim of right, when applicable, prevails unless it is overcome by a preponderance of the evidence.
12. **Easements: Adverse Possession: Words and Phrases.** The word "exclusive" in reference to a prescriptive easement does not mean that there must be use only by one person, but, rather, means that the use cannot be dependent upon a similar right in others.
13. **Easements: Highways: Abandonment.** In the case of public roads, the fact that only a few members of the public still use the road does not mean that the road has been abandoned.
14. **Easements: Proof.** The nature and extent or scope of an easement must be clearly established.
15. **Easements: Adverse Possession: Highways.** The extent and nature of an easement is determined from the use made of the property during the prescriptive period. The width of a public highway acquired by prescription or dedication must be determined as a question of fact by the character and extent of the use or the amount dedicated to public use. If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path, but the right extends to such width as is reasonably necessary for public travel.
16. **Equity: Costs.** In equity actions, taxation of costs rests in the discretion of the trial court.

Appeal from the District Court for Boyd County: MARK D. KOZISEK, Judge. Affirmed.

Shannon L. Doering for appellants.

Tom D. Hockabout, of Egley, Fullner, Montag & Hockabout, for appellees Willard Teadtke and Lola Teadtke.

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

MILLER-LERMAN, J.

NATURE OF CASE

This case was initiated by appellees, Willard Teadtke and Lola Teadtke, by the filing of a complaint seeking the declaration of a roadway easement and injunctive relief. E.D. Havranek and Karen K. Havranek appeal from the orders of

the district court for Boyd County, which exercised its equity jurisdiction and found that a public prescriptive easement exists across the Havraneks' property and defined the extent and nature of the easement. The Havraneks assert that the court erred by exercising its equity jurisdiction in this action, because the Teadtkes failed to avail themselves of the statutory remedy dealing with isolated land provided under Neb. Rev. Stat. §§ 39-1713 through 39-1719 (Reissue 2008) prior to filing this action. The Havraneks also appeal from the district court's decision on the merits. The Teadtkes cross-appeal the denial of their request for the cost of their road survey. Finding no error, we affirm.

STATEMENT OF FACTS

The Havraneks and the Teadtkes own adjoining properties located in Boyd County, Nebraska. The Teadtkes' 80-acre parcel is located directly south of the Havraneks' land. The only access to the Teadtkes' property is a road that runs south across the Havraneks' property from Nebraska Highway 12.

On November 26, 2007, the Teadtkes filed a complaint against the Havraneks and certain other parties. This appeal involves only the Teadtkes and the Havraneks. The complaint sought a declaration that there exists a public road across the Havraneks' property or a declaration that the Teadtkes own a private easement over the Havraneks' property from Highway 12 to the Teadtkes' property. The Teadtkes also sought an injunction preventing the Havraneks from obstructing the road within its 40-foot width and requiring the Havraneks to remove any existing obstructions. The Teadtkes asserted that the Havraneks had encroached on the right-of-way by constructing a fence that prevented the Teadtkes from moving implements and machinery along the road.

In their response, the Havraneks asked the district court to dismiss the Teadtkes' complaint for the reason, inter alia, that §§ 39-1713 through 39-1719 provide an adequate statutory remedy for the Teadtkes' alleged inadequate access to their property. The Havraneks argued that the court lacked equity jurisdiction because the Teadtkes failed to exhaust this statutory remedy dealing with isolated land.

At trial, the Teadtkes presented the testimony of residents of the area who testified regarding their recollections of the use of the land now owned by the Teadtkes. One longtime resident testified that the road that runs through the property now owned by the Havraneks had been used to access lands south of the Havraneks' property as far back as the 1930's and continuing through the 1940's. Other residents testified that at various times since the 1960's, the road had been used to access land south of the property for hunting, agricultural, and construction purposes. The Teadtkes presented the testimony of a member of the Lynch Township Board. He testified that he had been a member of the board since 1997 or 1998 and that in that time, the board had authorized maintenance of the road "once or twice a year" and had paid for a culvert to be installed.

The Teadtkes testified regarding their personal use of the road since the mid-1950's to access their property, which was then owned by Willard Teadtke's father. The Teadtkes have owned the land since 1993. They testified that other people had also used the road for various purposes over the years. Willard Teadtke testified that in order to accommodate the types of equipment that have traversed the road, the road needed to be 35 to 40 feet wide. He also testified that he paid a surveying firm $2,707.71 to perform a survey of the road. The Teadtkes presented the testimony of the land surveyor who had performed the survey. In connection with the surveyor's testimony, the court received into evidence the surveyor's drawing depicting an easement for the road with a width of 40 feet.

After the Teadtkes presented their evidence, the court stated that at the Teadtkes' request, the court intended to "personally view the property in question," which would entail "just driving down the road, making observations," accompanied by counsel for the parties. The court later noted for the record that the court had "had an opportunity to go out and observe the real estate in question."

In the Havraneks' defense, E.D. Havranek testified that in 2006, he put up a gate at the Highway 12 entrance to the road after obtaining the Teadtkes' approval. After the gate was

removed, E.D. Havranek began installing a fence along the east side of the road in June 2007. E.D. Havranek testified that the fence he constructed ran along only a part of the property and that other fencing had been there since at least 1965. He also testified that he had measured the width of the road as it entered from Highway 12 and that the width from the outer edges of the wheel tracks was 10 feet 6 inches.

Following trial, the court entered a decree on February 4, 2009. The court first rejected the Havraneks' argument that the court should not exercise its equity jurisdiction. The court indicated that §§ 39-1713 through 39-1719 provide a remedy for an owner of land that is "shut out from all public access" and noted that such remedy exists so that the landowner may petition the county board to establish and provide an access road. The court stated that the purpose of the present action as alleged by the Teadtkes was to determine whether the Teadtkes had access to their land by an established public road or by a prescriptive private easement. The court reasoned that the statutory remedy was not appropriate unless and until it was determined in this case that the land was shut out from all public access. If the result of this action were adverse to the Teadtkes, then they could allege that they have no public access to their property and could seek redress from the county board pursuant to §§ 39-1713 through 39-1719. If the court in this action declared that a public road existed or that the Teadtkes held a prescriptive easement, then the land would not be shut out from all public access and there would be no remedy under the statutes. The court therefore concluded that the statutory remedy provided in §§ 39-1713 through 39-1719 did not prevent the court from exercising its equity jurisdiction in this case.

The court then considered the substance of the complaint to determine whether a prescriptive easement existed. The court found the following from the evidence: As early as the 1930's, the road was used to access properties to the south of the Havraneks' property. The Teadtkes began occupying their property in the mid-1950's and bought the property in 1993; during that time, they had, for the most part, used the road without restriction. During a period in 2006, the Havraneks

placed a gate across the road near Highway 12 during pasture season, but the Havraneks sought the Teadtkes' permission to place the gate, which was removed when the need for its use no longer existed.

The court concluded that the Teadtkes had established the existence of a prescriptive easement by clear, convincing, and satisfactory evidence. The court determined that the Teadtkes and their predecessors in title had used and enjoyed the road since at least the mid-1950's. The court noted that because use of the road was uninterrupted and open for the required 10-year period, the presumption was raised that the use was adverse and under claim of right. The court further noted that the Havraneks did not overcome that presumption, because they adduced no evidence that the Teadtkes' or the public's use of the road was by license, agreement, or permission.

Referring to the evidence, the court further concluded that the prescriptive easement was public in nature. The court acknowledged that at the time of trial, use of the road was generally limited to the Teadtkes and their employees, contractors, and business associates. However, the court noted considerable evidence that from the 1930's through the 1950's, other persons used the road to access property south of the Havraneks' property because they lived on such property or they used the property for agricultural or hunting purposes. The court further noted that since at least 1997, the Lynch Township Board annually authorized grading of the road and, in 1998, installed a culvert under the road.

With regard to the extent of the easement, the court rejected the Teadtkes' request for an easement 40 feet in width along the entire length of the road. The court noted that the evidence established that the Teadtkes and others used a 35- to 40-foot-wide strip to negotiate the turn onto the road from Highway 12 and the first two curves of the road south of Highway 12; however, the court determined that the Teadtkes failed to establish that the road was 40 feet wide throughout its length.

Given the evidence, the court ordered and decreed that the public held a public prescriptive easement for ingress and egress over and across the Havraneks' property. The easement

was declared to be 40 feet wide at the entrance from Highway 12 and through the first two curves and 20 feet wide for the remainder of the easement. The court entered an injunction prohibiting the Havraneks from interfering with the public easement and requiring them to remove any existing encroachments they had placed on the property. The court taxed costs of $201.39 to the Havraneks and ordered all parties to pay their own remaining costs. The court overruled and denied any other claims for relief by either party, including the Teadtkes' request to be awarded the cost of their road survey.

The Havraneks appeal, and the Teadtkes cross-appeal.

ASSIGNMENTS OF ERROR

The Havraneks assert that the district court erred when it (1) exercised its equity jurisdiction in this action; (2) granted a public prescriptive easement; and (3) defined the scope of the easement, which exceeded the boundaries of what had been used by the Teadtkes or their predecessors.

For their cross-appeal, the Teadtkes assert that the court erred when it failed to tax as costs the expense they incurred for a survey of the road.

STANDARDS OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the trial court. *Miller v. Regional West Med. Ctr.*, 278 Neb. 676, 772 N.W.2d 872 (2009).

[2] A suit to confirm a prescriptive easement is one grounded in the equitable jurisdiction of the district court and, on appeal to this court, is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another. *Gerberding v. Schnakenberg*, 216 Neb. 200, 343 N.W.2d 62 (1984).

[3] The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion. See *Hein v. M & N Feed Yards, Inc.*, 205 Neb. 691, 289 N.W.2d 756 (1980).

ANALYSIS

Appeal: The District Court Properly Exercised Its Equity Jurisdiction.

The Havraneks first assert that the district court improperly exercised its equity jurisdiction in this case. They argue that the Teadtkes had an adequate statutory remedy under §§ 39-1713 through 39-1719 but failed to avail themselves of such remedy prior to seeking equitable relief. Given the allegations in the complaint and the relief sought, we conclude that the court properly exercised its equity jurisdiction.

In this action, the Teadtkes sought as relief a declaration that a public road existed over the Havraneks' property or a declaration that the Teadtkes owned a prescriptive easement over the property. The Teadtkes also sought injunctive relief to prevent the Havraneks from encroaching upon the road and to require the Havraneks to remove existing encroachments. An adjudication of rights with respect to an easement is an equitable action, *Homestead Estates Homeowners Assn. v. Jones*, 278 Neb. 149, 768 N.W.2d 436 (2009), and an action for injunction sounds in equity. *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

[4,5] Where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before one may resort to equity. *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001). An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006).

The Havraneks claim that the district court should not have entertained this action in equity, because the Teadtkes did not exhaust the statutory remedy under §§ 39-1713 through 39-1719. These statutes generally provide owners of isolated land the right to obtain access to the land by an access road or a public road. The owner of isolated land may apply to the county board as set forth in § 39-1713. If the board finds that certain conditions are present, the board is required to provide an access road or a public road to the land; the board is also required to appraise the damages to the owner of the land over

which access is to be provided, and such damages are to be paid by the person petitioning for access. See § 39-1716.

It is important to note that the relief available under §§ 39-1713 through 39-1719 is limited to owners of "isolated" lands. Under § 39-1713(1), a person seeking relief under the statutes must allege, inter alia, that "such real estate is shut out from all public access, other than a waterway, by being surrounded on all sides by real estate belonging to other persons, or by such real estate and by water." Such an assertion is inconsistent with the allegations made by the Teadtkes in this case.

The Teadtkes did not allege that their land was shut out from all public access; to the contrary, the gravamen of their complaint was that a road existed over the Havraneks' property and that the road provided access to their property. The Teadtkes sought a declaration that a public road existed and an injunction preventing the Havraneks from interfering with use of the road. Because the Teadtkes claimed the existence of a public road that provided access to their property, it would have been inconsistent for them to have alleged that their land was isolated or "shut out from all public access," as required for relief under §§ 39-1713 through 39-1719. See *Burton v. Annett*, 215 Neb. 788, 789, 341 N.W.2d 318, 319 (1983) (noting that landowner in action under § 39-1713 had "unsuccessfully sought judgment . . . for declaration of a prescriptive right-of-way" prior to pursuing statutory remedy under § 39-1713).

Because it was the Teadtkes' position that a public road provided access to their land, the statutory remedy provided under §§ 39-1713 through 39-1719 was not available to them and they were not required to exhaust such remedy prior to bringing this equitable action. We conclude that the district court's analysis to the same effect was correct and that the district court did not err by exercising its equity jurisdiction in this case.

Appeal: The District Court Did Not Err by Granting a Public Prescriptive Easement and Defining the Scope Thereof.

The Havraneks next assert that the district court erred by granting a public prescriptive easement. They argue as a general

matter that the Teadtkes failed to establish a prescriptive easement by clear and convincing evidence, and they argue in particular that the Teatdtkes failed to establish or even allege the existence of a public, as opposed to a private, easement. The Havraneks further claim that the court erred by granting an easement that exceeded in scope what had been used by the Teadtkes or their predecessors.

We first address the Havraneks' assertion that the Teadtkes failed to allege the existence of a public, as opposed to a private, easement. In their complaint, the Teadtkes alleged that a road existed across the Havraneks' property between Highway 12 and the Teadkes' property and that "said road is a public road used by [the Teadtkes and others] and the public in general." They also alleged that the road had been maintained by the town of Lynch "for many years." For their prayer for relief, the Teadtkes asked that the court "declare there exists a public road" across the Havraneks' property or, in the alternative, that the court declare that the Teadtkes owned a private easement over the Havraneks' property. The Teadtkes did not fail to allege the existence of a public easement, and we therefore consider whether the evidence established the existence of such public easement.

[6,7] To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land. *Harders v. Odvody*, 261 Neb. 887, 626 N.W.2d 568 (2001). To prove a prescriptive right to an easement, all the elements of prescriptive use must be generally established by clear, convincing, and satisfactory evidence. *Id.*

[8] The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. Such use must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, for the full prescriptive period. *Id.*

The district court found that all the elements of a public prescriptive easement existed. The court noted testimony regarding use of the road as early as the 1930's by prior landowners and others to access both the land now owned by the Teadtkes and other real estate. The court also noted testimony regarding use of the road since the 1950's by the Teadtkes and their associates. Such use extended for a period exceeding the 10 years required to establish a prescriptive easement.

[9-11] The prevailing rule is that where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under claim of right. *Harders v. Odvody, supra*. If a person proves uninterrupted and open use for the necessary period without evidence to explain how the use began, the presumption is raised that the use is adverse and under claim of right, and the burden is on the owner of the land to show that the use was by license, agreement, or permission. *Id*. The presumption of adverse use and claim of right, when applicable, prevails unless it is overcome by a preponderance of the evidence. *Id*. The Havraneks did not provide sufficient evidence to overcome the presumption of adverse use and a claim of right.

[12] The word "exclusive" in reference to a prescriptive easement does not mean that there must be use only by one person, but, rather, means that the use cannot be dependent upon a similar right in others. *Werner v. Schardt*, 222 Neb. 186, 382 N.W.2d 357 (1986). The Teadtkes showed that their use of the property was not dependent on a similar right in others.

[13] The evidence also established that the easement was public. According to the record, the road had been used by various persons for various purposes since the 1930's. In more recent years, the road had mainly been used by the Teadtkes and their associates. However, in the case of public roads, the fact that only a few members of the public still use the road does not mean that the road has been abandoned. *Sellentin v. Terkildsen*, 216 Neb. 284, 343 N.W.2d 895 (1984). The evidence also showed that the Lynch Township Board had authorized maintenance of the road and had installed a culvert. In

view of the evidence, we conclude that the district court did not err in concluding that the public held a prescriptive easement over the Havraneks' property.

With regard to the extent and scope of the easement, the Havraneks argue that by declaring an easement that was 40 feet wide in certain areas, the court exceeded the scope of actual use that had been proved by the Teadtkes. The court ordered that the easement was 20 feet wide through much of its length, rather than the 40 feet requested by the Teadtkes for the entire length of the easement. However, the court ordered that the easement was 40 feet wide for a portion of the easement that was near Highway 12. The court found that the additional width was needed for the Teadtkes and others "to negotiate the turn onto the road from Highway 12 and the first two curves south of Highway 12."

[14,15] The nature and extent or scope of an easement must be clearly established. *Werner v. Schardt, supra*. The extent and nature of an easement is determined from the use made of the property during the prescriptive period. The width of a public highway acquired by prescription or dedication must be determined as a question of fact by the character and extent of the use or the amount dedicated to public use. If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path, but the right extends to such width as is reasonably necessary for public travel. *Smith v. Bixby*, 196 Neb. 235, 242 N.W.2d 115 (1976).

We conclude that the district court did not err in the widths it assigned to the various portions of the easement. We note that Willard Teadtke testified regarding the difficulties of negotiating the turn from Highway 12 and the curves in the road near Highway 12. Willard Teadtke also testified that the road was used to transport farm machinery and other large equipment for farming operations on the Teadtkes' property. We note further that the court in this case stated on the record that it "had an opportunity to go out and observe the real estate in question." In determining that the court did not err in the widths it assigned to the easement, we consider the fact that the court actually observed the road and the surrounding area and from such observation determined that a width of 40 feet was

necessary in certain areas so that the Teadtkes and others could transport machinery and equipment over the road.

We conclude that the district court did not err in concluding that the public held a prescriptive easement over the Havraneks' property and did not err in declaring the easement to have a width of 40 feet in certain areas.

Cross-Appeal: The District Court Did Not Err When It Declined to Tax as Costs the Expense for the Road Survey.

In their cross-appeal, the Teadtkes assert that the district court erred when it declined to tax as costs the expense they incurred for a survey of the road. We conclude that the court did not abuse its discretion by deciding not to tax as costs the $2,707.71 the Teadtkes incurred for the survey.

[16] In equity actions, taxation of costs rests in the discretion of the trial court. *Hein v. M & N Feed Yards, Inc.*, 205 Neb. 691, 289 N.W.2d 756 (1980). The Teadtkes assert that this action was necessitated by the Havraneks when they encroached upon the Teadtkes' use of the road and that therefore the Havraneks as the unsuccessful party should bear some of the costs the Teadtkes incurred to help the court make an accurate ruling.

In its order, the court taxed costs in the amount of $201.39 to the Havraneks and ordered that "each party shall pay their remaining costs." Given our standard of review, we determine that the district court did not abuse its discretion in the taxation of costs, and we reject the Teadtkes' assignment of error on cross-appeal.

CONCLUSION

We conclude that the district court properly exercised its equity jurisdiction in this case and that the court did not err by declaring a public prescriptive easement and did not err in determining the scope of the easement. We further conclude that the court did not err when it declined to tax as costs to the Havraneks the expense the Teadtkes incurred for a road survey. We therefore affirm the orders of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LORA L. McKINNEY, APPELLANT.

777 N.W.2d 555

Filed January 22, 2010. No. S-09-311.

1. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
3. **Postconviction.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief is not a substitute for an appeal.
5. ____: ____. A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
6. ____: ____. A postconviction argument is not procedurally barred if it was raised on direct appeal, but neither expressly nor necessarily decided on the merits.
7. **Appeal and Error.** An appellate court has discretion to overlook the State's failure to argue that an error is harmless.
8. ____. Whether an assigned error was prejudicial, requiring reversal, is at issue in every appeal.
9. **Postconviction: Appeal and Error.** The remedy provided by the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008), is cumulative and is not intended to be concurrent with any other remedy existing in the courts of this state, and the phrase "any other remedy" encompasses a direct appeal when the issue raised in the postconviction proceeding can be raised in the direct appeal.
10. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, when a defendant was represented both at trial and on direct appeal by the same lawyer, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.

11. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
12. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution, but an evidentiary hearing may be denied when the records and files affirmatively show that the defendant is entitled to no relief.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Affirmed.

Sean J. Brennan, of Brennan & Nielsen Law Offices, P.C., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Lora L. McKinney was convicted in 2005 of first degree murder for the killing of Harold Kuenning and sentenced to life imprisonment. We affirmed McKinney's conviction and sentence in *State v. McKinney* (*McKinney I*),[1] finding that although the trial court erred in admitting McKinney's DNA into evidence, the error was harmless. McKinney filed a motion for postconviction relief, which the district court denied without an evidentiary hearing. The primary argument in McKinney's brief on appeal is that we erred in *McKinney I* by finding harmless error even though the State did not argue it. We find that each of McKinney's arguments is either

[1] See *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

meritless or procedurally barred, and we affirm the judgment of the district court.

BACKGROUND

The evidence against McKinney was detailed in *McKinney I*, and we summarize it here only to the extent necessary. The State's theory of the case was that on January 5, 1998, Kuenning took McKinney, his former girlfriend, to his rural cabin, where McKinney shot him and stole several guns from him, then drove his van back to Lincoln. McKinney's theory was that others were responsible for the killing; specifically, Terri Fort, with whom McKinney alleged Kuenning had a relationship, and Joseph Walker, McKinney's former boyfriend.

McKinney's theory was bolstered by the fact that Fort and Walker stayed in a hotel in Lincoln shortly after the killing, and a gun registered to Kuenning that may have been the murder weapon was found in their room. But McKinney's fingerprints were found on a purse and a cigarette pack at Kuenning's cabin, and her DNA was found on several items in the cabin. McKinney admitted to stealing a .44 Magnum revolver from Kuenning, and according to one witness, she later exchanged a .44 Magnum revolver for crack cocaine. Fort testified that McKinney and Kuenning left Lincoln together on the evening of January 5, 1998, and that McKinney did not return until the next morning. Walker testified that McKinney told him that she had killed Kuenning and needed help disposing of some guns. And McKinney lied to police during their investigation into Kuenning's killing.

Based on that evidence, McKinney was convicted of first degree murder. But on direct appeal, we concluded that evidence of McKinney's DNA should not have been admitted.[2] We held that probable cause was required to take a DNA sample from McKinney, and the State had not challenged the district court's finding that at the time the sample was collected, police did not have probable cause to believe McKinney had committed the crime. We found, however, that when the evidence set

[2] See *id.*

forth above was considered, any error in admitting the DNA evidence was harmless.[3]

McKinney had also sought DNA samples in the original trial proceedings from Fort, Walker, and three others. McKinney's intent was to bolster her theory of the case by comparing the DNA samples she obtained to unknown DNA found at Kuenning's cabin. But the district court refused to issue the subpoenas McKinney requested, and on appeal, we found that the district court had not erred. We explained that the circumstances did not require invading the witnesses' constitutional rights.[4]

Accordingly, we affirmed McKinney's conviction and sentence and denied her motion for rehearing. McKinney then filed a motion for postconviction relief in the district court. McKinney alleged that we had violated her constitutional rights by finding harmless error in *McKinney I*, because the State had not argued that the error was harmless. McKinney also alleged that we had applied the wrong legal standards in evaluating whether the error was harmless. McKinney alleged that we had erred in holding that she had no right to obtain DNA samples from other potential suspects. And she alleged ineffective assistance of counsel.

The district court rejected each of these contentions. The court found that we have the authority to raise harmless error sua sponte and that, in any event, the issue was procedurally barred. The court found that McKinney's other claims of error in *McKinney I* were procedurally barred. And the court found that McKinney was not prejudiced by the alleged ineffectiveness of her trial counsel. The district court dismissed McKinney's motion without an evidentiary hearing.

ASSIGNMENTS OF ERROR

McKinney assigns, restated, that the district court erred in (1) concluding that issues relating to our harmless error review in *McKinney I* were procedurally barred, (2) concluding that the issue relating to McKinney's attempt to obtain DNA

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[3] See *id.*

[4] See *id.*

samples from Fort and Walker was procedurally barred, and (3) refusing to conduct an evidentiary hearing on the effectiveness of McKinney's counsel.

STANDARD OF REVIEW

[1] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[5]

[2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[6] an appellate court reviews such legal determinations independently of the lower court's decision.[7]

ANALYSIS

[3-5] Before discussing McKinney's arguments in detail, it will be helpful to review some of the basic propositions of law that are applicable to cases of this kind. The Nebraska Postconviction Act[8] provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable.[9] But a motion for postconviction relief is not a substitute for an appeal.[10] So, a motion for postconviction relief cannot be used to secure review of issues which were known to the

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[5] *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009).

[6] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[7] *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009).

[8] Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008).

[9] *State v. York*, 278 Neb. 306, 770 N.W.2d 614 (2009).

[10] *State v. Gamez-Lira*, 264 Neb. 96, 645 N.W.2d 562 (2002).

defendant and could have been litigated on direct appeal—such issues are procedurally barred.[11]

Harmless Error in *McKinney I*

McKinney's first assignment of error relates to our finding in *McKinney I* that the trial court's error in admitting evidence of McKinney's DNA was harmless. McKinney's fundamental claim is that we erred in considering, sua sponte, whether the error was harmless. But first, she contends that the district court erred in concluding that her claim is procedurally barred.

The problem, according to McKinney, is that she was unaware of the possibility of harmless error until our opinion was issued, so her only means of arguing that we erred was in a motion for rehearing. And because we did not issue an opinion explaining our denial of McKinney's motion for rehearing, there is no way of knowing why we denied it. So, McKinney concludes, we may not have decided her motion for rehearing on the merits of her argument, and it is not procedurally barred.

[6] The rule in that regard, however, is that a postconviction argument is not procedurally barred if it was raised on direct appeal, but *neither* expressly nor necessarily decided on the merits.[12] Our authority to consider harmless error sua sponte may not have been expressly discussed in our opinion or in denying McKinney's motion for rehearing. But it was necessarily decided, both in our denial of the motion for rehearing and implicitly with our finding of harmless error in *McKinney I*.[13]

[7] And our decision was correct. It is well established that an appellate court has discretion to overlook the State's failure to argue that an error is harmless.[14] The unique function of the

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[11] See *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

[12] See *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007).

[13] See *id.*

[14] See, e.g., *U.S. v. McLaughlin*, 126 F.3d 130 (3d Cir. 1997); *U.S. v. Rose*, 104 F.3d 1408 (1st Cir. 1997); *U.S. v. Crowell*, 60 F.3d 199 (5th Cir. 1995); *U.S. v. Langston*, 970 F.2d 692 (10th Cir. 1992); *Lufkins v. Leapley*, 965 F.2d 1477 (8th Cir. 1992); *U.S. v. Pryce*, 938 F.2d 1343 (D.C. Cir. 1991); *U.S. v Giovannetti*, 928 F.2d 225 (7th Cir. 1991); *Randolph v. U.S.*, 882 A.2d 210 (D.C. 2005); *Heuss v. State*, 687 So. 2d 823 (Fla. 1996).

harmless error rule is to conserve judicial labor by holding harmless those errors which, in the context of the case, do not vitiate the right to a fair trial and, thus, do not require a new trial.[15] To preclude application of the test merely because the State failed to make the argument would elevate form over substance and hamper the goal of efficient use of judicial resources.[16] As the Seventh Circuit has explained,

> while we are not required to scour a lengthy record on our own, with no guidance from the parties, for indications of harmlessness, we are authorized, for the sake of protecting third-party interests including such systemic interests as the avoidance of unnecessary court delay, to disregard a harmless error even though through some regrettable oversight harmlessness is not argued to us. If it is certain that the error did not affect the outcome, reversal will not help the party arguing for reversal beyond such undeserved benefits as he may derive from delay. . . . And reversal will hurt others: not merely the adverse party, whose failure to argue harmlessness forfeits his right to complain about the injury, but innocent third parties, in particular other users of the court system, whose access to that system is impaired by additional litigation.[17]

Those concerns are illustrated in this case. The case against McKinney was complex, and a retrial would have expended significant prosecutorial and judicial resources. It would be inconsistent with our responsibilities to require the public to bear that expense when it is unnecessary to vindicate McKinney's right to a fair trial.

[8] McKinney complains that her constitutional rights were violated because, according to her, she was not notified that harmless error was at issue. This, according to McKinney, denied her rights to counsel and due process of law. But McKinney could and did argue that the error was

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[15] *Heuss, supra* note 14.

[16] *Id.*

[17] *Giovannetti, supra* note 14, 928 F.2d at 226 (citation omitted).

not harmless in her motion for rehearing. And whether an assigned error was prejudicial, requiring reversal, is at issue in every appeal.[18]

McKinney also argues that we erred in *McKinney I* by not applying the harmless error standard of *Chapman v. California*.[19] But we did apply *Chapman*. In *Chapman*, the U.S. Supreme Court explained that "[a]n error . . . which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless."[20] The Court explained that the question was "'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction'" and held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[21] And in *McKinney I*, we stated that

> [i]n a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury's verdict adversely to a defendant's substantial right. In a harmless error review, we look at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial was surely unattributable to the error.[22]

And consistent with those principles, in the end we concluded "from the entire record that the jury's verdict was surely

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[18] See Neb. Rev. Stat. § 29-2308 (Reissue 2008).

[19] *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

[20] *Id.*, 386 U.S. at 23-24. See, also, *Fahy v. Connecticut*, 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963).

[21] *Chapman, supra* note 19, 386 U.S. at 24, citing *Fahy, supra* note 20.

[22] *McKinney I, supra* note 1, 273 Neb. at 358-59, 730 N.W.2d at 87.

unattributable to the erroneous admission of McKinney's DNA, and that error was therefore harmless."[23]

McKinney's *Chapman* argument may take issue, not with the propositions of law that we stated in *McKinney I*, but with our application of that law to the facts—in other words, that our conclusion was wrong. And McKinney argues separately that our harmless error review was factually incorrect. Stated generally, she argues that the evidence we relied upon in our review was not persuasive or credible on several points.

[9] These claims, however, are plainly procedurally barred. The remedy provided by the Nebraska Postconviction Act is cumulative and is not intended to be concurrent with any other remedy existing in the courts of this state.[24] And the phrase "any other remedy" encompasses a direct appeal when the issue raised in the postconviction proceeding can be raised in the direct appeal.[25] Thus, a motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated on direct appeal.[26]

Whether the erroneous admission of McKinney's DNA was actually harmless was, obviously, decided in *McKinney I*. The Nebraska Postconviction Act does not permit relitigation of issues that were expressly decided in a previous appeal. Therefore, we do not consider McKinney's attempt to challenge our reasoning in *McKinney I*. The purpose of affording postconviction relief is not to permit the defendant endless appeals on matters already decided.

In sum, we find no merit to McKinney's arguments regarding our harmless error review in *McKinney I*. The district court did not err in refusing to hold an evidentiary hearing on these arguments and finding them to be without merit.

Authority to Obtain DNA Samples From Third Parties

McKinney also takes issue with our conclusion in *McKinney I* that the trial court had not erred in denying her motion to obtain

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[23] *Id.* at 360, 730 N.W.2d at 88.

[24] § 29-3003.

[25] *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

[26] See *id.*

DNA samples. McKinney claims, contrary to our express conclusion in *McKinney I*, that this was the "'"rare instance"'" where justice required an invasion of a third party's constitutional rights.[27]

But obviously, we reached the opposite conclusion in *McKinney I*. And as explained above, the Nebraska Postconviction Act does not permit relitigation of issues that were expressly decided in a previous appeal. The district court did not err in finding this argument to be procedurally barred.

Ineffective Assistance of Counsel

[10] McKinney's final argument is that the district court should have held an evidentiary hearing on her allegations of ineffective assistance of counsel. These allegations are not procedurally barred, because McKinney was represented by the same counsel at trial and on direct appeal. Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, when a defendant was represented both at trial and on direct appeal by the same lawyer, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.[28]

[11] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*,[29] to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[30]

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[27] *McKinney I, supra* note 1, 273 Neb. at 362, 730 N.W.2d at 90.

[28] *State v. Rhodes*, 277 Neb. 316, 761 N.W.2d 907 (2009).

[29] *Strickland, supra* note 6.

[30] See *State v. Glover*, 278 Neb. 795, 774 N.W.2d 248 (2009).

The only specific instance in which McKinney argues that her trial counsel was ineffective is in failing to object to a remark the State made during its closing statement. During closing, the State argued:

> And we know that Lora McKinney was acting alone when she murdered Harold Kuenning. There wasn't any other DNA at this crime scene, any other fingerprint evidence that would suggest that anyone else was present at that cabin besides the defendant and the victim. And there's also very — one other very revealing fact. And as you can see, there are no fingerprints along the passenger's side of [Kuenning's] van. Members of the jury, there's not even a smudge. No one went with Lora McKinney and Harold Kuenning out to that cabin and the murderer left alone. No one went with her. No one got out of the passenger's side of that van when it came to its final resting place.

McKinney argues that trial counsel should have objected to the claim that there was not other DNA at the crime scene, because there was unidentified DNA found—the DNA that formed the basis for McKinney's unsuccessful attempt to get DNA samples from Fort and Walker. And McKinney argues that an evidentiary hearing was necessary on this claim.

But we conclude, as did the district court, that McKinney was not prejudiced by counsel's failure to object. The objectionable remark was, when read in context, largely inconsequential. And more important, evidence had been presented of the unknown DNA found at the scene. Instead of objecting, McKinney's counsel used his closing statement to argue that the unknown DNA provided a basis for reasonable doubt. When the record is considered as a whole, there is no reasonable probability that the jury was misled by the State's misstatement during its closing statement.

[12] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[31]

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[31] *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

But an evidentiary hearing may be denied when the records and files affirmatively show that the defendant is entitled to no relief.[32] In this case, the record affirmatively demonstrates that McKinney was not prejudiced by trial counsel's failure to object to the State's closing statement.

McKinney also suggests, in passing, that she was denied effective assistance of counsel because her counsel on direct appeal did not argue that the erroneous admission of her DNA was not harmless. But McKinney was not prejudiced by the omission, because, as noted above, those arguments were presented in her motion for rehearing. And it is certainly not clear, given our review of the record in *McKinney I*, what her appellate counsel could have argued that would have affected our decision.

In short, we find no error in the district court's conclusion that McKinney was not prejudiced by the instances of ineffective assistance of counsel that she alleged.

CONCLUSION

Each of McKinney's arguments is either procedurally barred or without merit. We affirm the district court's judgment denying her motion for postconviction relief.

AFFIRMED.

HEAVICAN, C.J., not participating.

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[32] See *id.*

STATE OF NEBRASKA, APPELLEE, V.
PHILIP P. GIBILISCO, APPELLANT.
778 N.W.2d 106

Filed January 29, 2010. No. S-08-1255.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.
2. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
3. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance

or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.

4. **Pleadings.** A motion for reconsideration should be treated as a motion to alter or amend a judgment when such motion meets the criteria for a motion to alter or amend the judgment.
5. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. In addition, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
6. **Effectiveness of Counsel: Proof.** In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
7. **Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
8. **Postconviction: Appeal and Error.** A party cannot raise an issue in a postconviction motion if he or she could have raised that same issue on direct appeal.
9. **Postconviction: Effectiveness of Counsel: Appeal and Error.** A motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred when (1) the defendant was represented by a different attorney on direct appeal than at trial, (2) an ineffective assistance of trial counsel claim was not brought on direct appeal, and (3) the alleged deficiencies in trial counsel's performance were known to the defendant or apparent from the record.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

Gregory A. Pivovar for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Miller-Lerman, J.

NATURE OF THE CASE

After being convicted of five counts of first degree sexual assault, appellant, Philip P. Gibilisco, filed a verified motion for

postconviction relief in the district court for Douglas County. In his motion, Gibilisco raised claims of ineffective assistance of trial and appellate counsel. Several of the claims involved statutory speedy trial issues. The district court initially sustained the postconviction motion and dismissed all charges against Gibilisco. However, upon consideration of a subsequent motion filed by the appellee, State of Nebraska, the district court ultimately granted in part and in part denied Gibilisco's motion for postconviction relief, with the ultimate result being that the conviction on count I was vacated and the convictions on counts II through V were upheld. Gibilisco appeals. We affirm.

STATEMENT OF FACTS

On September 13, 2002, Gibilisco was charged by information with one count of sexual assault on a child "on or about the 24th day of March, 2002, thru [sic] the 15th day of July, 2002." After declining to enter into a plea agreement with the State, Gibilisco pled not guilty to this one count on September 18. On June 12, 2003, the information was amended by adding four additional counts of sexual assault on a child. Counts II through V allege the same timeframe. The evidence presented at trial generally established that Gibilisco was almost 40 years old at the time of the offenses and that he solicited a girl to perform oral sex on him on five occasions when she was 11 and 12 years old.

This case has been appealed twice before. In *State v. Gibilisco*, 12 Neb. App. 1 (No. A-03-844, Sept. 2, 2003), Gibilisco appealed the district court's denial of his pretrial motion to dismiss for vindictive prosecution. The Court of Appeals concluded that the order denying Gibilisco's motion to dismiss was not a final, appealable order and dismissed the appeal. Thereafter, a trial was held and Gibilisco was convicted on all five counts.

In *State v. Gibilisco*, A-04-480, 2005 WL 1022024 (Neb. App. Apr. 26, 2005) (not designated for permanent publication), Gibilisco appealed his convictions. On direct appeal, Gibilisco was represented by different counsel than at trial. He claimed that the district court erred in denying his motion

to dismiss in which he claimed vindictive prosecution, admitting a taped conversation between Gibilisco and the victim's mother, and failing to direct a verdict on four of the five counts. Gibilisco also challenged the sentence imposed by the district court. In addition, on direct appeal, Gibilisco claimed that his trial counsel was ineffective for failing to seek dismissal on statutory speedy trial grounds. In response to this last assignment of error, the Court of Appeals concluded that an evidentiary hearing would be necessary to determine whether a speedy trial violation had occurred and whether Gibilisco's trial counsel was ineffective for not seeking discharge.

On May 4, 2006, Gibilisco filed a motion for postconviction relief in which he raised several claims of ineffective assistance of trial and appellate counsel. Disposition of Gibilisco's postconviction motion gives rise to the instant appeal. For purposes of this appeal, the relevant claims raised in Gibilisco's postconviction motion are that trial counsel was ineffective for failing to (1) raise and preserve the issue of whether Gibilisco received a speedy trial; (2) object to the filing of the amended charges and failing to ask for a preliminary hearing; and (3) inform him of the penalties for the crimes when discussing plea negotiations and the treatment of sexual offenders in jail. Gibilisco also claimed that trial counsel was ineffective when he purportedly misinformed Gibilisco that the court would not order consecutive sentences.

By agreement of the parties, the district court held an evidentiary hearing limited to the issue of whether Gibilisco received ineffective assistance of trial counsel based on Gibilisco's claim that trial counsel failed to move to dismiss his case on the ground that his 6-month statutory speedy trial rights had been violated. See Neb. Rev. Stat. § 29-1207 (Reissue 2008). On June 6, 2007, the district court entered an order sustaining Gibilisco's motion.

In its June 6, 2007, order, the court stated that Gibilisco was first charged in the district court on September 11, 2002, and that therefore, absent excludable time, Gibilisco should have been brought to trial within 6 months, which was March 10, 2003. Trial on Gibilisco's case began on December 16, 2003.

The court noted that several procedural excludable events had occurred, including motions to suppress, continue, and dismiss, as well as an attempted appeal. The court found the total excludable time attributable to these events to be 270 days.

The court reasoned that in order to avoid running afoul of his 6-month right to a speedy trial, Gibilisco's trial should have begun within 270 days after March 10, or December 5, 2003. Because Gibilisco's trial did not start until December 16, the court found that Gibilisco's statutory right to a speedy trial had been violated. Given this violation, the court further concluded that Gibilisco's trial counsel was ineffective for failing to file a motion to discharge. The court sustained Gibilisco's motion for postconviction relief and vacated Gibilisco's convictions.

After the filing of the June 6, 2007, order, the State filed a motion to reconsider. In its motion, the State argued that although Gibilisco's right to a speedy trial may have been violated on count I of the information, any speedy trial violation should not apply to counts II through V of the amended information, because these subsequently filed charges restarted the speedy trial clock.

In response to the State's motion to reconsider, the court stayed its June 6, 2007, order and directed the parties to brief the matter. On November 2, the district court entered an order which granted the State's motion to reconsider and vacated its order of June 6.

The district court entered an additional order on November 7, 2008, granting in part and in part denying Gibilisco's motion for postconviction relief. The district court granted the motion with respect to count I on speedy trial grounds and consequently vacated the conviction and sentence as to count I of the amended information only. The district court denied Gibilisco's motion for postconviction relief with respect to the remaining speedy trial and other issues. Gibilisco appeals.

ASSIGNMENTS OF ERROR

Gibilisco claims, restated and summarized, that the district court erred in (1) allowing the State to challenge the court's June 6, 2007, order granting him postconviction relief by way of a motion to reconsider; (2) finding that the additional

charges in the amended information were not subject to the same dismissal date on speedy trial grounds as the original charge and reversing its dismissal of all charges based on this determination; (3) concluding that Gibilisco did not receive ineffective assistance of counsel based on his trial counsel's purported failure to properly relate a potential plea bargain and the consequences to Gibilisco; and (4) concluding that Gibilisco did not receive ineffective assistance of counsel based on his trial counsel's purported failure to move to quash the filing of the amended information.

STANDARDS OF REVIEW

[1] When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion. See *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009).

[2,3] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009). With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *Id.*

ANALYSIS

The District Court Properly Considered the State's Motion for Reconsideration as a Motion to Alter or Amend the Judgment.

As an initial matter, we must address Gibilisco's assignment of error challenging the validity of the State's motion for reconsideration of the district court's June 6, 2007, order. We understand Gibilisco's challenge to the State's motion for reconsideration to be that the motion for reconsideration was not the proper method for challenging the court's June 6 order. We find this assignment of error to be without merit.

[4] The State directs us to *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005). In *Bao*, we concluded that a motion for reconsideration should be treated as a motion to alter or amend a judgment when such motion meets the criteria for a motion to alter or amend the judgment, to wit, being filed not later than 10 days after the entry of judgment, see Neb. Rev. Stat. § 25-1329 (Reissue 2008), and seeking substantive alteration of the judgment. The State argues that as in *State v. Bao*, its motion for reconsideration was functionally a motion to alter or amend a judgment. We agree with the State and conclude that the State's motion for reconsideration qualifies for treatment as a motion to alter or amend a judgment.

The State filed the motion on June 8, 2007, within 10 days of the June 6 order granting Gibilisco postconviction relief. Further, the motion sought substantive alteration of the judgment by asserting that the June 6 order sustaining Gibilisco's motion was in error, because it concluded that Gibilisco received ineffective assistance of counsel based on his trial counsel's failure to make a motion for discharge for speedy trial act violations. The State argued in the motion for reconsideration that the postconviction motion should have been dismissed because the counts against Gibilisco contained in the amended information did not violate the speedy trial act, and therefore, Gibilisco's counsel was not ineffective for failing to move for discharge at trial.

The motion for reconsideration was in effect a timely motion to alter or amend the judgment, and the district court did not err in considering the motion.

Gibilisco's Claim of Ineffective Assistance of Counsel Due to Speedy Trial Issues Is Without Merit.

Gibilisco claims that he received ineffective assistance of trial counsel due to counsel's purported failure to challenge the amended information on speedy trial grounds. As a consequence, Gibilisco argues that the district court erred in this postconviction case when it vacated its June 6, 2007, order which had granted Gibilisco's motion for postconviction relief in its entirety based on a speedy trial violation, and further erred in its November 7, 2008, order which granted

postconviction relief limited to count I. We find no error in the district court's rulings.

As noted above, on November 2, 2007, the district court filed an order granting the State's motion for reconsideration, and on November 7, 2008, the court concluded that Gibilisco's counsel was not ineffective for failing to file a motion for discharge on speedy trial grounds on counts II through V of the amended information. In its order granting the State's motion for reconsideration, the court noted that these additional charges were first filed in an amended information and concluded that they were not subject to the same dismissal dates for speedy trial purposes as controlled the speedy trial analysis on count I, which was the only charge found in both the original and amended informations. The district court concluded that although there had been a violation of the speedy trial act on count I, the trial on the four new counts in the amended information did not violate the speedy trial act.

In reaching its conclusion, the district court quoted this court's decision in *State v. French*, 262 Neb. 664, 670, 633 N.W.2d 908, 914 (2001), as follows:

> It is important to determine whether the amendment charges the same crime or a totally different crime. A distinction is made between an *amendment* to a complaint or information and an *amended* complaint or information. If the amendment to the complaint or information does not change the nature of the charge, then obviously the time continues to run against the State for purposes of the speedy trial act. If the second complaint alleges a different crime, without charging the original crime(s), then it is an amended complaint or information and it supersedes the prior complaint or information. The original charges have been abandoned or dismissed.

Based on this jurisprudence, the district court reasoned that the substance of count I had not changed in the amended information, so the time for bringing Gibilisco to trial on that count had expired. The court further determined, however, that the amended information, which added counts II through V, restarted the speedy trial clock applicable to those counts.

Applying the reasoning in *French*, the court stated that in addition to repeating count I, the amended information charged Gibilisco with four additional, separate crimes of sexual assault on the same victim. The court stated that the speedy trial clock should have been restarted for these new and different charges. The court noted that Gibilisco had had ample opportunity to investigate and object to the nature and sufficiency of evidence on the amended information and to move to quash the amended information had that been warranted. The district court determined that counts II through V did not violate the speedy trial statute and that therefore, Gibilisco suffered no prejudice due to his trial counsel's purported failure to file a motion to discharge with respect to these additional charges. We agree with the district court's analysis.

Gibilisco argues that the district court's conclusions were in error, because the four counts contained in the amended information were based on the same set of facts as the original charge and the State knew of the facts associated with the additional charges at the time the original information was filed. Gibilisco therefore claims that the speedy trial clock should not be deemed to have restarted upon the filing of the amended information.

[5-7] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009). In addition, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id*. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id*. The two prongs of this test, deficient performance and prejudice, may be addressed in either order. See *id*. In determining whether a trial counsel's performance was

deficient, there is a strong presumption that such counsel acted reasonably. *Id*.

The issue in this case is the effect, if any, for speedy trial purposes of the filing of the amended information on each of the five counts. In *State v. French*, 262 Neb. 664, 633 N.W.2d 908 (2001), we noted that in cases involving amended charges, it is important to determine whether the amended charge is for the same crime or for a totally different crime. We stated that "[i]f the amendment to the complaint or information does not change the nature of the charge, then obviously the time continues to run against the State for purposes of the speedy trial act." *Id*. at 670, 633 N.W.2d at 914.

Here, the amended information charged five separate counts of first degree sexual assault, albeit during the same alleged timeframe. Although count I repeated the substance of the charge found in the original information, counts II through V were new charges based on four additional incidents of sexual assault against the victim in this case. These charges were not based on facts identical to the original charge; rather, they were separate incidents of sexual assault during the same time period as had been alleged with respect to the first charge. Except for count I, the nature of the charges against Gibilisco were changed by the amended information. Each of these new charges required the State to present separate, additional evidence in order to prove each additionally alleged crime beyond a reasonable doubt. Indeed, as has been described previously in this case on direct appeal, at trial, the victim testified that she could recall five separate incidents of sexual assault. *State v. Gibilisco*, No. A-04-480, 2005 WL 1022024 (Neb. App. Apr. 26, 2005) (not designated for permanent publication).

Referring to the amended information, Gibilisco suggests that allegations of a time period as distinguished from particular dates is problematic. We find no error in this regard. We have concluded that as long as the information provides a timeframe which has a distinct beginning and an equally clear end within which the crimes are alleged to have been committed, it is constitutionally sufficient. See *State v. Martinez*, 250 Neb. 597, 550 N.W.2d 655 (1996). See, also, *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984). As was noted in *Martinez*,

to hold otherwise would impose an impossible burden on a child sexual assault victim where there are allegations of multiple assaults over a lengthy timeframe.

To summarize, because counts II through V alleged separate and distinct crimes and required the State to present different evidence to prove each of these crimes as charged, the speedy trial clock began to run again upon the filing of the amended information. There was no speedy trial violation on these new charges. Because Gibilisco was not prejudiced by his counsel's purported failure to file a motion to discharge based on a violation of the speedy trial act with respect to counts II through V, Gibilisco did not receive ineffective assistance of counsel in this regard and we affirm the district court's ruling relative to counts II through V. For completeness, we note that the State did not cross-appeal the district court's order granting postconviction relief relative to count I, and we do not consider this ruling.

Gibilisco's Claim of Ineffective Assistance of Counsel With Respect to Communication of the Potential Plea Agreement Is Procedurally Barred.

Next, Gibilisco claims that he received ineffective assistance of trial counsel, because his trial counsel did not properly relay information to him with respect to the plea agreement offered by the State.

[8,9] Gibilisco did not raise this claim on direct appeal, and it is therefore procedurally barred. A party cannot raise an issue in a postconviction motion if he or she could have raised that same issue on direct appeal. *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008). A motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred when (1) the defendant was represented by a different attorney on direct appeal than at trial, (2) an ineffective assistance of trial counsel claim was not brought on direct appeal, and (3) the alleged deficiencies in trial counsel's performance were known to the defendant or apparent from the record. *Id.*

Here, Gibilisco had different counsel at trial and on appeal. On direct appeal, Gibilisco did not raise a claim of ineffective

assistance of trial counsel based on his counsel's purported failure to relay information with respect to a potential plea agreement. Because the alleged deficiencies regarding Gibilisco's plea agreement discussion with trial counsel were known to Gibilisco at the time of his initial appeal, a claim of ineffective assistance of trial counsel based on the manner in which plea information was communicated to Gibilisco is procedurally barred.

Gibilisco Did Not Receive Ineffective Assistance of Counsel Based on His Counsel's Purported Failure to Challenge the Amended Information.

Finally, Gibilisco claims that his trial counsel was ineffective for failing to move to quash the amended information. In his brief, Gibilisco generally complains that his trial counsel failed to attack the charges in the amended information in any "meaningful manner." Brief for appellant at 33. However, as was discussed above, the amended information was not constitutionally deficient. Therefore, Gibilisco suffered no prejudice on this basis and the district court properly denied his claim.

CONCLUSION

The filing of the amended information containing new charges that were substantially different from the single charge in the original complaint restarted the speedy trial clock on counts II through V in the amended information. Gibilisco was not denied his statutory right to a speedy trial on counts II through V. Therefore, the district court did not err when it concluded that Gibilisco did not receive ineffective assistance of counsel based on a purported failure of trial counsel to file a motion for discharge for speedy trial act violations on counts II through V. The remainder of Gibilisco's ineffective assistance of counsel claims are without merit. We therefore affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KYLE J. BORMANN, APPELLANT.

777 N.W.2d 829

Filed January 29, 2010. No. S-08-1281.

1. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
2. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
3. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
4. **Miranda Rights.** The safeguards provided by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.
5. **Constitutional Law: Arrests: Miranda Rights: Words and Phrases.** A person is in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), when there is a formal arrest or a restraint on one's freedom of movement to the degree associated with such an arrest.
6. **Miranda Rights: Police Officers and Sheriffs: Words and Phrases.** "Interrogation" under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.
7. **Miranda Rights: Words and Phrases.** Interrogation occurs when a person is placed under a compulsion to speak.
8. **Miranda Rights.** It is an unwarranted extension of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), to say that an unwarned statement so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.
9. **Confessions: Due Process.** The Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3, preclude admissibility of an involuntary confession.
10. **Confessions: Proof.** The State has the burden to prove that a defendant's statement was voluntary and not coerced.
11. **Confessions: Police Officers and Sheriffs: Due Process.** Coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment.

12. **Constitutional Law: Due Process.** The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

WRIGHT, J.

I. NATURE OF CASE

Kyle J. Bormann was convicted of second degree murder and use of a firearm to commit a felony. He was sentenced to a term of 60 years to life in prison for the murder and a consecutive term of 20 to 30 years for use of the firearm. He appeals.

II. SCOPE OF REVIEW

[1] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. With regard to historical facts, we review the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which we review independently of the trial court's determination. *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

[2,3] Whether jury instructions given by a trial court are correct is a question of law. *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id.*

III. FACTS

On January 20, 2008, Brittany Williams was shot and killed as she sat in her car in the drive-through lane of a fast-food restaurant in Omaha, Nebraska. The bullet came from north of the restaurant and passed through the front passenger window, striking her in the head.

Police officers arrived at approximately 8:40 p.m. and used yellow police tape to preserve the crime scene. An alley immediately to the east of the restaurant was cordoned off. A vehicle driven by a male came south in the alley and drove through the crime scene tape. The vehicle then turned back and traveled north.

Officers pursued the vehicle into a parking lot several blocks north of the restaurant. The vehicle was driven over a curb and was resting against a picnic table just north of the parking lot. The driver got out of the vehicle holding a rifle. He discarded the rifle and ran. Officers caught up with him, and he was taken into custody. The rifle was secured and taken into evidence.

The male was handcuffed, and a search was conducted. Police found a spent shell casing in his jacket pocket. Officers detected a strong odor of alcohol, and the male had difficulty walking to the cruiser, where he was placed in the back seat.

At that point, the male was asked to provide his name and address and was identified as Bormann. He was asked no further questions, but he leaned forward from the back seat and said he wanted to tell the officer "what was going on." The officer told Bormann to sit back and relax.

Another officer standing immediately outside the cruiser told Bormann he was under arrest and not to ask any questions, but Bormann spoke again. Frustrated, the officer told Bormann to "shut the [expletive] up." The officer in the cruiser told Bormann, "I am not asking you any questions, but if you want to talk, I'm listening." Bormann said that he had been at home watching a professional football game on television and that he became upset due to officiating calls by the referees. Bormann said he became further upset, found his deer rifle, got into the car, and drove around. The officer in the cruiser said that Bormann "abruptly ended by saying [he] didn't shoot

anybody." Bormann had not been given the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), at that time.

Bormann was transported to the Omaha Police Department's headquarters by a third officer. Without being questioned, Bormann asked the third officer which team he preferred in the football game Bormann had been watching. A short while later, Bormann volunteered that he was "sorry for everything that happened tonight."

At police headquarters, Bormann was placed in an interview room. A videotape recording of the interview was received into evidence at trial over Bormann's objection. The videotape shows that Bormann was left alone for about 8 minutes before a detective entered and asked Bormann for identification. Bormann said he had none. The detective left, returned with a notepad, and asked Bormann for his name, date of birth, address, telephone number, and Social Security number. Bormann was again left alone for about 20 minutes.

When the detective returned, Bormann had his head down on the table and appeared to be asleep. The detective roused Bormann and asked if he had any sharp instruments in his possession. The detective reviewed the biographical information he had obtained previously from Bormann and offered him water. The detective left the room, returned with water, and left again.

Approximately 8 minutes later, the detective returned. Bormann asked to call his parents. The detective said he would call them if it was necessary after he and Bormann talked for a while. Bormann was again asked for biographical information, including his age, name, date of birth, address, and previous address. Bormann described where he had lived for the prior several years and where he had attended high school. The detective explained that the questions were to ensure that Bormann understood English. Bormann said that he had good grades in high school and had attended 1 year of college. Bormann stated that he can read but has problems with comprehending what he has read.

Bormann said he understood what the detective was saying. He described his history of drug use and stated he had

used marijuana a few weeks earlier. While in college, he used cocaine and had been charged with possession. He was not using cocaine at the time but had recently abused inhalants. He said he had been drinking that night while watching football on television and had consumed a bottle of whiskey.

Bormann was asked whether he took any prescription medication and whether he had any disabilities. He denied taking any medication other than Tylenol for headaches. Bormann was advised that the detective was trying to determine whether Bormann understood what was going on and to make sure Bormann understood what was being said.

The detective said he wanted to give Bormann a chance to talk. At that point, about 1 hour after the videotape began, Bormann was read the *Miranda* rights advisory. He signed the rights advisory form and eventually acknowledged that he had committed the homicide by shooting from his parked car into Williams' vehicle. He was unable to explain any reason for the shooting.

Bormann was charged with first degree murder and use of a deadly weapon to commit a felony. A motion to suppress his statements was overruled. The trial court found that Bormann's statements in the police cruiser were not the product of interrogation and did not require *Miranda* warnings because Bormann was not being interrogated. The court found no evidence of a police practice intended to elicit an incriminating response. The officer's direction to sit back and relax did not compel Bormann to talk. There was no evidence that Bormann was susceptible to persuasion. The court found that Bormann persisted in talking even when he was directed to remain quiet.

The trial court found that Bormann's statement while being transported to police headquarters was made freely and voluntarily. His statement that he was "sorry for everything that happened tonight" was spontaneous and therefore admissible. The court concluded that because Bormann's statement in the cruiser was admissible, his videotaped statement at police headquarters was not derivative of an earlier inadmissible statement.

The trial court found the videotaped statement was admissible as a "'routine booking exception'" to *Miranda* and that

the questions asked at the beginning of the interview fell within the routine booking exception. Although questions were asked about Bormann's use of drugs and alcohol, the questions were asked to determine whether Bormann was able to answer questions at that time.

The trial court determined that a brief reference to the death penalty made during the questioning of Bormann at police headquarters did not make his videotaped statement involuntary. The court found that the detective referred to the death penalty only briefly and did not use it as a threat or inducement.

The jury found Bormann guilty of second degree murder and use of a weapon to commit a felony. He was sentenced to a term of 60 years to life in prison on the murder conviction and a consecutive term of 20 to 30 years for the firearm conviction. He appeals.

IV. ASSIGNMENTS OF ERROR

Bormann's assignments of error, summarized and restated, claim that the trial court erred in admitting his statements into evidence. He argues the court erred in admitting the statement made in the police cruiser, because he was not given *Miranda* warnings prior to the statement. He claims that the videotaped statement was made without a knowing, voluntary, and intelligent waiver of the right to counsel and the right against self-incrimination and that the questioning exceeded the scope of the exception to *Miranda* for routine booking questions. Bormann also alleges that the videotaped statement at police headquarters was the product of threats, coercion, or inducements of leniency, in violation of the Due Process Clauses of the federal and state Constitutions. Bormann also claims that the court erred in giving a step jury instruction which deprived him of the due process right to have the jury consider his defense to the charges.

V. ANALYSIS

1. Admission of Statements

(a) Police Cruiser

The first officer testified that Bormann was placed in the back seat of the police cruiser and asked to provide his name

and address. On two occasions, Bormann said he would like to talk. He was told to sit back and relax and not to ask any questions. Bormann appeared calm. He had watery eyes that were slightly bloodshot, and there was an odor of alcohol on his person. Bormann then volunteered that after becoming frustrated about the officiating of the football game he was watching, he got out his deer rifle and drove around. He said he had not shot anyone.

The second officer, who was standing outside the cruiser, testified that Bormann said he had been at home watching a football game, drinking, and getting upset with the referee because of some of the officiating calls he made. Bormann said that as the game progressed, he became more and more upset. He got dressed, grabbed his rifle, and started driving around. He finished his statement by saying, "I didn't shoot anybody tonight." Bormann argues his statement was inadmissible because he had not been given the *Miranda* warnings.

[4,5] The safeguards provided by *Miranda* "come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *State v. McKinney*, 273 Neb. 346, 364, 730 N.W.2d 74, 90 (2007). *Miranda* warnings are required only when there has been such a restriction on one's freedom as to render one "'in custody.'" *State v. McKinney*, 273 Neb. at 364, 730 N.W.2d at 90-91, quoting *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). A person is in custody for purposes of *Miranda* "when there is a formal arrest or a restraint on one's freedom of movement to the degree associated with such an arrest." *State v. McKinney*, 273 Neb. at 364, 730 N.W.2d at 91. Bormann was handcuffed and placed in the back seat of a police cruiser. His freedom of movement was restrained. It is not disputed that he was in custody at the time he made the statements to the officers in and near the cruiser.

[6] We then consider whether Bormann was interrogated while in the police cruiser. "'Interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the

suspect." *State v. Rogers*, 277 Neb. 37, 54, 760 N.W.2d 35, 52 (2009). In *Rhode Island v. Innis*, 446 U.S. 291, 301-02, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) (emphasis in original), the U.S. Supreme Court stated:

> A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

We have held that "[s]tatements made in a conversation initiated by the accused or spontaneously volunteered by the accused are not the result of interrogation and are admissible." *State v. Rodriguez*, 272 Neb. 930, 944, 726 N.W.2d 157, 171 (2007). In addition, the definition of interrogation excludes "a course of inquiry related and responsive to a volunteered remark." *Id.*

In interpreting *Rhode Island v. Innis, supra*, this court has stated that an objective standard is applied to determine whether there is interrogation within the meaning of *Miranda*. See *State v. Gibson*, 228 Neb. 455, 422 N.W.2d 570 (1988). The question to be answered is as follows:

> Would a reasonable and disinterested person conclude that police conduct, directed to a suspect or defendant in custody, would likely elicit an incriminating response from that suspect or defendant? . . . If the answer is "yes," there is interrogation requiring the *Miranda* warning before a defendant's incriminating response is constitutionally admissible as evidence against the defendant.

Id. at 463, 422 N.W.2d at 575.

Both officers in and near the cruiser testified that Bormann's statements while he was in the cruiser were volunteered. Neither of the officers elicited a response by beginning a conversation with Bormann. He was asked for his name and address in order for the officers to conduct a background check on him. This information was collected for arrest and did not require *Miranda* warnings.

[7] Neither officer took any action that elicited an incriminating response from Bormann. The officers cannot be held accountable for Bormann's response. They asked no questions beyond obtaining information for identification purposes. "[I]nterrogation occurs when a person is placed under a compulsion to speak." *State v. Rodriguez*, 272 Neb. at 943, 726 N.W.2d at 171. Bormann was not compelled to talk to the officers by their actions or statements. He voluntarily asked to talk to the officers, who discouraged him from doing so. Bormann continued to talk even when he was told not to speak. There was no interrogation in the police cruiser.

We conclude that Bormann was not subjected to interrogation while sitting in the police cruiser at the scene or while being transported to police headquarters. The statements made by Bormann were voluntary and were not the result of interrogation. Therefore, they were admissible. The trial court did not err in allowing such statements to be admitted into evidence.

(b) Interview Room

Bormann claims that the videotaped statement at police headquarters should be inadmissible because it includes 20 minutes of questioning before he was administered the *Miranda* warnings. The trial court found the statement to be admissible. See *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990) (routine booking exception allows collection of questions to secure biographical data necessary to complete booking or pretrial services without administration of *Miranda* warnings).

We conclude that the information obtained went beyond the collection of facts necessary for routine booking. However, this does not mean that the evidence was inadmissible. The information, while beyond that necessary for a routine booking, was obtained in order to determine if Bormann was competent to talk to police.

Information obtained in initial questioning is not necessarily considered interrogation under *Miranda*. *U.S. v. Brown*, 101 F.3d 1272 (8th Cir. 1996). The court stated:

> "A request for routine information necessary for basic identification purposes is not interrogation under *Miranda*,

> even if the information turns out to be incriminating. Only if the government agent should reasonably be aware that the information sought, while merely for basic identification purposes in the usual case, is directly relevant to the substantive offense charged, will the question be subject to scrutiny."

Id. at 1274, quoting *United States v. McLaughlin*, 777 F.2d 388 (8th Cir. 1985).

Bormann was in an interrogation room for about 45 minutes before the *Miranda* rights were administered. He was alone for more than 15 minutes before the detective entered and asked for identification. Bormann had none, and the detective obtained a notepad and asked Bormann for his name, date of birth, address, telephone number, and Social Security number. The detective left, returned, and asked Bormann if he had any sharp instruments in his possession. Biographical information was reviewed, and Bormann was offered water. The detective left to retrieve the water, returned with it, and left again.

The detective returned and again asked for biographical information. Bormann voluntarily described where he had lived for the previous several years. The detective asked Bormann about his educational background to ensure that Bormann understood the questions.

Because the detective smelled the odor of alcohol, he asked for Bormann's drug and alcohol history. Bormann said he had last used marijuana a few weeks earlier. He had previously used cocaine and had once been charged with possession. Bormann said he had recently abused inhalants. Bormann said he had been drinking that night while he was watching a football game and had consumed a bottle of whiskey.

The detective said he was trying to determine whether Bormann understood what was happening. He asked whether Bormann had taken any prescription medication and whether he had any disabilities. Bormann denied taking any medication other than Tylenol for headaches.

The detective said he wanted to give Bormann a chance to talk. Bormann then said he had possession of a high-powered rifle that night, but that he had not shot at any police. At that point, about 1 hour after the videotape began, the detective

read the *Miranda* rights advisory to Bormann, and he signed the rights advisory form.

In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. With regard to historical facts, we review the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which we review independently of the trial court's determination. *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

The issue is whether Bormann's statements prior to being given the *Miranda* warning tainted his waiver such that the statements cannot be said to be freely and voluntarily given.

[8] "It is an unwarranted extension of *Miranda* to say that an unwarned statement 'so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.'" *State v. Ray*, 266 Neb. 659, 665, 668 N.W.2d 52, 57 (2003), quoting *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985). We conclude that Bormann's pre-*Miranda* statement did not render his post-*Miranda* statements inadmissible.

The pre-*Miranda* questions concerned basic identification and Bormann's ability to understand the nature of the questioning. Bormann smelled of alcohol and had consumed an entire bottle of whiskey the day of the shooting. He had previously told police that he had a high-powered rifle and that he had not shot at any police. This statement cannot be said to have tainted the voluntariness of his waiver. Bormann's statement concerning his drug use was not related to the shooting incident and provided basic information relating to his physical and mental condition.

The trial court did not err in finding that Bormann's videotaped statement was voluntary. The questioning prior to the time Bormann was given his *Miranda* advisory did not affect the voluntariness of Bormann's post-*Miranda* statements.

Bormann freely and voluntarily executed the waiver of his *Miranda* rights.

(c) Product of Threats, Coercion, or Inducements

Bormann argues that the videotaped statement was inadmissible because it was the product of threats, coercion, or inducements. He claims his due process rights were violated when the detective mentioned the death penalty during the interrogation.

After Bormann was given the *Miranda* warnings, he was asked to describe his activity that day. Bormann stated he had slept until 3:30 p.m. and then began watching football. Bormann said he started drinking during an earlier football game. He did not remember more than the first quarter of the second game, but said he became upset when the team he was a fan of was losing. He did not remember the reason he left his house.

During the interview, Bormann continued to deny that he remembered any of his actions. Gradually, he recalled details of the day. He admitted that he fired the rifle while sitting in the driver's seat of his vehicle. Bormann stated he did not know why he left his house. The detective asked Bormann what his target was, because he wanted to make sure that Bormann did not go out looking for a specific person, which would be premeditated murder. Bormann was asked if he understood the meaning of premeditated murder. The detective stated, "That means death penalty." Bormann did not respond. The interview continued for another 30 minutes, at which time Bormann admitted that he shot at a car in the drive-through lane of a fast-food restaurant.

[9,10] Bormann argues that the detective's comments about the death penalty made Bormann's statement involuntary.

> A statement of a suspect, to be admissible, must be shown by the State to have been given freely and voluntarily and not to have been the product of any promise or inducement—direct, indirect, or implied—no matter how slight. However, this rule is not to be applied on a strict, per se basis. Rather, determinations of voluntariness are based upon an assessment of all of the circumstances and

> factors surrounding the occurrence when the statement is made.

State v. McPherson, 266 Neb. 734, 740-41, 668 N.W.2d 504, 511 (2003). The Due Process Clauses of the U.S. and Nebraska Constitutions preclude admissibility of an involuntary confession. *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000), citing U.S. Const. amend. XIV and Neb. Const. art. I, § 3. The State has the burden to prove that a defendant's statement was voluntary and not coerced. *State v. Garner, supra*. In determining whether a *Miranda* waiver is knowingly and voluntarily made, a court applies a totality of the circumstances test. Factors to be considered include the suspect's age, education, intelligence, prior contact with authorities, and conduct. *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

In *State v. Garner*, 260 Neb. at 46, 614 N.W.2d at 325, a detective told the defendant, a 15-year-old who was suspected of killing an elderly woman, that people would "'want to stick you in the electric chair and burn your butt forever for killing an 83-year-old white woman, when there may be more to it than that.'" The defendant then confessed to the murder.

On appeal, the defendant contended that his confession was involuntary because it was the product of threats, coercion, and inducements of leniency. He argued that his age, the time of day, and the fact he had no attorney or parent present affected the voluntariness of his confession. We stated that the confession of an accused may be involuntary and inadmissible if obtained in exchange for a promise of leniency. "However, mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or promise, does not make a subsequent confession involuntary." *State v. Garner*, 260 Neb. at 50, 614 N.W.2d at 327. In order to render a statement involuntary, any benefit offered to a defendant must be definite and must overbear his or her free will. *Id*. We concluded that because the detective did not refer to the death penalty in connection with an explicit threat or promise of leniency, the confession was not involuntary. *Id*.

[11] The U.S. Supreme Court has held that "coercive police activity is a necessary predicate to the finding that a confession

is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). "'[The] circumstances surrounding the statement and the characteristics of the individual defendant at the time of the statement are potentially material considerations . . . .'" *State v. Ray*, 266 Neb. 659, 666, 668 N.W.2d 52, 57 (2003).

In the case at bar, the detective's reference to the death penalty was not made as a threat or inducement. He was pointing out to Bormann the seriousness of the crime and differentiating premeditated murder from other grades of homicide. The videotape does not suggest that the detective's actions resulted in Bormann's will being overborne.

The trial court's findings of historical fact are not clearly erroneous. They are fully supported by the record. Based upon our independent review of the totality of the circumstances, we conclude that the videotaped statement by Bormann was voluntary. The trial court did not err in admitting the videotape into evidence.

2. Step Jury Instruction

Bormann's final assignment of error claims the trial court erred in giving a step jury instruction that deprived him of his due process right to have the jury consider his defense to the charges. The jury was given the following instruction:

> Under Count I of the Information, depending on evidence which you find that the State has proved beyond a reasonable doubt, you may find . . . Bormann:
>
> (1) Guilty of murder in the first degree; or
>
> (2) Guilty of murder in the second degree; or
>
> (3) Guilty of manslaughter; or
>
> (4) Not guilty.

The instruction included three sections, each of which spelled out the material elements for the three grades of homicide. Each instruction then stated that if the jury found from the evidence beyond a reasonable doubt that each and every one of the material elements set out in that section was true, the jury should find the defendant guilty of that crime. Each instruction went on to state: "If, on the other hand, you find

that the State has failed to prove beyond a reasonable doubt any one or more of the material elements" in that section, the jury should find Bormann not guilty of that crime. The instruction then directed the jury to "proceed to consider the lesser-included offense."

[12] Bormann's theory of defense was that he lacked the intent to kill and that, therefore, he could only have been found guilty of manslaughter. He claims that the step instruction violated his due process rights because it did not allow the jury to consider his theory. The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009). On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Id*.

In *State v. Goodwin, supra*, we recently addressed an argument similar to Bormann's argument. We agreed with other courts which have held that so-called acquittal first step instructions are not constitutionally deficient. As with *State v. Goodwin, supra*, the step instruction given in this case did not prevent the jury from considering the critical issue of whether Bormann had formed an intent to kill when he fired the fatal shot. Bormann was not precluded from offering evidence to support his theory of defense, nor was his counsel restricted from arguing that Bormann did not have the intent to kill and should therefore be found guilty of the lesser offense of manslaughter.

There was no prejudice to Bormann when the jury acquitted him of first degree murder. Pursuant to the step instruction, the jury was then required to consider whether the State had proved all the elements of second degree murder. Once the jury found that the State had proved each element of second degree murder beyond a reasonable doubt, Bormann's defense of manslaughter was no longer relevant. The jury found that Bormann intentionally killed Williams. The step instruction did not violate Bormann's constitutional right to present a complete defense. It was perfectly logical for the jury to conclude

that when Bormann pointed and fired his high-powered rifle at Williams, he possessed the intent to kill.

VI. CONCLUSION

The trial court did not err in admitting Bormann's statements into evidence or in its instructions to the jury. The convictions and sentences are affirmed.

AFFIRMED.

LONNIE L. KOCONTES, APPELLANT, V.
SEAN K. McQUAID AND EDWARD T.
BUJANOWSKI, APPELLEES.

778 N.W.2d 410

Filed January 29, 2010. No. S-09-235.

1. **Libel and Slander.** Whether a communication is privileged by reason of its character or the occasion on which it was made is a question of law.
2. **Appeal and Error.** An appellate court resolves questions of law independently of the determination reached by the court below.
3. **Pleadings: Appeal and Error.** An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.
4. **Pretrial Procedure: Appeal and Error.** On appellate review, decisions regarding discovery are generally reviewed under an abuse of discretion standard.
5. **Judges: Words and Phrases.** A judicial abuse of discretion exists when 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.
6. **Rules of the Supreme Court: Pleadings.** Dismissal under Neb. Ct. R. Pldg. § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.
7. **Pleadings: Appeal and Error.** When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.
8. **Libel and Slander.** An absolutely privileged communication is one for which, by reason of the occasion on which it was made, no remedy exists in a civil action for libel or slander.
9. ____. Absolute privilege attaches to defamatory statements made incident to, and in the course of, judicial or quasi-judicial proceedings if the defamatory matter has some relation to the proceedings.

10. **Libel and Slander: Trial.** The relevancy of the defamatory matter is not a technical legal relevancy but instead a general frame of reference and relationship to the subject matter of the action.
11. **Libel and Slander: Public Policy.** Absolute privilege stems from a public policy determination that weighs the public interest in free disclosure against the harm to individuals who may be defamed.
12. **Pretrial Procedure: Public Officers and Employees.** When the law commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is quasi-judicial.
13. **Board of Pardons: Libel and Slander.** The Nebraska Board of Pardons should be considered a quasi-judicial body for the purpose of applying absolute privilege.
14. **Pretrial Procedure.** The evaluation and investigation of facts and opinions for the purpose of determining what, if anything, is to be raised or used in pending litigation is as integral a part of the search for truth as is the presentation of such facts and opinions during the course of the trial.
15. **Libel and Slander: Public Policy.** The great underlying principle upon which the doctrine of privileged communications rests is public policy.
16. **Convictions.** A pardon affects the public interest in the conviction.
17. **Board of Pardons: Convictions: Public Policy.** Before a convicted person benefits from the clemency power of the Board of Pardons, public policy demands full disclosure of any and all pertinent information.
18. **Torts: Libel and Slander: Public Policy: Damages.** For purposes of public policy, a defamation suit is indistinguishable from other tort-related claims seeking money damages for the statement.
19. **Pretrial Procedure: Proof: Appeal and Error.** The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

James L. Beckmann, of Beckmann Law Offices, for appellant.

Raymond E. Walden, of Walden Law Office, and William R. Johnson, of Lamson, Dugan & Murray, L.L.P., for appellees.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Lonnie L. Kocontes filed a claim for libel per se against Sean K. McQuaid and Edward T. Bujanowski after they submitted

a letter to the Nebraska Board of Pardons discouraging it from granting Kocontes' application. The district court granted McQuaid and Bujanowski's motion to dismiss based on the absolute privilege protecting participants in judicial or quasi-judicial proceedings from the prospect of defamation actions. We consider whether the Board of Pardons is a quasi-judicial body such that absolute privilege applies to communications relating to its proceedings.

BACKGROUND

Kocontes is an attorney licensed in the State of California. Occasionally, Kocontes has represented clients on a pro hac vice basis in Florida. He has apparently been unable to obtain a license to practice law in Florida. This is at least in part because of drug-related felony convictions that occurred in Nebraska approximately 30 years ago. In the hopes of obtaining a license in Florida, Kocontes filed an application with the Nebraska Board of Pardons to pardon his prior convictions.

Kocontes' relationship with Bujanowski began sometime around September 2007, when Kocontes entered into a pro hac vice arrangement to represent him as the plaintiff in an action in Florida. By November, however, Kocontes' pro hac vice status had been revoked by the court. Kocontes asserts that the court had erroneously concluded that he was a Florida resident. Bujanowski retained McQuaid, a Florida attorney, to continue his lawsuit.

On January 28, 2008, Kocontes filed a complaint against McQuaid with the Florida State Bar, alleging that McQuaid had solicited Bujanowski at a time when Kocontes still represented Bujanowski. He also initiated a civil action in Florida against McQuaid and Bujanowski for defamation, alleging that McQuaid had made defamatory statements to Bujanowski in the process of soliciting his business and that both McQuaid and Bujanowski had made defamatory statements to an investigator in Bujanowski's lawsuit.

McQuaid and Bujanowski learned that Kocontes had a pending application for a pardon before the Nebraska Board of Pardons. They opposed the pardon, allegedly out of vindictiveness for Kocontes' suits against them. On March 6, 2008,

McQuaid sent a letter on Bujanowski's behalf to the Board of Pardons. The letter described the relationship between the parties and alleged that (1) Kocontes' pro hac vice status in Florida was removed due to Kocontes' misrepresentations to the court, (2) Kocontes had lied about his convicted felon status when registering to vote in Florida, and (3) Kocontes was illegally practicing law in Florida and had charged exorbitant fees. Finally, the letter suggested that the Board of Pardons investigate specific rumors of illegal behavior for which Kocontes had not been charged or convicted. In the present action, Kocontes alleges that all of these statements to the Board of Pardons were false and that McQuaid and Bujanowski either knew of their falsity or acted with reckless disregard as to their truth or falsity.

Kocontes' application for a pardon was denied by the Board of Pardons on June 5, 2008. That same day, Kocontes filed suit against McQuaid and Bujanowski in the district court for Lancaster County seeking damages for the alleged libelous statements in the letter.

McQuaid and Bujanowski filed a motion to dismiss the action, alleging that Nebraska lacked personal jurisdiction over them and that the action was barred by absolute privilege. McQuaid and Bujanowski were granted a protective order delaying the need to respond to Kocontes' discovery requests until the motion to dismiss was disposed of. The court denied Kocontes' motion to compel discovery to prove additional contacts and defamatory statements in Nebraska. Ultimately, the motion to dismiss was granted, with the district court's reasoning that an absolute privilege protected the statements. Kocontes appeals.

ASSIGNMENTS OF ERROR

Kocontes assigns that the district court erred when it (1) granted the motion to dismiss and (2) overruled Kocontes' motion to compel discovery.

STANDARD OF REVIEW

[1,2] Whether a communication is privileged by reason of its character or the occasion on which it was made is a question

of law.[1] An appellate court resolves questions of law independently of the determination reached by the court below.[2]

[3] An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.[3]

[4,5] On appellate review, decisions regarding discovery are generally reviewed under an abuse of discretion standard.[4] A judicial abuse of discretion exists when 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]

ANALYSIS

[6,7] Dismissal under Neb. Ct. R. Pldg. § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.[6] When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.[7] In this case, the court determined that the statements were absolutely privileged and that therefore, even if the allegations in the complaint were true, the statements could not form the basis of a defamation action. The court also found that no reasonable possibility existed that Kocontes would be able to correct the deficiency in his petition.

On appeal, Kocontes asserts that absolute privilege should not apply to complaints to the Board of Pardons. He argues that the Board of Pardons is not a quasi-judicial body and that, in any event, letters by strangers to the proceedings should not

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[1] *Sullivan v. Smith*, 925 So. 2d 972 (Ala. Civ. App. 2005).

[2] *Tolliver v. Visiting Nurse Assn.*, 278 Neb. 532, 771 N.W.2d 908 (2009).

[3] *Crane Sales & Serv. Co. v. Seneca Ins. Co.*, 276 Neb. 372, 754 N.W.2d 607 (2008).

[4] See *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997).

[5] *Id.*

[6] *Crane Sales & Serv. Co. v. Seneca Ins. Co., supra* note 3.

[7] *Id.*

be protected by the privilege. Even if the letter was protected, Kocontes asserts he should have been allowed to amend his complaint to assert the tortious interference with a business expectancy. Finally, he asserts he should have been allowed to discover any possible nonprivileged communications made by McQuaid and Bujanowski with Nebraska.

Absolute Privilege

[8-10] An absolutely privileged communication is one for which, by reason of the occasion on which it was made, no remedy exists in a civil action for libel or slander.[8] Absolute privilege attaches to defamatory statements made incident to, and in the course of, judicial or quasi-judicial proceedings if the defamatory matter has some relation to the proceedings.[9] The relevancy of the defamatory matter is not a technical legal relevancy but instead a general frame of reference and relationship to the subject matter of the action.[10]

[11] Absolute privilege stems from a public policy determination that weighs the public interest in free disclosure against the harm to individuals who may be defamed.[11] There are certain relations of life in which it is so important that the persons engaged in them should be able to speak freely that the law takes the risk of their abusing the occasion and speaking maliciously as well as untruly.[12] As will be illustrated further below, the privilege applies to witness testimony in a judicial proceeding, but it also applies to statements preliminary or ancillary to judicial or quasi-judicial proceedings.

[12] In *Shumway v. Warrick*,[13] we defined what is quasi-judicial for purposes of applying absolute privilege and held

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[8] *Regan v. Guardian Life Ins. Co.*, 140 Tex. 105, 166 S.W.2d 909 (1942).

[9] See, *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985); *Sinnett v. Albert*, 188 Neb. 176, 195 N.W.2d 506 (1972); *Shumway v. Warrick*, 108 Neb. 652, 189 N.W. 301 (1922); Restatement (Second) of Torts §§ 587 and 590A (1977).

[10] *Sinnett v. Albert, supra* note 9.

[11] See, e.g., *Adams v. Peck*, 288 Md. 1, 415 A.2d 292 (1980).

[12] *Sinnett v. Albert, supra* note 9.

[13] *Shumway v. Warrick, supra* note 9, 108 Neb. at 656, 189 N.W. at 302.

that "'[w]hen the law commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is quasi-judicial.'" We note that several other courts use a similarly broad definition that focuses on the ability of a board or tribunal to decide matters based on the application of human judgment to some sort of factual investigation.[14]

Nevertheless, it has been said that there is "'"no clear definition" of what constitutes a quasi-judicial proceeding before a quasi-judicial body.'"[15] In addition to the definition set forth in *Shumway*, we also find useful six principal attributes considered by other courts in making a determination as to whether a body is quasi-judicial: (1) the power to exercise judgment and discretion; (2) the power to hear and determine or to ascertain facts and decide; (3) the power to make a binding order and judgment; (4) the power to affect the personal or property rights of private persons; (5) the power to examine witnesses, to compel the attendance of witnesses, and to hear the litigation of the issues at a hearing; and (6) the power to enforce decisions or impose penalties.[16] A quasi-judicial body need not possess all six powers, but the more powers it does possess, the more likely it is to be acting in a quasi-judicial manner.[17]

We have considered a wide variety of entities as quasi-judicial bodies for purposes of absolute privilege, although we have never before specifically addressed the Board of Pardons. For example, in *Shumway*,[18] we held the privilege applied to a

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[14] *Fedderwitz v. Lamb*, 195 Ga. 691, 25 S.E.2d 414 (1943); *Parker v. Kirkland*, 298 Ill. App. 340, 18 N.E.2d 709 (1939); *Cole v. Star Tribune*, 581 N.W.2d 364 (Minn. App. 1998); *Lane v. Port Terminal R.R. Ass'n*, 821 S.W.2d 623 (Tex. App. 1991).

[15] *Vultaggio v. Yasko*, 215 Wis. 2d 326, 341, 572 N.W.2d 450, 456 (1998).

[16] See, e.g., *Craig v. Stafford Const., Inc.*, 271 Conn. 78, 856 A.2d 372 (2004); *Adco Services, Inc. v. Bullard*, 256 Ill. App. 3d 655, 628 N.E.2d 772, 195 Ill. Dec. 308 (1993).

[17] *Illinois College of Optometry v. Labombarda*, 910 F. Supp. 431 (N.D. Ill. 1996). See, also, *Craig v. Stafford Const., Inc., supra* note 16; *Adco Services, Inc. v. Bullard, supra* note 16.

[18] *Shumway v. Warrick, supra* note 9.

letter written by a banker to the state banking board. The board was considering a businessman's application for a charter to start a new bank. In concluding that the board was quasi-judicial, we observed that it was charged with making the ultimate decision as to whether to grant a banking charter and it was charged with investigating and determining the integrity and responsibility of parties applying for the same.

We concluded that the banker's protest was relevant and that it was covered by the privilege, because statements addressing the integrity and responsibility of the applicant were pertinent to the board's inquiry. We held that the banker was protected by the privilege regardless of whether his rights and interests were directly involved in the matter before the board or whether his opinion was compelled by the board.[19] It was the banker's right to appear before the banking board and protest the issuance of the charter.[20] Thus, "it would be paradoxical to hold that he was merely an interloper, a stranger to the proceedings, and therefore denied the privileges and immunities granted a party litigant."[21]

In *Sinnett v. Albert*,[22] we held that absolute privilege applied to a complaint to the Nebraska State Bar Association against an attorney by a former client. We held that the complaint was privileged regardless of whether it was ever admitted into evidence at a subsequent investigatory proceeding. Furthermore, the protection extended to statements in the complaint that pertained to an attorney who was not, in fact, the ultimate subject of the disciplinary proceedings, so long as the statements were incidental or explanatory to the complaint.

We said that proceedings for the discipline or disbarment of attorneys have traditionally been regarded as judicial in character. And we described in some detail how "[r]easonable demands of sound public policy require[d] the imposition of

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[19] *Id.*

[20] *Id.*

[21] *Id.* at 657, 189 N.W. at 303.

[22] *Sinnett v. Albert, supra* note 9.

absolute privilege"[23] to complaints about professional misconduct. We explained that the exercise of the right to lodge a complaint against an attorney "should not be discouraged by fear on the part of the complainant that he may have to defend a lawsuit for defamation by anyone who deems himself defamed by relevant statements made in the complaint."[24]

In other jurisdictions, absolute privilege has likewise been applied to complaints before a wide variety of entities, ranging from a police department's internal affairs division[25] to a council of optometric education.[26] Closer to the situation at hand, communications to states' boards of parole are almost universally considered protected by absolute privilege.[27] For instance, in *Pulkrabek v. Sletten*,[28] the court applied the privilege to a letter written by the prosecuting attorney questioning the competency of defense counsel who had agreed to a plea bargain. The court held that the privilege applied to the letter regardless of whether it was actually used in the parole meeting so long as it was drafted with the intent that it be considered by the parole board in its investigation of the inmate's application for parole.

In *Sullivan v. Smith*,[29] the court held that absolute privilege applied to the testimony of the victim's parents at a parole board meeting. In concluding that the parole board was a quasi-judicial body, the court explained that the parole board did not normally act in a ministerial manner, but, instead, its

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[23] *Id.* at 179, 195 N.W.2d at 509.

[24] *Id.*

[25] *Craig v. Stafford Const., Inc., supra* note 16.

[26] *Illinois College of Optometry v. Labombarda, supra* note 17.

[27] See, *Sullivan v. Smith, supra* note 1; *Neal v. McCall*, 134 Ga. App. 680, 215 S.E.2d 537 (1975); *Hartford v. Hartford*, 60 Mass. App. 446, 803 N.E.2d 334 (2004); *Burgess v. Silverglat*, 217 Mont. 186, 703 P.2d 854 (1985); *Pulkrabek v. Sletten*, 557 N.W.2d 225 (N.D. 1996); *Vasquez v. Courtney*, 276 Or. 1053, 557 P.2d 672 (1976). See, also, *Inmates of Neb. Penal & Correctional v. Greenholtz*, 436 F. Supp. 432 (D. Neb. 1976).

[28] *Pulkrabek v. Sletten, supra* note 27.

[29] *Sullivan v. Smith, supra* note 1.

decisions were "completely discretionary."[30] The board, the court explained, made decisions akin to those of a trial judge in determining the propriety of probation. In both instances, the determinations were effectively "not reviewable on appeal due to the complete discretion."[31] The court defined a "judicial" action for purposes of absolute privilege as an "'"'"'"[o]fficial action, the result of judgment or discretion . . . ."'"'"'"[32]

Not many cases have specifically considered whether proceedings to obtain a pardon are quasi-judicial in this context.[33] As Kocontes points out, at least one case, decided in 1918, has denied the privilege.[34] In *Andrews v. Gardiner*,[35] the New York Court of Appeals considered whether a physician's application to the governor for a pardon of a prior conviction was absolutely privileged. The court explained that the application was not a proceeding in court, nor one before an officer having attributes similar to a court.[36] Instead, it was "a petition for mere grace and mercy":

> It may be made by any one, and without the convict's knowledge. It grows out of the action of the courts, but it seeks to reverse their action by an appeal to motives and arguments which are not those of jurisprudence. There are no clearly defined issues. There is often a most informal hearing. Sometimes there is argument by counsel. As often, the plea for mercy is made by wife or kin or friends. . . . It is not necessary that reason be convinced; it is enough that compassion is stirred.[37]

The court reasoned that "[w]here the test of the pertinent is so vague, there must be some check upon calumny."[38]

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[30] *Id.* at 975.

[31] *Id.*

[32] *Id.* (emphasis omitted).

[33] Annot., 45 A.L.R.2d 1296 (1956).

[34] *Andrews v. Gardiner*, 224 N.Y. 440, 121 N.E. 341 (1918).

[35] *Id.*

[36] *Id.*

[37] *Id.* at 447, 121 N.E. at 343.

[38] *Id.* at 447-48, 121 N.E. at 343.

Furthermore, the court found a distinction between a witness required to attend a hearing and voluntary complainants. The court concluded that there was "no license, under cover of such an occasion, to publish charges known to be false or put forward for revenge."[39]

In several other cases, however, courts have found that absolute privilege does apply to communications to a pardons board. In *Cole v. Star Tribune*,[40] the Minnesota Court of Appeals held that letters sent by the victim's nieces to the board of pardons were absolutely privileged. The board of pardons was considering an inmate's application for early release. The board consisted of the governor, the attorney general, and the chief justice. The court noted certain formalities, including the fact that the public had been informed of the meeting of the board. The victim's nieces, particularly, were informed and given the right to be present or to submit a written statement. The board was required by statute to consider the victim's nieces' statements, although there was apparently no further instruction as to the manner in which it was to do so. The court concluded the board of pardons was quasi-judicial because it applied "'deliberate human judgment based upon evidentiary facts of some sort commanding the exercise of . . . discretionary power.'"[41]

In *Brech v. Seacat et al.*,[42] the Supreme Court of South Dakota held that the privilege applied to a sentencing judge's letter to the board of pardons, regardless of whether the letter was required of him. It was customary for the sentencing judge to forward such a letter to the board. And in *Connellee v. Blanton*,[43] the court held that absolute privilege applied to allegedly libelous statements in a prisoner's application for pardon to the governor. The court in *Connellee* noted that the right to apply for redress of grievances was one embedded in

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[39] *Id.* at 448, 121 N.E. at 344.

[40] *Cole v. Star Tribune, supra* note 14.

[41] *Id.* at 369.

[42] *Brech v. Seacat et al.*, 84 S.D. 264, 170 N.W.2d 348 (1969).

[43] *Connellee v. Blanton*, 163 S.W. 404 (Tex. Civ. App. 1913).

the state constitution. And while it observed that some classes of communication to heads of governmental departments were considered only conditionally privileged, the court concluded that this was a quasi-judicial proceeding. The court explained that the same principle of public policy which supports absolute privilege in judicial proceedings should apply with equal force to petitions for the exercise of the pardoning power—a power which was "superior to that of the court which rendered the judgment of conviction."[44] The court reasoned: "If the judicial proceedings which culminated in the conviction were absolutely privileged, why should not the same immunity be extended to the petition to a higher power to annul that judgment . . . ?"[45]

[13] We conclude that the cases applying the privilege to communications before boards of pardons provide the better-reasoned authority. In light of our definition set forth in *Shumway*,[46] the six-factor test applied by other courts, and the public policy reasons for absolute privilege, we conclude that the Nebraska Board of Pardons should be considered a quasi-judicial body for this purpose.

The Board of Pardons was created by Neb. Rev. Stat. § 83-1,126 (Reissue 2008). It consists of the Governor, the Attorney General, and the Secretary of State. By majority vote, the board has the statutory authority to remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations for all criminal offenses except treason and impeachment.[47] Applications requesting specific relief must be considered by the board at its next regularly scheduled meeting.[48] The Board of Pardons must consult with the Board of Parole concerning the applications.[49] Also, pursuant to article I, § 28, of the Nebraska Constitution and Neb. Rev. Stat.

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[44] *Id.* at 407.

[45] *Id.*

[46] *Shumway v. Warrick, supra* note 9.

[47] Neb. Rev. Stat. §§ 83-1,127(1) and 83-170(10) (Reissue 2008).

[48] Neb. Rev. Stat. §§ 83-1,129(3) and 83-1,130(1) (Reissue 2008).

[49] § 83-1,127(4).

§ 81-1848 (Reissue 2008), any victim of a crime committed by the applicant must be informed of the pardon application and be allowed to submit a written statement for consideration at pardon proceedings.

The current policy and procedure guidelines of the Board of Pardons state that it is the board's policy to hold its hearings in accordance with the Open Meetings Act.[50] "The purpose of any such hearing is to afford the members of the Board [of Pardons] the opportunity to question the applicant or others, or to hear such statements and review such information as the Board believes may be helpful to it . . . ."[51] The guidelines explain that the board may review information concerning the crime, the seriousness of the crime, the impact upon the victim, and other issues, but it is not the function of the board to retry the case for purposes of determining guilt or innocence.[52] On "Presentation of information, testimony, and argument," the guidelines state in relevant part:

> The Board [of Pardons] may hear testimony, whether or not offered under oath, and may received [sic] written statements and other information which the Board deems useful in the exercise of it's [sic] authority. . . . Ordinarily the applicant, or a representative of the applicant, will first present testimony, statements, or other information in support of the application, followed by the presentation of those appearing in opposition to the application. Correspondence received by any Board member shall be shared with the other members through Pardon Board staff.[53]

Section 83-1,129(3) states that while the hearings before the board are conducted "in an informal manner," a record of the proceedings must be made and preserved.

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[50] See, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2008 & Supp. 2009); Nebraska Pardons Board Policy and Procedure Guidelines § 003.03 (1994).

[51] Nebraska Pardons Board Policy and Procedure Guidelines, *supra* note 50, § 004.03.

[52] *Id.*, § 004.03C.

[53] *Id.*

In its investigation of the facts relevant to the application, Neb. Rev. Stat. § 83-1,128 (Reissue 2008) provides that the Board of Pardons, "in the same manner as similar process in the district court" has the power to issue subpoenas; to compel the attendance of witnesses and the production of books, papers, and other documents pertinent to the subject of an inquiry; and to administer oaths and take the testimony of persons under oath. The statute further provides that witnesses are subject to contempt for failure to attend or provide requested material when subpoenaed. And the statute provides that any person who knowingly testifies falsely or submits any false affidavit or deposition is "subject to the same orders and penalties to which a person before the district court is subject."

Thus, the law commits to the Board of Pardons the duty of looking into facts and acting upon them, and the board does not make decisions in a way which the law specifically directs, but in its discretion.[54] And regardless of whether it always sees fit to exercise them, the board clearly has all six powers considered indicative of a quasi-judicial body.

Kocontes argues that the Board of Pardons should not be considered quasi-judicial because its exercise of discretion is completely unconstrained. Kocontes points out that there are no specific facts it is directed by law to find, nor are there specified legal principles the board must apply to the facts it determines. In support of this argument, Kocontes makes reference to the reasoning of the court in *Andrews*.[55] But he also relies heavily on cases where we have considered if an administrative decision was made in the exercise of "judicial" functions such that it is reviewable by petition in error. In those cases, we stated that a board, tribunal, or officer exercises a judicial function "if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner."[56] We have defined "'[a]djudicative facts'" as those "which relate to a

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[54] *Shumway v. Warrick, supra* note 9.

[55] *Andrews v. Gardiner, supra* note 34.

[56] See, e.g., *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 140, 517 N.W.2d 113, 115 (1994). See, also, *Thomas v. Lincoln Public Schools*, 228 Neb. 11, 421 N.W.2d 8 (1988).

specific party and are adduced from formal proof."[57] Little has been said about "judicial manner."

In *Sarpy Cty. Bd. of Comrs. v. Sarpy Cty. Land Reutil.*,[58] the Nebraska Court of Appeals held that a decision by a county land reutilization commission to sell a piece of property was not subject to review by petition in error because the decision was *too* discretionary. The court noted that the statutes granting the commission its power[59] did not list the facts which must be determined or upon which its determination must depend. It was thus neither ministerial, judicial, nor quasi-judicial; "[r]ather, the decision . . . can only be seen as a matter of Commission policy or as a political decision of the Commission."[60] Later, in *Ditter v. Nebraska Bd. of Parole*,[61] the Court of Appeals similarly held that a decision by the Board of Parole during its review of an inmate's parole eligibility was not a "judicial" act subject to petition in error review, because it held no hearing and no "adjudicative facts" were determined by the board.

We note that more recently, in *Nicholson v. Red Willow Cty. Sch. Dist. No. 0170*,[62] we held that a school district superintendent's determination, without a hearing, of the sufficiency of signatures in a petition to transfer real property from one district to another was a quasi-judicial function subject to petition in error review. And we overruled the prior case of *Kosmicki v. Kowalski*,[63] in which we had held that an action was not judicial because it involved no "adjudicative facts."

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[57] *Hawkins v. City of Omaha*, 261 Neb. 943, 953, 627 N.W.2d 118, 127 (2001).

[58] *Sarpy Cty. Bd. of Comrs. v. Sarpy Cty. Land Reutil.*, 9 Neb. App. 552, 615 N.W.2d 490 (2000).

[59] See Neb. Rev. Stat. §§ 77-3205 and 77-3206(4) (Reissue 2009).

[60] *Sarpy Cty. Bd. of Comrs. v. Sarpy Cty. Land Reutil., supra* note 58, 9 Neb. App. at 561, 615 N.W.2d at 497.

[61] *Ditter v. Nebraska Bd. of Parole*, 11 Neb. App. 473, 481, 655 N.W.2d 43, 49 (2002).

[62] *Nicholson v. Red Willow Cty. Sch. Dist. No. 0170*, 270 Neb. 140, 699 N.W.2d 25 (2005).

[63] *Kosmicki v. Kowalski*, 184 Neb. 639, 171 N.W.2d 172 (1969).

But regardless of whether the Board of Pardons' decisions would or would not qualify as "judicial" under our petition in error analysis, we find Kocontes' reliance on these cases misplaced. Whether a decision can be reviewed by petition in error involves different considerations than those involved in the question of whether participants in the proceedings should be protected by an absolute privilege. One of the considerations for a petition in error is whether the decision being reviewed has taken place in a way that would create a record for meaningful appellate review.[64] For absolute privilege, in contrast, policy considerations encouraging full disclosure are paramount. At least one court has expressly held that the test for whether an entity is quasi-judicial for the purpose of absolute privilege is a different test than the one used to determine if a decision is quasi-judicial for the purpose of a method of review.[65]

We find no support for Kocontes' argument that the facts to be considered by the board must be delineated by law in order for the entity to act in a quasi-judicial manner. We do agree that the board must be bound to apply its judgment to some form of factual determinations so that its decision is more than simply an arbitrary game of chance. But the Nebraska Board of Pardons is so bound. Section 83-1,127(4) states that the board must consult with the Board of Parole, and § 81-1848 implies that it must also consider written statements by the victim. Extensive powers are granted to the Board of Pardons to investigate all facts it deems relevant. Thus, although not bound by jurisprudence, the Board of Pardons clearly endeavors to exercise its discretion in a "judicial" manner insofar as it exercises its discretion in conjunction with a careful determination of relevant facts. And, as the court pointed out in *Sullivan*,[66] when it comes to certain sentencing decisions, judges themselves are allowed virtually unfettered discretion not only in the decision itself, but in what facts it considers

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[64] See *Hawkins v. City of Omaha, supra* note 57.

[65] *Parker v. Kirkland, supra* note 14. But see *Vogel v. State*, 187 Misc. 2d 186, 721 N.Y.S.2d 901 (N.Y. Cl. 2000).

[66] *Sullivan v. Smith, supra* note 1.

relevant to that decision. Yet such actions are still considered "judicial."

Kocontes also argues that absolute privilege should not apply because proceedings of the Board of Pardons fail to provide any counterbalancing guarantees of truthfulness. Kocontes asserts that the key factor in deciding if absolute privilege applies is whether other safeguards exist that would encourage truthful statements and reveal and punish untruthful statements. He notes that in judicial proceedings, witnesses that are protected by absolute privilege are also subjected to discovery, cross-examination, and potential perjury charges.

First, we find that such guarantees are not, as Kocontes suggests, wholly absent from proceedings before the Board of Pardons. While any hearing is an informal one, the applicant's version of events is given fair consideration. Furthermore, the board has the power to subpoena any witness it chooses. As already noted, any person subjected to this power is "subject to the same orders and penalties to which a person before the district court is subject"[67] for knowingly testifying falsely or submitting any false affidavit or deposition.

[14] That the Board of Pardons did not exercise its subpoena powers in this instance or that it does not normally choose to exercise these powers is not decisive. Anyone presenting information to the board should be aware of the possibility that his or her statements may ultimately be subjected to this scrutiny. As such, untruthful, malicious statements are still discouraged. Even in the traditional litigation context, preliminary information by potential witnesses is covered by the privilege, regardless of whether the information is ultimately brought forth through sworn testimony and subjected to truth-seeking protections. To hold otherwise, the courts have explained, would defeat the purpose of the privilege, for there would be a chilling effect on potential witnesses' revealing what they know during the investigatory stages, and litigants would never know whether they should be called.[68] The evaluation and investigation of facts and opinions for the purpose of determining

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[67] § 83-1,128.

[68] See, e.g., *Adams v. Peck, supra* note 11.

what, if anything, is to be raised or used in pending litigation is as integral a part of the search for truth as is the presentation of such facts and opinions during the course of the trial.[69] The preliminary, investigatory stage of proceedings before the Board of Pardons is no less important.

Second, we disagree with Kocontes' emphasis on due process in determining whether the privilege applies. Many courts will consider the presence or absence of due process as a factor.[70] At least one court considers the "'"trappings required by due process"'" to be the primary consideration.[71] But this has never been the test in our court. Although we find the presence of other guarantees of trustworthiness relevant, we consider the guarantees provided by the Nebraska Board of Pardons sufficient in light of the other factors weighing in favor of absolute privilege.

[15-17] As already discussed, "[t]he great underlying principle upon which the doctrine of privileged communications rests is public policy."[72] We conclude that there are very unique public policy reasons supporting absolute privilege for communications to the Board of Pardons. A pardon is an act of "officially nullifying punishment or other legal consequences of a crime."[73] We have said that a pardon affects "the public interest in the conviction."[74] This is likewise true for the original trial. Society has an interest in the criminal justice system because it is what protects society from harm. And, as stated by the court in *Connellee*, "[i]f the judicial proceedings which culminated

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[69] *Reichardt v. Flynn*, 374 Md. 361, 823 A.2d 566 (2003); *Rabinowitz v. Wahrenberger*, 406 N.J. Super. 126, 966 A.2d 1091 (2009).

[70] *Boice v. Unisys Corp.*, 50 F.3d 1145 (2d Cir. 1995); *Kidwell v. General Motors Corp.*, 975 So. 2d 503 (Fla. App. 2007); *Reichardt v. Flynn, supra* note 69; *Imperial v. Drapeau*, 351 Md. 38, 716 A.2d 244 (1998); *Hartford v. Hartford, supra* note 27.

[71] *Gregory Rockhouse v. Glenn's Well Serv.*, 144 N.M. 690, 697, 191 P.3d 548, 555 (N.M. App. 2008).

[72] Martin L. Newell, The Law of Slander and Libel in Civil and Criminal Cases § 493 at 477 (Mason H. Newell ed., 3d ed. 1914).

[73] Black's Law Dictionary 1221 (9th ed. 2009).

[74] *Campion v. Gillan*, 79 Neb. 364, 372, 112 N.W. 585, 588 (1907).

in the conviction were absolutely privileged, why should not the same immunity be extended to the petition to a higher power to annul that judgment . . . ?"[75] Stated another way, all the same reasons for applying the privilege to the proceedings that resulted in the conviction would also apply to proceedings to remove it. Before a convicted person benefits from the clemency power of the Board of Pardons, public policy demands full disclosure of any and all pertinent information. Absolute privilege helps ensure that the board gets the information it needs to make this important decision affecting the public interest in convictions.

Having determined that the Board of Pardons is a quasi-judicial body, we consider McQuaid's and Bujanowski's statements to the board as relevant and protected by absolute privilege. While Kocontes points out that they are not "parties" to the proceedings, it is the policy of the Board of Pardons to consider any statements or correspondence received.[76] As noted in *Shumway*, it would be "paradoxical"[77] to consider a citizen complainant a stranger to proceedings when the board grants the right to lodge complaints in relation to the proceedings.

Amendment to Pleadings

Kocontes next argues that even if he stated no claim for a cause of action for defamation, the district court abused its discretion in concluding that an amendment to his pleading could not cure the defect. His principal argument in this regard is that he should have been allowed to assert a claim for interference with a business expectancy. The district court implicitly determined that absolute privilege also barred such a claim.

[18] The applicability of absolute privilege to the tort of interference with a business expectancy is an issue of first impression for this court. We observe, however, that the Court of Appeals has applied absolute privilege to claims of intentional infliction of emotional distress and to medical malpractice

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[75] *Connellee v. Blanton, supra* note 43, 163 S.W. at 407.

[76] Nebraska Pardons Board Policy and Procedure Guidelines, *supra* note 50, § 004.03.

[77] *Shumway v. Warrick, supra* note 9, 108 Neb. at 657, 189 N.W. at 303.

claims revolving around an allegedly false statement.[78] Most other jurisdictions to address this issue hold that the privilege applies as equally to defamation as it does to other tortious behavior, so long as the injury pleaded stemmed from the allegedly defamatory statement.[79] For purposes of public policy, a defamation suit is indistinguishable from other tort-related claims seeking money damages for the statement.[80] If the policy which affords an absolute privilege in defamation actions "is really to mean anything[,] then [a court] must not permit its circumvention by affording an almost equally unrestricted action under a different label."[81] "The privilege would be lost if the [plaintiff] could merely drop the defamation causes of action and creatively replead a new cause of action."[82] We agree. We therefore conclude that the district court did not abuse its discretion in determining that no amendment to the pleadings would cure the defect in Kocontes' petition.

Discovery

Finally, Kocontes asserts that the district court erred in denying his request for discovery. The court had postponed judgment on Kocontes' request pending determination of McQuaid and Bujanowski's motion to dismiss. Kocontes argues on appeal

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[78] *Drew v. Davidson*, 12 Neb. App. 69, 667 N.W.2d 560 (2003).

[79] *McLaughlin v. Copeland*, 455 F. Supp. 749 (D. Del. 1978); *Sweet v. Middlesex Mutual Insurance Company*, 397 F. Supp. 1101 (D.N.H. 1975); *People ex rel. Gallegos v. Pacific Lumber*, 158 Cal. App. 4th 950, 70 Cal. Rptr. 3d 501 (2008); *Buckhannon v. U.S. West Communications*, 928 P.2d 1331 (Colo. App. 1996); *Levin, Middlebrooks v. U.S. Fire Ins. Co.*, 639 So. 2d 606 (Fla. 1994); *Geick v. Kay*, 236 Ill. App. 3d 868, 603 N.E.2d 121, 177 Ill. Dec. 340 (1992); *Jarvis v. Drake*, 250 Kan. 645, 830 P.2d 23 (1992); *Gray v. Central Bank & Trust Co.*, 562 S.W.2d 656 (Ky. App. 1978); *Visnick v. Caulfield*, 73 Mass. App. 809, 901 N.E.2d 1261 (2009); *Wild v. Rarig*, 302 Minn. 419, 234 N.W.2d 775 (1975); *Rainier's Dairies v. Raritan Valley Farms, Inc.*, 19 N.J. 552, 117 A.2d 889 (1955); *Hernandez v. Hayes*, 931 S.W.2d 648 (Tex. App. 1996); *Price v. Armour*, 949 P.2d 1251 (Utah 1997).

[80] See *McLaughlin v. Copeland, supra* note 79.

[81] *Rainier's Dairies v. Raritan Valley Farms, Inc., supra* note 79, 19 N.J. at 564, 117 A.2d at 895.

[82] *Hernandez v. Hayes, supra* note 79, 931 S.W.2d at 654.

that he wanted to discover whether the defendants had made other defamatory statements in Nebraska that might not have been in a privileged context.

Kocontes refers to an affidavit submitted in support of his request. But the only indication of other communications in the affidavit is the following: "At the hearing I attended before the Nebraska Pardons Board in March 2008, the Nebraska Attorney General commented that he would be speaking to . . . McQuaid about me, apparently at . . . McQuaid's request." We find no reason why such a communication would not also be covered by the privilege. Although not written, it clearly involves communications with the Board of Pardons relevant to its ongoing proceedings. The district court apparently concluded the same.

[19] The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.[83] We find no abuse of discretion in this case.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

HEAVICAN, C.J., not participating.

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[83] *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991).

STATE OF NEBRASKA, APPELLEE, V.
THOMAS EDWARD NESBITT, APPELLANT.
777 N.W.2d 821

Filed January 29, 2010. No. S-09-350.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged

test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.

3. **Effectiveness of Counsel: Proof.** Nebraska follows the two-prong test for determining whether a criminal defendant received ineffective assistance of counsel. The first prong is whether counsel performed deficiently, that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. The second prong is whether the deficient performance actually prejudiced the criminal defendant in making his or her defense.
4. ____: ____. The prejudice prong of the ineffective assistance of counsel test requires that the criminal defendant show a reasonable probability that but for counsel's deficient performance, the result of the proceeding in question would have been different.
5. ____: ____. The two-prong ineffective assistance of counsel test need not be addressed in order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.
6. **Effectiveness of Counsel: Presumptions.** When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
7. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** Trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Clarence E. Mock and Matthew M. Munderloh, of Johnson & Mock, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Thomas Edward Nesbitt appeals from an order of the district court denying his motion for postconviction relief. See *State v. Nesbitt* (*Nesbitt II*).[1] After a hearing, the district court denied Nesbitt's postconviction relief on the issue of whether Nesbitt was denied effective assistance of counsel when his

[1] *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002).

trial counsel failed to assert objections to the prosecutor's use of Nesbitt's postarrest, post-*Miranda* silence to infer guilt.

BACKGROUND

The facts of this case are fully set forth in the direct appeal from Nesbitt's conviction, *State v. Nesbitt* (*Nesbitt I*),[2] and in *Nesbitt II* and will not be repeated herein except as necessary.

In 1986, a jury found Nesbitt guilty of first degree murder for the death of Mary Kay Harmer. In *Nesbitt I*, his conviction was affirmed.[3] In *Nesbitt II*, this court considered the district court's denial of postconviction relief without an evidentiary hearing. We affirmed the district court's order denying postconviction relief without a hearing on all but one issue: whether trial counsel was ineffective for failing to make objections under *Doyle v. Ohio*[4] to statements made by the prosecutor on cross-examination and in closing arguments. The following facts set forth Nesbitt's claim that his trial counsel was ineffective for failing to make *Doyle* objections to certain statements made by the prosecution:

During Nesbitt's murder trial, Nesbitt was questioned on direct examination about prearrest statements he made to police in 1975, just after Harmer's disappearance. On direct examination, Nesbitt admitted that he told police that Harmer had been at his home on the night of November 30 but left the next morning. At trial, Nesbitt testified to a different version of events.

Nesbitt testified at trial that he and Harmer, along with one or two other persons at various times, were in his home on the night of November 30, 1975. He testified that all persons in the home were using controlled substances. According to Nesbitt's testimony, Harmer excused herself to go to the bathroom, and when she did not return a short time later, he went to the bathroom and found her lying on the floor in a pool of vomit. He testified that after determining that she was dead, he cleaned her body and disposed of it, first wrapping it in carpet and

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[2] *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987).

[3] *Id.*

[4] *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

placing it in a garage, and then, on the following day, placing the body in a manhole at a housing development near Carter Lake, Iowa. He assumed that Harmer died of a drug overdose and denied killing her.

Nesbitt explained that he did not report Harmer's death to authorities because he did not trust them. Nesbitt further testified that he had had a similar conversation a few days later with other officers who had contacted a female acquaintance of Nesbitt's concerning Harmer's disappearance. Several days after these conversations, Nesbitt left Omaha, Nebraska, and moved to Chicago, Illinois, where he assumed a new identity. He testified that in 1978, law enforcement officials located him in Illinois, ascertained his true identity, and questioned him about Harmer's disappearance.

On cross-examination, Nesbitt again admitted that he originally told law enforcement authorities in 1975 that Harmer left his home while he was asleep. Later in the cross-examination, he was asked:

> Q Did you ever tell the story that you told this jury today to anyone who was investigating this case or anyone involved in law enforcement?
>
> A This is not a story; this is what happened.
>
> Q I ask you have you ever told this to anyone who was investigating the case or anybody who involved [sic] in law enforcement before today?
>
> A No.

Counsel did not object to these questions. In his closing argument, the prosecutor made the following statements:

> The first time anybody heard Mr. Nesbitt say that, [referring to his testimony that Harmer died of a drug overdose] that's involved in law enforcement or had anything to do with the case, other than he says his attorneys, was yesterday morning.
>
> . . . .
>
> . . . To talk real briefly about his testimony, of course, he is the last person to testify. He has had access to every report, every deposition — he sat in on some — and he is going to get on the stand and he's going to be real straightforward with you and tell you what happened . . . .

> . . . .
>
> . . . When the defendant testified, and [defense counsel] apparently thought I was trying to be a comic or it was a ridiculous cross examination, was the first time I ever talked to him in my life . . . .
>
> . . . .
>
> . . . There wasn't one time — and I think this offends me more than about anything else about this case — there wasn't one time from November 30th on, until today, that Mr. Nesbitt couldn't have told the Harmers where their daughter's body was anytime. And he didn't have to do it himself, but he sure could have let them know.

In *Nesbitt II*, after carefully reviewing the trial testimony, we concluded that the questions asked on cross-examination and the statements made in closing arguments were not clearly limited to Nesbitt's silence before he had received *Miranda* warnings. And we stated that the questions asked on cross-examination and the closing statements could reasonably be interpreted to refer to Nesbitt's post-*Miranda* silence. As such, we concluded that the prosecution's questions and statements violated *Doyle*[5] insofar as they were not limited to Nesbitt's prearrest, pre-*Miranda* contacts with the Omaha police in the days following Harmer's death. However, the record before us was insufficient to affirmatively establish that trial counsel made a conscious, strategic decision not to assert a *Doyle* objection. Thus, we held that Nesbitt pled facts sufficient to entitle him to an evidentiary hearing on his postconviction claim that his trial counsel was ineffective in not asserting *Doyle* objections to the prosecutor's questions and statements.

Nesbitt and his trial counsel testified at the evidentiary hearing. Counsel answered questions about his strategy for defense and his knowledge of *Doyle*. He explained that he was familiar with the *Doyle* opinion and that "the thought came to [his] mind" that the broad statements made by the prosecutor might be subject to a *Doyle* objection. But the way he "looked at it was that there was no discussion about — specifically about post-arrest, post-Miranda silence." And he "thought the jury

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[5] *Doyle v. Ohio, supra* note 4.

could be taking it as . . . basically they already knew [Nesbitt] talked to the cops a couple times, and he gave them this story about [Harmer] left."

Further, trial counsel explained that he thought objecting to the statements would be like objecting to part of his defense strategy. He stated: "Part of the defense was that the reason no police were called was because we can't trust them to tell them anything because the end result will be [Nesbitt] getting in trouble." When asked whether it would have made sense to make a *Doyle* objection, counsel stated, "[U]pon reflection, I could have made an objection." But he explained that he did not think the objection would have been sustained in its entirety. Counsel testified that he did not ask for a mistrial because he thought he and Nesbitt "were winning the case."

Nesbitt testified that he knew what *Miranda* warnings were and that he had been given *Miranda* warnings on at least four different occasions in 1978 by authorities in Illinois and in 1984 in Indiana. Nesbitt testified that he was again given *Miranda* warnings in Omaha in 1984 by an officer of the Omaha Police Department. Each time Nesbitt was read his rights, he exercised his right to remain silent. Nesbitt testified that trial counsel was aware that he had been given *Miranda* warnings.

Nesbitt also testified about his discussions with trial counsel concerning trial strategy. Nesbitt testified that he knew he was going to take the stand from "day one" and that he knew he was going to have to explain his prearrest behavior. Nesbitt claimed that he and trial counsel never specifically discussed trial strategy.

According to trial counsel, he and Nesbitt had several conversations during voir dire regarding which jurors they liked and disliked. Counsel testified that he did not discuss with Nesbitt any specific trial strategy he had about allowing the prosecution to make comments regarding Nesbitt's post-*Miranda* silence. However, counsel testified that he and Nesbitt discussed generally what kind of questions the prosecutor would ask Nesbitt and that they discussed the approach the prosecutor would take. The "question of Doyle per se was never discussed" because counsel did not think it was going to be an issue.

Following the evidentiary hearing, the district court entered an order denying Nesbitt's motion for postconviction relief. In its order, the district court found that there was insufficient evidence to establish that Nesbitt had received *Miranda* warnings in 1984 by the Omaha police officer. The district court also concluded that regardless of whether Nesbitt had received *Miranda* warnings, he failed to prove that he received ineffective assistance of counsel. In so concluding, the district court found that trial counsel was sufficiently aware of *Doyle* and that his decision not to object was reasonable. The district court explained that Nesbitt was going to testify about his distrust of police and that he purposefully told law enforcement nothing. Thus, the district court found Nesbitt failed to prove both that his trial counsel's performance was deficient and that he was prejudiced by counsel's performance.

Following the district court's order, Nesbitt filed a motion for new trial arguing that the district court was clearly wrong in finding that he did not receive *Miranda* warnings. The district court overruled Nesbitt's motion for a new trial. The district court reiterated its finding that trial counsel's performance was not ineffective because counsel's trial strategy was reasonable and because Nesbitt was not prejudiced by trial counsel's performance. From this order, Nesbitt appeals.

ASSIGNMENT OF ERROR

Nesbitt assigns that the district court erred in denying his request for postconviction relief, concluding in its order that trial counsel was not ineffective for not making *Doyle* objections to statements made by the prosecution during cross-examination and during closing arguments referring to Nesbitt's post-*Miranda* silence.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.[6]

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[6] *State v. Glover*, 278 Neb. 795, 774 N.W.2d 248 (2009).

[2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[7] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[8] an appellate court reviews such legal determinations independently of the lower court's decision.[9]

ANALYSIS

Nesbitt had the same counsel at trial as he did on direct appeal. Nesbitt alleges that his trial counsel was ineffective for failing to object when the prosecution impeached his trial testimony both on cross-examination and during closing arguments by referring to his post-*Miranda* silence, in violation of *Doyle*.[10] Nesbitt alleges that his counsel acted below all objective standards of reasonableness in his profession by failing to object to the prosecution's remarks. He alleges that this failure was prejudicial because the impeachment offered by the State was a "blanket" attack on his credibility as a witness and that *Doyle* violations are so inherently prejudicial that reversal of the judgment is mandated in this case.

As discussed above, in *Nesbitt II*, we held that Nesbitt had pled facts sufficient to entitle him to a postconviction hearing on the issue of whether his trial counsel was ineffective for failing to object to the statements made during cross-examination and in closing insomuch as those statements were not limited to Nesbitt's pre-*Miranda* statements. Our reasoning for remanding the cause for an evidentiary hearing was that the record before us was insufficient to establish whether trial counsel made a conscious, strategic decision to not object.

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[7] *Id.*

[8] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[9] *State v. Glover, supra* note 6.

[10] *Doyle v. Ohio, supra* note 4.

[3-5] Nebraska follows the two-prong test for determining whether a criminal defendant received ineffective assistance of counsel.[11] The first prong is whether counsel performed deficiently, that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. The second prong is whether the deficient performance actually prejudiced the criminal defendant in making his or her defense.[12] The prejudice prong requires that the criminal defendant show a reasonable probability that but for counsel's deficient performance, the result of the proceeding in question would have been different.[13] The two-prong test need not be addressed in order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.[14]

[6,7] When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.[15] Furthermore, trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.[16]

After reviewing counsel's testimony at the postconviction hearing, we conclude counsel acted reasonably by not objecting to the prosecution's statements. At the evidentiary hearing, counsel explained that part of Nesbitt's defense was that he was afraid that the police would frame him for Harmer's murder, and that as such, Nesbitt refused to make any statements to law enforcement regarding Harmer's disappearance. Nesbitt himself testified that he knew he was going to have to take the stand and explain that the statements he made to officers in 1975 were incorrect. Nesbitt testified that he was going to take

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[11] See *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

[12] See *id.*

[13] *Id.*

[14] See *id.*

[15] *State v. Jim*, 278 Neb. 238, 768 N.W.2d 464 (2009).

[16] *Id.*

the stand and testify because "the truth had to be said." Nesbitt also testified that he did not talk to the police about what really happened to Harmer because he believed the police would frame him for her murder. Certainly, it was reasonable for trial counsel not to object to statements he interpreted as coinciding with his defense strategy.

Moreover, Nesbitt has failed to show that he was prejudiced by the prosecution's comments. We follow the approach to the prejudice inquiry outlined by the Court in *Strickland v. Washington*:

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.[17]

It is undisputed that Nesbitt told officers a different story from the exculpatory story he told at trial. Nesbitt was admittedly a member of the Hell's Angels, which is a group that distrusted all law enforcement personnel. Nesbitt was fully aware that he was going to have to explain to the jury why he made prior inconsistent statements. And part of this explanation included explaining that the reason for his pretrial behavior was that he feared the police would frame him for murder because of his membership in the Hell's Angels, so he kept quiet. Nesbitt himself pointed out his silence before and

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[17] *Strickland v. Washington, supra* note 8, 466 U.S. at 695-96.

after arrest during his own testimony. Thus, we fail to see how Nesbitt was prejudiced by the prosecution's comments regarding his silence.

CONCLUSION

Based on the evidence presented at the postconviction evidentiary hearing, we conclude that the district court's finding is not clearly erroneous and that trial counsel's performance was not ineffective. We therefore affirm the district court's ruling.

AFFIRMED.

DUTTON-LAINSON COMPANY, A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. THE CONTINENTAL INSURANCE COMPANY, A CORPORATION, AND NORTHERN INSURANCE COMPANY OF NEW YORK, A CORPORATION, APPELLEES AND CROSS-APPELLANTS.

778 N.W.2d 433

Filed February 5, 2010. No. S-09-164.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law. In reviewing questions of law, an appellate court resolves the question independently of the lower court's conclusion.
3. **Judgments: Appeal and Error.** A trial court's findings of fact will be upheld on appeal unless clearly wrong.
4. **Damages: Proof.** While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.
5. **Prejudgment Interest: Appeal and Error.** Whether prejudgment interest should be awarded is reviewed de novo on appeal.
6. **Prejudgment Interest.** Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02(2) (Reissue 2004).
7. ____. Under Neb. Rev. Stat. § 45-103.02(2) (Reissue 2004), prejudgment interest is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to the plaintiff's right to recover and the amount of such recovery. This determination requires a two-pronged inquiry. There must be no dispute as to the amount due and to the plaintiff's right to recover.
8. **Final Orders.** As a general matter, where an order is clearly intended to serve as a final adjudication of the rights and liabilities of the parties, the silence of the

order on requests for relief not spoken to can be construed as a denial of those requests under the circumstances.

9. **Insurance: Contracts.** The language of an insurance policy should be considered in accordance with what a reasonable person in the position of the insured would have understood it to mean.
10. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.
11. **Insurance: Contracts: Words and Phrases.** The term "accident" has many meanings, and when used in a contract of indemnity insurance, unless otherwise stipulated, it should be given the construction most favorable to the insured.
12. **Trial: Witnesses.** As the trier of fact, the trial judge determines the credibility of the witnesses and the weight to give their testimony.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

James W.R. Brown, Steven J. Olson, and Thomas R. Brown, of Brown & Brown, P.C., L.L.O., for appellant.

Peter B. Kupelian and Carol G. Schley, of Kupelian, Ormond & Magy, P.C., and Thomas J. Culhane, of Erickson & Sederstrom, P.C., for appellee Northern Insurance Company of New York.

Robert S. Keith, of Engles, Ketcham, Olson & Keith, P.C., and Eileen King Bower and David Cutter, of Troutman Sanders, L.L.P., for appellee The Continental Insurance Company.

HEAVICAN, C.J., WRIGHT, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

INTRODUCTION

In the 1940's, Dutton-Lainson Company (Dutton) began a manufacturing business in Hastings, Nebraska. Dutton used various solvents in its operations to clean machines and parts. Beginning in 1985, the Environmental Protection Agency (EPA) required Dutton to remediate environmental contamination on its premises and other sites. Dutton filed claims with its insurers, which denied coverage.

Dutton sued The Continental Insurance Company (Continental) and Northern Insurance Company of New York (Northern), seeking indemnification for expenses related to the EPA investigation and the resulting cleanup. The Douglas County District Court found that Dutton had sustained total damages of $3,801,521.70. The court applied a pro rata, time-on-the-risk allocation of damages and entered judgment for Dutton against Continental in the amount of $475,190.21 and against Northern in the amount of $74,937.89. Dutton has appealed, and Continental and Northern have cross-appealed. We affirm.

SCOPE OF REVIEW

[1] A suit for damages arising from breach of a contract presents an action at law. *Albert v. Heritage Admin. Servs.*, 277 Neb. 404, 763 N.W.2d 373 (2009).

[2] The interpretation of an insurance policy is a question of law. In reviewing questions of law, an appellate court resolves the question independently of the lower court's conclusion. *Rickerl v. Farmers Ins. Exch.*, 277 Neb. 446, 763 N.W.2d 86 (2009).

FACTS

Pollution and EPA

Dutton's manufacturing business used various solvents to clean machines and parts. From approximately 1948 to 1971, the cleaning solvents contained trichloroethylene (TCE), and from approximately 1971 to 1985, the solvents contained "1,1,1, trichloroethane" (TCA).

Between February 1962 and October 1964, Dutton placed the solvents and sludge-filled degreaser fluid in sealed metal drums that were deposited in a city-operated landfill referred to as the "North Landfill." From October 1964 to July 1982, Dutton placed sludge from the degreaser and, prior to September 7, 1977, sludge-filled solvent fluid in sealed metal containers and deposited them in the city-operated "South Landfill."

After the drums and containers were deposited in the landfills, they were either emptied by Dutton employees or bulldozed by the landfill operator and crushed, causing the sludge

and solvent to be released and allowing TCE and TCA to seep into the soil and ground water at both sites. Dutton's deposits in the North and South Landfills were in compliance with then-existing laws and ordinances for the disposition of these solvents, and Dutton did not anticipate that the solvents would cause pollution of the soil or ground water.

In the early 1980's, testing at a number of municipal wells in Hastings revealed the presence of TCE. The EPA began an investigation and, on September 23, 1985, notified Dutton that it was a potentially responsible party (PRP) for the cost of cleaning up the contamination at the North and South Landfills and the contamination that emanated from those sites.

In addition, between 1948 and 1987, Dutton's regular manufacturing operations caused solvents containing TCE and TCA to spill onto the concrete floor of its operating premises and seep into the ground water beneath. The contaminants spread via the ground water to adjacent property. The pollution emanating from such seepage was designated as "Well No. 3."

Until Dutton received a letter from the EPA dated November 5, 1992, Dutton was unaware that the solvent was migrating through the concrete floor and invading the soil and ground water. The letter informed Dutton that it was a PRP for the cost of cleaning up the contamination at the Well No. 3 subsite and the contamination that had emanated from that subsite.

On December 28, 2001, the EPA notified Dutton that it was a PRP for "Operable Unit 19," which was an area-wide ground water contamination subsite allegedly contaminated by leaching from the other subsites that had not been addressed by other response actions. The polluted areas were eventually designated as a single EPA "Superfund site," made up of seven distinct subsites.

The PRP notices generally gave Dutton a specified period of time to voluntarily undertake cleanup of the various subsites. The notices stated that if no cleanup action was taken, the EPA would design and implement its own plan and would collect reimbursement from Dutton if it were ultimately determined to be a PRP.

Beginning August 14, 1998, consent decrees were entered in the U.S. District Court for the District of Nebraska between

Dutton and the EPA regarding cleanup of the various subsites. Pursuant to these decrees, Dutton has conducted extensive cleanup and continues to address the contamination. The cleanup is expected to continue until 2017.

Insurance History

Throughout its manufacturing operations, Dutton carried insurance policies with many different insurers, including United States Fidelity and Guaranty Company (USF&G), Empire Fire and Marine Insurance Company (Empire), Continental, and Northern. Continental issued three primary general liability policies: policy No. CBP415666 (apparently effective August 1, 1980, to August 1, 1983), policy No. CBP914504 (apparently effective August 1, 1981, to August 1, 1984), and policy No. CBP900212 (effective October 1, 1984, to October 1, 1987). Northern issued a general liability policy, No. SM57686390, for the period August 1 to October 1, 1983, and a second policy, No. SM37686395, for the period October 1, 1983, to October 1, 1986. This policy was canceled by Dutton effective October 1, 1984.

In November 1985, Dutton notified Continental and Northern of the EPA's designation of Dutton as a PRP for the North and South Landfills. Northern responded that it did not believe any "suit" within the meaning of the policy had yet been brought. Therefore, Northern asserted that it was premature to determine whether there was coverage and that the policy definitions of "occurrence" and "property damage," as well as other provisions, might limit coverage. Northern asked to be kept apprised of the EPA's investigation.

In February 1987, Continental sent Dutton a strict reservation of rights, asserting that there was a good likelihood that no coverage existed or that coverage was excluded by Continental's policies. Dutton updated its notice to Continental in 1991. In February 1992, Continental sent a letter to Dutton denying coverage for the claims.

On September 4, 2002, Dutton sued USF&G, Empire, Continental, and Northern, seeking indemnification for sums expended to defend against the EPA's investigation and to conduct the environmental cleanup, including future expenditures.

We affirmed the summary judgment entered in favor of USF&G and Empire, whose policies contained qualified pollution exclusions. See *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 716 N.W.2d 87 (2006) (*Dutton I*). We concluded that Dutton could not recover from USF&G and Empire. However, there were issues of fact precluding summary judgment as to Continental and Northern. Thus, we reversed the judgment and remanded the cause for further proceedings as to the policies issued by Continental and Northern, which are the subject of this appeal.

Dutton sought judgment against Continental and Northern, jointly and severally, in the sum of $4,854,231.49 plus interest and attorney fees. After a trial, the court entered judgment in favor of Dutton and against Continental and Northern.

In allocating the damages, the trial court applied a pro rata, time-on-the-risk method. It divided Dutton's damages evenly over the 40-year period from 1948 to 1987 during which contaminants were deposited. The court found that the Continental policies were in effect for 60 months and that Continental provided coverage for all four sites. Continental's share of the time-on-the-risk was calculated by dividing 60 months by 480 months, the total number of months the contaminants were deposited. The court calculated Continental's share as 12.5 percent of the total damages, for damages of $475,190.21.

The trial court concluded that Northern was liable for only the North and South Landfills. It denied coverage for Well No. 3 and Operable Unit 19 because of the late notice provided by Dutton. It found that Northern provided coverage for 14 months and that its share of the relevant damages was 2.91666 percent. The court awarded $74,937.89 in damages against Northern.

ASSIGNMENTS OF ERROR

Dutton assigns 18 errors which, summarized and restated, allege that the trial court erred in (1) finding that Northern had not waived notice with respect to Well No. 3 and Operable Unit 19 and that Northern was prejudiced by the alleged lack of notice, (2) finding that there was only one "occurrence" as defined in the policies, (3) finding that Dutton was not entitled

to recover employee costs of $1,031,836.99, (4) refusing to allow Dutton prejudgment interest, (5) not holding Continental and Northern jointly and severally liable, (6) not entering declaratory judgment that Continental and Northern were liable for indemnity and defense costs for future remediation, and (7) not allowing attorney fees.

Continental cross-appealed, claiming that the trial court erred in (1) finding that a PRP letter was a "suit" triggering a duty to defend under Continental's policies; (2) finding Dutton gave proper notice to Continental; and (3) its calculation of damages by (a) not requiring Dutton to prove that property damage occurred within the Continental policy periods, (b) adopting Dutton's categorization of damages, and (c) failing to allocate damages through 2017, when the remediation is expected to be complete.

Northern cross-appealed, claiming that the trial court erred in (1) finding that there was one occurrence and (2) determining damages recoverable from Northern.

ANALYSIS

Notice to Northern

Dutton argues that the trial court erred in its findings concerning notice given to Northern and in finding that Northern was prejudiced by the alleged lack of notice.

The record shows that Dutton first sent Northern a letter on November 1, 1985, informing the insurer that Dutton had been notified it was a PRP for contamination of the North and South Landfills. Dutton stated that it would provide additional information as to any developments concerning Dutton's liability.

The policies set forth the insured's duty as follows:

> (a) In the event of an **occurrence**, written notice containing particulars sufficient to identify the **insured** and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the **insured** to the Company or any of its authorized agents as soon as practicable.

The policies further provided that "[i]f claim is made or suit is brought against the **insured**, the **insured** shall immediately

forward to the Company every demand, notice, summons or other process received by him or his representative."

Northern responded by letter of April 16, 1986, that no "suit" within the meaning of the policy had been brought. Thus, any determination as to coverage would be premature. Northern stated that coverage for payments sought by future litigation might be inconsistent with the definitions of "occurrence" and "property damage" in the policies. Northern stated: "We would appreciate, however, being kept apprised of the progress of EPA's investigation, and would welcome any future information that you believe relevant."

On August 12, 1986, Northern again wrote to Dutton, stating: "We . . . request that you kindly contact the undersigned as soon as possible in writing regarding the above [ground water contamination] matter. We would appreciate any status that you may have regarding same, and any new developments which may have taken place, which we are not aware of." Northern had no further contact until the lawsuit was filed by Dutton in September 2002.

In *Dutton I*, we stated that notice to Northern for the Well No. 3 subsite would be excused if Dutton could reasonably have believed that further efforts at notification under the policy would be useless. The trial court in the current case found that Dutton did not provide convincing evidence that it believed further notice would be useless. Dutton admitted that any such notice was provided long after significant remediation efforts had taken place and that, in fact, no notice was provided until the lawsuit was filed in 2002, even though Dutton learned it was a PRP for Well No. 3 in 1992 and commenced remediation efforts for Operable Unit 19 in 1998.

Even if the notice given to Northern was not timely, the insurer was also required to prove that it was prejudiced by the late notice. "Prejudice is established by examining whether the insurer received notice in time to meaningfully protect its interests." *Dutton I*, 271 Neb. at 828, 716 N.W.2d at 102. The trial court concluded that Northern had shown actual prejudice. The record showed that Dutton voluntarily entered into agreements acknowledging its responsibility for the contamination, spent significant sums to remediate, and performed the

remediation without giving Northern an opportunity to participate in discussions or formulate a course of action. Thus, Dutton had determined its obligations with the EPA before Northern was even aware of the claims.

[3] We agree with the trial court. Dutton determined its obligation with the EPA before Northern was aware of the claims, and there was no evidence that Dutton reasonably believed that further notification to Northern would be useless. The court found the failure to provide notice was an oversight of routine corporate procedure. Based upon the record, the court found that Dutton gave no consideration to providing notice to Northern and that Dutton could not have reasonably believed such notice would be useless. A trial court's findings of fact will be upheld on appeal unless clearly wrong. See *Albert v. Heritage Admin. Servs.*, 277 Neb. 404, 763 N.W.2d 373 (2009).

We conclude the trial court did not err in finding that Dutton's failure to notify Northern was prejudicial. Dutton presented no evidence to justify its late notice to Northern. Northern requested an update from Dutton in 1986, and Dutton did not respond. The court correctly determined that Northern was not required to provide coverage for Well No. 3 and Operable Unit 19 and that Dutton should not recover from Northern any damages allegedly incurred in connection with those two subsites.

Number of Occurrences

Dutton argues that the trial court erred in finding that three separate events constituted one occurrence. It argues that the deposit of waste at the North and South Landfills and the dripping of solvent onto the factory floor were separate occurrences. The Northern policies limited property damage liability to $100,000 per "occurrence," and the Continental policies had an "occurrence" limit of $1 million.

The policies provided: "The total liability of the company for all damages because of all **property damage** sustained by one or more persons or organizations as the result of any one **occurrence** shall not exceed the limit of **property damage** liability stated in the declarations as applicable to 'each **occurrence**.'"

We initially point out that if the trial court correctly apportioned the damages according to the number of months that each policy provided coverage, the number of occurrences would not change the award to Dutton. Northern's limits were $100,000 per occurrence, and Continental's limits were $1 million per occurrence. Neither award ordered by the court exceeded the limits of the policies for one occurrence.

Dutton asserts that there was more than one occurrence. It is, however, impossible for Dutton to prove what damages were sustained during the relative periods of coverage by each insurer. The trial court's application of a time-on-the-risk allocation is a reasonable apportionment of the damages based upon one continuing occurrence. Should each event be a separate occurrence, then the burden would be upon Dutton to establish the damages that resulted during the periods the insurance policies were in effect. There was no evidence to separate the amounts of damage that resulted from each alleged occurrence.

The trial court found that Dutton deposited contaminants in the North Landfill from February 1962 through October 1964, the South Landfill from October 1964 through September 1982, and Well No. 3 from 1948 to 1987. Dutton offered testimony from Dr. Roy Spalding, a hydrologist who assisted Dutton in complying with the EPA directives at each of the subsites.

Spalding testified that the TCE and TCA were the source of Dutton's contribution to the contamination at the subsites and that the contamination of ground water will continue until remediation has been completed. Remediation is expected to be completed at Well No. 3 in 2012 and at the North Landfill by 2017. At trial, it was unknown when the remediation of the South Landfill and Operable Unit 19 would be complete. Spalding testified that it was impossible to determine the actual amount of contamination that took place during any given time period or to allocate expenses Dutton incurred to any specific period.

The trial court stated that in order to find there had been three occurrences and require coverage for the costs of remediation, Dutton's actions that caused the damage would have

had to occur during the policy periods. The court noted that if there were three occurrences, Continental and Northern could not be responsible for contamination of the North Landfill, because the contamination occurred between 1962 and 1964, which was prior to the policy periods. The same would be true of responsibility for contamination of the South Landfill, which occurred between 1964 and 1982, because Northern's policy began in 1983. The court determined that the contamination of all subsites occurred as a result of the continuous actions of Dutton and not as the result of three separate occurrences. We agree.

The trial court relied on *Sunoco, Inc. v. Illinois Nat. Ins. Co.*, 226 Fed. Appx. 104 (3d Cir. 2007), in which the court was asked to determine whether the insurance company had a duty to defend when 77 lawsuits were filed against Sunoco, Inc. The contamination caused by Sunoco's product occurred in different geographical regions and resulted in 77 claims from a variety of sources that included gas tank leaks and accidental spills. The federal court found that the injuries were caused by one occurrence—the hazardous manufacture of gasoline containing the contaminant and failure to warn.

The federal court noted that its inquiry was "whether there [was] 'one proximate, uninterrupted and continuing cause which resulted in all of the injuries and damage.'" *Id.* at 107. The court referred to this as the "'cause test,'" which requires that "'[a]s long as the injuries stem from one proximate cause there is a single occurrence.'" *Id.*, quoting *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56 (3d Cir. 1982).

The U.S. Court of Appeals for the Third Circuit has noted that a majority of jurisdictions have adopted the cause test. See *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 418 F.3d 330 (3d Cir. 2005). In that case, the court held that the sale and manufacture of asbestos products by the insured over several years constituted one occurrence. Another federal court held that a gas company's use of a product in its insulation program was a single occurrence because "the number of occurrences turns on the underlying cause of the property damage." *Colonial Gas Co. v. Aetna Cas. & Sur. Co.*, 823 F. Supp. 975, 983 (D. Mass. 1993).

In the case at bar, the trial court concluded that there was one occurrence, which began with Dutton's actions in 1948 and continued until 1987. An "occurrence" is defined in Northern's policies as "an accident, including continuous or repeated exposure to conditions, which results in **bodily injury** or **property damage** neither expected nor intended from the standpoint of the **insured**." The court determined that Dutton deposited the waste in compliance with then-existing laws and did so intentionally, even though it did not expect or intend to pollute the ground water. The court found no ambiguity in the policies' definition of the term "occurrence."

Contamination occurred at four different sites, but all of the contamination was caused by the actions of Dutton. The underlying cause of the damage was the use of TCE and TCA in the manufacturing operation. This action was continuous and repeated over a number of years. We conclude that the trial court correctly determined that there was one occurrence.

Employee Costs

Dutton also claims that the trial court erred in not allowing Dutton to recover employee costs of $1,031,836.99 for time spent on the investigation and remediation of contamination. The court determined that Dutton did not provide sufficient evidence of its employee costs and that the evidence provided was obtained by guess and conjecture. Dutton provided only a general estimate of employee costs based on the percentage of time certain employees worked on the EPA matter.

[4] While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural. *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008). Dutton claims it should recover portions of its employees' time spent responding to the EPA requests and working on the pollution remediation. As to the sufficiency of the evidence, we review the trial court's findings of fact for clear error. See *Albert v. Heritage Admin. Servs.*, 277 Neb. 404, 763 N.W.2d 373 (2009). We conclude the court was not clearly wrong in denying the employee costs.

Dutton offered an exhibit prepared by Dutton's vice president and chief financial officer. He interviewed employees about the amount of time they recalled spending on EPA issues, but he was not able to obtain specific information for each year. He then retrieved salary information for the employees and multiplied salaries by the time they reported spending on EPA matters. One of the employees had died in 1998, and other employees had left employment with Dutton by the time the information was gathered. There were no timesheets or other hourly reports on which to rely. The evidence of employee costs was, as the trial court found, based on speculation and conjecture, and the court did not err in refusing to award employee costs to Dutton.

Prejudgment Interest

Dutton assigns error in the trial court's refusal to award prejudgment interest. The trial court declined to award such interest because the damages were in dispute and were never certain.

[5-7] Whether prejudgment interest should be awarded is reviewed de novo on appeal. *Archbold v. Reifenrath*, 274 Neb. 894, 744 N.W.2d 701 (2008). Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02(2) (Reissue 2004). *Archbold v. Reifenrath, supra*. Under § 45-103.02(2), prejudgment interest is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to the plaintiff's right to recover and the amount of such recovery. This determination requires a two-pronged inquiry. There must be no dispute as to the amount due and to the plaintiff's right to recover. *Archbold v. Reifenrath, supra*.

There was obviously a dispute as to whether Dutton was entitled to recover any damages and, if so, the amount. The trial court did not err in refusing to award prejudgment interest.

Joint and Several Liability

Dutton next claims error in not holding Continental and Northern jointly and severally liable. Dutton seems to be arguing that the trial court erred in applying a pro rata, time-on-the-risk

allocation of the damages instead of requiring each insurer to pay the total amount of the alleged damages. Dutton provides little case law to support this claim.

Continental and Northern both urge this court to find that the trial court was correct in rejecting joint and several liability in favor of a pro rata, time-on-the-risk allocation. That method

> assumes that the damages in a contamination case are evenly distributed (or continuous) through each policy period from the first point at which damages occurred to the time of discovery, cleanup or whenever the last triggered policy period ended. Each triggered policy therefore bears a share of the total damages proportionate to the number of years it was on the risk relative to the total number of years of coverage triggered. . . . While such an allocation scheme is attractive for its simplicity, we recognize that damages are by nature fact-dependent and that trial courts must be given the flexibility to apportion them in a manner befitting each case.

NSP v. Fidelity & Cas. Co. of New York, 523 N.W.2d 657, 663 (Minn. 1994).

The Minnesota Supreme Court has stated that "contamination of the groundwater should be regarded as a continuous process in which the property damage is evenly distributed over the period of time from the first contamination to the end of the last triggered policy (or self-insured) period." *Id.* at 664.

> [T]he total amount of the property damage should be allocated to the various policies in proportion to the period of time each was on the risk. If, for example, contamination occurred over a period of 10 years, 1/10th of the damage would be allocable to the period of time that a policy in force for 1 year was on the risk and 3/10ths of the damage would be allocable to the period of time a 3-year policy was in force. The amount so determined does not, however, necessarily represent the amount of the insurer's liability with respect to that policy.

Id.

We conclude that Dutton cannot assert joint and several liability without proving the amount of damages that resulted during the periods of coverage provided by each insurer. There

were numerous insurers, and each policy represented a different time during the events from 1948 to 1987. If a time-on-the-risk allocation is not applied, then damages for each period of policy coverage must be established by Dutton.

Dutton's argument for joint and several liability would equate liability for the entire occurrence even though the coverage under each policy was for a limited time. This does not appear to be a reasonable assertion.

In *Consolidated Edison Co. of NY v. Allstate*, 98 N.Y.2d 208, 774 N.E.2d 687, 746 N.Y.S.2d 622 (2002), the court, in rejecting the argument that insurers were jointly and severally liable, concluded that joint and several allocation was not consistent with policy language providing indemnification for all sums of liability that resulted from an accident or occurrence during the policy period. Since there was one occurrence, the damage allocated to each policy providing coverage was based upon the amount of time that the policy was in force during such occurrence. Other courts have found this to be a fair manner in which to allocate coverage for the occurrence. We agree.

Under the policies, the insurance companies were to provide coverage for property damage that occurred during the policy period. A pro rata, time-on-the-risk allocation satisfies the language of the policies, and the trial court did not err in using this method.

Declaratory Judgment

Dutton argues that the trial court erred in failing to enter a declaratory judgment finding that Continental and Northern were liable for indemnity and defense costs incurred for future remediation. Dutton wants Continental and Northern to be held "liable for all amounts required to be expended" by Dutton with respect to the North and South Landfills, Well No. 3, and Operable Unit 19.

Continental argues that Dutton is actually seeking an award of future damages and that Dutton failed to prove such damages. During trial, Continental's objections to Dutton's evidence about the possibility of future damages were sustained and the court refused to allow testimony about future costs.

[8] The trial court made no ruling on future damages and did not reserve for further determination the question of declaratory relief. "As a general matter, where an order is clearly intended to serve as a final adjudication of the rights and liabilities of the parties, the silence of the order on requests for relief not spoken to can be construed as a denial of those requests under the circumstances." *D'Quaix v. Chadron State College*, 272 Neb. 859, 863, 725 N.W.2d 558, 561 (2007). The court's silence on the subject of declaratory relief, along with its sustaining of objections to the introduction of testimony concerning future damages, serves as a denial of Dutton's request for declaratory judgment. The trial court did not err in failing to grant declaratory relief, because Dutton failed to prove future expenses.

Attorney Fees

Finally, Dutton claims the trial court erred in failing to grant attorney fees. The court's order was silent on the issue of attorney fees.

Neb. Rev. Stat. § 44-359 (Reissue 2004) provides that in an "action upon any type of insurance policy . . . against any company, . . . the court, upon rendering judgment against such company, . . . shall allow the plaintiff a reasonable sum as an attorney's fee." However, "if the plaintiff fails to obtain judgment for more than may have been offered by such company, . . . in accordance with section 25-901, then the plaintiff shall not recover the attorney's fee provided by this section." § 44-359.

Continental made an offer to confess judgment for $748,828.88 before trial. Dutton refused the offer, and judgment was entered against Continental for $475,190.21. Northern made an offer to confess judgment before trial in the amount of $445,000. Dutton refused, and judgment was entered against Northern for $74,937.89. The pretrial offers were for more than the amount of the final judgment awarded by the court.

We have stated that § 44-359 read in conjunction with Neb. Rev. Stat. § 25-901 (Reissue 2008) "prohibit[s] an award of attorney fees to a plaintiff, in a suit against the plaintiff's

insurer, who rejects an offer of judgment and later fails to recover more than the amount offered." See *Young v. Midwest Fam. Mut. Ins. Co.*, 272 Neb. 385, 387, 722 N.W.2d 13, 16 (2006). Dutton is not entitled to attorney fees in this case.

CONTINENTAL'S CROSS-APPEAL

Suit Versus Claim

The trial court determined that the PRP letter of September 23, 1985, was akin to a "suit" and that the letter triggered Continental's duty to defend. Continental argues that the PRP letter was not a "suit" and that because there was no "suit," Continental had no duty to defend. Continental asserts that its policies differentiate between "claims" and "suits" and that the duty to defend applies only to suits.

Continental argues that letters or administrative orders of environmental agencies are not "suits" triggering a duty to defend, relying on *Foster-Gardner, Inc. v. Nat. Union Fire Ins.*, 18 Cal. 4th 857, 959 P.2d 265, 77 Cal. Rptr. 2d 107 (1998). In that case, the insured was ordered by the state EPA to remediate pollution. The insured sued its insurers when they refused to defend. The insurers argued that the word "suit," as used in the policies, meant "a civil action commenced by filing a complaint. Anything short of this is a 'claim.'" *Id.* at 878, 959 P.2d at 279, 77 Cal. Rptr. 2d at 121. The court stated that the policies at issue required the insurers to defend a "suit" but that the policies allowed discretion to investigate and settle a "claim."

Continental's policy stated:

> The company will pay on behalf of the **insured** all sums which the **insured** shall become legally obligated to pay as damages because of
>
> A. **bodily injury or**
>
> B. **property damage**
>
> to which this insurance applies, caused by an **occurrence**, and the company shall have the right and duty to defend any *suit* against the **insured** seeking damages on account of such **bodily injury** or **property damage**, even if any of the allegations of the *suit* are groundless,

> false or fraudulent, and may make such investigation and settlement of *any claim or suit* as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any *suit* after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

(Emphasis supplied.)

The PRP letter from the EPA, dated September 23, 1985, informed Dutton that it was believed to be a party responsible for contamination of landfills. The letter stated that if the EPA used public funds to clean up the hazardous substances, "responsible parties may be . . . liable for all costs incurred by the government in responding to" the contamination. Dutton was directed to notify the EPA verbally by the close of business on October 1 and in writing by October 4 of the nature and extent of the actions it was willing to undertake. If the EPA did not receive the requested responses, it would assume that Dutton was declining to undertake the necessary response actions at the site and the EPA would proceed to take any action necessary.

The trial court determined that the PRP letter was a warning to Dutton that it could be responsible for the contamination. Dutton chose to accept responsibility for remediating the contamination. If Dutton had refused to take action, the EPA could have proceeded with its investigation, and if the investigation proved that Dutton was responsible, then a suit would have been initiated. The court noted that damages awarded as a result of a suit could have been greater if Dutton had not taken steps to mitigate by cleaning up the contamination.

The trial court concluded that a PRP letter is akin to a "suit," based upon "the severity and significant repercussions" if Dutton took no action. It noted that insurance companies such as Continental which insure for this type of damage have common knowledge of the outcome when the EPA is involved in addressing contaminations. The court relied on two cases: *Aetna Cas. and Sur. Co., Inc. v. Pintlar Corp.*, 948 F.2d 1507 (9th Cir. 1991), and *Anderson Development Co. v. Travelers Indem. Co.*, 49 F.3d 1128 (6th Cir. 1995).

In *Aetna Cas. and Sur. Co., Inc. v. Pintlar Corp.*, 948 F.2d at 1517, the court held:

> [T]he EPA's administrative claims against the insureds triggered insurers' duty to defend. Coverage should not depend on whether the EPA may choose to proceed with its administrative remedies or go directly to litigation. A fundamental goal of CERCLA [Comprehensive Environmental Response, Compensation, and Liability Act of 1980] is to encourage and facilitate voluntary settlements. *Interim Guidance on Notice Letters, Negotiations, and Information Exchange*, EPA Memorandum, 53 Fed.Reg. 5298 (1988). It is in the nation's best interests to have hazardous waste cleaned up effectively and efficiently. But the insured is not required to submit to, and may in fact wish to oppose the threat. In either event, the insurer's duty to defend may well be triggered.

The federal court stated that a PRP notice differs from a "garden variety demand letter" in that it carries "immediate and severe implications," rather than simply exposing a party to a potential threat of future litigation. *Aetna Cas. and Sur. Co., Inc. v. Pintlar Corp.*, 948 F.2d at 1516. "[T]he PRP's substantive rights and ultimate liability are affected from the start of the administrative process." *Id.*

The court further noted that it may be "more prudent for the PRP to undertake the environmental studies and cleanup measures itself than to await the EPA's subsequent suit in a cost recovery action." *Id.* at 1517. "Lack of cooperation may expose the insured, and potentially its insurers, to much greater liability, including the EPA's litigation costs." *Id.* As a result, "an 'ordinary person' would believe that the receipt of a PRP notice is the effective commencement of a 'suit' necessitating a legal defense." *Id.* "If the threat is clear then coverage should be provided. The filing of an administrative claim is a clear signal that legal action is at hand." *Id.* at 1518.

In *Anderson Development Co. v. Travelers Indem. Co.*, 49 F.3d at 1132, the federal court applied a recent Michigan case in which the state court determined that a PRP letter "constituted the initiation of a suit triggering [the insurer's] duty to

defend." The federal court agreed with the state court's conclusion that a PRP letter issued by the EPA can be considered the "functional equivalent of a 'suit' brought in a court of law." *Id.* at 1131.

Courts have reached differing conclusions as to what is necessary to trigger a duty to defend. Some courts have held that the receipt of a PRP letter invokes an insurer's duty to defend. In these cases, the courts have found the word "suit" to be ambiguous and defined it broadly, taking into consideration the perceived coercive impact of a PRP letter and the ability of the EPA to enforce strict liability in actions under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. See, e.g., *Aetna Cas. and Sur. Co., Inc. v. Pintlar Corp.*, 948 F.2d 1507 (9th Cir. 1991) (applying Idaho law); *A.Y. McDonald Industries v. INA*, 475 N.W.2d 607 (Iowa 1991); *Coakley v. Maine Bonding & Cas. Co.*, 136 N.H. 402, 618 A.2d 777 (1992).

Other courts have determined that the word "suit" should be liberally interpreted in favor of the insured. These courts looked at whether the EPA letters were coercive to determine if a PRP letter or a notification letter from a state agency triggered the insurer's duty to defend. See, e.g., *Ryan v. Royal Ins. Co. of America*, 916 F.2d 731 (1st Cir. 1990); *Professional Rental v. Shelby Ins.*, 75 Ohio App. 3d 365, 599 N.E.2d 423 (1991).

Still other courts have determined that the word "suit" was unambiguous and applied the plain meaning of the word. As a result, they concluded that the commencement of some action in a court of law was required before an insurer's duty to defend is triggered and that the issuance of a PRP letter does not invoke the duty to defend. See, *Ray Industries, Inc. v. Liberty Mut. Ins. Co.*, 974 F.2d 754 (6th Cir. 1992) (rejected by *Anderson Development Co. v. Travelers Indem. Co.*, 49 F.3d 1128 (6th Cir. 1995)); *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990); *City of Edgerton v. General Cas. Co.*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994), *overruled, Johnson Controls v. Employers Ins.*, 264 Wis. 2d 60, 665 N.W.2d 257 (2003).

The interpretation of an insurance policy is a question of law. In reviewing questions of law, an appellate court resolves the question independently of the lower court's conclusion. *Rickerl v. Farmers Ins. Exch.*, 277 Neb. 446, 763 N.W.2d 86 (2009). We agree with the rationale in *Aetna Cas. and Sur. Co., Inc. v. Pintlar Corp., supra*, and *Anderson Development Co. v. Travelers Indem. Co., supra*. Whether an insurer is required to provide coverage on a policy should not be dependent on whether the EPA proceeds with administrative remedies or files litigation. A PRP letter is the functional equivalent of a "suit" as described in the insurance policies, and therefore, the insurers had a duty to defend Dutton. The PRP letter from the EPA carried with it the EPA's coercive powers. Dutton conducted an investigation to determine whether it was a PRP and determined that it was. Dutton proceeded to plan for remediation and developed new methods in an attempt to save further expense.

[9] The term "suit" can be readily understood to apply to actions that are the functional equivalent of a suit filed in a court of law. The PRP letter advised Dutton that it was immediately at risk. If Dutton declined the necessary response, its substantive rights and ultimate liability were affected from the receipt of the PRP letter. As noted in *Aetna Cas. and Sur. Co., Inc. v. Pintlar Corp.*, 948 F.2d 1507 (9th Cir. 1991), an ordinary person would believe that the receipt of a PRP letter was in effect the commencement of a suit. The language of an insurance policy should be considered in accordance with what a reasonable person in the position of the insured would have understood it to mean. *Dutton I*. The threats of the letter were clear and carried immediate implications. The trial court was correct in finding there was a "suit." Continental's cross-appeal on this issue has no merit.

Notice to Continental

Continental asserts that the trial court erred in finding that Dutton gave proper notice to Continental for two of the subsites. The court found that Dutton sent Continental a letter on November 1, 1985, informing the insurer about the PRP letter from the EPA. On December 2, 1991, Dutton sent

Continental a six-page letter notifying it that the insurer had a duty to defend. Continental responded by letter dated February 14, 1992, stating that it did not intend to take any action. Continental's denial of liability under the policy eliminated any further requirement of notice. The trial court determined that these contacts were sufficient to show that Dutton provided proper notice to Continental.

This finding by the trial court was a factual one. A trial court's findings of fact will be upheld on appeal unless clearly wrong. See *Albert v. Heritage Admin. Servs.*, 277 Neb. 404, 763 N.W.2d 373 (2009). The court's finding was not clearly wrong, and the record shows that Continental received sufficient notice.

Allocation of Damages

Continental also argues that the trial court erred in relieving Dutton of its burden to prove that property damage occurred within the periods covered by the Continental policies and in adopting Dutton's categorization of damages. This argument relates to the court's use of the pro rata, time-on-the-risk method to allocate damages.

[10] The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008). We have previously determined that the method of allocation of damages used by the trial court was appropriate.

Continental also claims the trial court erred in failing to allocate damages from 1948, when the contamination allegedly began, to 2017, when the remediation is expected to be complete. We have previously discussed Dutton's request for declaratory relief, which was in effect a request for future damages, and we found no basis for such relief.

The trial court determined that Continental had provided coverage for 60 months of the 480-month period over which damages occurred. The court fixed Continental's percentage at 12.5 percent. In its brief, Continental calls this court's attention

to the fact that it actually provided coverage for 74 months, which would in effect increase its potential liability. However, it asks this court to find that the damages should be spread over the entire period of 1948 to 2017, when remediation is expected to be complete. Continental suggests its coverage period of 74 months should be divided by the entire period to find its percentage of liability to be 8.8 percent, which would decrease its amount of liability.

We conclude that the trial court correctly limited the time of the occurrence to the period during which the contaminants were deposited, as opposed to the estimated time for the cleanup. This allocates the time on the risk to the period of the occurrence.

As to the fact that Continental may have had 74 months of coverage instead of 60, we note that Dutton did not assign this as error on appeal.

NORTHERN'S CROSS-APPEAL

Occurrence

Northern's cross-appeal asserts that the trial court erred in finding there was an "occurrence" as defined by Northern's policies. Citing *Farr v. Designer Phosphate & Premix Internat.*, 253 Neb. 201, 570 N.W.2d 320 (1997), Northern argues that in order to show there was an occurrence that was covered under the insurance policies, Dutton must have proved there was an accident and property damage from the accident that was neither expected nor intended. We conclude the court did not err in finding an occurrence within Northern's policies.

In *City of Kimball v. St. Paul Fire & Marine Ins. Co.*, 190 Neb. 152, 206 N.W.2d 632 (1973), this court was asked to determine whether damages from seepage of a sewage lagoon system were covered as an accident. We noted that "'[i]n the absence of any express policy provision in such respect, the inability to fix the exact time when and where an accident occurred does not preclude recovery under the policy.'" *Id.* at 161, 206 N.W.2d at 637. We determined that an accident may be a process. "When the accident is a process, how long then is not significant. It is the nature of the process which is important." *Id.*

[11] Courts have had difficulty in precisely defining the word "accident." In most jurisdictions, courts have held that the word has no technical meaning in law, but should be interpreted in its ordinary and popular sense. *City of Kimball v. St. Paul Fire & Marine Ins. Co., supra*. The term "accident" has many meanings, and when used in a contract of indemnity insurance, unless otherwise stipulated, it should be given the construction most favorable to the insured. *Id.*

Northern's policies defined an "occurrence" as an accident, which includes continuous or repeated exposure to conditions. As the trial court concluded, the property damage occurred as a result of exposure to the continuous deposit of sludge or pollution in the landfills and on the manufacturing plant floor. Dutton did not expect or intend the resulting damage. Construing the term "accident" most favorably to Dutton, we conclude that the trial court did not err in finding there was an occurrence.

DAMAGES

[12] Northern also argues that the trial court erred in several ways in determining damages. First, the court allegedly did not scrutinize the evidence offered by Dutton as to the amount of damages it sustained. As noted earlier, it is for the fact finder to determine the amount of damages and that determination will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. See *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008). Northern merely complains that the amount of damages claimed by Dutton was speculative because the amounts were not consistent. Northern claims the testimony was in conflict. As the trier of fact, the trial judge determines the credibility of the witnesses and the weight to give their testimony. *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009).

Second, Northern objects to the trial court's failure to determine which portions of Dutton's damages were defense costs and which were indemnity costs. The court found that the total indemnity costs were $919,983.03 and that the total defense

costs were $2,881,538.67. The court noted that defense costs are those costs necessary to determine the source of the contamination and to defeat or minimize liability to clean up the contamination. Indemnity costs are those costs incurred by Dutton to clean up the contamination.

Northern complains that the trial court merely accepted Dutton's figures at face value and did not provide a detailed analysis. However, the court excluded those damages (employee costs) which were not supported by the evidence and allowed those that were supported. Nebraska law only requires a plaintiff to prove his or her damages to a reasonable certainty; it does not require proof beyond all reasonable doubt. *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008). Northern provides no legal support for its contention, and we find no error in the trial court's determination.

Third, Northern claims the trial court erred in receiving into evidence Dutton's exhibit to support its claim for employee costs. The court determined that the evidence of employee costs related to the EPA matters was based upon guess and conjecture, and it refused to award damages for these costs. Thus, Northern was not prejudiced by this claim of error.

Fourth, Northern asserts that the trial court used the incorrect end date of 1987 in its time-on-the-risk allocation, rather than 2017, the expected end date of remediation. We have addressed this argument above, and there is no merit to this claim.

Finally, Northern argues that the trial court erred in allowing Dutton to recover damages incurred prior to its first notice to Northern. We have determined that Northern was not prejudiced by the timing of the notice it received from Dutton, and this claim also lacks merit.

CONCLUSION

The trial court did not err in its judgment, and it is affirmed.

AFFIRMED.

CONNOLLY and STEPHAN, JJ., not participating.

NUZHAT MAHMOOD, APPELLEE, V.
RAJUL-I-HAQUE MAHMUD, APPELLANT.
778 N.W.2d 426

Filed February 5, 2010. No. S-09-511.

1. **Judgments: Injunction: Appeal and Error.** A protection order is analogous to an injunction. Accordingly, the grant or denial of a protection order is reviewed de novo on the record.
2. **Jurisdiction: Appeal and Error.** Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision.
3. **Jurisdiction.** The issue of subject matter jurisdiction can be raised at any time.
4. **Pleadings.** A party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief.
5. **Pleadings: Notice.** Plaintiffs are not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.
6. **Judgments: Pleadings.** The contested factual hearing in protection order proceedings is a show cause hearing, in which the fact issues before the court are whether the facts stated in the sworn application are true.
7. **Pleadings: Proof: Records.** The allegations of a petition require proof by evidence incorporated in the bill of exceptions.
8. **Pleadings: Trial: Evidence.** A prima facie case may be established by a form petition and affidavit, but the petition and affidavit cannot be considered as evidence until offered and accepted at the trial as such.
9. **Judgments: Proof.** An ex parte order does not relieve the petitioner of the burden to establish by a preponderance of the evidence the truth of the facts supporting a protection order.

Appeal from the District Court for Douglas County: CRAIG Q. MCDERMOTT, County Judge. Reversed and remanded with directions.

John C. Wieland and Kevin J. McCoy, of Smith, Gardner, Slusky, Lazer, Pohren & Rogers, L.L.P., for appellant.

Elizabeth S. Borchers, P.C., and Tyler C. Block, of Marks, Clare & Richards, L.L.C., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Rajul-I-Haque Mahmud (Rajul) appeals from a harassment protection order entered in favor of Nuzhat Mahmood (Nuzhat).

We determine that the court had jurisdiction to issue the order even though Nuzhat filed a petition for an abuse protection order instead of a harassment protection order and even though she did not request that a judge of the county court, as opposed to a judge of the district court, hear her case. But we reverse due to the lack of evidence presented at the hearing.

BACKGROUND

Nuzhat filed, in the district court for Douglas County, a form petition and affidavit to obtain a domestic abuse and protection order under Neb. Rev. Stat. § 42-924 (Reissue 2008). In the petition and affidavit, Nuzhat averred that since her divorce from Rajul in 2002, protection orders had been entered in 2002, 2003, and 2005. Nuzhat further averred that Rajul was calling her home several times a week, and sometimes several times a day, and that he had sent her roughly 100 letters over the previous 2 years. The subject of Rajul's correspondence was to convince her that their marriage was still valid under Islamic law and that they should reconcile. Nuzhat explained that "[w]hile [Rajul] is careful to not use any words that may be construed as threatening, the tone of his voice is menacing and the frequency of his letters and phone calls have greatly disturbed my peace."

Nuzhat averred that she sought the protection order because she was recovering from surgery for a torn anterior cruciate ligament and felt she would be unable to protect herself. She stated that Rajul had recently "threat[ened]" to "'come see [her].'" Nuzhat specifically requested that the court enter a protection order prohibiting Rajul from (1) imposing any restraint upon her or her liberty; (2) threatening, assaulting, molesting, or attacking her or otherwise disturbing her peace; and (3) telephoning, contacting, or otherwise communicating with her. Nuzhat also sought an order that Rajul stay away from her residence and workplace. The petition was filed in the Douglas County District Court on March 13, 2009, and was marked as being "[a]ssigned to Judge McDermott," who is a judge of the county court for Douglas County.

On that same day, Judge Craig Q. McDermott found that a harassment protection order pursuant to Neb. Rev. Stat.

§ 28-311.09 (Reissue 2008) should be issued for a period of 1 year. The court found that it reasonably appeared from the facts in the affidavit that irreparable harm would result before the matter could be heard upon notice, so the court issued the order ex parte. Rajul was served with a copy of the order and informed that he had the right to appear and show cause why the order should not remain in effect. On March 20, 2009, Rajul requested a hearing.

At the hearing, Rajul appeared pro se and read a written statement to the court and answered questions by the court. Nuzhat's counsel interjected some comments. No evidence was formally admitted, nor was any sworn testimony presented. The court concluded that although Rajul was not necessarily "threatening" Nuzhat, he was "bothering" her, and it ordered that the protection order remain in place.

ASSIGNMENTS OF ERROR

Rajul assigns that the district court erred because (1) the court lacked jurisdiction to issue a harassment protection order upon Nuzhat's petition and affidavit; (2) issuance of a harassment protection order upon a petition and affidavit for a domestic abuse protection order was invalid because it did not comport with applicable statutes; (3) issuance of a harassment protection order upon a petition and affidavit for a domestic abuse protection order, and a hearing without notice to the pro se respondent as to the type of order being defended against, prejudiced Rajul and violated his due process rights; (4) the evidence did not support issuance of a domestic abuse protection order; and (5) the evidence did not support issuance of a harassment protection order.

STANDARD OF REVIEW

[1] A protection order is analogous to an injunction.[1] Accordingly, the grant or denial of a protection order is reviewed de novo on the record.[2]

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[1] See *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999).

[2] *Id.*

[2] Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision.[3]

ANALYSIS

JURISDICTION

We first address Rajul's arguments that the district court lacked jurisdiction because the matter was heard by a judge of the county court, not the district court. In his first assignment of error, Rajul asserts that the county court judge could not be deemed "'appointed'"[4] to hear the matter by the district court because Nuzhat failed to request a hearing before a county court judge. Rajul asserts that such a request is required under Neb. Rev. Stat. § 25-2740 (Reissue 2008) and that without it, a harassment protection case must be heard in district court. Section 25-2740(2) states:

> The party shall state in the petition or complaint whether such party requests that the proceeding be heard by a county court judge or by a district court judge. If the party requests the case be heard by a county court judge, the county court judge assigned to hear cases in the county in which the matter is filed at the time of the hearing is deemed appointed by the district court and the consent of the county court judge is not required.

The standard application form provided to Nuzhat did not contain an option to choose between a district court judge and a county court judge.

We find that the county court judge's authority was not invoked by § 25-2740. Rather, the county court judge had authority to hear the proceedings pursuant to Neb. Rev. Stat. § 24-312(3) (Reissue 2008). Under that section, no formal appointment or request is necessary. Instead, under § 24-312(3), domestic matters are distributed between the county and district court judges as part of an annual plan to more efficiently administer the caseload of these courts:

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[3] *State v. Clark*, 278 Neb. 557, 772 N.W.2d 559 (2009).

[4] Brief for appellant at 12.

> In an effort to more efficiently administer the caseload, the presiding judges of the district court and county court in each judicial district may assign between the courts cases involving domestic relations matters . . . . The presiding judges shall annually review the caseload of the two benches and determine whether to reassign cases involving domestic relations matters . . . . The consent of the parties shall not be required for such cases . . . . The annual plan on the case assignments shall be sent to the Supreme Court . . . .

On January 5, 2009, the presiding judges of the district and county courts of Douglas County filed a letter, pursuant to § 24-312(3), explaining that for the year 2009, they had agreed to split equally all domestic and harassment protection order cases between the two courts. It is apparent that this is the reason Nuzhat's petition was heard by a county court judge. Jurisdiction under § 24-312(3) is separate from the invocation of jurisdiction under § 25-2740, and we find no jurisdictional defect based on the absence of a specific request in the petition that a county court judge hear the case. Therefore, we find no merit to Rajul's first assignment of error.

[3] In his second assignment of error, Rajul argues that even if the county court could hear the petition, it lacked statutory authority to issue a *harassment* protection order, because Nuzhat's petition was for a *domestic abuse* protection order and she never filed an amended petition for a harassment protection order. We note that there is no record of Rajul's objecting to the alleged defect in the petition, but we will address the argument to the extent that Rajul asserts that the court lacked subject matter jurisdiction to issue the order. The issue of subject matter jurisdiction can be raised at any time.[5]

Rajul argues that a filing of the correct form is strictly necessary under § 28-311.09(6), which states:

> The clerk of the district court shall make available standard application and affidavit forms for a harassment protection order with instructions for completion to be

[5] See *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

> used by a petitioner. The clerk and his or her employees shall not provide assistance in completing the forms. The State Court Administrator shall adopt and promulgate the standard application and affidavit forms provided for in this section as well as the standard temporary and final harassment protection order forms and provide a copy of such forms to all clerks of the district courts in this state. These standard temporary and final harassment protection order forms shall be the only such forms used in this state.

Rajul also relies on subsection (1) of § 28-311.09 insofar as it states that the judge may issue a harassment protection order "[u]pon the filing of such a petition and affidavit . . . ."

We find no merit to Rajul's argument that § 28-311.09 is jurisdictional or that it changes the rules of notice pleading generally applicable to civil actions. A similar argument was rejected by the Washington Court of Appeals in *Emmerson v. Weilep*.[6] The court therein explained that although the applicable statute required that the administrator for the courts develop model forms and make such forms available, the statute did not expressly require petitioners to use those forms. While Nebraska's § 28-311.09(6) provides that the standard forms shall be the only ones used, this does not mean that without the proper standard form, the court lacks authority to act.

Moreover, in this case, Nuzhat used a standard form—she merely used the standard form for abuse instead of harassment. Our review of the two forms reveals that they are barely distinguishable. The differences between the two forms are that they contain different titles, that the abuse protection form asks for the relationship of the respondent, and that the abuse protection form asks the petitioner to list the most recent incidents of "domestic abuse," instead of the most recent incidents of "harassment."

[4,5] We find that the county court judge in this case properly looked to what Nuzhat was asking for instead of simply the title of the petition. Under the rules of notice pleading in

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[6] *Emmerson v. Weilep*, 126 Wash. App. 930, 110 P.3d 214 (2005).

effect since 2003,[7] Nebraska's pleading practices have now been liberalized.[8] A party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief.[9] Plaintiffs are not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.[10] The rationale for this liberal notice pleading standard is that

> when a party has a valid claim, he should recover on it regardless of [a] failure to perceive the true basis of the claim at the pleading stage, provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining a defense upon the merits.[11]

The thrust of Nuzhat's petition was to seek a harassment protection order. In accordance with § 28-311.09, the petition set forth the events and date of the acts constituting the alleged harassment. Nuzhat described a history of numerous telephone calls and letters, but she did not allege violence. And in accordance with the statutory description of harassment protection orders, the petition sought to enjoin the respondent from (1) imposing any restraint upon the person or liberty of the petitioner; (2) harassing, threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of the petitioner; or (3) telephoning, contacting, or otherwise communicating with the petitioner.[12] This provided fair notice of the claim asserted and was sufficient to confer authority on the court to issue the order. Therefore, we find no merit to Rajul's second assignment of error. And, because Rajul neither objected to the

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[7] See Neb. Ct. R. Pldg. §§ 6-1101 to 6-1116.

[8] See *Vande Guchte v. Kort*, 13 Neb. App. 875, 703 N.W.2d 611 (2005).

[9] *Id.*

[10] *Alvarez v. Hill*, 518 F.3d 1152 (9th Cir. 2008); *Wynder v. McMahon*, 360 F.3d 73 (2d Cir. 2004); *Slaney v. The Intern. Amateur Athletic Federation*, 244 F.3d 580 (7th Cir. 2001); *Rymal v. Baergen*, 262 Mich. App. 274, 686 N.W.2d 241 (2004); *Toney v. Bouthillier*, 129 Ariz. 402, 631 P.2d 557 (Ariz. App. 1981).

[11] 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1219 at 282-83 (3d ed. 2004).

[12] See § 28-311.09(1).

proceedings nor was prejudiced by the notice he received, we also reject his third assignment of error.

Sufficiency of Evidence

Having determined that the court had jurisdiction, we next address the underlying merits of Rajul's appeal. We find dispositive Rajul's argument that the evidence was insufficient. We need not address whether the facts alleged could be considered "harassment" under Neb. Rev. Stat. § 28-311.02 (Reissue 2008), but conclude simply that the proceedings were so informal that there was no evidence properly admitted for the court's consideration.

[6] In so holding, we are mindful of the fact that the contested factual hearing in protection order proceedings is a show cause hearing, in which the fact issues before the court are whether the facts stated in the sworn application are true.[13] Numerous cases have held that because the intrusion on the respondent's liberty interests is limited, the procedural due process afforded in a harassment protection hearing is likewise limited.[14] The Nebraska Court of Appeals has explained that protection proceedings are summary in nature and that the court in such proceedings is justified in excluding evidence if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[15]

[7] Nevertheless, some evidence must be presented. In this case, the proceedings were so informal that we have been left with no evidence at all. The record contains no sworn testimony or exhibits. Instead, the bill of exceptions reflects only the informal discussion of the parties at the show cause hearing. We have said that evidence consists of facts

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[13] *Zuco v. Tucker*, 9 Neb. App. 155, 609 N.W.2d 59 (2000).

[14] See, *Gourley v. Gourley*, 158 Wash. 2d 460, 145 P.3d 1185 (2006); *H.E.S. v. J.C.S.*, 175 N.J. 309, 815 A.2d 405 (2003); *McKinney v. McKinney*, 820 N.E.2d 682 (Ind. App. 2005); *Paschal v. Hazlinsky*, 803 So. 2d 413 (La. App. 2001).

[15] *Zuco v. Tucker, supra* note 13. See, also, Neb. Rev. Stat. § 27-403 (Reissue 2008).

admitted *at a trial* to establish or disprove the truth of allegations put in issue by the pleadings.[16] And the allegations of a petition require proof by evidence incorporated in the bill of exceptions.[17]

[8,9] We agree with Nuzhat that a prima facie case may be established by a form petition and affidavit. But the petition and affidavit cannot be considered as evidence until offered and accepted at the trial as such. The ex parte order does not relieve the petitioner of the burden to establish by a preponderance of the evidence the truth of the facts supporting a protection order.[18] Nuzhat's "Petition and Affidavit" was never entered into evidence; nor were the prior protection orders or any other evidence. The written statement Rajul read to the court cannot be considered evidence when he was not put under oath. While we do not expect show cause harassment protection hearings to reflect the full panoply of procedures common to civil trials, we do hold that at a minimum, testimony must be under oath and documents must be admitted into evidence before being considered. In light of the fact that the court had no evidence upon which it could base its findings, we find in our de novo review that the evidence is insufficient to support the protection order.

CONCLUSION

For the foregoing reasons, we reverse, and remand with directions to vacate the harassment protection order.

REVERSED AND REMANDED WITH DIRECTIONS.

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[16] *Kimball v. Nebraska Dept. of Motor Vehicles*, 255 Neb. 430, 586 N.W.2d 439 (1998).

[17] *Everts v. School Dist. No. 16*, 175 Neb. 310, 121 N.W.2d 487 (1963).

[18] See, *Abboud v. Lakeview, Inc.*, 237 Neb. 326, 466 N.W.2d 442 (1991); *People ex rel. Minteer v. Kozin*, 297 Ill. App. 3d 1038, 697 N.E.2d 891, 232 Ill. Dec. 149 (1998).

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DAVID R. TARVIN, JR., RESPONDENT.

777 N.W.2d 841

Filed February 5, 2010. No. S-09-529.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. An attorney against whom formal charges have been filed is subject to a judgment on the pleadings if he or she fails to answer those charges.
3. ____. The disciplinary rules provide that if no answer is filed, the court may dispose of the matter on a motion for judgment on the pleadings as long as an opportunity for oral argument is given before disbarment is ordered.
4. ____. The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
5. ____. With respect to the imposition of attorney discipline in an individual case, the Nebraska Supreme Court evaluates each attorney discipline case in light of its particular facts and circumstances.
6. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
7. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.
8. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.
9. ____. Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment.

Original action. Judgment of disbarment.

John W. Steele, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

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

PER CURIAM.

INTRODUCTION

The Counsel for Discipline of the Nebraska Supreme Court filed formal charges and additional formal charges against

respondent, David R. Tarvin, Jr. In the charges, the Counsel for Discipline alleged that respondent violated his oath of office as an attorney licensed to practice law in the State of Nebraska and various provisions of the Nebraska Rules of Professional Conduct based on his felony convictions involving theft of client funds and allegations that he has neglected client matters. This court granted judgment on the pleadings as to the facts in the formal charges and the additional formal charges and set the matter for oral argument. After reviewing the matter, we find that the proper sanction is disbarment.

STATEMENT OF FACTS

This case originated through a grievance filed with the Counsel for Discipline against respondent alleging that respondent may have misused client funds. While the matter was under investigation by the Counsel for Discipline, in January 2008, the Douglas County Attorney filed criminal charges against respondent for felony theft.

In March 2008, an attorney submitted a detailed report under oath to the Counsel for Discipline describing another instance in which respondent had allegedly misused client funds. Based on the report, the chairperson for the Committee on Inquiry of the Second Disciplinary District, in consultation with the Counsel for Discipline, applied for temporary suspension of respondent. This court issued an order on April 9, 2008, for respondent to show cause why he should not be suspended. Respondent did not respond to the show cause order. On May 7, this court temporarily suspended respondent in *State ex rel. Counsel for Discipline v. Tarvin*, case No. S-08-320.

After respondent was found guilty in the criminal case, formal charges were filed against him on May 29, 2009. Additional formal charges were filed against respondent simultaneously. This court entered judgment on the pleadings as to the facts in this case on August 26.

The facts as pled in the formal charges and additional formal charges state as follows: The Nebraska Supreme Court admitted respondent to the practice of law on September 24, 1996. At the times relevant to this case, respondent had been engaged

in the private practice of law with an office located in Douglas County, Nebraska.

On January 17, 2008, respondent was charged in the district court for Douglas County with one count of theft by unlawful taking (an amount exceeding $1,500), a felony. The theft involved client funds held by respondent. On May 12, respondent was charged in the district court for Douglas County with an additional count of theft by unlawful taking (an amount exceeding $1,500), a felony. The second charge involved funds of another client. On December 11, respondent entered a no contest plea to two counts of attempted felony theft. On February 19, 2009, respondent was found guilty of both counts and sentenced to, inter alia, 180 days in the Douglas County Correctional Center, placed on 5 years' probation, and ordered to make restitution in the amount of $15,264.43.

The Counsel for Discipline alleges in the formal charges that the foregoing acts of respondent constitute a violation of his oath of office as an attorney licensed to practice law in the State of Nebraska, as provided by Neb. Rev. Stat. § 7-104 (Reissue 2007), and a violation of the Nebraska Rules of Professional Conduct, Neb. Ct. R. of Prof. Cond. § 3-508.4 (misconduct).

Pursuant to Neb. Ct. R. § 3-310(F), the Counsel for Discipline filed additional formal charges against respondent. The additional charges allege that on January 30, 2007, respondent was retained by Melissa LaChapelle to prosecute a stepparent adoption. The biological father had agreed to relinquish his parental rights and agreed to the adoption. Respondent and LaChapelle entered into a written fee agreement, and LaChapelle paid the agreed-upon fee of $750 at the time of signing the agreement. Thereafter, LaChapelle answered a form questionnaire provided to her by respondent regarding the biological father so that the necessary pleadings could be prepared and service had on the biological father.

For over a year, LaChapelle and her family members made repeated attempts to contact respondent to find out the status of the case with little to no success. When LaChapelle was able to contact respondent, he explained that he was having trouble obtaining service on the biological father. By February 1,

2008, respondent still had not obtained service on the biological father, and again LaChapelle provided respondent with the contact information for the biological father, including his Social Security number, his cellular telephone number, and his address.

On or about April 2, 2008, respondent advised LaChapelle that he received a faxed copy of the signed relinquishment papers from the biological father. The biological father advised LaChapelle that he had sent the signed original to respondent by certified mail. LaChapelle never heard from respondent again, despite her attempts to contact him. LaChapelle's mother spoke with respondent on the telephone on May 9. Respondent advised her that he was sending a letter to LaChapelle. LaChapelle has not received any communication from respondent since she spoke with him on April 2.

Respondent has not refunded any of the $750 that LaChapelle paid to him to prosecute her case. Respondent failed to file any pleadings on behalf of LaChapelle to effect the stepparent adoption.

In a separate matter, respondent was retained by Julie Alfaro, formerly known as Julie Hoffa, to represent her in an action to dissolve her marriage. She was referred to respondent by her therapist, respondent's mother-in-law. Alfaro decided to retain respondent because he had returned her calls and seemed anxious to take the case. Alfaro met with and retained respondent on October 25, 2006, paying him $1,000, and she provided him with the necessary information to file the divorce. Respondent did file a complaint for the dissolution within 2 weeks of meeting with Alfaro, but thereafter did little work on the case.

Almost immediately after retaining respondent, Alfaro experienced difficulty communicating with respondent. When Alfaro was unable to contact respondent, she retained another attorney, who took over the case and saw it to conclusion.

The Counsel for Discipline alleges that this conduct by respondent constitutes a violation of his oath of office as an attorney licensed to practice law in the State of Nebraska, as provided by § 7-104, and violations of the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of

Prof. Cond. §§ 3-501.3 (diligence), 3-501.4 (communications), and 3-501.16 (declining or terminating representation).

The Counsel for Discipline asks that this court disbar respondent.

ANALYSIS

[1-3] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Smith*, 275 Neb. 230, 745 N.W.2d 891 (2008). An attorney against whom formal charges have been filed is subject to a judgment on the pleadings if he or she fails to answer those charges. *Id.* The disciplinary rules provide that if no answer is filed, the court may dispose of the matter on a motion for judgment on the pleadings as long as an opportunity for oral argument is given before disbarment is ordered. *State ex rel. Counsel for Dis. v. Wickenkamp*, 277 Neb. 16, 759 N.W.2d 492 (2009).

[4] The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *Id.* In the instant case, on August 26, 2009, this court granted the Counsel for Discipline's motion for judgment on the pleadings as to the facts; therefore, the only issue before us is the type of discipline to be imposed.

Neb. Ct. R. § 3-304 provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
>
> (1) Disbarment by the Court; or
>
> (2) Suspension by the Court; or
>
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
>
> (4) Censure and reprimand by the Court; or
>
> (5) Temporary suspension by the Court; or
>
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
>
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, § 3-310(N).

[5] With respect to the imposition of attorney discipline in an individual case, we evaluate each attorney discipline case

in light of its particular facts and circumstances. See *State ex rel. Counsel for Dis. v. Wintroub*, 277 Neb. 787, 765 N.W.2d 482 (2009).

In its brief and at oral argument, the Counsel for Discipline asked that this court disbar respondent. At oral argument, the Counsel for Discipline entered into evidence two prior private reprimands against respondent issued in January and February 2008.

[6,7] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Id*. We have also noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors. *State ex rel. Counsel for Dis. v. Wickenkamp, supra.* We have considered prior reprimands as aggravators. *Id.*

[8,9] Furthermore, cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions. *State ex rel. Counsel for Discipline v. Wintroub, supra.* Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment. *State ex rel. NSBA v. Malcom*, 252 Neb. 263, 561 N.W.2d 237 (1997).

As in *Wintroub*, where we imposed the sanction of disbarment, the record in this case reflects a pattern of misconduct by respondent involving both neglect and deceit for personal gain. The facts alleged in the formal charges, which stand as established in this case, demonstrate respondent was convicted of two felonies involving theft of client funds. The facts in the amended formal complaint demonstrate a pattern by respondent of improperly handling the cases entrusted to him. The two prior private reprimands further support the imposition of the Counsel for Discipline's suggested discipline of disbarment.

Respondent did not respond to the charges filed against him and has failed to present any evidence of mitigating circumstances.

Upon due consideration of the facts of this case, based on respondent's cumulative acts of misconduct, including conduct that involved deceit for personal gain, the court finds that the proper sanction is disbarment.

CONCLUSION

The judgment on the pleadings is granted in its entirety. It is the judgment of this court that respondent should be and is hereby disbarred from the practice of law, effective immediately. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and § 3-310(P) and Neb. Ct. R. § 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V. GERMAI R. MOLINA, APPELLANT.

778 N.W.2d 713

Filed February 5, 2010. No. S-09-619.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
3. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
4. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.

5. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
6. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.
7. ____: ____. When claims of a trial counsel's performance are procedurally barred, an appellate court examines claims regarding trial counsel's performance only if the defendant assigns as error that appellate counsel was ineffective for failing to raise trial counsel's performance.
8. **Postconviction.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable.

Appeal from the District Court for Hall County: JAMES D. LIVINGSTON, Judge. Affirmed.

John H. Marsh, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

WRIGHT, J.

NATURE OF CASE

Germai R. Molina was convicted of second degree murder and child abuse resulting in the death of his daughter. His convictions were affirmed by this court in *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006) (*Molina I*). Molina's motion for postconviction relief was denied without an evidentiary hearing by the Hall County District Court, and he appeals.

SCOPE OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Glover*, 278 Neb. 795, 774 N.W.2d 248 (2009).

[2,3] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *Id.* When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Glover, supra*.

[4] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion. *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009).

FACTS

At approximately 3:30 a.m. on July 23, 2003, Molina and his wife, Diana (Mrs. Molina), took their daughter, also named Diana, to a hospital in Grand Island, Nebraska. Diana, who was 2 years 10 months old, was not breathing and had no pulse. Molina reportedly told the emergency room physician that Diana had fallen down some stairs. Diana was pronounced dead after about 30 minutes of attempted resuscitation.

Molina was arrested at the hospital. He told police that the day before Diana died, he discovered that she had urinated on the floor. He spanked her with a belt and made her clean up the urine. He said that when he told his wife what had happened, she scolded Diana.

About 2:30 a.m. the next day, Diana woke up and said she needed to use the bathroom. Molina, his wife, and their two daughters slept in the basement of a two-story house. The bathroom was on the second floor. Molina said that he took Diana upstairs and that on the way back, she tripped and fell down the stairs. Diana was unconscious when he reached her. He said he splashed cold water on her face and rubbed alcohol on his hands and then on her nose, but Diana was unresponsive. He and Mrs. Molina attempted mouth-to-mouth resuscitation and then took Diana to the hospital.

Molina told police that Diana had stayed with her grandmother in El Salvador when he and his wife moved to Grand Island. Molina had brought Diana to Grand Island about 10 days prior to her death. He claimed that the marks on Diana's back were there when he picked her up in El Salvador and were the result of injuries inflicted by Mrs. Molina's cousin. Molina admitted to spanking Diana with a belt each of the four times she had urinated in the bedroom, striking five or six blows each time. He denied shaking her or striking her with any object other than a belt. He also admitted to picking Diana up by her hair several days earlier.

Molina was charged with one count of first degree murder and one count of child abuse resulting in death. He pled not guilty.

Mrs. Molina testified pursuant to a plea agreement. In the early morning approximately 24 hours before Diana's death, Mrs. Molina found Molina sitting on the edge of the bed with a belt. Diana was standing on an object that looked like a bucket, and she had her arms in the air. She was naked and wet and had marks on her body from the belt. Molina told Diana not to fall asleep and threatened that if she put her arms down, he was going to hit her with the belt. Molina told his wife that he was punishing Diana because she had urinated in her crib.

Molina made Diana stand in that position for about 3 hours, during which time he hit her with the belt five times. Mrs. Molina said she told Molina to let Diana go to sleep, but he refused. When Diana fell asleep and fell off the bucket, Molina put her back on her feet in the same position. Eventually, Molina put Diana in her crib.

When Mrs. Molina woke around 10 a.m., Molina was again making Diana stand with her arms raised and threatening that if she dropped her arms, he would hit her with the belt. She remained in that position for 2½ to 3 hours. Mrs. Molina testified that she told Molina he should stop punishing Diana. Molina said Mrs. Molina should stop talking and that if she did not, he would spank Diana more. Diana spent most of the day on her feet. Molina later became angry and pulled Diana by her hair, and a "bunch or a clump" of Diana's hair came out.

Around 8 p.m., Diana was allowed to drink some juice and eat an apple. She fell off the bucket, and Molina picked her up, spanked her about five times, and then placed her on top of the bucket, where she remained standing until Mrs. Molina went to bed around midnight. Mrs. Molina slept intermittently. Molina made Diana run around the room while he hit her. If she fell, he hit her repeatedly. Mrs. Molina later heard Diana screaming and saw Molina swinging Diana around and shaking her. Mrs. Molina said it sounded like Molina then picked Diana up and dropped her to the floor 10 or 20 times. She saw Molina hit Diana hard in the stomach, and Diana was unresponsive.

Before the Molinas took Diana to the hospital, Molina insisted on dressing Diana to try to hide the bruises that were all over her body. Mrs. Molina said Molina told her to say that Diana had sustained the bruises in El Salvador.

Molina testified that 2 days before Diana's death, he found that Diana had been injured and he put ice on her injuries. He thought Mrs. Molina had inflicted the injuries, and he told her that she had committed child abuse. The next day, he arrived home around midnight. Diana woke him and said she had to go to the bathroom. When he took Diana upstairs to use the bathroom, she was limping and had some new bruises. As they returned to the basement, Diana fell down the stairs. He and his wife tried to revive her, but were unsuccessful, so they took her to the hospital. Molina claimed that Mrs. Molina told him to tell the police that a cousin in El Salvador had inflicted the bruises. Molina denied that he had caused any of Diana's injuries.

The physician who treated Diana stated that her body was covered from head to toe with bruising and swelling and that her injuries were not consistent with a fall down the stairs. The injuries appeared to have been caused by blunt force trauma inflicted by a belt or similar object in the 24 or 36 hours prior to her death.

The autopsy showed that the cause of Diana's death was blunt trauma to the head with acute subdural and subarachnoid hemorrhage. The pathologist stated that the injuries could not have been sustained as the result of an accident, that they were sustained within 24 to 36 hours before Diana's death, and that

they were all part of "the same beating." Some of the bruises were classified as "defensive wounds," indicating that Diana had tried to protect herself.

Mrs. Molina agreed to plead guilty to knowingly and intentionally permitting child abuse resulting in serious bodily injury, a Class III felony. In the plea agreement, she was to serve 4 to 20 years' imprisonment.

Molina was convicted of second degree murder and child abuse resulting in death. He was sentenced to consecutive terms of imprisonment of 80 years to life on each conviction. He filed a timely notice of appeal, and his initial brief was filed by trial counsel. Because Molina wished to assert that he received ineffective assistance of counsel, trial counsel moved to withdraw. This court ordered the appointment of replacement counsel, and the trial court appointed the Nebraska Commission on Public Advocacy. We affirmed Molina's convictions in *Molina I*.

Molina now seeks postconviction relief, alleging that he received ineffective assistance of counsel in that counsel (1) failed to object, move for a mistrial, and raise issues on appeal concerning improper closing argument by the prosecutor; (2) failed to object, request an appropriate instruction, and raise on appeal issues related to intent; (3) failed to raise at trial and on appeal that Molina was subjected to double jeopardy or multiple punishments by being prosecuted for both murder and child abuse resulting in death; (4) failed to allege that the evidence was insufficient and failed to raise that claim on appeal; (5) failed to object at trial to the introduction of Molina's prior convictions and to raise the claim on appeal; (6) failed to offer at trial an edited portion of a videotaped statement given by Mrs. Molina; (7) failed to raise on appeal that the sentences were excessive and/or that Molina was subjected to multiple punishments; and (8) failed to request continuances to locate witness Maria Alvarez.

The court found no ineffective assistance of counsel related to the failure to object or move for a mistrial concerning the prosecutor's closing argument. The court found the issues of intent in the jury instructions, double jeopardy, multiple punishments for one crime, and excessiveness of the sentences had

been raised on direct appeal. It found that the evidence was sufficient to convict and that failure to raise the issue on appeal did not raise a probability that the result would have been different. It found there was no evidence that Molina's prior convictions had been mentioned at trial.

The court also found counsel was not ineffective for failing to offer an edited portion of the videotaped statement given by Mrs. Molina. Molina argued the videotape would have shown inconsistencies with his wife's trial testimony. The court determined there was no need for the videotape after witnesses had been cross-examined concerning the alleged inconsistent statements.

Finally, the court found that counsel was not ineffective in failing to request a continuance to secure the testimony of Alvarez, because there was no evidence that a continuance would have been granted or that Alvarez' testimony would have affected the outcome of the trial.

The court found no merit to any of Molina's claims and overruled his motion for postconviction relief. He appeals.

ASSIGNMENTS OF ERROR

Molina claims, summarized and restated, that the court erred in overruling his motion for postconviction relief by (1) finding there was no prosecutorial misconduct in closing arguments; (2) finding that trial counsel's failure to object or move for a mistrial based on the closing arguments was not ineffective assistance of counsel; (3) finding that issues related to intent were raised on direct appeal; (4) finding that counsel was not ineffective in failing to offer an edited portion of a videotaped statement; (5) finding that there was no likelihood of prevailing on an excessive sentence claim; and (6) finding no evidence that a continuance would have been granted or that Alvarez' testimony would have given rise to a likelihood or probability of a different outcome.

ANALYSIS

A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Glover*, 278 Neb. 795, 774 N.W.2d 248 (2009).

Closing Arguments

The court found no merit to Molina's claim that the prosecution made improper and inflammatory remarks in closing argument and that Molina's counsel should have objected or moved for a mistrial. The court found that the remarks did not prejudice Molina's right to a fair trial and that counsel's decision not to object or move for a mistrial did not rise to the level of inadequate representation. The issue before the jury was the death of a child, and the prosecutor's comments were intended to question the credibility of Molina's claim that his wife was the perpetrator. The court noted that the jury was instructed more than once during the trial that the attorneys' statements were not evidence.

In arguing that the court erred, Molina cites as improper four comments made by the prosecutor during closing arguments. First, the prosecutor stated: "You know, I'm appalled, I'm appalled, ladies and gentlemen, by the cynicism of the defense in this case. They want you to buy into this story so that [Molina] can get away with murder and I hope you don't let that happen."

Second, concerning Molina's expert witness' testimony, the prosecutor stated:

> [T]his is kind of ingenuous, and I think one of the cynical things about what's been done here, this whole well-if-it's-not-working-out-very-good, we'll just say these other injuries that we today decide to tell you [Mrs. Molina] did, that it happened [that Diana's] at the top of the stairs when her body shuts down. What are the odds of that happening? They are astronomical. I submit to you it's beyond the likelihood of any other event known to man that it would just happen she's at the top of the stairs close enough to the edge of the stairs, apparently, without taking a step, she just tilts over and falls all the way down.

Next, the prosecutor said:

> I think what the stair fall is is the classic example of the big lie, and yeah, [Molina has] been consistent in it because he's trapped into that because he's on tape, but the big lie, if you'll remember, is a concept that's been

> used in different political situations around the world where you say something outrageous and you keep saying it over and over and over again, and the bigger the lie, the more outrageous what you are saying is and the more you repeat it, the more you hope people will believe it. Hope it doesn't work, but that's what this is. It's the big lie.

Finally, the prosecutor said, "[T]he poison in this case is the poison in that man's heart; it's not in some aspirin bottle."

[5] Molina did not assign prosecutorial misconduct as error in his direct appeal. A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal. See *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009). Thus, this claim is procedurally barred to the extent it argues the prosecutor made improper comments during closing argument.

[6,7] Molina also argues that trial counsel was ineffective in failing to object to the prosecutor's comments or to ask for a mistrial based on the closing argument. Molina had two attorneys on direct appeal. His trial counsel filed an initial brief and then withdrew. Different counsel filed a supplemental brief. We have held that "[w]hen a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record." *State v. Duncan*, 278 Neb. 1006, 1014, 775 N.W.2d 922, 928 (2009). Otherwise, the issue will be procedurally barred. *Id*. When claims of a trial counsel's performance are procedurally barred, this court examines claims regarding trial counsel's performance only if the defendant assigns as error that appellate counsel was ineffective for failing to raise trial counsel's performance. *Id*.

On direct appeal, Molina did not allege that trial counsel was ineffective in failing to object to the prosecutor's remarks or ask for a mistrial based on closing arguments. This claim was known to Molina at the time of the direct appeal, and it is procedurally barred.

In addition, Molina has not assigned any error to appellate counsel's performance by alleging that appellate counsel was ineffective for failing to assign error to trial counsel's performance. Molina's assigned errors related to closing arguments have no merit.

INTENT

Molina contends that the court was wrong in finding that the question of the inclusion of intent in the jury instructions was raised on direct appeal. Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion. *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009).

Molina's argument seems to be that the jury instructions were ambiguous as to whether intent is an element of the crime of child abuse resulting in death or serious bodily injury. Molina claims that child abuse is a general intent crime and that first and second degree murder are specific intent crimes. He argues that trial counsel was ineffective in failing to object to the jury instructions concerning intent.

On direct appeal, Molina assigned as error the failure to instruct the jury on the lesser-included offenses of child abuse resulting in death. See *Molina I*. We concluded that the district court erred in failing to instruct the jury on the lesser-included offense of negligent child abuse. However, we found that the failure to give the instruction was not prejudicial. The jury was given the opportunity to determine whether Molina acted with or without intent, and it determined that he acted with the intent to kill. The jury could not have concluded that Molina acted without intent with respect to the child abuse charge. Error in failing to instruct the jury on the lesser-included offense was harmless, because the jury necessarily decided the factual question of intent adversely to Molina.

Molina again attempts to assign as error the jury instructions. This issue was decided on direct appeal and is now procedurally barred.

To the extent that Molina's argument can be interpreted to claim that counsel was ineffective in relation to the jury instructions, it has no merit. We concluded in *Molina I* that the refusal to give the instruction was not prejudicial to Molina.

Videotaped Statement

Molina alleged that trial counsel was ineffective in failing to offer an edited version of a videotaped statement given by Mrs. Molina. The court determined that the videotape raised only one relevant issue: whether any inconsistency between Mrs. Molina's statements in the videotape and her testimony at trial was sufficient to convince the jury that she was the perpetrator of the crime. Any issue as to ineffective assistance of counsel, including counsel's failure to offer an edited portion of the statement, could have been raised on direct appeal.

The videotape issue was raised on direct appeal. See *Molina I*. We found no abuse of discretion in the trial court's refusal to receive the entire videotape into evidence. This assigned error is without merit and is procedurally barred.

Excessive Sentences

Molina next argues that the court erred in finding that there was no likelihood he would have prevailed on an excessive sentence claim. Molina was sentenced to 80 years to life in prison for second degree murder and to 80 years to life in prison for child abuse resulting in death, to be served consecutively. He argues that imposing two consecutive life sentences in a case involving one death is excessive and an abuse of discretion.

Molina's claim concerning excessiveness of the sentences is procedurally barred because he could have raised it on direct appeal. See *State v. Sepulveda*, 278 Neb. 972, 775 N.W.2d 40 (2009). Any alleged ineffective assistance of counsel related to the sentences is also barred because it could have been raised by appellate counsel in the supplemental brief. See *State v. Duncan*, 278 Neb. 1006, 775 N.W.2d 922 (2009).

In addition, Molina has not assigned any error to appellate counsel's performance by alleging that appellate counsel was

ineffective for failing to assign error to trial counsel's performance. Molina's assignment of error has no merit.

Continuance

Finally, Molina argues that the court erred in finding that counsel was not ineffective in failing to ask for a continuance to locate Alvarez. The court found no evidence that a continuance would have been granted if requested or that Alvarez' testimony would have assisted the defense or affected the outcome of the trial. We agree.

This claim is also procedurally barred. The failure to request a continuance could have been raised on direct appeal by appellate counsel. See *State v. Sepulveda, supra*. Also, Molina has not assigned any error to appellate counsel's performance by alleging that appellate counsel was ineffective for failing to assign error to trial counsel's performance. Molina's assignment of error has no merit.

CONCLUSION

[8] The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable. *State v. York*, 278 Neb. 306, 770 N.W.2d 614 (2009).

Molina has not demonstrated any basis for postconviction relief. The district court was not clearly wrong in denying postconviction relief, and its decision is affirmed.

Affirmed.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. THOMAS D. GRABINSKI, RESPONDENT.

777 N.W.2d 584

Filed February 12, 2010. No. S-06-1126.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Thomas D. Grabinski, on January 11, 2010. The court accepts respondent's surrender of his license and enters an order of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on May 8, 1985.

Respondent is currently under investigation by the Office for the Counsel for Discipline of the Nebraska Supreme Court based on his convictions in the case of "*State of Arizona v. Thomas Dale Grabinski*, CR 2001-006183, [filed] in the Superior Court of Arizona for Maricopa County." In that case, respondent was convicted by a jury of felony fraud and racketeering. Respondent was sentenced on September 29, 2006, to prison terms of 6 years on one count and 5 years on another count, to be served concurrently. Based on respondent's convictions, this court suspended respondent's license on November 15, 2006, until further order of this court.

On January 11, 2010, respondent filed with this court a pleading surrendering his license to practice law in the State of Nebraska. In this pleading, respondent does not challenge or contest the truth of the allegations made against him. In addition to surrendering his license, respondent consented to the entry of an order of disbarment and waived his right to notice, appearance, and hearing prior to the entry of the order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Although the filing of January 11, 2010, presently before the court does not precisely track the language of § 3-315, we nevertheless find that the content of this pleading satisfies § 3-315, and pursuant to § 3-315, respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations made against him. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he knowingly does not challenge or contest the truth of the allegations against him that he was found guilty of felonies based on fraud and racketeering. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

CAPITOL CONSTRUCTION, INC., APPELLEE, V. MICKEY C. SKINNER AND JEAN M. SKINNER, AS PROPERTY OWNERS, AND MIKE SKINNER, AS CONTRACTOR, APPELLANTS.

778 N.W.2d 721

Filed February 12, 2010. No. S-08-588.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Courts: Judgments: Jurisdiction: Appeal and Error.** A district court sitting as an appellate court has the same power to reconsider its orders, both inherently and under Neb. Rev. Stat. § 25-2001 (Reissue 2008), as it does when it is a court of original jurisdiction.
3. **Motions to Vacate: Final Orders: Appeal and Error.** An order denying a motion to vacate or modify a final order is itself a final, appealable order.
4. **Courts: Appeal and Error.** Upon reversing a decision of the Nebraska Court of Appeals, the Nebraska Supreme Court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and CASSEL, Judges, on appeal thereto from the District Court for Douglas County, W. MARK ASHFORD, Judge, on appeal thereto from the County Court for Douglas County, JEFFREY MARCUZZO, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Aaron D. Weiner, of Abrahams, Kaslow & Cassman, L.L.P., for appellants.

Brian T. McKernan, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee.

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

GERRARD, J.

The district court, sitting as an appellate court, dismissed the appellants' appeal. The appellants asked the district court to reinstate the appeal, alleging that they had not received notice of the impending dismissal. The district court refused, and the appellants appealed again, arguing that the district court should have reinstated their appeal. But the Nebraska Court

of Appeals dismissed their appeal as untimely, because they had not appealed within 30 days of the district court's order of dismissal. The issue presented is whether the district court's order refusing to reinstate the appeal was itself a final, appealable order. We conclude that it was, and because the appellants timely appealed from that order, we reverse the judgment of the Court of Appeals and remand this cause with directions.

BACKGROUND

The appellants are Mickey C. Skinner and Jean M. Skinner, who own a house, and Mike Skinner, who lives there. Mike entered into a construction contract with Capitol Construction, Inc., the appellee, to replace the appellants' roof. Disagreements ensued, and the appellee sued in county court for money damages. Eventually, judgment was entered for the appellee in the amount of $5,698.38. The appellants filed a timely appeal to the district court, through new counsel. On November 26, 2007, the district court sent a progression letter to the appellants' *trial* counsel, who neither replied nor informed appellate counsel of the letter. On January 8, 2008, the district court entered an order dismissing the appeal.

On January 14, 2008, the appellants filed a motion to reinstate the appeal, alleging that the clerk of the district court had mistakenly sent all notices to the appellants' previous attorney instead of their appellate counsel of record. On April 24, the district court entered an order denying the motion to reinstate. The appellants appealed to the Court of Appeals. In their appellate brief, the only issue raised was that the district court erred in deciding not to reinstate the appeal. In other words, the appellants did not seek to appeal from the January 8 order—they sought to appeal from the April 24 order. Nonetheless, the Court of Appeals dismissed the appeal, concluding that the appeal was untimely because it was not filed within 30 days of the January 8 order.[1] We granted the appellants' petition for further review and ordered the appeal to be submitted without oral argument.[2]

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[1] *Capitol Construction v. Skinner*, 17 Neb. App. 662, 769 N.W.2d 792 (2009).

[2] See Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008).

ASSIGNMENT OF ERROR

The appellants assign, consolidated, that the Court of Appeals erred in holding that it did not have jurisdiction over their appeal from the April 24, 2008, order.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[3]

ANALYSIS

The starting point for our analysis of this appeal is our recent decision in *State v. Hausmann*.[4] In *Hausmann*, the defendant was convicted in the county court of being a minor in possession of alcohol. She appealed to the district court, but the district court dismissed the appeal on September 10, 2007, because the transcript was inadequate. On September 28, the defendant filed a motion to vacate the dismissal and permit the record to be corrected. The district court granted the motion on October 5. A supplemental transcript was filed, and on October 22, the court entered an order affirming the county court judgment. On November 21, the defendant appealed to the Court of Appeals.

The Court of Appeals dismissed the appeal as untimely filed.[5] The court held that the district court had no power, when sitting as an appellate court, to rehear its own decisions. Therefore, the court reasoned that the district court's original order of dismissal had been final and appealable and that the defendant's notice of appeal—filed more than 30 days after that order—was untimely.[6]

We reversed the decision of the Court of Appeals.[7] We began by noting the difference between two related, but

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[3] *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009).

[4] *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009).

[5] See *State v. Hausmann*, 17 Neb. App. 195, 758 N.W.2d 54 (2008), *reversed, Hausmann, supra* note 4.

[6] *Hausmann, supra* note 5.

[7] *Hausmann, supra* note 4.

distinct issues: whether the district court, sitting as an appellate court, has jurisdiction to rehear an appeal on which a final order has been entered and whether a motion asking the court to exercise such jurisdiction tolls the time for taking an appeal. We explained that it is not the entry of a final, appealable order that divests the district court of jurisdiction over the appeal—rather, the district court is divested of jurisdiction to a higher appellate court when an appeal is perfected, or to the county court when the county court acts upon the district court's mandate. And we held that a district court sitting as an appellate court has the inherent power to vacate or modify its judgments or orders, either during the term at which they were made or upon a motion filed within 6 months of the entry of the judgment or order.[8] We emphasized, however, that

> in the absence of an applicable rule to the contrary, a motion asking the court to exercise that inherent power does not toll the time for taking an appeal. A party can move the court to vacate or modify a final order—but if the court does not grant the motion, a notice of appeal must be filed within 30 days of the entry of the earlier final order if the party intends to appeal it. And if an appeal is perfected before the motion is ruled upon, the district court loses jurisdiction to act.[9]

But because the district court in that case had not lost jurisdiction, and had granted the motion to vacate the final order, we concluded that the notice of appeal was timely.

The Court of Appeals addressed the applicability of *Hausmann*[10] in its decision in this case. The Court of Appeals concluded that it lacked jurisdiction over the January 8, 2008, dismissal and framed the issue as whether it had jurisdiction to consider the April 24 denial of the motion to vacate, given that the notice of appeal was filed within 30 days of that ruling. The Court of Appeals noted that "the district court did not

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[8] *Id.*, citing Neb. Rev. Stat. § 25-2001(1) (Reissue 2008).

[9] *Hausmann, supra* note 4, 277 Neb. at 827, 765 N.W.2d at 225.

[10] *Hausmann, supra* note 4.

modify its dismissal" and that "certainty and finality of orders for appeal purposes are desirable."[11] And "[t]hose factors, coupled with the Supreme Court's clear directive in *Hausmann* that the litigant must within 30 days either achieve the modification he or she seeks or file an appeal," led the Court of Appeals to conclude that once the 30 days in which to appeal had run, without either the filing of a notice of appeal or a ruling on the motion to modify, the motion to vacate became akin to a "'motion to reconsider'" that did not extend the time in which to appeal.[12]

[2,3] But the Court of Appeals may have overlooked the basis for our conclusion in *Hausmann*,[13] which made clear that a district court sitting as an appellate court has the same power to reconsider its orders, both inherently and under § 25-2001, as it does when it is a court of original jurisdiction. And more importantly, an order denying a motion to vacate or modify a final order is itself a final, appealable order.[14] Such an order affects a substantial right upon a summary application in an action after judgment,[15] and we have repeatedly decided such appeals on the merits of the motion to vacate.[16]

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[11] *Capitol Construction, supra* note 1, 17 Neb. App. at 668, 769 N.W.2d at 797.

[12] *Id*.

[13] *Hausmann, supra* note 4.

[14] See *Pep Sinton, Inc. v. Thomas*, 174 Neb. 508, 118 N.W.2d 621 (1962). Cf., *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993); *Vacca v. DeJardine*, 213 Neb. 736, 331 N.W.2d 516 (1983); *Jones v. Nebraska Blue Cross Hospital Service Assn.*, 175 Neb. 101, 120 N.W.2d 557 (1963).

[15] See Neb. Rev. Stat. § 25-1902 (Reissue 2008).

[16] See, e.g., *Hartman v. Hartman*, 265 Neb. 515, 657 N.W.2d 646 (2003); *Nye v. Fire Group Partnership*, 263 Neb. 735, 642 N.W.2d 149 (2002); *Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448, 558 N.W.2d 531 (1997), *overruled on other grounds, Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000); *Andersen v. American Family Mut. Ins. Co.*, 249 Neb. 169, 542 N.W.2d 703 (1996); *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995); *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994); *Aetna Cas. & Surety Co. v. Dickinson*, 216 Neb. 660, 345 N.W.2d 8 (1984).

Andersen v. American Family Mut. Ins. Co.[17] illustrates those principles at work. In *Andersen*, a judgment was entered for the plaintiff on November 30, 1993, and the defendant filed a motion to amend the judgment or for an order nunc pro tunc on January 31, 1994. The motion to amend or for an order nunc pro tunc was overruled on the same day, and the defendant appealed. The defendant assigned errors with respect to both the November 30 judgment and the January 31 denial of its motion.

We refused to consider the defendant's assignments of error with respect to the November 30, 1993, judgment, reasoning that the defendant "apparently seeks to use the denial of its motion to amend or for an order nunc pro tunc to gain appellate review of the November 30, 1993, trial court order. This [the defendant] is not permitted to do."[18] We refused to review the November 30 judgment on jurisdictional grounds. Instead, we addressed "only whether the trial court erred in denying [the defendant's] January 31, 1994, motion to amend the trial court's journal entry or for an order nunc pro tunc."[19] We found that the criteria for modifying a judgment set forth in § 25-2001 were not satisfied and that a nunc pro tunc order would not have been proper, so we affirmed the January 31 order.[20]

Similarly, in this case, the Court of Appeals did not have jurisdiction to consider an appeal challenging the merits of the January 8, 2008, dismissal. But it *did* have jurisdiction to consider the merits of the April 24 order denying the motion to reinstate—in other words, to consider whether the appellants demonstrated that their appeal should be reinstated due to the alleged error of the clerk of the district court. And that is all the appellants asked. In *Hausmann*, we emphasized that if the district court does not grant a motion to reconsider an appellate decision, "a notice of appeal must be filed within 30

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[17] *Andersen, supra* note 16.

[18] *Id.* at 171, 542 N.W.2d at 705.

[19] *Id.*

[20] See *id.* See, also, *Thrift Mart, supra* note 16.

days of the entry of the earlier final order if the party intends to appeal it"—in other words, if the party intends to appeal *the earlier final order*.[21] The Court of Appeals erred in extending *Hausmann* to preclude an appeal from an order denying reconsideration, if that later order is based upon grounds that make it independently final and appealable and the merits of that order are the issue raised on appeal. And as a result, the Court of Appeals erred in concluding that appellate jurisdiction was lacking in this case.

[4] Upon reversing a decision of the Court of Appeals, we may consider, as we deem appropriate, some or all of the assignments of error the Court of Appeals did not reach.[22] As noted above, the appellants' brief to the Court of Appeals generally assigned that the district court erred in refusing to reinstate their appeal.

But appellate review of the district court's decision is complicated by the fact that neither the court's order, nor anything in the record, reflects the basis of the court's refusal to reinstate the appeal. This is particularly problematic given that the record establishes beyond reasonable dispute that the court's progression order was not sent to the appellants' appellate counsel. The appellants represent—and we have no reason to disbelieve—that the court did not believe it had jurisdiction to reinstate an appeal. This would not be surprising, because we had not yet decided *Hausmann* and a fair reading of the law at that time would have suggested to the district court that it had no such authority.[23]

In any event, we find it difficult to review the district court's exercise of its discretion when the basis for its decision is not reflected by the record, and it is not at all clear that the district court considered the appellants' motion on its merits. Under the circumstances, we conclude that it is appropriate to remand this cause to the district court for further proceedings in light

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[21] See *Hausmann, supra* note 4, 277 Neb. at 827, 765 N.W.2d at 225.

[22] See *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009).

[23] See, e.g., *State v. Dvorak*, 254 Neb. 87, 574 N.W.2d 492 (1998), *disapproved, Hausmann, supra* note 4.

of our decision in *Hausmann*[24] and the principles articulated in this opinion.

CONCLUSION

The Court of Appeals erred in concluding it lacked jurisdiction over this appeal, because the appellants' notice of appeal was filed within 30 days of the final, appealable April 24, 2008, order from which they sought to appeal. And we conclude that the cause should be remanded to the district court for further proceedings. Therefore, we reverse the judgment of the Court of Appeals and remand the cause to the Court of Appeals with directions to remand the cause to the district court for further proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

[24] *Hausmann, supra* note 4.

TRACFONE WIRELESS, INC., APPELLANT, V. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE.

778 N.W.2d 452

Filed February 12, 2010. No. S-08-1109.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009), may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Administrative Law: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusion independently of the court below and the administrative agency.
3. **Statutes: Appeal and Error.** When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
4. **Statutes: Intent: Appeal and Error.** In construing a statute, an appellate court looks to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served.

5. **Statutes: Appeal and Error.** An appellate court construes statutes relating to the same subject matter together to maintain a sensible and consistent scheme, so that effect is given to every provision.
6. **Rules of Evidence: Words and Phrases.** Adjudicative facts within the meaning of Neb. Evid. R. 201, Neb. Rev. Stat. § 27-201 (Reissue 2008), are simply the facts developed in a particular case, as distinguished from legislative facts, which are established truths, facts, or pronouncements that do not change from case to case but apply universally. The adjudicative facts are those to which the law is applied in the process of adjudication.
7. **Administrative Law: Judicial Notice: Legislature: Appeal and Error.** Legislative history is judicially noticeable by an appellate court and by the district court in an administrative proceeding.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Stephen M. Bruckner and Russell A. Westerhold, of Fraser Stryker, P.C., L.L.O., and Mitchell F. Brecher, of Greenberg Traurig, L.L.P., for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellee.

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

GERRARD, J.

I. NATURE OF CASE

The Enhanced Wireless 911 Services Act (911 Act)[1] requires wireless telecommunications carriers to collect a surcharge on wireless service for the purpose of implementing enhanced 911 emergency dispatch service, which can be loosely described as providing public safety agencies with identification and location information for wireless 911 callers.[2] The appellant, TracFone Wireless, Inc. (TracFone), is in the business of selling prepaid wireless service. At issue in this appeal is the method by which TracFone should be required to collect the 911 Act surcharge from its prepaid wireless customers.

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[1] Neb. Rev. Stat. §§ 86-442 to 86-470 (Reissue 2008).

[2] See §§ 86-448 and 86-463.

II. BACKGROUND

The 911 Act expresses

> the intent of the Legislature that . . . all users of prepaid wireless services pay an amount comparable to the amount paid by users of wireless services that are not prepaid in support of statewide wireless enhanced 911 service. It is also the intent of the Legislature that whenever possible such amounts be collected from the users of such prepaid wireless services.[3]

Under the 911 Act, the Nebraska Public Service Commission (Commission) is to establish surcharges for prepaid wireless service comparable to the surcharge assessed on other users of wireless services and develop methods for collection and remittance of surcharges from wireless carriers offering prepaid wireless services.[4] The Commission did so in a June 19, 2007, order, providing three preapproved methods that had been established by a previous version of the 911 Act:

> a) The wireless carrier shall divide the total earned prepaid wireless telephone revenue received by the wireless carrier within the monthly reporting period by fifty dollars and multiply the quotient by the surcharge amount;
>
> b) The wireless carrier shall collect on a monthly basis the surcharge from each customer's active, prepaid account. A customer with two or more active, prepaid accounts shall be assessed a separate surcharge for each active, prepaid account; or
>
> c) A wireless carrier shall remit the surcharge upon the activation of the active prepaid account and upon each replenishment of additional minutes purchased by the prepaid customer.[5]

The June 19 order also noted that "differences between various prepaid wireless carriers may require additional methods be made available," so it provided that "any prepaid wireless carrier wishing to utilize a method different than the three adopted

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[3] § 86-457(4).

[4] See § 86-457(5).

[5] Compare, 2007 Neb. Laws, L.B. 661, § 23; 2006 Neb. Laws, L.B. 1222, § 8.

herein, shall file with the Commission for approval a detailed description of the method it wishes to use."

TracFone filed such a request. TracFone explained that its services were entirely prepaid. Therefore, it proposed to collect a surcharge from each customer to whom it directly sold prepaid wireless service, in an amount equal to 1 percent of the purchase price. TracFone estimated that the average wireless customer spends approximately $50 per month on wireless service and pays a 50-cent surcharge[6]; therefore, a 1-percent surcharge on TracFone customers was, according to TracFone, comparable. TracFone explained that unlike other wireless service providers, TracFone could not deduct a surcharge directly from the customer's account balance, because the customer's prepaid account balance was stored in the customer's telephone, in the possession of the customer. TracFone also noted that it would be unable to collect a surcharge from customers who did not have a positive balance on the collection date, and that customers would be able to evade the surcharge by waiting until after the collection date to recharge their balances.

The Commission rejected TracFone's proposed alternative. The Commission noted that only 10 to 15 percent of TracFone's revenues are attributable to direct sales. The remaining sales of prepaid TracFone wireless service time are made by independent retail stores, such as Wal-Mart and Radio Shack. The Commission concluded that TracFone's proposal would not result in the remittance of surcharges comparable to those established for users of non-prepaid wireless service, because the surcharge would fall only on those users who purchased services directly from TracFone.

TracFone submitted a second proposal. This time, TracFone proposed to collect a 1-percent surcharge on every retail sale of TracFone service. TracFone would collect the surcharge on purchases made directly from it, and when service was purchased from an independent retail vendor, the vendor would collect the surcharge and give it to TracFone, which would in turn remit the surcharge to the 911 Act fund. But the Commission

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[6] See § 86-457(1)(b).

rejected TracFone's second proposal, reasoning that it did not have jurisdiction over retail vendors who were not telecommunications carriers. TracFone was ordered to use one of the three methods approved in the June 19, 2007, order or, if it wished to submit another alternative, use one of the three approved methods in the interim.

TracFone filed a petition for judicial review under the Administrative Procedure Act (APA).[7] The district court agreed with the Commission's rejection of TracFone's proposed methods of collection and found no merit to TracFone's argument that the Commission's established methods of surcharge collection treated prepaid and postpaid wireless carriers differently in violation of federal law. The court affirmed the decision of the Commission.

III. ASSIGNMENTS OF ERROR

TracFone assigns that the district court erred in

(1) determining that TracFone failed to demonstrate that it was impossible for it to collect the surcharge from users of its wireless service who purchase its service through independent retailers;

(2) determining that the 911 Act requires TracFone to pay the surcharge established by the act even though TracFone has no means to collect the surcharge directly from users of its wireless service who purchase its service through independent retailers;

(3) determining that TracFone's first alternative collection method did not comply with the 911 Act;

(4) determining that TracFone's second alternative collection method did not comply with the 911 Act;

(5) relying upon material not found in the record of the Commission to rule that TracFone's second alternative collection method did not comply with the 911 Act;

(6) determining that TracFone should be required to adopt one of the three established methods approved by the Commission for the collection of the 911 Act surcharge; and

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[7] See Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009). See, also, Neb. Rev. Stat. § 75-136 (Reissue 2009).

(7) determining that the Commission's interpretation of the 911 Act was not preempted by federal law.

IV. STANDARD OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[8]

[2] The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusion independently of the court below and the administrative agency.[9]

V. ANALYSIS

Because it underlies many of the parties' more specific arguments, we begin with a more complete examination of § 86-457, which establishes how wireless telecommunications carriers are to collect surcharges and remit them to the Commission to fund the implementation of enhanced 911 service. Section 86-457 provides in part:

> (1) Each wireless carrier shall collect:
>
> (a) A surcharge of up to seventy cents, except as provided in subdivision (1)(b) of this subsection and as otherwise provided in this section with respect to prepaid wireless service, on all active telephone numbers or functional equivalents every month from users of wireless service and shall remit the surcharge in accordance with section 86-459; or
>
> (b) A surcharge of up to fifty cents, except as otherwise provided in this section with respect to prepaid wireless service, on all active telephone numbers or functional equivalents every month from users of wireless service

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[8] *Children's Hospital v. State*, 278 Neb. 187, 768 N.W.2d 442 (2009).

[9] See *Holmes v. State*, 275 Neb. 211, 745 N.W.2d 578 (2008).

> whose primary place of use is in a county containing a city of the metropolitan class and shall remit the surcharge in accordance with section 86-459.
>
> The wireless carrier is not liable for any surcharge not paid by a customer.
>
> (2) Except as otherwise provided in this section, the wireless carrier shall add the surcharge to each user's billing statement. The surcharge shall appear as a separate line-item charge on the user's billing statement and shall be labeled as "Enhanced Wireless 911 Surcharge" or a reasonable abbreviation of such phrase.
>
> (3) If a wireless carrier, except as otherwise provided in this section, resells its service through other entities, each reseller shall collect the surcharge from its customers and shall remit the surcharge in accordance with section 86-459.
>
> (4) It is the intent of the Legislature that, effective July 1, 2007, all users of prepaid wireless services pay an amount comparable to the amount paid by users of wireless services that are not prepaid in support of statewide wireless enhanced 911 service. It is also the intent of the Legislature that whenever possible such amounts be collected from the users of such prepaid wireless services.
>
> (5) The [C]ommission shall establish surcharges comparable to the surcharge assessed on other users of wireless services and shall develop methods for collection and remittance of such surcharges from wireless carriers offering prepaid wireless services.
>
> (6) The duty to remit any surcharges established pursuant to subsection (5) of this section is the responsibility of the wireless carrier.

As will become evident, the interpretation of § 86-457 is one of the fundamental disagreements between the parties. The Commission argues that subsections (1) through (3) should be read as exclusively applying to traditional "postpaid" wireless services, while subsections (4) through (6) apply to prepaid wireless services such as TracFone's. TracFone disagrees. As explained below, we agree with the Commission.

1. TracFone Is Required to Remit Surcharges Regardless of Whether They Are Directly Collected From Customers

TracFone's first two assignments of error are related. First, TracFone contends that it is impossible for it to collect surcharges directly from its customers. And second, TracFone contends that if it cannot collect a surcharge directly from its customers, it is not required to remit the surcharge. In that regard, TracFone relies on § 86-457(1), which provides in relevant part that a "wireless carrier is not liable for any surcharge not paid by a customer."

But § 86-457(1) imposes surcharges on wireless service customers "except as otherwise provided . . . with respect to prepaid wireless service." And TracFone's argument is contrary to § 86-457(4), which expressly applies to prepaid wireless services and states that comparable surcharges should "whenever possible . . . be collected from the users of such prepaid wireless services." In accordance with that, § 86-457(5) requires the Commission to develop methods for "collection and remittance of such surcharges from wireless carriers offering prepaid wireless services."

[3-5] We have often said that when construing a statute, we must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.[10] We look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served.[11] And we construe statutes relating to the same subject matter together to maintain a sensible and consistent scheme, so that effect is given to every provision.[12]

When this statute is read as a whole, it is apparent that § 86-457(1), upon which TracFone's argument depends, applies to postpaid wireless services, not prepaid wireless services.

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[10] See *Gilbert & Martha Hitchcock Found. v. Kountze*, 272 Neb. 251, 720 N.W.2d 31 (2006).

[11] See *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002).

[12] See *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999).

The evident purpose of providing that a wireless carrier "is not liable for any surcharge not paid by a customer" of postpaid wireless service is to relieve the wireless carrier of responsibility for surcharges owed by wireless customers who do not pay their bills. It was not intended to relieve a wireless carrier of responsibility for remitting surcharges assessed for wireless customers who pay their bills in advance.

Instead, § 86-457(4) provides that surcharges should be collected from prepaid wireless customers "whenever possible"—language that clearly contemplates circumstances in which such direct collection is *not* possible. Nonetheless, the duty to remit those surcharges remains, pursuant to § 86-457(6), the responsibility of the wireless carrier.

TracFone counters with an attempt to distinguish a duty to "pay" the surcharges with the duty to "remit" the surcharges. TracFone cites no authority for its rather novel interpretation of the word "remit," nor are we aware of any. To "remit" money is simply to transmit or send it as payment.[13] The Legislature's use of the word "remit" to describe a wireless carrier's duty to ensure that the Commission receive the surcharges provides no basis for distinguishing between surcharges collected directly from postpaid wireless customers and surcharges assessed for prepaid wireless service.

TracFone also relies on § 86-459, which requires wireless carriers to remit to the Commission "the amounts collected pursuant to section 86-457." TracFone asserts that § 86-459 reveals the Legislature's intent to require a wireless carrier to remit only surcharges collected directly from customers. But § 86-459 is not limited to amounts collected *from customers*—it requires remittance of all "amounts collected pursuant to section 86-457," which includes surcharges assessed on prepaid wireless customers pursuant to § 86-457(5).

In sum, TracFone's argument is that if a wireless carrier is unable to collect a surcharge directly from a customer, the Legislature intended for *neither* the carrier nor the customer to pay it. This is contrary to the stated intent of the 911 Act, and to a commonsense reading of the statutory language.

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[13] See Black's Law Dictionary 1409 (9th ed. 2009).

TracFone's choice of business model does not give it license to throw up its hands and pay nothing. Instead, the surcharge should be collected from a wireless carrier's prepaid customers "whenever possible."[14] When that is not possible, a "comparable" surcharge will be assessed by the Commission, and the duty to remit that surcharge is the carrier's responsibility.[15] In this case, it is TracFone's, and TracFone's first and second assignments of error are without merit.

2. Commission Did Not Err in Rejecting TracFone's Proposed Alternative Methods of Collection

TracFone's next two assignments of error are directed at the Commission's rejection of its two proposed alternative methods of collecting the surcharge. We address each proposed alternative in turn.

(a) TracFone's First Proposed Alternative Collection Method Was Inconsistent With § 86-457

TracFone's first proposed alternative collection method was to collect a 1-percent surcharge on the purchase price of each sale of prepaid wireless service purchased directly from TracFone. The Commission rejected this alternative. In arguing that the Commission erred, TracFone relies on § 86-457(4), which, as discussed above, declares the Legislature's intent that surcharges be collected from the users of prepaid wireless services "whenever possible." TracFone asserts that it is only "possible" for it to collect surcharges from its sales directly to customers.

But only 10 to 15 percent of TracFone's sales are direct. TracFone's remaining sales are made through independent retailers, and under TracFone's first proposed alternative collection method, no surcharge would be collected from, or paid for, those sales. This would be contrary to the expressed intent of the Legislature that "all users of prepaid wireless services pay an amount comparable to the amount paid" by other wireless

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[14] See § 86-457(4).

[15] See § 86-457(5) and (6).

customers.[16] As discussed above, TracFone is not relieved of the responsibility for remitting the surcharge, regardless of whether it is "possible" to collect the surcharge directly from its customers. Therefore, the Commission did not err in rejecting this proposed alternative, and TracFone's assignment of error to the contrary is without merit.

(b) TracFone's Second Proposed Alternative Collection Method Was Outside Commission's Jurisdiction

TracFone's second proposed alternative collection method was essentially a supplemented version of the first. TracFone proposed to collect a 1-percent surcharge on the purchase price of each sale of prepaid wireless service purchased directly from TracFone *and* require its third-party vendors to collect a 1-percent surcharge from users at the point of sale, which would be remitted to TracFone for remittance to the Commission. The Commission rejected this alternative as being outside its regulatory authority.

The Commission's jurisdiction extends to a wide variety of commercial activities: common carriers; grain dealing and storage; manufactured homes, modular housing units, and recreational vehicles; motor carrier registration and safety; pipeline carriers and rights-of-way; railroad carrier safety; telecommunications carriers; transmission lines and rights-of-way; water service; and certain natural gas public utilities.[17] Nothing in § 75-109.01 gives the Commission jurisdiction over third-party vendors that do not fall within those categories. TracFone does not argue otherwise.

Instead, TracFone's argument rests entirely upon § 86-457(3), which provides that if a wireless carrier "resells its service through other entities, each reseller shall collect the surcharge from its customers and shall remit the surcharge" to the Commission. The 911 Act does not define "reseller." TracFone argues that its third-party vendors are "resellers" within the meaning of § 86-457(3).

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[16] See § 86-457(4).

[17] See Neb. Rev. Stat. § 75-109.01 (Reissue 2009). See, also, Neb. Rev. Stat. § 66-1802(13) (Reissue 2009).

But as explained above, § 86-457(3) applies to postpaid wireless services, not prepaid wireless services such as TracFone's. And contrary to TracFone's second proposal, § 86-457(3) requires *resellers*, not the initial wireless carrier, to remit surcharges to the Commission—requiring the Commission to exercise jurisdiction over the reseller. There is simply no indication that § 86-457(3) was intended to extend the Commission's jurisdiction to every gas station or grocery store that sells a prepaid calling card.

And the legislative history of the 911 Act buttresses this conclusion, indicating that the Legislature intentionally "omit[ted] any reference to collection of the surcharge by the retail industry who resells this prepaid wireless service," because it "did not believe that the . . . Commission should have the authority over the retail industry to collect a telecommunications surcharge."[18] The legislative history explains that under § 86-457(3), "[i]f a carrier resells its service, each reseller shall collect the surcharge, *except with respect to resellers of prepaid service, which are addressed in a later subsection*."[19] And in that later subsection, § 86-457(6), the Legislature struck proposed language "authorizing the collection from an entity that resells the prepaid wireless service, and insert[ed] a provision that the duty to remit the surcharge is the responsibility of the wireless carrier."[20]

Because TracFone's second proposed alternative was beyond the Commission's authority to adopt or enforce, the Commission did not err in rejecting it. We find no merit to TracFone's fourth assignment of error.

3. District Court Did Not Err in Considering Legislative History

The district court, like this court, found the legislative history of the 911 Act to support its construction of the statute.

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[18] Floor Debate, L.B. 661, Transportation and Telecommunications Committee, 100th Leg., 1st Sess. 12-13 (Mar. 8, 2007).

[19] Committee Statement, L.B. 661, Transportation and Telecommunications Committee, 100th Leg., 1st Sess. 3 (Jan. 30, 2007) (emphasis supplied).

[20] *Id.* at 4.

TracFone argues that because under the APA, "the agency record shall constitute the exclusive basis for agency action in contested cases under the act and for judicial review thereof,"[21] the district court could not consult materials outside the record. And TracFone argues that the legislative history was an "adjudicative fact,"[22] which we have said a district court cannot judicially notice in reviewing an administrative order.[23] TracFone also contends that the district court erred in referring to Federal Communications Commission reference materials for definitions of words in the statute.

[6,7] But we have never construed the APA to preclude a district court from researching the law, for obvious reasons. And the legislative history of a statute is not an adjudicative fact within the meaning of Neb. Evid. R. 201. "Adjudicative facts" within the meaning of rule 201 are simply the facts developed in a particular case, as distinguished from "legislative facts," which are established truths, facts, or pronouncements that do not change from case to case but apply universally.[24] The adjudicative facts are those to which the law is applied in the process of adjudication.[25] Legislative history is among the most literally "legislative" of facts, and it is well established that it is judicially noticeable by this court and by the district court in an administrative proceeding.[26]

TracFone also argues that the court should not have considered legislative history, because § 86-457(3) is unambiguous.[27] As we explained above, however, neither the plain language of § 86-457 nor the legislative history supports TracFone's position. Therefore, the distinction is not a meaningful one.

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[21] § 84-915.01(4).

[22] See Neb. Evid. R. 201, Neb. Rev. Stat. § 27-201 (Reissue 2008).

[23] See, e.g., *Becton, Dickinson & Co. v. Nebraska Dept. of Rev.*, 276 Neb. 640, 756 N.W.2d 280 (2008).

[24] *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999).

[25] *Id.*

[26] See *Dairyland Power Co-op v. State Bd. of Equal.*, 238 Neb. 696, 472 N.W.2d 363 (1991).

[27] See, e.g., *Scofield v. State*, 276 Neb. 215, 753 N.W.2d 345 (2008).

In short, the district court did not err in conducting legal research or consulting legislative history. We find no merit to TracFone's fifth assignment of error.

4. Commission Did Not Err in Requiring TracFone to Use Collection Method Provided in June 19, 2007, Order

In its order rejecting TracFone's second proposed alternative collection method, the Commission ordered TracFone to "immediately adopt and utilize one of the three established methods set forth in the June 19, 2007 order." The Commission ordered TracFone, if it wished to propose another alternative method, to "continue to utilize one of the three previously adopted methods . . . pending Commission approval of any alternative method it may propose."

TracFone asserts that the Commission's order runs contrary to the Legislature's purported intent to permit collection methods other than the three adopted by the Commission, which three had previously been required by statute, then repealed in favor of the Commission's regulatory process.[28] But, to begin with, we see nothing in the statute that requires the Commission to permit wireless carriers to suggest their own methods of collecting surcharges. Instead, the statute simply requires the Commission to establish surcharges and develop methods for collection and remittance.[29] The plain language of § 86-457(5) permits the Commission to require compliance with the surcharges and methods for collection and remittance that it establishes.

And more to the point, § 86-457(4) declared the Legislature's intent that users of prepaid wireless services pay a comparable surcharge effective July 1, 2007. By the time the Commission rejected TracFone's second proposed alternative, it was April 22, 2008, and the litigation was still ongoing. The Commission was entitled to require TracFone to comply with § 86-457 in *some* way, and was not required to wait until TracFone finally (if at all) found a mutually acceptable alternative for doing so.

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[28] See L.B. 661.

[29] See § 86-457(5).

Nor, even now, has TracFone proffered an alternative better than the two methods that the Commission correctly rejected, making it difficult to conclude that TracFone was prejudiced by the Commission's directive to comply with its June 19, 2007, order in the meantime.

In short, nothing in § 86-457 required the Commission to wait for TracFone to exhaust its ingenuity before compelling it to comply with the 911 Act. We find no merit to TracFone's sixth assignment of error.

5. Commission's Determination Is Not Preempted by Federal Law

Finally, TracFone argues that the Commission's determination is preempted by federal law. The federal Telecommunications Act of 1996 provides in part:

> **(a) In general**
>
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> **(b) State regulatory authority**
>
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> **(c) State and local government authority**
>
> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
>
> **(d) Preemption**
>
> If, after notice and an opportunity for public comment, the [Federal Communications] Commission determines

> that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the [Federal Communications] Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.[30]

TracFone argues that the Commission's order has the effect of prohibiting its ability to provide telecommunications service, and is not competitively neutral, so the order is expressly preempted by Congress' explicit declaration.[31]

We explained in *In re Application of Lincoln Electric System* that § 253(a) imposes a substantive limitation on state and local governments, while § 253(b) and (c) are "safe harbors" or exceptions to the general prohibition stated in § 253(a).[32] This means that the "safe harbor" provisions of subsections (b) and (c) are affirmative defenses to preemption of state and local exercises of authority that would otherwise violate subsection (a), and are not implicated unless a regulation is determined to be prohibitive in the first place.[33]

And TracFone has not demonstrated that the 911 Act, or the Commission's implementation of it, is prohibitive. Although TracFone claims that it is only required to demonstrate "a possible prohibition on the provision of services,"[34] more recent federal authority recognizes that under the plain language of

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[30] 47 U.S.C. § 253 (2006).

[31] See *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003), *overruled on other grounds, Nixon v. Missouri Municipal League*, 541 U.S. 125, 124 S. Ct. 1555, 158 L. Ed. 2d 291 (2004).

[32] *Id.*

[33] See, *Puerto Rico v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006); *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258 (10th Cir. 2004); *BellSouth Telecommunications v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001); *Qwest Communications v. City of Berkeley*, 202 F. Supp. 2d 1085 (N.D. Cal. 2001).

[34] Brief for appellant at 39 (emphasis in original). See *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *overruled, Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc), *cert. denied* 557 U.S. 935, 129 S. Ct. 2860, 174 L. Ed. 2d 576 (2009).

§ 253(a), to demonstrate preemption, a party must show actual or effective prohibition, rather than the mere possibility of prohibition.[35] No such showing was made here. Section 253(a) has been held to be violated by circumstances such as outright prohibition of telecommunications service,[36] a significantly burdensome application process,[37] an extensively delayed application process,[38] or the imposition of costs and fees that would reduce the carrier's profit by 86 percent.[39] This case presents nothing comparable.

TracFone argues that it suffers from an "inequitable competitive marketplace" because it is required "to pay the Surcharge 'out of pocket' when its competitors collect the Surcharge from their customers through billed line items which are clearly identified as being government-imposed charges, thereby suffering no adverse economic consequence."[40] But nothing prevents TracFone from recouping the surcharge from its customers or retailers, or explaining its prices to them. We are not entirely convinced that consumers are persuaded by such line items to overlook the bottom-line price that they have to pay for wireless service. A potential customer's choice to purchase from TracFone's competition is not a prohibition of TracFone's ability to provide telecommunications service.[41]

We find nothing in the record to suggest that TracFone was prohibited from providing telecommunications service within the meaning of § 253(a). Having reached that conclusion, we need not consider other complicated questions implicated by TracFone's argument, such as whether the 911 Act is competitively neutral within the meaning of § 253(c), whether private

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[35] See, *Sprint Telephony PCS, L.P., supra* note 34; *Level 3 v. City of St. Louis, Mo.*, 477 F.3d 528 (8th Cir. 2007).

[36] See *In re Application of Lincoln Electric System, supra* note 31.

[37] See *City of Santa Fe, New Mexico, supra* note 33.

[38] See *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002).

[39] See *Puerto Rico, supra* note 33.

[40] Brief for appellant at 40.

[41] See *Time Warner Telecom of Oregon v. City of Portland*, 452 F. Supp. 2d 1103 (D. Or. 2006).

parties have a right to enforce § 253, and whether the doctrine of primary jurisdiction should apply.[42] We find no merit to TracFone's final assignment of error.

VI. CONCLUSION

The Commission did not err in its construction of the 911 Act, in its rejection of TracFone's proposed alternative collection methods, or in requiring TracFone to comply with its approved collection methods pending approval of any other proposal. The district court did not err in affirming those conclusions, nor did the court err in relying on legal research and legislative history in doing so. And neither the 911 Act nor the Commission's application of it is preempted by federal law. Therefore, we affirm the judgment of the district court.

AFFIRMED.

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[42] See, e.g., *Puerto Rico, supra* note 33; *City of Santa Fe, New Mexico, supra* note 33; *TCG New York, Inc., supra* note 38; *BellSouth Telecommunications, supra* note 33; *City of Berkeley, supra* note 33.

McCULLY, INC., DOING BUSINESS AS McCULLY RANCH COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. BACCARO RANCH, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLEE.

778 N.W.2d 115

Filed February 12, 2010. No. S-09-372.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's grant of a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Pleadings: Proof.** Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief.
3. **Trial: Attorneys at Law: Appeal and Error.** A motion to disqualify an attorney is addressed to the discretion of the trial court, whose findings will not be disturbed absent evidence of abuse.
4. **Actions: Attorneys at Law: Appeal and Error.** An attorney disqualification matter is ancillary to the main case, whether the main case is at law, in equity, or

a special proceeding; thus, factual findings in disqualification cases will not be disturbed on appeal if substantial evidence supports those findings.

Appeal from the District Court for Hooker County: JOHN P. MURPHY, Judge. Affirmed in part, and in part reversed and remanded with directions.

Ward F. Hoppe and Tonia M. Novak, of Hoppe, Vogt & Barrows, L.L.P., for appellant.

George G. Vinton for appellee.

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

HEAVICAN, C.J.

I. INTRODUCTION

McCully, Inc., doing business as McCully Ranch Company (McCully), appeals the decision of the Hooker County District Court dismissing its amended complaint for failure to state a claim. McCully, a real estate brokerage, claims that Baccaro, Inc., breached a listing agreement and that it should be able to recover a commission from Baccaro under the agreement or, in the alternative, that quantum meruit should apply. The district court dismissed McCully's complaint for failure to state a claim. McCully also filed a motion to disqualify opposing counsel, which the district court denied. We reverse the decision of the district court as to the motion to dismiss but affirm as to the motion to disqualify.

II. BACKGROUND

McCully and Baccaro entered into a "Farm, Ranch and Land Exclusive Right to Sell or Exchange Listing" (listing agreement) on or about December 23, 2006. McCully filed its complaint in the district court on August 11, 2008. Baccaro responded with a motion to dismiss on August 21, which was granted, along with leave to amend. McCully filed an amended complaint on November 3, alleging both a breach of contract and unjust enrichment by Baccaro.

According to the amended complaint, Baccaro appointed McCully as Baccaro's exclusive agent for the purpose of selling

a ranch property in Hooker County, Nebraska. According to McCully, during the term covered by the listing agreement, December 23, 2006, through December 1, 2007, McCully found a buyer willing to exchange its ranch for Baccaro's ranch, plus an additional $180,000. Baccaro made a counteroffer for a direct exchange without an additional payment. At that time, the potential buyer refused the counteroffer. McCully's amended complaint alleged that on September 6, 2007, the same potential buyer accepted Baccaro's counteroffer, but that Baccaro refused to consent to the exchange until after the listing agreement had lapsed, in an effort to avoid compensating McCully.

In its amended complaint, McCully alleged both a breach of contract and unjust enrichment by Baccaro. Baccaro filed a motion to dismiss for failure to state a claim under Neb. Ct. R. Civ. Pldg. § 6-1112(b)(6). McCully later filed a motion to disqualify Baccaro's counsel based on a conflict of interest, which motion the district court denied. The district court granted Baccaro's motion to dismiss, finding that the listing agreement was unenforceable under the statute of frauds and that McCully could not circumvent the statute of frauds by pleading unjust enrichment. McCully appealed.

III. ASSIGNMENTS OF ERROR

McCully assigns, consolidated and restated, that the district court erred when it found that (1) McCully failed to state a claim for breach of contract or quantum meruit and (2) there was no conflict of interest sufficient to disqualify Baccaro's counsel.

IV. STANDARD OF REVIEW

[1] An appellate court reviews a district court's grant of a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[1]

[2] Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim

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[1] *McKenna v. Julian*, 277 Neb. 522, 763 N.W.2d 384 (2009).

unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief.[2]

[3] A motion to disqualify an attorney is addressed to the discretion of the trial court, whose findings will not be disturbed absent evidence of abuse.[3]

V. ANALYSIS

1. District Court Erred When It Granted Baccaro's Motion to Dismiss

We first turn to the district court's grant of Baccaro's motion to dismiss. The district court granted Baccaro's motion to dismiss based on Neb. Rev. Stat. § 76-2422 (Reissue 2009), which requires a "written agreement" for brokerage services. Under § 76-2422(6), a "written agency agreement" for brokerage services must specify "the agent's duties and responsibilities, including . . . the terms of compensation." The district court determined that § 76-2422 operated as a statute of frauds and that therefore, parol evidence was not allowed.[4] The district court determined the listing agreement was void because the listing agreement did not sufficiently specify the terms of compensation in the event of an exchange of land and parol evidence would be required to establish material terms of the agreement. The district court also found that McCully could not avoid the statute of frauds by alleging unjust enrichment.

We begin by noting that § 76-2422 was first enacted in 1994 as part of an effort to "codify in statute the relationships between real estate brokers or salespersons and persons who are sellers, landlords, buyers, or tenants of rights and interests in real property."[5] The consequence for violating any provision of Neb. Rev. Stat. §§ 76-2401 to 76-2430 (Reissue 2009) is that such violation is considered an unfair trade practice[6] and is

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[2] *Id.*

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

[4] See *Krueger v. Callies*, 190 Neb. 376, 208 N.W.2d 685 (1973).

[5] Neb. Rev. Stat. § 76-2401(3) (Reissue 2009).

[6] § 76-2425.

subject to administrative action under the Nebraska Real Estate License Act.[7] Section 76-2422 is therefore part of a statutory scheme regulating the agency relationships of real estate brokers and salespersons to buyers and sellers of real property, and it should be read in conjunction with the Nebraska Real Estate License Act.

(a) § 76-2422 Applies to Exchanges of Land

On appeal, McCully argues that § 76-2422 applies only to sales, not exchanges, of real property and therefore is irrelevant in this case. As such, McCully argues that its allegations that Baccaro was unjustly enriched should survive a motion to dismiss. Section 76-2422(6) provides in relevant part:

> Before engaging in any of the activities enumerated in subdivision (2) of section 81-885.01, a designated broker who intends to establish an agency relationship with any party or parties to a transaction . . . shall enter into a written agency agreement with a party or parties to the transaction to perform services on their behalf. The agreement shall specify the agent's duties and responsibilities, including any duty of confidentiality, and the terms of compensation. Any agreement under this subsection shall be subject to the common-law requirements of agency applicable to real estate licensees.

Section 81-885.01(2) defines a broker as "any person who, for any form of compensation or consideration or with the intent or expectation of receiving the same from another, negotiates or attempts to negotiate the listing, sale, purchase, *exchange*, rent, lease, or option for any real estate." (Emphasis supplied.) Therefore, under the plain language of § 81-885.01(2), one of the enumerated activities covered by § 76-2422(6) is the exchange of property, and McCully's argument is without merit.

(b) § 76-2422 Does Not Act as Statute of Frauds

We next turn to the question of whether § 76-2422 acts as a statute of frauds, as such was the district court's basis

[7] See Neb. Rev. Stat. §§ 81-885.01 to 81-885.55 (Reissue 2008).

for granting Baccaro's motion to dismiss. The district court found that "the listing agreement [did] not contain a certain compensation for payment" from Baccaro to McCully and that the lack of these terms rendered the agreement unenforceable. Moreover, the district court, citing *Blair v. Austin*,[8] found that McCully could not "circumvent the statute of frauds by pleading the action in *quantum meruit*." While we agree that a party cannot circumvent the statute of frauds based on quantum meruit,[9] we find that § 76-2422 does not operate as a statute of frauds, and as such, the district court was incorrect to grant the motion to dismiss on those grounds.

We note that Nebraska has a statute of frauds that explicitly applies to the sale of real estate. Neb. Rev. Stat. § 36-107 (Reissue 2008), first passed in 1897, states:

> Every contract for the sale of lands between the owner thereof and any broker or agent employed to sell the same, *shall be void*, unless the contract is in writing and subscribed by the owner of the land and the broker or agent. Such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.

(Emphasis supplied.) Under the plain language of this statute, noncompliance with its requirements means that the agreement is void and unenforceable, but prior case law has held that this statute does not apply to exchanges of land.[10]

In contrast, § 76-2422 and its related statutes contain no language that would render an agreement void. Section 76-2422 discusses the need for a written agreement in certain circumstances. As already noted, however, § 76-2422 is part of a larger scheme to regulate real estate brokers and salespersons, and a violation of a statute in this section may result in administrative action under the Nebraska Real Estate License Act. We therefore find that § 76-2422 does not operate as a statute of frauds.

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[8] *Blair v. Austin*, 71 Neb. 401, 98 N.W. 1040 (1904).

[9] See *id.*

[10] *Dunn v. Snell*, 124 Neb. 560, 247 N.W. 428 (1933).

(c) Amended Complaint

The question then presented to this court is whether McCully's amended complaint was sufficient to survive a motion to dismiss. We review a district court's grant of a motion to dismiss de novo, accepting all facts in the complaint as true and drawing all inferences in favor of the nonmoving party.[11] Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief.[12]

We find that the amended complaint was sufficient to survive Baccaro's motion to dismiss. The amended complaint states that the exchange was based on the listed value of $1.6 million and that Baccaro breached the contract after McCully had performed by finding a buyer for the property. Furthermore, the listing agreement provided sufficient terms of compensation to satisfy § 76-2422. The listing agreement includes a sliding-scale fee arrangement in which the commission is based on a percentage of the purchase price. The listing agreement also states that the "[c]omission rate based on the gross sale price of the property shall be payable to BROKER . . . [i]f, during the term of the Listing, . . . seller exchanges the Property." We find that when read together, the listing agreement and the amended complaint set out sufficient terms of compensation to state a claim upon which relief could be granted.

2. District Court Did Not Err in Denying Motion to Disqualify

McCully argues that the district court erred when it denied the motion to disqualify Baccaro's counsel. One of the owners of McCully, Kevin McCully, claims that George Vinton, counsel for Baccaro, represented him in matters the same as or substantially related to those involved in this suit. The district court found that Vinton did not represent McCully, or Kevin

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[11] See *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005).

[12] *McKenna, supra* note 1.

McCully, other than to prepare limited liability company forms for the McCully ranch in 2004.

We note that this case presents in an unusual procedural posture in that typically, the denial of a motion to disqualify will be challenged by mandamus. In this case, though, the issue is presented to us on direct appeal. We held in *CenTra, Inc. v. Chandler Ins. Co.*[13] that "when an appeal from an order denying disqualification involves issues collateral to the basic controversy, and when an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, the party should seek mandamus or other interlocutory review." In other words, once a case has been litigated, an appellate court will not disturb the denial of a motion to disqualify counsel, because to do so will give litigants "a second bite at the apple."[14] The present case, however, involves an appeal from a motion to dismiss that was sustained at the same time the motion to disqualify was denied, and none of the concerns present in *CenTra, Inc.* are present here. Because we are reversing and remanding on grounds other than the denial of the motion to disqualify, and because this issue may arise again, we address McCully's assignment of error here.

Kevin McCully claimed that he had consulted with Vinton approximately once per month since 2003 and that he had received advice on land sales and closing transactions for McCully. He stated that he had not received a bill from Vinton, other than for the preparation of limited liability company documents in 2004. Kevin McCully claimed that he consulted with Vinton regarding wills and real estate matters for which McCully was never billed. Kevin McCully also claimed that he referred Baccaro to Vinton to assist Baccaro in correcting a boundary line problem and that he attempted to consult with Vinton on the issue of compensation in this case. At that time, Vinton informed McCully that he was working for Baccaro. Kevin McCully alleged that Vinton had enough information about his personality and approach to real estate issues that Vinton had inside information he could use

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[13] *CenTra, Inc., supra* note 3, 248 Neb. at 854, 540 N.W.2d at 327.

[14] *Id.* at 852, 540 N.W.2d at 326.

against McCully in this matter. Kevin McCully's wife also submitted an affidavit claiming that she considered Vinton the family attorney.

One of the managing members of Baccaro, Alma Bullington, characterized Vinton as counsel for Baccaro for various matters since at least 2006. She stated that Vinton worked on resolving boundary issues as well as a potential contract between Baccaro and McCully in September 2007. Bullington claims that Vinton served as Baccaro's attorney from February 2007 through July 2008 and that at no time did she believe that Vinton was also serving as McCully's attorney. Bullington stated that Baccaro paid all of the legal bills for Vinton's work and that when McCully approached Vinton, Vinton stated that he would work on the agreement between the two only if authorized by Baccaro. Another managing member of Baccaro provided an affidavit that made essentially the same claims. Both of these managing members of Baccaro claimed that McCully never informed them that Vinton was also representing McCully.

In Vinton's affidavit, he stated that he had done work for various members of Bullington's family and Baccaro since the early 1990's. He also stated affirmatively that he never considered himself to be McCully's attorney. Vinton alleged that McCully was aware of this fact and that McCully came to him for his assistance on the boundary dispute because McCully was aware of Vinton's representation of Baccaro and the Bullington family. Vinton stated that McCully referred two parties to Vinton for whom McCully was the Realtor, but that Vinton did not work for McCully, nor did he bill McCully for any work done. Vinton stated that McCully prepared the listing agreement and that Vinton did not become involved in the present case until well after the agreement had been signed by both parties. Vinton stated that he worked with Kevin McCully, but never for him other than to prepare the limited liability company documents, and that Kevin McCully would have no reason to believe that Vinton had ever served as his attorney.

[4] A motion to disqualify an attorney is addressed to the discretion of the trial court, whose findings will not be disturbed

absent evidence of abuse.[15] An attorney disqualification matter is ancillary to the main case, whether the main case is at law, in equity, or a special proceeding; thus, factual findings in disqualification cases will not be disturbed on appeal if substantial evidence supports those findings.[16] Neb. Ct. R. of Prof. Cond. § 3-501.9(a) provides that

> [a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

We find no abuse of discretion in the district court's determination that Vinton had not served as McCully's attorney in the same or a substantially related matter. Although Kevin McCully claims that Vinton represented him in the matter at hand, he presents no evidence of such. The only matter in which Kevin McCully can demonstrate that Vinton represented him was in creating limited liability company documents 5 years previously. Preparing those documents cannot be considered "the same or a substantially related matter" with regard to this case. We therefore affirm the district court's denial of the motion to disqualify Baccaro's attorney.

VI. CONCLUSION

We find that McCully's complaint established a claim and a set of facts upon which relief could be granted, and we therefore reverse the decision of the district court granting Baccaro's motion to dismiss. We find that the district court did not abuse its discretion when it denied McCully's motion to disqualify opposing counsel, however. We therefore reinstate McCully's amended complaint and remand for proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

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[15] *CenTra, Inc., supra* note 3.

[16] See *id.*

STATE OF NEBRASKA, APPELLEE, V. JACOB C. FORD, APPELLANT.

778 N.W.2d 473

Filed February 19, 2010. No. S-09-020.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.
3. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
4. **Trial: Evidence: Witnesses.** One who wishes to object to an answer given by a witness to a question posed by opposing counsel may not object on the ground that the answer is not responsive, but must object on the ground that the answer is a voluntary statement or for some specific reason such as hearsay or a conclusion of the witness. Only the party asking the question can object on the ground that the answer is not responsive.
5. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
6. **Evidence: Words and Phrases.** Evidence is relevant if it tends in any degree to alter the probability of a material fact.
7. **Criminal Law: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
8. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
9. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the questioned trial was surely unattributable to the error.
10. **Constitutional Law: Criminal Law: Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clauses of the federal and state Constitutions do not forbid a retrial after an appellate determination of prejudicial error in a criminal trial so long as the sum of all the evidence admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Reversed and remanded for a new trial.

James Martin Davis, of Davis Law Office, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

STEPHAN, J.

Jacob C. Ford was convicted by a jury of first degree sexual assault. The primary issue at trial was whether Ford's sexual intercourse with the alleged victim, C.H., was consensual. After he was sentenced to 4 to 6 years' imprisonment, Ford filed this timely appeal, arguing that the district court erred with respect to several evidentiary rulings it made during the trial.

I. BACKGROUND

1. FACTS

On December 27, 2007, C.H. attended a party at a house in southwest Lincoln where four male roommates resided. C.H., a 22-year-old college student at the time, was acquainted with the residents of the house and had previously attended parties there. She understood that the party was to be a celebration of Ford's return on leave from an overseas military deployment. Ford had lived at the residence prior to his deployment and was staying there at the time of the party. C.H. had previously met Ford at a going-away party for him prior to his deployment, but she had no contact with him while he was overseas.

C.H. arrived at the party at about 11:30 p.m. and began consuming various alcoholic beverages. Over the course of the next 3½ hours, she consumed five beers, two half-shots of rum, and a drink which included beer and hard liquor. There were approximately 15 people at the party when C.H. arrived, and everyone was drinking, including Ford, who testified that he drank "anything and everything" until he became physically ill and that he then drank only beer.

C.H. was acquainted with Shaun H., one of the residents of the house, and had had a casual physical relationship with him several months previously. During the party, C.H. and Shaun talked and had physical contact. Sometime before 3 a.m., C.H.

suggested to Shaun that they go downstairs to his bedroom, and he agreed. C.H. testified that at this point, she was intoxicated, so she stopped drinking. Once in Shaun's bedroom, the two engaged in consensual sexual intercourse for at least 30 minutes.

C.H. testified that she was drunk and tired and that she fell asleep after having intercourse with Shaun. She remembered him waking her and telling her he was going upstairs. Shaun testified that he did not think C.H. had fallen asleep and that he talked to her for about 15 minutes before leaving the bedroom and going upstairs at approximately 5:30 or 6 a.m. Shaun and one of his roommates then began making breakfast. At the time, Ford was sleeping in a room located on the main floor of the residence. About 15 minutes after Shaun came upstairs, Ford told Shaun and his roommate that they were being too loud and that he was going downstairs to sleep.

There is sharply conflicting testimony as to what occurred next. C.H. testified that after Shaun went upstairs, she again fell asleep. She later woke up in the dark and realized that someone was vaginally penetrating her. Approximately 15 seconds later, the person withdrew and then ejaculated on her stomach. C.H. did not fight or scream during the encounter. She testified that after the person withdrew, she said, "You're not Shaun," and that he responded, "I told you that five times." She testified that it was only then that she realized the person was Ford.

Ford's account of the event is markedly different. He testified that when he entered the lower level of the house, he observed someone lying on the couch so he went into Shaun's bedroom, which had been his bedroom when he had previously lived in the house. Ford had placed his belongings in this bedroom while he was staying at the residence during his leave. Ford testified that the television was on in the bedroom. After entering the bedroom, he took off his shirt and then lay on the bed. According to Ford, about 30 seconds later, he felt a hand on his chest and a woman started kissing his neck. When the woman sat up, he realized it was C.H. Ford testified that C.H. continued to kiss him and that she spoke seductively. Ford testified that they had consensual sexual intercourse, which ended when Ford became tired, withdrew, and ejaculated on her

stomach. Ford testified that immediately after the encounter, he got dressed and talked briefly with C.H. Then, smelling food being prepared, Ford went upstairs to eat breakfast.

C.H. testified that after Ford went upstairs, she got up and got dressed. While dressing, she heard voices upstairs and heard Ford say, "'I told her that four or five times,'" and then she heard laughter. C.H. then tried without success to call her roommate, so she sent her roommate a text message from her cellular telephone. C.H. estimated that the text message was sent about 10 minutes after her encounter with Ford. Telephone records established that the text message was sent at 7:20 a.m.

Shaun testified that Ford came upstairs approximately 30 to 45 minutes after he announced that he was going downstairs to sleep. Ford testified that he sat down at the kitchen table with Shaun and one of his roommates and that they talked about the events of the party. Ford stated that he had just had sex with C.H., and Shaun stated that he had had sex with her also. This was the first time Ford was aware of the sexual encounter between C.H. and Shaun. Ford told Shaun that C.H. had initiated the encounter. Shaun suggested that C.H. may have mistaken Ford for him, but Ford expressed doubt because of the difference in their height and weight, and Ford stated that he had clearly identified himself to C.H. The men laughed about this, and they suspected that C.H. overheard their laughter and conversation before she came upstairs and left the house.

C.H. went home and told her roommate that she had been assaulted by Ford. Her roommate called the police. C.H. drove to a hospital, where a forensic sexual assault examination was conducted by a nurse. Ford's DNA was found on C.H.'s abdomen, on the front panel of her underwear, and on her pubic area. A physician testified that he observed injuries to C.H.'s vaginal area. The injuries were consistent with nonconsensual sex, but also could have occurred during consensual sex.

On January 2, 2008, a police investigator instructed C.H. to place a recorded telephone call to Ford. The investigator was able to hear C.H.'s part of the conversation, but he could not completely hear Ford. C.H. knew the call was being recorded, but Ford did not. The investigator gave C.H. suggestions

regarding the questions she should ask and the information she should obtain from Ford. During the call, C.H. stated that she wanted to talk to Ford about "what happened the other night. . . . [w]hat you did to me." Ford initially responded, "I didn't do anything." When C.H. continued to insist that he did, Ford stated, "[Y]ou climbed on top of me." When C.H. persisted, Ford eventually apologized but never expressly admitted that he had assaulted her.

During the trial, the district court made several evidentiary rulings which are the focus of the appeal. The court sustained the State's objections to Ford's attempt to elicit testimony concerning certain conduct and statements by C.H. It also sustained the State's objections and motions to strike certain testimony of several of Ford's character witnesses on the ground that the testimony was nonresponsive. The court permitted C.H. to testify as to the substance of the text message and received a photograph depicting the message over Ford's objection. And the district court permitted the State to question Ford regarding a consensual sexual relationship he had had with another woman which occurred after the charged offense. We will include additional facts with respect to these rulings in our discussion of each assignment of error.

2. Verdict and Sentence

At the conclusion of the 7-day trial, the jury found Ford guilty of first degree sexual assault. After he was sentenced to 4 to 6 years' imprisonment, Ford filed this timely appeal.

II. ASSIGNMENTS OF ERROR

Ford assigns, restated and renumbered, that the district court erred in (1) excluding evidence of C.H.'s sexual conduct and statements on the night of the party, (2) allowing the substance of and photographs of the text message into evidence, (3) continually sustaining the State's objections to the responsiveness of the answers of his character witnesses, and (4) allowing evidence of Ford's subsequent sexual relationship.

III. STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the

Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[1] The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.[2]

IV. ANALYSIS

1. Conduct and Statements of C.H.

(a) Additional Background

Prior to trial, the State filed motions in limine to prevent Ford from presenting certain evidence at trial, including testimony regarding C.H.'s sexually related conduct and statements she made during the party and a photograph taken during the party which depicted C.H. and two other women making a sexually suggestive hand gesture. The State argued that this constituted evidence of C.H.'s prior sexual behavior, which was inadmissible under Nebraska's then-applicable rape shield statute, Neb. Rev. Stat. § 28-321 (Reissue 2008). Ford countered that the evidence constituted circumstances surrounding the charged offense, not prior sexual behavior, which was relevant to Ford's state of mind. The district court sustained the State's motions in limine and precluded Ford from offering the evidence.

During trial, Ford made an offer of proof relating to the testimony excluded by the court's ruling on the motions in limine. The offer was that if allowed to testify, one of the male residents of the house where the party was held would testify that "he has this strange relationship with [C.H.] where . . . every time they see each other, she will grab his testicles; in return, he will grab her breasts. It's a — kind of a playful interchange between the two of them." The offer of proof did not include any representation that this conduct occurred at the party on December 27 and 28, 2007, or that Ford had ever witnessed it. In fact, the offer was that "if" Ford would have observed

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[1] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009); *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

[2] *State v. Edwards, supra* note 1.

this exchange, it "could" have impacted Ford's later decisionmaking with respect to C.H. Ford further offered to prove that the same witness would testify that there was a conversation at the party where the witness asked C.H. if she would have sex with him, and C.H. said that she would if Shaun and the other roommate approved. The offer of proof did not indicate that Ford actually heard this conversation, only that "if" Ford knew of this conversation, it "could" have been a factor in his decisionmaking. The district court sustained the State's objections to the offer of proof and refused to allow the proffered testimony.

However, the court did receive in evidence the photograph of C.H. and two other women which had been the subject of one of the State's motions in limine. In response to the State's objection based upon the ruling on the motion in limine, Ford's counsel explained that he was offering the photograph to show that C.H. was flirting with Ford on the night of the party, but specifically said he was not going to talk about what the hand gesture meant. The court received the photograph to be admitted on this basis. Later, during his cross-examination, Ford testified without objection that he took the photograph and that it depicted C.H. making a "sexual hand gesture," although he did not elaborate further and was not asked to do so.

(b) Disposition

Ford argues that the conduct and statements of C.H. directed to one of the male residents of the house should have been received under the three-part test articulated in *State v. Sanchez-Lahora*.[3] But that test corresponds to the provision of the rape shield statute which permits the court to receive evidence of the alleged victim's "past sexual behavior *with the defendant* when such evidence is offered by the defendant on the issue of whether the victim consented to the sexual behavior upon which the sexual assault is alleged."[4] The statute permits evidence of prior sexual behavior with persons *other than* the defendant only when offered by the defendant "upon the issue

[3] *State v. Sanchez-Lahora*, 261 Neb. 192, 622 N.W.2d 612 (2001).

[4] § 28-321(2)(b) (emphasis supplied).

whether the defendant was or was not, with respect to the victim, the source of any physical evidence, including but not limited to, semen, injury, blood, saliva, and hair."[5] Ford did not offer the evidence in question for this purpose.

[3] Ford also argues that even if the evidence was properly excluded under the rape shield statute, the exclusion violated his constitutional right to confront the witnesses against him. We have recognized that in limited circumstances, a defendant's constitutional right to confrontation can trump the rape shield statute.[6] But we need not analyze whether this case presents such a limited circumstance, because Ford did not assert a confrontation issue at trial. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.[7]

For the sake of completeness, we find no merit to Ford's argument that the excluded evidence was probative of the "sexually-charged nature of the party" and that "C.H.'s own conduct could have reasonably led others, including [Ford], to believe that she was interested in sexual activity with multiple partners on the night in question."[8] Even if C.H. engaged in the sexually suggestive conduct or made the statements attributed to her on the night of the party, there was no showing that Ford saw or heard such statements or conduct. The offer of proof stated only that "if" Ford observed the conduct or heard the statements, it "could" have or "may" have affected his later determination as to whether C.H. had consented to sex. Because there was no showing that Ford actually did see or hear the conduct or statements, they could not be relevant, even under Ford's reasoning, to the issue of consent.

Finally, we note that the trial court reversed its ruling on the State's motion in limine and received the photograph, taken by Ford, which depicted C.H. and two other women making a hand gesture. In arguing for its admissibility, Ford's counsel

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[5] § 28-321(2)(a).

[6] See *State v. Lessley*, 257 Neb. 903, 601 N.W.2d 521 (1999).

[7] *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Diaz*, 266 Neb. 966, 670 N.W.2d 794 (2003).

[8] Brief for appellant at 18.

stated that it was offered only to impeach the testimony of C.H. that she did not flirt with Ford at the party and that he did not intend to inquire into the meaning of the gesture. The record reflects that the photograph was ultimately received for the purpose for which it was offered, and thus, the district court's preliminary ruling on the motion in limine could not constitute prejudicial error.

2. Objections to Testimony as Nonresponsive

(a) Additional Background

During his case in chief, Ford called six witnesses to testify regarding his general reputation for peacefulness. During the direct examination of all but one of these witnesses, the State objected at various times, asserting that the witness' answer was "non-responsive" to the question asked and at times asking that the answer be stricken. The district court sustained each of these objections and motions to strike. All six witnesses ultimately testified to Ford's general reputation for peacefulness.

(b) Disposition

[4] In *Cardenas v. Peterson Bean Co.*,[9] we held "the proper rule to be that counsel who is not conducting the questioning has no standing to ask that a nonresponsive answer be stricken upon the sole ground of lack of responsiveness," although we noted that "a voluntary statement by a witness, not responsive to a question, should be stricken." In *Isham v. Birkel*,[10] we stated that "[e]xcluding testimony during oral examination at a trial on the sole ground of nonresponsiveness raised by counsel who is not interrogating the witness is error." In *State v. Swoopes*,[11] we synthesized the holdings of *Cardenas* and *Isham* into the following rule:

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[9] *Cardenas v. Peterson Bean Co.*, 180 Neb. 605, 609-10, 144 N.W.2d 154, 158 (1966).

[10] *Isham v. Birkel*, 184 Neb. 800, 801-02, 172 N.W.2d 92, 93 (1969).

[11] *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986), *overruled in part on other grounds, State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987).

> One who wishes to object to an answer given by a witness to a question posed by opposing counsel may not object on the ground that the answer is not responsive, but must object on the ground that the answer is a voluntary statement or for some specific reason such as hearsay or a conclusion of the witness. Only the party asking the question can object on the ground that the answer is not responsive.[12]

When Ford's character witnesses were asked on direct examination whether they had formed an opinion regarding Ford's reputation for peacefulness, they initially responded by stating the substance of the opinion, instead of affirmatively stating that they had an opinion and waiting for another question eliciting its substance. The prosecutor objected and moved to strike on the sole ground that the answers were "non-responsive." Under the authorities discussed above, this was not a proper objection for the prosecutor, as the nonexamining attorney, to make, and the district court therefore erred in sustaining the objections and related motions to strike.

3. Photograph of Text Message

(a) Additional Background

Prior to trial, Ford filed a motion in limine seeking to prevent the State from offering the content of the text message C.H. sent to her roommate on the morning of December 28, 2007. At a hearing on the motion, Ford argued that the fact that a text message regarding the incident was sent was admissible but that the exact language of the text was not. The State argued that it intended to offer the substance of the message as an excited utterance. The court overruled Ford's motion in limine.

At trial, C.H. testified that 10 minutes elapsed between the sexual encounter with Ford and the text message and that she was "scared" and "confused" when she sent it. The prosecutor then asked C.H. to state the substance of the text message, arguing in response to Ford's hearsay objection that it fell within

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[12] *Id.* at 920, 395 N.W.2d at 505. See, also, R. Collin Mangrum, Mangrum on Nebraska Evidence 34 (2009).

the excited utterance exception to the hearsay rule. The district court overruled the objection, concluding that the text message was both an excited utterance and "part of the res gestae of this crime." C.H. then testified that the text message stated, "I had just got raped by Jake. Don't know what to do." C.H. further testified that a police officer took both a photograph of the contents of the text message from the screen of her cellular telephone and a photograph showing the date and time of its transmission. When the State offered these photographs in evidence, Ford reasserted his previously made hearsay objection. The district court overruled the objection and received the photographs. One of the 8- by 10-inch color photographs shows the substance of the message: "I just got raped. . By jake. . I dont know what to do. ." The other shows the date and time when the message was sent and delivered.

(b) Disposition

We understand Ford's argument as being twofold. First, he contends that the admission of the photograph went beyond the scope of the "complaint of rape" rule, under which the victim of a sexual assault may testify to a complaint regarding a sexual assault made within a reasonable time after it occurs, but not as to the details of the complaint.[13] Ford argues that under the "complaint of rape" rule, a limiting instruction must be given to advise the jury that testimony regarding the complaint is not to be considered as substantive evidence that the assault occurred. We note that Ford neither requested a limiting instruction at trial nor objected to the admission of the photograph based on the "complaint of rape" rule. Ford requests that we review this under the plain error doctrine. However, it is clear from the record that the district court also received the testimony and photographic evidence of the text message as an excited utterance, and Ford does not assign error to this independent basis for receiving the evidence. Accordingly, we do not reach Ford's argument with respect to the "complaint of rape" rule because it is unnecessary to do so; and we do not reach the question of whether the evidence was properly

[13] See *State v. Daniels*, 222 Neb. 850, 388 N.W.2d 446 (1986).

received as an excited utterance because Ford does not assign error with respect to this ruling.

[5] Ford's second argument is that by receiving the photograph of the text message, to which C.H. had already testified, the court permitted the State to unduly emphasize a critical portion of C.H.'s testimony. Our cases impose significant restrictions on a jury's access to testimonial evidence during its deliberation.[14] But Ford did not raise this issue at trial; he objected to both the testimony about the text message and the admission of the photograph depicting the text message only on the ground of hearsay. When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.[15] Because the issue of whether the admission of the photograph constituted undue emphasis of the testimony was not preserved for appeal, we do not address it in this opinion.

4. Ford's Subsequent Sexual Conduct

(a) Additional Background

During its case in chief, the State called a female witness and elicited her testimony that during the last part of December 2007, she and Ford were "[j]ust friends, trying to get to know each other." When the State asked if her relationship with Ford was more than a "friendship," Ford made a relevance objection. The State argued that the testimony was relevant because Ford told the police that he did not know why he had sex with C.H., and the State wanted to show that one reason why Ford was not interested in C.H. was that Ford was interested in the witness. The State specifically stated that it was "not asking about sexual behavior" and that the witness did not attend the party. The court allowed the witness to testify that her relationship with Ford developed into

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[14] See, *State v. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002); *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000).

[15] *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009); *State v. Pieper*, 274 Neb. 768, 743 N.W.2d 360 (2008).

something more than just friends on or around December 27 or 28, 2007.

No further evidence relating to this witness was offered until the prosecutor cross-examined Ford about his cellular telephone records. During this cross-examination, the prosecutor asked whether Ford had been calling the woman who had previously testified during the period of December 24 or 25, 2007, until the time he initially spoke with the police on January 2, 2008, and Ford stated that he had. When Ford stated that he and the woman were friends, the prosecutor asked, "Well, that turned into something more, didn't it, Mr. Ford?" Ford's counsel objected on the basis of relevance, but the objection was overruled. The prosecutor asked, "Did your relationship with [the woman] ever develop past friendship?" Ford's counsel again objected to the question as irrelevant, and the court once again overruled the objection. The prosecutor then asked, "Did you engage in sexual intercourse with [the woman] during the last week of December?" Ford's counsel again made a relevance objection, which the court overruled. Ford then answered that he had not. Finally, the prosecutor asked whether Ford engaged in intercourse with the woman beginning in January 2008. No objection was made, and Ford answered in the affirmative.

(b) Disposition

In response to Ford's argument that the district court erred in permitting the prosecutor to elicit testimony about his sexual relationship with another woman commencing several days after the charged offense, the State contends that the issue is waived by Ford's failure to object to the question which elicited the response. We are not persuaded by this argument. Ford's counsel objected on relevance grounds throughout the line of questioning that led to the response, and his objections were consistently overruled. Although there was no objection to the question which immediately preceded the response, it is clear from the record that the prosecutor and the court were placed on notice of Ford's position that evidence of his sexual conduct subsequent to the charged offense was irrelevant.

[6] And we conclude that it was indeed irrelevant. Evidence is relevant if it tends in any degree to alter the probability of

a material fact.[16] The State has offered no cogent explanation, at trial or on appeal, to support the relevance of Ford's sexual relationship with another woman after the date of the charged sexual assault on C.H. The district court erred in overruling Ford's objections to the line of questioning which elicited this information.

5. Harmless Error Analysis

[7-9] Having identified two trial errors, we must now consider whether they were prejudicial or harmless. In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.[17] Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.[18] Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the questioned trial was surely unattributable to the error.[19]

We have no difficulty concluding that the errors in sustaining the State's objections to testimony on the part of Ford's character witnesses as nonresponsive were harmless beyond a reasonable doubt, whether considered individually or in the aggregate. These rulings did not result in the exclusion of any evidence. In each instance that a nonresponsive objection and motion to strike was sustained, Ford's counsel was able to reformulate his question and elicit favorable testimony regarding Ford's reputation for peacefulness.

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[16] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008); *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

[17] *State v. Epp, supra* note 1; *State v. Morrow*, 273 Neb. 592, 731 N.W.2d 558 (2007), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[18] *Id.*

[19] *Id.*

The erroneous admission of evidence of Ford's subsequent sexual conduct is another matter. The key factual issue in this case is whether C.H. consented to sexual intercourse with Ford. The only direct evidence on this issue came from the testimony of C.H. and Ford. Both, by their own admission, were significantly impaired by alcohol at the time of the sexual act. Both claimed that the other initiated the act. There was no evidence of physical or verbal resistance. The physical evidence was inconclusive. The erroneous admission of irrelevant evidence of Ford's subsequent sexual conduct with another woman could only have prejudiced him in the eyes of the jury. Given the sharply conflicting evidence on the issue of consent, we cannot say that the guilty verdict was surely unattributable to this error, and we therefore conclude that the State has not demonstrated that the error was harmless beyond a reasonable doubt.

V. CONCLUSION

[10] The Double Jeopardy Clauses of the federal and state Constitutions do not forbid a retrial after an appellate determination of prejudicial error in a criminal trial so long as the sum of all the evidence admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.[20] That is the case here. Therefore, for the reasons discussed, we reverse the judgment of the district court and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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[20] See, *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988); *State v. McCulloch, supra* note 17.

HEARST-ARGYLE PROPERTIES, INC., ET AL., APPELLANTS, V. ENTREX COMMUNICATION SERVICES, INC., ET AL., APPELLEES.

HEARST-ARGYLE PROPERTIES, INC., AND THE HEARST CORPORATION, APPELLANTS, V. ENTREX COMMUNICATION SERVICES, INC., ET AL., APPELLEES.

778 N.W.2d 465

Filed February 19, 2010. Nos. S-09-048, S-09-104.

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. **Contracts: Public Policy.** The meaning of a contract is a question of law, as is the determination of whether a contract violates public policy.
3. **Appeal and Error.** An appellate court resolves questions of law independently of the determination reached by the court below.
4. **Contracts.** A contract must receive a reasonable construction, and a court must construe it as a whole and, if possible, give effect to every part of the contract.
5. ____. A contract is viewed as a whole in order to construe it.
6. ____. Whatever the construction of a particular clause of a contract, standing alone, may be, it must be read in connection with other clauses.
7. **Courts: Contracts: Public Policy.** The power of courts to invalidate contracts for being in contravention of public policy is a very delicate and undefined power which should be exercised only in cases free from doubt.
8. **Contracts: Public Policy.** A contractual provision should not be declared void as contrary to public policy unless it is clearly and unmistakably repugnant to the public interest.

Appeals from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Appeal in No. S-09-048 dismissed. Judgment in No. S-09-104 affirmed.

J. Joseph McQuillan, of Walentine, O'Toole, McQuillan & Gordon, and Jeffrey R. Learned, of Denenberg Tuffley, P.L.L.C., for appellants.

William R. Johnson and Craig F. Martin, of Lamson, Dugan & Murray, L.L.P., for appellee Entrex Communication Services, Inc.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellee Communication Structures & Services, Inc.

Dean Suing, of Katskee, Henatch & Suing, for appellee Dudutis Erection & Maintenance, Inc.

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

GERRARD, J.

The issues presented in this appeal arise out of a construction contract requiring that the property owner maintain insurance "without optional deductibles" and providing that if the insurance had deductibles, the property owner would "pay costs not covered because of such deductibles." We must determine whether those provisions insulate the construction contractor from liability and whether public policy permits them to be enforced if the contractor was grossly negligent. We find that the provisions at issue protect the contractor, and we affirm the district court's ruling to that effect.

BACKGROUND

This case began with the July 2003 collapse of a television antenna tower in Omaha, Nebraska. The defendants in this case, Entrex Communication Services, Inc.; Communication Structures & Services, Inc.; and Dudutis Erection & Maintenance, Inc. (collectively the defendants), had either contracted or subcontracted to remove the analog antenna on the tower and replace it with a digital antenna. The owners of the tower, Hearst-Argyle Properties, Inc., and The Hearst Corporation (collectively Hearst), allege that the defendants' negligence caused the tower to collapse, causing over $6 million in damages to Hearst's property.

Hearst and its insurers sued the defendants on that basis. Although their claims were initially filed together, Hearst's claims were eventually separated, under a different trial docket number, from the insurers' claims. The district court granted the defendants' motion for summary judgment against the insurers, concluding that a waiver of subrogation clause in the contract between Hearst and the defendants barred recovery for insured damages. On appeal, we affirmed that conclusion.[1]

[1] See *Lexington Ins. Co. v. Entrex Comm. Servs.*, 275 Neb. 702, 749 N.W.2d 124 (2008).

Hearst continued to press its claim for $250,000 in alleged damages that had not been covered by insurance, because of its insurance policy deductible. The defendants moved for summary judgment, arguing that subparagraphs 11.4.1 and 11.4.1.3 of the parties' contract barred recovery for the deductible amount. Subparagraph 11.4.1 required Hearst to

> purchase and maintain . . . property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis *without optional deductibles*.

(Emphasis supplied.) And subparagraph 11.4.1.3 added, "If the property insurance requires deductibles, [Hearst] shall pay costs not covered because of such deductibles."

The district court agreed with the defendants' argument that the contract did not permit Hearst to recover its deductible and granted the defendants' motion for summary judgment.

ASSIGNMENTS OF ERROR

Hearst assigns that the district court erred in concluding that (1) subparagraphs 11.4.1 and 11.4.1.3 bar Hearst's claims for its deductible and (2) Hearst's gross negligence claims are barred by subparagraph 11.4.1.3.

STANDARD OF REVIEW

[1-3] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[2] The meaning of a contract is also a question of law, as is the determination of whether a contract violates public policy.[3] An appellate court resolves questions of law independently of the determination reached by the court below.[4]

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[2] *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

[3] See *Lexington Ins. Co., supra* note 1.

[4] *Tolliver v. Visiting Nurse Assn.*, 278 Neb. 532, 771 N.W.2d 908 (2009).

ANALYSIS

Appellate Jurisdiction

We first note a jurisdictional issue presented by a clerical error on Hearst's notice of appeal. As noted above, Hearst's claims and the claims of its insurers were separated in the trial court into two separate trial docket numbers. The district court entered summary judgment against Hearst on December 12, 2008. But Hearst's first notice of appeal in this case, filed January 9, 2009, was mistakenly filed under the docket number for the insurers' claims, not Hearst's. And by the time Hearst recognized its error and filed an amended notice of appeal, on January 26, more than 30 days had elapsed from the district court's final judgment.[5] The question, then, is whether either notice was sufficient to perfect Hearst's appeal.

We conclude that the untimely January 26, 2009, notice of appeal was not effective to confer appellate jurisdiction. The January 26 notice of appeal was not filed within 30 days after the entry of the judgment from which Hearst sought to appeal.[6] But Hearst's January 9, 2009, notice of appeal *was* filed within 30 days of the judgment, albeit under the wrong trial docket number. Section 25-1912 does not expressly require a notice of appeal to display a trial court docket number, or be filed in a particular trial court docket; instead, it requires only a "notice of intention" to prosecute an appeal from a judgment, decree, or final order of the district court. And other courts have found, under comparable circumstances, that a notice of appeal filed under the wrong docket number is not fatal to appellate jurisdiction.[7]

Hearst's defective January 9, 2009, notice of appeal effectively served as a "notice of intention" to prosecute an appeal

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[5] See Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

[6] See *id.*

[7] See, *Scherer v. Kelley*, 584 F.2d 170 (7th Cir. 1978); *Johnson v. Ragsdale*, 158 S.W.3d 426 (Tenn. App. 2004); *Seneca Ins. Co. v. Daniel*, 93 Fed. Appx. 872 (6th Cir. 2004). See, also, *U.S. v. Grant*, 256 F.3d 1146 (11th Cir. 2001); *Arequipeno v. Hall*, No. 9625, 2000 WL 420622 (Mass. App. Div. Apr. 12, 2000).

within the meaning of § 25-1912(1). It displayed the wrong trial docket number, but correctly and specifically identified the parties and the December 12, 2008, order being appealed from. The defendants do not argue that they were confused or misled by the notice of appeal; in fact, the record affirmatively demonstrates that they were not. And Hearst has presented this court with a consolidated record that contains the December 12 order and the evidence upon which the district court's order was based.[8] Under these circumstances, we conclude that § 25-1912(1) was substantially complied with and that we have jurisdiction to consider Hearst's appeal.

We are left with two appellate docket numbers. But a docket number is not synonymous with an appeal. Docket numbers are a function of this court's internal administration, and regardless of how they have been enumerated, it is clear that there is only one appeal here: Hearst's appeal from the December 12, 2008, summary judgment order. Because it will simplify matters for the trial court if our mandate on appeal corresponds to the trial docket number in which the December 12 order was entered, we accept Hearst's suggestion that we dismiss case No. S-09-048 as moot, and we enter our judgment in this appeal in case No. S-09-104.

Insurance Provisions of Contract

As noted above, subparagraph 11.4.1 of the parties' contract required Hearst to purchase and maintain builder's "all-risk" insurance "without optional deductibles." Subparagraph 11.4.1.2 required Hearst to notify Entrex Communication Services (hereinafter Entrex) if it did not intend to purchase the required insurance "with all of the coverages in the amount described above," permitting Entrex to obtain such insurance and charge the cost to Hearst. But instead, Hearst obtained insurance with a $250,000 deductible. And subparagraph 11.4.1.3 provides that if Hearst obtained property insurance with deductibles, Hearst "shall pay costs not covered because of such deductibles."

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[8] See *Holste v. Burlington Northern R.R. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

Nonetheless, Hearst argues that the contract does not preclude it from seeking indemnification for the deductible from the defendants. Hearst first points to subparagraph 11.4.7 of the contract, the "Waivers of Subrogation" provision, under which Hearst and Entrex "waive all rights against . . . each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other . . . for damages caused by fire or other causes of loss *to the extent covered by property insurance obtained pursuant to this Paragraph 11.4*." (Emphasis supplied.) Hearst argues that because subparagraph 11.4.7 operates only as a waiver of liability "to the extent covered by property insurance," the recovery of any amount not covered by insurance—i.e., the deductible—is not waived by this provision. With that much, we agree. Subparagraph 11.4.7 does not preclude Hearst from recovering the deductible amount.

[4-6] But subparagraph 11.4.1.3 does require Hearst to pay the costs not covered because of the deductible. Hearst argues that it is simply required to *pay* the costs not covered by the deductible, but that it can still seek indemnification for those costs. Hearst's construction of subparagraph 11.4.1.3, however, makes little sense when read in the context of the entire contract. A contract must receive a reasonable construction, and a court must construe it as a whole and, if possible, give effect to every part of the contract.[9] And a contract is viewed as a whole in order to construe it.[10] Whatever the construction of a particular clause of a contract, standing alone, may be, it must be read in connection with other clauses.[11]

Here, subparagraph 11.4.1 required Hearst to obtain property insurance without optional deductibles. Subparagraph 11.4.1.2 required Hearst to notify Entrex in writing if Hearst did not purchase insurance meeting that requirement, and provided that if Hearst chose not to do so, it would bear any resulting costs if Entrex was damaged. The only construction of subparagraph 11.4.1.3 consistent with the preceding provisions is that if

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[9] *Lexington Ins. Co., supra* note 1.

[10] *Keller v. Bones*, 260 Neb. 202, 615 N.W.2d 883 (2000).

[11] *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004).

Hearst neither obtained the required no-deductible insurance nor informed Entrex of that fact, Hearst would bear any resulting costs. To conclude otherwise would leave Entrex with no way to enforce its rights under paragraph 11.4.

Hearst also argues, briefly, that it was required only to obtain insurance without "optional deductibles" and that there is no proof in this case that the deductible was "optional." But subparagraph 11.4.1.3 more plainly states that "[i]f the property insurance requires deductibles, [Hearst] shall pay costs not covered because of such deductibles." We reject Hearst's argument that the deductible in this case does not fall within the scope of subparagraph 11.4.1.3.

We conclude that the district court correctly read the parties' contract to require Hearst to bear the risk associated with its insurance deductible. We find no merit to Hearst's first assignment of error.

Liability for Gross Negligence

Hearst argues that if subparagraph 11.4.1.3 operates to protect the defendants from liability for the deductible amount, it is against public policy and void to the extent that it operates to shield the defendants from liability for gross negligence.[12] Resolving Hearst's argument requires a close examination of two particular decisions of this court: *New Light Co. v. Wells Fargo Alarm Servs.*[13] and *Lexington Ins. Co. v. Entrex Comm. Servs.*[14]

In *New Light Co.*, the plaintiff contracted with the defendant for the defendant to install and maintain a fire alarm system. The operative contract contained an exculpatory clause stating that the defendant would not be liable for any loss or damage, irrespective of origin, to persons or property whether directly or indirectly caused by performance or nonperformance of any obligation imposed by the agreement or "'by negligent acts or omissions of [the defendant], its agents or

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[12] See *Bamford v. Bamford, Inc., ante* p. 259, 777 N.W.2d 573 (2010).

[13] *New Light Co. v. Wells Fargo Alarm Servs.*, 247 Neb. 57, 525 N.W.2d 25 (1994).

[14] *Lexington Ins. Co., supra* note 1.

employees.'"[15] The issue before this court was whether the exculpatory clause released the defendant from liability for gross negligence or willful and wanton misconduct.

We held that public policy prohibited such an exclusion. We explained that whether a particular exculpatory clause in a contractual agreement violates public policy depends upon the facts and circumstances of the agreement and the parties involved and that "[t]he greater the threat to the general safety of the community, the greater the restriction on the party's freedom to contractually limit the party's liability."[16] "Common sense tells us that the greater the risk to human life and property, the stronger the argument in favor of voiding attempts by a party to insulate itself from damages caused by that party's gross negligence or willful and wanton misconduct."[17]

Under the circumstances of that case, we reasoned that

> when we balance the parties' right to contract against the protection of the public, we find a sufficiently compelling reason to prevent [the defendant] from insulating itself by contractual agreement from damages caused by its own gross negligence or willful and wanton misconduct. Such an agreement would have a tendency to be injurious to the public. This limitation on the freedom to contract is imposed by law because of the potential risks to human life and property and is, therefore, independent of the agreement of the parties.[18]

But in *Lexington Ins. Co.*, the predecessor to this case, we concluded that *New Light Co.* did not extend to the waiver of subrogation provision contained in subparagraph 11.4.7 of the contract, even though that provision was effective against claims for gross negligence.[19] We recognized that "[a]dmittedly, language in *New Light Co.* can be read as suggesting that our policy concern was protecting the public by

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[15] *New Light Co., supra* note 13, 247 Neb. at 59, 525 N.W.2d at 27.

[16] *Id.* at 63, 525 N.W.2d at 30.

[17] *Id.* at 64, 525 N.W.2d at 30.

[18] *Id.*

[19] See *Lexington Ins. Co., supra* note 1.

providing incentive for parties to refrain from grossly negligent conduct."[20] We declined, however, to extend our discussion in *New Light Co.*

We explained that the danger with exculpatory clauses is that a party injured by another's gross negligence will be unable to recover its losses.[21] But such a danger is not present in cases involving waivers of subrogation, because the waiver applies only to losses covered by insurance, so there is no risk that an injured party will be left uncompensated. And we noted that waivers of subrogation served other important policy interests not met by pure exculpatory clauses, because they encouraged parties to anticipate risks and to procure insurance covering those risks, thereby avoiding future litigation, and facilitating and preserving economic relations and activity.[22]

We also noted that in the particular context of a construction contract, a waiver of subrogation avoids disruption and disputes among the parties to the project, eliminating the need for lawsuits and protecting the contracting parties from loss by bringing all property damage under the all-risk builder's property insurance.[23] We recognized "the important policy goal that waivers of subrogation serve in avoiding disruption of construction projects and reducing litigation among parties to complicated construction contracts" and explained that refusing to enforce waivers of subrogation against gross negligence claims "would undermine this underlying policy by encouraging costly litigation to contest whether a party's conduct was grossly negligent."[24] Therefore, we held that public policy favored enforcement of waivers of subrogation even against gross negligence claims.[25]

The present case falls someplace in the middle. On the one hand, as in *New Light Co.*, permitting the enforcement

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[20] *Id.* at 710, 749 N.W.2d at 130.

[21] *Id.*

[22] *Lexington Ins. Co., supra* note 1.

[23] *Id.*

[24] *Id.* at 711, 749 N.W.2d at 131.

[25] *Id.*

of subparagraph 11.4.1.3 against a claim of gross negligence leaves Hearst, the injured party, uncompensated for that amount of its damages. On the other hand, subparagraph 11.4.1.3 serves many of the same public policy interests as the waiver of subrogation at issue in *Lexington Ins. Co.*, because it encourages the anticipation of risks and the procurement of insurance, and brings those risks under the all-risk builder's property insurance. The property owner is provided an incentive to abide by the terms of the property insurance provisions.

Furthermore, subparagraph 11.4.1.3 is no more or less exculpatory of a grossly negligent defendant than the waiver of subrogation at issue in *Lexington Ins. Co.* Both provisions permit a grossly negligent party to shield itself from liability. The contract permitted Entrex to protect itself from risk by requiring the purchase of insurance—a decision that, in *Lexington Ins. Co.*, we held was favored by public policy. And even if shielded from liability, a contracting party still has an incentive to avoid both negligence and gross negligence, because performing the contracted-for work negligently could threaten its right to payment under the contract.

The present case is distinguishable from *Lexington Ins. Co.* only insofar as the damages Hearst sustained were uninsured. But they were uninsured because Hearst did not obtain the nondeductible insurance that the contract expressly contemplated. Refusing to enforce subparagraph 11.4.1.3 would leave Hearst in the peculiar position of *benefiting* from the degree of the defendants' alleged negligence, because if the defendants' negligence was gross, as opposed to ordinary, Hearst would be able to recover damages that by the terms of the contract should have been covered by Hearst's insurance. And that would encourage precisely the sort of costly litigation, to determine whether a party was grossly negligent, that we sought to discourage in *Lexington Ins. Co.*

[7,8] On balance, based on the facts and circumstances of the contract and the parties involved,[26] we conclude that enforcement of subparagraph 11.4.1.3 is not contrary to public policy.

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[26] See *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 571 N.W.2d 64 (1997).

The power of courts to invalidate contracts for being in contravention of public policy is a very delicate and undefined power which should be exercised only in cases free from doubt.[27] So, a contractual provision should not be declared void as contrary to public policy unless it is clearly and unmistakably repugnant to the public interest.[28]

In this case, as in *Lexington Ins. Co.*, the terms of the contract served to encourage the anticipation of risks and the procurement of insurance against those risks. The parties were sophisticated business entities capable of appreciating those risks. And had the terms of the contract been followed to the letter, none of the alleged damages would have been uninsured. Given the facts and circumstances of the contract and the parties involved, we find that subparagraph 11.4.1.3 is not void as against public policy, and find no merit to Hearst's final assignment of error.

CONCLUSION

We conclude that we have jurisdiction over this appeal by virtue of Hearst's erroneous but sufficiently effective January 9, 2009, notice of appeal. As a result, we enter judgment in case No. S-09-104 and dismiss case No. S-09-048 as moot. We further conclude that the contract required Hearst to bear the costs of its insurance deductible and that the contract's waiver of liability was not void as against public policy. We affirm the judgment of the district court.

APPEAL IN NO. S-09-048 DISMISSED.
JUDGMENT IN NO. S-09-104 AFFIRMED.

STEPHAN, J., not participating.

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[27] *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006); *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, 262 Neb. 515, 633 N.W.2d 102 (2001).

[28] *Ray Tucker & Sons, supra* note 26. See, also, *State ex rel. Wagner v. United Nat. Ins. Co.*, 277 Neb. 308, 761 N.W.2d 916 (2009); *Jeffrey Lake Dev., supra* note 27.

STATE OF NEBRASKA, APPELLEE, V. DEREK SCHEFFERT, APPELLANT.

778 N.W.2d 733

Filed February 26, 2010. No. S-09-458.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **Constitutional Law: Search and Seizure: Arrests: Probable Cause.** The Fourth Amendment mandates that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.
4. **Drunk Driving: Blood, Breath, and Urine Tests: Police Officers and Sheriffs.** To "observe," under the rule regarding observation prior to giving a preliminary breath test, does not require a police officer to stare fixedly at the person being tested. The officer must, however, be in a position to detect, through the use of one or more senses, any conduct or event which could contaminate the breath sample and taint the results.
5. **Blood, Breath, and Urine Tests: Evidence: Probable Cause.** A preliminary breath test is admissible for the limited purpose of establishing probable cause.
6. **Constitutional Law: Sentences: Prior Convictions: Drunk Driving.** Neb. Rev. Stat. § 60-6,197.02(3) (Cum. Supp. 2008) permits a defendant to challenge the validity of a prior conviction for driving under the influence offered for purposes of enhancement on the ground that it was obtained in violation of the defendant's Sixth Amendment right to counsel.
7. **Constitutional Law: Criminal Law: Right to Counsel.** A criminal defendant's Sixth Amendment right to the assistance of counsel attaches only after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. Postattachment, the accused is entitled to counsel at every critical stage of the proceeding.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Mark E. Rappl for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Derek Scheffert appeals his conviction for driving under the influence (DUI), fourth offense. Scheffert asserts that the district court for Lancaster County erred by overruling his motion to suppress evidence obtained as a result of his arrest for DUI and his submission to a chemical breath test. He also asserts that the court erred by relying on two of his prior DUI convictions at the enhancement hearing. We affirm Scheffert's conviction and sentence for DUI, fourth offense.

STATEMENT OF FACTS

At approximately 3 a.m. on March 21, 2008, Officer Robert Brenner stopped a vehicle driven by Scheffert because Brenner saw that the passenger-side headlight on Scheffert's vehicle was not operating. After obtaining Scheffert's driver's license and other information, Brenner ran a check of Scheffert's license and learned that there was an outstanding warrant for Scheffert's arrest. Brenner returned to Scheffert's vehicle, asked Scheffert to step out of the vehicle, and arrested him based on the warrant.

Brenner asked Scheffert whether Scheffert's female passenger would be able to drive Scheffert's vehicle from the scene. Scheffert responded that she would not, because she had been drinking. Brenner noticed an odor of alcohol on Scheffert's breath and asked whether he also had been drinking. Scheffert told Brenner that he had had two beers. Brenner saw that Scheffert's eyes were "glassy, watery, and bloodshot."

Brenner handcuffed Scheffert and escorted him to the back seat of Brenner's cruiser. Brenner determined that he should give Scheffert a preliminary breath test (PBT), but Brenner did not have a PBT unit in his cruiser. Brenner checked with another officer who was coming to the scene to verify that the other officer had a PBT unit with him. The other officer arrived with a PBT unit, and Brenner administered the PBT. The PBT showed a result of .147.

Based on the PBT result and his other observations, Brenner asked Scheffert to submit to a chemical breath test. Brenner read Scheffert a postarrest chemical test advisement form which informed him that, inter alia, he was "under arrest for operating or being in actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs." Brenner took Scheffert to jail, where Scheffert submitted to a chemical breath test which showed that Scheffert had .149 grams of alcohol per 210 liters of breath, which was above the legal limit.

After Scheffert was charged in the district court with fourth-offense DUI, he filed a motion to suppress all evidence gathered as the result of his seizure and arrest. Scheffert asserted that Brenner did not have probable cause to require him to submit to a chemical breath test because the administration of the PBT was not sufficiently reliable for the results to support a finding of probable cause. He argued that the PBT was not reliable because Brenner did not follow regulations that require the person administering a PBT to observe the person being tested for 15 minutes prior to giving the test.

At the hearing on the motion to suppress, Brenner testified, in addition to the facts set forth above, that he observed the required 15-minute waiting period prior to administering the PBT. According to the PBT checklist completed by Brenner, his observation began at 2:50 a.m. and the breath sample was taken at 3:09 a.m. On cross-examination, Brenner testified that his sole reason for stopping Scheffert's vehicle was that the passenger headlight was not operating, that Brenner had followed the vehicle for five blocks but had not observed any poor driving behavior, and that Scheffert responded in a reasonable fashion after Brenner activated his cruiser's overhead lights and initiated the stop. Upon contact with Scheffert, Brenner did not initially notice an odor of alcohol or other indicators of alcohol impairment, such as fumbling or problems with manual dexterity or walking.

Brenner testified that the 15-minute waiting period listed on the checklist began when he returned to Scheffert's vehicle and arrested him on the warrant. After arresting Scheffert, Brenner handcuffed him and put him into the back seat of the cruiser,

where Scheffert remained until the PBT was given. Brenner testified that during the time Scheffert was in the back seat prior to the test, Brenner spent some time in the front seat of the cruiser completing a citation, and that he spent a couple of minutes standing outside the cruiser waiting for the other officer to arrive with the PBT unit and talking with the other officer when he arrived. Brenner testified that while he was in the front seat, he could see Scheffert in the rearview mirror. While Brenner was outside the vehicle, the door and window were closed, and he could see Scheffert but could not necessarily hear him. Brenner testified that there were times that he was not "staring" at Scheffert but that he never turned his back to him when he was outside the vehicle.

The district court overruled the motion to suppress. The court noted first that there was no issue whether there was probable cause to arrest Scheffert based on the warrant. The only issues were whether the PBT was sufficiently reliable and whether there was adequate cause for Brenner to require Scheffert to submit to the chemical breath test.

According to the district court, the salient facts were not disputed, and the court concluded that Brenner had not observed Scheffert "as the rules require." The court stated that although the PBT results were inadmissible as evidence at trial, it "does not necessarily preclude use of the information produced by the test in reaching a conclusion regarding probable cause." The court also stated that even if Brenner could not consider the PBT results in determining probable cause to require the chemical breath test, "there was sufficient probable cause to require the test based on other information." The court noted that Brenner "observed Scheffert to have the odor of alcohol about him and to have watery, bloodshot, glassy eyes." The court concluded that these factors alone established sufficient probable cause to require the chemical breath test.

The case was tried to the court on stipulated evidence. Scheffert renewed his objection to the overruling of the motion to suppress. Based on the submitted evidence, the court found Scheffert guilty of DUI.

An enhancement hearing was conducted. The record from the hearing shows that Scheffert had three prior convictions

for DUI. Scheffert objected to the court's using two of the prior convictions. He asserted that the records of these two convictions failed to demonstrate that he was represented by counsel at all critical stages of the proceedings. He noted that the records for these two convictions showed that he appeared pro se at the arraignments and that he did not have either hired or appointed counsel until after the arraignments. He further noted that the records did not show that he waived counsel at the arraignments. He argued that an arraignment is a critical stage and that therefore, the State was required to show that he either had or waived counsel at that time.

The court overruled Scheffert's objection to its consideration of his prior convictions and found that Scheffert's DUI conviction was a fourth offense. The court sentenced Scheffert to intensive supervision probation for 4 years, including a 90-day jail sentence and a 15-year license revocation.

Scheffert appeals his conviction for fourth-offense DUI.

ASSIGNMENTS OF ERROR

Scheffert asserts that the district court erred by (1) overruling his motion to suppress based on its finding that there was sufficient probable cause to require him to submit to the chemical breath test and (2) considering two of his prior DUI convictions at the enhancement hearing because the record did not affirmatively show that he had or waived counsel at the arraignments.

STANDARDS OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination. *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

[2] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Head*, 276 Neb. 354, 754 N.W.2d 612 (2008).

ANALYSIS

The District Court Did Not Err by Overruling the Motion to Suppress Because Scheffert's Arrest for DUI Was Supported by Probable Cause and There Were Reasonable Grounds to Require a Chemical Test.

Scheffert first asserts that the district court erred by overruling his motion to suppress, thus admitting evidence of the chemical test. Scheffert does not argue that the stop of his vehicle was improper, nor does he dispute the district court's conclusion that there was probable cause to arrest him based on the outstanding warrant. He argues only that the court should have suppressed the results of the chemical breath test because the PBT results were not sufficiently reliable and ultimately that Brenner did not have adequate cause to require him to submit to the chemical breath test. We conclude that there was probable cause to arrest Scheffert for DUI and that reasonable grounds existed to require the chemical breath test; therefore, the court did not err by overruling Scheffert's motion to suppress.

With respect to the PBT, we note that Neb. Rev. Stat. § 60-6,197.04 (Reissue 2004) provides:

> Any peace officer . . . may require any person who operates or has in his or her actual physical control a motor vehicle in this state to submit to a preliminary test of his or her breath for alcohol concentration if the officer has reasonable grounds to believe that such person has alcohol in his or her body . . . .

Before Brenner required Scheffert to submit to the PBT, Brenner noticed an odor of alcohol on Scheffert's breath and saw that his eyes were "glassy, watery, and bloodshot," and Scheffert had told Brenner that he had had two beers. Upon observing symptoms or impaired driving, an experienced officer ordinarily has reasonable grounds to believe that such person has alcohol in his or her body, see *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009), and therefore require such driver to submit to a PBT. Scheffert does not dispute that Brenner had "reasonable grounds" to believe that Scheffert had alcohol in his body and to therefore require him to submit to the PBT.

With respect to chemical tests, we note that Neb. Rev. Stat. § 60-6,197(2) (Reissue 2004) provides:

> Any peace officer . . . may require any person arrested for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs to submit to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs in such blood, breath, or urine when the officer has reasonable grounds to believe that such person was driving or was in the actual physical control of a motor vehicle in this state while under the influence of alcoholic liquor or drugs in violation of section 60-6,196.

The record shows that before requiring Scheffert to submit to the chemical test, Brenner read to him a postarrest chemical test advisement which informed him that, inter alia, he was "under arrest for operating or being in actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs." Taking the evidence as a whole, it is clear that after Scheffert was arrested pursuant to the warrant, probable cause developed, and he was thereafter under arrest for DUI. Because Scheffert had been arrested for DUI, under § 60-6,197(2), Brenner could require Scheffert to submit to a chemical test if Brenner had "reasonable grounds" to believe that Scheffert had been driving under the influence.

[3] The Fourth Amendment mandates that an arrest be justified by probable cause to believe that a person has committed or is committing a crime. *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009). Therefore, in order to arrest Scheffert for DUI, Brenner needed probable cause to believe Scheffert had committed the crime, and in order to thereafter require Scheffert to submit to a chemical test under § 60-6,197(2), Brenner needed reasonable grounds to believe that Scheffert was driving under the influence. Although Scheffert's assignment of error as phrased states that there was not probable cause for a chemical test, his argument is best understood as a claim that Brenner did not have probable cause to arrest him

for DUI and did not thereafter have reasonable grounds to require him to submit to a chemical test.

Scheffert argues that the PBT was not reliable and therefore should not have been considered as support for a finding of probable cause to arrest him for DUI. He asserts that without consideration of the PBT results, such probable cause was lacking. As support for these claims, Scheffert asserts that Brenner was not in a position to observe him for the entire 15-minute waiting period as required under the rules noted below and that therefore, the PBT was not reliable.

Under Neb. Rev. Stat. § 60-6,201(3) (Cum. Supp. 2008), in order to be considered valid, tests made under § 60-6,197 to determine if a party has been driving under the influence must be performed according to methods approved by the Department of Health and Human Services (DHHS). At issue in this case is the PBT given under § 60-6,197.04. Prior to 2004, the substance of § 60-6,197.04 regarding PBT's was codified as part of § 60-6,197. Scheffert notes in this regard that, consistent with these statutes, 177 Neb. Admin. Code, ch. 1, § 012.03 (2004), adopted by the DHHS, approved a checklist for the use of PBT devices. The first step on the checklist states in part: "Observe the subject for 15 minutes prior to testing."

The checklist completed by Brenner in this case shows that he checked the step requiring observation for 15 minutes and wrote that the observation began at "0250" and that the sample was taken at "0309." Scheffert asserts that because Brenner did not have Scheffert directly in his sight at all times during the 15-minute observation period, Brenner failed to observe him for the requisite time under the DHHS rules. In support of his argument, Scheffert notes that Brenner stated that at times during the 15-minute period, he was standing outside the cruiser or was sitting in the front seat of the cruiser while Scheffert was sitting in the back seat.

Although the facts and hence the outcome were different from the present case, the Nebraska Court of Appeals considered an argument involving the 15-minute requirement in *State v. Cash*, 3 Neb. App. 319, 526 N.W.2d 447 (1995). In *Cash*, the Court of Appeals noted that the evidence therein showed

that the officer "left [the defendant] alone in the patrol car and went to [the defendant's] car to conduct a search." 3 Neb. App. at 324, 526 N.W.2d at 451. The State in *Cash* conceded that the officer did not observe the defendant as required, and therefore the Court of Appeals concluded that the PBT was not administered in accordance with methods approved by the DHHS.

In reaching its conclusion, the Court of Appeals noted that the word "observe" was not defined in the relevant statutes and guidelines, nor had it been interpreted in Nebraska case law in connection with such statutes and guidelines. The Court of Appeals looked to other jurisdictions that had interpreted the word "observe" in connection with similar drunk driving statutes.

The Court of Appeals stated:

> Other jurisdictions have come to the . . . conclusion that when an officer is required to observe a person before administering a test, the officer need not stare fixedly at the person being tested for the specified period of time in order to satisfy the observation requirement, but must remain in the person's presence and be aware of the person's conduct.

Cash, 3 Neb. App. at 324, 526 N.W.2d at 451.

[4] We agree with the analysis of the Court of Appeals in *Cash*. To "observe," under the rule regarding observation prior to giving a PBT, does not require a police officer to stare fixedly at the person being tested. The officer must, however, be in a position to detect, through the use of one or more senses, any conduct or event which could contaminate the breath sample and taint the results. See, *Bennett v. State, Dept. of Transp.*, 147 Idaho 141, 206 P.3d 505 (Idaho App. 2009); *State v. Filson*, 409 N.J. Super. 246, 976 A.2d 460 (2009).

With these standards in mind, we note that this case was not a situation like *Cash, supra*, in which the officer left the suspect in the patrol car and went elsewhere to search the suspect's car. As the record shows and the district court found, Brenner did not continuously have his eyes on Scheffert; however, Brenner did not leave Scheffert's presence during the

15-minute period. Brenner was either inside or just outside the vehicle in which Scheffert was seated. Although Brenner was not constantly watching Scheffert, Brenner remained close enough to sense an event which might have occurred that could taint the results of the PBT.

Brenner testified that when he was outside the cruiser, although the doors and windows were closed, he did not turn his back on Scheffert and was therefore able to see Scheffert. Further, when Brenner was sitting in the front seat of the cruiser and Scheffert was in the back seat, Brenner testified that he was able to see Scheffert in the rearview mirror. We note that Scheffert makes no assertion that any event occurred that would have tainted the test results, and we further note that during the entire observation period, Scheffert was handcuffed, which would have limited his ability to do something that would have tainted the results of the PBT. Given the foregoing facts, we disagree with the district court's conclusion that Brenner did not observe Scheffert "as the rules require." Consequently, we reject Scheffert's argument that the PBT results were not sufficiently reliable to be considered in determining whether Brenner had probable cause to arrest Scheffert for DUI.

[5] Nebraska case law has long held that a PBT is admissible for the limited purpose of establishing probable cause. See, *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000); *State v. Klingelhoefer*, 222 Neb. 219, 382 N.W.2d 366 (1986); *State v. Green*, 217 Neb. 70, 348 N.W.2d 429 (1984). The results of the PBT showed Scheffert's blood alcohol level to be .147, which is above the legal limit. Such results, combined with Brenner's smelling an odor of alcohol, seeing the condition of Scheffert's eyes, and Scheffert's admission to drinking, supported a finding of probable cause to arrest Scheffert for DUI. Such information also provided reasonable grounds to require Scheffert to submit to a chemical breath test after he had been arrested for DUI. See § 60-6,197(2). Although our reasoning differs from that of the district court, we conclude that the district court did not err by overruling Scheffert's motion to suppress evidence obtained as the result of his arrest for DUI and his submission to the chemical test.

Records of Scheffert's Prior Convictions Showed That Such Convictions Were Obtained In Compliance With His Right to Counsel, and Therefore Such Convictions Could Be Considered at His Enhancement Hearing.

Scheffert next asserts that the court erred by overruling his objection to consideration of two of his prior DUI convictions at the enhancement hearing. He argues that with regard to each of the two prior convictions, the record did not demonstrate that he was represented by counsel or had waived counsel at the arraignment, which he asserts is a critical stage of the proceedings. We conclude that although the right to counsel attached at the arraignment, counsel was not required at the arraignment itself, and that therefore, the court did not err by using the fact of the prior convictions to enhance Scheffert's sentence.

[6] Under Neb. Rev. Stat. § 60-6,197.02 (Cum. Supp. 2008), a court is required, as part of the judgment of conviction in a DUI case, to make a finding on the record as to the convicted person's prior DUI convictions as defined in § 60-6,197.02(1). Pursuant to § 60-6,197.02(3), "[t]he convicted person shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions." We have construed the language of this section, then codified at Neb. Rev. Stat. § 60-6,196(3) (Supp. 2003) and previously codified at Neb. Rev. Stat. § 39-669.07 (Reissue 1988), as permitting within limits a challenge based upon denial of the Sixth Amendment right to counsel. See *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999). In the context of a DUI case, we have observed that the statute "permits a defendant to challenge the validity of a prior DUI conviction offered for purposes of enhancement on the ground that it was obtained in violation of the defendant's Sixth Amendment right to counsel." *Id.* at 188, 595 N.W.2d at 926. Similarly, in connection with habitual criminal proceedings, we have stated that in order to use a prior conviction, the State must prove, inter alia, that "at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived

representation for those proceedings." *State v. Robinson*, 272 Neb. 582, 633, 724 N.W.2d 35, 77 (2006).

In the present case, the records for the two prior convictions challenged by Scheffert showed that he was represented by counsel when he entered pleas of guilty and when he was given sentences that included time in jail. We acknowledge that the records do not show that Scheffert was represented by counsel at his arraignments in those cases.

[7] We have stated that a criminal defendant's Sixth Amendment right to the assistance of counsel attaches only after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998). Postattachment, the accused is entitled to counsel at every critical stage of the proceeding. See *id*. The records from the two prior convictions in this case showed that Scheffert was represented by counsel at the critical stages that followed his arraignment—the plea hearing and the sentencing. The issue raised by Scheffert is whether he had the right to be represented by counsel at the arraignment itself.

As noted above, the right to the assistance of counsel attaches *after* arraignment. The U.S. Supreme Court recently reaffirmed in *Rothgery v. Gillespie County*, 554 U.S. 191, 213, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008), that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." The Court stated in *Rothgery* that "[a]ttachment occurs when the government has used the judicial machinery to signal a commitment to prosecute" and that "[o]nce attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings." 554 U.S. at 211, 212. The Court continued, "Thus, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." 554 U.S. at 212.

Under *Rothgery*, the right to counsel attaches at an event such as an arraignment, and "attachment" means that the defendant must in a reasonable time thereafter have counsel or waive counsel at subsequent critical stages. We have also so held. *Lotter, supra*. The arraignment itself is not necessarily a critical stage requiring counsel.

In the present case, the records of the two prior convictions show that in the critical stages following the arraignments—the plea hearings and the sentencing hearings—Scheffert was represented by counsel. Scheffert has not directed us to a particular reason that the arraignments in his two prior DUI cases under consideration should be excepted from the jurisprudence discussed above or that any rights were not protected by having counsel present at the subsequent critical stages. It was not required that Scheffert have counsel at the arraignments in the prior convictions, and the records show that he was represented by counsel at the critical stages that followed the arraignments. We therefore conclude that the record in this case showed the two prior convictions were counseled as required and that therefore, the two prior DUI convictions were eligible to be used to enhance the penalty in the current case. The court did not err by considering the two prior convictions at the enhancement hearing.

CONCLUSION

We conclude that the PBT was sufficiently reliable to be used to support a finding of probable cause to arrest Scheffert for DUI and that there were reasonable grounds to thereafter require a chemical test. We therefore conclude that the district court did not err by denying Scheffert's motion to suppress the results of the chemical test. We further conclude that the record relating to the two prior DUI convictions showed that such convictions were counseled as required and that therefore, the court did not err by considering such convictions at the enhancement hearing. We affirm Scheffert's conviction and sentence for DUI, fourth offense.

AFFIRMED.

MIDWEST PMS AND FEDERATED MUTUAL INSURANCE COMPANY, ITS WORKERS' COMPENSATION CARRIER, APPELLANTS, V. GARY DEAN OLSEN, EMPLOYEE, AND NATIONWIDE AGRIBUSINESS INSURANCE COMPANY, APPELLEES.

778 N.W.2d 727

Filed February 26, 2010. No. S-09-735.

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. **Statutes.** The meaning of a statute is a question of law.
3. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
4. **Jurisdiction: Words and Phrases.** Ancillary jurisdiction is the power of a court to adjudicate and determine matters incidental to the exercise of its primary jurisdiction of an action.
5. **Subrogation: Words and Phrases.** Generally, subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other.
6. ____: ____. Subrogation is the substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.
7. **Subrogation: Liability.** The doctrine of subrogation applies where a party is compelled to pay the debt of a third person to protect his or her own rights or interest, or to save his or her own property.
8. ____: ____. To be entitled to subrogation, one must pay a debt for which another is liable.
9. **Workers' Compensation.** The final resolution of an employee's right to workers' compensation benefits does not preclude an issue from being "ancillary" to the resolution of the employee's right to benefits within the meaning of Neb. Rev. Stat. § 48-161 (Reissue 2004).

Appeal from the Workers' Compensation Court. Reversed and remanded for further proceedings.

Todd R. McWha and Luke T. Deaver, of Waite, McWha & Harvat, for appellants.

David A. Dudley and Andrea A. Ordonez, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Nationwide Agribusiness Insurance Company.

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

GERRARD, J.

Under the Nebraska Workers' Compensation Act,[1] the Workers' Compensation Court has jurisdiction to decide disputed claims for workers' compensation and "any issue ancillary to the resolution of an employee's right to workers' compensation benefits."[2] In this case, the employee settled his claim, but one of his employer's insurers is still pursuing a claim of reimbursement from another insurer. The question presented in this appeal is whether the compensation court's ancillary jurisdiction extends to a claim between insurers when the employee's right to benefits is no longer disputed.

BACKGROUND

Gary Dean Olsen suffered an injury to his right shoulder on January 28, 2004, in an accident arising out of and in the course of his employment with Midwest PMS. At the time, Midwest PMS was insured for workers' compensation by Federated Mutual Insurance Company (Federated). All of Olsen's bills resulting from that injury were paid.

Olsen was injured again in late April 2005. At that time, Midwest PMS was insured for workers' compensation by Nationwide Agribusiness Insurance Company (Nationwide). Olsen filed a petition in the Workers' Compensation Court alleging that the April 2005 accident arose out of and in the course of his employment with Midwest PMS, resulting in an injury to his left shoulder and an aggravation of injury to his right shoulder. Olsen sought permanent partial disability benefits.

Both Federated and Nationwide answered the petition. Federated paid indemnity and medical benefits to Olsen for injuries following the alleged 2005 accident, but filed a cross-claim in the Workers' Compensation Court against Nationwide, alleging that if Olsen suffered new injuries to either shoulder in 2005, then Federated should be reimbursed by Nationwide.

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[1] See Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2004, Cum. Supp. 2008 & Supp. 2009).

[2] § 48-161.

The case proceeded as far as a pretrial order, which provided that the issues for trial included whether Olsen suffered a compensable injury in 2005 and whether Federated was entitled to reimbursement from Nationwide. But those issues were never determined, because Olsen and Midwest PMS, through Nationwide, reached a lump-sum settlement agreement that was approved by the Workers' Compensation Court on September 17, 2008. Olsen's petition was dismissed without prejudice on September 19.

On October 8, 2008, Federated filed a petition in the Workers' Compensation Court against Olsen and Nationwide. We acknowledge that Midwest PMS is listed as a party on the petition and subsequent filings, but it is clear that Federated is representing its own interests, and for simplicity, we will refer only to Federated. In its petition, Federated alleged that if Olsen's 2005 right shoulder injury was a new injury instead of a progression of the 2004 injury, and if the 2005 left shoulder injury occurred in the scope and course of Olsen's employment, then Federated should be reimbursed by Nationwide for any indemnity or medical bills paid by Federated for either 2005 injury. Nationwide denied the allegations and alleged that the Workers' Compensation Court had no jurisdiction to decide the dispute between the insurers. Olsen filed an answer alleging that he had been paid all of the benefits to which he was entitled and that there was no controversy between Olsen and Midwest PMS.

The Workers' Compensation Court agreed with Nationwide. Both the single judge and review panel of the Workers' Compensation Court concluded that the court's ancillary jurisdiction did not extend to an action between two insurers when there was no employee's claim pending. The single judge dismissed the petition for lack of jurisdiction, and the review panel affirmed that dismissal. Federated appeals.

ASSIGNMENTS OF ERROR

Federated assigns, consolidated and restated, that the Workers' Compensation Court erred (1) in concluding that it did not have subject matter jurisdiction to determine an insurance coverage dispute between two insurers and to determine

whether Federated should be reimbursed by Nationwide for payments made to Olsen and (2) in finding that it had no subject matter jurisdiction to decide whether there was a dispute between Midwest PMS and Olsen regarding unpaid benefits.

STANDARD OF REVIEW

[1-3] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[3] The meaning of a statute is also a question of law.[4] An appellate court reviews questions of law independently of the lower court's conclusion.[5]

ANALYSIS

The Workers' Compensation Court's ancillary jurisdiction was enacted by the Legislature in response to this court's decision in *Thomas v. Omega Re-Bar, Inc.*[6] In *Thomas*, the claimant was injured while employed by a subcontractor performing work in Nebraska. The employer notified its workers' compensation insurer, but the insurer claimed that its coverage only applied to employees working in Texas. When the claimant filed a petition in the Workers' Compensation Court, the employer asked the court to add a different insurer as a party defendant. The Workers' Compensation Court found that the claimant was entitled to benefits, but determined that neither insurer covered the employer for the claimant's injuries.[7]

On appeal, we concluded that the Workers' Compensation Court did not have jurisdiction to resolve the coverage dispute. We rejected the argument that the Workers' Compensation Court had jurisdiction over ancillary issues, invoking the familiar proposition that the Workers' Compensation Court "is a tribunal of limited and special jurisdiction and has only such

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[3] *R & D Properties v. Altech Constr. Co., ante* p. 74, 776 N.W.2d 493 (2009).

[4] *Harvey v. Nebraska Life & Health Ins. Guar. Assn.*, 277 Neb. 757, 765 N.W.2d 206 (2009).

[5] *R & D Properties, supra* note 3.

[6] *Thomas v. Omega Re-Bar, Inc.*, 234 Neb. 449, 451 N.W.2d 396 (1990).

[7] See *id.*

authority as has been conferred on it by statute."[8] Finding nothing in the Nebraska Workers' Compensation Act that "explicitly provide[d] the compensation court with subject matter jurisdiction to hear insurance coverage disputes," we held that it did not have such jurisdiction.[9]

Three justices dissented, interpreting the Nebraska Workers' Compensation Act "to grant, by implication, ancillary jurisdiction to the court" to resolve insurance coverage issues.[10] The dissenters reasoned that an alleged insurer, as a party, should be able to raise the defense that it had no policy covering the accident. And the dissenters thought it unfair that the employee would be required to proceed in district court to determine whether the insurer had liability, causing expensive litigation and unnecessary delay. So, the dissenters suggested that the Workers' Compensation Court should have jurisdiction to resolve insurance coverage issues "when such determination is *ancillary* to the resolution of the employee's right to compensation benefits."[11]

In response, the Legislature amended § 48-161, abrogating *Thomas* and adopting the dissenters' language that the Workers' Compensation Court "shall have jurisdiction to decide any issue ancillary to the resolution of an employee's right to workers' compensation benefits." The legislative history of § 48-161 suggests that the amendment was made at the request of the Workers' Compensation Court and that the Legislature's primary concern was that a claimant's compensation might be delayed if the Workers' Compensation Court was unable to resolve ancillary issues that affected the claimant's ability to obtain benefits.[12]

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[8] *Id.* at 452, 451 N.W.2d at 398.

[9] *Id.* at 453, 451 N.W.2d at 399.

[10] *Id.* at 456, 451 N.W.2d at 401 (Fahrnbruch, J., dissenting; White and Shanahan, JJ., join).

[11] *Id.* at 458, 451 N.W.2d at 401 (Fahrnbruch, J., dissenting; White and Shanahan, JJ., join) (emphasis in original).

[12] See Floor Debate, L.B. 313, Committee on Business and Labor, 91st Leg., 1st Sess. 10431 (Mar. 5, 1990).

In *Schweitzer v. American Nat. Red Cross*,[13] we noted the amendment to § 48-161, and explained that the statute "was amended to vest the Workers' Compensation Court with the power to determine insurance coverage disputes in the claims before it, including the existence of coverage, and the extent of an insurer's liability." Under *Schweitzer*, there is little question that had the dispute in this case between Olsen and his employer not been settled, the Workers' Compensation Court would have had jurisdiction to determine which insurer provided coverage for any benefits Olsen was awarded. But *Schweitzer* does not answer the question presented here: Whether the court's jurisdiction over issues "ancillary to the resolution of an employee's right to workers' compensation benefits" terminates when the employee's right to benefits is no longer at issue.

On the one hand, it is clear from the legislative history and the *Thomas* dissent that the primary motivation for amending § 48-161 was to ensure that a claimant's benefits were not delayed by insurance coverage disputes that the Workers' Compensation Court could not resolve. That concern, obviously, is not implicated in a situation such as this, when the employee's benefits have been finally settled.

[4] But on the other hand, an issue "ancillary to the resolution of an employee's right to workers' compensation benefits" is no less ancillary to that resolution before the employee has been paid than after. "Ancillary jurisdiction" is the power of a court to adjudicate and determine matters incidental to the exercise of its primary jurisdiction of an action.[14] The Workers' Compensation Court's primary jurisdiction is exercised just as effectively by its approval of a lump-sum settlement as by a determination on the merits of an employee's right to benefits. And the claim at issue here rests on questions of fact regarding Olsen's injury that are generally decided by the Workers' Compensation Court.

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[13] *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 358, 591 N.W.2d 524, 530 (1999).

[14] *Curtice v. Baldwin Filters Co.*, 4 Neb. App. 351, 543 N.W.2d 474 (1996).

[5-8] Although Federated's petition did not identify a legal theory of recovery, it is apparent that Federated is alleging facts supporting a claim of subrogation. Generally, subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other.[15] It is the substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.[16] The doctrine of subrogation applies where a party is compelled to pay the debt of a third person to protect his or her own rights or interest, or to save his or her own property.[17] To be entitled to subrogation, one must pay a debt for which another is liable.[18]

Here, Federated is alleging that Olsen's medical expenses should have been paid by Nationwide but that Federated paid them instead. Federated's right to recover from Nationwide is dependent upon Olsen's injury and his alleged right to recover for that injury from Nationwide instead of Federated. Such allegations state a claim of subrogation.[19]

Under such circumstances, where one workers' compensation insurer is asserting a subrogated claim against another workers' compensation insurer, it could be argued that the claim falls within the Workers' Compensation Court's primary jurisdiction, not merely its ancillary jurisdiction.[20] But at the very least, Federated's claim is ancillary to the Workers' Compensation Court's exercise of jurisdiction over Olsen's lump-sum settlement with Nationwide—or, more precisely, his settlement with his employer. We need not determine whether the district court could exercise jurisdiction over such a claim

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[15] *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996).

[16] *Id.*

[17] *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990).

[18] *Leader Nat. Ins., supra* note 15.

[19] See *id.*

[20] Compare, e.g., *Schweitzer, supra* note 13.

to conclude that the Workers' Compensation Court can. And we need not evaluate the merits of Federated's subrogation claim, in light of the settlement, to conclude that the Workers' Compensation Court has jurisdiction to consider them.

[9] We hold that the final resolution of an employee's right to workers' compensation benefits does not preclude an issue from being "ancillary" to the resolution of the employee's right to benefits within the meaning of § 48-161. And we conclude that under the circumstances presented here, Federated's subrogation claim was ancillary to the Workers' Compensation Court's approval of the lump-sum settlement between Olsen and his employer, Midwest PMS. The Workers' Compensation Court erred in concluding otherwise. And having determined that Federated's first assignment of error has merit, we need not consider its argument that there was still a dispute between Olsen and Midwest PMS.

CONCLUSION

The Workers' Compensation Court had jurisdiction to consider the merits of Federated's claim against Nationwide, despite the fact that Olsen had settled his claim with his employer. The judgment of the Workers' Compensation Court is reversed, and the cause is remanded for further proceedings to consider Federated's claim on its merits.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating in the decision.

STATE OF NEBRASKA, APPELLEE, V.
KEVIN A. SIMNICK, APPELLANT.
779 N.W.2d 335

Filed March 5, 2010. No. S-08-959.

1. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.
2. **Constitutional Law: Statutes: Sentences.** Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which

purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.

3. **Constitutional Law: Appeal and Error.** The Nebraska Supreme Court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.
4. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.
5. ____. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
6. ____. Consideration of plain error occurs at the discretion of an appellate court.
7. **Courts: Appeal and Error.** Upon reversing a decision of the Nebraska Court of Appeals, the Nebraska Supreme Court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.
8. **Sentences: Appeal and Error.** When part of a sentence is illegal, an appellate court may, if the sentence is divisible, modify it by striking out the illegal part.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and CASSEL, Judges, on appeal thereto from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Dennis R. Keefe, Lancaster County Public Defender, Webb E. Bancroft, and Yohance L. Christie, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

STEPHAN, J.

After entering a plea of no contest, Kevin A. Simnick was convicted on one count of first degree sexual assault and sentenced to a term of incarceration. In its sentencing order, the district court determined that Simnick had committed an "aggravated offense" as defined in Neb. Rev. Stat. § 29-4005

(Reissue 2008). Simnick was, therefore, subject to the lifetime registration requirements of the Sex Offender Registration Act (SORA)[1] and to lifetime community supervision[2] upon his release from incarceration or civil commitment. The Nebraska Court of Appeals affirmed the conviction and sentence.[3] We granted Simnick's petition for further review to consider issues arising from *State v. Payan*,[4] decided during the pendency of Simnick's appeal, in which we held that lifetime community supervision constituted a form of punishment.

BACKGROUND

In October 2007, Simnick was charged by information in the district court for Lancaster County with two counts of sexual assault of a child in the first degree. He entered not guilty pleas to both charges.

Eventually, a plea agreement was reached. One of the counts in the information was amended to allege the offense of first degree sexual assault.[5] Simnick, appearing with counsel, entered a plea of no contest to this amended count in exchange for the Lancaster County Attorney's agreement to dismiss the remaining count and the Scotts Bluff County Attorney's agreement not to prosecute Simnick for an offense involving the same child in that jurisdiction. The amended information alleged that the offense occurred "on, about, or between January 1, 2003 and July 31, 2006," in Lancaster County, that Simnick was a person 19 years of age or older, and that he subjected a person less than 16 years of age to sexual penetration. The State presented a factual basis for the plea which included a transcribed statement which Simnick gave to Lincoln police on August 27, 2007. The court advised Simnick of the nature of the charge against him and of the possibility of the following penalties: incarceration for a period of 1 to 50 years, restitution paid to

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[1] Neb. Rev. Stat. §§ 29-4001 to 29-4014 (Reissue 2008).

[2] See Neb. Rev. Stat. § 83-174.03 (Reissue 2008).

[3] *State v. Simnick*, 17 Neb. App. 766, 771 N.W.2d 196 (2009).

[4] *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009).

[5] See Neb. Rev. Stat. § 28-319 (Reissue 2008).

the victim, and lifetime registration as a sex offender. The court did not inform Simnick of the possibility of lifetime community supervision under § 83-174.03(1).

On August 11, 2008, Simnick appeared with counsel for sentencing. Simnick acknowledged reading and signing the "Notice and Acknowledgment of Lifetime Parole Supervision" form, which advised him that he would be subject to lifetime community supervision by the Office of Parole Administration. Simnick neither questioned nor objected to the notice. The district court found that Simnick had committed an "aggravated offense" as defined in § 29-4005 and imposed a sentence of incarceration for 20 to 35 years, with credit for time served. As a part of the sentence, the court found that Simnick was required to register under SORA for the remainder of his life and that Simnick would be subject to lifetime community supervision by the Office of Parole Administration upon his release from either incarceration or civil commitment.

Simnick filed a timely appeal of his conviction. He asserted, inter alia, (1) that his plea was involuntary because the district court did not advise him of the possibility of lifetime community supervision and (2) that the inclusion of lifetime community supervision in his sentence violated the Ex Post Facto Clauses of the state and federal Constitutions. In its appellate brief, the State briefly argued that Simnick waived these arguments by failing to object at his sentencing hearing. The Court of Appeals did not address this argument in its opinion affirming Simnick's conviction and sentence.

After we granted Simnick's petition for further review, the State filed a motion to dismiss as improvidently granted, arguing that the issues were not preserved for appellate review. We deferred ruling on the State's motion pending final submission.

ASSIGNMENTS OF ERROR

In his petition for further review, Simnick assigns, restated, that (1) the imposition of lifetime community supervision violated the Ex Post Facto Clauses of the Nebraska and federal Constitutions and (2) his no contest plea was not freely, knowingly, and voluntarily made.

STANDARD OF REVIEW

[1] The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.[6]

ANALYSIS

[2,3] Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.[7] This court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.[8]

Section 83-174.03, which subjects certain sex offenders to lifetime community supervision, was a part of L.B. 1199,[9] signed by the Governor on April 13, 2006. It went into effect 3 calendar months later, on July 14.[10] In *Payan*,[11] we held that lifetime community supervision pursuant to § 83-174.03 is a form of punishment. Simnick contends that his offense was committed before the effective date of § 83-174.03 and that therefore, the statute as applied to him constitutes ex post facto legislation because it increased the punishment for his offense after it was committed.

Plain Error

[4,5] The State correctly notes that Simnick asserted his ex post facto claim for the first time on appeal. In the absence of plain error, when an issue is raised for the first time in an

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[6] *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *State v. Diaz*, 266 Neb. 966, 670 N.W.2d 794 (2003).

[7] *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

[8] *Id.*

[9] 2006 Neb. Laws, L.B. 1199, § 89.

[10] See Neb. Const. art. III, § 27.

[11] *State v. Payan, supra* note 4.

appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.[12] Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.[13]

[6] Consideration of plain error occurs at the discretion of an appellate court.[14] We have exercised our discretion to correct plain error in a variety of criminal sentencing contexts, including a case[15] in which capital sentencing was not conducted in accordance with *Ring v. Arizona*,[16] cases in which prior convictions were utilized to enhance a sentence absent proof in the record that the defendant was represented by or knowingly waived counsel at the time of the prior convictions,[17] and a case in which a defendant convicted of driving under the influence was erroneously ordered to participate in alcohol assessment as a part of the sentencing order.[18]

We have also considered relevant judicial decisions handed down subsequent to trial as a factor in deciding whether to review for plain error.[19] Our holding in *Payan*[20] that lifetime community supervision is a form of punishment is highly

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[12] *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007); *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[13] *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008); *State v. Mata, supra* note 12.

[14] *State v. Sepulveda*, 278 Neb. 972, 775 N.W.2d 40 (2009); *State v. Archie, supra* note 12.

[15] *State v. Mata, supra* note 12.

[16] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[17] *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001).

[18] *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000).

[19] See *State v. Mata, supra* note 12.

[20] *State v. Payan, supra* note 4.

relevant to Simnick's ex post facto claim. *Payan* was decided while Simnick's appeal was pending in the Court of Appeals. Based upon the constitutional prohibition of ex post facto laws, Simnick has a substantial right not to be subjected to an enhanced penalty that did not exist when his offense was committed. Accordingly, we exercise our discretion to consider his ex post facto argument under the doctrine of plain error.

Ripeness

A convicted sex offender becomes subject to lifetime community supervision following either completion of a term of incarceration or release from civil commitment under three separate circumstances:

> (a) [The defendant] is convicted of or completes a term of incarceration for an offense requiring registration under section 29-4003 and has a previous conviction for a registerable offense, (b) [the defendant] is convicted of sexual assault of a child in the first degree pursuant to section 28-319.01, or (c) [the defendant] is convicted of or completes a term of incarceration for an aggravated offense as defined in section 29-4005.[21]

In *State v. Schreiner*,[22] we held that an ex post facto challenge by a defendant who had become subject to lifetime community supervision as a result of a prior conviction for a registrable offense was unripe for judicial review. In this case, the Court of Appeals relied upon *Schreiner* in concluding that "Simnick's constitutional challenge is unripe."[23]

But this case differs from *Schreiner* in that Simnick became subject to lifetime community supervision not on the basis of a prior conviction, but because the district court found that the offense on which he stands convicted in this proceeding constituted an "aggravated offense" as defined in § 29-4005. Under SORA, a convicted sex offender whose offense is determined to be an "aggravated offense" is also subject to the lifetime

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[21] § 83-174.03(1).

[22] *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

[23] *State v. Simnick, supra* note 3, 17 Neb. App. at 787, 771 N.W.2d at 213.

registration requirement.[24] In *Worm*,[25] we determined that a lifetime registration requirement under SORA resulting from a finding of an aggravated offense was "part of the sentencing court's judgment" for purposes of appeal and was, therefore, ripe for review on direct appeal. *Worm* therefore reached and rejected the ex post facto claim on its merits, concluding that because the registration requirement was not punitive, there was no violation of the Ex Post Facto Clauses.

Here, as in *Worm*, the challenged portion of the sentence arose from an aggravated offense finding which was made as a part of the sentencing order. Therefore, *Worm*, not *Schreiner*, controls the question of whether the constitutional issue is ripe for review. We conclude, under the reasoning of *Worm*, that the issue is ripe for review and that the Court of Appeals erred in reaching its contrary conclusion.

MERITS

[7] Upon reversing a decision of the Court of Appeals, this court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.[26] In the interest of judicial economy, we address the merits of Simnick's ex post facto claim which the Court of Appeals did not reach.

Because we held in *Payan*[27] that lifetime community supervision is a form of punishment, the dispositive question is whether Simnick's offense was committed before or after July 14, 2006, the effective date of § 83-174.03. The count in the amended information to which Simnick entered his plea alleged that the offense was committed "on, about, or between January 1, 2003 and July 31, 2006." The State argues that we should treat Simnick's crime as a "continuing offense"[28] spanning this entire time period and conclude that § 83-174.03 is not ex post facto as applied to Simnick.

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[24] See § 29-4005(2).

[25] *State v. Worm, supra* note 7, 268 Neb. at 80, 680 N.W.2d at 158.

[26] *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009).

[27] *State v. Payan, supra* note 4.

[28] Brief for appellee at 20.

In support of this argument, the State relies upon *State v. Cowles*,[29] an Iowa case in which a defendant entered a guilty plea to, inter alia, one felony count of sexual abuse involving a minor child. The offense was alleged to have occurred between the dates of April 9, 1996, and February 2, 1997. A statute establishing a mandatory minimum sentence became effective on July 1, 1996. At the plea hearing, the defendant was asked whether he had engaged in a sex act with the minor "'prior to February 3, 1997,'" and he gave an affirmative response.[30] The Iowa Supreme Court held that application of a statute specifying a mandatory minimum sentence would not constitute ex post facto legislation, because the defendant had "expressly admitted" at his plea and sentencing hearing that he had committed the offense between April 9, 1996, and February 2, 1997.[31] Although the court acknowledged that the defendant did not expressly admit that he committed the offense after the enactment of the mandatory minimum sentence statute, the court nevertheless found "an implicit admission of such conduct in the full context of the hearing."[32]

Federal courts have taken differing approaches to the analysis of a plain error ex post facto claim where a statute which enhances a criminal penalty is enacted during the time period the crime is alleged to have occurred and a jury is not specifically instructed that it must find criminal conduct occurring after the date of enactment. The Ninth Circuit has concluded that a guilty verdict constitutes a finding that the criminal conduct occurred until the most recent date alleged in the indictment, thereby establishing postenactment criminal conduct.[33] The Fifth Circuit has held that where most of the evidence focused on events occurring after the statutory amendment enhancing the penalty for the offense, there is no plain error in failing to give the jury instruction which would prevent ex post

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[29] *State v. Cowles*, 757 N.W.2d 614 (Iowa 2008).

[30] *Id.* at 615.

[31] *Id.* at 617.

[32] *Id.*

[33] *U.S. v. Calabrese*, 825 F.2d 1342 (9th Cir. 1987).

facto application.[34] The Second Circuit has found plain error based upon a possibility that the jury could have convicted the defendant exclusively on preenactment conduct.[35]

None of these cases provide guidance here, where there is neither an admission resulting from a guilty plea nor a finding of guilt by a jury. Instead, we have only Simnick's no contest plea and the factual basis for the plea offered by the State, which includes a statement Simnick gave to police on August 27, 2007. In the statement, Simnick admitted to a sexual assault involving penetration occurring 3 to 4 years previously. However, there is no admission or other evidence of conduct occurring during the 18-day period between July 14, 2006, the effective date of § 83-174.03, and July 31, the last day of the time period in which the crime was alleged to have been committed. On this record, we must conclude that the crime was committed before the enactment of the statute which imposed the additional punishment of lifetime community supervision. Accordingly, the inclusion of that punishment in Simnick's sentence violates the Ex Post Facto Clauses of the Nebraska and federal Constitutions.

Remedy

[8] When part of a sentence is illegal, an appellate court may, if the sentence is divisible, modify it by striking out the illegal part.[36] That portion of Simnick's sentencing order which states that he is subject to lifetime community supervision is divisible from the remainder of the sentence and should be stricken, leaving the remainder of the sentence in force.

Other Assignment

Simnick also contends that the Court of Appeals erred in determining that his no contest plea was entered voluntarily. He argues that his plea was involuntary because he was not

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[34] *United States v. Todd*, 735 F.2d 146 (5th Cir. 1984).

[35] *U.S. v. Marcus*, 538 F.3d 97 (2d Cir. 2008), *cert. granted* 558 U.S. 945, 130 S. Ct. 393, 175 L. Ed. 2d 266 (2009).

[36] *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989), *overruled on other grounds, State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); *Olson v. State*, 160 Neb. 604, 71 N.W.2d 124 (1955).

specifically advised that upon conviction, he could be subject to the lifetime community supervision provisions of § 83-174.03. Inasmuch as we have determined that Simnick is not subject to lifetime community supervision because § 83-174.03 was not in effect at the time of his offense, the issue with respect to his plea is moot and we do not address it.

CONCLUSION

For the reasons discussed, we overrule the State's motion to dismiss the petition for further review. We affirm that portion of the judgment of the Court of Appeals affirming Simnick's conviction; but we reverse that portion of the judgment which affirms the sentence of lifetime community supervision by the Office of Parole Administration upon Simnick's release from incarceration or civil commitment, and we remand the cause to the Court of Appeals with directions to vacate that portion of the sentence and remand to the district court with directions to resentence Simnick in accordance with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

MATTHEW L. ASHBY, INDIVIDUALLY, AND M.A., A MINOR, BY AND THROUGH MATTHEW L. ASHBY, HIS FATHER AND NEXT FRIEND, APPELLANTS, V. STATE OF NEBRASKA ET AL., APPELLEES.

779 N.W.2d 343

Filed March 5, 2010. No. S-08-1274.

1. **Judgments: Appeal and Error.** An appellate court determines questions of law independently of the determination reached by the lower court.
2. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and the court gives that party the benefit of all reasonable inferences deducible from the evidence.
4. **Tort Claims Act: Proof.** To recover in a negligence action brought under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2003), a

plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.

5. **Negligence.** The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.
6. **Negligence: Words and Phrases.** The law defines a duty as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
7. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
8. **Statutes.** In the absence of ambiguity or constitutional defect, courts must give effect to statutes as they are written.
9. **Negligence.** Absent a duty, a negligence claim fails.
10. **Constitutional Law: Actions.** In a suit under 42 U.S.C. § 1983 (2006), the first inquiry is whether the plaintiff has been deprived of a right secured by the Constitution and laws within the meaning of § 1983.
11. **Constitutional Law: Public Officers and Employees: Immunity: Liability.** When a plaintiff sues a state official, a court must first analyze whether the plaintiff has sued the official in his or her official or individual capacity for purposes of state sovereign immunity. If the court determines that a state official has been sued in his or her individual capacity, the court can address the official's qualified immunity from civil damages. That inquiry focuses not on whether the official has acted in his or her individual capacity, but on whether the official's conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known.
12. **Conspiracy: Words and Phrases.** A civil conspiracy is a combination of two or more persons acting in concert to accomplish an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
13. **Conspiracy: Proof.** A party does not have to prove a civil conspiracy by direct evidence of the acts charged. It may be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purpose to be accomplished.
14. **Actions: Conspiracy.** A civil conspiracy is only actionable if the alleged conspirators actually committed some underlying misconduct.
15. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions.
16. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must first determine whether the long-arm statute is satisfied. If the long-arm statute is satisfied, the second question is whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
17. **Jurisdiction: States.** Depending on the facts of a case, a court can exercise two types of jurisdiction: general personal jurisdiction or specific personal jurisdiction.
18. ____: ____. If the defendant's contacts are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert specific jurisdiction over the defendant, depending on the quality and nature of such contact.

19. **Due Process: Jurisdiction: States.** Due process for personal jurisdiction over a nonresident defendant requires that the plaintiff allege specific acts by the defendant which establish that the defendant had the necessary minimum contacts before a Nebraska court can exercise jurisdiction over a person.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Herbert J. Friedman and Daniel H. Friedman, of Friedman Law Offices, for appellants.

Jon Bruning, Attorney General, and Michael J. Rumbaugh for appellees State of Nebraska and Mary Dyer.

Susan Kubert Sapp and Stanton N. Beeder, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees Monica Taylor Kilmer, Douglas Eric Black, and Tammy Norris Black.

Milton A. Katskee and Melvin R. Katskee, of Katskee, Henatsch & Suing, for appellees Estate of Michael Washburn and Erickson & Sederstrom, P.C.

Walter E. Zink II and Amanda A. Dutton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Bryant A. Whitmire.

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

CONNOLLY, J.

SUMMARY

Matthew L. Ashby is the biological father of M.A., born in January 2004. Ashby never married M.A.'s mother, Monica Taylor Kilmer, and she never listed Ashby as M.A.'s father on the birth certificate. But Ashby registered with the biological father registry within the statutory period to claim paternity.[1] Before the period expired, however, the State of Nebraska, acting through adoption specialist Mary Dyer, allowed the

[1] See Neb. Rev. Stat. § 43-104.04 (Reissue 2004).

prospective adoptive parents, Douglas Eric Black and Tammy Norris Black, to take M.A. to Alabama. Ashby claims that the State and Dyer acted negligently and violated his due process rights in allowing M.A. to leave the state while Ashby could still assert paternity. The State disagrees. It contends that Dyer had met all the requirements under Nebraska law and the Interstate Compact on the Placement of Children (ICPC).[2]

Ashby also brings claims against Kilmer; the Blacks; the Blacks' attorney in Alabama, Bryant A. Whitmire; the estate of Kilmer's attorney in Nebraska, Michael Washburn; and Washburn's former law firm, Erickson & Sederstrom, P.C. He claims that all parties knew that he would contest the adoption and that they attempted to complete the adoption without informing him. Ashby sued the defendants for civil conspiracy, false imprisonment, constructive fraud, misrepresentation, and breach of fiduciary duty. Ashby also sued Kilmer's parents and the agency that facilitated the adoption, but those claims were dismissed and are not appealed.

The defendants moved for summary judgment, which the district court granted. Ashby, individually and on behalf of M.A., appeals, and we affirm.

FACTS

M.A.'s Birth and Adoption

Ashby and Kilmer separated shortly after M.A.'s conception. Before their separation, Kilmer informed Ashby that she was pregnant and was considering adoption. Ashby told her that if she did not want to raise the child, he would, and that he would not relinquish his parental rights or consent to an adoption. Before M.A.'s birth, however, he did not register with the biological father registry to receive notice of any intended adoption, nor did he give notice that he objected to an adoption and intended to claim paternity.[3] The two did not see each other or speak again until after the child was born.

Kilmer contacted a private adoption agency and, through the agency, selected the Blacks, a married couple living in

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[2] Neb. Rev. Stat. §§ 43-1101 and 43-1102 (Reissue 2008).

[3] See Neb. Rev. Stat. §§ 43-104.01(2) and 43-104.03 (Reissue 2004).

Alabama, to adopt her child. The day after M.A.'s birth, the Blacks came to Nebraska, and about 2 weeks later, they returned to Alabama with M.A. They commenced adoption proceedings in that state.

Washburn represented Kilmer in the private adoption. Because the Blacks lived out of state, Dyer helped in the adoption. Dyer is an adoption specialist with the Department of Health and Human Services and the person charged with assisting out-of-state adoptions under Nebraska's ICPC. According to Dyer, she approves the removal of children from Nebraska for adoption placement in other states. She approves each placement by filling out a form and then forwarding the paperwork approving the placement to her counterpart in the state receiving the child. Dyer stated that she could prevent a child from being placed in another state.

Dyer stated that because this was a private adoption, the State has no responsibility to determine whether a putative father has filed a notice of intent to claim custody. According to her, when a State ward is adopted, the State would prepare the adoption paperwork and would check the biological father registry. But because this was a private adoption, Dyer never checked to confirm whether Ashby had registered with the biological father registry or had received notification of the proposed adoption. She noted that even if she had checked, at the time she approved the placement, Ashby had still not registered.

Dyer testified that the biological mother's attorney carries the burden to check the registry in private adoptions. Dyer acknowledged that the publication notice she received from Washburn put her on notice that Ashby had until February 12, 2004, to register for paternity. But she claims that because the paperwork also indicated that Washburn had mailed a registered letter to Ashby on January 8, 2004, Ashby perhaps had only 5 business days after January 8 to register. Although she acknowledged that her file lacked a receipt from the letter and that she had no proof that Ashby had actually received the letter, she stated that she had no reason to doubt that Washburn had actually contacted Ashby by mail. Dyer also acknowledged that Washburn had indicated that Ashby was unwilling to agree

to the adoption and would not sign the consent to the adoption. She admitted that she normally required a "no claim of paternity" certificate before allowing children to leave the state when a biological father has not signed the documents allowing the adoption. But she had not received, nor did she require, such certificate from Washburn.

Because Dyer knew that Ashby still had time to assert his paternity, she had the Blacks sign an at-risk placement notice that required them to return the child to Nebraska if Ashby asserted his paternity.[4] Dyer testified that although she approves the placement of children outside the state, her duties required only that she execute an at-risk placement form. She contended her duties did not require her to determine whether the biological father has registered with the Department of Health and Human Services' vital records section. Yet, she acknowledged that she has the ultimate power to determine whether a child born in Nebraska may leave the state for a preadoption placement.

Ashby's Paternity and Custody Order

Before M.A.'s birth, Washburn attempted to contact Ashby by mail about the pending adoption. Washburn allegedly sent a letter to Ashby on January 8, 2004, but the record indicates that he never received a return receipt confirming that Ashby received the letter. Ashby claims that Washburn sent the letter to the wrong address and that he did not receive it until January 29, 8 days after M.A.'s birth. But Washburn also published notice of the birth, and under the statutes in effect at the time, Ashby had until February 12 to register. On January 30, the day after he received Washburn's letter, Ashby registered and filed for custody.

On April 21, 2004, the Madison County Court held a custody hearing. The court's order stated that Ashby had timely filed his notice of intent to claim paternity and that he was the biological father of the child, and it granted him custody. At that time, Dyer contacted the Alabama ICPC office and informed it

[4] See Neb. Rev. Stat. § 43-104.15 (Reissue 2008).

that under the at-risk placement agreement, the Blacks had to return M.A. to Nebraska. The Blacks refused.

Ashby, armed with the custody order, went to Alabama to have it enforced. The Alabama court, however, eventually declined to enforce the custody order because Ashby had failed to include the Blacks as parties to the action as required by the Uniform Child Custody Jurisdiction and Enforcement Act[5] and Parental Kidnapping Prevention Act of 1980.[6] The Alabama court concluded that the Nebraska judgment was valid as to Ashby's paternity but not valid as to the custody determination. So it did not order the Blacks to return M.A. to Nebraska.[7] It concluded, however, that M.A.'s custody should be determined in Nebraska after Ashby included the Blacks as parties in the custody case. It also stayed the adoption proceedings in Alabama until that happened. The record fails to show that Ashby took any further action to obtain custody. And in February 2009, Ashby voluntarily relinquished his parental rights in a settlement with the Blacks. The settlement, however, reserved his claims in this suit filed in the Lancaster County District Court.

Ashby's State Court Claims and District Court's Disposition

In the Lancaster County District Court action, Ashby alleged that the State, through its employee Dyer, negligently allowed M.A. to leave Nebraska before determining whether Ashby was properly notified of the adoption. And he alleges that Dyer's actions deprived him of procedural and substantive due process rights under 42 U.S.C. § 1983 (2006). Ashby also claimed that (1) all the defendants conspired to violate his civil rights and deprive him of a parental relationship with his son; (2) the Blacks falsely imprisoned M.A.; and (3) Dyer, Kilmer,

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[5] See *Ex parte D.B. and T.B.*, 975 So. 2d 940 (Ala. 2007), *affirming D.B. v. M.A.*, 975 So. 2d 927 (Ala. Civ. App. 2006). See, also, Neb. Rev. Stat. §§ 43-1226 to 43-1266 (Reissue 2004).

[6] See 28 U.S.C. § 1738A and 42 U.S.C. § 663 (2006).

[7] *Ex parte D.B. and T.B., supra* note 5.

the Blacks, Whitmire, Washburn, and Erickson & Sederstrom engaged in constructive fraud, misrepresentation, and breach of fiduciary duty. He sought not the return of his son, but compensatory and punitive damages.

In two separate orders, the district court granted summary judgment to Kilmer, the Blacks, Whitmire, Washburn, and Erickson & Sederstrom. In April 2008, the court denied Ashby's request that the court order Whitmire to produce his file on M.A. And in November 2008, the court granted summary judgment to the State and Dyer. Ashby now appeals.

Regarding the negligence claim against the State, the court concluded that (1) Dyer had no duty to check the biological father registry before allowing M.A. to leave Nebraska and (2) the State's only duty was to ensure that it met the ICPC requirements, which Dyer had done. Because the State had no duty, it could not be negligent. The court also found that res judicata barred Ashby's § 1983 claim against Dyer in her official capacity because a federal district court had decided the claim against Ashby.[8] And, because the evidence indicated that Dyer did not act in any capacity other than her official capacity, the court dismissed Ashby's § 1983 claim against her in her individual capacity.

Regarding the civil conspiracy claim, the court found that the evidence failed to show any agreement between the defendants to deprive Ashby of the opportunity to assert his parental rights. To the contrary, the court found that Ashby had established his paternity in both Nebraska and Alabama courts before the Blacks finalized the adoption. The court also found Ashby's false imprisonment claim failed because the Blacks had an order from an Alabama court granting them custody. The court found all other claims meritless and dismissed the case.

Ashby's Federal Court Claims and Federal District Court's Disposition

In the federal case, Ashby filed a § 1983 lawsuit against Dyer, Kilmer, the Blacks, Whitmire, Washburn, Erickson &

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[8] See *Ashby v. Dyer*, 427 F. Supp. 2d 929 (D. Neb. 2006).

Sederstrom, and other defendants. He claimed that all the defendants, acting under the color of state law, conspired to deprive him of due process by removing M.A. to another state for adoption. He also made state law claims of civil conspiracy, negligence, fraud, misrepresentation, and breach of fiduciary duty against all the defendants and a false imprisonment claim against the Blacks.

In April 2006, the federal court dismissed, with prejudice, the § 1983 claim against Dyer in her official capacity because Ashby was only requesting monetary damages. Regarding the claim against Dyer in her individual capacity, the court concluded that Ashby's allegation failed to state a § 1983 claim based on a civil conspiracy. The court concluded that a plaintiff's allegations that a state official acted negligently are insufficient to state a constitutional claim.[9] And, assuming that Dyer knew of Ashby's paternity claim, Ashby failed to allege that she shared this information. So there was not a "'meeting of the minds'" between Dyer and the other defendants "to violate [Ashby's] constitutional rights."[10] Because Dyer's allegations failed to show a state action, the federal court concluded that it lacked jurisdiction and dismissed the claims. It dismissed with prejudice the § 1983 claims against Dyer, in her official capacity, and against the remaining defendants. It apparently dismissed without prejudice the § 1983 claim against Dyer, in her individual capacity, and Ashby's remaining state law claims.

ASSIGNMENTS OF ERROR

Ashby alleges that the district court erred in (1) granting summary judgment to the State on his negligence claim; (2) finding that res judicata barred his § 1983 claim against Dyer, in her individual capacity; (3) granting summary judgment to Kilmer, the Blacks, Whitmire, Washburn, and Erickson & Sederstrom on his civil conspiracy claim; and (4) denying his motion to compel Whitmire to answer discovery questions.

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[9] *Id.*

[10] *Id.* at 934.

STANDARD OF REVIEW

[1] We determine questions of law independently of the determination reached by the lower court.[11]

[2,3] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[12] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted, and we give that party the benefit of all reasonable inferences deducible from the evidence.[13]

ANALYSIS

Negligence Claim Against the State

[4-7] Ashby alleges that the district court erred in finding that the State owed no duty to Ashby. To recover in a negligence action brought under the State Tort Claims Act,[14] a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.[15] The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.[16] The law defines a duty as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."[17] The question whether a legal duty exists for

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[11] See *Holmstedt v. York Cty. Jail Supervisor*, 275 Neb. 161, 745 N.W.2d 317 (2008).

[12] *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009). See, also, *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007).

[13] *Wilke, supra* note 12.

[14] Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2003).

[15] See *Ehlers v. State*, 276 Neb. 605, 756 N.W.2d 152 (2008).

[16] *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007).

[17] *Munstermann v. Alegent Health*, 271 Neb. 834, 845, 716 N.W.2d 73, 83 (2006).

actionable negligence is a question of law dependent on the facts in a particular situation.[18]

The alleged duty Ashby places on the State does not come from a single source. Instead, we understand Ashby's argument to be that based upon a combination of constitutional and statutory law, the State had a duty to confirm whether he had consented to the adoption, or that the Blacks did not need his consent, before the State approved M.A.'s removal from Nebraska. Ashby contends that the State is a "'sending agency'" under the ICPC in effect at the time of M.A.'s removal.[19] (The ICPC was amended in 2009.)[20] Ashby alleges that as a sending agency, the State must comply with every requirement in the ICPC and with Nebraska's adoption statutes. Ashby also asserts that as a sending agency under the ICPC, the State "'retain[s] jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending agency's state . . . .'"[21]

Ashby argues that these statutes require the State to satisfy the consent laws for in-state adoptions before permitting a child to be placed with out-of-state adoptive parents. He also argues that the State must comply with Nebraska adoption law to protect his constitutional parental right to care for and have custody of his child.[22] Ashby, however, does not challenge the constitutionality of any statute.

We agree with Ashby that in a private adoption, Nebraska is a sending agency under the ICPC. The ICPC defines a sending agency as "a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable

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[18] *Fickle, supra* note 16.

[19] Reply brief for appellants at 7.

[20] 2009 Neb. Laws, L.B. 237, § 3.

[21] Reply brief for appellants at 7. See § 43-1101, art. V(a).

[22] See, *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

agency or other entity which sends, brings, or causes to be sent or brought any child to another party state."[23]

The State argues that in a private adoption, the sending agency under the ICPC is the birth mother, not the State. We agree that the birth mother is a sending agency.[24] But we also believe that in a given placement, more than one individual or entity could be a sending agency. Here, Kilmer was a sending agency because she initiated and consented to placing M.A. with the Blacks. But the State, through Dyer, was also a sending agency. Dyer facilitated and approved the removal of M.A. from Nebraska, causing M.A.'s placement in Alabama. According to her own testimony, Dyer had the power to refuse to authorize removal of M.A. from Nebraska. So we do not agree with the State's argument that Kilmer was the sole person responsible for allowing the removal of M.A. The definition of a sending agency appears broad enough to include any individual or entity that causes a child to be moved interstate, even if that means there are multiple sending agencies in a single adoption. We conclude that the State is a sending agency under the ICPC.

But even if the State is a sending agency, for it to be negligent, it must have breached a duty owed to Ashby. Ashby asserts that the statutes require the State to determine whether he had consented to the adoption or whether his consent was not required before allowing M.A. to leave Nebraska. To address this argument, we look to Nebraska's paternity statutes.

When a child is born out of wedlock and the biological mother desires to relinquish her rights to the child, the biological mother's attorney or the adoption agency facilitating the adoption must attempt to notify the biological father or possible biological fathers. As outlined in Neb. Rev. Stat. § 43-104.08 (Reissue 2004):

> Whenever a child is claimed to be born out of wedlock and the biological mother contacts an adoption agency

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[23] § 43-1101, art. II(b).

[24] *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 229 Neb. 837, 429 N.W.2d 359 (1988).

> or attorney to relinquish her rights to the child . . . the agency or attorney contacted shall attempt to establish the identity of the biological father and further attempt to inform the biological father of his right to execute a relinquishment and consent to adoption, or a denial of paternity and waiver of rights . . . .

The notice must be served in advance of the child's birth, whenever possible, to allow the biological father to comply with the registration requirements. And the notice must inform the putative father that he may have the right to file a notice of objection and intent to obtain custody.[25]

The biological father can be notified by registered or certified mail, restricted delivery, return receipt requested.[26] Or, "[i]f the agency or attorney representing the biological mother is unable through reasonable efforts to locate and serve notice on the biological father or possible biological fathers as contemplated in sections 43-104.12 and 43-104.13, the agency or attorney shall notify the biological father or possible biological fathers by publication."[27] So, in a private adoption, regardless of how the attorney or adoption agency attempts to notify a biological father, the attorney or agency must exercise diligence to "identify and give actual or constructive notice to the biological father."[28]

But Nebraska's statutes do not prohibit placement with adoptive parents before notice is perfected. Instead, "[i]f the biological father [is] not given actual or constructive notice prior to the time of placement," the prospective adoptive parents are required to sign an at-risk placement form.[29] The form "give[s] the adoptive parents a statement of legal risk indicating the legal status of the biological father's parental rights as of the time of placement."[30] In signing the form, the adoptive

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[25] Neb. Rev. Stat. §§ 43-104.13 and 43-104.14 (Reissue 2004).

[26] Neb. Rev. Stat. § 43-104.12 (Reissue 2004).

[27] § 43-104.14(1).

[28] Neb. Rev. Stat. § 43-104.16 (Reissue 2008).

[29] § 43-104.15.

[30] *Id.*

parents "are acknowledging their acceptance of the placement, notwithstanding the legal risk."[31]

Here, Washburn attempted to, and eventually did, notify Ashby of the proposed adoption. But the notification took place after M.A.'s birth. As required by statute, Dyer approved placement of M.A. with the Blacks only after they signed an at-risk placement form. The form explicitly stated that "in the event the birth father comes forward, or asse[r]ts his interest in the subject child, even after the time of placement, the State of Alabama may require the undersigned to return the child to the State of Nebraska for further determination on the rights of the putative father." Nebraska's statutes require the birth mother's attorney or adoption agency, not the State, to notify the biological father of a proposed adoption. More important, these statutes specifically permit the State to approve out-of-state placement with prospective adoptive parents without the biological father's consent or notification if the prospective adoptive parents have signed an at-risk placement form.

Contrary to Ashby's claims, the State had no obligation under any of the paternity statutes or the ICPC to confirm that Ashby consented to the adoption before allowing M.A. to leave the state. We agree that the State, as a sending agency, was required to ensure ICPC compliance before allowing M.A. to leave Nebraska.[32] But nothing in the ICPC requires the State to ensure that a possible biological father has consented to an adoption or has not claimed paternity before approving a child's placement in a prospective adoptive home.

[8] Ashby contends that an at-risk placement form provides an inadequate substitute for Ashby's notice of, or consent to, the adoption. To reach that conclusion, Ashby would have us read into § 43-104.15 a different requirement for out-of-state at-risk placements than for in-state at-risk placements. But in the absence of ambiguity or constitutional defect, courts must

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[31] *Id.*

[32] § 43-1101, art. III(a) and (b).

give effect to statutes as they are written.[33] And Ashby has not challenged the constitutionality of § 43-104.15 or claimed that it is ambiguous. Section 43-104.15 permitted the at-risk placement with the Blacks, and we find nothing in either the ICPC or Nebraska law that placed a duty on the State to confirm that Ashby had first consented to the adoption.

Ashby also argues, however, that when reading Nebraska's adoption laws in pari materia with the paternity statutes, the statutes require consent for the adoption before making an out-of-state placement. He points to Neb. Rev. Stat. § 43-104(1) (Reissue 2004), which states "no adoption shall be decreed unless written consents" are executed by "both the mother and father of a child born out of wedlock." Here, however, the issue focuses on the *placement* of a child in another state. Ashby's argument confuses "adoption" with "placement." Placements occur before an adoption, and Nebraska's statutes permit both in-state and out-of-state placements without prior consent.

[9] In assisting this out-of-state private adoption, the State fulfilled its obligations. Despite Ashby's arguments to the contrary, the State did not have a duty to confirm that Ashby consented to the adoption before allowing the Blacks to remove M.A. from Nebraska. Absent a duty, a negligence claim fails.[34] The district court did not err in granting summary judgment to the State.

§ 1983 Claim Against Dyer

In addition to his state court lawsuit, Ashby filed a nearly identical lawsuit against Dyer and the other defendants in federal court. In the federal lawsuit, Ashby alleged that Dyer, acting under the color of state law, conspired with the other defendants to deprive Ashby of due process by removing his son from Nebraska to Alabama for adoption.

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[33] See, *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003); *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002).

[34] See *Fickle, supra* note 16.

The federal court dismissed the lawsuit in April 2006. In evaluating Ashby's § 1983 claim, the federal court held that because Ashby sought only monetary damages from Dyer, his lawsuit against her in her official capacity was barred by the 11th Amendment.[35] The federal court also recognized that Dyer had failed to affirmatively allege a qualified immunity defense and addressed the claims against her in her individual capacity on the merits.

The federal court then identified what a plaintiff must show for a § 1983 claim based on civil conspiracy, and it concluded Ashby's allegations failed to state a claim. Ashby claimed only that Dyer had allowed M.A. to leave the state without confirming whether Ashby's paternity had been determined. And he claimed that Dyer did not rescind her permission for M.A. to leave the state once Ashby filed his notice of intent to claim paternity. The federal court held that Ashby's allegations regarding Dyer's actions amounted only to negligence, which cannot form the basis of a constitutional tort claim.[36] Furthermore, the federal court found that even if Dyer knew that Ashby was claiming paternity, Ashby did not allege that she shared this information with the other defendants.

In this appeal, Ashby brought a § 1983 claim against Dyer in her official and individual capacities.[37] We agree with the federal district court that sovereign immunity bars Ashby's § 1983 claim against Dyer, in her official capacity, because he sought only money damages. We conclude that the Lancaster County District Court properly dismissed the § 1983 claim against Dyer, in her official capacity, based upon res judicata.

[10] Regarding Ashby's claim against Dyer in her individual capacity, he contends, restated, that Dyer violated his constitutionally protected due process rights. He argues that Dyer allowed M.A. to leave the state without confirming whether

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[35] *Ashby, supra* note 8.

[36] *Id.*, citing *Davis v. Fulton County, Ark.*, 90 F.3d 1346 (8th Cir. 1996). See, also, *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

[37] See *Holmstedt, supra* note 11.

Ashby had consented to the adoption. In a suit under § 1983, the first inquiry is whether the plaintiff has been deprived of a right secured by the Constitution and laws within the meaning of § 1983.[38] As the federal court did, we will assume that Ashby has articulated a parental right that the federal court would protect. Section 1983, however, imposes liability for violations of rights protected by the federal Constitution, not for violations of duties of care arising out of tort law.[39] Here, as in the federal case, Ashby's allegations against Dyer show, at most, only negligent conduct. And the record fails to show a deliberate indifference to Ashby's constitutional rights. In both cases, he claimed that Dyer failed to determine whether he consented to the adoption before approving M.A.'s placement with the Blacks. We, like the federal district court, conclude that allegations of negligence are insufficient to state a constitutional tort claim and that the district court properly dismissed Ashby's § 1983 claim against Dyer in her individual capacity.[40]

[11] We note, however, that the Lancaster County District Court dismissed the § 1983 claim against Dyer, in her individual capacity, because Ashby failed to show that she had acted in her individual capacity. The court's holding, however, confuses a state's sovereign immunity with a state official's qualified immunity. When a plaintiff sues a state official, a court must first analyze whether the plaintiff has sued the official in his or her official or individual capacity for purposes of state sovereign immunity.[41] If the court determines that a state official has been sued in his or her individual capacity, the court can address the official's qualified immunity from civil damages. That inquiry focuses not on whether the official has acted in his or her individual capacity, but on whether the official's conduct violates clearly established statutory or constitutional rights of which a reasonable person would have

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[38] *West v. Atkins*, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988).

[39] See, *Daniels, supra* note 36; 15 Am. Jur. 2d *Civil Rights* § 69 (2000).

[40] See *Daniels, supra* note 36.

[41] See *Holmstedt, supra* note 11.

known.[42] Here, Ashby sued Dyer in her individual capacity, so whether she acted in her individual capacity is irrelevant. Thus, the court's reasoning was incorrect; but again, we will not reverse a proper result merely because the court's decision rested on the wrong reason.[43]

Civil Conspiracy Claim Against Kilmer, the Blacks, Whitmire, Washburn, and Erickson & Sederstrom

Ashby asserts that Kilmer, the Blacks, Whitmire, Washburn, and Erickson & Sederstrom engaged in a conspiracy to intentionally interfere and deprive Ashby of his right to have custody of M.A. and to establish a parental relationship with him. We do not include Whitmire in our discussion because, as addressed below, the district court lacked personal jurisdiction over him.

[12-14] A civil conspiracy is a combination of two or more persons acting in concert to accomplish an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.[44] A party does not have to prove a civil conspiracy by direct evidence of the acts charged. It may be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purpose to be accomplished.[45] It is, however, necessary to prove the existence of at least an implied agreement to establish conspiracy.[46] Furthermore, a civil conspiracy is only actionable if the alleged conspirators actually committed some underlying misconduct.[47] And a conspiracy is not a separate and independent tort in itself; rather, it depends upon

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[42] See, *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007); *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999), *disapproved on other grounds, Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004).

[43] See, *In re Trust Created by Cease*, 267 Neb. 753, 677 N.W.2d 495 (2004); *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002).

[44] See, *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009); *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 570 N.W.2d 813 (1997).

[45] See *Four R Cattle Co., supra* note 44.

[46] See *id.*

[47] *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008).

the existence of an underlying tort.[48] So without such underlying tort, there can be no cause of action for a conspiracy to commit the tort.[49]

Applying these principles, we turn to Ashby's allegations regarding the underlying tort—intentional interference with his parental rights. Ashby contends that Nebraska recognizes a cause of action for the intentional interference with a parent's right to custody. Specifically, that "the defendants could be held liable for entering into a conspiracy with the goal of interfering with Ashby's right to establish a relationship with, and custody of, his child."[50]

We have held that parents may assert a cause of action against a third party who wrongfully deprives them of their parental rights.[51] In *Tavlinsky v. Ringling Bros. Circus*,[52] the defendants operated a traveling circus that employed the plaintiffs' 15-year-old son without their permission. The defendants' knowledge of the son's minor status and failure to obtain the parents' consent for employing him were sufficient to establish their liability. But we remanded the cause to determine if the parents had ratified the employment, and thereby waived the claim, by accepting money from the son's employment with the defendants.

Also, Neb. Rev. Stat. § 28-316 (Reissue 2008) provides a criminal sanction for interfering with a legal guardian's custody of a minor child. Similarly, the Restatement (Second) of Torts § 700[53] recognizes that a parent legally entitled to a child's custody may recover against a person who deprives him or her of custody. Under both *Tavlinsky* and § 700 of the Restatement, however, the parent seeking relief must show that he or she is legally entitled to custody.

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[48] *Id.*

[49] *Hatcher v. Bellevue Vol. Fire Dept.*, 262 Neb. 23, 628 N.W.2d 685 (2001).

[50] Brief for appellants at 38.

[51] *Tavlinsky v. Ringling Bros. Circus*, 113 Neb. 632, 204 N.W. 388 (1925).

[52] *Id.*

[53] Restatement (Second) of Torts § 700 (1977).

However, remember that Ashby was not entitled to custody before April 21, 2004, when he received a custody order from the Madison County Court. But Ashby's allegations focus on the defendants' actions before he obtained the custody order. And after April 21, the record shows that the Blacks successfully exercised their right to appeal.[54] Ashby was a party to the appeal, but because Ashby's Nebraska custody order did not comply with the requirements of Alabama's or Nebraska's Uniform Child Custody Jurisdiction and Enforcement Act[55] or the Parental Kidnapping Prevention Act of 1980,[56] the Supreme Court of Alabama refused to enforce the Nebraska custody order.[57] Contrary to Ashby's allegations, the defendants, in exercising their lawful right to appeal, were not wrongfully depriving Ashby of custody. And his allegations do not support a claim that the defendants' actions after April 21 showed an implied agreement to deprive him of his parental rights. In sum, the defendants did not wrongfully interfere with Ashby's ability to establish and assert his parental rights.

Ashby's allegations are more accurately characterized as attempting to state a claim for interference with his right to establish paternity and obtain custody. Based on the language of § 700,[58] however, we do not believe that a biological father can assert a claim for intentional interference with his parental rights before gaining a custody order.[59] Because Ashby cannot allege that he was legally entitled to custody at the time of the alleged interference, he cannot allege facts showing this required element of intentional interference with a parental relationship. And because he cannot allege facts that would satisfy the required elements of the tort, he cannot establish

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[54] See *Ex parte D.B. and T.B., supra* note 5.

[55] See, Ala. Code §§ 30-3B-101 to 30-3B-405 (West Cum. Supp. 2009); §§ 43-1226 to 43-1266.

[56] See 28 U.S.C. § 1738A and 42 U.S.C. § 663.

[57] See *Ex parte D.B. and T.B., supra* note 5.

[58] Restatement (Second) of Torts, *supra* note 53.

[59] But see *Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720 (1998).

a conspiracy claim based upon that tort.[60] Moreover, as of March 30, 2004, Ashby was actively litigating in Alabama whether his custody order was, in fact, valid and enforceable.[61] Thus, the district court properly granted summary judgment to Kilmer, the Blacks, Washburn, and Erickson & Sederstrom.

Personal Jurisdiction Over Whitmire

Whitmire, the Blacks' attorney, argues that the district court lacked personal jurisdiction over him because there were insufficient minimum contacts between him and Nebraska. He contends that summoning him to court in Nebraska would offend traditional notions of fair play and substantial justice. Ashby contends that the issue is not properly before us because the district court did not rule on personal jurisdiction and Whitmire did not raise the issue separately through a cross-appeal. But a review of the record shows that Whitmire moved to dismiss for lack of personal jurisdiction and for failure to state a claim for which relief can be granted, and he submitted no evidence at the hearings on the motion. The other defendants all submitted evidence on supporting their motions to dismiss that converted the motions into summary judgments[62]; Whitmire did not.[63] Nor did he seek any affirmative relief or defend on the merits.[64] And we have previously held that a court should determine whether it has personal jurisdiction before considering whether a complaint fails to state a cause of action under Neb. Ct. R. Pldg. § 6-1112(b)(6).[65] Only if the court rejects the jurisdictional objections should it address the objection that the complaint fails to state a claim upon which it can grant relief.[66] So we believe that the district court should have

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[60] *Hatcher, supra* note 49.

[61] See *Ex parte D.B. and T.B., supra* note 5.

[62] See *Nebraska Coalition for Ed. Equity, supra* note 12.

[63] See 5 John P. Lenich, Nebraska Civil Procedure § 11.5 (2008).

[64] See Neb. Rev. Stat. § 25-516.01(2) (Reissue 2008).

[65] *Holmstedt, supra* note 11.

[66] *Id.*

determined whether it had personal jurisdiction over Whitmire before addressing the merits of the case.

[15,16] Personal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions.[67] Before a court can exercise personal jurisdiction over a nonresident defendant, the court must first determine whether the long-arm statute is satisfied.[68] If the long-arm statute is satisfied, the second question is whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.[69]

Our inquiry begins with Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 2008). It extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the federal Constitution permits.[70] So we look to whether a Nebraska court's exercise of jurisdiction over Whitmire would be consistent with due process.[71]

First, we address whether Whitmire had sufficient minimum contacts with Nebraska necessary to satisfy due process.[72] Due process requires that a defendant's minimum contacts with the forum state be such that "'"'maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"'"[73] We look at the quality and type of Whitmire's activities.

[17,18] Depending on the facts of a case, a court can exercise two types of jurisdiction: general personal jurisdiction or specific personal jurisdiction.[74] General personal jurisdiction

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[67] *S.L. v. Steven L.*, 274 Neb. 646, 742 N.W.2d 734 (2007).

[68] See *id.* See, also, *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003).

[69] *Kugler Co., supra* note 68.

[70] *S.L., supra* note 67.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 651-52, 742 N.W.2d at 741.

[74] *Id.*

arises from the defendant's "'"'"'continuous and systematic general business contacts'"'"'" with the forum state.[75] Ashby does not claim that the court had general personal jurisdiction over Whitmire. If the defendant's contacts are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert specific jurisdiction over the defendant, depending on the quality and nature of such contact.[76] Ashby contends that allegations of a civil conspiracy involving Whitmire can support the exercise of specific personal jurisdiction.

In determining conspiracy liability, the actions of one coconspirator are attributable to all coconspirators.[77] So some courts have reasoned that if through one of its members a conspiracy inflicts an actionable wrong in one jurisdiction, the other members should not be allowed to escape being sued there by hiding in another jurisdiction.[78] Under a coconspirator theory of jurisdiction, the actions of one conspirator are attributable to all the coconspirators for assessing jurisdictional contacts.[79]

Ashby alleges that the Blacks, Whitmire's clients and alleged coconspirators, came to Nebraska and absconded with Ashby's son, interfering with Ashby's parental relationship. He contends that although Whitmire never entered Nebraska, because his alleged coconspirators committed acts in furtherance of the conspiracy in Nebraska, he is subject to the jurisdiction of a Nebraska court.

[19] We have not recognized whether a civil conspiracy can support the exercise of personal jurisdiction. Nor are

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[75] *Id.* at 652, 742 N.W.2d at 741.

[76] *Id.*

[77] See *Stillinger & Napier v. Central States Grain Co., Inc.*, 164 Neb. 458, 82 N.W.2d 637 (1957).

[78] See *Stauffacher v. Bennett*, 969 F.2d 455 (7th Cir. 1992) (superseded by Fed. R. Civ. P. 4(k)(2) as stated in *Central States v. Reimer Express World Corp.*, 230 F.3d 934 (7th Cir. 2000)).

[79] See *In re New Motor Vehicles Canadian Export*, 307 F. Supp. 2d 145 (D. Me. 2004).

we inclined to do so at this time. Due process for personal jurisdiction over a nonresident defendant requires that the plaintiff allege specific acts by the defendant which establish that the defendant had the necessary minimum contacts before a Nebraska court can exercise jurisdiction over a person.[80] Without minimum contacts, a Nebraska court cannot exercise jurisdiction over Whitmire without violating his right to due process. The difficulty with establishing personal jurisdiction based on an alleged conspiracy is that it merges the jurisdiction issue with the merits of the case. As noted by the Seventh Circuit:

> It would be more than awkward to postpone the jurisdictional issue to the merits; it would dissolve the issue. If the plaintiff won on the merits, the jurisdictional issue would be automatically resolved in his favor, while if he lost the defendant would waive the defense of personal jurisdiction and take the judgment for its preclusive value in subsequent suits. But to resolve the jurisdictional issue in advance would require . . . an evidentiary hearing as extensive as, and in fact duplicative of, the trial on the merits—either that or permit a nonresident to be dragged into court on mere allegations.[81]

Ashby's allegations regarding Whitmire's involvement in the alleged conspiracy are insufficient to show minimal contacts. He focuses only on acts that took place in Alabama. Ashby alleges that the Blacks' removal of M.A. from Nebraska is the central act that furthered the conspiracy. But regarding Whitmire's actions, Ashby claims only that Whitmire made false representations to, and withheld information from, the Alabama courts regarding M.A.'s paternity. He makes no allegations regarding Whitmire's involvement with any of the proceedings in Nebraska. And based upon these allegations, we do not believe Whitmire's connection to Nebraska rises to the level that he should have anticipated being haled

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[80] See *S.L., supra* note 67. See, also, *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

[81] *Stauffacher, supra* note 78, 969 F.2d at 459.

into court here. To hold otherwise would, we believe, offend notions of fair play and substantial justice, and would violate due process.

Although the district court failed to make this determination, we conclude the record is sufficient to show that the court improperly exercised personal jurisdiction over Whitmire.

Discovery Arguments

Because the court lacked personal jurisdiction, Ashby's assignment of error regarding his motion to compel Whitmire to answer discovery questions is not before us. And while Ashby also argues that the Blacks and Erickson & Sederstrom's designated attorney should be compelled to answer questions regarding both Whitmire's representation of the Blacks and Washburn's representation of Kilmer, we do not consider issues which Ashby argued but has not assigned.[82]

CONCLUSION

We conclude that the district court lacked jurisdiction over Whitmire and that the district court properly dismissed Ashby's claims against the remaining defendants.

Affirmed.

Wright, J., not participating.

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[82] *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009); *Agena v. Lancaster Cty. Bd. of Equal.*, 276 Neb. 851, 758 N.W.2d 363 (2008).

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. David L. Nich, Jr., respondent.

780 N.W.2d 638

Filed March 5, 2010. No. S-09-593.

Original action. Judgment of suspension.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

PER CURIAM.

INTRODUCTION

The office of the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent, David L. Nich, Jr. After a formal hearing, the referee concluded that Nich had violated the Nebraska Rules of Professional Conduct and his oath of office as an attorney, and recommended a suspension of 6 months. Neither party filed exceptions to the referee's report, and the Counsel for Discipline moved for judgment on the pleadings under the Nebraska Rules of Professional Conduct, see Neb. Ct. R. § 3-310(L). We grant the motion for judgment on the pleadings and impose discipline as indicated below.

STATEMENT OF FACTS

On June 16, 2009, formal charges were filed by the office of the Counsel for Discipline against Nich, alleging that Nich had violated the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communications), 3-501.16 (declining or terminating representation), 3-503.2 (expediting litigation), and 3-508.1 (bar admission and disciplinary matters).

A referee's hearing was held on October 20, 2009. Nich, acting pro se, testified at the hearing. In addition, two exhibits were introduced. The record in this case reveals the following facts: Nich was admitted to the practice of law in the State of Nebraska on September 20, 2000. He has been in private practice since the date of his admission.

The formal charges filed against Nich on June 16, 2009, contain two counts. Both pertain to Nich's representation of two clients in domestic relations cases.

Count I pertains to a client, Cheryl Jones. In February 2008, Nich and his partner were retained by Jones to represent her in a marriage dissolution action filed by Jones' husband. Temporary child support was awarded to Jones, but in the fall of 2008, Jones learned that her son's Social Security benefits would be adversely affected based on the amount of child

support awarded, so she asked Nich to seek a modification of the child support award.

On October 24, 2008, Nich filed a motion for modification, and an agreement was reached with opposing counsel on November 21. The judge assigned to the case instructed Nich to prepare the appropriate order memorializing the agreement. Nich did not prepare or file the order as he had been instructed to do by the court. Jones made numerous attempts to contact Nich by telephone and e-mail to check on the status of the amended order, but was unable to speak to him. Finally, Jones was forced to hire new counsel and filed her grievance with the Counsel for Discipline.

Count II in the formal charges pertained to another client, Joy Budin. On August 5, 2008, Nich was retained by Budin to represent her in divorce proceedings. During the initial meeting, Nich collected needed information and said that he would prepare documents for Budin's signature and that they would meet again on August 12. Nich failed to meet with Budin on August 12, due to his alleged car trouble. Budin spent the day trying to speak to Nich and finally was able to speak to him late in the day on August 12. Nich told Budin that he would send her the paperwork for her to sign. By August 18, Budin had not received the paperwork, so she again called Nich to inquire about her case. Nich said he thought he had mailed it to her but would do so again. Budin received the documents a few days later, signed them, and returned them immediately to Nich.

Hearing nothing further, Budin called Nich again on September 5, 2008. Nich told Budin her case had been filed. On September 8, while applying for a protection order, Budin was told by court personnel that her case had not been filed. Budin spent the rest of the day trying to contact Nich but was not able to talk to him until September 9, when Nich assured Budin that her case had been, in fact, filed by him. Nich promised to fax Budin copies of the file-stamped documents but did not do so that day.

Budin called and left a message for Nich that he was to do nothing further until she could speak directly to him. On

September 15, 2008, Budin called Nich's office and he provided Budin a case number indicating that her case had been filed with the court. She then called the court and was told that the case number was for a case filed by Nich, but it was not her case. Shortly thereafter, someone from the clerk's office called her back and said that the clerk's office had just received an envelope from Nich with her documents in it and that the envelope was postmarked September 12. Budin then called Nich and demanded her file and a refund of her retainer. Nich said he would compute his fee, then mail her a refund.

On September 24, 2008, Budin called Nich's office to inquire about the current status of the refund. Nich said he would get it to her by September 26. On October 2, Budin e-mailed Nich, again inquiring into the status of the refund, and he did not respond.

In late October 2008, Budin filed with the Counsel for Discipline her grievance, which was then sent by certified mail to Nich on October 30 and served on him on November 3. On December 12, Nich advised the Assistant Counsel for Discipline that he had finished his written response and that he was prepared to send the refund to Budin and would do so.

On January 8, 2009, Budin notified the Counsel for Discipline that she had not received a letter from Nich or a refund check.

In the answer filed by Nich with the Supreme Court on August 20, 2009, Nich admitted the factual basis of all paragraphs and all counts as outlined in the complaint. At the referee hearing, Nich testified that he had served in the U.S. Army for approximately 5 years and was medically discharged after being wounded in Panama. Nich testified that he clerked for 2 years with an Omaha attorney before being admitted to practice law and was a paralegal for 8 years prior to that.

In his testimony, Nich said he had been in private practice since he was admitted to the bar in 2000. From 2000 to 2006, he was a sole practitioner, and from 2006 to the present, he had practiced with one or two other attorneys, mainly doing criminal law work.

In addition to practicing law, Nich also teaches in the paralegal program at Metropolitan Community College in Omaha. He handles many cases for clients on a pro bono basis, relying on his military pension and his income from teaching at the college.

With regard to the allegations concerning count I, Nich testified that the case was really his partner's case and that the messages should have been given to her. He said it was a mixup in his office for which he accepted full responsibility. He has made changes in his office protocol, in that telephone messages are now logged or recorded and sent to the client's file. The receptionist now makes sure that all calls are returned.

With respect to the allegations of count II, Nich blamed many of the communication problems on his former receptionist. He also said that Budin did not pay him the full retainer initially and that when he started issuing bills to Budin, she became combative. He also said that whenever she called him, she was on a speaker telephone with another unknown male in the background. When Nich would request that Budin take him off speaker telephone, she would refuse to do that. Nich then informed her that he would be glad to speak to her face-to-face or one-on-one but was not willing to speak to her on the speaker telephone with the unidentified male listening in the background.

Nich further testified that in his written retainer agreement with Budin, the terms of the agreement stated that the retainer was earned upon the commencement of work, so he transferred funds directly into his general account once he had commenced working on the case. He said he held the letter and refund check "'for five days'" before mailing it, "maybe even a week." In actuality, it was several months later before he sent it, because, he stated, he did not want to deal with this "'nasty client.'"

Nich further testified that he did not file Budin's petition for dissolution, because the full retainer had not been paid by her. So, even though it was signed on August 21, 2008, he did not file it until September 15, and his request for the full retainer still had not been complied with by that date.

With regard to mitigating factors, Nich testified that in 2006, when the complaints started to be received by the Counsel for Discipline's office, he had suffered a heart attack following treatment for cancer in 2004 and 2005. He also said that he went through a divorce in 2005 and had a falling out with an attorney he had been sharing office space with in Papillion. Nich says he does a lot of pro bono work through the Nebraska State Bar Association's Volunteer Lawyers Project and handles many criminal cases for little or no fee.

With regard to aggravating circumstances, the Counsel for Discipline offered exhibits 1 and 2. Each exhibit showed a private reprimand. Exhibit 1 is a copy of a private reprimand issued to Nich by the Committee on Inquiry of the Fourth Disciplinary District on February 4, 2006. Attached to exhibit 1 is a copy of the complaint that had been filed against Nich on December 7, 2005. Nich was privately reprimanded for making inappropriate statements against a Lancaster County District Court judge. In particular, the statements were made in connection with a prisoner lawsuit in which Nich represented the plaintiffs. In that case, Nich filed pleadings moving to alter or amend an unfavorable ruling and, in the pleadings, employed numerous personal attacks on the competence of the trial judge presiding in the matter.

Exhibit 2 was another private reprimand issued by the Committee on Inquiry of the Fourth Disciplinary District on January 16, 2009, pertaining to a complaint made by a former client, Johnny Thomas. A copy of that complaint was not attached to exhibit 2, but Nich testified that Thomas had lied during a deposition and that Nich knew Thomas had lied. Rather than trying to give Thomas a chance to rehabilitate himself, Nich terminated the deposition before it was finished, and Thomas fired him immediately following that termination of the deposition. Thomas then filed a grievance with the Counsel for Discipline. In its decision of January 16, the Committee on Inquiry found that there was clear and convincing evidence that Nich had violated Neb. Ct. R. of Prof. Cond. §§ 3-501.6(a) and 3-503.3(a)(3), and Nich was "'strongly reprimanded.'"

The referee found that exhibits 1 and 2, which were offered and received into evidence without objection, were aggravating circumstances in this matter.

The referee issued his report and recommendation on December 21, 2009. In his report, the referee found that Nich had neglected legal matters entrusted to him by Jones and Budin and concluded that Nich had violated his oath of office as an attorney licensed to practice law in the State of Nebraska as provided by Neb. Rev. Stat. § 7-104 (Reissue 2007) and had violated the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.1, 3-501.3, 3-501.4, 3-501.16, 3-503.2, and 3-508.1. Furthermore, the referee stated that Nich had been a member of the bar since September 20, 2000, and had now faced discipline three times. The referee noted that he found Nich's conduct in count II particularly troubling, given the untruthful statements Nich made to his client, Budin, and to the Counsel for Discipline's office with regard to refunding Budin's retainer, stating that additional charges could have been brought for this conduct.

In reviewing the relevant case law, the referee concluded that this case was similar to *State ex rel. Counsel for Dis. v. Wadman*, 275 Neb. 357, 746 N.W.2d 681 (2008), and *State ex rel. Counsel for Dis. v. Peters*, 277 Neb. 343, 762 N.W.2d 294 (2009), where the attorneys had neglected multiple matters. In both those cases, this court imposed discipline of a 6-month suspension. Applying *Wadman* and *Peters* to the case at hand, the referee recommended that the Supreme Court suspend Nich from the practice of law for a period of 6 months. The referee further recommended that at such time that Nich regains his license to practice law, he should be put under a period of probation and strictly monitored by another licensed Nebraska attorney for a period of not less than 2 years following reinstatement. Neither party filed written exceptions to the referee's report. On December 31, 2009, the Counsel for Discipline filed a motion for judgment on the pleadings. Nich did not file a response to this motion.

ANALYSIS

A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Bouda*, 278 Neb. 380, 770 N.W.2d 648 (2009). To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id.*

As noted, neither party filed any written exceptions to the referee's report. Pursuant to § 3-310(L), the Counsel for Discipline filed a motion for judgment on the pleadings. When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive. See *State ex rel. Counsel for Dis. v. Bouda, supra.* Based upon the undisputed findings of fact in the referee's report, which we consider to be final and conclusive, we conclude that the formal charges are supported by clear and convincing evidence. We specifically conclude that Nich has violated his oath of office as an attorney and the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.1, 3-501.3, 3-501.4, 3-501.16, 3-503.2, and 3-508.1. Accordingly, we grant the Counsel for Discipline's motion for judgment on the pleadings.

We have stated that the basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Wickenkamp*, 277 Neb. 16, 759 N.W.2d 492 (2009). Neb. Ct. R. § 3-304 provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
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> (1) Disbarment by the Court; or
>
> (2) Suspension by the Court; or
>
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
>
> (4) Censure and reprimand by the Court; or
>
> (5) Temporary suspension by the Court; or

(6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.

(B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

We have stated that each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Wickenkamp, supra*. For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Id.* The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors. *Id.* We have considered prior reprimands as aggravators. *Id.* Further, cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions. *State ex rel. Counsel for Dis. v. Wintroub*, 277 Neb. 787, 765 N.W.2d 482 (2009).

In this case, we have considered the referee's report and recommendation, the findings of which have been established by clear and convincing evidence, and the applicable law. The evidence in the present case establishes, among other facts, that Nich repeatedly failed to effectively communicate with his clients and failed to make the proper court filings to progress his clients' cases. The record further shows that Nich was dishonest and misrepresented to Budin and the Counsel for Discipline information regarding his handling of the refunding of Budin's retainer.

As to mitigating factors, we note that Nich was experiencing personal problems prior to and at the time grievances against him were being investigated by the Counsel for Discipline and that he cooperated with the Counsel for Discipline during the disciplinary proceedings. However, as to aggravating factors, we note that the Counsel for Discipline provided evidence of two prior private reprimands, which indicate cumulative acts of misconduct and support a more severe sanction.

We have considered the record, the findings which have been established by clear and convincing evidence, and the

applicable law. Based upon our consideration of the record in this case, this court finds that Nich should be and hereby is suspended from the practice of law for a period of 6 months, effective immediately. Nich shall comply with Neb. Ct. R. § 3-316 and, upon failure to do so, shall be subject to a punishment for contempt of this court. At the end of the 6-month suspension period, Nich may apply to be reinstated to the practice of law, provided that Nich has demonstrated his compliance with § 3-316 and further provided that the Counsel for Discipline has not notified this court that Nich has violated any disciplinary rule during his suspension. Upon reinstatement, Nich shall be placed on probation and supervised for a period of 2 years by another attorney admitted to the Nebraska bar. We also direct Nich to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and § 3-310(P) and Neb. Ct. R. § 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

CONCLUSION

The Counsel for Discipline's motion for judgment on the pleadings is sustained. We adopt the referee's findings of fact and conclude that Nich has violated the Nebraska Rules of Professional Conduct and his oath of office as an attorney.

It is the judgment of this court that Nich should be and hereby is suspended from the practice of law for 6 months, effective immediately, and that upon reinstatement to the bar, Nich shall be supervised for a period of 2 years by an attorney licensed to practice law in the State of Nebraska.

JUDGMENT OF SUSPENSION.

NEBRASKA PUBLIC ADVOCATE, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE AND CROSS-APPELLANT, AND SOURCEGAS DISTRIBUTION LLC AND KNIGHT, INC., FORMERLY KNOWN AS KINDER MORGAN, INC., APPELLANTS AND CROSS-APPELLEES.

779 N.W.2d 328

Filed March 5, 2010. No. S-09-600.

1. **Administrative Law: Judgments: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record.
2. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
3. **Judgments: Collateral Attack.** When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.
4. **Judgments: Jurisdiction: Collateral Attack.** When the court has jurisdiction over the person and subject matter, a party to the proceeding will be bound by the judgment in the case when collaterally attacking it, even though the judgment was irregularly or erroneously entered.
5. **Judgments: Collateral Attack.** Until a judgment is rendered void in a proper proceeding and set aside, it remains valid and binding for all purposes and cannot be collaterally attacked.
6. **Res Judicata.** Res judicata extends not only to matters actually determined in a prior action, but also to other matters which could properly have been raised and determined therein.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Stephen M. Bruckner and Russell A. Westerhold, of Fraser Stryker, P.C., L.L.O., and Mark A. Fahleson and Troy S. Kirk, of Rembolt Ludtke, L.L.P., for appellant SourceGas Distribution LLC.

Steven G. Seglin, of Crosby Guenzel, L.L.P., for appellant Knight, Inc.

Roger P. Cox and Jack L. Shultz, of Harding & Schultz, P.C., L.L.O., for appellee Nebraska Public Advocate.

Jon Bruning, Attorney General, and L. Jay Bartel for appellee Nebraska Public Service Commission.

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

HEAVICAN, C.J.

INTRODUCTION

SourceGas Distribution LLC (SourceGas) and Knight, Inc., formerly known as Kinder Morgan, Inc. (KM), appeal the decision of the Lancaster County District Court. Both the Nebraska Public Service Commission (Commission) and the Nebraska Public Advocate (Public Advocate) cross-appeal. We affirm in part, and in part reverse and remand with directions.

FACTUAL BACKGROUND

On June 2, 2006, KM filed an application with the Commission requesting a general increase in its annual revenue requirement. In other words, KM asked for permission to raise the rates charged to its customers. The Public Advocate, an entity created by the Nebraska Legislature and appointed by the Commission to represent the interests of Nebraska citizens in matters such as the one at issue in this case,[1] intervened. At the time KM filed the application, KM was a jurisdictional utility under Nebraska law. On or about April 1, 2007, KM sold its retail distribution assets and transferred its Nebraska certificate of convenience to SourceGas. Since that time, SourceGas has been a jurisdictional utility within the meaning of state law.

Extensive discovery was had by the Public Advocate concerning this rate case. On September 1, 2006, while its application was still under consideration, KM properly placed into effect, subject to refund, interim rates.

On November 28, 2006, KM and the Public Advocate entered into a settlement regarding the rate application. That settlement entitled KM to recover an increase of $8.25 million in its annual revenue requirement beginning January 1, 2007. The Public Advocate agreed that the rates in the settlement

[1] Neb. Rev. Stat. § 66-1830 (Reissue 2003).

were "just and reasonable," that KM's interim rates were "established at an overall revenue level that is less than the revenue increase" set forth in the settlement, and that "no refund [was] required." The settlement was silent as to whether KM would be required to prorate its billing when implementing the new rates.

Approximately 1 month later, on December 27, 2006, the Commission approved the settlement. That order specifically concluded that "no refund [was] due" because "the interim distribution rates paid by customers were lower than the settled and approved rates" and "[KM] did not earn more than [it] should have during the interim rate period." This order was also silent as to whether KM was required to prorate its billing. There was no appeal taken from this order. The order became final and the time to appeal ran on January 26, 2007.

In the meantime, however, on January 5, 2007, the director of the Commission's natural gas department e-mailed KM, inquiring as to whether KM would be prorating its billing when implementing the new rates. A KM representative replied to the Commission on January 9, stating that KM would not be doing so. The representative explained that such was "consistent with [KM's] tariff, past practices and implementation of rates, as they have changed over time, including the implementation of interim rates back on September 1[, 2006] in [the] rate proceeding." The Public Advocate received copies of both the January 5 and January 9 e-mails.

On July 6, 2007, the Public Advocate filed a formal complaint with the Commission. In that complaint, the Public Advocate contended that KM failed to prorate when implementing its interim and final rates in the 2006 rate case. According to the Public Advocate, the effect of the failure to prorate billing was that depending upon the customer's billing cycle, a customer might have been billed at the new rates, which were effective January 1, 2007, for gas service rendered prior to that date. The Public Advocate requested that KM be required to provide refunds to customers who were charged in this manner.

The Commission dismissed the Public Advocate's complaint, contending that it was an impermissible collateral attack on

the December 27, 2006, order approving the settlement. The Commission concluded:

> The Formal Complaint . . . was not filed by the [Public Advocate] as a direct challenge to the Commission's final Rate Case Order . . . . The [Public Advocate] has tried to make a distinction between the . . . Formal Complaint and the . . . rate case proceeding. [It] asserts the issue is one of the legality of the method employed by [KM] to implement interim and final rates under the provisions of the [State Natural Gas Regulation Act]. However, the practical effect of the Formal Complaint is to have this Commission, outside of the proceedings in the . . . rate proceeding, go back and re-examine the Stipulation and Settlement Agreement, and the actions of [KM] in relation to the . . . rate proceeding and order.
>
> Neither the [State Natural Gas Regulation Act], Commission rules and regulations, nor the . . . Rate Case Order specifically requires proration to be used when a utility implements a rate change as the [Public Advocate] suggests. Reasonable interpretations of the [State Natural Gas Regulation Act] provisions could differ on the issue of proration and our rules and regulations and [the] Rate Case Order are silent on the implementation method required for the rate changes. In the absence of a specific rule or order, such a requirement would need to be established in the context of the rate case proceeding. For this Commission to make the determinations sought by the [Public Advocate] in the above-captioned proceeding, we would have to reconsider and re-scrutinize the . . . rate case proceeding and all the issues involved with that proceeding. To do so, in our opinion, would be a collateral attack of an earlier order.

The Public Advocate appealed to the Lancaster County District Court, which concluded that the Public Advocate's complaint was a collateral attack with respect to the interim rates, as the settlement notes that no refund was needed. But as to the final rates, the district court found no collateral attack:

> The court notes that the Settlement and Rate Case Order does not include any specific language regarding the method of implementing the final rates that became effective on January 1, 2007. In the absence of a specific agreement, the implementation of final rates is governed by [the State Natural Gas Regulation Act] and other applicable Nebraska law. . . . Although the analysis may necessitate reference to the terms and conditions of the Settlement and Rate Case Order, it does not require the Commission to modify, second guess, or evaluate the legality of the terms of either of those documents.

The court then remanded the case to the Commission for a determination of whether KM was required to prorate its billing.

ASSIGNMENTS OF ERROR

On appeal, SourceGas assigns that the district court erred in (1) determining that the Public Advocate's complaint was not a collateral attack on the order ending the 2006 rate case; (2) failing to affirm the Commission's dismissal because Nebraska law does not require the prorating of billing upon the implementation of rate changes; (3) failing to affirm the Commission's dismissal because KM's Commission-approved tariff required nonprorated implementation; (4) failing to affirm the Commission's dismissal because the Commission lacks the authority to grant the retroactive relief sought; and (5) failing to determine that KM, now known as Knight, was responsible for any refunds that might be owed to customers. Knight assigns that the district court erred in failing to determine the Commission lacked subject matter jurisdiction over it.

On cross-appeal, the Commission assigns that the district court erred in not finding the Public Advocate's complaint to be an impermissible collateral attack. Also on cross-appeal, the Public Advocate assigns that the district court erred in (1) affirming the Commission's conclusion that the complaint as to the interim rates was a collateral attack and (2) failing to conclude that KM could not charge interim rates for service rendered prior to September 1, 2006.

STANDARD OF REVIEW

[1] In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record.[2]

[2] An appellate court reviews questions of law independently of the lower court's conclusion.[3]

ANALYSIS

Impermissible Collateral Attack.

In its first assignment of error, SourceGas argues that the district court erred in reversing the decision of the Commission dismissing the Public Advocate's complaint. SourceGas contends that the Public Advocate's complaint was an impermissible collateral attack on the 2006 rate case and should be dismissed.

[3-5] When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.[4] When the court has jurisdiction over the person and subject matter, a party to the proceeding will be bound by the judgment in the case when collaterally attacking it, even though the judgment was irregularly or erroneously entered.[5] Until such judgment is rendered void in a proper proceeding and set aside, it remains valid and binding for all purposes and cannot be collaterally attacked.[6]

In order to resolve the question of whether the Public Advocate's formal complaint was an impermissible collateral attack, this court must determine whether the issue of prorated billing upon implementation of a rate change is negotiable in a rate case. If the issue was negotiable, the Public Advocate could have raised it, but failed to raise it, at the time of the

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[2] Neb. Rev. Stat. § 84-918(3) (Reissue 2008).

[3] *R & D Properties v. Altech Constr. Co., ante* p. 74, 776 N.W.2d 493 (2009).

[4] *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006).

[5] *Id.*

[6] *Id.*

rate case and is now precluded from bringing this action. The resolution of this question requires an examination of the State Natural Gas Regulation Act[7] and relevant Commission rules and regulations, and it is a question of law, which this court reviews de novo.

The Public Advocate directs us to several statutes and regulations in support of the argument that prorated billing is required by the State Natural Gas Regulation Act and therefore non-negotiable. In particular, the Public Advocate suggests that charging different customers different rates for the same gas service is a violation of § 66-1825(1), which requires rates to be "just and reasonable," and § 66-1825(2), which further prohibits a utility from "grant[ing] any unreasonable preference or advantage to any person or subject[ing] any person to any unreasonable prejudice or disadvantage." The Public Advocate maintains that KM's charging different rates based upon a billing cycle advantaged some customers while disadvantaging others.

The Public Advocate further suggests that § 66-1838(10)(b) does not permit rates to be "placed into effect" until 90 days after the adoption of final rates and that such "placed into effect" provision means those rates cannot be charged for service rendered prior to that time. The Public Advocate also notes that the Commission's own regulations with regard to billing state that "'[b]ills will be rendered monthly at the rates shown in the Company's tariff'"[8] and that the rates at issue do not change until the date set in the rate order case. The Public Advocate further contends that the settlement between it and KM specifically indicated that the final rates would not become effective until the date in the settlement, January 1, 2007. Other than the language of the statute and the regulation, the Public Advocate directs us to no authority in support of its argument.

We are not persuaded by the Public Advocate's argument. As was noted by the Commission, none of the statutes or

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[7] Neb. Rev. Stat. §§ 66-1801 to 66-1857 (Reissue 2003).

[8] Brief for appellee Public Advocate at 22. See 291 Neb. Admin. Code, ch. 9, § 015.01 (2006).

regulations to which the Public Advocate directs us evinces a clear indication that a utility company, upon implementing a rate change, is required to prorate its billing. Nor is there any specific mention of such a requirement in the State Natural Gas Regulation Act or in any of the Commission's regulations.

The crux of the Public Advocate's argument, as noted above, is that under § 66-1838(10)(b), a rate cannot be charged for service rendered prior to the time that a rate is "placed into effect." However, we find that this language is susceptible to differing interpretations. We agree with SourceGas that the "placed into effect" language of § 66-1838(10)(b) could also mean simply that the rate in effect at the time of billing is the rate to be charged.

Nor do we agree with the Public Advocate's assertion that charging certain customers different rates violates the requirement of "just and reasonable"[9] rates and that in being so charged, certain customers are "grant[ed an] . . . unreasonable preference or advantage."[10] We do recognize that the overarching basis of the Public Advocate's complaint in this case is that KM's customers should be treated equitably and that the failure to prorate billing may result in the appearance of some customers being treated differently from others. While the Public Advocate's goal is an admirable one, we note that prorated billing is also imprecise and can result in the differing treatment of individual customers.

The amount due for gas service is determined by a reading of a gas meter. Such reading normally cannot provide details as to a customer's gas usage on any given day. Thus, where bills are prorated, the amounts billed at the old and new rates are simply averaged and not necessarily an accurate representation of the gas used by the customer at any given rate. We therefore conclude that to the extent some customers might be granted a preference where billing is not prorated, that preference is not "unreasonably preferential or discriminatory" within the meaning of § 66-1825(1), nor does it mean that the rates charged were not "just and reasonable."

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[9] § 66-1825(1).

[10] § 66-1825(2).

Finally, we note that the record demonstrates that for decades, KM; its predecessor, K N Energy; and its successor, SourceGas, have not prorated billing upon the implementation of a rate increase. The Public Advocate argues that this history is irrelevant, as it refers to a prior act regulating natural gas service. While we acknowledge that the State Natural Gas Regulation Act was adopted in 2003, we disagree that such history is irrelevant. We further note that the record shows that several rate filings were made and implemented on a nonprorated basis subsequently to the 2003 passage of the act now in effect.

We conclude that as a matter of law, the issue of whether a utility must prorate its billing upon the implementation of new rates is not addressed by the applicable statutes, rules, or regulations and is therefore a proper subject of negotiation during a rate case proceeding.

[6] We also agree with SourceGas that the Public Advocate's complaint is an impermissible collateral attack. This court has noted on more than one occasion that the doctrine of res judicata

> "'is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other matters which could properly have been raised and determined therein. The rule applies to every question relevant to and falling within the purview of the original action, in respect to matters of both claim or grounds of recovery, and defense, which could have been presented by the exercise of diligence.'"[11]

The issue of whether prorated billing was necessary could have been discussed and agreed upon at the time of the 2006 rate case. We conclude that the failure to do so precludes the raising of that issue now.

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[11] *State v. Keen, supra* note 4, 272 Neb. at 129-30, 718 N.W.2d at 500. Accord *Norlanco, Inc. v. County of Madison*, 186 Neb. 100, 181 N.W.2d 119 (1970).

We therefore agree with the Commission's dismissal of the Public Advocate's complaint, and reverse the decision of the district court with respect to the final rates and remand this cause with directions to reinstate the Commission's dismissal of the formal complaint.

Remaining Issues on Appeal and Cross-Appeal.

Because we dismiss the Public Advocate's complaint, we need not address the remainder of SourceGas' assignments of error. Nor do we need to reach the Commission's cross-appeal.

In its cross-appeal, the Public Advocate contends that the district court erred in concluding that its complaint was a collateral attack as to the interim rates. The interim rates in this case were implemented on a nonprorated basis on September 1, 2006. The final settlement in the rate case was reached on November 28, nearly 3 months after the interim rate implementation. Given that the rates had been implemented for several months prior to the settlement and the approval of that settlement, we determine, in conformity with the above analysis, that the Public Advocate should have known that the interim rates were not implemented on a prorated basis. Because the Public Advocate should have known this, we conclude that the complaint as to the interim rates was also an impermissible collateral attack and should also be dismissed. We therefore affirm the district court's dismissal of the Public Advocate's complaint with respect to the interim rates.

CONCLUSION

The Public Advocate's formal complaint was an impermissible collateral attack on the 2006 rate case order and should be dismissed. Accordingly, we affirm in part, and in part reverse the decision of the district court and remand this cause with directions to reinstate the Commission's dismissal of the complaint.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

RADIOLOGY SERVICES, P.C., APPELLANT, V. KATHERINE ROUNSBORG HALL, APPELLEE.

780 N.W.2d 17

Filed March 12, 2010. No. S-09-171.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In a civil action for legal malpractice, a plaintiff alleging professional negligence on the part of an attorney must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client.
3. **Malpractice: Attorney and Client.** In a legal malpractice action, the required standard of conduct is that the attorney exercise such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances.
4. ____: ____. Although the general standard of an attorney's conduct is established by law, the question of what an attorney's specific conduct should be in a particular case and whether an attorney's conduct fell below that specific standard is a question of fact.
5. **Negligence: Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred.
6. **Negligence: Proximate Cause: Proof.** To establish proximate cause, the plaintiff must meet three basic requirements: (1) Without the negligent action, the injury would not have occurred, commonly known as the "but for" rule; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause.

Appeal from the District Court for Lincoln County: JOHN P. ICENOGLE, Judge. Affirmed.

Michael F. Coyle, David J. Stubstad, and Sherman P. Willis, of Fraser Stryker, P.C., L.L.O., for appellant.

William R. Johnson, of Lamson, Dugan & Murray, L.L.P., and Raymond E. Walden, of Walden Law Office, for appellee.

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

WRIGHT, J.

I. NATURE OF CASE

The Lincoln County District Court granted summary judgment in favor of Katherine Rounsborg Hall and dismissed the complaint of Radiology Services, P.C. The complaint alleged that Hall, an attorney, committed professional negligence and disseminated trade secrets during and after her legal representation of Radiology Services. We affirm.

II. SCOPE OF REVIEW

[1] In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Bamford v. Bamford, Inc., ante* p. 259, 777 N.W.2d 573 (2010).

III. FACTS

Radiology Services filed a complaint against Hall alleging that she simultaneously represented Radiology Services and her father, Dr. Gerald Rounsborg, regarding his retirement; assisted Rounsborg in competing with Radiology Services after his retirement; disclosed Radiology Services' confidential and proprietary information; and violated Nebraska's Trade Secrets Act, Neb. Rev. Stat. § 87-501 et seq. (Reissue 2008). Hall moved for summary judgment. The district court for Lincoln County found that there were no material facts in dispute and that the facts did not support Radiology Services' alleged causes of action and theories of recovery. It granted Hall's motion for summary judgment and dismissed the case. Radiology Services appeals.

Radiology Services provides radiology services to hospitals, clinics, and other medical facilities in Nebraska and Kansas. Its principal place of business is North Platte, Nebraska. Rounsborg is a radiologist and former employee of Radiology Services. He was employed with the group from 1979 to March 15, 2004, and was president of the group in 2003. His daughter, Hall, is an attorney licensed to practice law in Nebraska. She became the corporate attorney for Radiology Services in 1995.

1. Employment Termination Agreement Revised

During her representation of Radiology Services, Hall reviewed and revised Radiology Services' employment termination agreement. In 1997, at Radiology Services' request, she drafted the "Employment Termination Agreement Revised" (ETAR). Paragraph 1.4(c) provided:

> An EMPLOYEE electing to receive benefits or compensation under this Agreement agrees to refrain for a period of one year following the date of termination from working for or soliciting work from the CORPORATION's then existing hospital clients or accounts with whom the EMPLOYEE actually did business or had personal contact.

The original agreement specified that employees must be employed by the corporation for 10 years before being eligible for deferred compensation pursuant to the agreement. When the ETAR was drafted, Dr. Warren Orr, the founder of the corporation in the late 1970's, was automatically eligible for deferred compensation benefits, and Rounsborg had already been an employee for more than 10 years and would have been eligible under the original agreement. The ETAR provided that he was eligible for benefits as of April 1, 1989. The ETAR also specified that Dr. Kan Wu, who became an employee in 1992, would be eligible as of August 1, 2002. Drs. Tamara Hlavaty, Sam Liu, and David Hatch all became full-time Radiology Services employees in 1998 or later.

2. Albert Robinson's Employment Agreement

In March 1998, Hall drafted an employment agreement for Albert Robinson, a radiology technician with Radiology Services. The agreement included a 1-year noncompete clause. Hall sent it to Radiology Services and suggested that Radiology Services contact her with changes so the agreement could be signed by all parties. She followed up with this request on May 28 and on January 22 and April 1, 1999, indicating that she had not heard back regarding the agreement and asking for a signed copy.

In May 1999, at the request of Radiology Services, Hall sent Radiology Services a list of documents that had not been

signed or returned to her. Robinson's employment agreement was on this list. Hall advised that she did not have copies of the documents but understood that all of the unreturned documents had been signed. However, Robinson testified that he never saw the employment agreement and never executed it. Robinson resigned on January 16, 2004, and went to work as the director of marketing for Great Plains Radiology, P.C.

3. Rounsborg's Retirement Plans

Orr retired from Radiology Services on January 31, 2002. Rounsborg gave written notice to Radiology Services in January 2003 that he intended to retire on or about July 1, 2005, and that he was giving advance notice to give Radiology Services adequate time to plan for his departure and recruit a replacement if necessary.

In late 2003, Rounsborg hired Sam Mazzuca to evaluate Radiology Services. As part of the evaluation, Mazzuca talked with the other radiologists in the group and concluded that Rounsborg might have an alcohol problem. Mazzuca met with Hall, one of Rounsborg's sons, and two of Rounsborg's friends. Mazzuca expressed his concerns about Rounsborg's performance, which included memory loss, depression, and an alcohol problem.

Mazzuca asked Hall to participate in a discussion of these problems with Rounsborg. On December 1, 2003, Hall went with Mazzuca to meet Rounsborg to discuss Mazzuca's concerns. Mazzuca told Rounsborg that Radiology Services wanted him to be evaluated and take a 90-day disability leave. After the 90 days, Rounsborg could go back to work if he complied with any recommendations in the evaluation.

Rounsborg did not agree that he had a problem or with the disability status and continued to work his scheduled hours. Because he believed the other radiologists at Radiology Services were determined that he not return to work, Rounsborg agreed to take what he characterized as a leave of absence with pay from December 15, 2003, through March 15, 2004, and to obtain an alcohol assessment. During this time, Radiology Services paid him $38,194.58.

On December 3, 2003, Hall drafted an agreement between Rounsborg and Radiology Services that gave Rounsborg the option to retire on March 15, 2004. The agreement ended with a disclaimer that Hall was Rounsborg's daughter and that Radiology Services had ample opportunity to seek counsel from another source. Neither party executed this agreement. On December 10, 2003, Wu notified Hall that Radiology Services was discontinuing its relationship with her and seeking alternative counsel to avoid the appearance of a conflict of interest.

At a meeting of Radiology Services' board on January 15, 2004, the board removed Rounsborg as an officer of the corporation and elected Wu to serve as president. It also confirmed the discharge of Hall as the corporation's attorney. Rounsborg resolved to leave Radiology Services after the January 15 corporate meeting. The next day, he notified Wu of his intention to retire as of March 15.

Great Plains Radiology subsequently contacted Rounsborg regarding the possibility of his working with them as an independent contractor. Rounsborg advised Great Plains Radiology of his competition restrictions pursuant to the ETAR, including that he agreed to refrain from working for or soliciting work from Radiology Services' clients with whom he had contact. He sent Great Plains Radiology a list of the hospitals that fell under this agreement.

Hall then assisted Rounsborg in setting up a corporation through which he could work as an independent contractor. Despite these arrangements, Rounsborg never worked for Great Plains Radiology or any other radiology group after he retired from Radiology Services.

4. Letters to Clients

On December 17, 2003, Rounsborg sent letters to Radiology Services' clients. The letter stated that Radiology Services had hired a consultant and requested a summary of the client's experience with Radiology Services. Rounsborg requested feedback and complaints, particularly with regard to his work. He asked that responses to the survey be returned to him at his

home address. Hall provided Rounsborg with the addresses of the clients.

Following the clients' receipt of the letters, Radiology Services and a hospital in North Platte received several telephone calls from clients with questions concerning the receipt of the letters. Wu believed Radiology Services lost three clients as a result of the letters but admitted he did not have knowledge of anything that linked the loss of the clients to the letters.

5. Findings of District Court

The district court determined that the evidence was not sufficient to establish that the ETAR unusually or unfairly benefited Rounsborg and that the noncompetition clause in the ETAR did not provide a loophole for Rounsborg to compete. The court also determined that there was no evidence the ETAR was drafted in contradiction to the wishes of Radiology Services. The court found that although Rounsborg established a corporation to continue practicing radiology, there was no evidence that he ever practiced radiology or worked for or solicited a preexisting client of Radiology Services.

Regarding Robinson's employment agreement, the district court found the evidence did not show that Hall ever saw or was in possession of an executed copy of Robinson's agreement. It also found that Hall did not provide Rounsborg with any corporate information he was not entitled to have as a shareholder of the corporation. The court noted it was doubtful that the client list was a trade secret. Determining there was no issue of material fact and that the facts did not support Radiology Services' causes of action and theories of recovery, the court granted Hall's motion for summary judgment and dismissed the complaint.

IV. ASSIGNMENTS OF ERROR

Radiology Services alleges that the district court erred in ruling as a matter of law that Radiology Services asked Hall to draft an "exit agreement" for Rounsborg. It also claims there are issues of fact whether Hall simultaneously represented Radiology Services and Rounsborg, failed to preserve

Radiology Services' confidential and proprietary information, and shared Radiology Services' client list, which it characterized as a trade secret. Radiology Services further claims it established proximate causation between Hall's negligence and its damages.

V. ANALYSIS

1. Exit Agreement

Radiology Services first alleges that the court erred in ruling as a matter of law that Radiology Services asked Hall to draft an exit agreement for Rounsborg. This assignment of error is identical to Radiology Services' first point in its motion to alter or amend the order and judgment filed with the district court. The court issued an order overruling the motion and correcting its initial order with respect to this assignment of error. The latter order states:

> Generally the court finds that the arguments and assignments of error submitted by [Radiology Services] are without merit. The court does note, that it did in fact error [sic] in suggesting a legal finding of fact that an agent for [Radiology Services] requested [Hall] to draft an exit agreement for [Rounsborg].

Regardless, no such agreement was ever executed by Rounsborg or Radiology Services. The court concluded that the correction of the finding of fact did not change the appropriateness of summary judgment in Hall's favor and overruled Radiology Services' motion to alter or amend the judgment. Accordingly, this assignment of error was resolved by the district court and is without merit.

2. Legal Malpractice

Radiology Services' remaining assignments of error can be summarized to allege that there were issues of material fact whether several of Hall's actions violated the standard of care for practicing attorneys and whether her actions proximately caused damage to Radiology Services. We review the evidence in a light most favorable to Radiology Services and give Radiology Services the benefit of all reasonable inferences deducible from the evidence to determine whether there is a

genuine issue of material fact. See *Bamford v. Bamford, Inc., ante* p. 259, 777 N.W.2d 573 (2010).

[2] In a civil action for legal malpractice, a plaintiff alleging professional negligence on the part of an attorney must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client. *Wolski v. Wandel*, 275 Neb. 266, 746 N.W.2d 143 (2008).

It is not disputed that Hall was the corporate attorney for Radiology Services beginning in 1995; that on December 10, 2003, Wu advised her Radiology Services was terminating its relationship with her; and that the termination was ratified by the board on January 15, 2004. The remaining questions are whether Hall neglected a reasonable duty and whether such neglect was the proximate cause of damages to Radiology Services.

[3,4] In a legal malpractice action, the required standard of conduct is that the attorney exercise such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances. *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999). Although the general standard of an attorney's conduct is established by law, the question of what an attorney's specific conduct should be in a particular case and whether an attorney's conduct fell below that specific standard is a question of fact. See *Wolski v. Wandel, supra*.

[5,6] A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred. *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007). To establish proximate cause, the plaintiff must meet three basic requirements: (1) Without the negligent action, the injury would not have occurred, commonly known as the "but for" rule; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause. *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009).

Radiology Services identifies a number of Hall's actions that it claims constituted legal malpractice: (a) drafting a retirement agreement on behalf of Rounsborg and Radiology Services that

was advantageous to Rounsborg, (b) simultaneously representing Radiology Services and Rounsborg, (c) drafting letters to Radiology Services' clients on behalf of Rounsborg, (d) disclosing Radiology Services' client contact information, and (e) failing to retain Robinson's noncompete agreement.

(a) Drafting ETAR That Was Advantageous to Rounsborg

Radiology Services claims that the ETAR Hall drafted in 1997 was patently advantageous to Rounsborg and unfair to the other Radiology Services shareholders. At the time the ETAR was drafted, Radiology Services had three professional employees—Orr, Rounsborg, and Wu. Rounsborg joined the group in 1979, and at that time, Orr had been with Radiology Services for several years. Wu became an employee in 1992. Under the original employment termination agreement, employees were entitled to deferred compensation benefits upon their retirement after being employed with Radiology Services for 10 years. The ETAR required an employee to be a shareholder for 10 years before he or she became eligible for deferred compensation benefits.

By 1997, Orr and Rounsborg had been employees of Radiology Services for at least 10 years and had vested interests in deferred compensation benefits under the original agreement. The ETAR preserved these interests, specifying that Rounsborg was eligible to receive deferred compensation as of April 1, 1989. Wu had been an employee for 5 years, and the ETAR preserved his interest, as well as specifying he would be eligible for deferred compensation benefits after August 1, 2002.

All of Radiology Services' full-time employees at the time the ETAR was signed retained the benefits they were entitled to under the original agreement. Hlavaty, Liu, and Hatch all began working for Radiology Services full time after the ETAR was enacted. There is nothing in the record to suggest that the ETAR did not reflect the intention of Radiology Services' shareholders at the time the agreement was drafted or that the agreement was advantageous to Rounsborg. This assignment of error is without merit.

(b) Simultaneous Representation of Radiology Services and Rounsborg

Radiology Services claims that Hall was aware of Rounsborg's intention to retire following the 90-day disability period and that she was negligent in failing to inform the corporation of this plan. It claims that had it known that Rounsborg would not return to work following the disability period, it would not have made disability payments. Radiology Services alleges that it incurred a loss because it paid Rounsborg more than $38,000 in disability payments. The record does not support these claims.

The evidence establishes that Mazzuca, on behalf of Radiology Services, asked Hall to use her influence with Rounsborg to try to persuade him to get an alcohol assessment, which she did on December 1, 2003. At the meeting, Mazzuca said he felt the board would pay short-term disability to Rounsborg if he took the assessment and followed its recommendations. Rounsborg inquired about whether he could return to work if the assessment was favorable. He stated that if he were allowed to return to work, he would possibly want the option of working part time and without call obligations. Mazzuca consulted with Wu and advised Rounsborg that Radiology Services would consider allowing him to continue practicing under these conditions.

After meeting with Rounsborg and Mazzuca, Hall drafted an agreement intended to be between Radiology Services and Rounsborg indicating that Rounsborg would take vacation from December 15, 2003, until March 15, 2004, and that following the completion of the vacation period, Rounsborg could elect to continue his employment with Radiology Services or retire with no further notice. The agreement disclosed that Hall was Rounsborg's daughter and had performed legal work for Radiology Services in the past. This agreement was never signed by either party.

Rounsborg did not believe that he had any professional competency problems and continued to work his regularly scheduled hours and take previously scheduled vacations until December 15, 2003. At that time, he agreed to take a leave

of absence. As it became clear that Radiology Services and Rounsborg would have conflicting positions, on December 10, Wu advised Hall that Radiology Services was terminating its relationship with Hall.

Radiology Services held its annual meeting on January 15, 2004. Rounsborg, Wu, Hlavaty, Liu, Hatch, and Mazzuca were present. Rounsborg was removed as president of the corporation, Wu was elected as the new president, and Rounsborg's access to corporate documents and information was suspended. The board recognized the termination of Hall as its attorney. The board approved Rounsborg's placement on disability status with pay from December 15, 2003, through March 15, 2004. Rounsborg was requested to abide by the noncompete provisions in the ETAR.

The minutes reflect that Rounsborg would be at a health center in Chicago, Illinois, in January 2004 for an assessment and that the future employment of Rounsborg depended on the report from the health center and was at the discretion of the officers. Rounsborg asked if the board would allow him to give less than 90 days' notice if he decided to retire. The minutes stated: "[Rounsborg] said that March 15, 2004 would be the possible date to begin his retirement if he decides to retire." The board voted on waiving the 90 days' notice required by the bylaws, and the motion passed. The day after the meeting, on January 16, 2004, Rounsborg notified Wu and Radiology Services that he intended to retire effective March 16.

There is no evidence that any of the board members were deceived by Rounsborg's ultimate decision to retire at the conclusion of his 90-day period of disability leave. Rounsborg's future employment was dependent on his assessment results and the vote of the corporation's officers. Radiology Services considered the possibility that Rounsborg might not come back to work when it asked him to take disability leave.

There is no evidence that Hall made any representation to Radiology Services regarding Rounsborg's retirement, that she made any arrangement for him to retire without advising the board, or that he had made a decision to retire before the

January 15, 2004, board meeting. Accordingly, there is no evidence supporting Radiology Services' claim that Hall was negligent regarding this issue or that any possible negligence was the proximate cause of Radiology Services' alleged loss.

Radiology Services also argues that Hall assisted Rounsborg in competing against Radiology Services. This claim is also unfounded. The evidence is clear that after retiring from Radiology Services, Rounsborg never worked as a radiologist again—for Great Plains Radiology or anyone else. There is no evidence that Rounsborg solicited business from Radiology Services' clients or that Radiology Services lost any business due to the actions of Rounsborg or Hall.

(c) Letters to Radiology Services' Clients Regarding Rounsborg's Performance

On December 17, 2003, Rounsborg sent letters to Radiology Services' clients. The letter noted that Radiology Services had hired a consultant and asked for any complaints, requests for review, or disciplinary actions that had been filed concerning Rounsborg's work at the facility, as well as any other feedback the client had regarding Radiology Services. The letter asked that the responses be sent directly to Rounsborg. Radiology Services claims that Hall drafted the letter and that the letters resulted in Radiology Services' losing three clients—hospitals in Ord, Gothenburg, and Cambridge, Nebraska.

Rounsborg was president of Radiology Services at the time he sent out the letters. He had hired Mazzuca to review Radiology Services' operations and sought feedback from clients. There is no evidence that Rounsborg was not authorized to solicit this type of information. Furthermore, the evidence does not establish that the letters resulted in the loss of any clients. Clients who changed radiologists indicated their decisions were based on dissatisfaction with Radiology Services, more helpful technical services offered by Great Plains Radiology, or the client's preference to work with Robinson. Therefore, even if Hall should not have drafted the letter, there is no evidence that her actions were the proximate cause of any damages Radiology Services suffered due to the loss of three clients.

(d) Confidential and Proprietary Information and Trade Secret

Radiology Services alleges that Hall committed legal malpractice by disclosing its client contact information to Rounsborg and Great Plains Radiology. It claims this disclosure constituted a failure to preserve confidential and proprietary information. Also relevant to this discussion is Radiology Services' claim that this disclosure was a trade secret violation.

The evidence shows that Rounsborg was with Radiology Services for 25 years and was president of the corporation in 2003. Rounsborg knew the identities of the corporation's clients. In his deposition, Rounsborg recited a list of Radiology Services' clients from memory. Addresses of these clients were easily ascertainable. Even assuming Hall provided Rounsborg with a list of client addresses, she did not provide him with any information that he did not already have or that he was not otherwise entitled to have as president of the corporation. Her actions did not constitute a failure to preserve confidential or proprietary information.

A customer list can be a trade secret in some circumstances. See *Home Pride Foods v. Johnson*, 262 Neb. 701, 634 N.W.2d 774 (2001). Courts are reluctant to protect customer lists to the extent that they embody information that is readily ascertainable through public sources. *Id.* Where time and effort have been expended to identify particular customers with particular needs or characteristics, courts will prohibit others from using this information to capture a share of the market. *Id.* Protected lists are distinguishable from mere identities and locations of customers that anyone could easily identify as possible customers. *Id.*

To the extent that Hall disclosed the client list to Great Plains Radiology, it is evident that the identification of clients was made to advise Great Plains Radiology of the clients Rounsborg could not work with or solicit to avoid being in violation of his noncompete agreement. The list consisted of the names of the hospital clients and the city where each hospital was located.

It was generally known among medical practitioners which radiology groups were providing services to the various

hospitals. Hlavaty testified that if this information was not known, an individual could look at hospital board records or call an administrator, technologist, or physician to determine which radiology group serviced a particular hospital. The "List of Prohibited Hospitals and Facilities" given to Great Plains Radiology listed merely the names and locations of a portion of Radiology Services' customers whom Great Plains Radiology could easily have identified on its own.

Furthermore, there is no evidence that Radiology Services suffered any damages as a result of the disclosure of the customer list to Rounsborg or Great Plains Radiology. Although Radiology Services lost three clients following Rounsborg's departure, each departing hospital indicated that it either was unhappy with the services provided by Radiology Services or wished to maintain its relationship with Robinson. This assignment of error is without merit.

(e) Robinson's Noncompete Agreement

Radiology Services alleges Hall was in possession of a noncompete agreement signed by both Radiology Services and Robinson and that she failed to retain the signed copy. As a result, Robinson was able to solicit accounts for his new employer, Great Plains Radiology. Three clients, hospitals in Gothenburg, Ord, and Cambridge, left Radiology Services and began working with Great Plains Radiology, although only one indicated Robinson was a factor in the decision to switch. Radiology Services estimates that it lost $482,906 in business due to the switches. Without a signed copy of the agreement, Radiology Services claimed it was unable to enforce a noncompete clause or recover damages from Robinson. It is undisputed that Robinson left Radiology Services and solicited its clients on behalf of Great Plains Radiology. However, there is no evidence that Robinson signed the agreement or that Hall had a copy of the signed agreement.

In March 1998, Hall sent Radiology Services a draft of an employment agreement, including a noncompete agreement, for Robinson and asked that Radiology Services contact her with changes so the agreement could be signed by all parties. Hall sent several followup requests indicating that she had not

heard back from Radiology Services and asking that a signed copy of the agreement be returned to her and a copy placed in the corporation's minute book. The letters are dated May 28, 1998, and January 22 and April 1, 1999. The April 1 letter includes a draft of an employment agreement for Robinson and notes that if Radiology Services would like her to pursue a written employment agreement with Robinson, it should get back to her. Robinson testified that he never saw the agreement and never executed it.

Robinson resigned from Radiology Services on January 16, 2004. On February 17, a Radiology Services employee called Hall asking for Robinson's employment agreement. The employee noted that Hall was unable to locate a signed agreement from Robinson and that Hall stated she did not recall ever having one.

Although Hall may have believed that Robinson signed the agreement, the evidence does not establish that she was ever in possession of or saw a signed copy of the agreement. Robinson testified he had not seen or executed the agreement, and there is no evidence that anyone else ever saw a signed copy of the agreement. The district court did not err in concluding there was no genuine issue of material fact regarding Robinson's noncompete agreement. Because Hall never had a signed copy, there is no proximate cause between her actions and Radiology Services' loss.

VI. CONCLUSION

Viewing the evidence in the light most favorable to Radiology Services, we conclude that there is no genuine issue of material fact and that Hall is entitled to judgment as a matter of law. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

IN RE INTEREST OF MARCELLA B. AND JUAN S.,
CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, AND CANDICE J.
NOVAK, GUARDIAN AD LITEM, APPELLANT,
V. LATISHA J., APPELLEE.
778 N.W.2d 744

Filed March 12, 2010. No. S-09-382.

Petition for further review from the Court of Appeals, SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired, on appeal thereto from the Separate Juvenile Court of Douglas County, VERNON DANIELS, Judge. Judgment of Court of Appeals affirmed.

Candice J. Novak, of Thomas G. Incontro, P.C., L.L.O., guardian ad litem.

Thomas C. Riley, Douglas County Public Defender, and Martha J. Wharton for appellee Latisha J.

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

PER CURIAM.

Having reviewed the briefs and record and having heard oral arguments, we conclude on further review that the decision of the Nebraska Court of Appeals in *In re Interest of Marcella B. & Juan S.*, 18 Neb. App. 153, 775 N.W.2d 470 (2009), is correct and, accordingly, affirm the decision of the Court of Appeals dismissing the appeal.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
LANCE FULLER, APPELLANT.
779 N.W.2d 112

Filed March 12, 2010. No. S-09-494.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether

the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.

2. **Statutes: Appeal and Error.** The interpretation of a statute is a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Criminal Law: Statutes.** Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.

Appeal from the District Court for Adams County, STEPHEN R. ILLINGWORTH, Judge, on appeal thereto from the County Court for Adams County, ROBERT A. IDE, Judge. Judgment of District Court affirmed.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Lance Fuller appeals from the order of the district court for Adams County which affirmed his county court conviction for third degree sexual assault. Fuller asserts that there was not sufficient evidence to support his conviction, because the acts for which he was charged and convicted do not meet the definition of "sexual contact" provided in Neb. Rev. Stat. § 28-318(5) (Reissue 2008). We affirm.

STATEMENT OF FACTS

Fuller was charged in the county court for Adams County on June 25, 2007. The complaint charged Fuller with third degree sexual assault in violation of Neb. Rev. Stat. § 28-320(1)

(Reissue 2008), which provides in relevant part: "Any person who subjects another person to sexual contact . . . without consent of the victim . . . is guilty of sexual assault in either the second degree or third degree." Section 28-320(3) provides: "Sexual assault shall be in the third degree and is a Class I misdemeanor if the actor shall not have caused serious personal injury to the victim." At issue in this appeal is the meaning of "sexual contact" contained in a portion of § 28-318(5) which applies to § 28-320 and provides that "[s]exual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor."

The complaint alleged that on May 5, 2007, Fuller subjected C.F. to sexual contact without consent; the complaint did not allege that C.F. suffered serious personal injury. On May 5, 2007, Fuller was 18 years old, and C.F., who is Fuller's half brother, was 9 years old.

A jury trial was conducted in county court. At trial, the stepfather of Fuller and C.F. testified that on the afternoon of May 5, 2007, he was watching television in the basement of the family home when he decided to go upstairs and check on Fuller and C.F. He found them in Fuller's bedroom, where he saw the two on the bed facing each other with a blanket over them. The stepfather asked what was going on and pulled the blanket off. He saw Fuller trying to pull up C.F.'s pants and saw that Fuller's pants were partially down. The stepfather told C.F. to go downstairs. The stepfather called his wife, who is the mother of Fuller and C.F., and when she arrived home, they called the police.

The police officer who investigated the incident testified at trial that Fuller told him that "something just kind of came over him and he threw a blanket over [C.F.] and himself" and that "he pulled [C.F.'s] pants down and rubbed his dick on [C.F.'s] leg." C.F. testified at trial that he and Fuller were sitting on Fuller's bed when Fuller "flipped the blankets over me and started — pulled down my pants to my ankles and started rubbing his penis on my shin." C.F. testified that Fuller did not

touch him anywhere other than "the outside of the right shin" and that Fuller did not have C.F. touch Fuller anywhere.

After the State presented its evidence, Fuller moved for dismissal on the basis that the State's evidence failed to establish a necessary element of third degree sexual assault. Fuller argued that the evidence did not establish "sexual contact" as that term is defined in § 28-318(5). The court overruled the motion. After Fuller rested his defense, he moved for a directed verdict on the same basis, and the court overruled the motion. The jury found Fuller guilty of third degree sexual assault. Fuller's motion for a new trial was denied, and the county court sentenced him to 90 days in jail.

Fuller appealed his conviction to the district court for Adams County. On appeal, Fuller argued, inter alia, that there was not sufficient evidence to support his conviction, because the evidence failed to establish "sexual contact" as the term is defined in § 28-318(5) and applies to § 28-320. The district court rejected Fuller's arguments and affirmed his conviction and sentence.

Fuller appeals the district court's rulings which affirmed his conviction and sentence.

ASSIGNMENT OF ERROR

Fuller asserts that the district court erred by affirming the denial of his motions based on sufficiency of the evidence and by affirming his conviction, because under the definition of "sexual contact" in § 28-318(5), there was not sufficient evidence to support his conviction under § 28-320.

STANDARDS OF REVIEW

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at

trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009).

[2] The interpretation of a statute is a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007).

ANALYSIS

Fuller asserts that the district court erred by affirming the denial of his motions based on sufficiency of the evidence and by affirming his conviction, because there was not sufficient evidence to support his conviction under § 28-320. He argues that the evidence does not support a finding that he subjected C.F. to "sexual contact" as the term is defined in § 28-318(5) and is applicable to § 28-320. Fuller specifically argues that rubbing his penis on C.F.'s shin was not "sexual contact" for purposes of § 28-320, because under § 28-318(5), the shin is not a "sexual or intimate part" and he did not cause C.F. to "touch" Fuller's sexual or intimate parts. We disagree with Fuller's reading of the statutes and conclude that the evidence supported Fuller's conviction and that the district court did not err.

Fuller was convicted of third degree sexual assault, which, under § 28-320(1), occurs when a person "subjects another person to sexual contact . . . without consent of the victim." The evidence in this case showed that Fuller rubbed his penis on C.F.'s shin. Fuller does not argue that the evidence failed to show that such rubbing was without C.F.'s consent. Instead, as noted, he argues that rubbing his penis on C.F.'s shin was not "sexual contact" as that term is defined by the relevant statute.

For purposes of § 28-320 and other statutes, "sexual contact" is defined in § 28-318(5) as follows:

> Sexual contact means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall

> also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party. Sexual contact shall also include the touching of a child with the actor's sexual or intimate parts on any part of the child's body for purposes of sexual assault of a child under sections 28-319.01 and 28-320.01.

We note that § 28-318(5) contains four sentences describing conduct that is considered "sexual contact." The first sentence of the subsection refers to the actor's "intentional touching of the victim's sexual or intimate parts or . . . the victim's clothing covering the immediate area of the victim's sexual or intimate parts." Fuller's conduct in this case is not described by the first sentence, because the term "intimate parts" is defined in § 28-318(2) to mean "the genital area, groin, inner thighs, buttocks, or breasts." The evidence in this case shows without contradiction that Fuller touched C.F.'s shin. The shin is not a sexual or intimate part under the statutory definition, and the evidence does not show that Fuller touched any part of C.F.'s body that would be considered a sexual or intimate part.

Similarly, the final sentence of § 28-318(5) does not apply to the evidence in this case. Although Fuller's rubbing his penis on C.F.'s shin would constitute "touching of a child with the actor's sexual or intimate parts on any part of the child's body," the final sentence of § 28-318(5) specifies that this definition applies to "sexual assault of a child under sections 28-319.01 and 28-320.01." In this case, Fuller was charged under § 28-320. He was not and, as Fuller notes, could not have been charged under Neb. Rev. Stat. § 28-319.01 (Reissue 2008) or Neb. Rev. Stat. § 28-320.01 (Reissue 2008), because both of those statutes apply only when "the actor is at least nineteen years of age or older" and Fuller was 18 years old at the time of the incident herein. Given this specification and because we conclude that the second sentence of § 28-318(5) controls the outcome of this

case, we do not apply or consider the breadth of the last sentence in § 28-318(5) in this appeal.

The question at the center of this case is whether Fuller's conduct is encompassed under the second sentence of § 28-318(5), which provides that "[s]exual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor." We note that in its order rejecting Fuller's argument on appeal from the county court, the district court stated:

> The second sentence of 28-318(5) clearly defines sexual contact to include the touching by the victim of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. The victim's leg in this case touched an extension of [Fuller's] genital or groin area. This touching was initiated by [Fuller]. [Fuller] therefore committed a sexual assault under [§ 28-320].

We agree with the district court's determination that Fuller's conduct was "sexual contact" under the definition provided in the second sentence of § 28-318(5). In his brief on appeal to this court, Fuller contends that his conviction was contrary to the second definition of "sexual contact" in § 28-318(5), because C.F.'s shin "is not an intimate part" and Fuller "did not cause [the] victim to touch any of [Fuller's] intimate parts." Brief for appellant at 6. Fuller's argument suggests that the word "by" in the phrase "touching by the victim" indicates that the victim must initiate the touching. Fuller misreads the statute.

[3] Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Bossow*, 274 Neb. 836, 744 N.W.2d 43 (2008). Giving the statute under consideration a sensible construction, we conclude that Fuller's conduct was "sexual contact" under the second sentence of § 28-318(5) and amounted to a sexual assault in the third degree.

Contrary to Fuller's reading, the second sentence of § 28-318(5) does not specify a part or parts of the victim's body that must touch the actor's sexual or intimate parts. We thus reject Fuller's argument that because C.F.'s shin was involved, no crime was committed.

The second sentence of § 28-318(5) provides that there must be a "touching by the victim of the actor's sexual or intimate parts" and that "such touching [be] intentionally caused by the actor." We construe a "touching" in this context to be physical contact between two body parts, although for completeness, we note that the statute states that the defendant-actor may be clothed. As long as it is shown that two body parts made physical contact, and one of such parts was the sexual or intimate part of the defendant-actor, it is not necessary under § 28-318(5) to engage in an unsolvable analysis of whether at any moment the actor was "touching" the victim or whether the victim was "touching" the actor for sexual contact to have occurred. The last phrase of the second sentence of § 28-318(5) provides that "such touching is intentionally caused by the actor," which we understand to mean that the defendant-actor initiated the incident of "sexual contact" under this provision. Thus, when there has been physical contact between a victim and the actor's sexual or intimate part, there has been a "touching by the victim," and we reject Fuller's argument to the effect that the statute requires that the touching be initiated by an act of the victim.

The evidence in this case showed that there was physical contact between Fuller's penis and C.F.'s shin. It is clear that Fuller's penis was a sexual or intimate part under the definition provided in the statutes, and the evidence of physical contact supports the findings that a touching of Fuller's penis by C.F.'s shin occurred and that such touching was intentionally caused by Fuller. Such evidence was sufficient to support a finding of "sexual contact" as defined in the second sentence of § 28-318(5). We therefore conclude that the evidence in this case was sufficient to support Fuller's conviction for third degree sexual assault under § 28-320.

CONCLUSION

We conclude that the evidence supported Fuller's conviction, including the finding that "sexual contact," as defined under the relevant statutes, occurred. The district court did not err when it affirmed the county court's rulings denying Fuller's motions based on insufficient evidence and affirmed his conviction. We therefore affirm Fuller's conviction and sentence as affirmed by the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
FRANCIS L. SEBERGER, APPELLANT.
779 N.W.2d 362

Filed March 19, 2010. No. S-09-476.

1. **Motions to Suppress: Confessions: Constitutional Law: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
2. **Confessions.** To be admissible, a statement or confession of an accused must have been freely and voluntarily made.
3. ____. A defendant who objects that a statement was involuntary is entitled to a hearing in which both the underlying factual issues and the voluntariness of the statement are actually and reliably determined.
4. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

James R. Mowbray and Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

GERRARD, J.

Francis L. Seberger was convicted of first degree murder in connection with the death of his wife, Debbie Seberger (Debbie), and sentenced to life imprisonment. This is Seberger's direct appeal from his conviction and sentence. The primary issue in this appeal is whether the trial court erroneously failed to make specific findings regarding the voluntariness of some of Seberger's statements to police.

BACKGROUND

Taken in the light most favorable to the State,[1] the record establishes the following sequence of events, which began on May 31, 1997: Seberger and Debbie were estranged, and Seberger had called Debbie's residence several times that evening. Seberger went to a convenience store and filled a can with gasoline. A short time later, two calls were received by the 911 emergency dispatch service. The first was from Debbie, who reported that someone was trying to force entry into her residence. The second was from Debbie's neighbor, who reported a fire at Debbie's residence.

Police and fire department personnel responded, and police encountered Seberger driving away from the residence when they arrived. A fire in the house was quickly suppressed. Debbie was found in the front yard with severe burns, and Seberger made several angry remarks toward her. Seberger had also been burned. Investigators determined that the fire was caused by the ignition of a flammable liquid, such as gasoline, and gasoline was found on Debbie's clothing, Seberger's clothing, and carpeting from the residence. Debbie told a nurse that someone had poured gasoline on her. During subsequent interviews with law enforcement, Seberger admitted that he had sprayed Debbie with gasoline, although he did not clearly admit to igniting the gasoline.

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[1] See *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

Debbie died on July 1, 1997, as a result of her burn injuries. Seberger was charged by information with arson in the first degree and first degree murder, on both premeditated and felony murder theories. Seberger filed a motion to suppress statements that he had made in the ambulance and hospital on the night of the incident, in an interview with police at the hospital on June 2, and in an interview with police and fire investigators on June 4. Specifically, Seberger asked for a hearing "for the purpose of determining which, if any, of his pretrial admissions or statements were given voluntarily, intelligently, or understandingly" and to suppress "any and all pretrial statements, admissions, [or] confessions . . . which were not given voluntarily, intelligently, or understandingly, or which were obtained in violation of his rights under the Fourth, Fifth or Fourteenth Amendments to the United States Constitution."

A hearing was held, and the trial court sustained Seberger's motion in part, and overruled it in part. The court suppressed the statements Seberger made on May 31, 1997, "finding that in the totality of the circumstances, Miranda wasn't given and that the statements were not freely and voluntarily and intelligently made, so those [statements] will be suppressed." But with respect to the later statements, the court found that "Miranda was given, that the waiver was freely, voluntarily and intelligently made, and those statements are not suppressed." The court made a journal entry to much the same effect, finding that on May 31, "the required constitutional rights were not afforded [Seberger] nor where [sic] the statements freely, voluntarily, or intelligently made," but overruling the motion to suppress the June 2 and 4 statements.

Seberger waived his right to a jury trial, and the case was tried to the court. Consistent with its pretrial rulings, the court overruled Seberger's objections at trial to evidence of his June 2 and 4, 1997, statements to police. Seberger did not testify in his own defense. Seberger asked the court to find him guilty of manslaughter, not murder. Nonetheless, while Seberger was found not guilty of arson, he was convicted of premeditated first degree murder. After a capital sentencing hearing, Seberger was sentenced to life imprisonment.

The State attempted to appeal from the sentencing panel's decision not to impose the death penalty, but we found that the State had no statutory authority to do so and dismissed the State's appeal.[2] Seberger filed a brief of appellee, through trial counsel, but did not perfect an appeal of his own. Seberger filed a motion for postconviction relief through new counsel. The postconviction court found that Seberger had been denied his right to a direct appeal by ineffective assistance of direct appeal counsel and awarded Seberger a new direct appeal. This is that appeal.

ASSIGNMENTS OF ERROR

Seberger assigns, consolidated and restated, that

(1) the district court erred by failing to make a determination with respect to the voluntariness of Seberger's June 2 and 4, 1997, statements to his interrogators, and for overruling his objections when evidence and testimony concerning those statements were received at trial, in violation of his rights as guaranteed by the 5th and 14th Amendments to the U.S. Constitution; and

(2) he was denied effective assistance of counsel because his trial counsel (a) advised him to waive his right to a jury trial, (b) advised him not to testify at trial, and (c) failed to offer evidence that Debbie sold oil-based candles and had an inventory of such candles that could have been the ignition source of the fire.

STANDARD OF REVIEW

[1] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.[3]

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[2] See *State v. Seberger*, 257 Neb. 747, 601 N.W.2d 229 (1999).

[3] See *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

ANALYSIS

[2,3] Seberger's first assignment of error is directed at the trial court's purported failure to rule on the voluntariness of his June 2 and 4, 1997, statements to authorities. To be admissible, a statement or confession of an accused must have been freely and voluntarily made.[4] And a defendant who objects that a statement was involuntary is entitled to a hearing in which both the underlying factual issues and the voluntariness of the statement are actually and reliably determined.[5]

In this appeal, Seberger does not argue that his statements were actually involuntary. Rather, he argues only that the trial court failed to make the necessary finding that his statements were voluntary, so the case should be remanded to the district court for additional findings on voluntariness. He claims that the trial court's ruling addressed his *Miranda* rights,[6] but not voluntariness. And he argues that under *State v. Kula*,[7] the court was required to determine whether his statements were voluntary.

We find no merit to Seberger's argument. First, we do not agree with his interpretation of the trial court's ruling on his motion to suppress. The trial court's focus on *Miranda* was hardly inconsistent with a determination of whether the statements were voluntary. It is a violation of the Due Process Clause to use a defendant's involuntary statement against him at a criminal trial,[8] while the constitutional guidelines established by *Miranda* are intended to secure a defendant's Fifth Amendment right against self-incrimination.[9] But the U.S.

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[4] *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[5] See *id.*

[6] See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[7] *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000).

[8] *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978).

[9] *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

Supreme Court has explained that *Miranda* safeguards are intended to ensure that

> the police do not coerce or trick captive suspects into confessing, to relieve the "'inherently compelling pressures'" generated by the custodial setting itself, "'which work to undermine the individual's will to resist,'" *and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary*.[10]

Thus, while compliance with *Miranda* does not conclusively establish the voluntariness of a subsequent confession, "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."[11] So the trial court's discussion of whether Seberger had been given *Miranda* warnings, and properly waived them, was entirely relevant to evaluating the voluntariness of Seberger's statements.

And when the trial court's ruling is read as a whole, it is clear that the court considered and rejected Seberger's challenge to the voluntariness of his statements. The U.S. Supreme Court has explained that although a trial court's conclusion that a statement was voluntary must be clear from the record, the U.S. Constitution does not require the court to write formal findings of fact or write an opinion.[12] Seberger's motion, and the arguments of counsel, obviously raised the question of voluntariness. And with respect to the May 31, 1997, statements that the court did suppress, the court explained that it was considering "the totality of the circumstances whether those statements were freely, voluntarily and intelligently made." And the court concluded *both* that "Miranda wasn't given and that

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[10] *Berkemer v. McCarty*, 468 U.S. 420, 433, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (emphasis supplied).

[11] *Id.*, 468 U.S. at 433 n.20. Accord, *Dickerson, supra* note 9; *U.S. v. Guanespen-Portillo*, 514 F.3d 393 (5th Cir. 2008).

[12] See, *Mincey, supra* note 8; *Sims v. Georgia*, 385 U.S. 538, 87 S. Ct. 639, 17 L. Ed. 2d 593 (1967).

the statements were not freely and voluntarily and intelligently made, so those [statements] will be suppressed."

It is impossible to conclude that the trial court excluded the May 31, 1997, statements because they were not voluntary, but then forgot to consider the voluntariness of the June 2 and 4 statements. Instead, it is apparent that when the context of the motion to suppress and suppression hearing are considered, the court's denial of the motion necessarily rejected Seberger's objection that his statements were not voluntary.[13]

Seberger also argues that the trial court's ruling was insufficient because it did not make detailed findings of historical fact. He correctly notes that in *State v. Osborn*,[14] we stated that even though no statute required an articulation of the factual conclusions upon which the denial of a motion to suppress was based, that did not mean that "other considerations" may not require findings of fact.[15] So, noting that "findings of fact may be indispensible to a proper appellate review,"[16] we held that trial courts were to "articulate . . . their general findings when denying or granting a motion to suppress."[17]

But we also stated that the "degree of specificity required will vary, of course, from case to case."[18] And we found in *Osborn* that our review of the matter could proceed on the record before us, concluding that there was no clear error in the "factual findings and legal conclusions implicit in the district court's decision."[19]

Obviously, for the reasons articulated in *Osborn*, it is better practice for trial courts to articulate their findings of fact and law completely, on the record. But *Osborn* does not require reversal or remand of every case in which a trial court's findings could have been more complete. And more pertinent

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[13] See *Mincey, supra* note 8.

[14] *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996).

[15] *Id.* at 66, 547 N.W.2d at 145.

[16] *Id.*

[17] *Id.* at 67, 547 N.W.2d at 145.

[18] *Id.*

[19] *Id.*

to this case, *Osborn* plainly acknowledges that the extent to which the trial court should articulate its findings is dependent upon the circumstances of the case. In *Osborn*, the concern we expressed was that "we might not know whether the trial court rejected a defendant's factual contentions or had acted on some legal basis."[20] This was because in *Osborn*, at the hearing on the motion to suppress, there were sharp conflicts in the testimony and evidence regarding the circumstances of the defendant's interrogation.[21]

The same cannot be said in this case, where the circumstances of the interview were largely undisputed. Seberger has directed us to no meaningful dispute regarding the historical facts, nor is one apparent from the record. And whether those facts suffice to meet constitutional standards is a question of law.[22] Under the circumstances, the trial court's ruling was sufficient, and our review of the record reveals no basis to disagree with the trial court's conclusion.

Nor does *State v. Kula*[23] support Seberger's position. In *Kula*, the statements at issue had been made to a private citizen, not law enforcement. Although the defendant challenged the voluntariness of the statements, the trial court did not rule on the issue, because it found that no hearing or determination of voluntariness was required for statements made to private citizens. But on appeal, we explained that to be admissible, an accused's statements to a private citizen must be voluntary. So, we concluded that the trial court had erred in failing to make a threshold ruling on the voluntariness of the defendant's statements.[24] But the issue in *Kula* was not the sufficiency of the trial court's ruling on voluntariness—it was the trial court's clear decision, on the record, not to make a ruling on voluntariness.[25] And, as explained above, the court's ruling on

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[20] *Id.*

[21] See *id.*

[22] See *Goodwin, supra* note 3.

[23] See *Kula, supra* note 7.

[24] See *id.*

[25] See *id.* See, also, *Sims, supra* note 12.

voluntariness was sufficient in this case.[26] Therefore, we find no merit to Seberger's first assignment of error.

[4] Seberger's second assignment of error involves claims of ineffective assistance of trial counsel. Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question.[27] Seberger concedes that the record in this appeal is insufficient to evaluate his claims, and we agree. The State argues that the record is sufficient to conclude that Seberger was not prejudiced by his waiver of a jury trial, because Seberger's strategy of admitting to manslaughter was more likely to succeed at a bench trial, and the result of a jury trial would likely have been the same.

But counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance, not only when the advice is unreasonable, but also when counsel interferes with his or her client's freedom to decide to waive a jury trial.[28] Even if we could conclude on this record that trial counsel's advice was reasonable, we cannot determine whether trial counsel interfered with Seberger's freedom to decide to waive a jury trial. And the record is plainly insufficient to evaluate the strategic choices implicated by Seberger's other ineffective assistance claims. Therefore, we do not consider his final assignment of error.

CONCLUSION

We find no merit to Seberger's argument that the trial court erroneously failed to consider the voluntariness of his June 2 and 4, 1997, statements. And the record is insufficient to evaluate his claims of ineffective assistance of trial counsel. We affirm Seberger's conviction and sentence.

AFFIRMED.

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[26] See *Mincey, supra* note 8.

[27] *State v. Sellers, ante* p. 220, 777 N.W.2d 779 (2010).

[28] See *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

JACOB NORTH PRINTING CO., INC., APPELLANT, v. BARRY MOSLEY, APPELLEE.

779 N.W.2d 596

Filed March 19, 2010. No. S-09-774.

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, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Attorneys at Law: Appeal and Error.** In an appeal from an order disqualifying counsel, an appellate court reviews the trial court's factual findings for clear error and ultimately makes its disqualification decision independent of the trial court's ruling.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
4. **Attorneys at Law: Final Orders: Appeal and Error.** An order disqualifying counsel in a civil matter is not a final order. Such orders, however, are subject to interlocutory review if the order of disqualification involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests. This concept is referred to as the "collateral order doctrine."
5. **Attorneys at Law: Conflict of Interest.** In the context of an attorney disqualification case, the issue collateral to the underlying action for purposes of the collateral order doctrine is whether counsel should be disqualified on the basis of the prior representation of an adverse party.
6. **Attorneys at Law: Proof.** The burden of showing that counsel should be disqualified is on the party seeking disqualification.
7. **Attorneys at Law: Appeal and Error.** In a motion seeking disqualification of counsel, it is error for a district court to consider whether disqualification is necessary in order to avoid the appearance of impropriety.
8. **Attorneys at Law: Conflict of Interest: Appeal and Error.** An appellate court should take into account the following considerations when making a determination about whether a prior matter was substantially related to a later one for the purposes of a motion to disqualify counsel: whether the liability issues presented are similar; whether any scientific issues presented are similar; whether the nature of the evidence is similar; whether the lawyer had interviewed a witness who was a key in both causes; the lawyer's knowledge of the former client's trial strategies, negotiation strategies, legal theories, business practices, and trade secrets; the lapse of time between causes; the duration and intimacy of the lawyer's relationship with the clients; the functions being performed by the lawyer; the likelihood that actual conflict will arise; and the likely prejudice to the client if conflict does arise.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for further proceedings.

Mark A. Fahleson and Brian S. Kruse, of Rembolt Ludtke, L.L.P., for appellant.

James C. Zalewski and Maria J. Thietje, of DeMars, Gordon, Olson & Zalewski, for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

Jacob North Printing Co., Inc. (Jacob North), filed an action against a former employee, Barry Mosley, alleging that Mosley converted and misappropriated trade secrets and customer information belonging to Jacob North. Mosley filed a motion to disqualify Jacob North's counsel. That motion was granted. Jacob North appeals. We reverse, and remand to the district court for further proceedings.

FACTUAL BACKGROUND

Jacob North provides printing and printing-related services to clients throughout the United States. Mosley was hired by Jacob North on about May 12, 2003. Mosley had previously been employed by Omaha Printing Company.

In January 2004, Mosley was sued by Omaha Printing Company for violation of a covenant not to compete. Jacob North retained attorney Mark Fahleson and his law firm to represent Mosley in that action. At that time, Fahleson and his firm represented Jacob North in a variety of other legal matters. The litigation was eventually settled in March 2006.

Mosley's employment with Jacob North ceased on about March 12, 2009. Mosley was subsequently employed by McCormick-Armstrong, Inc., a competitor to Jacob North, located in Wichita, Kansas. On March 27, Jacob North filed suit against Mosley alleging a breach of the duty of loyalty, misappropriation of trade secrets, conversion, and a violation

of Nebraska's Consumer Protection Act. Fahleson filed the complaint on Jacob North's behalf.

Due to the 2004 representation, on April 6, 2009, Mosley filed a motion to disqualify Fahleson. The district court granted Mosley's motion, reasoning that the "close similarities between the two cases, the short period of time between the Douglas County case and the present litigation, and the necessity of avoiding the appearance of impropriety" supported disqualification. Jacob North appeals.

ASSIGNMENT OF ERROR

Jacob North assigns that the district court erred in granting the motion to disqualify its counsel.

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, which requires the appellate court to reach a conclusion independent of the lower court's decision.[1]

[2] In an appeal from an order disqualifying counsel, an appellate court reviews the trial court's factual findings for clear error and ultimately makes its disqualification decision independent of the trial court's ruling.[2]

ANALYSIS

District Court's Order Is Final.

As an initial matter, Mosley contends that the district court's order granting his motion for disqualification is not a final order.

[3-5] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.[3] We have previously held that an order disqualifying counsel in a civil matter is not a final order.[4] We have, however, allowed interlocutory review of such orders

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[1] *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

[2] *Beller v. Crow*, 274 Neb. 603, 742 N.W.2d 230 (2007).

[3] See *Hallie Mgmt. Co. v. Perry, supra* note 1.

[4] See *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997).

disqualifying counsel if the order of disqualification involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests.[5] This concept is referred to as the "collateral order doctrine."[6] We have explained that in the context of an attorney disqualification case, the issue "collateral to the underlying action" is whether counsel should be disqualified on the basis of the prior representation of an adverse party.[7]

This case involves such a collateral issue, namely, whether Fahleson should be disqualified from representing Jacob North because of Fahleson's prior representation of Mosley. We therefore have jurisdiction over this appeal under the collateral order doctrine.

District Court Erred in Disqualifying Fahleson.

[6] Having concluded that we have jurisdiction, we must next determine whether the district court erred in granting Mosley's motion to disqualify Fahleson. The burden of showing that counsel should be disqualified is on the party seeking disqualification,[8] in this case, Mosley.

Neb. R. of Prof. Cond. § 3-501.9(a) provides that

> [a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

The parties do not dispute that Fahleson formerly represented Mosley. Nor is this litigation the same litigation at issue in the prior representation. The issue on appeal in this case instead is whether the prior representation was "substantially related" to the current matter.

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[5] See *id.*

[6] See *id.*

[7] *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

[8] See *Beller v. Crow, supra* note 2. See, also, Neb. Ct. R. of Prof. Cond. § 3-501.9, comment 3.

Comment 3 to § 3-501.9 provides in part:

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

This court noted in *State ex rel. Wal-Mart v. Kortum*[9] that

> [i]n fashioning a "substantially related subject matter" test, a court must balance several competing considerations, including the privacy of the attorney-client relationship, the prerogative of a party to choose counsel, and the hardships that disqualification imposes on parties and the entire judicial process. . . . However, the preservation of client confidences is given greater weight in that balancing. . . .
>
> Mindful of these competing interests, we determine that the subject matters of two causes are "substantially related" if the similarity of the factual and legal issues creates a genuine threat that the affected attorney may have received confidential information in the first cause that could be used against the former client in the present cause.
>
> Simply stated, if the court determines that the unique factual and legal issues presented in both cases are so similar that there exists a genuine threat that confidential information may have been revealed in the previous case that could be used against the former client in the instant case, then disqualification must ensue.

[7] As an initial matter, we note that in reaching its decision, the district court specifically stated in part that the "necessity of avoiding the appearance of impropriety" compelled the decision to disqualify Fahleson. But in fact, this court, on several occasions, has specifically held that this is not a consideration in a disqualification analysis. "Clearly, the 'appearance of impropriety' . . . do[es] not address whether two causes are

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[9] *State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 811, 559 N.W.2d 496, 501 (1997) (citations omitted).

'substantially related' and, thus, [is] not [a] factor[] that may be considered in determining whether or not to disqualify an attorney or firm."[10] We therefore conclude that the district court erred insofar as it considered the appearance of impropriety in its decision to grant the motion to disqualify. Because we review the district court's factual findings for clear error but its conclusion of law de novo, and because we do not consider the appearance of impropriety in our analysis, we conclude the district court's error was harmless.

We now turn to Jacob North's argument on appeal. Jacob North argues that disqualification is unnecessary because the two matters at issue are not substantially related.

> [T]he legal theories and liability issues are completely different in the two cases. The Douglas County Action was a breach of contract case involving Mosley and Omaha Printing Company, and based on a written non-compete agreement. There is no contract or non-compete agreement at issue in this case. Jacob North alleges Mosley wrongfully converted company property and misappropriated trade secrets and customer information. The scientific issues and evidence [are] different in that the Douglas County Case did not involve transmission of trade secrets via e-mail. The witnesses are different, with the exception of Mosley himself. The prior action involved a suit by a completely different company.[11]

Mosley contends differently, noting that

> the most obvious concerns are Fahleson's intimate relationship with both cases, the very likely potential for conflict, and the likelihood of prejudice to Mosley. . . .
>
> . . . .
>
> In the case at bar, the allegations in Jacob North's *Complaint and Praecipe* are based on, generally, the allegation that Mosley converted client lists. Although Jacob North asserts that the cases are not similar due to the Omaha litigation being based on a "non-compete

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[10] *Id.* at 812, 559 N.W.2d at 501. See, also, *Richardson v. Griffiths, supra* note 4.

[11] Brief for appellant at 8.

> agreement", as opposed to trade secrets and customer information, . . . it is clear that both cases are premised on the allegations of unfair competition.[12]

[8] We agree with Jacob North and conclude that these two matters are not substantially related. In *Kortum*,[13] we listed considerations in making a determination about whether a prior matter was substantially related to a later one: whether the liability issues presented are similar; whether any scientific issues presented are similar; whether the nature of the evidence is similar; whether the lawyer had interviewed a witness who was a key in both causes; the lawyer's knowledge of the former client's trial strategies, negotiation strategies, legal theories, business practices, and trade secrets; the lapse of time between causes; the duration and intimacy of the lawyer's relationship with the clients; the functions being performed by the lawyer; the likelihood that actual conflict will arise; and the likely prejudice to the client if conflict does arise.

We have examined the record and analyzed it in conjunction with the factors set forth in *Kortum*, and we conclude that the record does not establish a substantial relationship sufficient to require Fahleson's disqualification. While both cases do involve unfair competition, the prior case dealt with Mosley's alleged breach of a noncompete agreement, while the current case contends that Mosley engaged in the conversion of Jacob North's client lists. Such a similarity is insufficient to show a substantial relationship. We further conclude that the two cases do not present the same liability or scientific issues. Nor do these two matters involve the same type of evidence. The only witness in common would appear to be Mosley himself.

In addition to the above, Mosley has presented no evidence whatsoever that Fahleson now has, or ever had, any knowledge regarding Mosley's trial and negotiation strategies, legal theories, business practices, or trade secrets, nor has Mosley presented any evidence that Fahleson has any knowledge about the client lists at issue in this litigation. And to the extent that

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[12] Brief for appellee at 7-8.

[13] *State ex rel. Wal-Mart v. Kortum, supra* note 9.

Mosley might have met his burden simply by his largely conclusory statements that the matters were related, we find that Fahleson adequately rebutted those allegations when, in an affidavit, he expressly denied that he was "aware of any trade secrets, trial strategies, negotiation strategies, legal theories or business practices of [Mosley]."

We also note that the length of time between the end of Fahleson's representation of Mosley and the commencement of the litigation in this case was 3 years—2 years in excess of the 1 year separating representations in *Kortum*. According to Fahleson's affidavit, during those 3 years, neither Fahleson nor his firm represented Mosley in any other action or capacity. And prior to the earlier litigation, Mosley was informed as to the ongoing nature of Fahleson's relationship with Jacob North and therefore would have been aware that even as Fahleson was representing Mosley, he was continuing to represent Jacob North. Such would militate against a finding of an intimate relationship between Mosley and Fahleson.

We agree with Jacob North that the district court erred in disqualifying Fahleson as counsel and therefore reverse the order of the district court and remand this cause to the district court for further proceedings.

CONCLUSION

The district court erred in disqualifying Fahleson because its current representation of Jacob North against Mosley was not substantially related to Fahleson's earlier representation of Mosley against Omaha Printing Company. The decision of the district court is reversed, and this cause is remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GERALD JACKSON, APPELLEE, V. BROTHERHOOD'S RELIEF AND COMPENSATION FUND, APPELLANT.

779 N.W.2d 589

Filed March 19, 2010. No. S-09-812.

1. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. **Employer and Employee: Blood, Breath, and Urine Tests.** An employee refuses to take a drug test if he or she fails to provide a sufficient amount of urine when directed and there is no adequate medical explanation for the failure.
4. **Stipulations.** The construction of a stipulation is a question of law.
5. ____. Parties have no right to stipulate as to matters of law, and such a stipulation, if made, will be disregarded.

Appeal from the District Court for Box Butte County: BRIAN C. SILVERMAN, Judge. Reversed and remanded with directions to dismiss.

Renee Eveland, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellant.

Andrew W. Snyder and Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, L.L.C., for appellee.

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

GERRARD, J.

This is the second time this case has been before us.[1] It remains a case about an alleged breach of contract. Gerald Jackson, a railroad employee, sued Brotherhood's Relief and Compensation Fund (the Fund), alleging that the Fund breached its member agreement to pay him "'Held Out of Service'" benefits in the event he was suspended by his employer. The

[1] See *Jackson v. Brotherhood's Relief & Comp. Fund*, 273 Neb. 1013, 734 N.W.2d 739 (2007).

district court found in favor of Jackson. The primary issue presented in this appeal is whether Jackson is entitled to "held out of service" benefits pursuant to the member agreement. We conclude as a matter of law that Jackson is not entitled to benefits, and we reverse the judgment of the district court and remand with directions to dismiss Jackson's complaint.

BACKGROUND

Jackson was employed as an engineer at Burlington Northern Santa Fe Railway (BNSF). On January 2, 2003, Jackson reported to work and was asked to submit to a random drug test. The drug test required both a breath test and a urine sample. Jackson performed the breath test but did not provide a urine sample. Jackson testified that if he had been able to give a sample, he would have done so.

Karen Donker, who was hired by BNSF to perform the drug test, testified that over a 3-hour timespan, she asked Jackson three to five times to urinate. Jackson never went into the restroom or attempted to urinate. Jackson testified that he urinated 5 minutes before he went to work and did not "have the urge to go." Donker testified that at the end of the 3-hour waiting period, Jackson told her "no, he was not going to go." Jackson said that he ate a large meal before coming to work and refused to drink any liquid because he would suffer indigestion and heartburn. Jackson also testified that in the week before the drug test, he had been ill with flu-like symptoms, dehydration, and diarrhea. A week after the drug test, Jackson was diagnosed with prostatitis, a bacterial infection of the prostate gland that (according to Jackson) can be a "contributing factor" to an inability to urinate.

Because Jackson did not provide a urine sample, he was suspended by BNSF and a formal investigation was initiated by the railway. Following the formal investigation, Jackson was "held out of service" for 9 months for refusal to provide a urine specimen, in violation of the BNSF alcohol and drug policy.

At the time Jackson was suspended, he was a member of the Fund in "good and regular" standing. The Fund provides its members "held out of service" benefits, an accidental

death and dismemberment insurance policy, and the potential of small retirement benefits, in consideration for the payment of dues. The Fund bases its determination of benefits eligibility upon the results of the grievance process provided under the member's collective bargaining agreement. The terms of the agreement between the Fund and a member are contained in the Fund's "constitution," which governs the claims process.

In accordance with the constitution, Jackson timely submitted a claim to the Fund for benefits, along with the transcript and exhibits from the BNSF investigative hearing. The Fund denied Jackson's claim in a written letter, stating: "After closely studying the facts submitted in your claim, we regret to advise you that it cannot be approved since it does not come within the provisions of the *Constitution.* We refer you specifically to Article XII, Sec. 4 and Article XXXIII, Sec. 1-a." (Emphasis in original.) Section 4 of article XII states in relevant part: "Member shall not be eligible for any benefits or compensation whatsoever for 'Held Out of Service', as hereinafter defined, where such claim is based in whole or in part upon . . . failure to take training or to take or pass any examination . . . required by the employer . . . ." Section 1-a of article XXXIII of the constitution defines the term "held out of service" as follows:

> "Held Out of Service", as used in this Constitution, shall include all cases where an employee of the Motive Power or Transportation Department has been entirely and permanently, or temporarily, relieved by his employer from the performance of his said usual duties after formal investigation, at which said employee was properly represented by a representative of the local grievance committee or other employee, as discipline for an offense or offenses, *not, however, because of any willful or intentional violation or infraction of any order or orders, rule or rules, regulation or regulations, expressed or implied, of his employer, or of any violation or infraction of any Federal or State Law now in force or hereafter enacted.*

(Emphasis supplied.)

After his claim was denied, Jackson filed a complaint against the Fund in the district court. He alleged that the Fund had breached its contract with him by failing to compensate him while he was suspended. Jackson sought damages and attorney fees and costs. Following the initial trial, a jury found in favor of Jackson and awarded him $53,010, the amount of damages to which the parties had stipulated. The district court also sustained Jackson's motion for attorney fees and costs. The Fund appealed, and we transferred the appeal to our docket. On appeal, we held that the district court erred in admitting certain exhibits into evidence, and we vacated the jury's verdict and the judgment entered against the Fund.[2] The case was remanded for a new trial.

A bench trial was held on remand, and the district court found that Jackson's failure to give a urine sample was not willful or intentional and that he was entitled to $53,010 as damages for being held out of service. The court awarded Jackson attorney fees and costs and denied the Fund's motions to dismiss and for a new trial. The Fund appeals.

ASSIGNMENTS OF ERROR

The Fund assigns, consolidated and restated, that the district court erred in (1) finding Jackson was entitled to benefits under the constitution, (2) using an improper standard of review, and (3) awarding attorney fees and costs.

STANDARD OF REVIEW

[1] The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.[3]

ANALYSIS

The primary issue presented in this appeal is whether Jackson was entitled to benefits pursuant to the Fund's constitution. The

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[2] *Id.*

[3] *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008).

Fund argues that Jackson is not entitled to benefits under the plain language of the constitution, because he refused to take a federally required drug test by not providing a urine sample. First, the Fund argues, proof that Jackson's conduct was willful or intentional is unnecessary because under article XII of the constitution, a failure to provide a urine sample is a sufficient basis for the denial of benefits. Second, the Fund asserts that under article XXXIII, Jackson willfully or intentionally violated an order, rule, or regulation of his employer. Because, as explained below, we conclude that the denial of benefits was warranted by article XXXIII, we need not address whether the urine test was an "examination . . . required by the employer" within the meaning of article XII.

As noted above, article XXXIII defines "held out of service" as having been "relieved by his employer from the performance of his said usual duties after formal investigation," but excludes a suspension based on "any willful or intentional violation or infraction of any order or orders, rule or rules, regulation or regulations, expressed or implied, of his employer, or of any violation or infraction of any Federal or State Law now in force or hereafter enacted." We have no difficulty in concluding that a "refusal" to provide a urine sample required by federal law is a willful or intentional violation or infraction within the meaning of article XXXIII. And based on our review of the record, there is little doubt that Jackson intentionally refused to provide a urine specimen for a random drug test, in violation of the federal regulations we will explain in more detail below.

It is undisputed that Jackson was required by BNSF—and federal law—to submit to a random drug test requiring both a breath and a urine specimen. And it is also undisputed that Jackson did not give, or even try to give, a urine sample. Following his refusal to provide a urine sample at the random drug test, BNSF sent a letter to Jackson informing him that he was suspended because he violated the BNSF policy on drug and alcohol use. The letter also stated that the suspension was "in accordance with 49 CFR Part 219.107," which provides that "[a]n employee who refuses to provide breath or a body fluid specimen or specimens when required to by the railroad under

a mandatory provision of this part must be deemed disqualified for a period of nine (9) months."[4]

In 1991, Congress passed the Omnibus Transportation Employee Testing Act of 1991,[5] amending the Federal Railroad Safety Act of 1970 to require drug testing of railroad workers in safety-sensitive positions.[6] Federal Railroad Administration regulations, as amended, establish minimum federal safety requirements for the control of alcohol and drug use in railroad operations.[7] Those regulations establish when testing is required, who is to be tested, and the actions which must be taken when an employee passes or fails a required test.[8] In addition, the Department of Transportation (DOT) promulgated regulations which support Federal Railroad Administration testing, essentially providing the technical, scientific, and medical detail on how Federal Railroad Administration drug and alcohol specimens are to be collected, analyzed, reviewed, and reported.[9] Drug testing procedures must comply with the scientific and technical procedures set forth in those regulations.[10]

The Fund points out that Jackson was deemed, as a matter of federal law, to have "refused" the test under 49 C.F.R. § 40.191(a), which lists 11 examples of what constitutes a refusal to take a drug test. In particular, § 40.191(a)(3) states, in pertinent part, that an employee has refused to take a drug test if he or she "[f]ail[s] to provide a urine specimen for any drug test required by this part or DOT agency regulations . . . ." The Fund argues that a refusal to provide a urine specimen is a willful or intentional act within the meaning of article XXXIII. We agree.

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[4] 49 C.F.R. § 219.107(a) (2009).

[5] Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, 105 Stat. 952 (codified at 49 U.S.C. § 20140 (2006)).

[6] See *id.*

[7] See 49 C.F.R. part 219.

[8] See *id.*

[9] See 49 C.F.R. part 40 (2009).

[10] See 49 C.F.R. § 382.105 (2009).

[2] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.[11] But in this case, the facts are undisputed. Jackson was required by his employer and federal law to submit to a random drug test which required both a breath and a urine specimen. Jackson failed to provide a urine specimen—in fact, he did not even try over the course of 3 hours. He has therefore willfully refused to submit to a drug test within the meaning of DOT regulations. And because Jackson refused to submit to the drug test, he is not permitted to receive "held out of service" benefits under the terms of the constitution.

[3] Even if we consider Jackson's purported medical inability to urinate, the evidence he submitted on that point was insufficient as a matter of law. Under DOT regulations, a medical excuse is permitted only if subsection 49 C.F.R. § 40.191(a)(5) is satisfied. That subsection states that an employee has refused to take a drug test if he or she "[f]ail[s] to provide a sufficient amount of urine when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure (see § 40.193(d)(2))." Under § 40.193, an employee who fails to provide a sufficient sample is urged to drink 40 ounces of fluid during a period of up to 3 hours or until a sufficient sample is produced.[12] At that point, if an insufficient sample is again provided, there are medical interventions, including consulting the medical review officer and directing the employee to obtain an evaluation from a licensed physician, acceptable to the review officer, who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen.[13]

In this case, although the record is not completely clear on the point, it appears that Donker followed the insufficient-sample procedure despite Jackson's unwillingness to try to produce a specimen, because she waited for 3 hours and urged

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[11] *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 654 N.W.2d 376 (2002).

[12] § 40.193(b)(2).

[13] § 40.193(c).

him to drink liquids. But a referral physician conducting an examination pursuant to § 40.193(d) is asked to determine either that "[a] medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine"[14] or that "[t]here is not an adequate basis for determining that a medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine."[15] And in this case, although evidence at trial indicates that Jackson had been diagnosed with prostatitis a week after the attempted test, no evidence sufficiently established a causal connection between this condition and Jackson's failure to provide a urine sample for the BNSF drug test.

The office notes of Dr. Robert Graves, a urologist, were in evidence. He examined Jackson and diagnosed him with prostatitis a week after the BNSF drug test, but the notes do not state that prostatitis caused (or could have caused) Jackson to be incapable of providing a urine sample. In fact, in a letter to Jackson dated January 23, 2003, and forwarded to a medical review officer for BNSF, Graves said he was unable to "give a medical explanation for [Jackson's] inability to give a urine specimen during the three-hour period" on January 2. Graves wrote that "the inability to give the urine specimen would be more related to dehydration rather than from the prostatitis itself," and he encouraged Jackson to "drink several glasses of water" the next time he was required to provide his employer a urine sample. This opinion was obviously insufficient to meet the standards set forth by § 40.193(d)(1) for excusing a failure to provide a urine sample. And an unsupported assertion of dehydration is specifically *excluded* as a medical condition that can excuse the failure to provide a sufficient sample.[16] Even if Jackson's medical evidence is considered, under the standards established in the Code of Federal Regulations, Jackson still "refused," as a matter of law, to comply with BNSF and federal regulations requiring drug testing.

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[14] § 40.193(d)(1).

[15] § 40.193(d)(2).

[16] See § 40.193(e).

Considering the undisputed facts in this case, we conclude that the Fund is not required to pay Jackson "held out of service" benefits. The district court erred in finding otherwise. The Fund also argues that the district court erred in using an improper standard of review, because under the constitution, "[w]hen the cause for discipline in the employer's official notification is excluded from benefits hereunder, no benefits or compensation shall be paid by the Organization, even though it may appear such discipline was erroneously assessed, and the member's redress for such discipline shall be against the employer." The Fund argues that under this provision, if Jackson was erroneously found to have refused a drug test, his remedy was against BNSF, not the Fund.[17] Given our resolution of the first assignment of error, however, we need not address this assignment of error.

And the award of attorney fees and costs to Jackson was based upon his obtaining a judgment against the Fund. Because we have concluded that the court erred in finding that Jackson was entitled to benefits under the constitution, we also conclude Jackson was not entitled to attorney fees and costs.

[4,5] Finally, we note, as an aside, Jackson's argument that the Fund's position is barred by a pretrial stipulation. The parties stipulated that Jackson "was 'held out of service' from performing his regular duty for a period of nine months by his employer." On appeal, Jackson argues that this means the Fund stipulated that Jackson fell within the constitution's definition of "held out of service," which excludes willful or intentional violations of orders, rules, or regulations. But the construction of a stipulation is a question of law,[18] and it is clear from the record that no one understood this stipulation to be, in effect, an abandonment of the Fund's case. Rather, the stipulation simply meant there was no dispute that Jackson had been suspended. In any event, whether the undisputed facts fell within the *contractual* definition of "held out of service" depends on

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[17] See, e.g., *Brandt v. Brotherhood's Relief and Compensation Fund*, No. 07 C 2204, 2008 WL 4899630 (N.D. Ill. Nov. 12, 2008).

[18] *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).

the meaning of the constitution, which is a question of law.[19] And parties have no right to stipulate as to matters of law; such a stipulation, if made, will be disregarded.[20] We find no merit to Jackson's argument.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court and remand the cause with directions to dismiss Jackson's complaint.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

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[19] See *Builders Supply Co., supra* note 3.

[20] *City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co.*, 201 Neb. 405, 268 N.W.2d 98 (1978).

STATE OF NEBRASKA, APPELLEE, V. ANTOINE D. YOUNG, APPELLANT.

780 N.W.2d 28

Filed March 26, 2010. No. S-09-246.

1. **Effectiveness of Counsel: Records: Trial: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
2. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** Under Nebraska law, in order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.
3. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
4. **Criminal Law: Venue: Proof.** Venue may be proved like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient.

5. **Appeal and Error: Words and Phrases.** Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
6. **Appeal and Error.** Consideration of plain error occurs at the discretion of an appellate court.
7. **Verdicts: Juries: Jury Instructions: Presumptions.** Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.
8. **Jury Instructions: Appeal and Error.** Although the Nebraska pattern jury instructions are to be used whenever applicable, a failure to follow the pattern jury instructions does not automatically require reversal.
9. ____: ____. All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
10. **Effectiveness of Counsel: Jury Instructions.** Defense counsel is not ineffective for failing to raise an argument that has no merit or for failing to object to jury instructions that, when read together and taken as a whole, correctly state the law and are not misleading.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Peder Bartling, of Bartling Law Offices, P.C., L.L.O., for appellant.

Antoine D. Young, pro se.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

STEPHAN, J.

Antoine D. Young was convicted of first degree murder and use of a deadly weapon in the commission of a felony in the death of Ray S. Webb. Young was sentenced to life imprisonment on the murder conviction and to 40 to 40 years' imprisonment on the weapons conviction, to be served consecutively. In this direct appeal, separate briefs were filed by Young's appellate counsel and by Young pro se.

I. BACKGROUND

On the afternoon of August 25, 2007, Webb was fatally shot while seated behind the steering wheel of a vehicle which was stopped in the drive-through lane of a fast-food restaurant in Omaha, Nebraska. Two witnesses testified that immediately prior to the shooting, they were standing with Young outside a barbershop located across the street from the restaurant. Both witnesses stated that they observed Young cross the street, approach Webb's vehicle, and fire the fatal shots from a handgun. One of these witnesses stated that Young was bald with a full beard and was wearing a white T-shirt, black shorts, a black baseball hat, and tennis shoes at the time of the shooting.

Another witness was a passenger in a vehicle which was stopped in front of Webb's vehicle at the time of the shooting. This witness testified that after hearing what he first thought were fireworks, he turned and saw a bearded man dressed in black standing at the driver's side of Webb's vehicle. This witness again heard noises which he thought were fireworks, and he observed a shiny metallic object in the air in front of the man standing outside Webb's vehicle.

A defense witness testified that as he drove past the restaurant, he heard shots and observed a bearded man dressed in a black hat, a black T-shirt, white shorts, and white tennis shoes approach Webb's vehicle from the rear, fire a black pistol, and then flee from the back of the restaurant. He testified that Young was not the person he observed.

Reginald Clark, a defense witness who had been acquainted with Young since childhood, testified that as he drove past the restaurant, he observed two unidentified men dressed in black walking quickly from the drive-through lane. From a photograph, Clark identified Webb's vehicle as that which he observed in the drive-through lane as he drove past. Clark did not recognize the men he observed walking away from the restaurant, and he did not hear gunfire or see a weapon. Clark testified that when he stopped at a nearby intersection, another motorist came alongside his vehicle and made a comment which led him to believe that "[s]omething bad" had occurred

at the restaurant. Clark testified that he did not observe Young in the vicinity of the restaurant as he drove past.

Another witness, "Ramona," testified that on the afternoon of the shooting, she was leaving the restaurant and observed Webb, with whom she was acquainted, standing outside his vehicle, arguing with an unidentified man and woman. When the argument had concluded, Ramona saw Webb enter his vehicle and saw the man with whom he had been arguing approach another vehicle, retrieve an unidentified object, and place it beneath his shirt. Ramona testified that she then observed the unidentified man approach Webb's vehicle and heard two gunshots, but that she did not see the shooting.

Testifying in his own defense, Young stated that he was not present at the barbershop or the restaurant on the afternoon of August 25, 2007, but instead spent the afternoon at a family gathering at a city park located approximately 4 miles from the restaurant. Two persons testified that they saw Young at the gathering, and a third person who attended the gathering testified that he observed Young's vehicle parked nearby. In response to a question during his cross-examination, Young testified that he was successful and did well in college. The prosecutor impeached this testimony using a transcript showing that Young had failed most of his college courses.

During the jury instruction conference, there was no discussion of an alibi instruction. Approximately 5 minutes after the instructions were given and the case was submitted to the jury, the trial judge reconvened the jury in the presence of Young and counsel and stated that he had forgotten to give an alibi instruction. The judge then instructed the jury as follows: "At issue in this case is whether [Young] was present at the time and place of the crime. The State must prove that [Young] was present during the time and place of the crime." Outside the presence of the jury, Young's counsel objected on the ground that the instruction should have stated that the State's burden of proof was "beyond a reasonable doubt." The prosecutor objected on grounds that the alibi instruction was given after closing arguments and was unnecessary. The court overruled both objections.

The jury returned guilty verdicts, and the court accepted the verdicts and adjudged Young guilty on both counts. After he was sentenced and his motion for new trial was overruled, Young perfected this timely appeal. His appellate counsel is not the same attorney who represented him at trial.

II. ASSIGNMENTS OF ERROR

The sole assignment of error in the brief filed by Young's appellate counsel is that Young received ineffective assistance of counsel at trial. Young argues specifically in that brief that his trial counsel

> (1) failed to offer any evidence whatsoever from three critical exculpatory witnesses, the identity of which counsel was aware prior to trial, that Young was not the person who committed the homicide, (2) failed to elicit evidence regarding Young's lack of motive to kill Webb, (3) failed to develop fully Young's alibi defense, (4) failed to tender an alibi instruction during the instruction conference, (5) failed to elicit testimony from [Young's brother], (6) failed to elicit corroborative hearsay testimony from . . . Clark, and (7) failed to prepare Young properly to testify.[1]

Young also submitted a pro se brief, in which he argued that (1) the prosecution failed to establish venue, (2) the prosecutor made improper remarks during closing argument, (3) the trial judge erred in instructing the jury, (4) the trial judge failed to properly accept the jury's guilty plea and adjudge Young guilty of the crimes charged, and (5) his trial counsel was ineffective.

III. STANDARD OF REVIEW

[1] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.[2]

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[1] Brief for appellant at 15.

[2] *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009); *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008).

IV. ANALYSIS

1. Error Assigned by Appellate Counsel

[2] Under Nebraska law, in order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.[3] Our rule differs from that announced by the U.S. Supreme Court in *Massaro v. United States*,[4] which permits an ineffective assistance of counsel claim to be brought in a collateral postconviction proceeding regardless of whether it was raised on direct appeal. This court has not adopted the federal rule, noting that, pursuant to *Massaro v. United States*, it is not a constitutional requirement.[5]

But the fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. In most instances, it cannot, because the trial record reviewed on appeal is "devoted to issues of guilt or innocence" and usually "will not disclose the facts necessary to decide either prong of the *Strickland* [*v. Washington*[6]] analysis."[7] We have generally reached ineffective assistance of counsel claims on direct appeal only in those instances where it was clear from the record that such claims were without merit[8] or in the rare case where trial counsel's error was "so egregious and resulted in such a high level of prejudice [that] no tactic or strategy can

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[3] *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

[4] *Massaro v. United States*, 538 U.S. 500, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003).

[5] *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

[6] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[7] *Massaro v. United States, supra* note 4, 538 U.S. at 505.

[8] See, e.g., *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995).

overcome the effect of the error, which effect was a fundamentally unfair trial."[9]

[3] With these principles in mind, we turn to the ineffective assistance claims which Young, through his appellate counsel, has asserted on direct appeal. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[10]

(a) Evidence of Third-Party Guilt

The record reflects that during pretrial discovery, Young's trial counsel learned that Omaha police had received information from an incarcerated person. This person reported that he was told by his cellmate that a third person had admitted to killing Webb. Trial counsel also discovered that police had been told by Ramona that she "believed" the same third person killed Webb, because she observed someone who "might have matched [the third person's] description leaving the scene." The record also indicates that Webb's widow initially made a statement to police implicating the same third person in the murder, but later told police she believed Young was responsible. When police questioned the third person, he denied involvement, explained his whereabouts on the day of the shooting, and passed a polygraph examination.

The record reflects that Young's counsel attempted to introduce the hearsay testimony regarding the third person's alleged admission of involvement in Webb's murder, arguing that the evidence should be received under *Holmes v. South Carolina*.[11] The district court rejected this theory. Young now argues that trial counsel's theory that the hearsay was admissible under

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[9] *State v. Faust*, 265 Neb. 845, 875, 660 N.W.2d 844, 872 (2003), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[10] *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010); *State v. Sepulveda*, 278 Neb. 972, 775 N.W.2d 40 (2009).

[11] See *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

Holmes v. South Carolina was clearly without merit and contends that trial counsel should have explored other means of adducing the evidence, including securing the third person's presence at trial. We determine that an evaluation of trial counsel's actions would require an evaluation of trial strategy and of matters not contained in the record. The record is insufficient to review this claim of ineffective assistance of counsel in this direct appeal.[12]

Young also argues that his trial counsel was ineffective in failing to elicit testimony from Ramona and Webb's widow regarding the third person's alleged involvement in Webb's murder. We conclude that the record on direct appeal is not sufficient to adequately review this claim.

(b) Motive of Third Party

Young contends that his trial counsel was ineffective in failing to present evidence that someone other than Young had a motive to kill Webb. From our review of the record, we cannot make any meaningful determination of whether such evidence existed or, if it did, whether trial counsel made a reasonable strategic decision not to present it. We thus conclude that the record on direct appeal is not sufficient to adequately review this claim.

(c) Alibi Defense

Although Young and three other defense witnesses testified that Young was at a family gathering 4 miles away from the shooting at the time it occurred, Young argues that his trial counsel was ineffective in failing to call additional witnesses who could have supported his alibi defense. We cannot determine from this record whether there were additional witnesses who could have testified regarding the alibi defense or, if so, whether such testimony would have strengthened or weakened the evidence which was actually presented. We thus conclude that the record on direct appeal is not sufficient to adequately review this claim.

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[12] See *State v. Davis, supra* note 2.

(d) Alibi Instruction

Young claims that his trial counsel was ineffective in failing to request an alibi instruction. An evaluation of trial counsel's actions would require an evaluation of trial strategy and of matters not contained in the record. We conclude that the record on direct appeal is not sufficient to adequately review this claim.

(e) Young's Brother

Young argues that his trial counsel was ineffective in failing to call as a defense witness Young's brother, who is the owner of the barbershop located across the street from the restaurant where the shooting occurred. We conclude that the record on direct appeal is not sufficient to adequately review this claim.

(f) Clark

Young contends that his trial counsel was ineffective in failing to elicit Clark's testimony about a statement made to Clark by an unidentified motorist. The statement related to the details of what the motorist had seen as he drove past the restaurant. We note that counsel attempted to establish the admissibility of this testimony on the theory that the statement made to Clark was an excited utterance, but the court ruled prior to trial that the statement was inadmissible on this basis. Clark did testify that he interpreted the statement as indicating that "[s]omething bad" had just occurred at the restaurant. We conclude that the record on direct appeal is not sufficient to adequately review this claim.

(g) Preparation for Testimony

Finally, Young argues that his trial counsel was ineffective in failing to adequately prepare him to testify. He generally contends that through better preparation, the impeachment resulting from his inconsistent testimony on cross-examination regarding his college grades could have been averted. But on this record, we cannot determine whether or not counsel adequately prepared Young to address this issue, and we note that the impeachment could have been avoided if Young had simply been truthful about his academic performance in

response to the prosecutor's initial inquiry. We conclude that the record on direct appeal is not sufficient to adequately review this claim.

2. Error Assigned in Pro Se Brief

(a) Venue

[4] In his supplemental pro se brief, Young argues that the State failed to prove venue pursuant to Neb. Rev. Stat. § 29-1301 (Reissue 2008), which provides that except in circumstances not applicable here, "[a]ll criminal cases shall be tried in the county where the offense was committed . . . ." Venue may be proved like any other fact in a criminal case.[13] It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient.[14] The information against Young alleged that the crimes were committed in Douglas County, Nebraska, and Young was tried in the district court for that county. Several witnesses testified that Webb was shot outside an Omaha restaurant. The paramedic who responded and pronounced Webb dead at the scene of the shooting testified that the restaurant was located in Douglas County. Venue was proved.

(b) Acceptance of Verdict

Young also argues as plain error that his sentence is void because the district court did not properly accept the jury's verdict and adjudge him guilty. The record refutes this claim. The jury returned its verdict on the afternoon of January 29, 2009. In a journal entry bearing that date, the court wrote, "Jury resumed deliberations and verdict was reached. Verdict announced with [Young] being present with his [attorney] . . . . Jury found [Young] guilty of Count I – murder in the first degree, and Count II – use of a deadly weapon to commit a felony. Verdict accepted." Additionally, in its order

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[13] *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164 (2004).

[14] *Id.*

of judgment and conviction, filed February 3, 2009, the court wrote:

> [T]he jury found [Young] guilty on both counts as charged[.]
>
> . . . .
>
> The verdict of the jury as to these counts is accepted by the Court and judgment is rendered against [Young] in conformity with the verdict of the jury.
>
> IT IS THEREFORE ORDERED that [Young] is adjudged guilty[.]

Young's contention that the district court erred in failing to accept the jury's verdict and adjudge him guilty is without merit.

(c) Prosecutor's Remarks

Young argues plain error with respect to statements made by the prosecutor during closing argument to which no objection was made. Specifically, Young contends that the prosecutor "vouched for the credibility"[15] of various witnesses by noting they had no reason to lie and that the prosecutor improperly noted Young had lied during his testimony.

[5-7] Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[16] Consideration of plain error occurs at the discretion of an appellate court.[17] During trial testimony, each of the witnesses referenced in the prosecutor's closing argument testified either directly or indirectly that he or she did not have a relationship with Young or a connection to the murder. Young's testimony regarding his academic success can fairly be characterized as untruthful, given the impeachment evidence adduced. The jury

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[15] Pro se supplemental brief for appellant at 9.

[16] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010); *State v. Molina, supra* note 3.

[17] *State v. Vela, supra* note 16; *State v. Sepulveda, supra* note 10.

was instructed that statements made by the lawyers were not evidence and that it should not consider statements made by the lawyers that were not supported by the evidence. Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.[18] Here, there is nothing in the record to suggest that the jury did not follow the court's instruction, that the State made improper comments not supported by the evidence, or that Young was prejudiced in any way. We find no plain error in these portions of the prosecutor's argument.

(d) Jury Instructions

[8,9] Young also assigns plain error with respect to portions of jury instructions Nos. 1, 7, 8, and 16 to which no objection was made at trial. Young's argument focuses on the fact that the language of the instructions differs slightly from that of the corresponding sections of our pattern jury instructions for criminal cases. Although we have stated that the Nebraska pattern jury instructions are to be used whenever applicable, we have recognized that a failure to follow the pattern jury instructions does not automatically require reversal.[19] All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.[20] Applying this standard, we find no plain error resulting from the differences between instructions Nos. 1, 7, 8, and 16, and the corresponding pattern instructions.

(e) Ineffective Assistance of Counsel

Young's pro se brief includes claims of ineffective assistance of trial counsel in addition to those asserted in the brief filed

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[18] *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009); *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[19] *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007); *McClure v. Forsman*, 266 Neb. 90, 662 N.W.2d 566 (2003).

[20] *State v. Schmidt*, 276 Neb. 723, 757 N.W.2d 291 (2008); *State v. Welch*, 275 Neb. 517, 747 N.W.2d 613 (2008).

by his appellate counsel. First, he contends that his trial counsel was ineffective in failing to investigate or interview *any* of the witnesses endorsed by the State. But the record reflects that counsel took pretrial depositions of several of the State's endorsed witnesses. This claim is thus refuted by the record and without merit.

[10] Young also contends that his trial counsel was ineffective in failing to object to or otherwise preserve issues regarding venue, acceptance of the verdict, jury instructions, and remarks made by the prosecutor during closing argument. But we have considered these issues under Young's pro se assignments of plain error and concluded that they are without merit. Defense counsel is not ineffective for failing to raise an argument that has no merit[21] or for failing to object to jury instructions that, when read together and taken as a whole, correctly state the law and are not misleading.[22] Thus, we can and do conclude on this record that there is no merit in the pro se ineffective assistance claims which correspond to the pro se plain error assignments.

Finally, Young contends that his trial counsel was ineffective in stipulating to the licensure, education, background, and other foundational requirements for the testimony of the pathologist who performed the autopsy of Webb and testified regarding his findings. But the record reflects that despite the stipulation, the pathologist testified that he was a duly licensed physician specializing in pathology, that he was trained to perform autopsies, and that he had performed approximately 800 forensic autopsies in the preceding 15 years. Young does not assign error with respect to any portion of the pathologist's substantive testimony. Accordingly, the record is sufficient for us to conclude that the offer to stipulate to the pathologist's professional qualifications did not constitute ineffective assistance of counsel.

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[21] *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004); *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002).

[22] *State v. McHenry, supra* note 21. See, also, *State v. Tucker*, 257 Neb. 496, 598 N.W.2d 742 (1999).

V. CONCLUSION

For the reasons discussed, we conclude that the record does not permit us to reach any of the ineffective assistance of counsel claims asserted in the brief filed by Young's appellate counsel. However, we do reach all of the claims raised by Young in his pro se brief, including the additional claims of ineffective assistance of trial counsel, and conclude that they are without merit. Accordingly, we affirm the convictions and sentences.

AFFIRMED.

DAVENPORT LIMITED PARTNERSHIP, APPELLEE, V. 75TH & DODGE I, L.P., ET AL., APPELLANTS.

780 N.W.2d 416

Filed March 26, 2010. No. S-09-387.

1. **Declaratory Judgments.** Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute.
2. **Contracts.** The determination of rights under a contract is a law action.
3. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. The appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.
5. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
6. **Contracts.** Whether a contract is ambiguous is a question of law.
7. ____. The meaning of an ambiguous contract is generally a question of fact.
8. ____. A court interpreting a contract must first determine as a matter of law whether the contract is ambiguous.
9. ____. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
10. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.

11. **Contracts.** A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.
12. ____. When a court has determined that ambiguity exists in a document, an interpretative meaning for the ambiguous word, phrase, or provision in the document is a question of fact for the fact finder.
13. **Contracts: Evidence.** If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract.
14. **Contracts: Parol Evidence.** A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous.
15. **Waiver: Words and Phrases.** Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.
16. **Waiver: Estoppel.** In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such purpose, or acts amounting to estoppel on his or her part.
17. **Contracts: Waiver: Proof.** A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.
18. **Leases.** Acceptance of an option to extend a lease must be strictly construed in accordance with the terms of the option.
19. **Landlord and Tenant: Leases: Time.** A lessee has no right to a renewal term unless the option is exercised in a timely manner in strict accordance with the specifications of the lease agreement.
20. **Contracts.** A contract is viewed as a whole in order to construe it.
21. ____. Whatever the construction of a particular clause of a contract, standing alone, may be, it must be read in connection with other clauses, and all writings forming part of the same transaction are interpreted together.
22. **Mortgages: Leases.** A mortgagee of a leasehold interest takes his or her mortgage subject to all of the covenants and conditions of the lease, and the mortgage is only coextensive with the term of the lease. The mortgage interest falls with the termination of the leasehold interest.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Heather Voegele-Andersen and Elisa Davies, of Koley Jessen, P.C., L.L.O., for appellants.

Joseph E. Jones and Rebecca A. Zawisky, of Fraser Stryker, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

NATURE OF CASE

Davenport Limited Partnership (Davenport) filed a declaratory judgment action against 75th & Dodge I, L.P.; 75th & Dodge II, L.P.; and Dodge Mortgage, L.L.C. (collectively the Dodge entities), seeking a declaration that the Dodge entities had no rights in a lease relating to a parcel of land near 75th and Dodge Streets in Omaha, Nebraska. When the suit was filed, Davenport was the landlord of the property under a commercial lease to Dodge I. Dodge I sublet the property to Dodge II. The primary question presented in this case is whether Dodge I properly gave notice to Davenport to renew the lease for an additional 10 years or more.

BACKGROUND

In 1960, Ernst Lied leased a 9-acre tract of land located at 7520 Dodge Street in Omaha to The Brandeis Investment Company. The Brandeis Investment Company then leased its interest in the property to Lenrich Associates through a lease (the Ground Lease) originally executed in March 1966. The next month, Lenrich Associates entered into a lease (the Space Lease) with Diana Stores Corporation. The Ground Lease was originally for a 32-year term, expiring in 1998. It allowed for renewal in a minimum of 10-year increments, not to extend beyond the year 2059. To exercise its option to extend the Ground Lease, the tenant was required to give written notice to the landlord at least 12 months before the end of the term. Article XXXI(a) of the Ground Lease states:

> On or before one (1) year . . . prior to the expiration date of any then existing term (including the original term hereof or any extended or renewed term occurring after the termination date of the original term hereof), Tenant shall execute and deliver in writing to Landlord, notice of its desire to so extend or renew, and said notice shall set forth the beginning and ending date of any such extended or renewal term.

Through a variety of assignments and transfers, Davenport and the Dodge entities eventually became parties to two separate leases for the property. Davenport became the landlord

of the Ground Lease, with Dodge I as lessee, so Dodge I became landlord of the Space Lease, with Dodge II and Dodge Mortgage as lessees. Dodge II and Dodge Mortgage also became leasehold mortgagees of the Ground Lease.

Henry Singer, the president and sole owner of Dodge I's general partner, testified that in 1995, he had a telephone conversation with Alan Baer, a predecessor in interest to Davenport's rights, about renewing the Ground Lease. According to Singer, Baer asked Singer what he "intended to do about [the] lease." Singer said that he "would be renewing the lease to be coterminus with . . . Dodge II," apparently referring to the Space Lease, which runs at least until 2017. Singer testified that Baer responded, "fine, that's okay." There is no written evidence memorializing that telephone conversation. There is also no evidence that Dodge I ever disclosed to Davenport that such a conversation had occurred, at any time between Baer's death in 2002 and May 31, 2007.

It is unclear from the record whether the Ground Lease was formally renewed at the end of the original lease term in 1998. However, Davenport continued to accept rent from Dodge I after the end of the original lease term.

On April 15, 2003, James Maenner, an employee with a commercial real estate investment company, sent a letter to Robert Murray, Davenport's counsel, regarding the possible purchase of Davenport's leasehold position by Dodge I and Dodge II. A report enclosed with the letter indicated that the Ground Lease had expired on May 31, 1998, and could be renewed in 10-year "increments" not past May 31, 2059. Also included under "Important dates for each leasehold position" was the statement "Notice to renew no later than one (1) year before expiration of a renewal period." Singer also received a copy of the letter and report, and there is no evidence that Dodge I or Singer questioned Maenner's statement regarding the lease expiration at that time.

In October 2007, Dodge I advised Davenport that it had found a potential tenant for the Space Lease and sent a consent agreement to Murray asking that a representative of Davenport sign it. In response, Murray, after consultation with Davenport's chairman, sent an e-mail advising Dodge I that Davenport had

not received timely written notice from Dodge I in 2007 of its intent to exercise its right to renew the Ground Lease for another 10 years. The e-mail stated that "it is Davenport's understanding that the possessory interest of [Dodge I] will expire as of May 31, 2008," and that "Davenport does not believe it is either fair or, in this case, in compliance with the documents, for [Dodge I] to fail to give notice of renewal until a new tenant has been found for the property."

Upon receipt of the e-mail, Singer was "shocked and surprised." Singer testified that after receiving the e-mail, he reviewed the lease, noting the written notice requirement for a 10-year term renewal. Singer then sent a letter to Murray explaining that he felt Dodge I had "made our intentions clear as to renewing the lease between Davenport and [Dodge I] on several occasions." Singer concluded his letter by stating, "However, as a matter of precaution, this should serve as our formal notice of renewal for an additional ten (10) year term (i.e., ending in 2018)."

One month later, Davenport filed this declaratory judgment action, seeking a declaration that Dodge I had not properly renewed the lease. After a bench trial, the district court entered judgment for Davenport, finding that the Dodge entities had no continuing rights to the lease property. The district court found that Dodge I failed to give written notice, that Davenport did not waive the written notice requirement, and that the acceptance of rent from Dodge I after 1998 operated as an extension of the lease for the 10-year minimum lease period required by the Ground Lease. The Dodge entities appeal.

ASSIGNMENTS OF ERROR

The Dodge entities assign that the district court erred in

(1) finding a 10-year renewal period in the Ground Lease;

(2) finding that Davenport's acceptance of rent following the original term of the Ground Lease constituted only a 10-year extension of the Ground Lease by operation of law;

(3) applying an improper legal standard in determining whether the written notice requirement of the Ground Lease had been waived;

(4) finding that the written notice requirement of the Ground Lease had not been waived;

(5) finding that the telephone conversation between Singer and Baer did not constitute a waiver of the written notice requirement of the Ground Lease;

(6) finding that Dodge I did not properly provide notice of its intent to renew the Ground Lease beyond May 31, 2008; and

(7) finding that Dodge II and Dodge Mortgage's leasehold mortgagee interests end upon termination of the Ground Lease.

STANDARD OF REVIEW

[1-3] Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute.[1] The determination of rights under a contract is a law action.[2] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.[3] The appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[4]

[4-7] When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.[5] The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions

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[1] *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987).

[2] See *Perry v. Esch*, 240 Neb. 289, 481 N.W.2d 431 (1992).

[3] *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 654 N.W.2d 376 (2002).

[4] *Pavers, Inc. v. Board of Regents*, 276 Neb. 559, 755 N.W.2d 400 (2008).

[5] *Mortgage Express v. Tudor Ins. Co.*, 278 Neb. 449, 771 N.W.2d 137 (2009).

independently of the determinations made by the court below.[6] And whether a contract is ambiguous is a question of law.[7] The meaning of an ambiguous contract, however, is generally a question of fact.[8]

ANALYSIS

Ground Lease Was Extended in 1998 for 10 Years

Dodge I's first two assignments of error deal with the duration of the Ground Lease renewal. The district court found that the parties agreed to a 10-year renewal period and that therefore, the Ground Lease extended until May 31, 2008. For reasons that will be explained below, we agree with the district court's conclusion that Singer's 1995 telephone conversation with Baer was not an effective extension of the Ground Lease. But the parties agree that the continued payment and acceptance of rent after 1998 effected an extension of the Ground Lease. The question, under those circumstances, is what term is implied by such an extension. Dodge I argues that the district court erred in finding a 10-year renewal period in the Ground Lease, and specifically contends that it was error to find Davenport's acceptance of rent after expiration of the original term of the Ground Lease constituted only a 10-year extension.

[8-10] A court interpreting a contract must first determine as a matter of law whether the contract is ambiguous.[9] A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.[10] However, a contract is ambiguous when a word, phrase, or provision in the contract has, or is

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[6] *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008).

[7] See *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

[8] *Id.*

[9] *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006).

[10] *Id.*

susceptible of, at least two reasonable but conflicting interpretations or meanings.[11]

In the instant case, the district court effectively concluded that the Ground Lease was ambiguous and determined that the duration of the Ground Lease renewal period was 10 years. The Ground Lease provides, in pertinent part:

> Tenant shall have the right and option . . . to renew the term of this lease for additional periods of time, each of which shall not be less than ten (10) years in duration, upon the same terms and conditions as in this lease contained . . . save and except that in no event shall the date of termination of any such extension or renewal period extend beyond May 31, 2059, such option in each such instances to be exercised in the following manner[.]

This provision is susceptible to different interpretations. By the terms of the Ground Lease, a tenant would be able to renew the term of the lease for an additional period of time ranging from 10 to 60 years. Thus, when the parties agree to renew the Ground Lease, it is not at all clear for what duration, except that the "additional periods of time" will not be less than 10 years or extend beyond 2059. In other words, the Ground Lease is ambiguous regarding the effect of an unspecified "holdover" extension of the lease.

[11-14] Having concluded that the Ground Lease is ambiguous, we turn next to its meaning. A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.[12] Rather, when a court has determined that ambiguity exists in a document, an interpretative meaning for the ambiguous word, phrase, or provision in the document is a question of fact for the fact finder.[13] In this regard, therefore, if a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract.[14]

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[11] *Id.*

[12] *Gary's Implement, supra* note 7.

[13] *Id.*

[14] *Ruble v. Reich*, 259 Neb. 658, 611 N.W.2d 844 (2000).

A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous.[15]

The district court's finding that the parties agreed to a 10-year renewal period, and that the Ground Lease was extended only until May 31, 2008, is not clearly erroneous; it is fully supported by the record. To begin with, Maenner's report, which was provided to all the parties and with which none of them disagreed, indicates that the parties understood the Ground Lease to renew in 10-year increments. In particular, the term "increments," and reference to ongoing terms of renewal, suggests the parties foresaw multiple renewal periods and, therefore, did not consider the first renewal, in 1998, to extend the lease until 2059.

Consistent with Maenner's report, Davenport's e-mail to Dodge I in November 2007, regarding Dodge I's failure to renew the Ground Lease for an additional 10 years, is consistent only with an understanding of a 10-year renewal term. Dodge I's response, stating that Dodge I thought its intent to renew was clear, but also serving "formal notice of renewal for an additional ten (10) year term (i.e., ending in 2018)," is also consistent only with such an understanding of the Ground Lease. Singer's response was not that the Ground Lease did not require renewal after 10 years—it was that Singer thought the Ground Lease already *had* been renewed for another 10 years. But the 10-year renewal period was assumed. Singer was, in effect, confirming the parties' understanding that the original renewal was for 10 years.

When we consider the judgment in a light most favorable to Davenport, as we must, we conclude that the district court's factual finding that the renewal term was 10 years was not clearly erroneous. Although the parties could have extended the Ground Lease for a period longer than 10 years, so long as it did not extend beyond 2059, the language of the Ground Lease, illuminated by the dealings of the parties, suggests that a holdover extension of the lease would be for a 10-year

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[15] *In re Trust Created by Cease*, 267 Neb. 753, 677 N.W.2d 495 (2004).

period. The Dodge entities' first assignment of error is without merit.

Payment and Acceptance of Rent Did Not Extend Ground Lease to 2059

In a related assignment of error, Dodge argues that the district court erred in finding Davenport's acceptance of rent after expiration of the original term of the Ground Lease constituted only a 10-year extension. Dodge I asserts that the payment and acceptance of rent from June 1998 through October 2007 extended the Ground Lease by operation of law to 2059, the total length of time for the option to renew. In support of its position, Dodge I cites *Enterprise Co. v. Americom Corp*.[16]

In *Enterprise Co.*, the parties entered into a written lease agreement for commercial office space. The lease term ran for 3 years. The lease provided that the tenant would be entitled to a 3-year extension at a higher rent if the tenant exercised the option in writing no later than 6 months before the end of the original term. The tenant did not provide written notice, but instead held over and paid the higher rent provided for in the option. At the end of the first year, the tenant vacated the premises. The landlord contended that the tenant had exercised the option by holding over and was liable for the 2 remaining years of the extended term. The Nebraska Court of Appeals agreed and held that the tenant exercised the option to renew the lease for the extended 3-year term when it held over and paid the increased rent as provided in the option provision of the written lease, even though it did not provide written notification of its exercise of the option.

Enterprise Co., however, is of limited value here. In *Enterprise Co.*, the tenant's only extension option was for a 3-year period at a higher rent. In this case, however, the Ground Lease permitted a tenant to renew potentially six times, as long as the renewal term was at least 10 years and did not last beyond 2059. In fact, *Enterprise Co.* supports the district

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[16] *Enterprise Co. v. Americom Corp.*, 1 Neb. App. 1125, 510 N.W.2d 537 (1993).

court's judgment, because *Enterprise Co.* makes clear that an extension by default—a holdover—occurs pursuant to the extension provision of the lease. As we discussed above, the record makes it clear that the parties to this case renewed the Ground Lease in 1998 for 10 years. The payment of rent was consistent with that understanding.

We cannot agree with Dodge I's contention that *Enterprise Co.* supports a finding that the Ground Lease was extended until 2059. Neither the language of the contract nor the behavior of the parties was consistent with such an understanding. Therefore, we conclude that Dodge I's second assignment of error is without merit.

Davenport Did Not Waive Notice Requirement

To comply with the contractual language of the Ground Lease, Dodge I was required to provide written notice of its intent to renew the Ground Lease. The district court reasoned that Singer's purported extension of the Ground Lease, in his 1995 telephone conversation with Baer, was ineffective because Baer did not waive the written notice requirement. Dodge I argues that the district court erred and that the Ground Lease was extended in 1995 to last until 2017.

[15-17] Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.[17] In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such purpose, or acts amounting to estoppel on his or her part.[18] A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.[19]

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[17] *Jelsma v. Scottsdale Ins. Co.*, 231 Neb. 657, 437 N.W.2d 778 (1989).

[18] *Id.*

[19] *Id.*

[18,19] Our precedent has long adhered to the general rule that acceptance of an option to extend a lease must be strictly construed in accordance with the terms of the option.[20] For example, in *Wolf v. Tastee Freez Corp.*,[21] we held that a lessee who provided only an 89-day written notice in the face of a provision which required a 90-day written notice had failed to properly exercise the renewal option. We held that a notice of renewal was served too late, but we reversed the trial court's grant of a summary judgment in favor of the lessors, because there was a question of fact as to whether oral notice was timely given. In so ruling, we wrote:

> The lessors' agreement to renew is an executory contract, and until the lessee has exercised it in some affirmative way, the lessor cannot be held for the additional term. That the acceptance of an offer must be made within the time specified in the offer is a general rule of law.[22]

Under a provision specifically designating the time within which notice to extend a lease must be given, that time is of the essence, and such provision is to be strictly construed.[23] A lessee has no right to the renewal term unless the option is exercised in a timely manner in strict accordance with the specifications of the lease agreement.[24]

As a preliminary matter, Dodge I argues that the district court erred in applying an "improper legal standard" in determining whether the written notice requirement of the Ground Lease had been waived. If the proper legal standard had been applied, Dodge I argues, the district court would have found a waiver of the written notice requirement. And Dodge I argues that the district court erred in finding that the written notice requirement of the Ground Lease was not waived by the telephone conversation between Singer and Baer. Essentially,

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[20] *Guy Dean's Lake Shore Marina v. Ramey*, 246 Neb. 258, 518 N.W.2d 129 (1994).

[21] *Wolf v. Tastee Freez Corp.*, 172 Neb. 430, 109 N.W.2d 733 (1961).

[22] *Id.* at 432, 109 N.W.2d at 735.

[23] *Guy Dean's Lake Shore Marina, supra* note 20.

[24] *Id.*

Dodge I argues that if *Wolf* had been applied to the facts here, the district court would have found a waiver of the written notice requirement.

The district court discussed *Wolf* at length and concluded that it was of limited value in deciding this case. We agree. As explained above, in *Wolf*, we held that a notice of renewal was served too late, but we reversed the trial court's grant of a summary judgment in favor of the lessors, because there was a question of fact as to whether oral notice was timely given. In *Wolf*, there were multiple conversations regarding the renewal term, near the time for renewal of the lease, and there was specific reference to the notice requirement. The lessors offered that the lessee could provide notice to the lessors at a later time in the following spring, after the written notice of renewal was required.

The facts here are substantially different. To begin with, the district court questioned whether the alleged conversation between Singer and Baer occurred, noting that Dodge I failed to disclose the purported conversation anytime prior to Singer's deposition. The court also noted that the alleged conversation was not mentioned in Singer's November 2007 letter to Davenport, despite the letter's reference to three other circumstances which Dodge I believed satisfied its intent to renew. In fact, there is no evidence that at any time between 2002, when Baer died, and May 31, 2007, Dodge I ever disclosed to Davenport that such a conversation occurred.

Furthermore, even if the purported conversation took place, there is no evidence that Baer voluntarily and intentionally relinquished a known existing legal right, namely a right to waive notice of renewal. Based on our review of the record, we find no evidence that Baer intentionally relinquished a known right or that either party was considering the notice requirement when the telephone conversation occurred.

Given the lack of evidence surrounding the alleged conversation, we cannot construe the acceptance of rent after the expiration of the original term as supporting a conclusion that the Ground Lease was extended to 2017 with no written notice. And we cannot find that the district court's findings to that effect were clearly wrong. Dodge I can point to only

one purported conversation that occurred in 1995—roughly 12 years before expiration of the first 10-year renewal term and 2 years before the original term expired—that made no reference to the notice requirement. Therefore, we conclude that Dodge I's assignment of error is without merit.

Leasehold Mortgagees Cannot Cure Expiration of Ground Lease

In the final assignment of error, Dodge II and Dodge Mortgage argue that even if the court finds that Dodge I does not have continuing rights under the Ground Lease, they have (or at least could have) continuing legal rights as leasehold mortgagees pursuant to a "Tri-Party Agreement."

The parties to the Tri-Party Agreement, which was entered into shortly after the Ground Lease, were the fee owner of the property (Lied), Davenport's predecessor (The Brandeis Investment Company), and Dodge I's predecessor (Lenrich Associates), and the Tri-Party Agreement is binding upon the successors in interest to its parties. At issue here is exhibit D to the Tri-Party Agreement. The Tri-Party Agreement provided that the parties would execute exhibit D within 10 days of a request made by the sublessee, now Dodge I. Exhibit D provides, in pertinent part:

> 3. That notwithstanding any provisions in the Lease the Fee Owner [Lied] and Fee Lessee [Davenport] will permit Leasehold Mortgagee [Dodge Mortgage] to cure any default on the part of Sublessee [Dodge I] from time to time in accordance with the provisions contained in [the Ground Lease] . . . and that further they will permit any Leasehold Mortgagee, its successors and assigns, to obtain a new sublease under the terms and provisions as set forth in the [Ground Lease] and as referred to in paragraph 1 above, notwithstanding any forfeiture, termination or other cancellation or surrender of said [Ground Lease].

Dodge II and Dodge Mortgage argue that exhibit D provides them a right to cure in the event the Ground Lease expires. Specifically, they argue that the term "termination" includes expiration of the lease. Davenport contends, on the other

hand, that the terms "forfeiture," "termination," "cancellation," and "surrender" do not include expiration. And because the Ground Lease expired, Davenport argues, Dodge II and Dodge Mortgage are not permitted to cure any default by Dodge I.

[20,21] A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.[25] And a contract is viewed as a whole in order to construe it.[26] Whatever the construction of a particular clause of a contract, standing alone, may be, it must be read in connection with other clauses,[27] and all writings forming part of the same transaction are interpreted together.[28]

Here, the term "expiration" was not included in paragraph 3 of exhibit D, but "expiration" was included in other sections of the Tri-Party Agreement. For example, paragraph C of the Tri-Party Agreement states that the fee owner agrees to the Ground Lease and would be bound by the Ground Lease "in the event of the cancellation, termination, *expiration* or surrender of the Lease [to Davenport] for any reason." (Emphasis supplied.) And the term "expiration" is used in relation to a lease or sublease several other times in the Tri-Party Agreement and its exhibits.

Most pertinently, exhibit C to the Tri-Party Agreement was drafted to secure the interests of lessees under the Space Lease, much in the same way that exhibit D was drafted to secure the interests of leasehold mortgagees. But unlike exhibit D, exhibit C expressly provided that the Space Lease would remain in effect "[i]n the event of the termination of the [Ground Lease] or in the event said [Ground Lease] shall terminate *or expire* for any reason whatsoever before any of

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[25] *Gary's Implement, supra* note 7.

[26] *Hearst-Argyle Prop. v. Entrex Comm. Servs., ante* p. 468, 778 N.W.2d 465 (2010).

[27] *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004).

[28] See, *Union Ins. Co. v. Land and Sky, Inc.*, 247 Neb. 696, 529 N.W.2d 773 (1995); *Smith v. United States Fidelity & Guaranty Co.*, 142 Neb. 321, 6 N.W.2d 81 (1942).

the dates provided for in said Space Lease . . . .” (Emphasis supplied.) And, in fact, the record establishes that Dodge II has availed itself of exhibit C to extend its tenancy through the end of the Space Lease, despite the expiration of the Ground Lease.

The Tri-Party Agreement and exhibits, when read together, support the district court’s conclusion that the natural expiration of the Ground Lease is not a “termination” of the Ground Lease within the meaning of exhibit D. Exhibit D permits a leasehold mortgagee to cure a “default” by Dodge I on the Ground Lease and obtain a new lease under the terms of the Ground Lease notwithstanding “termination.” But a “default,” in this context, is the omission or failure to perform a legal or contractual duty.[29] Because Dodge I was not required to extend the Ground Lease, no “default” occurred here. And contrary to the Dodge entities’ argument, a “termination” can refer not only to an ending or conclusion, but to “[t]he act of ending something.”[30] It is apparent that when used in the Tri-Party Agreement, the word “termination” refers not to a natural expiration brought about by the passage of time, but to a premature termination effected by some other cause.[31]

In other words, exhibit D would have been available to a leasehold mortgagee had Dodge I breached the Ground Lease, permitting Davenport to terminate the Ground Lease before it expired. But that is not the case here. The expression of one thing implies the exclusion of another,[32] and in this case, the use of the words “expiration” and “termination” together in several places, but not in exhibit D, provides ample support for the district court’s conclusion that the expiration of the Ground Lease was not a “termination” within the meaning of exhibit D.

[22] The mortgagee of the leasehold interest takes his mortgage subject to all of the covenants and conditions of the

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[29] Black’s Law Dictionary 480 (9th ed. 2009).

[30] *Id.* at 1609.

[31] Cf. *Reimers-Hild v. State*, 274 Neb. 438, 741 N.W.2d 155 (2007).

[32] See, e.g., *Hafeman v. Gem Oil Co.*, 163 Neb. 438, 80 N.W.2d 139 (1956).

lease, and the mortgage is only coextensive with the term of the lease.[33] The mortgage interest falls with the termination of the leasehold interest.[34] Because Dodge I did not provide written notice of its intent to renew the Ground Lease for another term by May 31, 2007, the lease expired on May 31, 2008, and Dodge II and Dodge Mortgage cannot rely on exhibit D of the Tri-Party Agreement to revive it.

CONCLUSION

Based on the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

MILLER-LERMAN, J., not participating.

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[33] *Bowen v. Selby*, 106 Neb. 166, 183 N.W. 93 (1921).

[34] *Id.*

STATE OF NEBRASKA, APPELLEE, V. JAMES JACKSON ANDERSON, APPELLANT.

781 N.W.2d 55

Filed April 2, 2010. No. S-09-348.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Collateral Attack: Jurisdiction.** Collateral attacks on previous driving under the influence convictions are impermissible unless the challenge is grounded upon certain claims including that the trial court lacked jurisdiction over the parties or subject matter.
3. **Constitutional Law: Due Process: Drunk Driving: Prior Convictions: Right to Counsel.** The due process requirements of both the state and federal Constitutions are satisfied by the right of direct appeal from a plea-based driving under the influence conviction and the procedure set forth in Neb. Rev. Stat. § 60-6,196(3) (Reissue 2004), which permits a defendant to challenge the validity of a prior driving under the influence conviction offered for purposes of enhancement on the ground that it was obtained in violation of the defendant's Sixth Amendment right to counsel.
4. **Constitutional Law: Waiver.** A defendant may waive a constitutional right or guarantee provided it is done knowingly and voluntarily.

Appeal from the District Court for Hall County: WILLIAM T. WRIGHT, Judge. Affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

James Jackson Anderson appeals his conviction for driving under the influence (DUI), third offense. Anderson asserts that the district court for Hall County erred by using two of his prior DUI convictions for enhancement purposes over his objection. He argues that the convictions should not have been used because each conviction was obtained through the use of the uniform waiver system set forth in Neb. Ct. R. § 6-1455 of the uniform county court rules. We conclude that the district court did not err, and we affirm his conviction.

STATEMENT OF FACTS

Anderson was charged with DUI, third offense, in an information in which it was alleged that he drove under the influence on May 18, 2008, and that he had twice previously been convicted of DUI. On November 5, pursuant to a plea agreement, Anderson pled no contest to the underlying DUI charge, but it was left to be determined whether the conviction would be enhanced as a third offense.

At the December 11, 2008, enhancement hearing, the State offered evidence of Anderson's two prior convictions for DUI. The records showed that on July 10, 2003, and on July 7, 2005, Anderson pled guilty to DUI in the Hall County Court. In each case, Anderson completed a waiver and plea form in which he waived rights and entered his plea. Each form indicated that Anderson was waiving his rights, inter alia, to have the complaint read to him and be informed of the possible penalties,

to have a trial before a judge or jury, and to appeal any final decision of the court. The form also stated that Anderson "realize[d] that this plea admits the fault of my violation(s) which may be used against me in any later proceeding." With respect to the 2003 conviction, Anderson was sentenced to a fine of $400 and 9 months' probation. With respect to the 2005 conviction, Anderson was sentenced to a fine of $400 and 7 days' incarceration. The record of each prior conviction showed that at the time of the plea and sentencing, Anderson was represented by counsel.

Anderson testified at the enhancement hearing regarding his prior convictions. He testified that with respect to both convictions, he never saw a judge; never entered a courtroom; and never had a judge advise him of his rights, of the consequences of waiving his rights, or of the potential for enhancement in subsequent DUI convictions and the potential penalties in such subsequent convictions. Instead, he and his attorney completed the waiver and plea forms and filed them at the county courthouse. Anderson admitted on cross-examination that with respect to each prior conviction, he was represented by counsel, he knew he was pleading guilty and would be sentenced, he signed the waiver and plea forms containing the waiver of rights, and he had the opportunity to read the forms before signing them.

Anderson also called as a witness the clerk magistrate of the Hall County Court, who testified regarding procedures used by the court with respect to waiver and plea forms. The clerk magistrate testified that the records clerk who receives a waiver and plea form fills in the order and stamps a judge's signature on the form and that the judge's signature stamp is not used without the direction or authorization of the judge. The waiver and plea form has been used often in Hall County Court for DUI convictions.

The State called as a rebuttal witness the Hall County Court judge whose signature appeared on the waiver and plea forms in both prior convictions. The trial judge testified that the waiver and plea forms were used in accordance with § 6-1455 of the uniform county court rules, which section authorizes the uniform waiver system. Section 6-1455 permits use of a waiver for

specific offenses listed in a schedule but also permits the use of a waiver for other violations when authorized by a judge. Use of the waiver system for DUI is determined on a case-by-case basis. While Anderson did not appear before him, the judge met with Anderson's attorney in each case and authorized the use of the waiver in Anderson's cases, and the judge thereafter authorized court personnel to stamp the judge's signature on the plea and waiver forms.

The judge testified that the procedure the judge used in connection with the uniform waiver system was for the judge to meet with the attorney, who then worked with the defendant to complete and file the plea and waiver form. The sentence was determined by the judge and was written in the judge's notes, which were provided to the attorney before the attorney and the defendant filed the form. The judge testified that if the defendant and his or her attorney were somehow dissatisfied with the penalty resulting from this waiver system, they did not need to file the form and instead could come back to the courtroom "and we can have a trial."

Following the enhancement hearing, the district court determined that Anderson's objections to the use of the two prior convictions were without merit and that both prior convictions could be used for enhancement purposes. The court concluded that Anderson was guilty of DUI, third offense. In its journal entry and judgment filed January 22, 2009, the court noted that the record was clear that Anderson was represented by counsel in each prior DUI conviction. The court cited *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999), for the proposition that the only statutory procedure for challenging a prior DUI conviction offered for purposes of enhancement is that set forth in Neb. Rev. Stat. § 60-6,196(3) (Reissue 2004), which limits a challenge to an alleged denial of the Sixth Amendment right to counsel. The district court further noted that Anderson had argued that *Louthan* was inapplicable. The court indicated that Anderson had claimed that by using the uniform waiver system in waiving his right to appeal from the prior convictions, he had been denied due process in connection with those convictions. Anderson claimed that he could not exercise his due process rights unless he was allowed

to collaterally attack the prior convictions in this enhancement proceeding.

The court rejected Anderson's arguments on the basis that Anderson knowingly waived his right to appeal by voluntarily using the plea and waiver forms in the prior convictions. The court concluded that there was "nothing in the public policy of the State which requires any greater protection of [Anderson] in making such bargains as occurred in the present case." The court rejected Anderson's objections to the use of the two prior convictions and found Anderson guilty of DUI, third offense. Thereafter, the court sentenced Anderson to a fine, probation, and jail time.

Anderson appeals.

ASSIGNMENT OF ERROR

Anderson claims that he was denied the right to appeal and that thus he was denied due process in each of the two prior DUI convictions obtained using the uniform waiver system. Therefore, he claims the district court erred when it used the two prior DUI convictions to enhance his present DUI conviction to a third offense.

STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Head*, 276 Neb. 354, 754 N.W.2d 612 (2008).

ANALYSIS

Anderson claims that he was denied due process in the two prior DUI convictions and that the district court erred by using the two convictions to conclude that he was guilty of DUI, third offense. He specifically argues that he was denied a right to appeal by virtue of his pleading guilty under the uniform waiver system, thus denying him due process, and that therefore the two prior convictions should not have been considered at the enhancement hearing. We conclude that Anderson was not denied due process in the prior convictions and that the district court did not err by considering the prior convictions for enhancement in the present case.

[2] We have stated that collateral attacks on previous DUI convictions are impermissible unless the challenge is grounded upon the court's lack of jurisdiction over the parties or subject matter, *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008), or entail a violation of the defendant's due process rights to appeal or rights to counsel in violation of the defendant's Sixth Amendment rights, *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999). Anderson's challenge to the prior convictions is not based on jurisdiction, and thus, we do not consider it on that basis. See *Royer, supra*.

[3] In *Louthan*, we held that

> the due process requirements of both the state and federal Constitutions are satisfied by the right of direct appeal from a plea-based DUI conviction and the procedure set forth in § 60-6,196(3), which permits a defendant to challenge the validity of a prior DUI conviction offered for purposes of enhancement on the ground that it was obtained in violation of the defendant's Sixth Amendment right to counsel.

257 Neb. at 188, 595 N.W.2d at 926. We note that Anderson makes no argument that his prior convictions were obtained in violation of his right to counsel, and, indeed, the evidence from the prior convictions shows that both convictions were counseled. Thus, a challenge based on lack of counsel is not implicated.

In the present appeal, Anderson claims he was denied a right to appeal from the two prior DUI convictions and was thus denied due process in connection with the two prior convictions. However, because the record shows that he knowingly and voluntarily waived his right to appeal in the prior DUI convictions, he was not denied due process, and we reject Anderson's claim.

With regard to the right of direct appeal, the record shows that upon pleading guilty, Anderson waived the enumerated rights, including his right of appeal in both prior DUI convictions, and he voluntarily chose to avail himself of the convenience of using the uniform waiver system. Under the uniform waiver system, a defendant pleads guilty and waives the enumerated rights in exchange for a stated penalty. It is clear from

the record that the defendant can decline the waiver and stated form of sentence and proceed to trial without waiver of rights, thus preserving the right to appeal. In this regard, we note that in his testimony at the enhancement hearing, Anderson admitted with respect to both prior convictions that he signed the waiver and plea forms, that he had counsel, and that he had the opportunity to read the forms before signing them. He did not decline the opportunity to use the uniform waiver system and, to the contrary, availed himself of its advantages.

[4] We have stated, in a case involving a waiver of the right to appeal, that a "defendant may waive a constitutional right or guarantee provided it is done knowingly and voluntarily." *State v. Hatten*, 187 Neb. 237, 242, 188 N.W.2d 846, 850 (1971). To the extent Anderson argues that he was denied a right to appeal, we reject such argument and agree with the district court's ruling that Anderson received the protections to which he was entitled. The record shows that Anderson validly waived his rights to appeal and that he was not denied due process. A defendant can waive a constitutional right, including the right to appeal, if done knowingly and voluntarily. *Hatten, supra*. The record is clear that Anderson waived his right to appeal in each prior DUI conviction knowingly and voluntarily, and he was not therefore denied due process in connection with those convictions. The district court properly rejected Anderson's objections to the use of the two prior DUI convictions obtained under the uniform waiver system. The district court did not err in enhancing Anderson's DUI conviction to third offense.

CONCLUSION

We conclude that Anderson's challenge to his two prior DUI convictions was without merit and that therefore the district court did not err in considering such prior convictions when it found that Anderson was guilty of DUI, third offense. We affirm his conviction.

AFFIRMED.

CHADLY S. BALLARD, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE.

781 N.W.2d 47

Filed April 2, 2010. No. S-09-905.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Federal Acts: Railroads: Claims: Courts.** In disposing of a claim controlled by the Federal Employers' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under the act are determined by the provisions of the act and interpretive decisions of the federal courts construing the act.
4. **Federal Acts: Railroads: Liability: Negligence: Damages.** Under the Federal Employers' Liability Act, railroad companies are liable in damages to any employee who suffers injury during the course of employment when such injury results in whole or in part due to the railroad's negligence.
5. **Federal Acts: Railroads: Negligence: Proximate Cause: Proof.** To recover under the Federal Employers' Liability Act, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury.
6. **Federal Acts: Railroads: Torts: Intent.** The Federal Employers' Liability Act has been interpreted to reach at least some intentional torts.
7. **Federal Acts: Railroads: Liability: Negligence: Torts: Intent.** Two theories of liability are recognized in cases under the Federal Employers' Liability Act involving intentional assaults by fellow employees: The first theory is respondeat superior. This theory provides that the plaintiff may prevail in an intentional tort case by showing that the intentional tort was committed in furtherance of the employer's objectives. The second theory is direct negligence. Under the direct negligence theory, the employer is liable if the employer was negligent in hiring, supervising, or failing to fire the employee.
8. **Federal Acts: Railroads: Liability: Negligence: Proof.** To prove a railroad's negligence under the Federal Employers' Liability Act, the plaintiff must show that the railroad had knowledge of the employee's propensities and failed to act on the information. In other words, the railroad employer is liable for failing to prevent reasonably foreseeable danger to an employee from intentional or criminal misconduct.
9. **Federal Acts: Railroads: Liability: Proof.** Under the Federal Employers' Liability Act, a plaintiff's burden is twofold: the plaintiff must show both that (1) the employee had a propensity for the type of behavior that caused the plaintiff harm and (2) the employer railroad knew of this propensity.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Michael A. Nelsen, of Marks, Clare & Richards, L.L.C., for appellant.

David J. Schmitt and John M. Walker, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Chadly S. Ballard brought this action under the Federal Employers' Liability Act (FELA)[1] for injuries he claims he sustained when three fellow employees harassed him. Ballard alleges Union Pacific Railroad Company (UP) negligently supervised its workers and negligently failed to provide a safe work environment. The district court granted UP's motion for summary judgment and dismissed the action. Ballard appeals. We moved the appeal to our docket in accordance with our statutory authority to regulate caseloads of the appellate courts of this state.

BACKGROUND

Ballard brought suit against UP in the U.S. District Court for the District of Nebraska (Federal District Court)[2] based on the same set of facts as the current appeal. In that case, Ballard made various allegations, including employment discrimination in violation of title VII, 42 U.S.C. § 2000e et seq. (2006); 42 U.S.C. §§ 1981 and 1983 (2006); and the First Amendment to the U.S. Constitution. Subsequently, Ballard dismissed his causes of action under the First Amendment and §§ 1981 and 1983, leaving only the cause of action under title VII to be decided. The Federal District Court granted UP's motion for

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[1] 45 U.S.C. §§ 51 through 60 (2006).

[2] *Ballard v. Union Pacific R. Co.*, No. 8:06CV718, 2008 WL 1990787 (D. Neb. May 5, 2008).

summary judgment and dismissed the lawsuit. In its order, the Federal District Court summarized the pertinent facts of the case as follows:

> In 2005, Ballard began working as a truck driver in Portland, Oregon. His crew then moved to Delta, Utah. Johnny Adison, Ted Tom, and Oliver Becenti also worked in this group with Ballard. Adison and Tom were laborers and Becenti an assistant foreman. None of these employees were supervisors, nor could they hire, fire or promote other employees. Ballard had not worked with these three employees prior to this time. Craig Dannelly was Ballard's immediate supervisor. It is undisputed that on March 21, 2005, Becenti and Tom took Ballard under the arms, lifted him off the ground, and Adison thrust his hips into Ballard's groin area. When the three let Ballard down, he called them "sick bastards."
>
> Ballard then reported the incident to Dannelly. Dannelly said he would speak to his supervisor . . . . Ballard then contacted his union representative . . . , and then he called what he believed to be the Union Pacific Equal Employment Opportunity . . . hotline. [A footnote to this case states: "It turns out that Ballard actually called a phone number that was UP's Value Line which is used for reporting a violation or possible violation of the law or UP policies."[3]] Ballard indicated that he did not believe the three men were homosexual. Ballard did not return to work the following day.
>
> UP then began an investigation. . . . UP's Director of Construction[] immediately traveled to the job site to conduct the investigation. Since Ballard did not show up for work, he was contacted by speaker phone. Following various interviews, Adison, Becenti, and Tom were charged with violating UP's Rule of Conduct 1.6 and suspended that day, March 22, 2005, pending a formal investigation. Rule 1.6 provides, in part, "Any act of hostility, misconduct, or willful disregard or negligence affecting the interests of the Company or its employees is sufficient cause

[3] *Id.* at *2 n.3.

> for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated." . . . Ballard returned to work on March 28, 2005. Dannelly asked Ballard to return to work in Salt Lake City, Utah, to separate him from the same group where the harassment had occurred.[4]

The Federal District Court granted summary judgment in favor of UP and dismissed Ballard's claims. Subsequently, Ballard brought this suit in state court alleging FELA violations. The facts giving rise to the Federal District Court case are the same as this appeal. In both cases, Ballard testified at a deposition.

Ballard claimed in his state deposition that the March 21, 2005, incident was not the first time he had problems with the three men. According to Ballard, the three men harassed him about a week or two before the assault. Ballard could not remember specifically what the men said to him, but he thought it had something to do with his being "small." However, Ballard did not report the incident to any supervisors or managers and, as far as he knew, no UP employees knew about the alleged harassment. Additionally, Ballard admitted that the three men's behavior on March 21 was not typical. In the incident report, Ballard stated that he did not know what prompted them to do what they did. He said that it was "not a normal occurrence for them to joke around like that."

Nevertheless, Ballard alleged that UP knew or should have known that Oliver Becenti, Ted Tom, and Johnny Adison had a propensity to harass employees. He asserted that at least two other employees were harassed. The record includes the affidavit of David Duncan, a UP employee who worked with Becenti, Tom, Adison, and Ballard during the time in question. According to Duncan, Adison "'goosed'" or grabbed the buttocks of employees on several occasions while the employees walked down a UP office hallway. Duncan claimed he was one of the employees that was "goosed." Duncan alleged that UP should have noticed this behavior because it occurred in the hallway near UP supervisors' offices. However, Duncan did not

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[4] *Id.* at *2.

report this behavior to any UP supervisors or managers, nor did he actually know whether any UP supervisors or managers saw this behavior.

Ballard claims that exhibit 25 in the record provides evidence that UP was put on notice of the three men's dangerous propensities to harass coworkers. It is unclear from the record what exhibit 25 is. Exhibit 25 is unsworn, unsigned, undated, and unaddressed. It is labeled as "Report of Complaint offered by Plaintiff in Federal Court litigation." It apparently refers to incidents of name-calling:

> This complaint was forwarded to Jerry D. Swore@UP, Greg A. Lemmerman@UP and to Craig Domski for resolution.
>
> Vicki Toledo came up to me and said that she wanted to talk to me about something that had been said on the bus. I asked her what the problem was. She said that Ted Tom had said something on the bus and that she wanted something done right now. I told her that after the job briefing that I would get Ted Tom and her together and see what the problem was. After job briefing we got together and tried to find out just what the problem was. Vicki then said that she was told by Tina Curley that Ted Tom had said something about Oliver Becennti [sic] and Vicki Toledo having a baby together and that it was supposed to be a rail dog or puppy. I asked Ted if this was true and he said he did not say anything. That it was Glen Wagon that had said it. I then got Glen in my truck and asked him what was said. He said that it was someone else on the bus making remarks about Oliver on the bus. Vicki and Ted [a]nd Glen both talked to each other in Navajo leaving me and Steve Busch both in the dark. Neither one of us are fluent in Navajo. This was all hear say [sic] to Vicki because she was not on that bus. This was all told to her by Tina Curley. I also addressed this issue at job briefing, and this was not acceptable at any time on the UPRR.
>
> Victoria Toledo reported accusations from Ted Tom stating that the women that work for the gang are their whores and that is how they get pregnant. They call

> themselves the Rail Dogs and that the women are carrying Rail Dog babies. The harassing comments were brought to Jerry Swore's attention and he just commented that they are a lot of kids on the bus and he can just talk with the guy.

(Emphasis in original.)

UP moved for summary judgment. After a hearing, the court granted UP's motion. It concluded that Ballard failed to produce sufficient evidence indicating that UP knew or should have known that any of the three men had a propensity for violence or a proclivity for actions which would have resulted in the action and injury to Ballard. The court stated, "The fact that one of these co-workers may have goosed or grabbed people's asses during the week before this incident does not rise to the level of the harassment as alleged by [Ballard] and which would have reasonably put [UP] on notice."

ASSIGNMENT OF ERROR

Ballard asserts the district court erred in granting UP's motion for summary judgment.

In its brief, UP raised the doctrine of res judicata as a defense. UP raised this issue for the first time on appeal and did not plead this as a defense at the trial court level. Additionally, UP did not cross-appeal. Res judicata is an affirmative defense which must ordinarily be pleaded to be available.[5] And while we may raise the issue of res judicata sua sponte,[6] it is infrequently done.[7] As such, we decline to consider the res judicata issues in the present appeal.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may

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[5] *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982).

[6] *Swift v. Dairyland Ins. Co.*, 250 Neb. 31, 547 N.W.2d 147 (1996).

[7] *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998).

be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[8]

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[9]

ANALYSIS

[3] As an initial matter, we note that in disposing of a claim controlled by FELA, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under FELA are determined by the provisions of the act and interpretive decisions of the federal courts construing FELA.[10]

[4,5] Under FELA, railroad companies are liable in damages to any employee who suffers injury during the course of employment when such injury results in whole or in part due to the railroad's negligence.[11] This court has stated that to recover under FELA, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury.[12]

[6-8] FELA has been interpreted to reach at least some intentional torts.[13] Two theories of liability are recognized in FELA cases involving intentional assaults by fellow employees: The first theory is respondeat superior. This theory provides that a FELA plaintiff may prevail in an intentional tort case by

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[8] *Holsapple v. Union Pacific RR. Co., ante* p. 18, 776 N.W.2d 11 (2009).

[9] *Id.*

[10] *Deviney v. Union Pacific RR. Co.*, 18 Neb. App. 134, 776 N.W.2d 21 (2009). See *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008).

[11] *McNeel v. Union Pacific RR. Co., supra*, note 10.

[12] *Id.*

[13] See, *Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807 (7th Cir. 1985); *Naidoo v. Union Pacific Railroad*, 224 Neb. 853, 402 N.W.2d 653 (1987).

showing that the intentional tort was committed in furtherance of the employer's objectives. The second theory is direct negligence. Under the direct negligence theory, the employer is liable if the employer was negligent in hiring, supervising, or failing to fire the employee.[14] To prove the railroad's negligence, the plaintiff must show that the railroad had knowledge of the employee's propensities and failed to act on the information.[15] In other words, the railroad employer is liable for failing to prevent reasonably foreseeable danger to an employee from intentional or criminal misconduct.[16]

Liability Under FELA—Respondeat Superior

Ballard does not argue that UP was negligent based upon respondeat superior, and it is clear that that theory does not apply to the facts of this case. Regardless, there is no dispute that the three men were acting entirely upon their own impulses with no benefit to UP.[17]

Liability Under FELA—Direct Negligence

Ballard argues that it is reasonable, however, to infer that UP knew or should have known about the three men's propensities to harass and to be violent and that therefore, UP was negligent in failing to supervise its employees. We disagree.

[9] A railroad employer may be liable under the direct negligence theory if the railroad employer negligently hired, supervised, or failed to provide a safe workplace. A plaintiff's burden is thus twofold: the plaintiff must show both that (1) the employee had a propensity for the type of behavior that caused the plaintiff harm and (2) the employer railroad knew of this propensity.[18]

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[14] See *id.*

[15] See *id.*

[16] *Naidoo v. Union Pacific Railroad, supra* note 13.

[17] See *Higgins v. Metro-North R. Co.*, 318 F.3d 422 (2d Cir. 2003).

[18] *Murphy v. Metropolitan Transp. Authority*, 548 F. Supp. 2d 29 (S.D.N.Y. 2008). See *Persley v. National R.R. Passenger Corp.*, 831 F. Supp. 464 (D. Md. 1993).

A somewhat similar situation was presented in *Persley v. National R.R. Passenger Corp.*[19] There, the plaintiff, an employee of Amtrak, was sexually assaulted by a fellow employee and sued Amtrak under FELA. The plaintiff alleged that the assault was caused in part by Amtrak's negligence. The court granted Amtrak's motion for summary judgment, reasoning that although the coemployee may have had a general reputation with a number of his supervisors for being flirtatious and a "'womanizer,'"[20] there was no evidence that either the plaintiff or any other Amtrak employee had ever previously reported any incidents of harassment involving the coemployee to any Amtrak supervisor.

In another factually similar case, *Francisco v. Burlington Northern R.R. Co.*,[21] the Eighth Circuit held that the plaintiff failed to establish a genuine issue of fact as to whether his employer knew or should have known about an unsafe or potentially unsafe working condition. In that case, the plaintiff sued his employer, alleging FELA violations for injuries he sustained when his supervisor hit him on the head with a hardhat. The plaintiff alleged that his employer negligently failed to provide a safe work environment. In support of his allegations, the plaintiff submitted his affidavit and the affidavit of two other employees. The affidavits indicated that the supervisor's treatment of other employees commonly included hitting, pinching, and shoving, as well as grabbing or kicking at the buttocks or groin area of the employees.

Despite this evidence, the Eighth Circuit held that the plaintiff failed to prove as a matter of law that his employer knew or should have known about the supervisor's dangerous propensities. The court reasoned that the affidavits indicated at best that other employees merely witnessed the supervisor's behavior. The court noted that the mere fact that other employees were "present during one or more unspecified acts of 'horseplay' by [the supervisor]—even assuming they actually saw the alleged

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[19] *Persley v. National R.R. Passenger Corp., supra* note 18.

[20] *Id.* at 467.

[21] *Francisco v. Burlington Northern R.R. Co.*, 204 F.3d 787 (8th Cir. 2000).

'horseplay'—is too generalized and vague"[22] to establish a genuine issue of material fact that the employer knew or should have known the supervisor created a foreseeable risk of injury to its employees.

The Eighth Circuit found it significant that the plaintiff clearly admitted that he never complained about his supervisor's conduct prior to his injury, he had never received any complaints regarding the supervisor's behavior in his capacity as a union representative, and he had never heard or seen the supervisor engage in such behavior before. The Eighth Circuit also questioned whether the "'horseplay' and other physical conduct alleged by [the plaintiff] could even create the sort of dangerous condition in the work place from which a reasonable foreseeability of harm *could* be inferred."[23]

In the present case, Ballard failed to prove that UP knew or should have known prior to the incident that Becenti, Tom, and Adison had dangerous propensities. Prior to this incident, neither Ballard nor any other UP employee had reported any inappropriate behavior regarding these three men to UP. Further, the record does not disclose that the three men had a history of violent acts or of sexual harassment or that their supervisors were aware of facts which would have led them to suspect that the three men might engage in such conduct. Ballard has produced no evidence to support an inference that UP was aware of any dangerous propensities of the three men.

Ballard's claim that UP should have known is based on one other employee's affidavit stating he was "goosed" by one of the three men and on exhibit 25, which allegedly demonstrates that UP was aware that Tom called women "whores." Even viewed in a light most favorable to Ballard, this evidence, first, is insufficient to support an inference that Becenti, Tom, and Adison had dangerous propensities. None of the evidence suggests that Becenti ever participated in the alleged harassment. Second, nothing in the record establishes a reasonable inference that the behavior that gave rise to this case

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[22] *Id.* at 789.

[23] *Id.* at 790 n.4 (emphasis in original).

was foreseeable. The testimony in the affidavit falls short of establishing any proof that UP knew that Adison had grabbed the buttocks of employees in the UP hallway. Ballard himself agreed that the three men's behavior on March 21, 2005, was not typical and that he did not know what made the men act this way. As the Federal District Court said, this was a one-time incident.

Ballard also argues that UP was negligent for not training its employees on its policies to not harass or touch fellow employees. Ballard provides little in the way of case law or evidence to support this argument. We conclude that this argument is without merit.

After reviewing the record, we conclude there is no evidence from which a jury could infer that UP knew or should have known that the three men had a propensity to commit such acts.[24] As such, UP was not negligent.

CONCLUSION

Ballard failed to prove that UP was negligent. As such, the district court order is affirmed.

AFFIRMED.

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[24] See *Brooks v. Washington Terminal Co.*, 593 F.2d 1285 (D.C. Cir. 1979).

STATE OF NEBRASKA, APPELLEE, V. TYLER R. NUSS, APPELLANT.

781 N.W.2d 60

Filed April 9, 2010. No. S-09-546.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable search and seizure.

3. **Search Warrants: Affidavits: Probable Cause.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause.
4. **Search Warrants: Probable Cause: Words and Phrases.** Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.
5. **Search Warrants: Probable Cause: Proof: Time.** Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at the time.
6. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
7. **Search Warrants: Affidavits: Evidence: Appeal and Error.** In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
8. **Search Warrants: Probable Cause: Evidence: Minors.** While copies of images obtained during a law enforcement investigation may be used to establish probable cause to search for evidence of crimes involving visual depiction of sexually explicit conduct involving minors, they are not absolutely required. Probable cause may also be established by a detailed verbal description of the conduct depicted in such images.
9. **Search Warrants: Affidavits: Police Officers and Sheriffs: Evidence: Search and Seizure.** The good faith exception provides that even in the absence of a valid affidavit to support a search warrant, evidence seized under the warrant need not be suppressed when police officers act in objectively reasonable good faith in reliance upon the warrant.
10. **Motions to Suppress: Search Warrants: Affidavits: Police Officers and Sheriffs: Evidence.** Evidence may be suppressed if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth, (2) the issuing magistrate wholly abandoned his or her judicial role, (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.

Appeal from the District Court for Hall County: JAMES D. LIVINGSTON, Judge. Affirmed.

Arthur S. Wetzel, of Anderson, Vipperman, Kovanda & Wetzel, and Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

STEPHAN, J.

After a stipulated bench trial, Tyler R. Nuss was convicted of possession of visual depictions of sexually explicit conduct which has a child as one of its participants or portrayed observers, in violation of Neb. Rev. Stat. § 28-813.01 (Reissue 2008). Over Nuss' objection, the trial court received evidence obtained during a search of his residence which was conducted pursuant to a search warrant. The court had previously denied Nuss' motion to suppress that evidence, concluding that the affidavit filed in support of the search warrant application provided sufficient probable cause for the warrant. Nuss now appeals the denial of his motion to suppress and the use of the evidence obtained during the search at his trial.

BACKGROUND

On December 18, 2007, Sgt. J. McCoy of the Nebraska State Patrol completed an affidavit in support of his application for a warrant to search the Nuss residence in Grand Island, Nebraska. In the affidavit, McCoy stated that he had reasonable grounds to believe that "[v]isual depictions of received files or other computer graphic files which depict children in a sexually explicit manner, as defined by Neb. Rev. Statute Sec. 28-1463.02," were concealed or kept in the residence.

As probable cause for the warrant, McCoy cited his work history with the State Patrol, including his participation in investigations relating to the sexual exploitation of children and his observation of "numerous examples of child pornography in all forms of media including computer media." McCoy also described two Federal Bureau of Investigation (FBI) undercover investigations through which files stored on a computer at the Nuss residence were surreptitiously viewed from a remote location. In the first of these investigations, conducted on October 29, 2007, an FBI analyst downloaded 12 files from a specific "IP address" utilizing a

peer-to-peer file-sharing program. According to McCoy, the analyst determined that 10 of the downloaded files contained "child pornography." Through an administrative subpoena, the IP address was traced to the Nuss residence. In the second undercover investigation, conducted on November 9, an FBI special agent downloaded 28 files from another IP address traced to the Nuss residence. Based upon his review, McCoy concluded that 20 of the files contained what "appear[ed] to be child pornography." McCoy did not describe any of the images downloaded, nor did he attach copies of the images to the affidavit. Rather, he stated:

> There is probable cause to believe that a search of this premise[s] will result in the seizures of evidence relating to the possession, receipt, transmission, and distribution of images depicting the sexual performance by a child less than eighteen years of age in violation of Nebraska State statute 28-1463.01 and 28-1463.05.

McCoy concluded the affidavit by stating, "Based on prior experience and training, affiant believes that the above described residence and or outbuildings and vehicles contain visual depictions of received files or other computer graphic files which depict children in a sexually explicit manner . . . ."

The requested search warrant was issued by a county judge on December 18, 2007. On the same day, McCoy and other officers conducted a search of the Nuss residence and seized various items, including a computer. They discovered 38 files on the computer, described as "depicting children under the age of 18 engaged in masturbation, real or simulated oral sex, [and] anal sex." During the search, Nuss admitted that he downloaded certain images. Nuss was subsequently charged with possession of visual depiction of sexually explicit conduct, in violation of § 28-813.01.

Nuss filed a motion to suppress all items seized from his residence; the motion was filed on various grounds, including that McCoy's affidavit did not state facts sufficient to constitute probable cause for issuance of the search warrant. The district court overruled the motion, noting that while McCoy did not use statutory language to describe the images claimed to constitute probable cause, "in a common sense review there is

sufficient information available from the totality of the circumstances to indicate to the issuing magistrate a fair probability that there was evidence of a crime located at the particular place as cited in the Affidavit."

The parties agreed to a bench trial on stipulated facts. Nuss renewed his motion to suppress, which was again overruled, and the court received the evidence obtained as a result of the search. The court found Nuss guilty of knowingly possessing visual depictions of sexually explicit conduct, as defined by Neb. Rev. Stat. § 28-1463.02(5) (Reissue 2008), in violation of § 28-813.01. Nuss was sentenced to 18 months' probation and ordered to register as a sex offender under Nebraska's Sex Offender Registration Act.[1]

ASSIGNMENTS OF ERROR

Nuss assigns, consolidated and restated, that the district court erred in overruling his motion to suppress and in finding him guilty on the basis of the evidence to which his motion was addressed.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination.[2]

ANALYSIS

Sufficiency of Affidavit

[2-6] The Fourth Amendment to the U.S. Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ," and further provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and

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[1] Neb. Rev. Stat. §§ 29-4001 to 29-4014 (Reissue 2008).

[2] *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

the persons or things to be seized." The Nebraska Constitution provides similar protection.[3] The execution of a search warrant without probable cause is unreasonable and violates these constitutional guarantees.[4] Accordingly, a search warrant, to be valid, must be supported by an affidavit which establishes probable cause.[5] Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.[6] Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at the time.[7] In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test.[8] The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.[9]

[7] In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.[10] Here, McCoy requested that the issuing magistrate find probable cause based upon McCoy's description of the files and images which the FBI obtained from Nuss' computer in its undercover investigation. Our review is guided by the principle that "[s]ufficient information must be

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[3] See, Neb. Const. art. I, § 7; *State v. Bakewell*, 273 Neb. 372, 730 N.W.2d 335 (2007).

[4] *State v. Swift*, 251 Neb. 204, 556 N.W.2d 243 (1996).

[5] *State v. Bossow*, 274 Neb. 836, 744 N.W.2d 43 (2008).

[6] *Id.*

[7] *Id.*; *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001).

[8] *State v. Bossow, supra* note 5; *State v. Ildefonso, supra* note 7.

[9] *State v. Bossow, supra* note 5; *State v. Lammers*, 267 Neb. 679, 676 N.W.2d 716 (2004).

[10] *State v. Lammers, supra* note 9.

presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others."[11]

In similar cases where computer images surreptitiously obtained by law enforcement have been relied upon as probable cause for a search warrant, courts have taken differing approaches regarding the degree of specificity which must be used in describing the images to the issuing magistrate. In *U.S. v. Brunette*,[12] the court held that an officer's description of images as meeting the federal statutory definition of child pornography was insufficient to establish probable cause. The court reasoned that this was simply a conclusion of the officer, unaccompanied by any factual specification of the officer's reasons for believing that the images were pornographic. Noting the "inherent subjectivity" of this determination, the court concluded that the magistrate should have viewed the actual images in order to make an independent determination of whether they depicted child pornography so as to establish probable cause for the search.[13] Similarly, in *U.S. v. Genin*,[14] the court held that an affidavit which described videos in the defendant's possession merely as "child pornography" was insufficient to permit the magistrate to make an independent determination of probable cause. The court noted that the affiant "could have simply appended screenshots of the videos to his affidavit or included in the affidavit a reasonably detailed description of those videos, thus allowing the issuing magistrate—an impartial and independent judicial officer—to determine whether probable cause existed."[15]

Other courts require less specificity. For example, in *U.S. v. Lowe*,[16] the court found that an affiant's description of the

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[11] *Illinois v. Gates*, 462 U.S. 213, 239, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

[12] *U.S. v. Brunette*, 256 F.3d 14 (1st Cir. 2001).

[13] *Id.* at 18.

[14] *U.S. v. Genin*, 594 F. Supp. 2d 412 (S.D.N.Y. 2009).

[15] *Id.* at 425.

[16] *U.S. v. Lowe*, 516 F.3d 580, 586 (7th Cir. 2008).

images established probable cause, reasoning that, as a general rule, "an issuing court does not need to look at the images described in an affidavit in order to determine whether there is probable cause to believe that they constitute child pornography. A detailed verbal description is sufficient." In *U.S. v. Chrobak*,[17] the affiant described images sent by the defendant to a newsgroup Web site known to be frequented by child pornographers and pedophiles as depicting "'sexually explicit conduct involving children under the age of 16.'" The court determined that this description was sufficient to establish probable cause, noting that it was almost identical to the language of the federal statute[18] under which the defendant was charged with possession and transport in interstate commerce of child pornography. In *U.S. v. Stults*,[19] the court reviewed an affidavit which included the descriptive names of files obtained from the defendant's computer by law enforcement using file-sharing software; such filenames included "Photo by Carl—pedo incest 13yr girl f* * * *d by daddy." The affiant also stated that the files contained "'numerous images of child pornography.'"[20] The court held this was sufficient to establish probable cause. We note that the term "child pornography" is specifically defined in the federal criminal statutes.[21]

[8] We now hold as a matter of first impression that, while copies of images obtained during a law enforcement investigation may be used to establish probable cause to search for evidence of crimes involving visual depiction of sexually explicit conduct involving minors, they are not absolutely required. Probable cause may also be established by a detailed verbal description of the conduct depicted in such images. Under this standard, the affidavit in this case was insufficient to establish probable cause. In the affidavit, McCoy stated that he expected to find "images depicting the sexual performance

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[17] *U.S. v. Chrobak*, 289 F.3d 1043, 1045 (8th Cir. 2002).

[18] See 18 U.S.C. § 2252 (2006).

[19] *U.S. v. Stults*, 575 F.3d 834, 838 (8th Cir. 2009).

[20] *Id.* at 844.

[21] See 18 U.S.C. § 2256(8) (2006).

by a child less than eighteen years of age in violation of Nebraska State statute 28-1463.01 and 28-1463.05" if the requested search warrant for the Nuss residence were issued. But he did not utilize language from these statutes in describing the files and images he relied upon to establish probable cause for the warrant. Instead, McCoy referred to filenames "which are consistent with child pornography" and images which "appear to be child pornography" without stating the actual filenames or describing the particular conduct depicted in the images. These are mere conclusions. Unlike its federal counterpart, Nebraska's Child Pornography Prevention Act[22] does not define the phrase "child pornography." Instead, § 28-1463.02(5) defines the phrase "[s]exually explicit conduct," as used in the statute under which Nuss was charged, to include very specific sexual acts, such as "[r]eal or simulated intercourse," "real or simulated masturbation," and "erotic fondling." McCoy's affidavit does not use or even refer to the statutory definitions of sexually explicit conduct in describing the images intercepted during the undercover investigation and relied upon as probable cause for the requested search warrant. And as noted, the actual images did not accompany the affidavit. On this record, we must conclude that the affidavit lacked factual information upon which the issuing magistrate could make an independent assessment of McCoy's conclusions that the files and images constituted "child pornography" or his belief that a search would yield depictions of children "in a sexually explicit manner." Accordingly, the affidavit was insufficient to establish probable cause for the issuance of the search warrant.

Good Faith Exception

[9,10] Our determination that the warrant was issued without a showing of probable cause does not end the inquiry, because the State has preserved the issue of whether, notwithstanding the defective affidavit, the evidence obtained during the search is admissible under the good faith exception to the exclusionary

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[22] Neb. Rev. Stat. §§ 28-1463.01 to 28-1463.05 (Reissue 2008).

rule first recognized in *United States v. Leon*.[23] The good faith exception provides that even in the absence of a valid affidavit to support a search warrant, evidence seized under the warrant need not be suppressed when police officers act in objectively reasonable good faith in reliance upon the warrant.[24] Evidence may be suppressed if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth, (2) the issuing magistrate wholly abandoned his or her judicial role, (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.[25] In *Leon*, the Supreme Court noted that "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of the exclusionary rule.[26] The Court recently provided further guidance on this point, writing in *Herring v. United States*[27]:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. . . . [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

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[23] *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). See, also, *State v. Tompkins*, 272 Neb. 547, 723 N.W.2d 344 (2006), *modified on denial of rehearing* 272 Neb. 865, 727 N.W.2d 423 (2007).

[24] *State v. Tomkins, supra* note 23; *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999), *overruled on other grounds, State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000). See, also, *United States v. Leon, supra* note 23.

[25] *State v. Tompkins, supra* note 23; *State v. Edmonson*, 257 Neb. 468, 598 N.W.2d 450 (1999). See, also, *United States v. Leon, supra* note 23.

[26] *United States v. Leon, supra* note 23, 468 U.S. at 911.

[27] *Herring v. United States*, 555 U.S. 135, 144, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).

In this case, Nuss argues that McCoy's affidavit was "so lacking in a factual basis that his belief in the legitimacy of the resulting search warrant was entirely unreasonable."[28] He notes that while a court in assessing an officer's good faith in conducting a search pursuant to a warrant may consider the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit, there is no such evidence in this case.

But we are not persuaded that the deficiency in the affidavit precludes application of the good faith exception. In *U.S. v. Jasorka*,[29] the court concluded that it need not decide whether a magistrate in issuing a search warrant was justified in relying upon an affiant's assertion that intercepted images depicted "'male children displaying a lewd and lascivious exhibition of the genitals and pubic areas,'" because the law on this point was unclear and the conduct of the customs agents who executed the warrant was objectively reasonable under *Leon*. In *U.S. v. Brunette*,[30] the court specifically determined that the description of intercepted images in an affidavit was insufficient to establish probable cause but employed the *Jasorka* reasoning in concluding that the good faith exception applied.

We think the same principle applies here. Until our holding in this case, it was not clear under Nebraska law that labeling intercepted computer images as "child pornography" was insufficient, standing alone, to establish probable cause to search for evidence of visual depiction of sexually explicit conduct involving minors. We acknowledge the observation of the district court that the phrase "child pornography" has a commonly accepted meaning, and the existence of some federal case law indicating that an affidavit describing intercepted images as "child pornography" is sufficient to establish probable cause for a search warrant.[31] While our decision today turns in part on

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[28] Reply brief for appellant at 5.

[29] *U.S. v. Jasork*a, 153 F.3d 58, 59 (2d Cir. 1998).

[30] *U.S. v. Brunette*, *supra* note 12.

[31] See, *U.S. v. Stults, supra* note 19; *U.S. v. Grant*, 434 F. Supp. 2d 735 (D. Neb. 2006).

the fact that the applicable Nebraska criminal statutes, unlike their federal counterparts, do not include a definition of "child pornography," we cannot expect that a state trooper executing an affidavit in 2007 would have anticipated this distinction. Under the good faith exception as defined in *Leon* and refined by *Herring*, we conclude that McCoy acted in reasonable good faith and that his conduct was neither sufficiently deliberate nor culpable to trigger the exclusionary rule. Accordingly, we conclude that the district court did not err in overruling Nuss' motion to suppress and receiving the evidence obtained pursuant to the search warrant over Nuss' objection.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

HEAVICAN, C.J., concurring.

I agree with the majority's holding that

> while copies of images obtained during a law enforcement investigation may be used to establish probable cause to search for evidence of crimes involving visual depiction of sexually explicit conduct involving minors, they are not absolutely required. Probable cause may also be established by a detailed verbal description of the conduct depicted in such images.

I write separately because contrary to the majority's holding, I would find that the affidavit in this case was sufficient to establish probable cause under the above standard.

The affidavit in support of the search warrant in this case indicated that investigating officers observed images which "contained child pornography" and that filenames attached to some of those images were "consistent with child pornography." The averring officer noted that if the search warrant were issued, he expected to find "images depicting the sexual performance by a child less than eighteen years of age in violation of Nebraska State statute 28-1463.01 and 28-1463.05."

In support of its conclusion that McCoy's affidavit did not establish probable cause, the majority relies in part on the fact that the term "child pornography" is not defined by the Child

Pornography Prevention Act and that, instead, a violation of Neb. Rev. Stat. § 28-1463.05 (Reissue 2008) occurs when one possesses materials that visually depict children engaged in "sexually explicit conduct." Thus, the majority concludes that McCoy's references to only "child pornography" are insufficient to establish probable cause.

While I would agree with the majority that "child pornography" is not defined by the act, I would disagree that McCoy's reference to that term fails to establish probable cause. It is clear that the purpose of the act as a whole is to criminalize the possession or creation of "child pornography." For example, as is provided by Neb. Rev. Stat. § 28-1463.01 (Reissue 2008), the name of the act under which the prohibition against possession of materials depicting "sexually explicit conduct" is the "Child Pornography Prevention Act."

Moreover, child pornography certainly has a generally accepted meaning. "Pornography" is defined as "[m]aterial . . . depicting sexual activity or erotic behavior in a way that is designed to arouse sexual excitement,"[1] while "child pornography" is defined as "[m]aterial depicting a person under the age of 18 engaged in sexual activity."[2] And these definitions are certainly consistent with "sexually explicit conduct" as envisioned by Neb. Rev. Stat. § 28-1463.02(5) (Reissue 2008).

McCoy's affidavit plainly sets forth that two investigating officers, both special agents with the FBI, downloaded and viewed visual depictions which the officers determined were child pornography and that those files were traced to an IP address registered to Nuss. That affidavit also indicated that McCoy believed that more items constituting child pornography in violation of the act were likely to be found in a search of Nuss' home.

As noted above, "child pornography" has a generally accepted definition and that definition is certainly consistent with the meaning of "sexually explicit conduct." McCoy's affidavit referred to the applicable statutes. In addition, McCoy averred that he had previous experience with "investigations

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[1] Black's Law Dictionary 1279 (9th ed. 2009).

[2] *Id.*

relating to the sexual exploitations of children" and had previously "observe[d] and review[ed] numerous examples of child pornography," including the images in this case. And, similar conclusions were also reached by both FBI agents. To paraphrase *U.S. v. Chrobak*,[3] an Eighth Circuit Court of Appeals case with similar facts, it is unlikely that the issuing judge would have disagreed with the affiant's characterization of the images reviewed by the affiant as child pornography, and it is likewise unlikely that the issuing judge would have concluded that the images were not encompassed by the definition of "sexually explicit conduct" as set forth in § 28-1463.02(5).

For the above reasons, I would find that probable cause was established and I would affirm on this basis. I therefore concur in the judgment of the court.

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[3] *U.S. v. Chrobak*, 289 F.3d 1043 (8th Cir. 2002).

SMEAL FIRE APPARATUS CO., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. ROBERT KREIKEMEIER AND R. K. MANUFACTURING, INC., APPELLANTS AND CROSS-APPELLEES.

782 N.W.2d 848

Filed April 16, 2010. No. S-08-1230.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.
2. **Contempt.** Civil contempt proceedings are instituted to preserve and enforce the rights of private parties to a suit, to compel obedience to orders and decrees made to enforce such rights, and to administer the remedies to which the court has found the parties to be entitled.
3. ____. Civil contempt proceedings are remedial and coercive in their nature.
4. **Restitution: Intent: Words and Phrases.** "Restitution" under Neb. Rev. Stat. § 25-1072 (Reissue 2008) was intended to compensate a complainant's loss or injury caused by a party's violation of an injunction.
5. **Constitutional Law: Contempt: Jury Trials.** There is no constitutional right to a jury trial in a contempt proceeding when the court awards compensatory relief.
6. **Equity: Jury Trials.** Under Nebraska law, parties generally do not have a right to a jury trial in actions or proceedings which have as their main object equitable relief.

7. **Courts: Equity: Jurisdiction.** A court properly exercising equity jurisdiction may completely adjudicate all matters properly presented and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation.
8. **Injunction: Equity: Contempt.** An action for an injunction is equitable in nature. And a contempt proceeding to protect and enforce parties' private rights under an injunction is treated as supplemental to and of the same nature as the main action.
9. **Courts: Equity: Jurisdiction.** When a party has properly invoked the court's equity jurisdiction in a contempt proceeding, the court may resolve all related matters presented to it.
10. **Courts: Jurisdiction.** A court that has jurisdiction to issue an order also has the power to enforce it.
11. ____: ____. A court can issue orders that are necessary to carry its judgment or decree into effect.
12. **Courts.** Nebraska courts, through their inherent judicial power, have the authority to do all things reasonably necessary for the proper administration of justice. And this authority exists apart from any statutory grant of authority.
13. **Courts: Constitutional Law: Contempt.** The power to punish for contempt is incident to every judicial tribune. It is derived from a court's constitutional power, without any expressed statutory aid, and is inherent in all courts of record.
14. **Contempt.** Compensatory relief that is limited to a complainant's actual losses sustained because of a contemnor's willful contempt is remedial and is not prohibited in a civil contempt proceeding.
15. **Contempt: Equity.** If a complainant seeks, or a court is considering, a modification of an underlying decree as an equitable sanction for contempt of the court's decree, the alleged contemnor must first have notice that a modification and a finding of contempt will be at issue.
16. **Contempt: Notice.** When an alleged contemnor has notice and an opportunity to be heard, a court can modify an underlying decree as a remedy for contempt if the violation cannot be adequately remedied otherwise.
17. **Contempt.** In general, civil contempt sanctions are remedial if they coerce the contemnor's obedience for the benefit of a private party or compensate a complainant for losses sustained.
18. **Contempt: Final Orders.** Under Nebraska law, an order of contempt in a postjudgment proceeding to enforce a previous final judgment is properly classified as a final order; the contempt order affects a substantial right, made upon a summary application in an action after judgment.
19. **Contempt: Appeal and Error.** For appeal purposes, the distinction between criminal and civil contempt sanctions has no relevance to whether a party may appeal from a final order in a supplemental postjudgment contempt proceeding.
20. **Actions: Appeal and Error.** The law-of-the-case doctrine reflects the principle that an issue that has been litigated and decided in one stage of a case should not be relitigated at a later stage.
21. ____: ____. On appeal, the law-of-the-case doctrine is a rule of discretion, not jurisdiction.
22. **Actions: Final Orders: Appeal and Error.** The law-of-the-case doctrine requires a final order. A party is not bound by a court's findings in an order that it was not required to appeal.

23. **Constitutional Law: Courts: Equity: Injunction: Statutes.** District courts have equity power under the Nebraska Constitution to grant permanent injunctions. And that power cannot be abridged by statute.
24. **Courts: Equity: Injunction.** A court of equity has the power to interpret its own injunctive decree if a party later claims that a provision is unclear.
25. **Injunction: Appeal and Error.** The critical question for appeal purposes is whether a clarification order merely interprets an injunctive decree or whether it modifies the decree in a way that affects a party's substantial right.
26. **Injunction: Final Orders.** A court's order clarifying a permanent injunction is a final order only if it changes the parties' legal relationship by expanding or relaxing the terms, dissolving the injunction, or granting additional injunctive relief.
27. **Contempt.** In determining whether a party is in contempt of an order, a court may not expand an earlier order's prohibitory or mandatory language beyond a reasonable interpretation considering the purposes for which the order was entered.
28. **Contracts: Intent: Evidence.** Contract principles generally apply to the enforcement of consent decrees. And these principles prohibit a court from considering extrinsic evidence of the decree's meaning absent some ambiguity.
29. **Contempt: Final Orders: Appeal and Error.** An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record.
30. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
31. **Contempt: Appeal and Error.** A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous.
32. **Contempt: Words and Phrases.** When a party to an action fails to comply with a court order made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element. "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order.
33. **Contempt: Proof.** Under Nebraska law, a party seeking to hold another in contempt of an order has the heavy burden of establishing that contempt beyond a reasonable doubt.
34. **Injunction: Notice.** Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.
35. **Contempt: Notice.** A court cannot hold a person or party in contempt unless the order or consent decree gave clear warning that the conduct in question was required or proscribed.
36. **Trade Secrets: Injunction: Contempt.** Injunctions protecting trade secrets may justify less specificity than other orders or decrees to avoid disclosing a plaintiff's trade secret. Ambiguities in such decrees involving technical or scientific knowledge may require courts to review the context in which the injunction was entered to determine what conduct the defendant reasonably should have known was prohibited. Ambiguities that persist even when considered in the light of the record or after applying other aids of interpretation must be construed in favor of the person or party charged with contempt.

37. **Contempt: Costs: Attorney Fees.** Costs, including reasonable attorney fees, can be awarded in a contempt proceeding.
38. **Actions: Proof.** The standard of proof functions to instruct fact finders about the degree of confidence our society believes they should have in the correctness of their factual conclusions for a particular type of adjudication.
39. **Actions: Due Process: Proof.** In civil cases, when a party's interests are substantial and involve more than the mere loss of money, but obviously do not involve a criminal conviction, due process is satisfied by an intermediate "clear and convincing" standard of proof.
40. **Contempt: Criminal Law: Proof.** Proof beyond a reasonable doubt is a criminal trial protection that does not apply to civil contempt proceedings.
41. **Contempt: Proof.** As of the date of this opinion, outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence.

Appeal from the District Court for Dodge County: GERALD E. MORAN, Judge. Reversed and remanded with directions.

Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy, Nick & Placek, for appellants.

Paul R. Elofson, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

I. SUMMARY

This is a second appeal from a contempt order. The district court entered a preliminary injunction in 1989 and a permanent injunction in 1990, upon the parties' stipulated settlement. The injunction enjoined the appellants, Robert Kreikemeier and R. K. Manufacturing, Inc. (collectively R.K.), from using or disclosing a manufacturing process used by Smeal Fire Apparatus Co., Inc. (SFAC), in the hydraulic systems of its aerial firefighting ladders. The district court has twice found that R.K. willfully disobeyed its injunction order. In our 2006 opinion, *Smeal Fire Apparatus Co. v. Kreikemeier* (*Smeal I*),[1]

[1] *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006).

we dismissed R.K.'s first appeal from the court's first contempt order for lack of a final order.

On remand, a different judge again found R.K. in contempt of the injunction and imposed a coercive sanction of $5,000 per day, costs, and fees. SFAC moved for summary dismissal of R.K.'s appeal, arguing that the second order was also not a final, appealable order.

Although there is no graceful way of retreating from this court's previous rulings, some of our troubling contempt cases have created needless difficulties at both the trial and the appellate levels. An untangling of the snarls was long overdue. Our decision changes the legal landscape of our present contempt law. We overrule a long line of cases affecting a trial court's jurisdiction, an appellate court's jurisdiction, and the standard of proof in civil contempt cases.

We first address the jurisdictional issues. In determining that we have jurisdiction, we overrule cases that have unnecessarily limited a court's inherent and statutorily granted contempt powers and cases that have precluded appellate review of final civil contempt orders. These cases' roots run deep. Correcting our contempt jurisprudence will require extensive pruning.

The first jurisdictional issue presents the question whether a district court has power in a contempt proceeding to order compensatory or equitable relief. Next, we address whether a contemnor can appeal a civil contempt order from a separate postjudgment proceeding.

We will set out our holding with more specificity in the following pages; but, briefly, it is this: We hold that in a civil contempt proceeding, a district court has inherent power to order compensatory relief when a contemnor has violated its order or judgment. We further hold that whether a contempt sanction is civil or criminal is relevant only when a party appeals from an interlocutory order of contempt. An interlocutory contempt order is an order that a court issues during an ongoing proceeding before the final judgment in the main action. Because R.K. appeals a final contempt order from a supplemental postjudgment contempt proceeding, we have jurisdiction.

Regarding the substantive issues, we conclude that the court erred in finding that R.K. had willfully violated the injunction.

The injunction contained ambiguous terms that could only be clarified by reviewing the preliminary injunction record. A review of that record shows that the injunction did not give R.K. clear warning that it could be held in contempt for its conduct.

Finally, we conclude that for future cases, the standard of proof in civil contempt proceedings is clear and convincing evidence, unless the Legislature has mandated another standard.

II. BACKGROUND

SFAC and R.K. both manufacture aerial firefighting ladders. SFAC formerly employed Kreikemeier. In 1990, to resolve its trade secrets claim against R.K., SFAC obtained an agreed-upon injunction order. The order enjoined R.K. from using or disclosing SFAC's manufacturing process for a hydraulic valve spool.

In 2001, SFAC claimed that R.K. had violated the injunction. And the district court found R.K. to be in willful contempt. The court ordered R.K., as a condition to purge itself of contempt, to take the following actions: (1) within 30 days, notify the court of all of R.K.'s units with parts manufactured that violated the injunction; (2) within 60 days, notify purchasers that their use of the units violated the injunction; and (3) within 2 years, make a good faith effort to obtain agreements with the unit purchasers to exchange the parts. It also ordered R.K. to pay court costs, attorney fees, and expert witness fees.

R.K. appealed. The Court of Appeals relied on this court's decisions that a contemnor can only attack a coercive sanction through a habeas corpus proceeding. It concluded that R.K. could not appeal the district court's order imposing a coercive sanction.[2] The Court of Appeals nonetheless concluded that it could review that part of the order requiring R.K. to pay costs and fees because R.K. could not avoid those awards. It concluded that the district court had not abused its discretion

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[2] See *Smeal Fire Apparatus Co. v. Kreikemeier*, 13 Neb. App. 21, 690 N.W.2d 175 (2004), *overruled in part, Smeal I, supra* note 1.

in making these awards. We granted R.K.'s petition for further review.

In *Smeal I*,[3] like the Court of Appeals, we also dismissed R.K.'s appeal for lack of jurisdiction. But we vacated the Court of Appeals' decision exercising jurisdiction over the award of attorney fees and costs. We repeated our previous holding that "'the imposition of a coercive sanction is never final and may not be attacked by direct appeal.'"[4] Also, we repeated our other previous holding that a district court lacks jurisdiction to order equitable relief in a contempt proceeding. We further concluded that the court's award of attorney fees and costs could not be extracted from the impermissible grant of equitable relief. We dismissed the appeal and vacated the court's order, including the award of attorney fees and costs.

On remand, after a hearing, the district court reaffirmed its earlier finding by a different judge that R.K. was willfully in contempt. The court adopted and reiterated the earlier injunction requirements, prohibiting R.K. from using SFAC's manufacturing process. It interpreted our mandate as requiring it to impose a purge plan that did not grant equitable relief to SFAC and to include a coercive sanction to obtain R.K.'s compliance.

Accordingly, the court's order required R.K. to do two things within 10 days. First, R.K. had to inform its current and former employees, officers, managers, stockholders, partners, and manufacturing agents of the court's order prohibiting the grinding or milling of the disputed valve spool, in the manner exemplified by exhibit 210. Second, Kreikemeier had to file an affidavit attesting under penalty of perjury that R.K. had held a company meeting in which R.K. informed the above persons of the court's prohibition on the manufacturing process, as illustrated by a photograph from exhibit 210. As a coercive sanction, the court stated that if R.K. failed to comply with its order, it would assess a fine of $5,000

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[3] *Smeal I, supra* note 1.

[4] *Id.* at 621, 715 N.W.2d at 140, quoting *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991).

per day, jointly and severally, until R.K. complied. The fine would begin on the 11th day after the court entered its order. Finally, the court assessed $126,601.29 in costs and attorney fees against R.K.

R.K. appealed the court's finding of contempt before the 11th day. Quoting from our 2006 decision, SFAC again moved this court to summarily dismiss the appeal for lack of jurisdiction because there was no final order. R.K. resisted SFAC's motion. R.K. contended that the court had again entered an impermissible order awarding equitable relief. And R.K. argued that because it could not mitigate the coercive fine and award of attorney fees and costs, this was a final, appealable contempt order. We overruled SFAC's motion, subject to reconsideration upon submission of the case on the merits.

III. ASSIGNMENTS OF ERROR

R.K. assigns, condensed and restated, that the district court erred in (1) finding that R.K.'s willful disobedience of the court's 1990 injunction order had been established beyond a reasonable doubt; (2) finding that Kreikemeier had admitted that R.K. violated the order; (3) ignoring SFAC's expert witness' testimony at the preliminary injunction hearing and a 2002 deposition; and (4) failing to find that exhibit 43, a diagram used by SFAC's expert witness, is the correct depiction of SFAC's trade secret protected by the court's permanent injunction.

On cross-appeal, SFAC assigns two errors: (1) the court erred in failing to award it the full amount of its requested attorney fees and costs; and (2) the court erred in failing to rule that its January 2008 order was the law of the case or res judicata on the factual issue that R.K.'s grinding method violated the injunction.

As noted, however, SFAC moved to dismiss this appeal for lack of a final order. An appellate court lacks jurisdiction to entertain appeals from nonfinal orders.[5] So, before reaching the substantive issues raised by R.K.'s assignments of error, we determine whether we have jurisdiction.

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[5] *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

IV. ANALYSIS

1. JURISDICTION

(a) Parties' Contentions

SFAC contends that the court's November 2008 contempt order is not a final order because it imposed civil, coercive sanctions. Relying on our 2006 opinion in *Smeal I*, it argues that contempt orders imposing civil, coercive sanctions are always nonfinal orders, which a contemnor can only attack through habeas corpus proceedings.

R.K. disagrees. It contends that the order is final under our decisions in *Dunning v. Tallman*[6] and *State ex rel. Kandt v. North Platte Baptist Church*.[7] In *Smeal I*, we relied on our decision in *Dunning* to hold that the trial court lacked jurisdiction to grant equitable relief. R.K. argues that the trial court has again required it to comply with a purge condition that granted SFAC equitable relief. It implicitly argues that the court lacked jurisdiction to enter this order. In addition, R.K. argues that under *State ex rel. Kandt*, we will review a contempt order after the trial court imposes a fine on the contemnor that cannot be mitigated. R.K. attempts to distinguish the district court's 2003 order that imposed contempt sanctions and was appealed in *Smeal I*. It contends that in *Smeal I*, we concluded that the 2003 order was a nonfinal order because it attempted to grant equitable relief to SFAC with no consequence for noncompliance. R.K. argues that in contrast to the 2003 order, the court's 2008 order imposes a sanction for its failure to comply with its purge plan—and so there is a final order.

(b) Standard of Review

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law, which we independently decide.[8]

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[6] *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993).

[7] *State ex rel. Kandt v. North Platte Baptist Church*, 225 Neb. 657, 407 N.W.2d 747 (1987).

[8] *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009).

(c) Scope of Court's Powers in a Contempt Proceeding

Before discussing whether this is a final, appealable order, we address R.K.'s argument that the court lacked jurisdiction to grant equitable relief to SFAC through its purge plan. Obviously, if the court lacked jurisdiction to enter this order, we must reverse the order and dismiss the appeal.

Woven into the fabric of our case law are rules prohibiting both compensatory and equitable relief to a party injured by a contemnor's violation of a court's order or judgment. As noted, we relied on *Dunning* in *Smeal I* to conclude that the trial court lacked jurisdiction to impose its first purge plan and had therefore entered an extrajudicial award of equitable relief. The rule against granting equitable relief emerged from our rule that a court cannot grant compensatory relief to an injured party in a contempt proceeding. But these rules have put trial courts in a judicial straightjacket and impeded their inherent authority to remedy a civil contempt. So, while we do not agree with R.K. that the court's purge plan on remand again granted equitable relief to SFAC, we conclude that R.K.'s argument raises a broader jurisdictional problem.

We believe our rule that courts lack jurisdiction to grant compensatory or equitable relief in a contempt proceeding to enforce an injunction is contrary to Neb. Rev. Stat. § 25-1072 (Reissue 2008). It also conflicts with a court's inherent contempt powers. In overlooking § 25-1072, we have sowed confusion regarding a court's contempt powers.

The Legislature has not amended § 25-1072 since 1929. The statute sets forth the relief that a court may order for a party's contempt of an injunction:

> An injunction granted by a judge may be enforced as the act of the court. Disobedience of an injunction may be punished as a contempt by the court . . . . [A] party guilty of [contempt] may be required, in the discretion of the court or judge, to pay a fine not exceeding two hundred dollars, for the use of the county, to make immediate restitution to the party injured, and give further security to obey the injunction; or, in default thereof, he may be committed to close custody, until he shall

fully comply with such requirements, or be otherwise legally discharged.

(i) Our Rule Prohibiting Compensatory Relief

Our decision in *Dunning*, prohibiting a court's grant of equitable relief in a contempt proceeding, has its roots in *Kasparek v. May*.[9] So, we first discuss our prohibition against compensatory relief. In *Kasparek*, we excluded indemnity for damages from the relief a court can order for contempt of an injunction. *Kasparek* dealt with a contemnor's violating a permanent injunction. The injunction enjoined him from maintaining a dike and required him to remove it or to lower it and build a drainage ditch around it. In addition to enforcing the injunction, the adjacent landowner sought damages. We rejected damages as a remedy. We stated that we did not agree with jurisdictions holding that in contempt proceedings "a fine may be imposed for the indemnification of the person who has been damaged by the failure to perform."[10] We held that civil contempt is available to enforce a previous judgment, but not to afford a remedy for subsequent damages: "If [the adjacent landowner] suffered further damages, his remedy is an action at law for the subsequent damage."[11] But we did not cite or discuss § 25-1072.

And, in *Kasparek*, we did not cite to any cases from other jurisdictions. But other state courts that prohibit compensatory fines in contempt proceedings generally rely on the language of their governing state statutes.[12] Some of these courts have reasoned that compensatory fines award damages without giving the contemnor the right to a jury trial.[13] Other courts, like this court in *Kasparek*, have reasoned that the purpose of civil contempt sanctions is only to compel obedience to

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[9] *Kasparek v. May*, 174 Neb. 732, 119 N.W.2d 512 (1963).

[10] *Id.* at 741, 119 N.W.2d at 519.

[11] *Id.*

[12] See Annot., 85 A.L.R.3d 895 § 5 (1978 & Supp. 2009).

[13] See *H. J. Heinz Co. v. Superior Court*, 42 Cal. 2d 164, 266 P.2d 5 (1954).

a past order. They conclude that requiring the contemnor to pay money damages to the injured party is inconsistent with that purpose.[14]

But these reasons conflict with § 25-1072. It plainly states that a trial court may order a contemnor to "make immediate restitution to the party injured" for violation of an injunction. So, § 25-1072 is consistent with what we have stated about the remedial purpose of civil contempt proceedings.

[2,3] Civil contempt proceedings are "'instituted to *preserve and enforce the rights of private parties to the suit* and to compel obedience to orders and decrees made to enforce the rights and to *administer the remedies to which the court has found them to be entitled* . . . .'"[15] Civil contempt proceedings are *remedial* and coercive in their nature.[16] "'If it is for civil contempt[,] the punishment is remedial, and for the benefit of the complainant.'"[17] Remedying the complainant's injury for a contemnor's disobedience clearly protects and enforces the complainant's rights under the original order or judgment. So, our holding in *Kasparek* that excluded compensatory relief thwarted a primary purpose for initiating civil contempt proceedings.

[4] Moreover, we have recognized that restitution can serve the remedial purpose of compensating an injured party. It is true that restitution, strictly speaking, normally refers to restoration of an economic benefit; it can also refer to a money substitution for an economic benefit that the defendant unjustly obtained at the plaintiff's expense.[18] So, the measurement of restitution

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[14] See *Dodson v. Dodson*, 380 Md. 438, 845 A.2d 1194 (2004).

[15] See, *Eliker v. Eliker*, 206 Neb. 764, 770, 295 N.W.2d 268, 272 (1980) (emphasis supplied), quoting *Maryott v. State*, 124 Neb. 274, 246 N.W. 343 (1933); *McFarland v. State*, 165 Neb. 487, 86 N.W.2d 182 (1957); *Leeman v. Vocelka*, 149 Neb. 702, 32 N.W.2d 274 (1948).

[16] *McFarland, supra* note 15, quoting *In re Nevitt*, 117 F. 448 (8th Cir. 1902). Accord *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 31 S. Ct. 492, 55 L. Ed. 797 (1911).

[17] *McFarland, supra* note 15, 165 Neb. at 492, 86 N.W.2d at 185, quoting *Gompers, supra* note 16.

[18] See, *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004); 1 Dan B. Dobbs, Dobbs Law of Remedies § 4.1(1) (2d ed. 1993).

is normally a defendant's unjust gain and may exceed money damages, which are generally measured by a plaintiff's loss.[19] But under a juvenile restitution statute, we have stated that restitution generally "encompasses the '[r]eturn or restoration of some specific thing to its rightful owner' or '[c]ompensation for loss.'"[20] And under a criminal restitution statute, we have stated that restitution is remedial when it is limited to the injured party's actual losses.[21] Other courts with statutes identical to § 25-1072 have similarly concluded that restitution under that state's statute includes compensatory relief for a plaintiff's loss or injury.[22] We agree. Under § 25-1072, it serves no purpose to impose a technical understanding of the term "restitution." The Legislature clearly intended "restitution" under this statute to compensate a complainant's loss or injury caused by a party's violation of an injunction.[23]

[5-7] Finally, a contemnor is not denied a right to a jury trial by an award of compensatory relief under § 25-1072. There is no constitutional right to a jury trial in a contempt proceeding when the court awards compensatory relief.[24] And under Nebraska law, parties generally do not have a right to a jury trial in actions or proceedings which have as their main object equitable relief.[25] Also, a court properly exercising equity jurisdiction may completely adjudicate all matters

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[19] See 1 Dobbs, *supra* note 18.

[20] *In re Interest of Brandon M.*, 273 Neb. 47, 52, 727 N.W.2d 230, 235 (2007), quoting Black's Law Dictionary 1339 (8th ed. 2004).

[21] See *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006). Accord, *Hicks v. Feiock*, 485 U.S. 624, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988); *Gompers, supra* note 16.

[22] See, *Holloway v. Water Co.*, 100 Kan. 414, 167 P. 265 (1917); *Cincinnati v. Council*, 35 Ohio St. 2d 197, 299 N.E.2d 686 (1973); *Malnar v. Whitfield*, 774 P.2d 1075 (Okla. App. 1989). See, also, 66 Am. Jur. 2d *Restitution* § 1 (2001).

[23] See Webster's Encyclopedic Unabridged Dictionary of the English Language 1222 (1994) (defining restitution).

[24] See *Mine Workers v. Bagwell*, 512 U.S. 821, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994).

[25] See *State ex rel. Cherry v. Burns*, 258 Neb. 216, 602 N.W.2d 477 (1999). See, also, *Eihusen v. Eihusen*, 272 Neb. 462, 723 N.W.2d 60 (2006).

properly presented and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation.[26]

[8,9] An action for an injunction is equitable in nature.[27] And a contempt proceeding to protect and enforce parties' private rights under an injunction is treated as supplemental to and of the same nature as the main action.[28] It is true that "[r]estitution claims for money are usually claims 'at law,'"[29] which could be resolved without resort to equity.[30] But when a party has properly invoked the court's equity jurisdiction in a contempt proceeding, the court may resolve all related matters presented to it.

In sum, the reasons other courts have given for precluding compensatory relief in contempt proceedings do not apply under § 25-1072. Nor was our decision in *Kasparek* consistent with § 25-1072's specific grant of the power to order restitution in a contempt proceeding to enforce an injunction. Although § 25-1072 is limited to remedies for violating an injunctive decree, our holding in *Kasparek* applies to any civil contempt proceeding. And the holding in *Kasparek* clashes with a court's inherent power in civil contempt proceedings to take necessary actions to enforce its order and administer justice.

(ii) A Court Has Inherent Power to Remedy Violations of Its Orders

Before we decided *Kasparek*, we had held that § 25-1072 cannot limit a district court's inherent power to punish for contempt of its orders: "[T]he power to punish for contempt of court is a power inherent in all courts of general jurisdiction,

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[26] See *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999). See, also, *Hull v. Bahensky*, 196 Neb. 648, 244 N.W.2d 293 (1976).

[27] See *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007).

[28] See, *Leman v. Krentler-Arnold Co.*, 284 U.S. 448, 52 S. Ct. 238, 76 L. Ed. 389 (1932); *Gompers, supra* note 16. Compare *Lowe v. Prospect Hill Cemetery Ass'n*, 75 Neb. 85, 106 N.W. 429 (1905).

[29] See 1 Dobbs, *supra* note 18 at 556.

[30] See *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000).

. . . independent of any special or express grant of statute."[31] In *State ex rel. Beck v. Frontier Airlines*,[32] the contemnor argued that the district court lacked authority to impose a fine above the $200 specified in § 25-1072. We rejected that argument and affirmed the court's $1,000 fine for each day of a specified period that the defendant violated the court's injunction.

[10-13] We have stated that a court that has jurisdiction to issue an order also has the power to enforce it.[33] A court can issue orders that are necessary to carry its judgment or decree into effect.[34] Nebraska courts, through their inherent judicial power, have the authority to do all things reasonably necessary for the proper administration of justice.[35] And this authority exists apart from any statutory grant of authority. We have recently explained that the power to punish for contempt is incident to every judicial tribune. It is derived from a court's constitutional power, without any expressed statutory aid, and is inherent in all courts of record.[36]

[14] Similarly, federal courts and other state courts hold that courts of general jurisdiction have broad remedial power to enforce their orders, judgments, or decrees.[37] "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief."[38] So, we hold that

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[31] *State ex rel. Beck v. Frontier Airlines, Inc.*, 174 Neb. 172, 181, 116 N.W.2d 281, 286 (1962).

[32] See *id.*

[33] See *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006).

[34] See *Laschanzky v. Laschanzky*, 246 Neb. 705, 523 N.W.2d 29 (1994).

[35] See *id.*

[36] See *Penn Cal, L.L.C. v. Penn Cal Dairy*, 264 Neb. 122, 646 N.W.2d 601 (2002), quoting *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000).

[37] See, e.g., *U.S. v. Alcoa, Inc.*, 533 F.3d 278 (5th Cir. 2008); *McGregor v. Chierico*, 206 F.3d 1378 (11th Cir. 2000); *King v. Allied Vision, Ltd.*, 65 F.3d 1051 (2d Cir. 1995); *Kidder v. Kidder*, 135 N.H. 609, 609 A.2d 1197 (1992); *State v. Walton*, 215 Or. App. 628, 170 P.3d 1122 (2007); *Mulligan v. Piczon*, 739 A.2d 605 (Pa. Commw. 1999).

[38] *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193, 69 S. Ct. 497, 93 L. Ed. 599 (1949). See, also, *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344 (1986).

compensatory relief that is limited to a complainant's actual losses sustained because of a contemnor's willful contempt is remedial and is not prohibited in a civil contempt proceeding. Accordingly, we overrule *Kasparek v. May*[39] to the extent that it prohibits compensatory relief in a contempt proceeding.

(iii) Courts Are Not Prohibited From Granting Any Equitable Relief for Contempt

R.K. argues that under our decision in *Dunning*,[40] a court does not have jurisdiction to grant equitable relief to remedy a civil contempt.

In *Dunning*, we relied solely on *Kasparek* to hold that a court lacks jurisdiction to order equitable relief in a civil contempt proceeding. In *Dunning*, the contemnor violated a noncompetition agreement. The agreement was part of the parties' property settlement agreement and incorporated into the marital dissolution decree. The complainant asked the court to extend the noncompetition agreement as a sanction for the contempt. The court fined the contemnor $20,000 for her contempt, but its purge plan permitted her to avoid the fine by complying with the noncompetition agreement for an additional year. When she refused, the court made the fine unconditional.

On appeal, we stated that a court cannot impose punitive fines in civil contempt proceedings. But we reasoned that the fine was not necessarily a punitive sanction for contempt if it permissibly coerced compliance with the extended duration of the noncompetition agreement. And we recognized that in actions for injunctions, other courts had used their equitable powers to extend the duration of noncompetition agreements equal to the duration of the breach. But we concluded that the requested relief—an extension of a noncompetition agreement—was not allowable in a civil contempt proceeding. We determined that it was analogous to the damages requested in *Kasparek*: "Because an award of damages is unavailable in a civil contempt proceeding, . . . then, under the *Kasparek*

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[39] *Kasparek, supra* note 9.

[40] *Dunning, supra* note 6.

rationale, a civil contempt proceeding cannot be the means to afford equitable relief to a party."[41] More specifically, we held that in imposing a sanction for civil contempt, a court cannot use, as a requisite to purge contempt, a condition that affords equitable relief to a party.[42] We further held that "the trial court lacked jurisdiction or power to require that [the contemnor] comply with the judicially extended noncompetition provision as a means to avoid the $20,000 fine."[43]

Yet, like our holding in *Kasparek*, our holding in *Dunning* is inconsistent with a court's inherent power to enforce its orders. Our holding in *Dunning* sprouted from *Kasparek*, which we have now overruled as an improper limitation on a court's remedial powers for violations of its orders or judgments. So, our prohibition against equitable relief has unnecessarily choked our contempt jurisprudence. Accordingly, we also overrule the prohibition in *Dunning v. Tallman*[44] against a court's granting any equitable relief in a contempt proceeding.

(iv) Restrictions on Court's Power to Order Equitable Relief for Contempt

Like injunctions, both an original marital dissolution proceeding and proceedings for modification of dissolution decrees are equitable in nature.[45] We permit a party to use contempt proceedings to enforce a property settlement agreement incorporated into a divorce decree.[46] And a district court, in exercising its broad jurisdiction over marriage dissolutions, retains jurisdiction to enforce all terms of approved property settlement agreements.[47] Because of the court's continuing equity jurisdiction over the decree, the power to

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[41] *Id.* at 11, 504 N.W.2d at 93.

[42] *Id.*

[43] *Id.*

[44] *Dunning, supra* note 6.

[45] See *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999).

[46] See *Novak v. Novak*, 245 Neb. 366, 513 N.W.2d 303 (1994). See, also, *Grady v. Grady*, 209 Neb. 311, 307 N.W.2d 780 (1981).

[47] *Strunk, supra* note 33.

provide equitable relief in a contempt proceeding is particularly appropriate.[48]

[15] But there are limits to a court's power to order equitable relief in a contempt proceeding. We have held that a court cannot modify a dissolution decree in a contempt proceeding absent an application for a modification and notice that a party seeks modification.[49] Similarly, parties must have notice and a hearing before a court modifies a permanent injunction.[50] So, if a complainant seeks, or a court is considering, a modification of the underlying decree as an equitable sanction for contempt of the court's decree, the alleged contemnor must first have notice that a modification and a finding of contempt will be at issue.

[16] But when the alleged contemnor has notice and an opportunity to be heard, a court can modify the underlying decree as a remedy for contempt if the violation cannot be adequately remedied otherwise.

Having determined that a court has jurisdiction to order compensatory and equitable relief, we now consider whether the court's order of civil sanctions was appealable.

(d) Existing Nebraska Case Law Prohibits a Contemnor's Appeal From a Civil Contempt Order

We have held that a contemnor cannot appeal a contempt order if it imposes a civil, coercive sanction.[51] In *Smeal I*, we repeated this rule and noted that the rule's origin was our 1984 decision in *In re Contempt of Liles* (*Liles*).[52] After *Liles*, both this court and the Nebraska Court of Appeals have stated in many other cases that contempt orders imposing civil sanctions

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[48] See *Erickson v. Erickson*, 998 So. 2d 1182 (Fla. App. 2008).

[49] See, *Mays v. Mays*, 229 Neb. 674, 428 N.W.2d 618 (1988); *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986); *Neujahr v. Neujahr*, 218 Neb. 585, 357 N.W.2d 219 (1984).

[50] See, e.g., *Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181 (5th Cir. 2008); *Arata v. Nu Skin Intern., Inc.*, 96 F.3d 1265 (9th Cir. 1996); *U.S. v. Western Elec. Co.*, 894 F.2d 430 (D.C. Cir. 1990).

[51] See, *Dunning, supra* note 6; *State ex rel. Kandt, supra* note 7.

[52] *In re Contempt of Liles*, 216 Neb. 531, 344 N.W.2d 626 (1984).

are not final, appealable orders or that such orders can be attacked only through a habeas corpus proceeding.[53]

All but one of our later cases involved a final contempt order from a postjudgment proceeding to enforce a previous final judgment. And whether we reviewed those contempt orders hinged upon whether the trial court's sanction was civil or criminal. We would review orders imposing criminal sanctions but not orders imposing civil sanctions.

[17] In general, civil contempt sanctions are remedial if they coerce the contemnor's obedience for the benefit of a private party or compensate a complainant for losses sustained.[54] As we have often stated, a coercive contempt sanction is conditioned upon the contemnor's continued noncompliance with a court order; i.e., the defendant is in a position to mitigate the sentence by complying with the court's order.[55] In contrast, criminal contempt sanctions are punitive. They vindicate the court's authority and cannot be ended by any act of the contemnor.[56]

As we know, a critical distinction exists between civil and criminal sanctions: A court can impose criminal, or punitive,

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[53] See, *Smeal I, supra* note 1; *Allen v. Sheriff of Lancaster Cty.*, 245 Neb. 149, 511 N.W.2d 125 (1994); *Dunning, supra* note 6; *Maddux, supra* note 4; *State ex rel. Collins v. Beister*, 227 Neb. 829, 420 N.W.2d 309 (1988); *State ex rel. Kandt, supra* note 7; *State ex rel. Kandt v. North Platte Baptist Church*, 219 Neb. 694, 365 N.W.2d 813 (1985); *In re Contempt of Sileven*, 219 Neb. 34, 361 N.W.2d 189 (1985); *Sorensen v. Peterson*, 218 Neb. 680, 358 N.W.2d 742 (1984); *Rol v. Rol*, 218 Neb. 305, 353 N.W.2d 19 (1984); *Frandsen v. Frandsen*, 216 Neb. 828, 346 N.W.2d 398 (1984); *City of Beatrice v. Meints*, 12 Neb. App. 276, 671 N.W.2d 243 (2003); *Michael B. v. Donna M.*, 11 Neb. App. 346, 652 N.W.2d 618 (2002); *In re Interest of Simon H.*, 8 Neb. App. 225, 590 N.W.2d 421 (1999); *Jessen v. Jessen*, 5 Neb. App. 914, 567 N.W.2d 612 (1997); *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995); *Hammond v. Hammond*, 3 Neb. App. 536, 529 N.W.2d 542 (1995).

[54] See, *Bagwell, supra* note 24; *McFarland, supra* note 15, quoting *Gompers, supra* note 16.

[55] See, e.g., *Smeal I, supra* note 1, citing *Liles, supra* note 52; *State ex rel. Kandt, supra* note 7.

[56] See *In re Contempt of Sileven, supra* note 53, quoting *Southern Railway Company v. Lanham,* 403 F.2d 119 (5th Cir. 1968).

sanctions only if the proceedings afford the protections offered in a criminal proceeding.[57] Another distinction relates to appeals. A contemnor can always appeal from a criminal contempt order.[58] But the issue here is whether a party can appeal from a civil contempt order. In *Liles*, we misread federal case law on this issue. And, unfortunately, *Liles* and its progeny have spawned considerable confusion. To clear the confusion, we look to federal rules for when a contemnor can appeal a civil contempt order.

(i) Federal Rules Permit a Party's Appeal From a Final Contempt Judgment

The U.S. Supreme Court has held that federal appellate courts cannot review a party's appeal from a trial court's interlocutory contempt order. Appellate courts can only review final contempt judgments. And a contempt order issued before a final decree in the main action is only final if it imposes a criminal sanction to vindicate the court's authority.[59] Accordingly, federal appellate courts will review interlocutory contempt orders against parties only in a party's appeal from the final decree or judgment.[60] For example, if a party failed to comply with a discovery ruling, the trial court's contempt order would constitute an interlocutory contempt order that was unreviewable by an appellate court except as part of the party's appeal from the trial court's final judgment.

Federal courts apply the same rule to contempt orders issued during supplemental postjudgment proceedings still in progress; parties must seek review of such orders as part of their appeal from the final judgment.[61] The only appeals that the

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[57] See, e.g., *Dunning, supra* note 6; *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994), *overruled on other grounds, Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999); *Leeman, supra* note 15.

[58] See *Smeal I, supra* note 1.

[59] See *Doyle v. London Guarantee Co.*, 204 U.S. 599, 27 S. Ct. 313, 51 L. Ed. 641 (1907).

[60] See 15B Charles Alan Wright et al., Federal Practice and Procedure § 3917 at 387 (2d ed. 1992) (citing cases).

[61] See *Fox v. Capital Co.*, 299 U.S. 105, 57 S. Ct. 57, 81 L. Ed. 67 (1936).

U.S. Supreme Court has permitted from interlocutory, civil contempt orders are nonparty appeals. This exception exists because nonparties could never obtain review of such orders.[62] But most federal appellate courts have explicitly held that a final contempt judgment from a postjudgment contempt proceeding to enforce a previous final judgment is appealable.[63] Under federal case law, the distinction between criminal or civil sanctions has no relevance to exercising appellate jurisdiction over a final judgment from a postjudgment contempt proceeding.[64] And the right of appeal from a postjudgment contempt order does not depend upon whether the trial court has made a final assessment of fines when coercive fines were the civil sanction.[65] It is true we have stated that "[c]ivil contempt orders are treated as interlocutory . . . ."[66] But like our holding in *Liles*, that statement went too far because only civil contempt orders issued before a final judgment in the main action are interlocutory.

(ii) Liles *Was Incorrectly Decided*

In *Liles*, the trial court had ordered the contemnor jailed for refusing to testify at a show cause hearing for his past contempt of an injunction. We had previously denied his habeas corpus petition and were considering his motion for a stay of his jail sentence pending his appeal. We denied the motion because we concluded that a civil contempt order is not appealable. We stated that "punitive sanctions are reviewable by appeal;

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[62] See *Doyle, supra* note 59, citing *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 24 S. Ct. 665, 48 L. Ed. 997 (1904).

[63] See, e.g., *Berne Corp. v. Government of the Virgin Islands*, 570 F.3d 130 (3d Cir. 2009); *Autotech Techs. v. Integral Research & Development*, 499 F.3d 737 (7th Cir. 2007); *State of N.Y. v. Shore Realty Corp.*, 763 F.2d 49 (2d Cir. 1985); *Shuffler v. Heritage Bank*, 720 F.2d 1141 (9th Cir. 1983). See, also, 15B Wright et al., *supra* note 60, § 3917.

[64] See, e.g., *Consumers Gas & Oil v. Farmland Industries, Inc.*, 84 F.3d 367 (10th Cir. 1996).

[65] See, *Shore Realty Corp., supra* note 63; *Shuffler, supra* note 63.

[66] See *State ex rel. Kandt, supra* note 7, 225 Neb. at 660, 407 N.W.2d at 750.

whereas coercive sanctions can only be attacked collaterally by habeas corpus."[67]

But the rule we extracted from federal case law swept too broadly. We failed to distinguish between interlocutory civil contempt orders issued before the trial court's final judgment and a final contempt order imposed in a separate postjudgment proceeding to enforce a previous final judgment. Contrary to our decisions in earlier cases,[68] we implied that a party could never appeal a contempt order imposing a coercive sanction. And, as noted, we have reviewed or rejected appeals in several cases involving appeals from postjudgment contempt orders based on whether the sanction was civil or criminal. But our case law is inconsistent with federal rules because the rule we set forth in *Liles* was too broad.

Moreover, *Liles* created needless obstacles to appellate review. Under our rule that civil contempt orders are nonappealable, we have obviously rarely reviewed the correctness of a trial court's finding of contempt unless the trial court has impermissibly imposed a criminal sanction in a civil proceeding.[69] And we have also held that the correctness of the contempt order is moot if the party complies with the purge plan to escape the coercive sanction of open-ended incarceration.[70] Finally, a habeas corpus proceeding is an illusory substitute for an appeal in most cases. As we stated in *Smeal I*, a habeas corpus proceeding applies only to persons *illegally detained*.[71] Habeas corpus generally does not apply to a coercive fine sanction.[72] And even when the contempt sanction is a coercive incarceration, attacking the order through a habeas corpus proceeding will usually be futile.[73] So, the

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[67] *Liles, supra* note 52, 216 Neb. at 534, 344 N.W.2d at 629.

[68] See, *McFarland, supra* note 15; *In re Havlik*, 45 Neb. 747, 64 N.W. 234 (1895).

[69] See, e.g., *State ex rel. Reitz, supra* note 57.

[70] See *McFarland, supra* note 15.

[71] *Smeal I, supra* note 1.

[72] See *State ex rel. Collins, supra* note 53.

[73] See *Sileven v. Tesch*, 212 Neb. 880, 326 N.W.2d 850 (1982).

combination of these rules have unintentionally but effectively choked off a contemnor's right to appeal from a judgment of civil contempt.

Additionally, we have created procedural knots by hinging the right to appeal upon the character of the trial court's sanction. For example, in a second appeal from a contempt order, we held that a civil coercive sanction had changed to a criminal sanction after the trial court assessed total fines.[74] And we have inconsistently characterized the same sanction in separate cases as civil or criminal for exercising appellate jurisdiction and reviewing the contempt order.[75]

In sum, hinging the right to appeal on a sanction's characterization has been a difficult rule to apply and at times inconsistent. More important, our rule has boxed contemnors into a minefield. They either face continuing coercive sanctions or risk a court's determination that the issue is moot because they complied with the purge plan. We conclude that our holding in *Liles* that any civil contempt order is nonappealable was manifestly wrong. The rule is unworkable for final contempt orders entered in a separate postjudgment proceeding to enforce a previous final judgment.

[18] Although we agree with federal courts that final, postjudgment contempt orders should be appealable, we disagree with the characterization of these orders as "final judgments." We believe that this characterization is inconsistent with treating a civil contempt proceeding as supplemental to the main action.[76] Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), we have stated that an order on "'summary application in an action after judgment'" is an order ruling on a postjudgment motion in an action.[77] We conclude that under Nebraska law, an order of contempt in a postjudgment proceeding to enforce a previous final judgment is more properly classified as a final order;

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[74] See *State ex rel. Kandt, supra* note 7.

[75] Compare *Maddux, supra* note 4, with *Allen, supra* note 53.

[76] See, *Leman, supra* note 28; *Gompers, supra* note 16.

[77] *Heathman v. Kenney*, 263 Neb. 966, 969, 644 N.W.2d 558, 561 (2002).

the contempt order affects a substantial right, made upon a summary application in an action after judgment.[78]

[19] For appeal purposes, we hold that the distinction between criminal and civil contempt sanctions has no relevance to whether a party may appeal from a final order in a supplemental postjudgment contempt proceeding.

We now overrule any cases that could be interpreted as holding that a final civil contempt order from a postjudgment proceeding is nonappealable and may only be attacked through a habeas corpus proceeding. Specifically, we overrule *Liles*[79] and all the cases listed in footnote 53 to the extent that they hold or imply that contemnors can never appeal from a final order of civil contempt.

2. R.K.'s Failure to Appeal From the Court's Order Clarifying the Injunction Does Not Foreclose Our Review of Those Findings

A provision of the injunction allowed R.K. to use "any commercially available hydraulic control valves or valve spools." On remand from *Smeal I*, R.K. moved for an order granting it permission to grind a commercially available valve spool. In January 2008, after an evidentiary hearing, the district court overruled that motion. It found that the valve spool R.K. proposed to use would no longer be a commercially available valve spool after R.K. modified it.

In its cross-appeal, SFAC argues that a party must seek the court's clarification if the party is in doubt of an ambiguous provision in an injunctive decree. SFAC focuses on our statements in *Kasparek*[80] and a 1981 case, *Sprunk v. Ditter*.[81] There, we said that if a party is uncertain what a court intended by its order, the party's remedy is to seek further advice and instructions from the trial court. And if a party acts

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[78] See *Hendrix v. Consolidated Van Lines, Inc.*, 176 Kan. 101, 269 P.2d 435 (1954).

[79] *Liles, supra* note 52.

[80] See *Kasparek, supra* note 9.

[81] See *Sprunk v. Ditter*, 209 Neb. 156, 306 N.W.2d 850 (1981).

on his own interpretation, he does so at his peril.[82] So, SFAC contends that the court's clarification order was a final order affecting a substantial right. Because R.K. failed to appeal the order, SFAC claims those findings became the law of the case and are not subject to review by this court in this appeal. We disagree.

[20-22] The law-of-the-case doctrine reflects the principle that an issue that has been litigated and decided in one stage of a case should not be relitigated at a later stage.[83] On appeal, however, the law-of-the-case doctrine is a rule of discretion, not jurisdiction.[84] And the doctrine requires a final order. A party is not bound by a court's findings in an order that it was not required to appeal.[85]

Our statement in *Kasparek* that a party should seek a clarification of an unclear injunctive decree mirrors a statement made by the U.S. Supreme Court. In *McComb v. Jacksonville Paper Co.*,[86] the Court framed the issue as follows: "Respondents could have petitioned the District Court for a modification, clarification or construction of the order. . . . But respondents did not take that course either. They undertook to make their own determination of what the decree meant. They knew they acted at their peril." In holding that courts have jurisdiction to interpret their own injunctions, the Court has reasoned that courts of equity have continuing jurisdiction to interpret their orders.[87]

[23] This court has similarly stated that district courts have equity power under the Nebraska Constitution to grant

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[82] See *id.*, quoting *Kasparek, supra* note 9.

[83] *County of Sarpy v. City of Gretna*, 276 Neb. 520, 755 N.W.2d 376 (2008).

[84] See *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

[85] See *United States v. U. S. Smelting Co.*, 339 U.S. 186, 70 S. Ct. 537, 94 L. Ed. 750 (1950).

[86] *McComb, supra* note 38, 336 U.S. at 192. See, also, *Regal Knitwear Co. v. Board*, 324 U.S. 9, 65 S. Ct. 478, 89 L. Ed. 661 (1945).

[87] See *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009), citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 54 S. Ct. 695, 78 L. Ed. 1230 (1934).

permanent injunctions. And that power cannot be abridged by statute.[88] A district court's constitutional equity power enables a court to have continuing jurisdiction in any succeeding term over a permanent injunction.[89]

It is true that we have previously held that a party to a final marital dissolution decree cannot ask a court to interpret the decree other than through a modification or a contempt proceeding.[90] But the decree at issue in the marital dissolution case failed to distribute some of the parties' marital property.[91] Here, however, we are not dealing with a material omission in the injunctive decree—the correction of which would require a modification. Instead, R.K. sought a clarification of the court's injunctive decree.

[24,25] In sum, we agree with federal courts that a court of equity has the power to interpret its own injunctive decree if a party later claims that a provision is unclear.[92] But permitting a party to seek clarification of an injunction is not the same as requiring a party to do so. Instead, the critical question for appeal purposes is whether the clarification order merely interprets the decree or whether it modifies the decree in a way that affects a party's substantial right. We find guidance in federal cases.

A federal statute permits parties to appeal from interlocutory orders modifying an injunction or denying a modification.[93] But federal courts do not permit parties to appeal from orders interpreting or clarifying an injunction.[94] They have distinguished modifications and clarifications by looking to the substantive effect of the order instead of the parties' or

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[88] *Lowe, supra* note 28.

[89] See *id.*

[90] See *Neujahr, supra* note 49, 223 Neb. 722, 393 N.W.2d 47 (1986).

[91] See *id.*

[92] See, *McComb, supra* note 38; *Regal Knitwear Co., supra* note 86.

[93] See 28 U.S.C. § 1292(a)(1) (2006).

[94] See, e.g., *Mikel v. Gourley*, 951 F.2d 166 (8th Cir. 1991); *Motorola, Inc. v. Computer Displays Intern.*, 739 F.2d 1149 (7th Cir. 1984); 16 Charles Alan Wright et al., Federal Practice and Procedure § 3924.2 (2d ed. 1996 & Supp. 2009).

court's characterization. Several federal appellate courts have adopted a version of the following test: If the order only restates the parties' legal relationship without changing the original relationship, relaxing any prohibitions, or imposing any new obligations, it is a mere interpretation that cannot be appealed.[95]

[26] Nebraska does not have a comparable interlocutory appeal statute. But we have stated that a court cannot, in interpreting an injunctive decree, expand the terms of a previous order or judgment beyond a reasonable interpretation in the light of its purpose.[96] So, we believe that whether an order implementing or interpreting an injunction alters the parties' relationship is also a valid test for determining whether the order affects a substantial right under § 25-1902. Therefore, we hold that a court's order clarifying a permanent injunction is a final order only if it changes the parties' legal relationship by expanding or relaxing the terms, dissolving the injunction, or granting additional injunctive relief.

R.K. asked the court to determine whether the injunction permitted its proposed grinding of a commercial valve spool. The court's order clarified that the injunction prohibited R.K.'s proposed modification. SFAC obviously does not claim that the order overruling R.K.'s request to modify a commercially available valve spool expanded the decree's terms in a way that granted additional injunctive relief to SFAC. We conclude that R.K.'s failure to appeal from the January 2008 order does not foreclose review of the court's later findings in the contempt proceeding.

3. District Court Erred in Finding R.K. Willfully Violated the Permanent Injunction

Having disposed of the jurisdictional issues and the law-of-the-case doctrine, we come to the merits of R.K.'s appeal. R.K.

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[95] See, e.g., *Pimentel & Sons Guitar Makers, Inc. v. Pimentel*, 477 F.3d 1151 (10th Cir. 2007); *Cunningham v. David Special Commitment Center*, 158 F.3d 1035 (9th Cir. 1998); *Mikel, supra* note 94; *Sierra Club v. Marsh*, 907 F.2d 210 (1st Cir. 1990); *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970 (11th Cir. 1986); *Motorola, Inc., supra* note 94.

[96] *See Smeal I,* supra note 1.

contends that the district court erred in finding that SFAC had proved beyond a reasonable doubt that R.K. willfully violated the injunction. R.K. argues that it modified the part of its valve spool that opens the pressure side of the control valve, not the part that opens the tank side; R.K. contends that injunction did not prohibit it from modifying the pressure side of its valve spools.

(a) Additional Facts

As we will explain later, we conclude that the key terms in the injunction were ambiguous as to whether they prohibited R.K.'s conduct complained of in the contempt proceedings. Understanding that ambiguity and what the injunction was intended to prohibit requires that we delve into an aerial ladder's hydraulic systems.

(i) Hydraulic Basics

As noted, SFAC's disputed trade secret involves a hydraulic valve spool. SFAC and R.K. use hydraulic systems to move their aerial ladders. Oversimplified, the hydraulic systems create power to move the ladders by moving hydraulic fluid through a control valve. The control valves have four openings called ports. A pump moves pressurized hydraulic fluid—in this case oil—from a reservoir tank through a line connected to the valve's pressure port. The valve directs the pressurized fluid to a work port, A or B. Both work ports have lines connected to a hydraulic cylinder that controls a particular ladder movement. In a hoist cylinder system, for example, if the fluid in the valve is directed to the A work port, it will pass through a line to the part of the cylinder that pushes the fluid against a piston in a way that raises the ladder and holds it up. At the same time, fluid is returning to the valve through the line connected to the B work port. That fluid is directed to the tank port of the valve, which has a return line to the reservoir tank. The returning fluid is redirected to the control valve, creating a circuitry.

The flow in the valve is controlled by a hydraulic valve spool, which is a movable, cylinder part in the valve. The valve spools are machined so that depending on how they are moved, they open the pressure and tank ports and direct the flow of

hydraulic fluid to the A or B work ports. As we understand the parties' testimony and briefs, they have referred to the part of a valve spool that opens the pressure side (or pump side) of the control valve as the corresponding "pump side" or "pressure side" of the valve spool. And they have referred to the part of the valve spool that opens the tank side of the valve as the "tank side" or "return side" of the valve spool. For convenience, we shall also refer to the pressure side and tank side of the valve spool to mean the part of the valve spool that opens the corresponding pressure or tank port of the valve.

A common problem with hydraulic systems is pressure surges, which occur because there is a burst of fluid through the system when the valve is opened. The surge creates oscillations in the system until the pressure settles back into a constant pressure. In aerial ladders, the oscillations transfer to the ladder, causing jerky movements and making control of the ladder difficult. While Kreikemeier worked for SFAC, SFAC developed a modification for its valve spools to dissipate these pressure surges.

With that background, we are asked to decide whether the court correctly found that R.K.'s 1996 modification of the pressure side of its commercially available valve spools violated the 1990 injunction.

(ii) Prohibited Conduct Under the Injunctions

Both the 1989 preliminary injunction and the 1990 permanent injunction prohibited R.K. from disclosing or using a "surge free control valve created by grinding or milling the valve spool so as to create an unbalanced control spool which converts the tank side of a hydraulic cylinder to a fluid damper which dissipates pressure surges."

[27,28] In determining whether a party is in contempt of an order, a court may not expand an earlier order's prohibitory or mandatory language beyond a reasonable interpretation considering the purposes for which the order was entered.[97] We recognize that contract principles generally apply to the

[97] See *Smeal I, supra* note 1.

enforcement of consent decrees. And these principles prohibit a court from considering extrinsic evidence of the decree's meaning absent some ambiguity.[98] But here, both parties disputed the meaning of key technical terms in the injunction: "unbalanced control spool" and "fluid damper." Because of their different definitions of these terms, they argued that the injunction prohibited different conduct. The Court of Appeals, in a 2004 unpublished opinion involving these parties, determined that both of these terms were ambiguous as a matter of law. It stated that the terms could be fairly interpreted in more than one way.[99] We agree, as we will discuss further in the analysis section. Because of this ambiguity, the district court on remand from *Smeal I*[100] judicially noticed the testimony of SFAC's hydraulic expert at the preliminary injunction hearing, the expert's 2002 deposition, and the transcript of the preliminary injunction hearing. We similarly conclude that reviewing the previous injunction proceedings is crucial to understanding the injunction's purpose.

(iii) 1989 Preliminary Injunction Hearing

In February 1989, the court heard the preliminary injunction. This was 8 months after Kreikemeier signed a contract to build aerial ladders for another manufacturer referred to in the record as "Maxim," one of SFAC's competitors.

Delwin Smeal testified that as SFAC incorporated other components into its hydraulic system, Smeal realized that SFAC needed to modify its valve spool to deal with jerkiness in the ladder's operation. In 1977, after considerable trial and error, he discovered how to mill a valve spool to get a smoother hydraulic operation for SFAC's aerial ladders. About 1983, the

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[98] See, e.g., *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 95 S. Ct. 926, 43 L. Ed. 2d 148 (1975); *U.S. v. Saccoccia*, 433 F.3d 19 (1st Cir. 2005); *U.S. v. Asarco Inc.*, 430 F.3d 972 (9th Cir. 2005); *McDowell v. Philadelphia Housing Authority (PHA)*, 423 F.3d 233 (3d Cir. 2005).

[99] See *Smeal Fire Apparatus Co. v. Kreikemeier*, No. A-03-116, 2004 WL 2434884 (Neb. App. Nov. 2, 2004) (not designated for permanent publication).

[100] *Smeal I, supra* note 1.

modification process was refined, using commercially available valve spools.

Kreikemeier started working at SFAC in 1977. Smeal stated that Kreikemeier began working on SFAC's aerial ladder hydraulics in 1982 and that he taught Kreikemeier how to mill SFAC's valve spools. In 1984, SFAC began selling its ladders to Pierce Manufacturing Company (Pierce), a company that produced finished firetrucks but did not manufacture aerial ladders. At some point, Maxim also asked SFAC to sell its aerial ladders to Maxim. Because Maxim was a competitor, SFAC declined. SFAC suspected that Maxim wanted only to "reverse engineer" SFAC's ladder, causing SFAC to lose its competitive advantage. After SFAC declined this offer, a representative from Maxim contacted Kreikemeier about him either working for Maxim or building ladders for Maxim. The Maxim representative had previously worked for Pierce and had become familiar with Kreikemeier during that time. At some point, Kreikemeier told Maxim that he was not interested in working for it; he stated that he wanted to start his own company. When he did not break off his negotiations with Maxim, SFAC terminated his employment in May 1988. In June 1988, Kreikemeier signed a contract to build aerial ladders for Maxim.

Kreikemeier knew SFAC's entire manufacturing process because he had been the assistant manager of the aerial ladder division before SFAC terminated his employment. Before leaving SFAC, Kreikemeier admitted to Smeal that he planned to use SFAC's hydraulic system.

Kreikemeier admitted that when he left SFAC, he took copies of SFAC's plans, structural designs, and everything written down on paper about SFAC's ladder, including SFAC's modification of its valve spools. He stated that he did not take the documents to duplicate SFAC's ladder but admitted that he referred to them in designing his ladder. He also admitted that he did not produce the SFAC documents in response to the court's document production order. And he burned SFAC's documents just before the preliminary injunction hearing. He specifically admitted to using SFAC's grinding method to modify the valve spools in the hydraulic valves for R.K.'s outrigger jacks, which stabilize the truck when the aerial ladder is

in use. But the evidence did not show that R.K. was grinding the valve spools in its hydraulic system for raising or lowering an aerial ladder.

Smeal testified that SFAC's trade secret was multifaceted. He was asked whether his modification of the valve spool represented all of the confidential information and trade secrets that SFAC possessed regarding its aerial ladders. He denied that characterization. Smeal stated that SFAC also added components to the lines between the valve and the cylinder and that neither the external components nor the valve spool modification would work unless they were coordinated. But he admitted that the external components were commercially available and that SFAC did not make any changes to the control valve other than to modify the valve spool. He stated that SFAC cut its valve spools to advance the flow from the pressure line to the work port and from the work port to the tank line. He also stated that SFAC dissipated "unwanted build-up pressure inbetween . . . valves and cylinders . . . [b]y cutting the spool." But Smeal did not identify any specific cuts or modifications that SFAC made to its valve spools.

The only witness to identify SFAC's valve spool modification was its hydraulic expert, Wayne Whaley, Ph.D. Whaley believed that SFAC's valve spool modification was unique and superior to other methods for dissipating pressure surges because it permitted the pressure in the valve to remain constant, relative to the flow of the fluid and the position of the valve spool. He stated that SFAC had achieved constant pressure by effectively creating a fluid damper on both lines leading to the cylinder.

According to Whaley, SFAC had created its constant pressure circuitry system out of standard hydraulic components. He explained that SFAC had done this by "creating an orifice opening in the region of the tank spool": i.e., by modifying "the portion of the valve spooling that returns fluids back to the tank." More important to our resolution, he stated that the only cuts SFAC made were on "that part of the spool where the flow returns to the tank" and that the pressure side of its valve spool was not changed.

Whaley explained that this unbalanced modification converted the tank side of the cylinder into a fluid damper "by creating this small orifice that begins to open before the pressure side, the pump side of the flow goes to the other side of the cylinder." Or, as he explained in a 2002 deposition, the tank side of the control valve is opened a little before the pressure side is opened to leak out some of the fluid. This modification greatly minimized the pressure surges that go through the system when a valve opens or closes.

Using the information that Smeal gave him, Whaley also created a diagram of SFAC's valve with the spool modification. Whaley had never seen a valve like SFAC's before, and he believed it was patentable. Whaley titled the diagram "An Ideal Linear Control Valve." In response to the court's questions, Whaley specifically stated that this diagram showed SFAC's spool alteration. He stated that all hydraulic valve spools were capable of being modified in this manner and that the modification could be easily done by any skilled craftsman who knew the secret: how to modify the tank side of the valve spool to create a fluid damper. (As noted, the focus of the trade secret in Whaley's testimony was an orifice on the tank side of the valve spool that leaked fluid back to the reservoir tank.)

The court received into evidence a document providing Whaley's opinion of SFAC's trade secret as illustrated by his diagram. In the document, he stated that SFAC

> has clearly invented a new surge-free control valve not available from any other source and not known in the fluid power control industry. [SFAC's] surge-free valve utilizes an unbalanced control spool which converts *the tank side* of a hydraulic cylinder to a fluid damper which dissipates pressure surges.

(Emphasis supplied.) He further stated that SFAC's "surge-free control valve in combination with any compensation circuit may also be a trade secret." But he stated that he would need to do more patent research before making that conclusion.

In March 1989, the court issued the preliminary injunction. The court incorporated Whaley's above description of SFAC's trade secret as the manufacturing process that R.K.

was prohibited from revealing or using. There were no further hearings.

In June 1990, the court issued a permanent injunction upon the parties' settlement agreement. It is true that Smeal had testified that SFAC cut its valve spool to advance flow from the pressure port to the work port and from the work port to the tank port. But the agreed-upon injunction did not prohibit R.K. from modifying its valve spools on the pressure side or from modifying its valve spools to increase flow from the pressure port to the work port. Instead, the permanent injunction's prohibition was identical to the preliminary injunction. It prohibited R.K. from using an unbalanced control spool to convert the tank side of a hydraulic cylinder to a fluid damper to dissipate pressure surges.

(iv) 2002 Contempt Proceedings

The evidence at the first contempt proceeding established that in 1996, R.K. began making the modification to its valve spools to correct oscillation problems in the lowering of its ladder. To correct the problem, R.K. removed metal in two places from the pressure side of its valve spools that controlled a ladder's up-and-down motion. Smeal testified that R.K.'s modification of its valve spools was the same as the modification that SFAC made to the pressure side of its valve spools to avoid these oscillations. He stated that SFAC was grinding its valve spools in this manner while Kreikemeier worked at SFAC and that Kreikemeier had sketched the way SFAC modified its valve spools while working there. But the modification that SFAC made to the pressure side of its valve spools addressed a different problem and had a different effect than the modification that it made to the tank side of the spool. Smeal stated that when the ladder was moving down, unless the pressure side was modified to increase the volume of oil flowing into the work port, opening the tank port would cause a pressure drop that created a "shock wave" and produced oscillations.

Smeal admitted that R.K.'s commercially available valve spool would slightly open the tank port of the valve before opening the pressure port without any modification. He admitted

that R.K. removed metal from only the pressure side of its valve spools and not the tank side. Smeal also admitted that Whaley had prepared the language that described Smeal's trade secret, which language was in both the preliminary and the permanent injunction. And he admitted that the injunction was a description of the trade secret Smeal was trying to protect in 1989.

But Smeal denied that valve spools which slightly opened the tank port before the pressure port were "unbalanced," as defined in the injunction. Instead, he defined "unbalanced" to mean that the valve spool would allow a higher volume of oil to flow in through the pressure port than the returning fluid that flowed out of the valve. And he stated that this unbalanced flow used the tank side of the hydraulic cylinder as a fluid damper.

Smeal also denied that exhibit 43, which was Whaley's diagram from the preliminary injunction hearing, represented any part of SFAC's trade secret that was protected by the injunction. He stated that Whaley was "mixed up" about SFAC's trade secret and that no diagram or picture at the preliminary injunction reflected SFAC's trade secret. The court sustained a relevancy objection to exhibit 43.

After the hearings, the court also sustained relevancy and hearsay objections to exhibit 54, which was the transcript of the 1989 preliminary injunction hearing. And it sustained a relevancy objection to exhibit 53, which was a 2002 deposition of Whaley. The court stated that Whaley's testimony was based on exhibit 43, his diagram, which was irrelevant. So it concluded that Whaley's testimony based on his diagram did not assist the court in understanding the evidence or determining the facts at issue. In sum, the court refused to look at any evidence from the preliminary injunction hearing or Whaley's 2002 deposition. As noted, however, the Court of Appeals later determined that key terms in the injunction were ambiguous.

In June 2002, the court found R.K. was willfully in contempt of the permanent injunction. In reaching this conclusion, the court concluded that the injunction was unambiguous, but the court defined two terms of the injunction. It defined

an "unbalanced spool" as a valve spool that allows hydraulic fluid to flow at an uneven rate or different rate of flow through either port. It defined a "fluid damper" as an "orifice or metering notch."

The court stated that Kreikemeier had admitted that since 1996, R.K. had been grinding its valve spools on the pressure side to allow the hydraulic fluid to flow through the pressure port before the fluid could exit the tank port. It concluded that whether the injunction protected Smeal's trade secret was irrelevant to whether R.K. had violated the injunction. It found that R.K.'s grinding of its valve spools violated the injunction because it resulted in the surge-free control valve that was prohibited by the injunction. It further found that R.K.'s violation was willful and intentional, with knowledge that its acts violated the injunction. This order was the subject of *Smeal I*, but we did not reach the substantive merits of the court's order.

(v) R.K.'s 2008 Motion for Permission to Modify a Commercially Available Valve Spool

We issued our decision in *Smeal I* in May 2006.[101] In June, R.K. moved to dismiss the contempt action or to reopen the case for additional evidence. It relied on the Court of Appeals' opinion that key terms in the injunction were ambiguous as a matter of law. In September, R.K. filed a new motion for permission to modify a commercially available valve spool in a manner that would allow the pressure port to open before the tank port when the ladder was moving down. R.K. contended that its grinding would duplicate a commercially available valve spool.

At the hearings on the motion for permission to modify a commercially available valve spool, the court took judicial notice of Whaley's testimony from the 1989 preliminary injunction hearing; his 2002 deposition, taken between hearings in the 2002 contempt proceeding; and the transcript of the preliminary injunction hearing. The court stated that it was taking notice of this evidence because the Court of Appeals had

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[101] See *Smeal I, supra* note 1.

concluded that the terms "unbalanced control spool" and "fluid damper" were ambiguous.

In Whaley's 2002 deposition, exhibit 53, he was asked about the diagram of an ideal control valve admitted at the preliminary injunction hearing. He reiterated his testimony from that hearing that SFAC created a fluid damper to dissipate power surges in its valve by grinding the tank side of its valve spool to make an orifice that gradually opened to the tank port. Whaley stated that the term "fluid damper" in his written explanation of SFAC's trade secret referred to the modification that opened the tank side of the valve first, thus permitting hydraulic oil to flow to the tank side first. And he stated that the term "unbalanced" referred to the timing difference between the tank side opening before the pressure side. He specifically stated that his description did not refer to a modification that caused the pressure port to open first.

After the hearing, the court found Smeal's evidence more credible and concluded that R.K. would not be using a commercially available spool if it permitted R.K.'s request to modify the spool.

(vi) Interpretation of This Court's Mandate

In April 2008, SFAC moved for a new contempt order with coercive sanctions consistent with this court's mandate and for attorney fees and costs. In *Smeal I*, we vacated "those aspects of the district court's order affording equitable relief to [SFAC and] the award of attorney fees and costs."[102] We did not vacate the court's finding of contempt.

In May 2008, the court heard arguments on SFAC's contempt motion and R.K.'s motion to dismiss the contempt action or to reopen it. In response to R.K.'s motion, the court received all of the evidence that it had received at the hearing on R.K.'s permission to modify a commercially available valve spool. But it stated that because it no longer considered the terms of the injunction to be ambiguous, "the way is clear to enter the contempt order in this case." It interpreted our mandate in *Smeal I* as requiring it to reimpose a purge plan and directed

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[102] *Smeal I, supra* note 1, 271 Neb. at 627, 715 N.W.2d at 144.

counsel for SFAC to prepare a new contempt order. The only remaining issue was attorney fees.

(vii) 2008 Contempt Order

In November 2008, the court issued a new contempt order. It stated that it had reviewed all of the evidence it had received at the motion for permission to modify a commercially available valve spool. It again stated that this court's mandate required it to impose a purge plan that did not grant equitable relief to Smeal. It explicitly adopted its findings from its order on the above motion. It stated that

> since the manner by which [R.K.] sought to grind the valve spool . . . used as an exemplar a valve spool ground in a manner that [was earlier] found to be in violation of the injunction, with the benefit of the prior rulings and the evidence and the testimony of January 2008, this court reaffirms [the first] finding of contempt.

To purge R.K.'s contempt, the court required R.K. to take steps to ensure its compliance. It required R.K. to hold a company meeting within 10 days. At the meeting, R.K. was required to present the court's order prohibiting the requested manufacturing process, as exemplified by exhibit 210, to the following people: current and future employees, officers, managers, stockholders, partners, and manufacturing agents. Exhibit 210 depicted R.K.'s modified valve spool.

(b) Standard of Review

[29-31] An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record.[103] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[104] A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous.[105]

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[103] *Schwartz v. Schwartz*, 275 Neb. 492, 747 N.W.2d 400 (2008).

[104] *Id.*

[105] *Douglas Cty. v. Kowal*, 270 Neb. 982, 708 N.W.2d 668 (2006).

(c) Analysis

R.K. contends that the court ignored Whaley's testimony at the preliminary injunction and in his 2002 deposition. It further argues that the court erred when it failed to find that exhibit 43, which was Whaley's diagram, correctly depicted SFAC's trade secret protected by the court's permanent injunction.

[32,33] When a party to an action fails to comply with a court order made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element.[106] "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order.[107] Under current Nebraska law, a party seeking to hold another in contempt of an order has the heavy burden of establishing that contempt beyond a reasonable doubt.[108]

The question at the contempt proceeding was not whether R.K. pirated SFAC's trade secrets. The question was whether R.K.'s alleged use of SFAC's trade secrets violated the parties' agreed-upon injunction order. Before proceeding to our analysis, we set forth some general principles that are helpful to the resolution of this appeal.

[34,35] "Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed."[109] "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. . . . [T]hose who must obey them will know what the court intends to require and what it means to forbid."[110] Understood in light of these principles, the "'four

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[106] *Schwartz, supra* note 103.

[107] *Id.*

[108] See *id.*

[109] *Schmidt v. Lessard*, 414 U.S. 473, 476, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974). Accord, *Longshoremen v. Marine Trade Assn.*, 389 U.S. 64, 88 S. Ct. 201, 19 L. Ed. 2d 236 (1967); *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11 (1st Cir. 1991). See, also, 11A Charles Alan Wright et al., Federal Practice and Procedure § 2955 (2d ed. 1995).

[110] *Longshoremen, supra* note 109, 389 U.S. at 76.

corners'" rule for interpreting consent decrees is intended to narrowly cabin the circumstances in which contempt may be found.[111] "It is because '[t]he consequences that attend the violation of a court order are potentially dire,' . . . 'that courts must "read court decrees to mean rather precisely what they say."'"[112] So a court cannot hold a person or party in contempt unless the order or consent decree gave clear warning that the conduct in question was required or proscribed.[113]

[36] But injunctions protecting trade secrets may justify less specificity than other orders or decrees to avoid disclosing the plaintiff's trade secret.[114] For this reason, injunctions protecting trade secrets that raise ambiguities involving technical or scientific knowledge may require courts to review the context in which the injunction was entered. This allows the court to determine what conduct the defendant reasonably should have known was prohibited. Even in that circumstance, however, ambiguities that persist even when considered in the light of the record or after applying other aids of interpretation must be construed in favor of the person or party charged with contempt.[115]

We interpret the court's contempt order on remand to mean that the court concluded that it was not required to consider anew whether R.K.'s grinding of its valve spools violated the injunction. The court did not make any specific findings of fact. And although it judicially noticed the preliminary injunction and Whaley's deposition, it did not define the ambiguous

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[111] *Saccoccia, supra* note 98, 433 F.3d at 28.

[112] *Id.* (citations omitted).

[113] See, e.g., *Romero v. Drummond Co., Inc.*, 480 F.3d 1234 (11th Cir. 2007); *Perez v. Danbury Hosp.*, 347 F.3d 419 (2d Cir. 2003); *Gates v. Shinn*, 98 F.3d 463 (9th Cir. 1996); *F.D.I.C. v. Conner*, 20 F.3d 1376 (5th Cir. 1994).

[114] See *3M v. Pribyl*, 259 F.3d 587 (7th Cir. 2001).

[115] See, e.g., *U.S. v. Conces*, 507 F.3d 1028 (6th Cir. 2007); *Saccoccia, supra* note 98; *U.S. v. Voss*, 82 F.3d 1521 (10th Cir. 1996); *In re Marcus*, 138 Cal. App. 4th 1009, 41 Cal. Rptr. 3d 861 (2006); *Chesapeake v. City of Baltimore*, 89 Md. App. 54, 597 A.2d 503 (1991); *Mtr Holtzman v Beatty*, 97 A.D.2d 79, 468 N.Y.S.2d 905 (1983); *Marian Shop, Inc. v. Baird*, 448 Pa. Super. 52, 670 A.2d 671 (1996).

terms of the injunction. Its earlier finding that R.K.'s proposed grinding would not result in a commercially available valve spool did not clarify matters.

The injunction was prohibitory, not mandatory. That is, the injunction specifically excluded from its prohibition R.K.'s use of any commercially available valve spool. That exclusion obviously did not mandate that R.K. use only commercially available valve spools. Instead, the injunction enjoined R.K. from using a "surge free control valve created by grinding or milling the valve spool *so as to create an unbalanced control spool which converts the tank side of a hydraulic cylinder to a fluid damper which dissipates pressure surges*." (Emphasis supplied.) It did not enjoin R.K. from modifying commercial valve spools in any manner.

But the court in its 2008 order did not find that R.K.'s proposed grinding of a valve spool would result in an unbalanced control spool which converted the tank side of a hydraulic cylinder to a fluid damper to dissipate pressure surges. Instead, the court seems to have deferred to the earlier 2002 contempt order. But the 2002 contempt order is similarly flawed because the court refused to review the record of the preliminary injunction hearing to clarify ambiguities in the injunction.

Despite SFAC's claim that the injunction prohibited R.K. from modifying the pressure side of the valve spool, the injunction's language referred to converting the "*tank side* of a hydraulic cylinder" to a fluid damper. (Emphasis supplied.) In the face of R.K.'s claim that the injunction was not intended to apply to the modification to the pressure side of the valve spool, the inconsistency between SFAC's interpretation and the injunction was sufficient to create an ambiguity. So, during the first contempt proceeding, the court erred in concluding that the record from the preliminary injunction hearing was irrelevant. Had the court consulted that record, the ambiguity would have been resolved in R.K.'s favor.

The permanent injunction represented the parties' settlement agreement. And the record shows that they clearly agreed to prohibit R.K. from using SFAC's trade secret as described by Whaley. Whaley's description of using a valve spool to convert the tank side of a hydraulic cylinder into a fluid damper was

unequivocally explained as making cuts on the tank side of the valve spool, with no modification to the pressure side of the valve spool. He specifically stated that SFAC's grinding permitted the tank side to open before the pressure side to dissipate pressure surges.

What SFAC has tried to do is to make R.K.'s grinding on the pressure side of its valve spool fit the language of the injunction. It doesn't fit. We recognize that the record shows that Smeal considered SFAC's trade secret to be more than Whaley's description, and he later denied that Whaley's diagram of SFAC's trade secret had depicted any part of SFAC's trade secret. But the issue in a contempt proceeding is what conduct is clearly prohibited by the injunction. Nothing in the injunction clearly prohibited R.K. from modifying the pressure side of the valve spool. And SFAC was obviously aware of the conduct to which Whaley's language from the preliminary injunction referred.

SFAC's change of position at the contempt proceeding about the meaning of Whaley's language is precisely what a court may not permit. Even if SFAC's interpretation were plausible, the court was not free to consider its arguments in a vacuum. Unless a court construes an injunction's terms closely to its intended purpose, complainants could create endless arguments for a party's violation of an injunction. Contempt sanctions cannot be premised upon a moving target. We conclude that the district court erred in finding that SFAC had proved beyond a reasonable doubt that R.K.'s grinding on the pressure side of its hydraulic valve spools was prohibited by the injunction.

4. Attorney Fees

[37] In its cross-appeal, SFAC argues that the court erred in failing to award it the full amount of its requested attorney fees and expenses. Costs, including reasonable attorney fees, can be awarded in a contempt proceeding.[116] But an award of attorney fees requires a finding of contempt.[117] We have

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[116] *Smeal I, supra* note 1.

[117] See *Kasparek, supra* note 9.

held that the court erred in finding R.K. willfully violated the injunction. It follows that its award of attorney fees and costs must be vacated.

5. Prospective Standard of Proof for Showing Civil Contempt Is Clear and Convincing Evidence

Having overhauled our contempt jurisprudence, we believe that we should take a closer look at our present "beyond a reasonable doubt" standard of proof in civil contempt cases. This standard of proof dates back to our cases holding that all contempt proceedings are criminal in nature and governed by rules applicable to criminal prosecutions.[118] Unfortunately, some of these opinions ignored an earlier decision in which we had tried to reconcile the inconsistency in our case law and the case law of other states.

In *Maryott v. State*,[119] we stated that indirect contempts—disobedience committed outside of the court's presence—can be either criminal or civil. We recognized that contempt proceedings have both punitive and coercive aspects, but we stated: "Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that such act is, ordinarily, a mere civil contempt, and the rules applicable to a criminal contempt are not applicable."[120] Accordingly, we rejected the contemnor's argument that the State must file an information to commence a contempt proceeding and held that the party injured by the contempt can commence a civil contempt proceeding by affidavit.

Later, we clarified that sanctions of fines or incarceration are criminal only if they (1) are intended to vindicate the court's authority and punish a contemnor for a completed act of disobedience and (2) cannot be mitigated by complying with the court's order.[121]

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[118] See, e.g., *Whipple v. Nelson*, 138 Neb. 514, 293 N.W. 382 (1940).

[119] *Maryott, supra* note 15.

[120] *Id.* at 277, 246 N.W. at 344.

[121] See *McFarland, supra* note 15. Compare *State ex rel. Collins, supra* note 53.

In 1975, following U.S. Supreme Court precedent, we held that a jury trial is not required before a court can commit a contemnor for civil contempt or punish petty criminal contempts summarily, when the punishment is not excessive.[122] The Nebraska Court of Appeals has explained that a jury trial with criminal protections is required only when a court commits a defendant for direct contempts if the cumulative incarceration period exceeds 6 months.[123] In 1980, we held that double jeopardy has no application to civil contempt proceedings to enforce child support obligations.[124] And in *Grady v. Grady*,[125] a 1981 case, we stated that "an action to enforce a court order is normally a mere civil contempt and requires the appropriate standard of proof applicable thereto instead of the stricter 'proof beyond a reasonable doubt' standard applied to criminal contempts."

But we did not overrule cases applying the stricter standard of proof in *Grady*, and our rule requiring proof beyond a reasonable doubt in civil contempt proceedings persisted. In 1984, without discussing *Grady*, we again held in a civil contempt case that guilt must be established beyond a reasonable doubt.[126] In 1987, we cited California cases to support the "beyond a reasonable doubt" standard of proof in civil contempt proceedings: "The requirement of proof beyond a reasonable doubt is justified in contempt cases because of the penalties that may be imposed."[127] And in 1994, also without discussing *Grady*, we reversed in part a Court of Appeals' opinion relying on *Grady*

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[122] See *Village of Springfield v. Hevelone*, 195 Neb. 37, 236 N.W.2d 811 (1975), citing *Bloom v. Illinois*, 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968).

[123] See *State v. Harker*, 8 Neb. App. 663, 600 N.W.2d 488 (1999).

[124] See *Eliker, supra* note 15.

[125] See *Grady, supra* note 46, 209 Neb. at 316, 307 N.W.2d at 782.

[126] *In re Contempt of Liles*, 217 Neb. 414, 349 N.W.2d 377 (1984).

[127] *State ex rel. Kandt, supra* note 7, 225 Neb. at 661, 407 N.W.2d at 750-51, citing *Ross v. Superior Court*, 19 Cal. 3d 899, 569 P.2d 727, 141 Cal. Rptr. 133 (1977), and *Farace v. Superior Court for County of Orange*, 148 Cal. App. 3d 915, 196 Cal. Rptr. 297 (1983).

as authority for applying a preponderance standard of proof in civil contempt cases.[128]

Over the years, both this court and the Nebraska Court of Appeals have stated that "beyond a reasonable doubt" is the standard of proof in numerous civil contempt cases.[129] But our reinstatement of the stricter standard of proof has put this court in a small minority. Our research has uncovered only three state courts that require proof beyond a reasonable doubt in civil contempt cases: this court, California courts,[130] and Alabama courts.[131] As noted, the U.S. Supreme Court has held that civil contempt sanctions require neither a jury trial nor proof beyond a reasonable doubt.[132] Although the Supreme Court has not adopted a specific standard of proof for civil contempt proceedings, federal courts of appeals have unanimously required "clear and convincing" proof of civil contempt.[133]

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[128] See *Novak, supra* note 46 (overruling *Novak v. Novak*, 2 Neb. App. 21, 508 N.W.2d 283 (1993)).

[129] See, *Schwartz, supra* note 103; *Kowal, supra* note 105; *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997); *Novak, supra* note 46; *Dunning, supra* note 6; *State ex rel. Kandt, supra* note 7; *In re Contempt of Liles, supra* note 126; *Bahm v. Raikes*, 200 Neb. 195, 263 N.W.2d 437 (1978); *Paasch v. Brown*, 199 Neb. 683, 260 N.W.2d 612 (1977); *Kasparek, supra* note 9; *Frye v. Frye*, 158 Neb. 694, 64 N.W.2d 468 (1954); *Whipple, supra* note 118; *Lawson v. Lawson*, 16 Neb. App. 854, 753 N.W.2d 863 (2008); *Locke v. Volkmer*, 8 Neb. App. 797, 601 N.W.2d 807 (1999).

[130] See, *Ross, supra* note 127; *McCann v. Municipal Court*, 221 Cal. App. 3d 527, 270 Cal. Rptr. 640 (1990).

[131] See *Savage v. Ingram*, 675 So. 2d 892 (Ala. Civ. App. 1996).

[132] See *Bagwell, supra* note 24. See, also, *Hicks, supra* note 21; *U.S. v. Harris*, 582 F.3d 512 (3d Cir. 2009); *Lasar v. Ford Motor Co.*, 399 F.3d 1101 (9th Cir. 2005); *F.T.C. v. Kuykendall*, 371 F.3d 745 (10th Cir. 2004).

[133] See, *In re Grand Jury Subpoena (T-112)*, 597 F.3d 189 (4th Cir. 2010); *Marshak v. Treadwell*, 595 F.3d 478 (3d Cir. 2009); *F.T.C. v. Trudeau*, 579 F.3d 754 (7th Cir. 2009); *Whitcraft v. Brown*, 570 F.3d 268 (5th Cir. 2009); *Labor/Community Strategy Ctr. v. Los Angeles County*, 564 F.3d 1115 (9th Cir. 2009); *In re Grand Jury Investigation*, 545 F.3d 21 (1st Cir. 2008); *U.S. v. Ford*, 514 F.3d 1047 (10th Cir. 2008); *Conces, supra* note 115; *Georgia Power Co. v. N.L.R.B.*, 484 F.3d 1288 (11th Cir. 2007); *Paramedics Electro. v. GE Medical Systems*, 369 F.3d 645 (2d Cir. 2004); *Jake's, Ltd., Inc. v. City of Coates*, 356 F.3d 896 (8th Cir. 2004); *Food Lion v. United Food & Commercial Workers Union*, 103 F.3d 1007 (D.C. Cir. 1997).

Many state courts also require clear and convincing proof of civil contempt.[134]

We recognize that many state courts permit parties to prove civil contempt by a preponderance of the evidence.[135] And in some circumstances, Neb. Rev. Stat. § 42-358(3) (Reissue 2008) permits a rebuttable presumption of contempt if a prima facie showing is made that an obligor is delinquent in his or her child or spousal support obligations.[136] But apart from a statutory mandate requiring a different standard, we do not believe presumptions or a preponderance standard is consistent with what we have stated about civil burdens of proof.

[38,39] The standard of proof functions to instruct fact finders about the degree of confidence our society believes they should have in the correctness of their factual conclusions for a particular type of adjudication.[137] In a criminal case, due process requires the prosecution to prove, beyond a reasonable doubt, every factual element necessary to constitute the crime charged.[138] But in civil cases, when a party's interests are

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[134] See, *Loewinger v. Stokes*, 977 A.2d 901 (D.C. 2009); *Matsuura v. E.I. du Pont de Nemours and Co.*, 102 Haw. 149, 73 P.3d 687 (2003); *Efstathiou v. Efstathiou*, 982 A.2d 339 (Me. 2009); *In re Birchall*, 454 Mass. 837, 913 N.E.2d 799 (2009); *Town of Riverhead v. T.S. Haulers, Inc.*, 68 A.D.3d 1103, 890 N.Y.S.2d 332 (2009); *Martin v. Martin*, 179 Ohio App. 3d 805, 903 N.E.2d 1243 (2008); *Henry v. Schmidt*, 91 P.3d 651 (Okla. 2004); *Now Courier v. Better Carrier Corp.*, 965 A.2d 429 (R.I. 2009); *Durlach v. Durlach*, 359 S.C. 64, 596 S.E.2d 908 (2004); *Barton v. Barton*, 29 P.3d 13 (Utah App. 2001); *Vt. Women's Health Ctr. v. Operation Rescue*, 159 Vt. 141, 617 A.2d 411 (1992).

[135] See, e.g., *West v. Municipality of Anchorage*, 174 P.3d 224 (Alaska 2007); *Braisted v. State*, 614 So. 2d 639 (Fla. App. 1993); *Talton v. USAA Cas. Ins. Co.*, 981 So. 2d 696 (La. App. 2008); *Fisher v. McCrary*, 186 Md. App. 86, 972 A.2d 954 (2009); *Bounds v. Bounds*, 935 So. 2d 407 (Miss. App. 2006); *State ex rel. Udall v. Wimberly*, 118 N.M. 627, 884 P.2d 518 (N.M. App. 1994); *Harcar v. Harcar*, 982 A.2d 1230 (Pa. Super. 2009); *Moody v. Hutchison*, 159 S.W.3d 15 (Tenn. App. 2004).

[136] See *Hicks, supra* note 21.

[137] See *Nebraska Legislature on behalf of State v. Hergert*, 271 Neb. 976, 720 N.W.2d 372 (2006), quoting *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

[138] *Id.*

substantial and involve more than the mere loss of money, but obviously do not involve a criminal conviction, due process is satisfied by an intermediate "clear and convincing" standard of proof.[139]

[40,41] Although a conditional commitment to jail is clearly not a criminal sanction, it involves more than the mere loss of money. Because a conditional commitment is a possible sanction in a civil contempt proceeding, we conclude that the "clear and convincing" standard of proof is the most appropriate standard. Proof beyond a reasonable doubt, however, is a criminal trial protection that does not apply to civil contempt proceedings.[140] Accordingly, we overrule all the cases listed in footnote 129 to the extent that these cases hold or imply that proof beyond a reasonable doubt is required for civil contempt proceedings. Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence.

A clear and convincing standard of proof would not have changed the outcome of this case, but applying the law retroactively could affect parties in pending cases who have justifiably relied upon our longstanding previous case law requiring proof "beyond a reasonable doubt" in civil contempt proceedings. Thus, "[f]airness and equity dictate that the above-announced rule of law be effective as of the date of this opinion."[141]

V. CONCLUSION

We conclude that a court has the inherent power to remedy a contemnor's willful violation of its order or judgment by awarding compensatory relief to a party injured by the contempt. In a proper case, a court may award equitable relief to remedy the violation. We further conclude that a party may appeal from a final order of contempt, regardless whether the court's sanction

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[139] See *id.*, citing *Addington, supra* note 137.

[140] See, *Bagwell, supra* note 24; *Grady, supra* note 46.

[141] See *Commercial Fed. Sav. & Loan v. ABA Corp.*, 230 Neb. 317, 322, 431 N.W.2d 613, 617 (1988). See, also, *Gt. Northern Ry. v. Sunburst Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932).

is labeled civil or criminal. Because R.K. has appealed from a final order of contempt, we have jurisdiction.

We conclude that a court has inherent power to interpret its own injunctive decree if a party later seeks clarification or claims that a provision is unclear. Whether a party may appeal from such an order depends upon whether it affects a substantial right: it is not a final order if it does not change the parties' legal relationship by expanding or relaxing the decree's terms, dissolving the injunction, or granting additional injunctive relief. Because SFAC did not claim the court's order interpreting the injunction granted additional relief to it, we will not apply the law-of-the-case doctrine to hold that R.K. was bound by findings in the court's interpretative order because it did not appeal until the court entered its final order of contempt.

We conclude that the court erred in finding that SFAC had proved beyond a reasonable doubt that R.K. willfully violated the injunction by grinding on the pressure side of its hydraulic valve spools. We therefore reverse the district court's order finding R.K. in contempt. We remand the cause with directions that the court vacate its order finding R.K. in contempt and awarding SFAC attorney fees and costs.

Finally, we conclude that as of the date of this opinion, unless a statutory procedure imposes a different burden of proof, it will be the complainant's burden to prove civil contempt by clear and convincing evidence.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF G.H., ALLEGED TO BE A DANGEROUS SEX OFFENDER. G.H., APPELLANT, V. MENTAL HEALTH BOARD OF THE FOURTH JUDICIAL DISTRICT, APPELLEE.

781 N.W.2d 438

Filed April 16, 2010. No. S-09-530.

1. **Mental Health: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record.

2. **Mental Health: Judgments: Appeal and Error.** In reviewing a district court's judgment upon review of a mental health board determination, an appellate court will affirm the judgment unless it finds, as a matter of law, that the judgment is not supported by clear and convincing evidence.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Zoë R. Wade for appellant.

Jeffrey J. Lux, Deputy Douglas County Attorney, for appellee.

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

STEPHAN, J.

G.H. was convicted in 2002 of one count of sexual assault on a child and one count of attempted first degree sexual assault. He was sentenced to 3 to 5 years' imprisonment on the first count and to 10 to 15 years' imprisonment on the second count, the sentences to run concurrently. In May 2008, a petition was filed pursuant to Nebraska's Sex Offender Commitment Act (SOCA),[1] alleging that G.H. was a dangerous sex offender. After conducting an evidentiary hearing, the Mental Health Board of the Fourth Judicial District (the Board) found G.H. to be a dangerous sex offender and ordered his continued confinement for inpatient sex offender treatment. The district court affirmed, and G.H. appeals.

I. FACTS

G.H.'s 2002 crimes were perpetrated on his 9-year-old niece and his 42-year-old sister. On May 30, 2008, while G.H. was still incarcerated for these offenses, the Douglas County Attorney filed a petition alleging that G.H. was a dangerous sex offender within the meaning of SOCA. The matter came on for hearing before the Board on June 12.

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[1] Neb. Rev. Stat. §§ 71-1201 to 71-1226 (Reissue 2009).

Mark E. Lukin, Ph.D., was the only witness who testified at the hearing. Lukin is a licensed psychologist employed by the Nebraska Department of Correctional Services as a clinical psychologist. At the time of his testimony, Lukin was in charge of the inpatient mental health unit at the Lincoln Correctional Center. His duties included supervising and conducting evaluations of sex offenders.

Lukin evaluated G.H. in February 2008. The evaluation consisted of a mental status examination; a review of G.H.'s prior sex offender evaluations and his prior sex offender treatment; a review of G.H.'s corrections file and presentence investigation report; a clinical interview; and the administration and interpretation of several risk assessment instruments, including the "STATIC-99," the "Stable 2000," and the "SORAG." On the STATIC-99, G.H. scored a 6 on a scale of 0 to 12. Lukin testified that this score placed G.H. in the high-risk category for committing a future sexual offense. According to the STATIC-99 manual, a person with a score of 6 has a 39-percent chance of sexually reoffending within 5 years and a 52-percent chance of sexually reoffending within 15 years. On the Stable 2000 test, G.H. received a score of 10, which Lukin interpreted as indicating "broad problems in [his] ability to manage [his] future reoffense risk." On the SORAG, G.H. was determined to have a 58-percent chance to sexually reoffend within 7 years and a 66-percent chance to sexually reoffend within 10 years.

Based on all of the information obtained during his evaluation of G.H., Lukin arrived at a three-part diagnosis with a reasonable degree of psychological certainty: (1) alcohol dependence, in remission due to the controlled prison environment; (2) a cognitive disorder; and (3) an antisocial personality disorder with dependent features. Lukin testified that the alcohol dependence and cognitive disorder were "Axis I" mental disorders as defined by the American Psychiatric Association's "Diagnostic and Statistical Manual"[2] (which we will refer to as the "DSM-IV-TR") and that the antisocial personality

[2] See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. text rev. 2000).

disorder was considered an "Axis II" disorder as defined by the DSM-IV-TR. Lukin opined that the alcohol dependence was a "primary concern" as to whether G.H. was likely to reoffend sexually and that while the cognitive disorder did not contribute to the risk of reoffense, it was a treatment interference factor that limited G.H.'s ability to benefit from treatment. Lukin opined that the antisocial personality disorder was also a primary factor in assessing the risk of reoffense. Lukin testified that because of the disorders he diagnosed, G.H. would "present an ongoing risk" of danger to himself or others. Lukin also testified that because of the disorders, there was an increased risk that G.H. would engage in repeat acts of violence, and that G.H. was substantially unable to control his behavior regarding sexual offenses. Lukin testified that upon release from incarceration, G.H. would be at "high risk to sexually and/or violently reoffend compared to other individuals who have already committed sexual or violent crimes." Lukin testified that G.H. would benefit from treatment, and although Lukin had not prepared a specific treatment plan for G.H. at the time of his testimony, it was Lukin's opinion based upon the actuarial risk and other information he reviewed that "the highest available level of care" would be appropriate for G.H.

After considering all the evidence, the Board found by clear and convincing evidence that G.H. was a dangerous sex offender and that inpatient treatment was the least restrictive available therapy for him. The Board determined on the basis of Lukin's testimony that G.H. "demonstrates a constellation of mental illness," including alcohol addiction, antisocial personality disorder, and cognitive impairment that "would make him more likely to engage in repeat acts of sexual violence." The Board ordered G.H. placed in the custody of the Nebraska Department of Health and Human Services for inpatient sexual offender treatment.

G.H. filed a petition in error in the district court for Douglas County seeking review and reversal of the commitment order on several grounds. The district court overruled the petition in error and affirmed the commitment order. G.H. then perfected this timely appeal from the order of the district court.

II. ASSIGNMENTS OF ERROR

G.H. assigns, restated and renumbered, that the district court erred in finding clear and convincing evidence that he was a dangerous sex offender because (1) the evidence does not support a finding that G.H. suffers from an antisocial personality disorder or that an antisocial personality disorder makes G.H. dangerous; (2) the court erroneously considered Lukin's diagnosis of alcohol dependence as a mental illness which could subject G.H. to commitment; (3) the evidence does not support a finding that G.H. suffered from alcohol dependence at the time of the hearing or that alcohol dependence makes G.H. dangerous; (4) the evidence does not support a finding that G.H. suffers from a cognitive disorder or that a cognitive disorder makes G.H. dangerous; (5) the actuarial instruments employed during G.H.'s assessment do not provide a sufficient basis for Lukin's opinion; (6) Lukin's opinion of dangerousness, expressed entirely in terms of risk, is insufficient to support a finding that G.H. is a dangerous sex offender; and (7) there was insufficient evidence that the proposed treatment plan was the least restrictive alternative.

III. STANDARD OF REVIEW

[1,2] The district court reviews the determination of a mental health board de novo on the record.[3] In reviewing a district court's judgment upon review of a mental health board determination, an appellate court will affirm the judgment unless it finds, as a matter of law, that the judgment is not supported by clear and convincing evidence.[4]

IV. ANALYSIS

Nebraska has two statutory methods by which individuals who pose a risk to society due to a mental disorder may be subjected to involuntary custody and treatment. The Nebraska Mental Health Commitment Act (MHCA)[5] applies to any

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[3] *In re Interest of D.V.*, 277 Neb. 586, 763 N.W.2d 717 (2009); *In re Interest of J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009), *cert. denied* 558 U.S. 857, 130 S. Ct. 148, 175 L. Ed. 2d 96.

[4] See *In re Interest of J.R., supra* note 3.

[5] Neb. Rev. Stat. §§ 71-901 to 71-962 (Reissue 2009).

person who is mentally ill and dangerous.[6] SOCA applies specifically to convicted sex offenders who have completed their jail sentences but continue to pose a threat of harm to others.[7] In order to subject a person to involuntary confinement for purposes of treatment under SOCA, the State has the burden to prove by clear and convincing evidence that "(a) the subject is a dangerous sex offender and (b) neither voluntary hospitalization nor other treatment alternatives less restrictive of the subject's liberty than inpatient or outpatient treatment ordered by the mental health board are available or would suffice to prevent the harm."[8]

Section 71-1203(1) of SOCA incorporates Neb. Rev. Stat. § 83-174.01(1) (Reissue 2008), which defines the term "[d]angerous sex offender" as

> (a) a person who suffers from a mental illness which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of one or more sex offenses, and who is substantially unable to control his or her criminal behavior or (b) a person with a personality disorder which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of two or more sex offenses, and who is substantially unable to control his or her criminal behavior.

1. Dangerous Sex Offender

(a) Personality Disorder

Lukin testified with reasonable psychological certainty that G.H. had an antisocial personality disorder with dependent features. Lukin reached this diagnosis on the basis of G.H.'s "long-standing pattern of repeated and varied offenses." There is no evidence disputing this diagnosis. G.H. argues that it is entitled to no weight because Lukin testified that the personality disorder "might reduce [G.H.'s] likelihood of caring or being motivated to avoid reoffense and subsequent

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[6] § 71-902; *In re Interest of O.S.*, 277 Neb. 577, 763 N.W.2d 723 (2009), *cert. denied* 558 U.S. 857, 130 S. Ct. 148, 175 L. Ed. 2d 96.

[7] § 71-1202; *In re Interest of O.S., supra* note 6.

[8] § 71-1209(1). See *In re Interest of D.V., supra* note 3.

consequence for those crimes." But this isolated statement focuses on the personality disorder alone, not the combined effect of the personality disorder and other diagnoses, which we discuss below. We conclude that the evidence establishes the diagnosis of antisocial personality disorder and that it was properly considered by the district court.

(b) Alcohol Dependence

G.H. contends that alcohol dependence cannot be considered a "mental illness" for purposes of SOCA, based upon definitional differences between SOCA and MHCA. SOCA incorporates by reference[9] the definition of "mentally ill" found in MHCA:

> Mentally ill means having a psychiatric disorder that involves a severe or substantial impairment of a person's thought processes, sensory input, mood balance, memory, or ability to reason which substantially interferes with such person's ability to meet the ordinary demands of living or interferes with the safety or well-being of others.[10]

But SOCA does not incorporate MHCA's definition of "substance dependent," which means

> having a behavioral disorder that involves a maladaptive pattern of repeated use of controlled substances, illegal drugs, or alcohol, usually resulting in increased tolerance, withdrawal, and compulsive using behavior and including a cluster of cognitive, behavioral, and physiological symptoms involving the continued use of such substances despite significant adverse effects resulting from such use.[11]

Nor does SOCA include its own definition of "substance dependent." Under MHCA, a person may be adjudicated as a "[m]entally ill and dangerous person" and subjected to involuntary custody and treatment on the basis of either mental

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[9] §§ 71-1203(1) and 83-174.01(3).

[10] § 71-907.

[11] § 71-913.

illness or substance dependence.[12] G.H. argues that because SOCA does not incorporate the language of MHCA with respect to substance dependence, substance dependence cannot be considered a mental illness for purposes of determining that an individual is a dangerous sex offender.

Lukin testified that alcohol dependence is an Axis I mental disorder as defined by the DSM-IV-TR, and he considered the alcohol dependence and antisocial personality disorder as primary factors in assessing the risk that G.H. would reoffend sexually. Lukin testified: "I did not [diagnose G.H.] with a paraphiliac condition simply because it's the prominence of his substance dependence and antisocial personality. He would be characterized more as an opportunistic sex offender and someone with general antisocial personality independent rather than a primary paraphiliac or patterned sex offender."

We note that because G.H. had been convicted of two sex offenses, he could be adjudicated as a dangerous sex offender on the basis of the personality disorder alone under the alternative definition of § 83-174.01(1)(b). On these facts, we conclude that the diagnosis of alcohol dependence was properly considered in conjunction with the diagnosis of an antisocial personality disorder in the calculus of whether G.H. was a dangerous sex offender within the meaning of SOCA.

We are not persuaded by G.H.'s argument that the diagnosis of alcohol dependence should be disregarded because Lukin described it as "in remission." Lukin attributed this fact to the "controlled environment" created by G.H.'s incarceration, but testified that G.H. nevertheless displayed signs consistent with alcohol dependence.

(c) Cognitive Disorder

G.H. argues that Lukin's diagnosis of a cognitive disorder was an insufficient basis upon which to conclude that he was a dangerous sex offender. Lukin explained that this diagnosis "is really an acknowledgement that there are some impairments in [G.H.'s] cognition without being able to fully assess the etiology or the causal factors." Lukin regarded this as a

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[12] See § 71-908.

"relatively minor factor" in assessing the risk of reoffense, but he testified that it would "delimit or may constrain [G.H.'s] ability to gain the full amount of treatment that he might otherwise have if he did not have the condition." It is clear that Lukin did not base his opinion that G.H. was a dangerous sex offender solely or primarily on his cognitive disorder diagnosis, but merely considered the diagnosis with other factors. As such, the diagnosis was properly considered by the Board and the district court. The district court specifically noted the limitations on the significance of this diagnosis to which Lukin testified.

(d) Danger of Reoffense

To establish that G.H. was a dangerous sex offender under SOCA, the State was required to prove by clear and convincing evidence that he is likely to engage in repeat acts of sexual violence and that he is substantially unable to control his criminal behavior.[13] In this context, "[l]ikely to engage in repeat acts of sexual violence means the person's propensity to commit sex offenses resulting in serious harm to others is of such a degree as to pose a menace to the health and safety of the public."[14] Similarly, "[s]ubstantially unable to control . . . criminal behavior means having serious difficulty in controlling or resisting the desire or urge to commit sex offenses."[15]

G.H. argues that the results of the actuarial risk assessment instruments do not provide a sufficient basis for Lukin's opinion that G.H. would pose a danger if released without treatment. G.H. contends that the results measure actuarial chance but provide no insight on the specific question of whether he would reoffend if released without treatment. But as G.H. acknowledges in his brief, Lukin did not rely exclusively on the results of the STATIC-99, Stable 2000, and SORAG assessments in forming his opinions. Lukin also considered the history he obtained from G.H. and the clinical interview he

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[13] See §§ 71-1203(1), 71-1209(1), and 83-174.01(1). See, also, *In re Interest of O.S., supra* note 6.

[14] §§ 71-1203(1) and 83-174.01(2).

[15] §§ 71-1203(1) and 83-174.01(6).

conducted. Lukin testified that the risk assessment instruments were peer reviewed and generally accepted in the field of psychology as a means of assessing the risk that a convicted sex offender will reoffend.

We have noted in a different but related context that the nonexistence of an instrument which will perfectly predict future conduct does not preclude the use of rationally based instruments developed and validated by mental health professionals.[16] In a recent SOCA case,[17] we concluded that a psychologist's evaluation which included STATIC-99 and SORAG scores was sufficient and probative of the fact that a sex offender remained a danger to society. Although, in the instant case, the Stable 2000 and SORAG instruments were administered several months before the hearing, there is no indication in the record that this affected the validity of the results as a means of assessing the risk of recidivism at the time of the hearing. We are satisfied that there was adequate foundation for the actuarial risk assessment scores and conclude that they were properly considered by the Board and the district court as part of the basis for Lukin's opinions.

G.H. also argues that Lukin's opinion of dangerousness, expressed entirely in terms of risk, is insufficient to support a finding that G.H. is a dangerous sex offender. G.H. contends that Lukin's opinions establish nothing more than an increased risk or possibility that he will reoffend without treatment. According to G.H., this is insufficient under cases holding that in order to support civil commitment in civil mental health proceedings, a medical expert must establish that the subject poses a danger to others to a reasonable degree of medical certainty.[18]

This is the same standard that we require for expert medical opinion to establish causation under tort law. In that context, we have held that although expert medical testimony need not

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[16] *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004).

[17] *In re Interest of O.S., supra* note 6.

[18] See, *In re Interest of Tweedy*, 241 Neb. 348, 488 N.W.2d 528 (1992); *In re Interest of Rasmussen*, 236 Neb. 572, 462 N.W.2d 621 (1990); *In re Interest of Headrick*, 3 Neb. App. 807, 532 N.W.2d 643 (1995).

be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the defendant's negligence.[19] Medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least "probable," in other words, more likely than not.[20] Applying the same principle here, the question is whether Lukin established a probability that G.H. would commit repeat acts of sexual violence.

Lukin testified that in his professional opinion, G.H. fell within the statistical range of sexual and violent reoffense predicted by his SORAG scores, i.e., a 58-percent chance of sexual or violent reoffense, or both, within 7 years and a 76-percent chance of sexual or violent reoffense, or both, within 10 years. Asked if the conditions he diagnosed made G.H. "likely to engage in repeat acts of violence," Lukin testified, "Yes. It increases his risk." Lukin further testified that G.H. attributed his commission of sex offenses to alcohol, but that to Lukin's knowledge, G.H. had never undergone inpatient alcohol treatment. Based upon his clinical interview and review of records and actuarial risk assessments, Lukin opined that G.H. would be "at high risk to sexually and/or violently reoffend compared to other individuals who have already committed sexual or violent crimes." Lukin further testified that due to the diagnosed mental and personality disorders, G.H. was substantially unable to control his behavior with regard to sexual offenses. We conclude that this testimony, viewed in its entirety, was sufficient as a matter of law to support the findings of the Board and the district court that G.H. was a dangerous sex offender for purposes of SOCA.

2. Least Restrictive Treatment Alternative

In addition to establishing that G.H. was a dangerous sex offender, the State also had the burden of proving by clear

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[19] *Fackler v. Genetzky*, 263 Neb. 68, 638 N.W.2d 521 (2002); *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999).

[20] *Id.*

and convincing evidence that neither voluntary hospitalization nor other alternative treatment less restrictive than inpatient treatment would prevent him from harming himself or others.[21] Lukin testified that while he had not prepared a specific treatment plan for G.H., it was his opinion that due to G.H.'s relatively high risk of recidivism and the fact that G.H. had limited experience with independent living during the past 20 years due to his incarceration, G.H. would require the "highest available level of care," and that an inpatient treatment program would be the appropriate and least restrictive treatment alternative for him. In response to a question from a member of the Board regarding an appropriate treatment plan for G.H., Lukin testified:

> [M]y professional judgment would be that what would be best for [G.H.] would also be best for the community, and that is a residential or secure setting to continue the efforts that he started already, and to over a period of time step him down.
>
> And rather than releasing him directly to an environment where he's had very little success, living independently in the community, it would allow him a step toward greater approach so that his skills increase both in managing his sexual urges and his sobriety.

We conclude that Lukin's testimony was sufficient as a matter of law to meet the State's burden of justifying civil commitment of a dangerous sex offender under SOCA.

V. CONCLUSION

For the reasons discussed, we conclude as a matter of law that the judgment of the district court affirming the findings of the Board is supported by clear and convincing evidence, and we affirm.

AFFIRMED.

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[21] See, § 71-1209(1)(b); *In re Interest of O.S., supra* note 6.

CITY OF FREMONT, NEBRASKA, APPELLANT, V. WANDA KOTAS ET AL., APPELLEES.

781 N.W.2d 456

Filed April 23, 2010. No. S-09-448.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** Aside from factual findings, which are reviewed for clear error, the granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(1) is subject to de novo review.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court decides independently of the determination made by the lower court.
4. **Constitutional Law: Initiative and Referendum.** The right to an initiative vote to enact laws independent of the Legislature is the first power reserved by the people in the Nebraska Constitution.
5. ____: ____. Substantive challenges to proposed initiatives are not justiciable before the measure is adopted by voters.
6. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.
7. **Declaratory Judgments.** An action for declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain.
8. **Declaratory Judgments: Justiciable Issues.** The existence of a justiciable issue is a fundamental requirement to a court's exercise of its discretion to grant declaratory relief.
9. **Justiciable Issues.** A justiciable issue requires a present substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
10. **Constitutional Law: Initiative and Referendum.** A constitutional amendment which embraces several subjects, all of which are germane to the general subject of the amendment, will, under the single subject rule, be upheld as valid and may be submitted to the people as a single proposition.

Appeal from the District Court for Dodge County: JOHN E. SAMSON, Judge. Affirmed.

J.L. Spray and Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, and Dean Skokan, Fremont City Attorney, for appellant.

Kris W. Kobach, Immigration Reform Law Institute, University of Missouri-Kansas City School of Law, for appellees.

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

WRIGHT, J.

NATURE OF CASE

The defendants, Wanda Kotas, Jerry Hart, and John Wiegert, circulated a city initiative petition (Measure) which sought to enact an ordinance that would prohibit the harboring and hiring of illegal aliens in the City of Fremont. Fremont filed for declaratory relief on the grounds that the Measure was unconstitutional and violated the single subject rule.

The district court dismissed Fremont's first cause of action, granted the defendants' motion for summary judgment on the second cause of action, and concluded that the Measure should be put before the electors of Fremont during a special election. Fremont appeals.

SCOPE OF REVIEW

[1] Aside from factual findings, which are reviewed for clear error, the granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(1) is subject to de novo review. *Leach v. Dahm*, 277 Neb. 452, 763 N.W.2d 83 (2009).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence. *Johnson v. Anderson*, 278 Neb. 500, 771 N.W.2d 565 (2009).

FACTS

The defendants circulated a petition proposing a Measure that would make it unlawful for any person or business entity in Fremont to knowingly or recklessly lease or rent property to an illegal alien unless expressly permitted by federal law.

The Measure would require tenants and occupants to obtain an occupancy license from the Fremont Police Department prior to occupying any leased or rented dwelling unit. The Fremont Police Department would be required to contact the federal government to determine whether each potential occupant is lawfully present in the country. Additionally, all businesses in Fremont would be required to register with the "E-Verify Program."

The defendants filed completed petitions in support of the Measure with the Fremont city clerk on February 23, 2009. On March 11, Fremont filed for declaratory judgment with the Dodge County District Court pursuant to Neb. Rev. Stat. § 18-2538 (Reissue 2007). Fremont's amended complaint, filed March 23, alleged Fremont lacked the requisite authority to enact the proposed Measure because it violated the Supremacy Clause of the U.S. Constitution and was preempted by federal law. Fremont also alleged that the Measure was improper because it contained more than one subject.

The defendants moved to dismiss the first cause of action pursuant to § 6-1112(b)(1) and (6), and moved for summary judgment with respect to the second cause of action.

Relying on our decision in *Stewart v. Advanced Gaming Tech.*, 272 Neb. 471, 723 N.W.2d 65 (2006), the district court held that substantive constitutional challenges are not justiciable before an initiative is approved by the voters. It dismissed Fremont's first cause of action. The court granted the defendants' motion for summary judgment on the second cause of action, concluding that even though the Measure addressed both housing and employment, it had only one general subject—the regulation of illegal aliens in Fremont—and therefore did not violate the single subject rule. Fremont appeals, and we affirm.

ASSIGNMENTS OF ERROR

Fremont alleges, combined and restated, that the district court erred in finding that it lacked subject matter jurisdiction and in failing to find that the Measure contained multiple subjects, in violation of the single subject rule.

ANALYSIS

Preelection Declaratory Judgment

[3] Fremont first challenges the district court's finding that it lacked subject matter jurisdiction because the Measure is not justiciable until after voters approve it. Essentially, the issue is whether § 18-2538 authorizes preelection judicial review of substantive challenges to municipal initiatives. Statutory interpretation presents a question of law, which an appellate court decides independently of the determination made by the lower court. *In re Interest of Elias L.*, 277 Neb. 1023, 767 N.W.2d 98 (2009).

[4] The right to an initiative vote to enact laws independent of the Legislature is the first power reserved by the people in the Nebraska Constitution. See Neb. Const. art. III, § 2. The Legislature provides for initiatives and referendums for municipal subdivisions in chapter 18, article 25, of the Nebraska Revised Statutes. See Neb. Rev. Stat. §§ 18-2501 through 18-2538 (Reissue 2007). An initiative or referendum may be used to enact a "[m]easure," defined as "an ordinance, charter provision, or resolution which is within the legislative authority of the governing body of a municipal subdivision to pass, and which is not excluded from the operation of referendum by the exceptions in section 18-2528." § 18-2506.

Circulators may seek to enact a measure via initiative by soliciting signatures for an initiative petition. See § 18-2503. If the circulators collect enough signatures, the municipal subdivision's governing body must consider passage of the measure. See §§ 18-2524 and 18-2525. If the governing body does not pass the measure, it is put before the voters. It must be put on the ballot at the next scheduled primary or general election if the petition receives signatures from at least 15 percent of the qualified electors. See § 18-2524. If the petition requests a special election and received signatures from at least 20 percent of the qualified electors, the measure must be put before the voters in a special election. See § 18-2525.

After an initiative petition is filed, "[t]he municipality or any chief petitioner may seek a declaratory judgment regarding any questions arising under Chapter 18, article 25, . . . including,

but not limited to, determining whether a measure is subject to referendum or limited referendum or whether the measure may be enacted by initiative." § 18-2538. If an action for declaratory judgment is brought under § 18-2538, such action is governed generally by the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 2008). See § 18-2538.

In the case at bar, the defendants collected 3,343 valid signatures, which was in excess of 20 percent of the qualified electors in Fremont. The circulated petition also called for the initiative to be referred to the voters at a special election. Accordingly, if the Measure is valid, a special election must be held. Fremont petitioned for declaratory judgment before it was notified of the verified number of signatures on the petition, and therefore, its action for declaratory judgment was timely filed. See § 18-2538.

Fremont claims that pursuant to chapter 18, the district court has statutory authority to enter a declaratory judgment on the constitutionality of the Measure before the voters of Fremont adopt it. Relying on *State ex rel. Andersen v. Leahy*, 189 Neb. 92, 199 N.W.2d 713 (1972), Fremont argues that the Measure is beyond Fremont's legislative authority to enact. See § 18-2506. In *Leahy*, circulators sought by initiative petition to repeal annexation of the city of Millard to the city of Omaha. We held that the ordinance proposed by such initiative must be legislation that the city council or the legislative body had the power to enact under powers granted and defined by the Legislature. Because the detachment of territory from a municipal corporation was a matter of statewide concern, the legislative body of Omaha did not have the power to enact the ordinance. Once Millard became legally annexed, the initiative process could not be invoked to detach it.

Fremont points out that courts have uniformly determined that harboring and housing provisions such as those contained in the Measure are preempted by federal law and therefore are unconstitutional. It therefore asserts that measures which are unconstitutional or void are beyond the power or authority of a municipality to enact and are therefore not subject to initiative or referendum. We point out that a measure is not

unconstitutional until a court makes such a determination. A challenge to the constitutionality of a measure is a substantive challenge. A measure is not enacted by initiative until it is adopted by the voters. In many instances, the initiative may not be passed or adopted, or matters affecting the constitutionality of the initiative may change before the initiative is adopted.

Although § 18-2538 allows for preelection judicial review regarding questions arising under chapter 18, article 25, the language "whether a measure may be enacted by initiative" does not permit a court to issue an advisory opinion regarding the substance of an initiative measure prior to its adoption. This language encompasses only procedural challenges.

[5,6] Substantive challenges to proposed initiatives are not justiciable before the measure is adopted by voters. In *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996), we recognized that to the extent the appellants sought a declaration that an initiative measure, if adopted, would enact amendments that would violate the federal or state Constitution, the appellants were seeking an advisory opinion. In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory. *Stewart v. Advanced Gaming Tech.*, 272 Neb. 471, 723 N.W.2d 65 (2006); *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006).

In *Stewart*, a registered voter sought an injunction preventing Nebraska's Secretary of State from placing on the ballot an initiative authorizing the use of video keno. Because it was a statewide initiative petition, the preelection challenge was governed by Neb. Rev. Stat. § 32-1412 (Reissue 2008). The district court dismissed the challenge to the initiative because it was not ripe for determination. We affirmed, concluding that preelection judicial review of substantive challenges to the initiative was violative of the Nebraska Constitution. We recognized that procedural challenges to the legal sufficiency of an initiative petition may be determined prior to an election.

Fremont attempts to distinguish *Stewart* on the basis that it involves a statewide initiative and the case at bar involves a municipal initiative. It cites *Sydow v. City of Grand Island*, 263

Neb. 389, 639 N.W.2d 913 (2002), in support of this claim. In *Sydow*, a resident circulated a municipal initiative petition proposing to enact a sales tax to create an endowment fund for the city of Grand Island. After Grand Island refused to place the measure on the ballot at the next election, the district court issued an alternative writ of mandamus. Grand Island appealed, arguing that mandamus was not an appropriate remedy because the city lacked the statutory authority to create the endowment. Fremont claims that *Sydow* establishes that the municipal initiative process is significantly different from the statewide initiative process and therefore permits preelection declaratory judgments. In *Sydow*, we considered only the issue of mandamus and did not consider whether declaratory judgment was proper before an election. Accordingly, *Sydow* is not instructive.

Fremont also argues that the Legislature authorized declaratory relief with regard to initiatives and referendums under chapter 18. Our interpretation of § 18-2538 requires a determination of the scope of such declaratory relief. We decide the issue as a matter of law independent from the determination of the trial court. See *R & D Properties v. Altech Constr. Co., ante* p. 74, 776 N.W.2d 493 (2009). Statutory interpretation is a question of law, which we resolve independently of the trial court. *Underhill v. Hobelman, ante* p. 30, 776 N.W.2d 786 (2009). Hence, whether the court has jurisdiction is based upon our interpretation of § 18-2538.

[7-9] Actions for declaratory judgment pursuant to § 18-2538 are subject to § 25-21,149, which specifies in part that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." However, an action for declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain. *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981). We have long held that the existence of a justiciable issue is a fundamental requirement to a court's exercise of its discretion to grant declaratory relief. *Ellis v. County of Scotts Bluff*, 210 Neb. 495, 315 N.W.2d 451 (1982). See, also, *Allstate Ins. Co., supra*. A justiciable issue requires a present

substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement. *Ellis, supra*. If the residents of Fremont have not yet voted on the Measure, it may not be adopted. Thus, Fremont presents us with a state of facts that are contingent and uncertain.

Fremont's request for declaratory judgment as to the constitutionality of the Measure before the citizens of Fremont have adopted the Measure is a request for an advisory opinion. Accordingly, it is outside the jurisdiction of the courts.

Single Subject Rule

Fremont's second cause of action alleges the Measure is unconstitutional because it contains more than one subject. Because this cause of action requests a procedural review of the city initiative, the district court correctly determined the issue is justiciable and can be decided prior to an election.

[10] In *Drummond v. City of Columbus*, 136 Neb. 87, 285 N.W. 109 (1939), and *Munch v. Tusa*, 140 Neb. 457, 300 N.W. 385 (1941), we explained that the single subject rule provides that where the limits of a proposed law having a natural and necessary connection with each other and together are part of one general subject, then the proposal is a single and not a dual proposition. A constitutional amendment which embraces several subjects, all of which are germane to the general subject of the amendment, will, under such requirement, be upheld as valid and may be submitted to the people as a single proposition. *Munch, supra*.

The single subject rule was incorporated into article III, § 2, of the Nebraska Constitution in 1998 to prevent "log-rolling." *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003) (Wright, J., concurring). Log rolling is the practice of combining dissimilar propositions into one proposed amendment so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately. *Id.* (citing *Tilson v. Mofford*, 153 Ariz. 468, 737 P.2d 1367 (1987)).

In the case at bar, the district court found that the Measure had but one general subject—the regulation of illegal aliens in

Fremont. It found that this fact was borne out by the title of the initiative, which stated that the purpose of the Measure was "[a]n ordinance of the City of Fremont, Nebraska, . . . to prohibit the harboring of illegal aliens or hiring of unauthorized aliens, providing definitions, making provision for occupancy licenses, [and] providing judicial process . . . ."

Additionally, the district court found that every provision within the Measure was part of its general subject. Although the ordinance had several components dealing with occupancy, licensing, electronic verification, government uses, resources, and penalty provisions, the Measure was not confusing or deceiving to the voters. The court concluded that since the issues raised in the Measure had a natural and necessary connection with each other and were part of the general subject of regulating illegal aliens in Fremont, the single subject rule was not violated. We agree.

CONCLUSION

The district court correctly determined that it did not have subject matter jurisdiction to determine the substantive constitutional challenge to the Measure unless and until it is approved by the voters. The court also correctly determined that the cause of action requesting a procedural review of the single subject rule of the Measure was justiciable and could be decided prior to the election and that the Measure had one general subject and did not violate the single subject rule. We therefore affirm the judgment of the district court in its entirety.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
TYRUS T. SHELLY, APPELLANT.
782 N.W.2d 12

Filed April 23, 2010. No. S-09-618.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.

2. **Courts: Appeal and Error.** After receiving a mandate, a trial court is without power to affect the rights and duties outside the scope of the remand from an appellate court.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed in part, and in part vacated and remanded with directions.

Brian S. Munnelly for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Tyrus T. Shelly appeals the June 3, 2009, order of the district court for Douglas County denying his second postconviction motion. We conclude that the district court was without authority to consider the second postconviction motion at issue until his first postconviction motion had been resolved. We therefore affirm in part, and in part vacate and remand with directions to dismiss Shelly's second postconviction motion filed January 23, 2009, without prejudice, and to hold an evidentiary hearing on Shelly's first postconviction motion filed August 14, 2003, in accordance with our prior mandate in case No. S-03-1045.

STATEMENT OF FACTS

In 1995, pursuant to a plea agreement, Shelly pled guilty to second degree murder, attempted second degree murder, and two counts of use of a firearm to commit a felony. Shelly was sentenced to imprisonment for 30 years to life on the murder count, 25 to 30 years on the attempted murder count, and 5 to 10 years on each of the firearm counts. The sentence in the attempted murder count was ordered to be served concurrent to the sentence in the murder count; the sentences in the firearm counts were ordered to be served concurrent to one another but consecutive to the other sentences. In this appeal, we do not

consider the statutory correctness of the concurrent sentencing on the firearms counts.

On August 14, 2003, Shelly filed a motion for postconviction relief in which he asserted that his trial counsel had failed to comply with his request to file a direct appeal. After determining that Shelly's allegations were conclusory in nature, that he failed to specify what aspect of his case warranted an appeal or what issues should have been appealed, and that he failed to show how he was prejudiced by counsel's alleged failure to file an appeal, the district court denied postconviction relief without an evidentiary hearing.

Shelly appealed the denial of his postconviction motion to this court. On appeal, the State filed a suggestion for remand in which it conceded that the district court erred by denying the postconviction motion on the basis that Shelly failed to show prejudice. The State cited *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000), in which we held that prejudice will be presumed when counsel fails to file or perfect an appeal after being so directed by a criminal defendant. The State also cited *State v. McCroy*, 259 Neb. 709, 613 N.W.2d 1 (2000), in which we applied the rule in *Trotter* to plea-based convictions. Shelly filed a motion in support of the State's suggestion for remand.

We treated the filings as a stipulation for summary reversal and concluded that summary reversal should be granted. In an order filed November 26, 2003, in case No. S-03-1045, we vacated the judgment of the district court denying postconviction relief and remanded the cause to the district court with directions to conduct an evidentiary hearing with respect to Shelly's allegation that his trial counsel had failed to perfect a direct appeal from his plea-based convictions and sentences after being requested to do so by Shelly. Our mandate with respect to this first postconviction action issued accordingly.

After our mandate, on January 23, 2009, Shelly filed a new motion for postconviction relief captioned "Verified Motion for Postconviction Relief." In this motion, which we deem as Shelly's second motion for postconviction relief, Shelly asserted six claims for relief: (1) that the trial court lacked subject matter jurisdiction, (2) that his pleas were invalid, (3) that

he was denied counsel during a lineup, (4) that he was denied effective assistance of trial counsel, (5) that he was denied effective assistance of appellate counsel when counsel failed to file a direct appeal, and (6) that he was denied effective assistance of postconviction counsel. Shelly also asserted that his postconviction counsel had withdrawn from representing him in 2005, and the court subsequently granted Shelly's request for appointment of counsel.

The district court took up the January 23, 2009, second postconviction motion and entered an order with respect thereto on June 3, which order is the subject of this appeal. In the order, the district court noted that Shelly had previously filed a motion for postconviction relief, that the district court had overruled such motion, and that this court had remanded the cause for an evidentiary hearing on the issue of counsel's alleged failure to file a direct appeal. The court determined that "[b]ecause of the mandate on one issue, [the district court had] no authority to consider the additional issues set forth in [Shelly's] most recent motion." The court then stated that even if it were to consider the motion filed January 23 as a second motion for postconviction relief, the motion was "procedurally barred" as a successive motion. The court therefore "overruled" the January 23 motion and ordered that "only the one issue required by mandate is to be addressed at the evidentiary hearing."

Shelly appeals the June 3, 2009, order.

ASSIGNMENTS OF ERROR

Shelly claims that the district court erred by failing to consider the additional issues he presented in the January 23, 2009, postconviction motion. Shelly claims that the court's determination that it did not have authority to consider the second postconviction motion under the scope of this court's prior mandate was error or, in the alternative, that the court's determination that the motion was procedurally barred as a successive motion was error.

STANDARD OF REVIEW

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

which requires the appellate court to reach a conclusion independent of the lower court's decision. *State v. York*, 278 Neb. 306, 770 N.W.2d 614 (2009).

ANALYSIS

We note first that although at oral argument in this appeal Shelly sought to recharacterize his January 23, 2009, filing as an amendment to his first postconviction motion, in his brief, he referred to the January 23 motion as a "Second Verified Motion for Postconviction Relief," brief for appellant at 12, and asserted that his first motion for postconviction relief "was never adjudicated," *id.* at 15. We note further that the January 23 filing was titled "Verified Motion for Postconviction Relief" and contained no language requesting to amend the first motion for postconviction relief. The January 23 motion is therefore properly characterized as a second motion for postconviction relief.

In Shelly's appeal to this court from the denial of his first postconviction motion, we remanded the cause with directions to hold an evidentiary hearing on the issue of whether he was denied effective assistance of counsel when counsel did not file a direct appeal. The record before us indicates that the evidentiary hearing was never held, and there is no indication in the record that Shelly made any sort of filing in the district court to resolve the proceedings with respect to the first postconviction motion. We conclude that because proceedings with respect to the first postconviction motion have not been resolved, it was premature for Shelly to file a second motion for postconviction relief, and the district court should have dismissed such motion rather than ruling on it.

In resolving the current appeal, we refer to *State v. Wiemer*, 3 Neb. App. 821, 533 N.W.2d 122 (1995). In *Wiemer*, the defendant had voluntarily withdrawn his first postconviction motion and the appellate court implicitly reasoned that because the first motion for postconviction relief was no longer pending, the district court's consideration of the defendant's second postconviction motion was proper. The present case stands in contrast to *Wiemer*.

At the time Shelly filed the second postconviction motion, the evidentiary hearing on the first motion was still pending

and it was premature for Shelly to file a second motion. Because the evidentiary hearing regarding the first postconviction motion has not yet been held, there has not been a ruling regarding whether counsel provided ineffective assistance by not filing a direct appeal. Thus, it is conceivable that following the evidentiary hearing in the first postconviction motion, the district court could grant relief in the form of a new direct appeal and that such appeal could encompass the claims Shelly set forth in the second postconviction motion.

[2] As the district court correctly noted in its June 3, 2009, order, consideration of the second postconviction motion was outside the scope of the mandate from this court which was limited to an evidentiary hearing on the one issue raised in the first postconviction motion. After receiving a mandate, a trial court is without power to affect the rights and duties outside the scope of the remand from an appellate court. *County of Sarpy v. City of Gretna*, 276 Neb. 520, 755 N.W.2d 376 (2008). Therefore, the district court was correct in noting that it could not consider the substance of Shelly's second postconviction motion as part of the remand regarding the first postconviction motion.

However, the district court's ruling that the second postconviction motion was procedurally barred was a ruling on the merits of the second postconviction motion and was outside the scope of the mandate. Because consideration of the second motion exceeded the mandate from this court and because it was premature for Shelly to file a second motion before the first motion had been resolved, the district court was without jurisdiction to consider the second postconviction motion and should have dismissed the second motion without prejudice rather than ruling on it. We therefore vacate this portion of the June 3, 2009, order. For completeness, we note that in its June 3 order, the district court contemplated an evidentiary hearing on the direct appeal issue raised in the first postconviction motion. Such evidentiary hearing has not yet been held and should be held on remand from this appeal.

CONCLUSION

We conclude that Shelly's second postconviction motion was premature, because proceedings with regard to his first

postconviction motion were still pending and consideration of the second postconviction motion was outside the scope of the mandate on remand from the appeal of the denial of his first postconviction motion. We vacate that portion of the district court's order overruling the second postconviction motion. We remand the cause to the district court with directions to dismiss the second postconviction motion without prejudice and to forthwith conduct an evidentiary hearing on the first postconviction motion in accordance with the mandate of this court in case No. S-03-1045.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE,
V. IRA LEON, APPELLANT.
781 N.W.2d 608

Filed April 23, 2010. No. S-09-636.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS, Judge. Affirmed.

Tracy L. Hightower-Henne, of Hightower Law, L.L.C., for appellant.

Ira Leon, pro se.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

Ira Leon was convicted of first degree murder, robbery, and use of a weapon to commit a felony in 1992. On May 4, 2009,

Leon sought DNA testing of biological material collected as evidence in his case. Leon's motion was denied, and he appeals. We affirm.

FACTS

Leon was charged with first degree murder, robbery, and use of a weapon to commit a felony in the February 19, 1992, death of Bettie Christensen. Leon had originally been charged with premeditated murder or, in the alternative, felony murder. But pursuant to a plea bargain, Leon agreed to plead no contest to premeditated first degree murder, robbery, and use of a weapon to commit a felony. In exchange, the State amended the information against Leon, striking that portion charging Leon with felony murder. The State also agreed not to seek the death penalty or the maximum terms of imprisonment for the robbery and use charges, and further agreed not to present any additional evidence at sentencing. Per the agreement, the State was permitted to ask the district court for a minimum period of incarceration of 17 years in addition to Leon's life sentence for the first degree murder conviction and also to request that Leon's sentences be served concurrently.

In support of the no contest plea, the State alleged that at around 10:10 p.m. on February 19, 1992, Leon and another man, Stacey Fletcher, entered a convenience store located in North Platte, Nebraska. Leon and Fletcher were in possession of two tire irons at the time they entered the store. Upon realizing that Leon and Fletcher were going to rob the store, Christensen, the store clerk, screamed and ran toward the back room. According to Fletcher, at that point, Leon began beating Christensen about the head. After Christensen was dead, Leon and Fletcher stole $400 to $500 in cash from the cash register and left the store. They were later apprehended at a North Platte residence. The tire irons were recovered. Both tire irons tested positive for the presence of human blood. One tire iron also had hair resembling the victim's on it. In addition, a customer who entered the store at the time of the murder and robbery positively identified Leon.

Leon was subsequently sentenced to consecutive terms of life imprisonment for first degree murder, 12 to 25 years'

imprisonment for robbery, and 5 to 10 years' imprisonment for use of a weapon to commit a felony. No direct appeal was filed, but Leon did file a motion for postconviction relief in January 1993. An evidentiary hearing on that motion was held, but the motion was overruled. That judgment was affirmed by the Court of Appeals in case No. A-93-914 on April 21, 1994.

On May 4, 2009, Leon filed a motion for DNA testing under the DNA Testing Act.[1] Leon requested that DNA testing "be completed on the biological materials that were collected as evidence in this case to correct the manifest injustice of the judgement [sic] against [him] based on false statements . . . and testimony of [Fletcher]." Leon alleged that testing of the evidence in this case would show that it was Fletcher, and not Leon, who committed the murder. In an affidavit filed later, Leon requested the testing of about 100 pieces of evidence to determine whether biological material was present. Leon maintained the testing would show that Fletcher had substantial contact with the victim and that Leon had no contact with the victim, thus "undermining Fletcher's statements to the State that [Leon] killed the victim."

On June 15, 2009, the district court denied Leon's motion, finding that DNA testing would not produce noncumulative, exculpatory evidence relevant to the claim that Leon was wrongly convicted or sentenced. The district court noted that Leon did not deny that he was present at the scene or involved in the robbery of the store. "Even assuming for the sake of argument that . . . Fletcher actually inflicted the fatal blows upon the victim, [Leon] would still be guilty of felony murder if he was guilty of robbery as an aider and a death resulted during the course of committing the robbery."

Leon appeals.

ASSIGNMENT OF ERROR

On appeal, Leon assigns that the district court erred in denying his motion for DNA testing.

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[1] Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Reissue 2008).

STANDARD OF REVIEW

[1] A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[2]

ANALYSIS

The DNA Testing Act provides in relevant part:

> (1) Notwithstanding any other provision of law, a person in custody pursuant to the judgment of a court may, at any time after conviction, file a motion, with or without supporting affidavits, in the court that entered the judgment requesting forensic DNA testing of any biological material that:
>
> (a) Is related to the investigation or prosecution that resulted in such judgment;
>
> (b) Is in the actual or constructive possession or control of the state or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition; and
>
> (c) Was not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results.
>
> . . . .
>
> (5) Upon consideration of affidavits or after a hearing, the court shall order DNA testing pursuant to a motion filed under subsection (1) of this section upon a determination that such testing was effectively not available at the time of trial, that the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and that such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.[3]

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[2] *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007).

[3] § 29-4120.

Exculpatory evidence is defined as "evidence which is favorable to the person in custody and material to the issue of the guilt of the person in custody."[4]

On appeal, Leon contends that DNA testing should be conducted on all of the evidence gathered in connection with the robbery of the store and subsequent murder of Christensen. Leon contends that testing would show that only Fletcher had Christensen's blood on his person and clothing and would also show that only Fletcher's DNA was on Christensen's person. Leon argues that this would show that only Fletcher had contact with Christensen and that thus, Fletcher was responsible for Christensen's murder.

Leon first contends that blood was found on Fletcher's clothing and not on Leon's clothing and that such fact proves Fletcher and not Leon killed Christensen. However, it was known at the time Leon entered his plea that there was blood all over Fletcher's clothing but not on Leon's clothing. In fact, Leon's counsel argued these facts at sentencing.

Because of this, the most DNA testing would reveal is whose blood was on Fletcher's clothing. Such a finding would not be exculpatory, as there were a number of ways this blood could have gotten on Fletcher's clothing, even without Fletcher's having killed Christensen. The record shows that there was blood at the scene at the time the police arrived. There was expert testimony that blood would have splattered during the killing. And Fletcher's statement was that he followed Leon to the back room and watched as Leon killed Christensen by striking her with the tire iron.

The lack of Christensen's DNA on Leon's clothing would also not be exculpatory. Just as it was known that there was blood on Fletcher's clothes, it was also known that there was no blood on Leon's clothes. There was evidence that Leon had been seen washing himself following the murder and prior to his arrest. In addition, there was evidence that Leon had changed his clothes after the murder and that blood was present on shoes found in the house where Leon was found after the murder.

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[4] § 29-4119.

This case is very similar to *State v. Lotter*.[5] In *Lotter*, the defendant wished to have DNA testing performed on the clothing, gloves, and shoes worn by his codefendant. We rejected Lotter's claims, holding:

> In the case at bar, the victims could be the source of the blood samples in question. DNA testing could establish that the blood came from one or more of the victims, but it could not determine how the blood was deposited upon the items being tested. Since the results of DNA testing could not establish how the blood was deposited on [the codefendant's] gloves, shoes, or clothing, the results could not establish that [the codefendant] shot the victims. Therefore, the results of such testing could not be exculpatory.[6]

Leon also contends that DNA testing would show that only Fletcher's DNA would be found on Christensen's person. But just as the presence of Christensen's blood on Fletcher's clothing would not be exculpatory, nor would the presence of Fletcher's DNA on Christensen be exculpatory. As is noted above, there is evidence that Leon washed and changed his clothes before being arrested.

We note that in his brief, Leon suggests long brown hairs resembling Fletcher's were found in Christensen's hand. While we found reference in the record to hairs being found in Christensen's hand, we found no description of those hairs or of Fletcher's hair. And in any event, the fact that Fletcher's hairs could have been found on Christensen does not preclude the possibility that Leon was involved in the murder and is therefore not exculpatory as to Leon.

Leon's argument that his motion for DNA testing should have been granted is without merit.

CONCLUSION

The decision of the district court denying Leon's motion for DNA testing is affirmed.

AFFIRMED.

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[5] *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

[6] *Id.* at 770, 669 N.W.2d at 447-48.

BETHANY MANNING, APPELLEE, V. DAKOTA COUNTY SCHOOL DISTRICT NO. 22-0011, ALSO KNOWN AS SOUTH SIOUX CITY COMMUNITY SCHOOLS, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

782 N.W.2d 1

Filed April 23, 2010. No. S-09-714.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **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.
3. **Civil Rights: Attorney Fees.** If 42 U.S.C. § 1983 (2006) would have been an appropriate basis for relief, then the plaintiff in such action is entitled to attorney fees under 42 U.S.C. § 1988 (2006).
4. ____: ____. A litigant cannot obtain attorney fees simply by an incantation of 42 U.S.C. § 1983 (2006).
5. **Municipal Corporations: Civil Rights: Liability.** Respondeat superior is an insufficient basis for establishing liability of a municipality under 42 U.S.C. § 1983 (2006), and municipal liability under § 1983 is limited to actions for which the municipality is actually responsible.
6. **Negligence: Liability: Municipal Corporations: Public Officers and Employees.** A municipality is liable under 42 U.S.C. § 1983 (2006) only when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.
7. **Due Process.** Procedural due process is flexible and calls for such protections as the particular situation demands.
8. ____. Where a state must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirement of the Due Process Clause.
9. **Due Process: Public Officers and Employees.** In the case of random, unauthorized deprivations by state employees, due process does not require a predeprivation hearing; rather, postdeprivation state tort remedies are sufficient.

Appeal from the District Court for Dakota County: WILLIAM BINKARD, Judge. Affirmed in part, and in part reversed.

Kelley Baker and Steve Williams, of Harding & Schultz, P.C., L.L.O., for appellant.

Scott J. Norby, of McGuire & Norby, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The Dakota County School District No. 22-0011 (the school district) appeals from a judgment against it in an action brought by Bethany Manning for backpay, reinstatement of employment, and attorney fees and costs. The school district had hired Manning to fill a vacancy for a full-time teaching position, but because of concerns about her qualifications, the school district designated her as a "long-term substitute." This designation deprived Manning of any contractual rights under the collective bargaining agreement and statutory rights granted to "probationary certificated employees" under the Nebraska tenure statutes.[1] Manning's employment was eventually terminated without notice and hearing as provided for under § 79-828 for probationary certificated employees.

BACKGROUND

The facts leading up to the current appeal are largely undisputed and can be found in the related opinion of *South Sioux City Ed. Assn. v. Dakota Cty. Sch. Dist.*[2] When a full-time teacher for the school district resigned after several years of service, the school district needed to fill the vacancy before the start of the 2007-08 school year. The position involved teaching students who are deaf or hard of hearing. Three people were involved in the hiring process: the student services director, the assistant superintendent, and the principal. Three people applied for the job, but only Manning had the required qualifications.

Despite Manning's qualifications, the student services director was not convinced that Manning was a good fit for the teaching position. Because of these doubts, the student services director and the assistant superintendent decided to offer

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[1] Neb. Rev. Stat. §§ 79-824 through 79-845 (Reissue 2008).

[2] *South Sioux City Ed. Assn. v. Dakota Cty. Sch. Dist.*, 278 Neb. 572, 772 N.W.2d 564 (2009).

Manning the position as a "long-term substitute." They believed that as a "long-term substitute," Manning did not fall under the terms of the teachers' collective bargaining agreement with the school district or under the statutory protections granted to certificated employees.[3] Thus, the school district could continue to look for better candidates for the job and replace Manning in the manner and at the time it saw fit.

The student services director offered Manning a reduced "substitute teacher" salary for the first 20 days and a standard salary based on her education level and years of experience thereafter. In an e-mail, the assistant superintendent of the school district told Manning she would not be entitled to sick leave or any of the other benefits provided to teachers who are covered by the collective bargaining agreement. And at the end of the first semester, the school district would reopen interviews for the position and Manning could "reapply" at that time. No formal contract was presented to Manning or approved by the school board.

Manning accepted the offer and began her employment at the beginning of the school year. At the end of the first semester, she reapplied for the position. By that time, however, one of the previously unsuccessful applicants had acquired the required certification to also be qualified for the job. On December 11, 2007, the student services director informed Manning that the school district had found someone else to fill the position and that the last day her services would be required was December 13.

The South Sioux City Education Association initiated a grievance against the school district, alleging that Manning was a "full-time certificated teacher" and demanding that she be issued a standard contract and be prospectively and retroactively granted all the economic and fringe benefits of the collective bargaining agreement.

The South Sioux City Education Association brought an action before the Commission of Industrial Relations (CIR), which found that the act of treating Manning as a substitute

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[3] See, e.g., §§ 79-824 through 79-845.

teacher rather than as a certificated employee was a prohibited practice under Neb. Rev. Stat. § 48-824(2)(a) and (f) (Reissue 2004). The CIR concluded that Manning was a "certificated employee" as defined by § 79-824 and was therefore covered by the collective bargaining agreement.

Section 79-824 states in relevant part that a certificated employee means and includes all teachers, "other than substitute teachers, who are employed one-half time or more."[4] A "[p]robationary certificated employee" is a teacher who has served under a contract with the school district for less than 3 successive school years.[5] The CIR reasoned that someone cannot "substitute" for an open position, i.e., where the previous teacher's absence is permanent. It also rejected the school district's contention that Manning was only "one-half time," because when it fired her, she happened to have served only 83.5 service days out of a total of 188 teacher service days in 2007-08. The CIR reasoned that it undermined teachers' statutory rights to allow the school district to unilaterally convert otherwise probationary certificated teachers into substitutes by not allowing them to work at least half the year. The CIR awarded Manning backpay and the value of her benefits through December 13, 2007, and it ordered the school district to cease and desist from implementing unilateral deviations from the collective bargaining agreement.

The school district appealed the CIR's order, and, in *South Sioux City Ed. Assn. v. Dakota Cty. Sch. Dist.*, we affirmed.[6] We agreed that Manning was a probationary certificated employee as defined by Neb. Rev. Stat. § 79-101(9) (Reissue 2008) and § 79-824. We agreed generally with the reasoning of the CIR. We also explained that Manning was not a "'[s]ubstitute employee'" as defined by Neb. Rev. Stat. § 79-902(38) (Reissue 2008), because she was not hired due to the "temporary absence of a regular employee."[7]

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[4] § 79-824(1).

[5] § 79-824(3).

[6] *South Sioux City Ed. Assn. v. Dakota Cty. Sch. Dist., supra* note 2.

[7] *Id.* at 583, 772 N.W.2d at 573.

During the pendency of the CIR action, Manning brought this action, in a "Complaint for Declaratory Relief," against the school district in the district court for Dakota County. Manning alleged that she was a probationary certificated employee under § 79-824(1) and (3) and that as a result, she was entitled to a teacher's contract under Neb. Rev. Stat. § 79-817 (Reissue 2008); salary and benefits as negotiated by the collective bargaining agreement; and notice and hearing before termination, as provided by § 79-828. Manning asked for reinstatement with a written contract until such time as the school district followed proper notice and hearing procedures to terminate her employment. Manning also asked for backpay and consequential damages.

Manning requested attorney fees and costs pursuant to 42 U.S.C. § 1988 (2006). Manning alleged that the school district violated her federal due process rights by canceling her employment without notice and hearing.

The district court issued an order in favor of Manning on all counts. The court granted Manning reinstatement until such time as the school district followed correct statutory procedures for her termination of employment, and it ordered that the school district provide her with a written teacher's contract. The court granted Manning $6,321.37 in backpay and benefits for the first semester, $27,507.38 in backpay from December 14, 2007, to May 23, 2008, and $53,396 for what she would have earned in the 2008-09 school year. After Manning submitted an application and affidavit demonstrating attorney fees and costs, the district court granted her $25,872.75 in attorney fees and $841.38 in costs pursuant to § 1988. The school district appeals.

ASSIGNMENTS OF ERROR

The school district asserts that the district court erred when it determined that (1) Manning was a probationary certificated employee, (2) Manning had a property interest in her employment position, (3) Manning's employment continued with the school district, (4) the school district violated § 79-817 and Manning was entitled to a written contract until lawfully terminated, (5) the school district violated Manning's due process

rights and was entitled to notice and hearing under § 79-828, (6) Manning was entitled to the economic terms and conditions of the collective bargaining agreement, (7) Manning was entitled to backpay, (8) Manning was entitled to costs and attorney fees under § 1988, and (9) attorney fees were fair and reasonable.

STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[8]

ANALYSIS

Certificated Employee

We have already concluded in *South Sioux City Ed. Assn. v. Dakota Cty. Sch. Dist.* that Manning was a probationary certificated employee.[9] None of the arguments presented by the school district in this appeal dissuade us from that conclusion. As a probationary certificated employee, Manning was entitled by statute to an employment contract, certain benefits under the collective bargaining agreement, and notice and hearing before termination.[10] The school district's assignments of error relating to the district court's reinstatement of Manning's employment, with a contract, and the award of backpay and benefits, are all premised on its continuing argument that Manning was not a probationary certificated employee. Having concluded otherwise, we find no merit to those assignments of error.

Attorney Fees and Costs

[2] We next consider the school district's assignments of error relating to the award of attorney fees and costs. As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when

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[8] *State v. Scheffert, ante* p. 479, 778 N.W.2d 733 (2010).

[9] *South Sioux City Ed. Assn. v. Dakota Cty. Sch. Dist., supra* note 2.

[10] See §§ 79-824 through 79-845.

a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.[11] The district court granted Manning attorney fees under § 1988, the Civil Rights Attorney's Fees Awards Act of 1976.

Section 1988 provides that in "any action or proceeding to enforce a provision of [§] 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Manning argues that she presented an action to enforce civil rights pursuant to 42 U.S.C. § 1983 (2006). Particularly, she argues that she presented an action for deprivation of her property interest in continued employment without procedural due process of law.

[3] In enacting § 1988, Congress was more concerned with the substance of plaintiffs' claims than with the form in which those claims are presented.[12] Furthermore, the fact that a party prevails on a ground other than § 1983 does not preclude an award of attorney fees under § 1988. "If § 1983 would have been an appropriate basis for relief, then [the plaintiff in such action] is entitled to attorney's fees under § 1988 . . . ."[13] Thus, when the claim upon which a plaintiff actually prevails is accompanied by a "substantial," though undecided, § 1983 claim arising from the same nucleus of facts, a fee award is appropriate.[14]

[4] It is unclear to what extent, if at all, the district court based its underlying award on § 1983, as opposed to statutory and contractual rights. Regardless, in order to determine whether the district court's grant of attorney fees was proper, we consider whether Manning presented a "substantial" § 1983 claim. A litigant cannot obtain attorney fees simply by an incantation of § 1983.[15]

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[11] *Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004).

[12] *Goss v. City of Little Rock, Ark.*, 151 F.3d 861 (8th Cir. 1998).

[13] *Id.* at 866; *Robinson v. City of Omaha*, 242 Neb. 408, 495 N.W.2d 281 (1993).

[14] *Maher v. Gagne*, 448 U.S 122, 100 S. Ct. 2570, 65 L. Ed. 2d 653 (1980).

[15] *Smith v. Cumberland School Committee*, 703 F.2d 4 (1st Cir. 1983).

At a minimum, a § 1983 claim cannot be considered "substantial" if it is foreclosed by governing law.[16] In *Francis v. City of Columbus*,[17] for example, we concluded that attorney fees under § 1988 were unavailable for the plaintiff's pending claims under state law because the § 1983 action could not succeed. The action involved the Tax Injunction Act, which prohibited § 1983 actions for relief from state tax when there is an adequate state remedy. We concluded that there were adequate state remedies. In a similar case before the U.S. Supreme Court, *National Private Truck Council, Inc. v. Oklahoma Tax Com'n*,[18] the Court explained that when no relief can be awarded pursuant to § 1983, no attorney fees can be awarded under § 1988.

For purposes of this opinion, we will assume without deciding that Manning had a property interest in her continued employment so as to implicate the Due Process Clause. But even so, we conclude that Manning did not have an actionable § 1983 claim. Section 1983 provides, as relevant:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Two related doctrines preclude Manning's claim under § 1983. First, under the U.S. Supreme Court's interpretation of § 1983 as it pertains to municipalities and the doctrine of respondeat superior, a school district is not liable for the acts of its employees when those acts do not represent the official policy of the school district. Second, under what is known as

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[16] See *Hagans v. Lavine*, 415 U.S. 528, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974).

[17] *Francis v. City of Columbus*, 267 Neb. 553, 676 N.W.2d 346 (2004).

[18] *National Private Truck Council, Inc. v. Oklahoma Tax Com'n*, 515 U.S. 582, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995).

the *Parratt/Hudson* doctrine,[19] there is no federal due process violation under color of state law when the deprivation was the result of "random and unauthorized" acts by state employees and the State provides adequate postdeprivation remedies.

Municipal Responsibility for Acts of Its Employees

[5] The U.S. Supreme Court originally held that municipalities were not "persons" under § 1983.[20] It has since overruled this decision and has held that municipalities and other local governmental units, such as school boards, are included among those "persons" to whom § 1983 applies.[21] However, the Court has retained significant limitations to a municipality's liability for the acts of its employees in a § 1983 action. Focusing on the causal language of § 1983, as well as legislative history indicating that Congress doubted its power to oblige municipalities to control the conduct of others, the U.S. Supreme Court concluded that § 1983 did not mean to incorporate doctrines of vicarious liability.[22] The Court held that respondeat superior is an insufficient basis for establishing liability and that municipal liability under § 1983 is limited to actions for which the municipality is actually responsible.[23]

[6] A rigorous standard of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employees.[24] The U.S. Supreme Court

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[19] *Parratt v. Taylor*, 451 U.S. 527, 541, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). Accord *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984).

[20] *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

[21] *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

[22] *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986); *Monroe v. Pape, supra* note 20.

[23] *Pembaur v. City of Cincinnati, supra* note 22.

[24] *Board of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997).

elaborated that Congress did not intend municipalities to be held liable unless action pursuant to "official municipal policy of some nature caused a constitutional tort."[25] In other words, a municipality is liable only when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.[26]

There is no evidence in this case that it was the official policy of the school district to create "long-term substitutes" in an attempt to circumvent the Nebraska tenure statutes. Policy is made when a decisionmaker, possessing final authority to establish municipal policy with respect to the action, issues an official proclamation, policy, or edict.[27] "The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion."[28] Rather, "municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."[29]

In a footnote in the U.S. Supreme Court's opinion in *Pembaur v. City of Cincinnati*,[30] the Court illustrated that a county sheriff's decision to hire or fire an employee would not subject the municipality to § 1983 liability, even if the municipality had left to the sheriff the discretion to hire and fire employees and the sheriff had exercised that discretion in an unconstitutional manner. The municipality would be liable under § 1983, the Court explained, only if the municipal board

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[25] *Monell v. New York City Dept. of Social Services, supra* note 21, 436 U.S. at 691.

[26] *Monell v. New York City Dept. of Social Services, supra* note 21; *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002).

[27] *Pembaur v. City of Cincinnati, supra* note 22.

[28] *Id.*, 475 U.S. at 481-82.

[29] *Id.*, 475 U.S. at 483.

[30] *Pembaur v. City of Cincinnati, supra* note 22.

had delegated its power to establish final employment policy to the sheriff.[31]

Likewise, here, while the student services director, the assistant superintendent, and the principal may have had the discretion to make hiring decisions, they do not appear to have the authority to establish final policy for the school district.

Nor is there evidence that it was the custom of the school district to hire as "long-term substitutes" employees who really were "probationary certificated employees," and then discharge them without notice or hearing. To the contrary, the school superintendent testified that in his 20 years of experience, he had never hired an employee in this manner. A custom is proved by demonstrating that a given course of conduct, although not specifically endorsed or authorized by state or local law, is so well settled and permanent as virtually to constitute law.[32]

Thus, the nucleus of facts here does not present a case in which the municipality should be held responsible, under § 1983, for the actions of those who allegedly deprived Manning of her due process rights. This is not a case where "official municipal policy of some nature caused a constitutional tort."[33] Therefore, § 1983 would not have been an appropriate basis for relief, and attorney fees under § 1988 are not recoverable.

Parratt/Hudson Doctrine

[7,8] Relatedly, because the acts of the school administrators toward Manning were a particular, unauthorized response to their unease with Manning's candidacy for the position, the State adequately protected Manning's federal due process rights by providing her with state postdeprivation remedies. In a § 1983 claim, the procedural process due to a person who has a property interest in continued employment is based in federal constitutional safeguards. There is not a violation of

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[31] *Id.*

[32] *Monell v. New York City Dept. of Social Services, supra* note 21; *Fletcher v. O'Donnell*, 867 F.2d 791 (3d Cir. 1989).

[33] *Monell v. New York City Dept. of Social Services, supra* note 21, 436 U.S. at 691.

due process every time a government entity violates its own rules.[34] Moreover, a constitutional deprivation of procedural due process actionable under § 1983 "is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process."[35] This is distinguishable from a violation of substantive constitutional rights, which occurs at the moment the harm occurs.[36] Procedural due process is flexible and calls for such protections as the particular situation demands.[37] Where a state must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirement of the Due Process Clause.[38]

[9] Under the *Parratt/Hudson* doctrine, the U.S. Supreme Court has held that in the case of "random and unauthorized" deprivations by state employees, due process does not require a predeprivation hearing; rather, postdeprivation state tort remedies are sufficient.[39] The Court has explained that because such misconduct is inherently unpredictable, the state's obligation under the Due Process Clause is to provide sufficient remedies after its occurrence, rather than to prevent it from happening.[40] Whether the individual employee, as opposed to the State, can foresee the deprivation and provide a predeprivation process is of no consequence. "The controlling inquiry is

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[34] *Franceski v. Plaquemines Parish School Bd.*, 772 F.2d 197 (5th Cir. 1985). See, also, e.g., *Levenstein v. Salafsky*, 164 F.3d 345 (7th Cir. 1998); *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504 (10th Cir. 1998).

[35] *Zinermon v. Burch*, 494 U.S. 113, 126, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990).

[36] See, *Halverson v. Skagit County*, 42 F.3d 1257 (9th Cir. 1994); *Bakken v. City of Council Bluffs*, 470 N.W.2d 34 (Iowa 1991).

[37] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985); *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

[38] *Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997).

[39] *Parratt v. Taylor, supra* note 19, 451 U.S. at 541. Accord *Hudson v. Palmer, supra* note 19.

[40] *Hudson v. Palmer, supra* note 19.

solely whether the state is in a position to provide for predeprivation process."[41]

Generally, conduct that is contrary to law is considered random and unauthorized.[42] The exception, not applicable here, is that some courts have found deprivations, when effected by high-level decisionmakers, cannot be considered "random and unauthorized."[43] Furthermore, if a state procedure allows unfettered discretion by a state actor, then an abuse of that discretion may be predictable, authorized, and preventable with a predeprivation process.[44]

In *Clark v. Kansas City Missouri School Dist.*,[45] a public school teacher brought a § 1983 action alleging that the principal and the district superintendent deprived her of property without due process of law. Relying on the *Parratt/Hudson* doctrine, the court noted that the teacher did not challenge the procedures established by the school district, but challenged the acts of certain employees. And the teacher did not present evidence that the employees acted pursuant to any established district procedure. Their actions were, instead, random and unauthorized. Because the State provided adequate common-law remedies for the deprivation, the court concluded that her due process claim failed as a matter of law. Similar cases brought under § 1983 by teachers alleging that their termination, demotion, or involuntary medical leave violated procedural due process have failed because the actions were considered random and unauthorized and there was an adequate state remedy.[46]

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[41] *Id.*, 468 U.S. at 534.

[42] *Hamlin v. Vaudenberg*, 95 F.3d 580 (7th Cir. 1996).

[43] *Dwyer v. Regan*, 777 F.2d 825 (2d Cir. 1985).

[44] See, *Zinermon v. Burch, supra* note 35; *Hamlin v. Vaudenberg, supra* note 42.

[45] *Clark v. Kansas City Missouri School Dist.*, 375 F.3d 698 (8th Cir. 2004).

[46] *Jefferson v. Jefferson Co. Pub. School Sys.*, 360 F.3d 583 (6th Cir. 2004); *Hartwick v. Bd. of Tr. of Johnson Cty. Com. Col.*, 782 F. Supp. 1507 (D. Kan. 1992); *Setchel v. Hart County School Dist.*, No. 3:09-CV-92, 2009 WL 3757464 (M.D. Ga. Nov. 6, 2009); *Anderson v. Bd. of Educ. of City of Chicago*, No. 03 C 7871, 2004 WL 1157824 (N.D. Ill. May 21, 2004).

Manning does not challenge the Nebraska tenure statutes, but asserts that the school administrators acted in violation of those statutes. Not only were the school administrators' actions unauthorized, but, as already discussed, there is no evidence that this was an ongoing custom such that the State should have interceded to prevent it beyond the statutory mandates upon which Manning relies. And certainly, given the strictures of the tenure statutes, this is not a case where the district employees were granted unfettered discretion. The adequacy of the state postdeprivation remedies is not questioned, and Manning has demonstrated their efficacy through this suit. Although state remedies may not provide all the relief which may have been available under § 1983, such as recovery of attorney fees, that does not mean that the state remedies are not adequate to satisfy the requirements of due process.[47]

In order to obtain attorney fees under § 1988, it was Manning's burden to demonstrate at least a "substantial" § 1983 claim. She has failed to do so. We find merit to the school district's assignments of error pertaining to the award of attorney fees and costs, and we reverse that portion of the lower court's judgment. We need not address whether the fees were reasonable.

CONCLUSION

We affirm the judgment awarding Manning reinstatement, backpay, and benefits. We reverse the award of attorney fees and costs.

AFFIRMED IN PART, AND IN PART REVERSED.

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[47] *Parratt v. Taylor, supra* note 19.

MARY HERRINGTON, APPELLANT, V. P.R. VENTURES, LLC, DOING BUSINESS AS MISTY'S RESTAURANT, AND HARLEYSVILLE, ITS WORKERS' COMPENSATION CARRIER, APPELLEES.

781 N.W.2d 196

Filed April 23, 2010. No. S-09-1076.

1. **Workers' Compensation: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
2. **Statutes.** Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
3. **Statutes: Appeal and Error.** An appellate court will not read anything plain, direct, or unambiguous out of a statute.
4. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
5. ____. A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.
6. **Statutes: Intent: Appeal and Error.** In construing a statute, an appellate court looks to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served.

Appeal from the Workers' Compensation Court. Affirmed.

Jeffrey A. Bloom and Joseph C. Dowding, of Dowding, Dowding & Dowding, for appellant.

Jason A. Kidd, of Engles, Ketcham, Olson & Keith, P.C., for appellees.

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

STEPHAN, J.

This appeal presents an issue of statutory interpretation. We conclude that the review panel of the Nebraska Workers' Compensation Court correctly interpreted Neb. Rev. Stat. § 48-191 (Reissue 2004), and therefore affirm.

The facts are simple and undisputed. In July 2008, Mary Herrington filed a petition in the Workers' Compensation Court, alleging that she had been injured in accidents arising

out of and in the course of her employment with P.R. Ventures, LLC. The parties agreed to a settlement, and on December 4, the Workers' Compensation Court entered an order approving a lump-sum payment of $10,000 to Herrington. A draft for $10,000 was sent by P.R. Ventures to Herrington's attorney by overnight mail on Monday, January 5, 2009. Herrington received the draft on January 6.

In February 2009, Herrington filed a motion for waiting-time penalties, attorney fees, and interest, claiming that the draft was sent outside the 30-day time period specified by Neb. Rev. Stat. § 48-125 (Reissue 2004). P.R. Ventures resisted the motion, arguing that the draft was timely sent pursuant to § 48-191, which provides:

> Notwithstanding any more general or special law respecting the subject matter hereof, whenever the last day of the period within which a party to an action may file any paper or pleading with the Nebraska Workers' Compensation Court, *or take any other action with respect to a claim for compensation*, falls on a Saturday, a Sunday, any day on which the compensation court is closed by order of the Chief Justice of the Supreme Court, or any day declared by statutory enactment or proclamation of the Governor to be a holiday, the next following day, which is not a Saturday, a Sunday, a day on which the compensation court is closed by order of the Chief Justice of the Supreme Court, or a day declared by such enactment or proclamation to be a holiday, shall be deemed to be the last day for filing any such paper or pleading *or taking any such other action with respect to a claim for compensation*.

(Emphasis supplied.) The trial judge awarded Herrington waiting-time penalties, attorney fees, and interest, reasoning that § 48-191 applied only to interactions between parties and the court, and did not apply to interactions between the parties. The review panel reversed, reasoning that the statutory phrase "'other action with respect to a claim for compensation'" was "generally broad and include[d] payment of a claim for compensation."

Herrington filed a timely appeal, and we granted her petition to bypass and then ordered that the case be submitted without oral argument.

ASSIGNMENT OF ERROR

Herrington's sole assignment of error is that the review panel erred in finding that the lump-sum payment was timely made pursuant to the provisions of § 48-191.

STANDARD OF REVIEW

[1] The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[1]

ANALYSIS

The lump-sum settlement was approved by the Workers' Compensation Court on December 4, 2008. The 30-day period in which the $10,000 payment had to be sent in order to avoid penalties, attorney fees, and interest commenced on December 5.[2] The final day of the 30-day period was therefore Saturday, January 3, 2009. It is undisputed that the payment was not sent until Monday, January 5. The sole issue in this appeal is whether the payment was timely under § 48-191, which extends the time period for an "action with respect to a claim for compensation" when the final day of the time period falls on a Saturday, a Sunday, or a day when the Workers' Compensation Court is otherwise legally closed.

[2-6] Familiar general principles guide our analysis in this case. Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.[3] An appellate court will not read anything plain, direct, or unambiguous out

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[1] *Miller v. Regional West Med. Ctr.*, 278 Neb. 676, 772 N.W.2d 872 (2009); *Powell v. Estate Gardeners*, 275 Neb. 287, 745 N.W.2d 917 (2008).

[2] See, § 48-125; *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005), *modified on denial of rehearing* 270 Neb. 40, 699 N.W.2d 819; *Brown v. Harbor Fin. Mortgage Corp.*, 267 Neb. 218, 673 N.W.2d 35 (2004).

[3] *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009).

of a statute.[4] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[5] A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.[6] In construing a statute, an appellate court looks to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served.[7]

Based on these general principles, we conclude that the review panel correctly interpreted § 48-191. The statute is not ambiguous. The plain language "any other action with respect to a claim for compensation" is broad enough to include not only transactions between a party and the court, but also transactions between the parties. Except in circumstances not applicable here, § 48-125 directs that payments of workers' compensation benefits "shall be sent directly to the person entitled to compensation or his or her designated representative."[8] Clearly, the mailing of a lump-sum settlement check to its intended recipient is an "action with respect to a claim for compensation" such that the time for mailing must be determined pursuant to § 48-191.

Contrary to Herrington's argument, we perceive no inconsistency between §§ 48-125 and 48-191. The former provides a penalty for payments made more than 30 days after entry of a judgment; the latter simply directs how this time period, as well as others under the Nebraska Workers' Compensation Act, is to be computed. Nor are we persuaded by the argument that

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[4] *In re Estate of Lienemann*, 277 Neb. 286, 761 N.W.2d 560 (2009); *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

[5] *Concrete Indus. v. Nebraska Dept. of Rev.*, 277 Neb. 897, 766 N.W.2d 103 (2009); *State ex rel. Lanman v. Board of Cty. Commissioners*, 277 Neb. 492, 763 N.W.2d 392 (2009).

[6] *Concrete Indus. v. Nebraska Dept. of Rev., supra* note 5; *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007).

[7] *TracFone Wireless v. Nebraska Pub. Serv. Comm., ante* p. 426, 778 N.W.2d 452 (2010).

[8] § 48-125(1) (now found at § 48-125(1)(a) (Supp. 2009)).

application of § 48-191 would contravene the general purpose of § 48-125, which is to "encourage prompt payment by making delay costly if the award has been finally established."[9] Section 48-191 simply provides a practical, uniform standard for computing time periods under the Nebraska Workers' Compensation Act.

CONCLUSION

For these reasons, we affirm the order denying the award of waiting-time penalties, attorney fees, and interest.

AFFIRMED.

[9] *Soto v. State, supra* note 2, 269 Neb. at 345-46, 693 N.W.2d at 499. Accord *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d 786 (1998).

IN RE APPLICATION OF ANTHONY YBARRA FOR ADMISSION TO THE NEBRASKA STATE BAR ON EXAMINATION.

781 N.W.2d 446

Filed April 23, 2010. No. S-34-090002.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** Under Neb. Ct. R. § 3-115, the Nebraska Supreme Court considers the appeal of an applicant from a final adverse ruling of the Nebraska State Bar Commission de novo on the record made at the hearing before the commission.
2. **Rules of the Supreme Court: Attorneys at Law: Proof.** The Nebraska State Bar Commission's rules place on an applicant the burden of proving good character by producing documentation, reports, and witnesses in support of the application.
3. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.
4. **Attorneys at Law.** Where the record of an applicant for admission to the Nebraska State Bar demonstrates a significant lack of honesty, trustworthiness, diligence, or reliability, a basis may exist for denying his or her application.
5. ____. When evidence exists to indicate that an applicant has engaged in conduct demonstrating a lack of character and fitness, the Nebraska State Bar Commission must determine whether present character and fitness qualify the applicant for admission.

Original action. Application denied.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for applicant.

Brad Roth and Chris F. Blomenberg, of McHenry, Haszard, Hansen, Roth & Hupp, P.C., for Nebraska State Bar Comission.

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

PER CURIAM.

I. NATURE OF CASE

Anthony Ybarra appeals the decision of the Nebraska State Bar Commission (Commission) denying his application to take the Nebraska bar examination. The Commission determined that Ybarra did not meet the character and fitness requirements for admission to the bar. We affirm the Commission's denial of Ybarra's application to take the Nebraska bar examination.

II. BACKGROUND

Ybarra attended Chadron State College and received a bachelor's degree in May 2005. He began law school at the University of Nebraska in August 2005 and graduated in December 2008. He applied to take the Nebraska bar examination in February 2009. The Commission scheduled an interview with Ybarra to address his history of contacts with law enforcement, allegations of domestic abuse, and his credit history. After the Commission voted to deny his application, Ybarra requested and the Commission granted a formal hearing. The following evidence was received at the hearing.

1. ALLEGATIONS AGAINST YBARRA

(a) D.G.

Prior to attending law school, Ybarra worked as a police officer with the Scottsbluff Police Department from December 1997 to March 2003. During this time, Ybarra had an intimate relationship with a woman who will be referred to as "D.G." The relationship ended in August 1999. In August 2001, D.G. twice filed a petition for a protection order against Ybarra. The

petitions were denied. In an affidavit in support of one of the protection orders, D.G. reported incidents of Ybarra's harassing her.

On April 22, 2001, Ybarra arrested D.G. for driving under the influence (DUI). According to D.G., Ybarra was sitting in his patrol car outside a bar when D.G. left the bar. Ybarra followed her for more than a mile and turned on his patrol car's overhead lights when she stopped at her sister's house. D.G. was not concerned at first, because Ybarra had previously pulled her over on a number of occasions to talk to her and ask her to go to lunch. Instead, Ybarra administered field sobriety tests and then arrested D.G. After she posted bond and returned home at 4 a.m., D.G. found Ybarra waiting for her. Ybarra then entered her house without permission. She asked him to leave, indicating that if he did not, she would call the police. Ybarra said, "'I am the police'" and left. He subsequently called D.G. from his patrol car. She told him she had nothing to say and hung up. D.G. said she believed Ybarra was using his authority to intimidate her.

Ybarra told a different version of the events of that evening. Ybarra said he was on patrol when he saw a vehicle make a wide turn. He followed the vehicle and determined it was speeding. Ybarra stopped the vehicle and then learned D.G. was the driver. Ybarra arrested D.G. for DUI and transported her to a police station. Ybarra said he went to D.G.'s home at her request to inform her mother that D.G. had been arrested. He claimed there was a problem with the telephone in the jail. Ybarra said he went to an automatic teller machine to get cash for D.G.'s mother to use to post D.G.'s bond. When he returned, D.G. was present because her bond had already been posted.

A patrol sergeant with the Scottsbluff Police Department testified that the bar D.G. left before being arrested by Ybarra was not on Ybarra's assigned beat on that night. The sergeant did not think it was feasible for Ybarra to have seen D.G. make a wide turn from the point where Ybarra said he was parked at the time. The sergeant said he used the telephone in the jail that night and had no problems. He said he could not believe that an officer would actually bond out his own prisoner.

He said there had been several complaints against Ybarra because Ybarra parked at that bar and followed customers after they left.

D.G.'s driver's license was temporarily revoked as a result of the DUI charge. After an administrative license revocation hearing, the revocation proceeding was dismissed by the hearing officer. Ybarra had previously testified in a number of hearings before the same officer. At Ybarra's hearing before the Commission, the revocation hearing officer testified that Ybarra exercised "horrendous judgment" by going to D.G.'s mother's home at 3 a.m. to loan her money to post D.G.'s bond. The officer stated that Ybarra was not credible at the revocation hearing. Ybarra had encouraged the officer not to dismiss the revocation proceeding because it would affect Ybarra's reputation and because he thought the dismissal would jeopardize his credibility as a police officer. The revocation hearing officer said he thought Ybarra was acting as a "rogue cop" and that it appeared Ybarra had been scorned and was trying to get revenge on D.G.

The second incident between Ybarra and D.G. occurred on July 22, 2001. When D.G. called police to her home for a domestic dispute, Ybarra was the first officer to arrive. D.G. said she tried to walk away from Ybarra, but he got in his patrol car and cut her off by driving in front of her. Ybarra grabbed her arm and said he wanted to talk, but D.G. refused and asked to speak to another officer.

D.G. wrote to the Commission to express her concerns about Ybarra. She stated her belief that the protection orders were denied because Ybarra was a police officer. She reported to the chief of police incidents of Ybarra's contacting her without permission, but the complaints were initially ignored. D.G. said she moved out of Nebraska to get away from Ybarra. She believed Ybarra was dangerous, and she feared he would use his authority to his advantage if he were granted a license to practice law.

(b) K.

In December 2002, Ybarra was charged with third degree sexual assault on the complaint of a woman we will refer to as

"K." because her last name is not in the record. She worked in the Scotts Bluff County jail and had a sexual relationship with Ybarra for about a month in the fall of 2001.

Concerning the incident leading to the criminal charge, Ybarra stated that he was in the jail after having arrested a drunk driver. He noticed a pack of cigarettes in the left front pocket of K.'s shirt. Ybarra said he thought K. had stopped smoking, so he reached across and grabbed the pack of cigarettes out of the pocket. Ybarra told K. he would get rid of the cigarettes.

A few weeks later, Ybarra was informed that he was being investigated for a sexual assault on K. He was subsequently charged with third degree sexual assault and found not guilty by a jury. Ybarra was scheduled to appear before the Scottsbluff City Council to respond to the accusation, but he decided to resign from his position as a police officer rather than make a public record about the incident.

(c) T.W.

T.W., an attorney in the Scotts Bluff County Attorney's office, dated Ybarra from September 2001 until October 2004. In November 2004, she requested a protection order against him. T.W. said that after she attempted to end the relationship, Ybarra's behavior escalated from emotional abuse and manipulation to stalking. She alleged that his behavior had become increasingly abusive, harassing, and inappropriate at both her home and her office and that she had serious concerns for her physical safety.

In T.W.'s affidavit in support of the protection order, she alleged that she had learned that Ybarra had been unfaithful and had been dating another woman for 6 months. T.W. decided she no longer wanted to speak to Ybarra. Ybarra called T.W.'s home and office telephones incessantly and left messages with office assistants. At one time, Ybarra called T.W.'s office and said that he had an emergency and that T.W. needed to contact him immediately. She did not return the telephone call. T.W. felt it necessary to leave the courthouse or arrange to work outside the office when Ybarra said he was coming to see her there. When T.W. returned to her private office, she found

notes from him, including one that said, "I love you! [T.W.]" T.W. said she was forced to have security escorts from her office to her car. After Ybarra sent T.W. an e-mail stating that the relationship was over, Ybarra continued to call her home at all hours of the day and night.

The protection order was granted for 1 year. After it was issued, Ybarra came to T.W.'s office, claiming he needed to discuss child support matters. She was forced to remain in her office while security personnel ensured he had left the building.

In a letter to the Commission, T.W. stated that Ybarra had a history of "abuse, manipulation, violence and predatory behavior that is a serious risk for any vulnerable person, especially any female, who may come into contact with him. . . . There is no regret, no remorse and absolutely no change in his personal character or behavior."

The victim and witness assistance director for the Scotts Bluff County Attorney's office wrote to the Commission to oppose Ybarra's admission to the bar. The director stated he had assisted three women who were granted domestic abuse protection orders against Ybarra. The director said one of the most disturbing experiences was when Ybarra violated a protection order by making excuses to be in the building where T.W. worked. The director said Ybarra had no regard for the law and felt he was above it.

Ybarra stated that he dated T.W. for 3 years and that the relationship began to deteriorate when he moved to Chadron to attend college. He began a new relationship after he had not heard from T.W. for a time. Ybarra claimed T.W. called him at 1 or 2 a.m. and said she was in Chadron and wanted to see him. He went to her hotel room, where they talked for about an hour. Initially, she would not let him leave. The next day, they had breakfast and eventually had sexual relations. When Ybarra's new girlfriend, A.S., came to the room, T.W. became upset and left. Ybarra claimed T.W. continuously called him at home and at work. Ybarra said he tried to avoid her calls but eventually agreed to meet her at a city park.

When they met, T.W. was crying and upset about Ybarra's seeing another woman. Ybarra claimed that T.W. said she was

going to drive her car off the road and that she began stabbing her wrist with a sharp object on her keyring. When he grabbed her to try to stop her, she pulled away and ran. Ybarra apologized and told T.W. he still loved her. They agreed to meet several weeks later, but at that time, T.W. refused to speak to Ybarra. T.W. was then granted the protection order.

(d) A.S.

A.S. began dating Ybarra at Chadron State College. Later, while both were attending the University of Nebraska College of Law, A.S. was granted a domestic abuse protection order against Ybarra. In her supporting affidavit, dated August 1, 2007, A.S. stated that in May, Ybarra found her asleep "next to a male friend." She awoke when Ybarra began stroking her leg. She and Ybarra went into the hallway of the apartment, and Ybarra said he would leave her alone for good if she would have sex with him. When she refused, Ybarra bent A.S. over a staircase and proceeded to touch her vagina and then penetrated her with his penis even though she asked him to stop. She did not report the incident to authorities.

In June 2007, A.S. came home to find Ybarra waiting for her. She was wearing a male friend's T-shirt and shorts, and Ybarra demanded that she take them off. When she did not remove the clothes, Ybarra cut them off with scissors. She began to scream and cry, and Ybarra placed his hands over her nose and mouth to muffle her cries. He then pinned her to the ground until she calmed down and stopped screaming. He prevented her from getting up and threatened to kill her. He said that he did not care if he went to prison and that it would be her fault if he never saw his children again.

On July 29, 2007, A.S. arrived home to find Ybarra in her apartment. To get him out of the apartment, she took him for a drive. He asked her to pull over so they could have sex. A.S. refused, but Ybarra began to grab her breasts. He then tried to grab her face and forcibly kissed her, biting her lip. When she pushed him away with her right arm, Ybarra punched her in the upper arm.

Around August 1, 2007, A.S. reported that Ybarra had entered her apartment without her permission and left flowers and

stuffed animals for her. No forced entry was found, and A.S. told police that Ybarra may have had a key to her apartment made without her permission. She believed he had previously entered her apartment and ejaculated on the bedspread.

The protection order was issued on August 1, 2007, and within hours of its issuance, Ybarra arrived at A.S.' residence with a copy of the order in his hand. On August 2, Ybarra was charged with third degree domestic assault, violation of a domestic abuse protection order, and trespassing. Ybarra entered into a plea agreement and was found guilty of first-offense violation of a protection order and first degree criminal trespass. The third degree domestic assault charge was dismissed. He was fined $25. Ybarra completed a 24-week domestic violence intervention program upon the advice of his attorney.

Ybarra's version of events differed. He stated that A.S. attempted to commit suicide when he broke off the relationship. He did not report the suicide attempt because he was concerned it would affect A.S.' ability to finish law school or take the bar examination. Ybarra said A.S. hurt her lip when they were attempting to kiss in the car and bumped into each other. When they returned to her apartment, they fought, and Ybarra grabbed A.S. by the arms because she was swinging at him. Ybarra denied the other incidents.

At the time the protection order was issued, A.S. was working for the Attorney General's office. An investigator for the office wrote to the Commission asking it to deny Ybarra's application. The investigator said he was involved in the investigation of an alleged domestic assault by Ybarra on A.S. That investigation "uncovered a significant history of abhorrent behavior toward women" by Ybarra, including when he was working as a law enforcement officer.

2. Other Evidence

At the hearing, Ybarra introduced evidence to support his application, including a letter from the mother of a woman he had dated since July 2008; a letter from the mother of one of his children; a letter from an attorney who employed Ybarra as a law clerk and who had offered him a position after he passes the bar examination; a letter from the child support

specialist in the Scotts Bluff County Attorney's office, who indicated that Ybarra was current in his child support obligations; a letter from the dean of students at the University of Nebraska-Lincoln, who stated that Ybarra fulfilled the obligations attached to his student judicial sanctions; and letters of appreciation for his work as a police officer in Scottsbluff. Ybarra denied the allegations of all four women as recounted above, except the violation of the protection order.

3. Commission's Action

After the hearing, the Commission notified Ybarra that it had denied his request to sit for the bar examination. The Commission's decision was based on the admission requirements for the practice of law and the standard of character and fitness.[1] Section 3-103 provides:

> An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency by an applicant in one or more of the following essential eligibility requirements for the practice of law may constitute a basis for denial of admission. In addition to the admission requirements otherwise established by these rules, the essential eligibility requirements for admission to the practice of law in Nebraska are:
>
> (A) The ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations;
>
> (B) The ability to conduct oneself diligently and reliably in fulfilling all obligations to clients, attorneys, courts, and others;
>
> (C) The ability to conduct oneself with respect for and in accordance with the law and the Nebraska Rules of Professional Conduct;
>
> (D) The ability to communicate clearly with clients, attorneys, courts, and others;

[1] See Neb. Ct. R. § 3-103.

(E) The ability to reason, analyze, and recall complex factual information and to integrate such information with complex legal theories;

(F) The ability to exercise good judgment in conducting one's professional business;

(G) The ability to avoid acts that exhibit disregard for the health, safety, and welfare of others;

(H) The ability to use honesty and good judgment in financial dealings on behalf of oneself, clients, and others;

(I) The ability to comply with deadlines and time constraints;

(J) The ability to conduct oneself professionally and in a manner that engenders respect for the law and the profession.

The Commission specifically cited subsections (A), (C), (F), (G), (H), and (J), and Ybarra has appealed from the Commission's decision.

III. ASSIGNMENT OF ERROR

Ybarra contends the Commission erred in failing to find that the evidence established that Ybarra met the standard of character and fitness to sit for the state bar examination.

IV. STANDARD OF REVIEW

[1] Under Neb. Ct. R. § 3-115, the Nebraska Supreme Court considers the appeal of an applicant from a final adverse ruling of the Commission de novo on the record made at the hearing before the Commission.[2]

V. ANALYSIS

The record supports the Commission's denial of Ybarra's application to take the Nebraska bar examination. Ybarra exhibited abusive behavior toward four women with whom he had previous relationships. In each case, the version of events provided by the woman describes Ybarra's actions toward her as intimidating, violent, assaultive, unlawful, perverted, and demonstrating an abuse of his authority. In each instance,

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[2] *In re Application of Hartmann*, 276 Neb. 775, 757 N.W.2d 355 (2008).

Ybarra provides an explanation differing from that given by the woman.

In the DUI incident with D.G., Ybarra followed her from a bar and then stopped her for DUI. He was waiting at her home when she arrived after posting bond. Ybarra claimed he did not know D.G. was the driver until after he stopped the car for making a wide turn and speeding, and he claimed D.G. asked him to contact her mother about bond. In the domestic dispute incident, Ybarra was the first officer to arrive, even though he knew from the address that it was D.G.'s home. Ybarra apparently saw no conflict in answering a police call about a domestic matter at the home of a former girlfriend.

The record contains no statement from K. about the incident in which Ybarra touched her. Ybarra stated that he reached into K.'s shirt pocket to take away her cigarettes, but he was eventually charged with third degree sexual assault for his actions. He resigned from the police department rather than face a public hearing into the matter.

T.W. obtained a protection order against Ybarra for his harassing and inappropriate behavior after she ended their relationship. T.W. said Ybarra continuously called her at home and at the office even after she told him she no longer wanted to speak to him. T.W. said she was forced to change the locks on her home and to get security escorts from her office to her car. Ybarra claimed that T.W. called him at home and at work and that she was upset when he began a new relationship. He alleged that he continued to call T.W. because he was concerned for her safety after she made suicidal statements.

A.S. also obtained a protection order against Ybarra after their relationship ended. She reported incidents of physical violence, including forcible sex. She believed Ybarra had entered her apartment without her permission and ejaculated on her bedspread. Ybarra claimed that he was concerned about A.S.' safety because she was suicidal. He denied the incidents of physical contact, except that he grabbed her by the arms when she was swinging at him.

The incidents with the four women span a time period of over 6 years and occurred in several locations. However, there is a pattern in Ybarra's behavior which appeared to intensify

over time. All of the incidents involved women with whom Ybarra had an intimate relationship.

> The primary purposes of character and fitness screening before admission to the bar of Nebraska are to [en]sure the protection of the public and to safeguard the justice system. . . . The public is adequately protected only by a system that evaluates character and fitness as those elements relate to the practice of law. The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their attorneys.[3]

[2,3] The Commission's rules "place on the applicant the burden of proving good character by producing documentation, reports, and witnesses in support of the application."[4] The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.[5] Neb. Rev. Stat. § 7-102(1) (Reissue 2007) provides: "No person shall be admitted . . . unless it is shown to the satisfaction of the Supreme Court that such person is of good moral character." This court has delegated administrative responsibility for bar admissions solely to the Commission.[6]

[4,5] Where the record of an applicant for admission to the Nebraska State Bar demonstrates a significant lack of honesty, trustworthiness, diligence, or reliability, a basis may exist for denying his or her application.[7] When evidence exists to indicate that an applicant has engaged in conduct demonstrating a lack of character and fitness, the Commission must determine whether present character and fitness qualify the applicant for admission.[8]

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[3] Neb. Ct. R. § 3-101 et seq., appendix A.

[4] *Id.* See, also, *In re Application of Hartmann, supra* note 2.

[5] *In re Application of Hartmann, supra* note 2.

[6] *Id.*

[7] *Id.*

[8] *Id.*

> "The ultimate test of present moral character, applicable to original admissions to the Bar, is whether, viewing the applicant's character in the period subsequent to his misconduct, he has so convincingly rehabilitated himself that it is proper that he become a member of a profession which must stand free from all suspicion. . . . That the absence of good moral character in the past is secondary to the existence of good moral character in the present is a cardinal principle in considering applications for original admission to the Bar."[9]

In another bar admission case, we noted that the applicant had been involved in three serious incidents involving "'"abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, [and] turbulent behavior"'" and that such behavior is a proper basis for the denial of admission to the bar.[10] While two of the incidents had occurred 9 years earlier, the most recent had taken place while the applicant was a first-year law student. We concluded that the Commission did not err in determining that the applicant, who had been allowed to take the bar examination, should not be admitted to the bar association.[11]

Ybarra has demonstrated a pattern of behavior involving former female acquaintances. The incidents included in the record took place between 2001 and 2007. Two took place while he was a police officer. In the arrest of D.G., Ybarra continued to perform the DUI investigation even after he learned her identity; he obtained money to pay her bond, an action that was deemed inappropriate by a patrol sergeant with the Scottsbluff Police Department; he arrested someone with whom he had a previous sexual relationship, a violation of the police department's conflict of interest policy; and he arrested D.G. after

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[9] *In re Application of Majorek*, 244 Neb. 595, 605, 508 N.W.2d 275, 282 (1993), quoting *In re Application of Allan S.*, 282 Md. 683, 387 A.2d 271 (1978).

[10] *In re Application of Antonini*, 272 Neb. 985, 993-94, 726 N.W.2d 151, 157 (2007), quoting *In re Application of Silva*, 266 Neb. 419, 665 N.W.2d 592 (2003).

[11] *In re Application of Antonini, supra* note 10.

she left a bar that was not on Ybarra's beat. The administrative license revocation hearing officer believed that Ybarra had acted as a "rogue cop" and found that Ybarra's testimony was not credible.

The record includes little detail about the incident with K., the jail employee, but Ybarra's actions were serious enough to warrant a charge of third degree sexual assault. He was found not guilty by a jury, but he later resigned from his job as a police officer rather than appear at a public hearing before the city council.

Two of the women, T.W. and A.S., obtained protection orders against Ybarra. Ybarra's behavior toward T.W. was increasingly harassing: He continually called her at home and at work, left notes in her private office, and visited her uninvited at the office, leading T.W. to express concern about her physical safety.

Ybarra's actions escalated and became more physical as time passed, becoming more inappropriate after he began law school. It was alleged that Ybarra physically restrained A.S., cut off her clothes, hit her on the arm, bit her on the lip, and sexually assaulted her. Even after being served with a protection order, Ybarra's first response to that order was to go to A.S.' apartment to confront her. Ybarra denies any misbehavior on his part. He even claims two of the women were suicidal over the end of their relationships with him.

The record shows a pattern of improper behavior on the part of Ybarra—four women made claims of assault against Ybarra or sought protection orders against him. In each of the cases, Ybarra denies any wrongdoing and attempts to blame the woman, claiming she was either lying or suicidal, that she was harassing him, or that he was trying to protect her. By his denial, Ybarra takes no responsibility for any of the behavior and shows no remorse for his actions. Indeed, he does not appear to believe that his behavior has been inappropriate.

The only evidence Ybarra presented to suggest that he acknowledges or admits to any problems is his completion of a 24-week domestic violence program, which he undertook on the advice of his attorney. However, Ybarra never admitted that any of the allegations by the four women had a basis

in fact. He has not suggested that he has been rehabilitated. While Ybarra has not been charged criminally or convicted of these alleged assaults, the allegations suggest a pattern of conduct toward four different women that is totally unacceptable behavior.

The Commission specifically cited subsections (A), (C), (F), (G), (H), and (J) of § 3-103 as the basis for its decision to deny Ybarra's application to sit for the bar examination. The Commission thus found Ybarra lacked the ability to demonstrate honesty and integrity; to act in accordance with the law and the rules of ethics; to exercise good judgment; to avoid acts that show disregard for the health, safety, and welfare of others; and to conduct himself professionally. The record shows a history of behavior which is abusive, violent, hostile, intimidating, threatening, assaultive, unlawful, and perverted. The record shows that Ybarra does not meet the standards of character required to be admitted to the bar.

VI. CONCLUSION

Ybarra's behavior demonstrates a pattern of abhorrent behavior toward women. Three women in the past 9 years have sought protection orders against him. He has not admitted that his behavior is inappropriate and has not demonstrated any remorse. The Commission was correct in determining that Ybarra does not meet the standards of character required for admission to the bar and that he should not be allowed to take the state bar examination. We affirm the Commission's denial of Ybarra's application to take the Nebraska bar examination.

APPLICATION DENIED.

RODNEY M. WETOVICK, NANCE COUNTY ATTORNEY, APPELLEE AND CROSS-APPELLANT, V. THE COUNTY OF NANCE, A BODY POLITIC AND CORPORATE, ET AL., APPELLANTS AND CROSS-APPELLEES.

782 N.W.2d 298

Filed April 29, 2010. No. S-08-1302.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Actions: Governmental Subdivisions: Equity.** An action for a declaration that a governmental entity has violated a law is equitable in nature.
3. **Declaratory Judgments: Equity: Appeal and Error.** In reviewing an equity action for a declaratory judgment, an appellate court decides factual issues de novo on the record and reaches conclusions independent of the trial court.
4. **Evidence: Appeal and Error.** When credible evidence is in conflict on material issues of fact, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
5. **Justiciable Issues.** Justiciability issues that do not involve a factual dispute present a question of law.
6. **Statutes.** Statutory interpretation is a question of law.
7. **Appeal and Error.** An appellate court resolves questions of law independently of the determination reached by the court below.
8. **Declaratory Judgments: Proof.** To obtain declaratory relief, a plaintiff must prove the existence of a justiciable controversy and an interest in the subject matter of the action.
9. **Justiciable Issues.** A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
10. **Declaratory Judgments: Justiciable Issues: Standing: Moot Question.** Both standing and mootness are key functions in determining whether a justiciable controversy exists, or whether a litigant has a sufficient interest in a case to warrant declaratory relief.
11. **Moot Question.** Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.
12. ____. Unless an exception applies, a court or tribunal must dismiss a moot case when changed circumstances have precluded it from providing any meaningful relief because the litigants no longer have a legally cognizable interest in the dispute's resolution.
13. **Declaratory Judgments: Pleadings.** When a plaintiff's pleadings in a declaratory judgment action put the defendant on notice of the remedy sought, a trial court may order relief which is clearly within the scope of its declaratory judgment.

14. **Declaratory Judgments.** When a party's requested relief is not clearly within the scope of a court's declaratory judgment, the court should grant such relief only for a plaintiff's concurrent or subsequent cause of action or the plaintiff's application for supplemental relief under Neb. Rev. Stat. § 25-21,156 (Reissue 2008).
15. **Counties: Statutes.** A county in this state is a creature of statute and has no inherent authority. It can exercise only those powers expressly granted to it by statute or necessarily implied to carry out its expressed powers.
16. **Counties.** A grant of power to a county is strictly construed, and reasonable doubts regarding the existence of its power are resolved against it.
17. **Counties: Public Officers and Employees.** Absent a legislative grant of authority, a county board has no power to perform the official duties of other officials or boards.
18. **Evidence.** Unless an exception applies, only a preponderance of evidence is required in civil cases. Monetary disputes are not an exception.
19. **Counties: Public Officers and Employees: Evidence.** Under Neb. Rev. Stat. § 23-1111 (Reissue 2007), unless a county board shows by a preponderance of the evidence that an elected officer's employment determination is arbitrary, capricious, or unreasonable, it lacks authority to disapprove it.
20. **Counties: Statutes.** Neb. Rev. Stat. § 23-908 (Reissue 2007) does not control a budget dispute when a more specific statute applies.
21. **Counties: Statutes: Public Officers and Employees.** In budget disputes between a county board and an elected officer over the officer's employment determinations, Neb. Rev. Stat. § 23-1111 (Reissue 2007) controls, not Neb. Rev. Stat. § 23-908 (Reissue 2007), unless a more specific statute applies to a particular officer's personnel requests.
22. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** Ordinarily, when an appellate court judicially construes a statute and that construction fails to evoke an amendment, it is presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.
23. **Counties: Public Officers and Employees.** Whether a county officer has reasonably fixed the terms and conditions of employment for an assistant or clerk presents a question of fact.
24. **Public Officers and Employees: Wages: Evidence.** Evidence that an elected officer could hire part-time assistants, or even a full-time assistant, for a somewhat lower salary or without benefits does not alone show that the officer's choice is unreasonable.
25. **Counties: Public Officers and Employees: Wages: Child Support.** Under Neb. Rev. Stat. § 43-512.05 (Reissue 2008), to the extent that a county board has already appropriated sufficient funding to pay the necessary salaries and expenses for performing child support enforcement duties, the board is entitled to deposit federal reimbursement funds into its general fund. But any reimbursement funds that the county is not entitled to keep must be carried over from year to year in the county attorney's budget when his or her office is performing all of the child support enforcement duties.
26. **Attorney Fees: Appeal and Error.** A party may recover attorney fees and expenses in a civil action only when a statute permits recovery or when the

Nebraska Supreme Court has recognized and accepted a uniform course of procedure for allowing attorney fees.

27. **Costs: Attorney Fees: Words and Phrases.** The term "costs" in a statute is not generally understood to include "attorney fees."
28. **Declaratory Judgments: Costs: Attorney Fees.** Under Neb. Rev. Stat. § 25-21,158 (Reissue 2008), the Nebraska Supreme Court has not interpreted "costs" to include attorney fees or recognized a uniform course of procedure generally permitting attorney fees to be taxed as costs. Without another source of statutory authority that permits attorney fees to be taxed as costs, the prevailing party cannot recover attorney fees in a declaratory judgment action.
29. **Attorney Fees: Contempt.** Attorney fees in contempt cases fall under a court's inherent power to do all things necessary to enforce its judgment.
30. **Attorney Fees.** Outside of enforcing orders and judgments, the Nebraska Supreme Court has extended a court's inherent power to award attorney fees only in a narrow circumstance: when a party's conduct during the course of litigation is so vexatious, unfounded, and dilatory that it amounts to bad faith.

Appeal from the District Court for Nance County: MICHAEL J. OWENS, Judge. Affirmed.

George E. Martin III and Aimee C. Bataillon, of Spencer, Fane, Britt & Browne, L.L.P., for appellants.

Mark M. Sipple, of Sipple, Hansen, Emerson & Schumacher, for appellee.

Rodney M. Wetovick, Nance County Attorney, pro se.

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

CONNOLLY, J.

SUMMARY

The appellee, Rodney M. Wetovick, the Nance County Attorney, submitted a budget with a salary request for a full-time secretary. The appellant Nance County Board of Supervisors (Board) refused to approve Wetovick's budget and instead voted to require Wetovick to employ part-time secretaries. Wetovick sued Nance County, the Board, and its members, seeking a declaratory judgment that his salary determination was reasonable and that the Board's disapproval of his decision was unreasonable. For simplicity, we will refer only to the Board.

After a bench trial, the court found that Wetovick's request was reasonable and that the Board had unreasonably required him to have part-time secretaries. It ordered the Board to approve Wetovick's budget request for a full-time secretary.

The issue is not whether a county board can cut an officeholder's budget. It can. The issue is whether a county board can dictate the terms of employment for an officer's employee absent proof that the officer's terms are unreasonable. It can't. We conclude that under Neb. Rev. Stat. § 23-1111 (Reissue 2007), the Board lacked authority to disapprove Wetovick's reasonable salary request absent a finding that the request was arbitrary, capricious, or unreasonable.

BACKGROUND

Wetovick was elected Nance County Attorney in November 2006. Before taking office in January 2007, he informally surveyed other county attorneys in the area to determine the staffing requirements and the reasonable compensation for legal secretaries. He concluded that he would need a full-time legal secretary and that reasonable compensation was $24,000.

On January 4, 2007, after conducting interviews for secretaries, Wetovick hired Cyndy Pilakowski. Pilakowski's salary was $24,000 on an annualized basis, or $12,000 through June 30, 2007, which was the end of the county's 2006-07 fiscal year. Pilakowski was already a county employee and was covered under the county's health insurance policy.

Wetovick believed that under § 23-1111 and the Board's personnel policy manual, he had authority to hire a secretary and set the position's salary and working conditions. The manual provided that each county official had hiring authority and the duty to inform new employees of their salary, benefits, and working conditions. He also determined that the remaining funds in the county budget for his office were inadequate to pay a secretary. So he spoke to the Board about adjusting his budget for the remainder of the fiscal year. The Board agreed and paid Pilakowski's salary from January to June 2007. The board did not complain about his hiring choice or Pilakowski's performance.

Earlier, in 2003, the county had stopped offering new employees secondary health insurance for family members because of

rising health insurance costs. After the change, new employees could obtain only single coverage for themselves. But because Pilakowski was a county employee before the change, she carried family coverage when she started working for Wetovick in January 2007.

In April 2007, the Board asked Pilakowski to accept a monthly incentive payment to drop her health insurance coverage because her husband carried insurance. To save money, the county paid employees a $200 monthly incentive if they dropped their single coverage insurance and a $400 monthly incentive if they dropped their family coverage. Pilakowski agreed to drop her family coverage. The county, however, treated her as a new employee and paid her only a $200 monthly incentive for dropping her coverage. But Pilakowski filed a successful grievance, and the county paid her the $400 monthly incentive for dropping family coverage. This dispute occurred before Wetovick submitted his 2007-08 budget in June 2007.

Also in the spring of 2007, the Board paid for a comparability study of other county attorneys' budgets and services. The study concluded that Nance County had twice the average number of felony cases as the other counties surveyed and significantly more open child support cases. But it also concluded that the budget for the Nance County Attorney's office was much lower than in other counties. This study was presented to the Board in May 2007.

The 2007-08 fiscal year began on July 1, 2007. In his June budget, Wetovick estimated $24,720 for his secretary's annual salary, which presented a 3-percent cost-of-living raise. In response, the Board proposed to budget him $6,120 for a full-time secretary during the first 3 months of the fiscal year—July, August, and September. This amount represented 3 months' salary at the agreed-upon annual salary of $24,720. For the remaining 9 months of the fiscal year, the Board proposed to budget Wetovick $15,000 for part-time secretaries.

The Board's proposed budget of $15,000 for 9 months represented an annual budget of $20,000 for part-time secretaries, or a reduction of $4,720 from Wetovick's submitted estimate for his full-time secretary's annual salary. The Board's chairperson testified that for the last 9 months of the fiscal year,

Pilakowski would have earned $18,600, instead of the $15,000 the Board budgeted Wetovick's office. Also, the Board concluded that Pilakowski would no longer be eligible for insurance after September 2007. So under its requirement of part-time secretaries, the Board would avoid paying Pilakowski monthly incentives for dropping her insurance. Avoiding these payments would reduce the county's costs by $3,600 for the last 9 months of the 2007-08 fiscal year. But the Board's chairperson agreed that Wetovick's estimated budget with a full-time secretary and the Board's proposed budget with part-time secretaries were about $7,700 to $8,900 apart. The range apparently represented the cost savings for 9 months compared with a full year.

In September 2007, Wetovick appeared at the Board's budget hearing. The Board reiterated its position that he should employ only part-time secretaries to avoid paying benefits. Wetovick told the Board that his office was already short of the hours required under the county's contract with the State to perform child support enforcement. He stated that he did not believe he could meet his obligation with part-time employees. He explained to the Board that he needed to avoid turnover in his office because the State's computerized child support system had an extensive learning curve. The Board formally adopted its proposed revision of Wetovick's budget to reduce his budget for clerical staff from full-time to part-time.

After October 1, 2007, at Wetovick's request, his secretary continued working for him full time at a reduced salary and without her monthly incentive payments. In November, Wetovick sued the Board.

Wetovick's Complaint

In his operative complaint, as relevant here, Wetovick sought a declaratory judgment for the following: (1) The Board's disapproval of his budget was unauthorized because the Board had not found that his budget was arbitrary and unreasonable; (2) his office needed a full-time assistant, and his secretary's salary and benefits were reasonable; (3) the Board's disapproval and revision of his budget was arbitrary, unreasonable, and unlawful; and (4) the Board was required to keep the child

support incentive payments received during the 2006-07 fiscal year in a segregated account for enhancing child support enforcement efforts. At the end of trial, however, the court permitted Wetovick to amend his complaint so that the fourth allegation would include keeping "incentive and reimbursement" payments in a segregated account. Wetovick also sought a writ of mandamus ordering the Board to approve his budget as submitted without alteration. Finally, he sought costs and attorney fees.

Evidence at Trial

Wetovick testified that he needed a full-time secretary for two reasons. First, Wetovick believed it was important to have an experienced person available to conduct business with the public in his absence. Second, he believed he needed a full-time, experienced assistant to fulfill his office's child support enforcement duties.

The State's child support computer system is called CHARTS (Children Have a Right to Support). It keeps track of all child support cases in the state, including receipts, allocation, distribution, and disbursement. The administrator for finance and central operations of the Department of Health and Human Services (the Department) testified that CHARTS was a complex system and required considerable training to use. Wetovick also testified that CHARTS was complex and that the training was extensive and expensive. Wetovick had been told that becoming very proficient would require 2 to 3 years' experience. He could not operate the system and stated that Pilakowski had already attended numerous workshops and received other training from the Department. Another county attorney testified that his secretary was still learning the CHARTS system after a year because it was so complex and that he could not run his office without a full-time secretary.

The Department's reimbursement funds for child support enforcement depended upon Wetovick's office completing the necessary hours for the county's open cases. The Department had estimated that his office needed to put in 13 to 15 hours per week. Wetovick explained that through CHARTS, his office would find individuals who start employment and

owe child support or find individuals whose child support obligation should be modified. He stated that Pilakowski was the caseworker for his office who was required to put in 15 hours per week working on cases that needed attention. He also stated that she had not been able to complete the required hours because of prosecutorial matters. And Wetovick did not believe his office could provide 15 hours per week of child support enforcement duties with part-time assistants. It was because his office was already short of its required hours that he had asked his secretary to continue working full time after October 1, 2007.

Wetovick also stated that his office's efforts had more than doubled the amount of reimbursement funds that the county received. He believed that the increased funds easily covered the difference between his budget and the county's budget. The county did not dispute this increase in reimbursement funds or that they would make up the difference in the budgets.

Because the position required extensive training and experience, Wetovick testified that he wanted to avoid turnover. He stated that he did not want to hire someone who would later look for another job because his office paid low part-time wages and lacked benefits. Because he believed the job required full-time effort, he had not been as interested in applicants who mainly wanted part-time work. For the same reasons, he rejected the Board's suggestion that he employ two part-time secretaries instead of one full-time secretary.

County attorneys from nearby counties with smaller populations and fewer felony cases also testified. One stated that he employed both a full-time secretary and a full-time child support enforcement officer to assist him. The other employed a full-time secretary. Both testified that it was important to have an experienced, full-time secretary because of a county attorney's multiple duties and the necessity of having someone who could draft legal documents and deal with problems and requests for help in the county attorney's absence.

In justifying the Board's position, the Board's chairperson testified that Wetovick could have more hours of clerical assistance at a lower cost if he employed two part-time secretaries. As an example, he stated that under the Board's $15,000

budget for 9 months, two part-time secretaries could work 1.37 more hours per week than a full-time secretary, if Wetovick were able to hire them at $9.50 per hour, which represented the county's average part-time wage. But he conceded that the primary reason for the Board's disapproval of a full-time secretary for Wetovick was to avoid paying insurance benefits.

The chairperson also admitted that the county had not required all county positions to be filled by part-time employees—not even road crew and janitor positions. He admitted that the only county office the Board believed should not be staffed with a full-time person was the county attorney's office. Moreover, Board members, who rarely worked full-time hours, were eligible to receive health insurance benefits or monthly incentive payments. And the record lacks any evidence that anyone competent to draft legal documents and assist with child support enforcement duties would do so for the county's average part-time salary and no benefits.

District Court's Order

In its order, the court stated that any aspect of Wetovick's complaint that it had not addressed was denied. It concluded that under § 23-1111, the issue was whether Wetovick's insistence upon a full-time secretary was unreasonable, arbitrary, or capricious. It concluded that Wetovick had acted reasonably and that the Board's decision to require him to use part-time assistants was unreasonable. It directed the Board to approve Wetovick's budget for the 2007-08 fiscal year to the extent that it related to full-time employment of clerical staff. It denied Wetovick's request for a writ of mandamus, because its remedy under his declaratory judgment claim showed that he was not without any other means of relief. Later, the court denied Wetovick's request for attorney fees and costs, because neither a statute nor uniform course of action allowed attorney fees. And while the county's conduct had been unreasonable, the court concluded that it did not amount to bad faith.

ASSIGNMENTS OF ERROR

The Board assigns, restated and condensed, that the court erred in (1) failing to determine that after the 2007-08 budget

year ended, it lacked jurisdiction under the Uniform Declaratory Judgments Act[1] to consider Wetovick's budget request; (2) finding that Wetovick's request for a full-time assistant was reasonable; (3) finding that the Board's disapproval of his request and altering of his budget were unreasonable; and (4) failing to determine that the Board had authority under Neb. Rev. Stat. § 23-908 (Reissue 2007) to alter Wetovick's proposed budget.

On cross-appeal, Wetovick assigns that the court erred in (1) failing to award Pilakowski backpay and benefits; (2) failing to order the Board to set aside reimbursement funds received from the state and federal government, for costs incurred in child support enforcement, in a separate account to enhance child support enforcement; and (3) failing to award him attorney fees.

STANDARD OF REVIEW

[1-4] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.[2] An action for a declaration that a governmental entity has violated a law is equitable in nature.[3] In reviewing an equity action for a declaratory judgment, an appellate court decides factual issues de novo on the record and reaches conclusions independent of the trial court.[4] But when credible evidence is in conflict on material issues of fact, the court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.[5]

[5-7] Justiciability issues that do not involve a factual dispute present a question of law.[6] And statutory interpretation is

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[1] Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 2008).

[2] *Homestead Estates Homeowners Assn. v. Jones*, 278 Neb. 149, 768 N.W.2d 436 (2009).

[3] See *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

[4] *Homestead Estates Homeowners Assn., supra* note 2.

[5] *Id.*

[6] *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

a question of law.[7] We resolve questions of law independently of the determination reached by the court below.[8]

ANALYSIS OF BOARD'S APPEAL

The Case Was Not Moot

The county's fiscal year for 2007-08 ended on June 30, 2008, and the court entered its order in August 2008. The Board contends that Wetovick's declaratory judgment action was moot because the court could not make a present determination about the reasonableness of his budget proposal after the fiscal year had ended. So it argues that the court lacked jurisdiction to grant any relief. We disagree.

[8-10] To obtain declaratory relief, a plaintiff must prove the existence of a justiciable controversy and an interest in the subject matter of the action.[9] A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.[10] Both standing and mootness are key functions in determining whether a justiciable controversy exists, or whether a litigant has a sufficient interest in a case to warrant declaratory relief.[11]

[11,12] Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.[12] Unless an exception applies, a court or tribunal must dismiss a moot case when changed circumstances have precluded it from providing any meaningful relief because the

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[7] *Id.*

[8] *Id.*

[9] *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007).

[10] *Id.*

[11] *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006).

[12] *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009).

litigants no longer have a legally cognizable interest in the dispute's resolution.[13]

Wetovick sought a declaration that he reasonably required a full-time secretary to run his office and that the Board lacked authority to disapprove his budget. The court found that the Board had acted unreasonably in refusing to approve his budget. As we will explain, the court's finding meant that the Board lacked authority to disapprove Wetovick's budget and that the Board's action was void.[14] Moreover, when the judgment was issued, Wetovick had other claims pending: (1) a claim for a declaration that his office was entitled to all federal reimbursement funds and (2) a petition for a writ of mandamus. Both parties obviously maintained an interest in the resolution of these issues. So the case was not mooted by the ending of the county's fiscal year.

The Court Had Authority to Order the Board to Approve Wetovick's Budget Request for a Full-Time Assistant

[13,14] Alternatively, the Board contends that even if the case was not moot, the court lacked authority in a declaratory judgment action to order the Board to approve Wetovick's budget. However, when the plaintiff's pleadings in a declaratory judgment action put the defendant on notice of the remedy sought, a trial court may order relief which is clearly within the scope of its declaratory judgment.[15] Conversely, when a party's requested relief is not clearly within the scope of a court's declaratory judgment, the court should grant such relief only for a plaintiff's concurrent or subsequent cause of action or the plaintiff's application for supplemental relief under § 25-21,156.[16]

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[13] See *id.*

[14] See, *Eriksen v. Ray*, 212 Neb. 8, 321 N.W.2d 59 (1982); *State, ex rel. Allen, v. Miller*, 138 Neb. 747, 295 N.W. 279 (1940).

[15] See, e.g., *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *Heimbouch v. Victorio Ins. Serv., Inc.*, 220 Neb. 279, 369 N.W.2d 620 (1985); *Dixon v. O'Connor*, 180 Neb. 427, 143 N.W.2d 364 (1966).

[16] See, *Standard Fed. Sav. Bank v. State Farm*, 248 Neb. 552, 537 N.W.2d 333 (1995); *S.N. Mart, Ltd. v. Maurices Inc.*, 234 Neb. 343, 451 N.W.2d 259 (1990).

We conclude that the court's order effectively determined that the Board was without authority to disapprove Wetovick's budget request for a full-time assistant. Because the court had authority to order relief within the scope of its declaratory judgment, it could order the Board to approve Wetovick's budget.

The Standard for Disapproving an Officer's Employment Determination Is Proof by a Preponderance That the Officer's Decision Was Unreasonable, Arbitrary, or Capricious

The Board contends that under § 23-1111, it may disapprove the terms and conditions of employment set by an elected officer if it "has *any* evidence"[17] that the terms and conditions are unreasonable. For its "any evidence" standard, it relies on our decision in *Bass v. County of Saline*,[18] in which we interpreted and applied § 23-1111.

Section 23-1111 provides, "The *county officers* in all counties *shall have the necessary clerks and assistants for such periods and at such salaries as they may determine* with the approval of the county board, whose salaries shall be paid out of the general fund of the county." (Emphasis supplied.) In *Bass*[19] and *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*,[20] we specifically held under § 23-1111, it is the duty of county officers to determine the employment terms and conditions for their necessary employees.

In *Bass*, the county board reduced a county court clerk's salary, set by the county judge, by $35 per month under the board's established salary schedule. The board relied on the approval requirement in § 23-1111 to argue that it could reduce the salary, even though the board did not dispute that the judge had set a reasonable and fair salary.

We rejected that argument. We stated that a county board cannot arbitrarily ignore the officer's employment determination:

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[17] Brief for appellants at 19 (emphasis in original).

[18] *Bass v. County of Saline*, 171 Neb. 538, 106 N.W.2d 860 (1960).

[19] See *id.*

[20] *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985).

"To so hold would have the effect of investing the county board with full power to fix salaries of employees in county offices contrary to the expressed intent of the Legislature, and render nugatory the provision of section 23-1111 . . . granting such authority to county officers."[21]

In determining the effect of the Legislature's requirement of a county board's approval, we relied on an earlier case dealing with a similar issue. That case involved the Attorney General's statutory authority to expend highway cash funds "'subject to the approval of the state engineer.'"[22] There, we stated:

> "'The amount of work involved in rendering the services and the proportionate charge that should be made therefor is a matter peculiarly within the knowledge and the discretion of the attorney general. *In the absence of a showing that such charges are unreasonable or unconscionable*, [the attorney general's] decision as to the allocation of expenditures must be controlling.'"[23]

We also quoted with approval an Arizona Supreme Court case. That court applied the same reasoning to reverse a county board's reduction of a court reporter's salary set by local judges under their statutory authority to fix such salaries subject to the board's approval.[24]

We concluded from these cases that a county officer may not arbitrarily, capriciously, or unreasonably fix a salary. But we put the burden of proof on the county board to show that the officer's salary determination was arbitrary, capricious, or unreasonable before it could reduce or disapprove a salary set by the officer: "*In the absence of evidence* that the salary fixed by the county [officer] is unreasonable, capricious, or arbitrary, the county board is without authority to disapprove it."[25]

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[21] *Bass, supra* note 18, 171 Neb. at 541, 106 N.W.2d at 863.

[22] *Id.* at 542, 106 N.W.2d at 863, quoting *State, ex rel. Johnson, v. Tilley*, 137 Neb. 173, 288 N.W. 521 (1939).

[23] *Id*., quoting *State, ex rel. Johnson, supra* note 22 (emphasis supplied).

[24] *Bass, supra* note 18, citing *Powers v. Isley*, 66 Ariz. 94, 183 P.2d 880 (1947).

[25] *Id*. at 543, 106 N.W.2d at 864 (emphasis supplied).

But the Board contends that under *Bass*, the only question for the district court was whether the Board acted without any evidence that Wetovick's salary determination was unreasonable. It argues that in *Bass*, we required only some evidence for a board to disapprove an officer's employment determination. We disagree.

[15-17] Our limitation in *Bass* of a county board's power to disapprove an officer's employment determination balanced the requirement of a board's approval under § 23-1111 with the broader rule that a board cannot exercise duties the Legislature has granted to county officers. A county in this state is a creature of statute and has no inherent authority. It can exercise only those powers expressly granted to it by statute or necessarily implied to carry out its expressed powers.[26] A grant of power to a county is strictly construed, and reasonable doubts regarding the existence of its power are resolved against it.[27] Accordingly, we have held that absent a legislative grant of authority, a county board has no power to perform the official duties of other officials or boards.[28]

[18,19] Under these principles, we reject the Board's argument that a county board can disapprove an elected officer's employment determination if there is any evidence that the determination is unreasonable. Doing so would eviscerate the Legislature's intent in § 23-1111 that county officers have the duty to make these decisions and would shift employment decisions to county boards. In *Bass*, we clearly required county boards to adduce evidence that an officer's employment determination was unreasonable before disapproving it. This holding simply clarified which party had the burden of proof

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[26] *State ex rel. Johnson v. County of Gage*, 154 Neb. 822, 49 N.W.2d 672 (1951) (citing cases). See, also, *L. J. Vontz Constr. Co. v. City of Alliance*, 243 Neb. 334, 500 N.W.2d 173 (1993); *Thiles v. County Board of Sarpy County*, 189 Neb. 1, 200 N.W.2d 13 (1972); *Bass, supra* note 18.

[27] *Guenzel-Handlos v. County of Lancaster*, 265 Neb. 125, 655 N.W.2d 384 (2003); *DLH, Inc. v. Lancaster Cty. Bd. of Comrs.*, 264 Neb. 358, 648 N.W.2d 277 (2002); *State ex rel. Johnson, supra* note 26.

[28] See, e.g., *Sarpy Co. Pub. Emp. Assn., supra* note 20; *Speer v. Kratzenstein*, 143 Neb. 310, 12 N.W.2d 360 (1943).

in these disputes. Although we did not specify a standard of proof, unless an exception applies, only a preponderance of evidence is required in civil cases.[29] Monetary disputes are not an exception.[30] Thus, the obvious meaning of our holding in *Bass* is that under § 23-1111, unless a county board shows by a preponderance of the evidence that an elected officer's employment determination is arbitrary, capricious, or unreasonable, it lacks authority to disapprove it.

The Board's General Budgeting Authority Under § 23-908 Does Not Control a County Officer's Employment Decisions

The Board also contends that the court failed to recognize its authority under § 23-908 to alter Wetovick's budget. That statute, in relevant part, provides:

> The county board shall consider the budget document, as submitted to it by the budget-making authority, of the county, and may, in its discretion, revise, alter, increase or decrease the items contained in the budget, but not without first having a hearing with the office or department affected.

Relying on our decision in *Meyer v. Colin*,[31] the Board argues that it acted within its authority to alter Wetovick's budget as long as it did not budget his office out of existence or unduly hinder him in the performance of his duties.

[20] Under § 23-908, an officer is not the "budget-making authority." Neb. Rev. Stat. § 23-906 (Reissue 2007) specifies that the county's budget-making authority is the county's finance committee unless the county board has instead designated one of its own members or the county comptroller. It is true that § 23-908 gives a county board authority to revise, alter, increase, or decrease the overall county budget document.

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[29] See, e.g., *Pallas v. Dailey*, 169 Neb. 533, 100 N.W.2d 197 (1960); *Keiserman v. Lydon*, 153 Neb. 279, 44 N.W.2d 513 (1950).

[30] See *Nebraska Legislature on behalf of State v. Hergert*, 271 Neb. 976, 720 N.W.2d 372 (2006), citing *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

[31] *Meyer v. Colin*, 204 Neb. 96, 281 N.W.2d 737 (1979).

But a county board may not use its authority under § 23-908 to budget an office out of existence or to unduly hinder the officer in the conduct of his or her duties.[32] And, citing *Bass*, we have held that § 23-908 does not control a budget dispute when a more specific statute applies.[33] The more specific statute for this budget dispute—who sets salary and working conditions—is obviously § 23-1111. That conclusion is consistent with our decision in *Meyer*.

In *Meyer*, the county board had instructed officeholders and department heads to exclude expected salary raises for employees from their budget requests. If an office was short of funds needed for raises, the board required officeholders to request supplemental appropriations from a contingent account the board had established and funded. When the county assessor ignored this instruction and included the estimated cost-of-living raises for his employees in his budget, the county board deleted the raises from his budget. The assessor challenged the board's budgetary practice generally. One of his arguments on appeal was that the board's deletion of his employees' raises constituted an unwarranted interference by the board with the operation of his office. But we did not decide this issue under § 23-908, because the board's action directly implicated the assessor's independence and discretion under § 23-1111:

> *The question presented is actually distinct from mere budgeting procedures and relates, instead, to the independence and discretion which are to be afforded an elected officer.* It is clear that section 23-1111, . . . requiring the approval of salaries by the County Board, does not allow the Board to arbitrarily reduce the salaries recommended by the elected officer. See Bass v. County of Saline, 171 Neb. 538, 106 N. W. 2d 860. Similarly, the power of the Board to reduce requests submitted by the various offices, provided in section 23-908, . . . does not give the Board the authority to budget a particular

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[32] *State ex rel. Garvey v. County Bd. of Comm.*, 253 Neb. 694, 573 N.W.2d 747 (1998); *Meyer, supra* note 31.

[33] See *State ex rel. Agricultural Extension Service v. Miller*, 182 Neb. 285, 154 N.W.2d 469 (1967).

> office out of existence or to unduly hinder the officer in the conduct of his duties. [The assessor] testified he was running his office shorthanded because of the cut in his requested budget. This condition was, however, essentially self-imposed. *At no time did he request a supplemental appropriation. Without regard to the appropriateness of its doing so, it fully appears that the Board stood ready to make such appropriations. There is no evidence of any intent of the Board to interfere or of any actual interference by the Board in the operation of* [*the assessor's*] *office.*[34]

Obviously, an issue decided on an officer's failure to prove a county board's interference with his salary determination did not pronounce any new standard of proof for a board's disapproval of an officer's salary determination. So *Meyer* did not disturb the central holding in *Bass* that a board must show the officer's determination was unreasonable, arbitrary, or capricious before it can reduce or disapprove that salary.

[21] Moreover, the Board's contention that *Meyer* somehow changed this standard is refuted by our later decision in *State ex rel. Garvey v. County Bd. of Comm.*[35] There, we concluded that § 23-1111 did not apply to a public defender's personnel requests, because a more specific statute applied. But we repeated our holding in *Bass* that when § 23-1111 governs, the county board lacks authority to disapprove an officer's salary determination absent evidence that the officer acted unreasonably, capriciously, or arbitrarily. We conclude that in budget disputes between a county board and an elected officer over the officer's employment determinations, § 23-1111 controls, not § 23-908, unless a more specific statute applies to a particular officer's personnel requests.

[22] Finally, *Bass* was decided in 1960. And the Legislature has not amended § 23-1111. Ordinarily, when an appellate court judicially construes a statute and that construction

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[34] *Meyer, supra* note 31, 204 Neb. at 102, 281 N.W.2d at 741-42 (emphasis supplied).

[35] *State ex rel. Garvey, supra* note 32.

fails to evoke an amendment, it is presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.[36]

Having disposed of the Board's arguments that the court applied the wrong standards in deciding this issue, we come to the main issue—whether the court erred in finding that Wetovick's budget request for a full-time secretary was reasonable.

The District Court Correctly Found That Wetovick Reasonably Determined That He Needed a Full-Time Secretary

The Board contends that Wetovick's request for a full-time secretary was unreasonable because he "complained to the Board that his office did not have enough hours of clerical support to perform its child support enforcement duties, yet he demanded that the Board approve a budget for his office that would not have remedied that shortfall."[37] Alternatively, the Board contends that Wetovick's testimony that he wanted to avoid turnover in his office did not support the court's finding that his request was reasonable. It argues that the evidence failed to show that the county had a higher turnover rate with part-time employees than with full-time employees. And it argues that Wetovick admitted to interviewing two qualified applicants who wanted to work only part time. Finally, the Board argues that its part-time requirement could have resulted in Wetovick's having more hours of clerical staff per week at less cost to the county. These arguments miss the mark.

[23] Whether a county officer has reasonably fixed the terms and conditions of employment for an assistant or clerk presents a question of fact.[38]

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[36] *Lagemann v. Nebraska Methodist Hosp.*, 277 Neb. 335, 762 N.W.2d 51 (2009).

[37] Brief for appellants at 22.

[38] See, *Tolliver v. Visiting Nurse Assn.*, 278 Neb. 532, 771 N.W.2d 908 (2009); *Stueve v. Valmont Indus.*, 277 Neb. 292, 761 N.W.2d 544 (2009); *In re Guardianship & Conservatorship of Cordel*, 274 Neb. 545, 741 N.W.2d 675 (2007); *Plath v. Brunken*, 102 Neb. 467, 167 N.W. 567 (1918); 18B Am. Jur. 2d *Corporations* § 1661 (2004).

The Board does not contend that Wetovick's salary determination for a full-time assistant was unreasonable. And Wetovick presented ample evidence to show that he needed a full-time secretary to assist him with child support enforcement duties, to draft legal documents, and to deal with the public while he was away.

He further presented evidence that the CHARTS computer system was complicated and that using the system required extensive training, which was expensive. His secretary was required to devote 15 hours per week just to the CHARTS system and child support enforcement duties. Wetovick's admission that even with his full-time secretary, he still needed to have more hours devoted to these duties did not mean that his request for a full-time secretary was unreasonable. Even if he could have obtained slightly more hours of clerical assistance by paying two part-time employees a lower hourly salary, he could reasonably conclude that a well-trained, full-time assistant would perform the child support enforcement duties more effectively and efficiently. His secretary had already received extensive training. And part-time employees would not develop the same expertise using the system as a secretary working full time. He could also reasonably conclude that because the position required extensive training and expertise, it justified a full-time salary with benefits so that an employee would be less likely to leave his employment.

The Board's contention that Wetovick could possibly get more hours of clerical assistance per week with two part-time employees fails to consider these factors. "[T]he amount of work involved in the rendering of services and the value of compensation for those services are matters particularly within the knowledge of the county official."[39] So Wetovick's decision to continue with one full-time, experienced secretary instead of two part-time, inexperienced secretaries was within his discretion unless the Board showed that his salary determination was unreasonable.

But Wetovick also presented evidence that his salary determination was within the range of salaries paid other full-time

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[39] *State ex rel. Garvey, supra* note 32, 253 Neb. at 699, 573 N.W.2d at 750.

legal secretaries. As noted, the Board's chairperson conceded that the primary reason for the Board's disapproval of a salary for a full-time secretary and insistence upon part-time secretaries was to avoid paying benefits. This claim was essentially the same as its argument on appeal: i.e., that it can reduce an officer's employment determination under its general budgetary authority whenever it determines an officer could have hired someone for a lower salary or without benefits. We reject that argument.

[24] Permitting county boards to disapprove any employment determination because the officer could have hired someone with less experience for a lower salary would shift the duty to hire assistants to the boards. The Legislature did not intend for county boards to micromanage an officer's employment decisions. Nor did it intend for county boards to dictate that an officer cannot set reasonable working conditions if the employee would be eligible for benefits. Evidence that an elected officer could hire part-time assistants, or even a full-time assistant, for a somewhat lower salary or without benefits does not alone show that the officer's choice is unreasonable.

In addition, the Board originally approved Pilakowski's salary and only disapproved it after she filed a successful grievance over the amount of her incentive buyout. Despite the Board's claim that it only initially approved Pilakowski's salary to help Wetovick get started in his office, the same cost savings existed both before and after its dispute with her. It seems odd and counterproductive that the Board would have permitted Wetovick to train Pilakowski on the CHARTS system if it had intended to disapprove her salary in the next fiscal year. Finally, the Board singled Wetovick's office out for its part-time, "no benefits" requirements. It did this despite evidence that his office's child support efforts had significantly increased reimbursement revenues for the county that would have covered the cost of a full-time secretary.

While we are aware of the effect that rising health care costs have on local governments, the Board is not handcuffed in budget disputes. Under *Meyer*,[40] the Board can use its general

[40] See *Meyer, supra* note 31.

budgetary authority to reasonably reduce an officer's overall budget as long as it does not budget the office out of existence or unduly hinder the officer in performing his or her duties. But that is not what the Board did here.

In sum, our de novo review of the evidence supports the district court's finding that Wetovick was reasonable in wanting to hire a full-time secretary over two part-time assistants. It also supports the court's finding that the Board had unreasonably disapproved his budget. But because the county failed to prove that Wetovick's employment determination was unreasonable, it lacked authority to disapprove it. The Board's disapproval was therefore void. We turn next to Wetovick's cross-appeal.

ANALYSIS OF WETOVICK'S CROSS-APPEAL

Wetovick Lacked Standing to Obtain Declaratory Relief for Pilakowski

Wetovick argues that the court erred in failing to declare that Pilakowski was entitled to backpay and benefits as requested in his prayer for relief. We disagree.

Wetovick had an obvious interest in knowing whether he could set a reasonable salary and terms of employment despite the Board's "no benefits" requirement. To the extent that Wetovick sought to clarify his relationship with the Board, Pilakowski was not a necessary party to his obtaining declaratory relief, because the court could decide the controversy without prejudicing her interests.[41] But Wetovick lacked standing to seek declaratory relief for Pilakowski, and she was not joined as a party.

The Record Fails to Show That the Board Had Excess Reimbursement Funds to Appropriate to Wetovick's Budget

Wetovick contends that the court erred in failing to determine that the plain language of Neb. Rev. Stat. § 43-512.05(3) (Reissue 2008) requires the Board to segregate federal

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[41] See, *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009); *Dunn v. Daub*, 259 Neb. 559, 611 N.W.2d 97 (2000).

reimbursement funds to be used only for enhancing child support enforcement efforts. Section 43-512.05(3) provides:

> The department shall adopt and promulgate rules and regulations regarding the rate and manner of reimbursement for costs incurred in carrying out [§§ 43-512 to 43-512.10 and 43-512.12 to 43-512.18], taking into account relevant federal law, available federal funds, and any appropriations made by the Legislature. Any reimbursement funds shall be added to the budgets of those county officials who have performed the services as called for in the cooperative agreements and carried over from year to year as required by law.

The federal Child Support Enforcement Act[42] provides participating states with reimbursement funds for a percentage of their expenditures in operating a federally approved plan to improve the establishment and enforcement of support obligations.[43] Nebraska's § 43-512.05 is one of the state statutes that implement the federal requirements for receiving these funds. Section 43-512.05(2) provides:

> The department and the governing board of the county, county attorney, or authorized attorney may enter into a written agreement regarding the determination of paternity and child, spousal, and medical support enforcement for the purpose of implementing [§§ 43-512 to 43-512.10 and 43-512.12 to 43-512.18]. Paternity shall be established when it can be determined that the collection of child support is feasible.

Many of the statutes to which subsection (2) refers impose mandatory duties on a county attorney or an authorized attorney. These duties are also required under the Department's "cooperative reimbursement agreement" with the county board and county attorney. The cooperation agreement also includes other duties that are required by other Nebraska statutes or federal regulations. But whether the Department's cooperation is with a county attorney or an authorized attorney, many of

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[42] See 42 U.S.C. §§ 651 to 669b. (2006).

[43] See 42 U.S.C. §§ 651 and 655.

the duties required under § 43-512.05(2) and the cooperation agreement must be performed by a law enforcement official authorized to prosecute claims on behalf of the State. And the Board did not show that a county employee outside of Wetovick's office performed any of the contract's duties.

As noted, § 43-512.05(3) provides that "[a]ny reimbursement funds shall be added to the budgets of those county officials *who have performed the services* as called for in the cooperative agreements and *carried over from year to year* as required by law." (Emphasis supplied.) The Board concedes that subsection (3) "may appear to direct counties to add reimbursement funds to their county attorneys' budgets."[44] But it contends that the statute actually directs that only county boards be reimbursed because county board members are the only county officials who appropriate funds for child support enforcement activities.

The cooperation agreement provides that the Department will reimburse the county for a percentage of its expenditures under the agreement, including employees' salaries and benefits, to the extent that those employees were performing child support enforcement duties. To receive reimbursement funds, the Department required documentation for the time employees spent performing the agreement's duties. For that prorated portion of their salaries and benefits, the Department reimbursed the county at the rate allowed under federal statutes.[45]

Obviously, if the county board has already appropriated sufficient funding to the county attorney's office to pay the necessary salaries for performing the duties under the cooperation agreement, then additionally requiring the board to appropriate all federal reimbursement funds to the county attorney's budget would result in a double reimbursement. Thus, reading § 43-512.05(3) literally could lead to an absurd result in some circumstances.

[25] But when subsections (2) and (3) are read together, we believe the Legislature intended to avoid this result by permitting the Department to also contract with the county board.

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[44] Reply brief for appellants at 19.

[45] See 42 U.S.C. § 655(a)(2).

So under § 43-512.05, to the extent that the county board has already appropriated sufficient funding to pay the necessary salaries and expenses for performing child support enforcement duties, we conclude that the Board is entitled to deposit federal reimbursement funds into its general fund. But for any reimbursement funds that the county is not entitled to keep, § 43-512.05(3) plainly requires such funds to be carried over from year to year in the county attorney's budget when his or her office is performing all of the child support enforcement duties.

Clearly, the county would not have received the reimbursement funds if Wetovick's office had not documented the time he and Pilakowski spent on child support enforcement duties. But we do not have those documents in the record. Nor do we have the Department's reimbursement records. We conclude that the record is insufficient for us to determine whether Wetovick was entitled to have any of the reimbursement funds set aside for his office.

Attorney Fees

Finally, Wetovick contends that the court erred in failing to award him attorney fees. He argues that § 25-21,158 permits an award of costs in declaratory judgment actions and that costs include attorney fees. We disagree.

[26] A party may recover attorney fees and expenses in a civil action only when a statute permits recovery or when the Nebraska Supreme Court has recognized and accepted a uniform course of procedure for allowing attorney fees.[46]

[27,28] It is true that § 25-21,158 gives a court discretion to award costs in a declaratory judgment action. But in the only case in which we have applied this statute, we awarded only costs, not attorney fees.[47] The term "costs" in a statute is not generally understood to include "attorney fees."[48] In declaratory judgment cases in which attorney fees were allowed,

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[46] *Evertson, supra* note 6.

[47] *Phillips v. Phillips*, 163 Neb. 282, 79 N.W.2d 420 (1956).

[48] See, *Oliver v. Lansing*, 57 Neb. 352, 77 N.W. 802 (1899); 1 Robert L. Rossi, Attorneys' Fees § 7:2 (2d ed. 1995) (citing cases).

the parties' dispute involved other statutes that permitted the recovery of attorney fees.[49] But in declaratory judgment cases in which we concluded that other statutes authorizing attorney fees did not apply, we determined that the party was not entitled to attorney fees.[50] We have reached the same conclusion after determining that a contract provision providing for attorney fees was void as against public policy.[51] Clearly, under § 25-21,158, we have not interpreted "costs" to include attorney fees or recognized a uniform course of procedure generally permitting attorney fees to be taxed as costs. So without another source of statutory authority permitting attorney fees to be taxed as costs, the prevailing party cannot recover attorney fees in a declaratory judgment action. This also is the general rule in other jurisdictions.[52]

[29,30] Wetovick relies on our decision in *Smeal Fire Apparatus Co. v. Kreikemeier*.[53] His reliance is misplaced. There, we stated that "[c]osts, including reasonable attorney fees, can be awarded in a contempt proceeding."[54] Attorney fees in contempt cases fall under a court's inherent power to do all things necessary to enforce its judgment.[55] But outside

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[49] See, e.g., *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993); *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990); *Coleman v. Kahler*, 17 Neb. App. 518, 766 N.W.2d 142 (2009); *Alderman v. County of Antelope*, 11 Neb. App. 412, 653 N.W.2d 1 (2002).

[50] See, e.g., *State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co.*, 222 Neb. 13, 382 N.W.2d 2 (1986); *Dairyland Ins. Co. v. Kammerer*, 213 Neb. 108, 327 N.W.2d 618 (1982); *Ehlers v. Campbell*, 159 Neb. 328, 66 N.W.2d 585 (1954); *State ex rel. Ebke v. Board of Educational Lands & Funds*, 159 Neb. 79, 65 N.W.2d 392 (1954).

[51] *Quinn v. Godfather's Investments*, 217 Neb. 441, 348 N.W.2d 893 (1984).

[52] See 1 Allan D. Windt, Insurance Claims & Disputes: Representation of Insurance Companies and Insureds § 8:14 (5th ed. 2007) (citing cases).

[53] *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006).

[54] *Id.* at 625, 715 N.W.2d at 142.

[55] See *Kasparek v. May*, 174 Neb. 732, 119 N.W.2d 512 (1963), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier, ante* p. 661, 782 N.W.2d 848 (2010).

of enforcing orders and judgments, we have extended a court's inherent power to award attorney fees only in a narrow circumstance: when a party's conduct during the course of litigation is so vexatious, unfounded, and dilatory that it amounts to bad faith.[56] And we have specifically declined to extend that exception further.[57] Obviously, the court correctly found that the exception does not apply here, and the court was not enforcing its judgment in a contempt proceeding. Because no statute or uniform course of action permitted attorney fees to be taxed as costs in this action, this assignment is without merit.

CONCLUSION

We conclude that the case was not moot at the time of judgment. We conclude that disputes over a county officer's employment decisions are controlled by § 23-1111, not a county board's general budgeting authority under § 23-908. In disputes under § 23-1111, a county board cannot disapprove an officer's employment determination unless it proves by a preponderance of the evidence that the officer's decision was arbitrary, capricious, or unreasonable.

We conclude that the court properly found that Wetovick reasonably needed a full-time secretary. Because the Board failed to prove that his decision was unreasonable, it lacked authority to disapprove Wetovick's budget request for his secretary. And because the court had authority to order relief within the scope of its declaratory judgment, it could order the Board to approve Wetovick's budget.

Regarding Wetovick's cross-appeal, we conclude that he lacked standing to seek declaratory relief on behalf of his secretary, who was not joined as a party. We conclude that the record is insufficient to determine whether Wetovick was entitled to have the Board set aside federal reimbursement funds for his office's child support enforcement duties. Finally, we conclude that § 25-21,158 is not statutory authority for taxing attorney fees as costs and that no uniform

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[56] See *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983).

[57] See *Quinn, supra* note 51.

course of procedure generally permitted the court to tax attorney fees as costs in this declaratory judgment action. Accordingly, the court correctly denied the claims raised by Wetovick's cross-appeal.

AFFIRMED.

HEAVICAN, C.J., dissenting.

I join in the majority's conclusion that this appeal is not moot, as well as its decision with respect to Wetovick's cross-appeal. But I dissent from the majority's conclusion that the Board lacked the authority to disapprove Wetovick's budget request.

The majority's opinion relies heavily on this court's decision in *Bass v. County of Saline*,[1] as well as subsequent cases discussing and interpreting *Bass.* In the present case, the majority interprets *Bass* and subsequent cases, as well as Neb. Rev. Stat. § 23-1111 (Reissue 2007), to hold that "a county officer may not arbitrarily, capriciously, or unreasonably fix a salary. But we put the burden of proof on the county board to show that the officer's salary determination was arbitrary, capricious, or unreasonable before it could reduce or disapprove a salary set by the officer."

But § 23-1111 states no such standard. That section provides that "[t]he county officers in all counties shall have the necessary clerks and assistants for such periods and at such salaries as they may determine with the approval of the county board, whose salaries shall be paid out of the general fund of the county." This language plainly states *only* that county officers should have necessary clerks and assistants as the officer determines *with the approval of the county board.*

In this case, the Board is the budget-making authority for the county. Not only does § 23-1111 give the Board some authority over the salaries of employees of county officers, but Neb. Rev. Stat. § 23-908 (Reissue 2007) gives the Board the discretionary authority to "revise, alter, increase or decrease the items contained in the budget," subject to a hearing for those affected offices. When considered together, it is clear

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[1] *Bass v. County of Saline*, 171 Neb. 538, 106 N.W.2d 860 (1960).

to me that the Board retains authority over the budgets of its county officials.

The statutes in this case are not conflicting; rather, the problem is *Bass*. The standard set forth in that case, which is not supported by the plain meaning of the statute it purports to interpret, creates a conflict where there is otherwise none—namely, that a board cannot arbitrarily reduce a salary under § 23-1111, but nevertheless retains discretionary authority to revise budgets under § 23-908. This conflict makes it difficult at best for budget-making authorities in counties such as Nance County to adequately budget. In my view, *Bass* wrongly interprets § 23-1111 and should be overruled.

Instead, I would adopt the standard set forth in *Meyer v. Colin*.[2] In *Meyer*, we noted the authority of the officer to set salaries and further explained that under § 23-908, "the Board [does not have] the authority to budget a particular office out of existence or to unduly hinder the officer in the conduct of his duties."[3] The trial court in this case should be focused on whether the Board "unduly hindered" the officer, here the county attorney, from running his office. The burden should be on the county attorney, as the petitioner, to show that the Board has overstepped its bounds.[4]

Finally, I note that I agree with the majority insofar as its holding provides that a county board cannot infringe upon the power of a county official to run his or her office. For example, only the elected officer can decide whether to employ part-time or full-time employees. While I would conclude that a county board ultimately sets the budgetary policy of a county, in my view, this authority must be exercised carefully because it exists in harmony with the power of the county officer to set the salaries for his or her office (subject to board

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[2] *Meyer v. Colin*, 204 Neb. 96, 281 N.W.2d 737 (1979).

[3] *Id.* at 102, 281 N.W.2d at 741.

[4] See, e.g., *Tipp-It, Inc. v. Conboy*, 257 Neb. 219, 596 N.W.2d 304 (1999); *Jensen v. Universal Underwriters Ins. Co.*, 208 Neb. 487, 304 N.W.2d 51 (1981); *County of Banner v. Young*, 184 Neb. 546, 169 N.W.2d 280 (1969). See, also, 22A Am. Jur. 2d *Declaratory Judgments* § 239 (2003).

approval). I would affirm that power of the county officer to run his or her office as he or she sees fit, with that power subject to legitimate budgetary constraints encountered by the county board.

IN RE INTEREST OF DAKOTA M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DAKOTA M., APPELLANT.

781 N.W.2d 612

Filed April 29, 2010. No. S-09-989.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.
4. **Juvenile Courts: Probation and Parole.** Absent specific authority under the juvenile code, the juvenile courts do not have the authority to order the confinement of a juvenile as a condition of probation in the dispositional portion of a proceeding.

Appeal from the County Court for Madison County: DONNA F. TAYLOR, Judge. Reversed and vacated.

Melissa A. Wentling, Madison County Public Defender, for appellant.

Gail E. Collins, Deputy Madison County Attorney, for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

In this appeal, Dakota M. contends that the juvenile court did not have the statutory authority to impose detention as

a condition of his probation. Based on our holding in *In re Interest of Dustin S.*,[1] we conclude that he is correct.

BACKGROUND

On March 30, 2009, the county court for Madison County, sitting as a juvenile court, adjudicated Dakota as a child within the provisions of Neb. Rev. Stat. § 43-247(1) (Reissue 2008). Following a dispositional hearing on July 13, the court placed Dakota on supervised probation for a period of 6 months. As a condition of probation, the court ordered that Dakota "[a]ttend school, obey all school rules . . . not quit school, be absent or tardy . . . and . . . receive passing grades in all subjects."

On September 16, 2009, the State filed a motion for revocation of probation, alleging that Dakota had violated his probation by receiving a 5-day out-of-school suspension. Dakota appeared with his mother on September 29 and requested court-appointed counsel. The juvenile court granted Dakota's request and continued the hearing until counsel could be appointed. The juvenile court then included a "condition of release" to Dakota's probation, now requiring Dakota to serve any future out-of-school suspensions at a juvenile detention facility. The juvenile court specifically did not rule on the motion for revocation.

Dakota received another out-of-school suspension on October 6, 2009. The next day, Dakota's court-appointed counsel filed an objection to the detention order and argued that the juvenile court did not have the statutory authority to order detention and that the detention was contrary to this court's holding in *In re Interest of Dustin S.*[2] At a hearing on the motion, the State conceded that the court did not have the authority under the Nebraska Juvenile Code[3] but suggested that such authority might be found in Neb. Rev. Stat. § 29-2270 (Reissue 2008), which authorizes the court to enforce, modify, or revoke an existing probation order if the juvenile does not regularly

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[1] *In re Interest of Dustin S.*, 276 Neb. 635, 756 N.W.2d 277 (2008).

[2] *Id.*

[3] See Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 2008 & Supp. 2009).

attend school. The juvenile court overruled Dakota's objection, distinguishing his case from *In re Interest of Dustin S.* by stating, "I'm not even punishing him for a school rule violation. The Court's purpose of ordering children who are in out of school suspension is for their own protection."

Dakota timely appealed and also filed a motion to stay the juvenile court's order. The Court of Appeals granted the motion to stay on October 9, 2009. We subsequently moved the case to our docket on our own motion, pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[4]

ASSIGNMENT OF ERROR

Dakota assigns, consolidated and restated, that the juvenile court erred in imposing detention as a condition of probation because (1) it lacked statutory authority to do so and (2) it violated his right to due process.

STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[5] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[6]

ANALYSIS

[3] The issue in this case is whether a court may order a juvenile adjudicated under § 43-247(1) to serve an out-of-school suspension in a juvenile detention center as a condition of probation. Section 43-247(1) gives juvenile courts original jurisdiction over "[a]ny juvenile who has committed an act other than a traffic offense which would constitute a misdemeanor or an infraction under the laws of this state, or

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[4] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[5] *In re Interest of C.H.*, 277 Neb. 565, 763 N.W.2d 708 (2009); *In re Interest of Dustin S., supra* note 1.

[6] *In re Interest of Dustin S., supra* note 1; *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008).

violation of a city or village ordinance." As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.[7] Section 43-286(1) permits several dispositions with respect to a juvenile adjudicated under § 43-247(1), including restitution, community service, probation, or placement of the juvenile in a suitable family home or institution.

[4] We held in *In re Interest of Dustin S.*[8] that § 43-286(1) does not authorize juvenile courts to order confinement of a juvenile as a condition of probation. In that case, the court ordered the juvenile to complete 6 months of probation for secretly placing a video camera inside his neighbor's bedroom closet. The court included a 6-day detention as one of the conditions of probation, stating that its purpose in requiring the detention was to make the victim feel like the juvenile did not get off "'scott free [sic].'"[9] Although we noted that punishment was not a purpose of detention in the juvenile setting, our holding was clearly based upon the juvenile court's lack of statutory authority to order the detention. Specifically, we concluded that "absent specific authority under the juvenile code, the juvenile courts of this state do not have the authority to order the confinement of a juvenile as a condition of probation in the dispositional portion of the proceeding."[10]

In this case, the court attempted to distinguish its action from the detention order in *In re Interest of Dustin S.* by noting that the detention was for Dakota's own protection, not for purposes of punishment. But that is a distinction without a difference. Just as there was no statutory authority for the detention order in *In re Interest of Dustin S.*, there was none here. At the time of the detention order, there was a pending motion to revoke Dakota's probation, but revocation had not yet occurred. Dakota remained on probation. And there is nothing in the juvenile code which permitted the court to order that

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[7] *In re Interest of Dustin S., supra* note 1.

[8] *Id.*

[9] *Id.* at 637, 756 N.W.2d at 279.

[10] *Id.* at 639, 756 N.W.2d at 280.

out-of-school suspensions be served in a detention center as a condition of probation. Regardless of the court's intentions, it simply did not have the legal authority under the juvenile code to order detention while Dakota remained on probation.

Nor does § 29-2270 authorize the detention order. That statute provides that a person who is less than 19 years of age and is subject to the supervision of a juvenile or adult probation officer shall, as a condition of probation, be required to attend school or vocational training, and it authorizes a district, county, or juvenile court to "take appropriate action to enforce, modify, or revoke its order granting probation" in the event of noncompliance with this condition.[11] But "appropriate action" for a juvenile court is limited to that which is authorized by the juvenile code, and it does not include detention of a juvenile who is on probation.[12]

CONCLUSION

For the reasons discussed, we reiterate our prior holding that juvenile courts do not have the statutory authority to impose detention as a condition of probation. Accordingly, we reverse and vacate the juvenile court's detention order in this case. Because this resolves the appeal, we do not address Dakota's due process argument.

REVERSED AND VACATED.

HEAVICAN, C.J., not participating.

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[11] § 29-2270.

[12] See *In re Interest of Dustin S., supra* note 1.

IN RE INTEREST OF TYLER T., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. TYLER T., APPELLANT.

781 N.W.2d 922

Filed April 29, 2010. Nos. S-09-631 through S-09-633.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.

2. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Juvenile Courts: Records.** Separate juvenile courts and county courts sitting as juvenile courts are courts of record.

Appeals from the County Court for Madison County: DONNA F. TAYLOR, Judge. Reversed and vacated, and causes remanded for further proceedings.

Melissa A. Wentling, Madison County Public Defender, for appellant.

Joseph M. Smith, Madison County Attorney, and Gail E. Collins for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Following multiple adjudications by the county court for Madison County, sitting as a juvenile court, Tyler T. was placed on probation and ordered to successfully complete juvenile drug treatment court. In these consolidated appeals, Tyler appeals from an order apparently entered by that court in each of these cases, requiring that he serve 1 day in a juvenile detention center for failing a drug test administered by the drug treatment court. Because the record is insufficient for meaningful appellate review, we reverse, vacate the orders, and remand each cause for further proceedings.

BACKGROUND

On March 13, 2007, Tyler was adjudicated pursuant to Neb. Rev. Stat. § 43-247(2) (Cum. Supp. 2006) and placed on probation. On September 24, he was adjudicated under § 43-247(1) and found to be in violation of the prior probation order. The juvenile court extended his probation and made it applicable to both cases. On March 25, 2008, the juvenile court again adjudicated Tyler pursuant to § 43-247(1). The juvenile court extended the probation on the two prior adjudications and made it applicable to all three cases.

The State filed motions to revoke probation in all three cases on June 25, 2008. Instead of revoking Tyler's probation, the juvenile court extended the probation for 9 months and imposed additional conditions. The State again moved to revoke probation in all three cases on April 9, 2009. Following a hearing on the motions, the juvenile court again extended the probation for 1 year and added the condition that Tyler attend and successfully complete the drug treatment court program. The record shows that Tyler participated in that program from June 2 to 16. But there is no verbatim record of any proceedings after June 16. The final entry in the bill of exceptions states, "There was no recording made of Tyler[']s hearing on June 23, 2009."

The notice of appeal filed in each case indicates that Tyler appeals from an "Arrest and/or Detention Authorization" filed June 23, 2009, but that document does not appear in any of the transcripts. On Tyler's motion, confessed by the State, the Court of Appeals entered orders in each appeal staying commitment of Tyler pending further order of the court. In each case, there is a praecipe requesting documents pertaining to proceedings that occurred on June 23, but the county court responded with a "Showing" which states, "[The] requested [documents] are in possession of the Probation Office and are not a part of the County Court filings. Therefore these items are not included in the transcript." After the appeals were docketed, the parties filed a stipulation in each case regarding what transpired on June 23 and their unsuccessful efforts to obtain a record from the court. We moved the appeals to our docket pursuant to our statutory authority to regulate the dockets of the appellate courts[1] of this state and ordered the appeals consolidated for oral argument and disposition.

ASSIGNMENT OF ERROR

Tyler assigns, restated, that the lower court erred in imposing detention as a sanction for allegedly failing a drug test when (1) such sanction constitutes a due process violation and (2) the lower court did not have the statutory authority to

[1] Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

impose such sanction. In its briefs, the State concedes that the juvenile court was without authority to commit Tyler to a juvenile detention center.

STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[3]

ANALYSIS

Recently and again today, we held that a juvenile court does not have statutory authority to order detention of a juvenile who is on probation.[4] The same issue is presented in these appeals, but we are unable to reach it because of glaring deficiencies in the record. An appellate court obviously cannot conduct a de novo review "on the record" where there is no record of that portion of a proceeding to which error is assigned. While it is generally incumbent upon the appellant to present a record supporting the errors assigned,[5] it is apparent in the present case that no verbatim record was made of the hearing conducted on June 23, 2009. Additionally, when a transcript, containing the pleadings and order in question, is sufficient to present the issue for appellate disposition, a bill of exceptions is unnecessary to preserve an alleged error of law regarding the proceedings under review.[6] But here, the transcripts do not include the orders apparently entered on that date to which error was assigned, because, according to the county judge, the

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[2] *In re Interest of C.H.*, 277 Neb. 565, 763 N.W.2d 708 (2009); *In re Interest of Dustin S.*, 276 Neb. 635, 756 N.W.2d 277 (2008).

[3] *In re Interest of Dustin S., supra* note 2; *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008).

[4] *In re Interest of Dakota M., ante* p. 802, 781 N.W.2d 612 (2010); *In re Interest of Dustin S., supra* note 2.

[5] See *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

[6] *Foster v. Foster*, 266 Neb. 32, 662 N.W.2d 191 (2003).

orders are in the possession of the "Probation Office" and were never made a part of the court file.

The parties urge us to consider their stipulation filed in each case as the record on appeal. Our rules of appellate practice permit the parties to agree on a statement of a case which shall constitute the bill of exceptions on appeal, but we require that the case stated be certified by the trial judge and included in the transcript.[7] That did not occur here, and we therefore cannot consider the stipulation filed in each case as a "case stated" under this rule.[8] We are thus left with no record on appeal regarding the assigned errors, despite what we believe to be the sincere and diligent efforts of both parties to obtain a record from the county court.

[3] It is apparent from the arguments of counsel and the incomplete bill of exceptions that some type of hearing was held on June 23, 2009, and that it resulted in some type of detention order from which Tyler is attempting to appeal. There is no indication that the parties waived a record of the hearing. Separate juvenile courts and county courts sitting as juvenile courts are courts of record.[9] It was the responsibility of the county court, sitting as a juvenile court, to ensure that any testimony or other oral proceedings during the hearing were recorded.[10] And likewise, it was the responsibility of the county court to file its order so that the order could be included in the transcript and reviewed on appeal.

These responsibilities were not excused or diminished by the fact that this was a juvenile drug treatment court proceeding. The Legislature has generally authorized drug courts and other problem-solving-court programs to be established

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[7] See Neb Ct. R. App. P. § 2-105(B)(13) (rev. 2008).

[8] *Id.*

[9] See, Neb. Rev. Stat. §§ 24-502 (Reissue 2008), 24-517(10) (Supp. 2009), and 43-2,111 (Reissue 2008); *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987), *disapproved on other grounds, In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

[10] See, *Gerdes v. Klindt's, Inc.*, 247 Neb. 138, 525 N.W.2d 219 (1995); *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994); *Lockenour v. Sculley*, 8 Neb. App. 254, 592 N.W.2d 161 (1999).

and operated in accordance with rules promulgated by this court.[11] Under our rules, problem-solving courts encompass "programs and services established within the district, county or juvenile courts," including but not limited to "drug court programs established pursuant to Neb. Rev. Stat. § 24-1302."[12] Problem-solving courts may exist and be established only upon approval of this court.[13] They are "postplea or postadjudication in nature."[14]

Given the therapeutic component of problem-solving-court programs, we are not prepared to say that each and every action taken in such a proceeding must be a matter of record. But we have no difficulty in concluding that when a judge of a problem-solving court conducts a hearing and enters an order affecting the terms of the juvenile's probation, the proceeding must be on the record. We agree with other courts which have held that where a liberty interest is implicated in problem-solving-court proceedings, an individual's due process rights must be respected.[15]

Here, Tyler contends that the county court, sitting as a juvenile problem-solving court, ordered his detention without legal authority and in violation of his due process rights. We cannot undertake a meaningful appellate review of this claim because of the complete absence of a verbatim record of the hearing or the resulting order. Accordingly, in each appeal, we reverse the decision, vacate the purported detention order entered on June 23, 2009, and remand the cause for further proceedings.

REVERSED AND VACATED, AND CAUSES REMANDED FOR FURTHER PROCEEDINGS.

HEAVICAN, C.J., not participating.

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[11] Neb. Rev. Stat. §§ 24-1301 and 24-1302 (Reissue 2008).

[12] Neb. Ct. R. § 6-1202.

[13] Neb. Ct. R. § 6-1201.

[14] Neb. Ct. R. § 6-1208(A).

[15] See, e.g., *Torres v. Berbary*, 340 F.3d 63 (2d Cir. 2003); *Harris v. Com.*, 279 Va. 541, 689 S.E.2d 713 (2010); *State v. Rogers*, 144 Idaho 738, 170 P.3d 881 (2007); *People v. Anderson*, 358 Ill. App. 3d 1108, 833 N.E.2d 390, 295 Ill. Dec. 557 (2005); *State v. Cassill-Skilton*, 122 Wash. App. 652, 94 P.3d 407 (2004).

STATE OF NEBRASKA, APPELLEE, V. RAS D. HAAS, APPELLANT.

782 N.W.2d 584

Filed May 7, 2010. No. S-09-424.

1. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
3. **DNA Testing: Appeal and Error.** A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
4. ____: ____. In an appeal from a proceeding under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Reissue 2008), the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
5. **Equal Protection: Jurors: Discrimination.** The Equal Protection Clause of the 14th Amendment forbids prosecutors from using peremptory challenges to strike potential jurors solely on account of their race.
6. **Jurors: Discrimination: Prosecuting Attorneys: Proof.** The trial court's first step in evaluating whether a party has used a peremptory challenge in a racially discriminatory manner is to determine whether the defendant made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race.
7. **Postconviction: Appeal and Error.** An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief.
8. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** To establish ineffective assistance of counsel in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a defendant must show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that the deficient performance prejudiced the defendant in his or her case.
9. **Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
10. **Pleadings.** The decision to grant or deny an amendment to a pleading rests in the discretion of the court.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

James R. Mowbray and Jerry L. Soucie, of Commission on Public Advocacy, and Susan L. Kirchmann for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

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

WRIGHT, J.

NATURE OF CASE

Ras D. Haas was convicted of two counts of sexual assault on a child and was sentenced to 20 to 30 years' imprisonment on each count, to be served consecutively. The Nebraska Court of Appeals affirmed the convictions and sentences in *State v. Haas*, A-05-804, 2006 WL 996535 (Neb. App. Apr. 18, 2006) (not designated for permanent publication). In this action, Haas seeks postconviction relief on the grounds that trial counsel provided ineffective assistance because counsel failed to preserve a challenge to a juror pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (*Batson*), and failed to seek DNA testing of biological evidence.

SCOPE OF REVIEW

[1] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Id.*

[2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009). When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *Id.* With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80

L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *Dunster, supra*.

[3,4] A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007). In an appeal from a proceeding under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Reissue 2008), the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

FACTS

In 2005, a jury convicted Haas of two counts of sexual assault on a child. One victim, D.W., was 15 years old in April 2004. She testified that on April 12, 2004, she and S.S., a 14-year-old girl, decided to run away from home and ended up at Haas' apartment. They smoked marijuana, drank alcohol, spent the night, and then left the next morning.

D.W. testified she had sexual intercourse with Haas three times while at his apartment. D.W. claimed she agreed to have sex with Haas because S.S. told her that if "any of [the men at the apartment] wanted to do anything," she should do so, "otherwise [the girls] wouldn't have a place to stay." S.S. testified that she also had sexual intercourse with Haas. D.W. reported the sexual contact with Haas to police in late April 2004.

On May 7, 2004, police obtained a search warrant for Haas' apartment. Officers seized a comforter and sheets found on Haas' bed. Semen was located on some of the bedding; however, DNA testing was not performed, because the bedding was seized approximately a month after the alleged assaults had occurred and both D.W. and S.S. testified that the bedding was not the same as what was on Haas' bed at the time of the assaults.

At trial, Haas called two witnesses to testify on his behalf. The first witness, a psychiatrist who treated D.W. in March and April 2004, had given D.W. a number of medications to

treat "depression anxiety." The psychiatrist testified that these medications combined with alcohol could cause enhanced sedation, confusion, disorientation, and delirium.

The second witness has a daughter with Haas. She testified that she lived in Illinois, but that from April 11 through 14, 2004, she and her daughter were in Lincoln and stayed at Haas' apartment. She denied that anyone other than her and her daughter stayed overnight at Haas' apartment during that time.

Haas was convicted and sentenced to 20 to 30 years' imprisonment on each count, to be served consecutively. Haas appealed and was represented by different counsel on appeal. Appellate counsel argued that Haas received ineffective assistance of trial counsel. The Court of Appeals determined that the record was not sufficient to adequately review Haas' ineffective assistance of counsel claims and therefore did not address them. It affirmed his convictions and sentences.

On March 5, 2007, Haas moved for postconviction relief. He did not allege that counsel was ineffective for failing to preserve a *Batson* challenge or for failing to request DNA tests prior to trial. Haas was granted leave to amend his motion to add the ineffective assistance of counsel claim related to the *Batson* issue.

On August 11, 2008, Haas filed a pro se motion for DNA testing and a request for the appointment of Nebraska's Commission on Public Advocacy. The commission was appointed to represent Haas on the DNA issue.

On August 26, 2008, the district court ordered an evidentiary hearing on Haas' postconviction claim that trial and appellate counsel were ineffective for failing to raise and preserve a *Batson* challenge. The court appointed different counsel to represent Haas on this specific issue but denied the remainder of his postconviction claims without an evidentiary hearing. Haas did not appeal from the district court's order.

On February 24, 2009, Haas, through postconviction counsel, sought to amend his postconviction motion to add the claim that his trial counsel was ineffective for failing to secure DNA testing. The district court denied this motion. Also

on February 24, an evidentiary hearing was held on Haas' *Batson* claims.

On March 24, 2009, the district court denied Haas' motion for postconviction relief on the *Batson* issue. The court found that there was no evidence in the record of the race of a potential juror and that even if the potential juror was African-American, there was no evidence from which an inference could be made that the State struck the juror on the basis of race. Even setting aside these deficiencies, the court concluded there was no showing that Haas' attorney's actions prejudiced Haas. On April 13, the court determined that DNA testing was not unavailable due to ineffective assistance of counsel. It denied an evidentiary hearing and denied relief on the issue.

Haas appeals the denial of his motion to add the claim that his trial counsel was ineffective for failing to secure DNA testing, the denial of an evidentiary hearing on his motion for DNA testing, and the denial of his motion for postconviction relief with respect to the *Batson* issue.

ASSIGNMENTS OF ERROR

Haas alleges, summarized and restated, that the district court erred in (1) finding there was insufficient evidence to show that a juror was African-American, (2) failing to address the State's strike of a juror who had an African-American child, (3) finding Haas had to prove he suffered prejudice as a result of these two jurors' being stricken, (4) denying Haas leave to amend his motion for postconviction relief to add the additional claim of ineffective assistance of counsel for failure to secure DNA testing, and (5) denying Haas an evidentiary hearing on his allegation that DNA testing was effectively unavailable at the time of his trial.

ANALYSIS

Haas claims the district court erred in finding there was insufficient evidence to show that a juror referred to as "D.A.K." was African-American. D.A.K. became a prospective juror after another juror was dismissed for cause. Following voir dire, the State used its first peremptory challenge to strike D.A.K. Haas' trial counsel did not raise a *Batson* objection.

[5,6] In *Batson*, the U.S. Supreme Court held that the Equal Protection Clause of the 14th Amendment forbids prosecutors from using peremptory challenges to strike potential jurors solely on account of their race. See, also, *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007). The trial court's first step in evaluating whether a party has used a peremptory challenge in a racially discriminatory manner is to determine whether the defendant made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. See *id*. If the defendant makes the requisite showing, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Finally, the trial court must determine whether the defendant carried his or her burden of proving purposeful discrimination. See *id*.

On postconviction, Haas claimed his trial counsel's failure to make a *Batson* objection was ineffective assistance of counsel. Haas offered the transcript of voir dire and the clerk's jury list as evidence but did not call any witnesses. Reviewing the evidence, the district court found that there was no evidence of D.A.K.'s race and concluded that trial counsel's performance was not deficient. Haas claims the court erred in finding there was insufficient evidence to show that D.A.K. was African-American.

We agree with the district court that the record does not establish D.A.K.'s race or the race of any other juror. As evidence of D.A.K.'s race, Haas relies entirely on his allegation in his motion for postconviction relief that D.A.K. was African-American. Despite Haas' claim, the court did not err in finding there was insufficient evidence to show that D.A.K. was African-American. Thus, Haas has not established the first step of a *Batson* challenge, that the prosecution has exercised a peremptory challenge on the basis of race. See *Gutierrez, supra*.

[7] Haas also claims that the district court erred in failing to address the State's strike of an alternate juror who had an African-American child. The record does not establish that this issue was raised in the district court. An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion

for postconviction relief. *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009). Since this issue was not raised in the court below, we will not consider it here.

[8,9] Haas next alleges that the district court erred in finding that he was required to prove he was prejudiced by potential juror D.A.K.'s being stricken from the panel. Haas raises the *Batson* challenges in the form of an ineffective assistance of counsel claim. To establish ineffective assistance of counsel in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a defendant must show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that the deficient performance prejudiced the defendant in his or her case. See *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009). In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably. *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009). Haas failed to establish that a *Batson* challenge was appropriate and, therefore, did not establish that his counsel was deficient in failing to raise the issue at trial. Because Haas did not satisfy the first prong of *Strickland*, we need not determine whether the court erred in finding that Haas was required to prove prejudice. This assignment of error is without merit.

Haas also claims the district court erred because it did not allow him to amend his pleading to add the DNA testing claim to his motion for postconviction relief. Through postconviction counsel, Haas sought to add the allegation that he received ineffective assistance of counsel due to his trial and appellate counsel's failure to secure DNA testing of the bedding. The court denied his request, noting that the DNA testing claim had not been raised in his earlier petition for postconviction relief and that, except for his *Batson* claim, the court had denied Haas' request for an evidentiary hearing and denied his request for postconviction relief on the non-*Batson* issues on August 26, 2008.

[10] The decision to grant or deny an amendment to a pleading rests in the discretion of the court. *State v. Silvers*, 260

Neb. 831, 620 N.W.2d 73 (2000). The district court had already issued an order on Haas' postconviction claims, reserving only the *Batson* claim for further consideration. Furthermore, the bedding for which Haas sought DNA testing was not the bedding on which the sexual assaults occurred. The court did not abuse its discretion in denying Haas' motion for leave to amend to include the DNA testing claim.

Finally, Haas claims the district court should have granted him an evidentiary hearing on his claim that DNA testing was effectively unavailable because he received ineffective assistance of counsel. Under the DNA Testing Act, a court is required to order DNA testing if it finds that (1) testing was effectively not available at the time of the trial, (2) the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and (3) such testing may produce noncumulative, exculpatory evidence relevant to the defendant's claim that he or she was wrongfully convicted. § 29-4120(5). We conclude that Haas has not met the requirements of the act.

The district court found that current methods of DNA testing were available at the time of Haas' trial. Haas now attempts to argue that DNA testing was effectively not available because his counsel was ineffective in failing to request DNA testing. The DNA Testing Act gives inmates access to evolving scientific technology and was not intended to be an alternative vehicle for raising claims of ineffective assistance of counsel. See § 29-4118. Evidence which was available but not pursued is not considered to have been unavailable.

In addition, there is no basis to conclude that testing the biological evidence on the bedding seized from Haas' apartment would produce exculpatory evidence. Police officers seized white, patterned sheets from Haas' apartment nearly a month after the sexual assaults occurred and found semen on them. Both victims testified that Haas had red sheets on his bed the night of the assaults and that the sheets which were seized were not the same sheets. It is obvious that testing the bedding would not produce noncumulative, exculpatory evidence relevant to Haas' claim that he was wrongfully convicted.

A motion for DNA testing under the DNA Testing Act is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the determination of the trial court will not be disturbed on appeal. *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003). The current methods of DNA testing were available at the time of Haas' trial. We conclude that the district court did not abuse its discretion in refusing DNA testing.

CONCLUSION

We find that the district court did not err in denying Haas postconviction relief and denying DNA testing. Haas did not establish whether D.A.K. was African-American and, therefore, did not establish that the prosecution exercised peremptory challenges on the basis of race. The issue of whether striking a juror based on the race of the juror's child is subject to a *Batson* challenge was not raised before the lower court; therefore, we do not consider it on appeal. We also conclude that the district court did not abuse its discretion in denying Haas' motion to amend his postconviction motion to allege ineffective assistance of counsel for failing to secure DNA testing and that Haas did not establish a basis that would require DNA testing pursuant to the DNA Testing Act.

For the reasons set forth herein, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ANTHONY A. CASILLAS, APPELLANT.
782 N.W.2d 882

Filed May 7, 2010. No. S-09-660.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.

3. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function when admitting expert testimony.
4. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
5. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
6. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
7. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.
8. ____: ____: ____. A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of the liberty of the citizen involved.
9. **Police Officers and Sheriffs: Search and Seizure.** A seizure does not occur simply by reason of the fact that a police officer approaches an individual, asks him or her for identification, and poses a few questions to that individual, so long as the officer does not indicate that compliance with his or her request is required and the questioning is carried on without interrupting or restraining the person's movement.
10. **Constitutional Law: Search and Seizure.** If there is no detention or seizure within the meaning of the Fourth Amendment to the U.S. Constitution, then the Fourth Amendment safeguard against an unreasonable search and seizure is not implicated and reasonable suspicion is not required.
11. **Miranda Rights: Investigative Stops: Motor Vehicles.** Persons temporarily detained pursuant to an investigatory traffic stop are not "in custody" for the purpose of *Miranda*.
12. **Miranda Rights: Drunk Driving: Investigative Stops.** Temporarily detaining a driver to submit to routine field sobriety tests does not ordinarily rise to the level of custody so as to implicate *Miranda*.
13. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
14. **Trial: Expert Witnesses.** Under the principles set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.

15. **Trial: Expert Witnesses: Intent.** The purpose of the gatekeeping function is to ensure that the courtroom door remains closed to "junk science" that might unduly influence the jury, while admitting reliable expert testimony that will assist the trier of fact.
16. **Expert Witnesses.** Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.
17. **Trial: Evidence.** The trial court does not have the discretion to abdicate its gatekeeping duty.
18. **Trial: Expert Witnesses.** A pretrial hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), is not always mandated, and the extensiveness of any such hearing is left to the discretion of the trial court.
19. **Trial: Expert Witnesses: Proof.** Fundamentally, it is the burden of the proponent of the evidence to establish the necessary foundation for its admission, including its scientific reliability under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
20. **Trial: Expert Witnesses: Pretrial Procedure.** To sufficiently call specialized knowledge into question under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), is to object with enough specificity so that the court understands what is being challenged and can accordingly determine the necessity and extent of any pretrial proceeding.
21. ____: ____: ____. The proponent of specialized evidence need not go through the exercise of re-proving reliability of the same evidence in every case.
22. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
23. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.
24. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
25. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and John C. Jorgensen for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Anthony A. Casillas was charged with driving under the influence, third offense, and with the aggravated crime of driving with a concentration of more than .15 of 1 gram of alcohol per 210 liters of breath. Casillas was found drunk sitting on the driver's side of his parked vehicle after a 911 emergency dispatch call reported a similar vehicle being driven erratically in the same area. A Breathalyzer test showed a breath alcohol level of .267. Casillas' theory of defense at trial was that he was not operating his vehicle on the night in question, although, on appeal, he does not challenge the sufficiency of the jury's finding that he was. Casillas argues on appeal that the arresting officer's observations of his impairment should have been suppressed because they stemmed from an unlawful search and seizure, that his statements to the officer were made in violation of *Miranda*, and that the reliability of the horizontal gaze nystagmus (HGN) test conducted by the arresting officer should have been addressed in a separate evidentiary hearing before being allowed into evidence at trial. Casillas also challenges the jury instructions and asserts that his sentences were excessive.

BACKGROUND

On May 12, 2008, around 8:30 p.m., a woman driving north on 27th Street in Lincoln, Nebraska, became concerned about the vehicle in front of her. The witness testified that the vehicle, a blue Chevrolet pickup truck, was driving erratically and had driven up onto the curb a couple of times. The witness called 911 from her cellular telephone to report her observations to the police. Before losing sight of the truck, the witness saw it turn onto Y Street and then onto 28th Street. She could not identify the driver of the vehicle.

Officer Jon Rennerfeldt responded to the call and arrived at 28th and Y Streets at approximately 8:50 p.m. He saw a blue Chevrolet pickup truck parked along the curb on 28th Street, partially up the curb and on the grass. Casillas was sitting in the driver's seat. Rennerfeldt parked his police cruiser in the street and approached the truck on foot. He did not activate his police cruiser's overhead lights.

At trial, Rennerfeldt testified that as he approached, he observed exhaust coming from the tailpipe of the truck. He further testified that when he was near the truck, he saw the driver remove the keys from the ignition. On cross-examination, Rennerfeldt admitted that he had never before reported seeing exhaust coming from the tailpipe. He also admitted that in previous deposition testimony, he had said he did not recall for certain whether the truck was running when he approached.

Rennerfeldt testified that when he asked Casillas for his license, registration, and proof of insurance, Casillas "kind of slowly looked at me and said he didn't have a license, and he just kind of sat there" and did nothing. Rennerfeldt stated that he immediately noticed a strong odor of intoxicating beverage coming from the truck and from Casillas. He also noticed that Casillas' eyes were bloodshot and watery and that his speech was slurred. Rennerfeldt asked Casillas how much he had had to drink, and Casillas replied, "too much." Defense counsel did not object at trial to this statement.

Rennerfeldt next testified that he asked Casillas to step out of the truck to assess his level of impairment. At this point, defense counsel made a continuing objection to Rennerfeldt's testimony based upon a pretrial motion to suppress, which was overruled. Rennerfeldt testified that as Casillas exited the truck, he attempted to steady his balance by grabbing onto the door. And as Casillas walked toward the sidewalk, he grabbed onto the side and back of his truck in order to keep his balance.

Over defense counsel's objection, Rennerfeldt testified that the first field sobriety test he attempted to administer was the HGN test. Rennerfeldt was a 7-year veteran of the police force and testified that he is trained in detecting impairment through

field sobriety tests, including the HGN test. Rennerfeldt testified specifically that he had attended a 24-hour class given by the Phoenix, Arizona, police department when he was an officer in Arizona. In that class, the HGN test was conducted in a "wet workshop," where test groups of people either had or had not consumed varying amounts of alcohol. He also attended training on HGN in Nebraska. Rennerfeldt explained that someone who is not under the influence will be able to smoothly track an object passed slowly from side to side, while a person under the influence exhibits jerky eye movements when attempting the same. Rennerfeldt explained that there are three phases to the HGN test. However, he was not able to get through the first phase of the test with Casillas because Casillas was not able to track the stimulus well enough. Rennerfeldt testified that while attempting the first phase, he observed a "very delayed" jerking of Casillas' eyes.

After the HGN test, Rennerfeldt asked Casillas to attempt the one-legged stand. As he instructed Casillas on the test, he observed Casillas swaying in a circular motion. After the explanation, Casillas told Rennerfeldt, "fuck this shit, man." Defense counsel did not specifically object to this statement. Rennerfeldt asked Casillas if he would like to try one more test, but Casillas refused.

Rennerfeldt took Casillas to a detoxification center to test his breath alcohol levels. Rennerfeldt is a licensed operator of the Intoxilyzer Model 5000 and conducted the test. Evidence was adduced at trial establishing the reliability of the machine used to test Casillas. At 10:08 p.m., the Intoxilyzer reported that Casillas had .267 grams of alcohol per 210 liters of breath.

At the close of the State's case in chief, defense counsel moved to dismiss. Counsel explained that there was no dispute that the Intoxilyzer score was significantly high and that .267 is over .08 and .15. But counsel argued that there was insufficient evidence that Casillas was operating the truck on the night in question. The court overruled the motion.

Casillas took the stand in his own defense. According to Casillas, he never drove that evening. He explained that he had driven his truck to a friend's house in the afternoon, but did

not drive it after that time. Casillas testified that while at his friend's house, he had consumed 8 or 10 beers and innumerable shots of vodka. Casillas described his level of intoxication as a 7 on a 10-point scale and explained that he was drunk enough to be concerned that he might pass out. It was for that reason that he went to his truck. According to Casillas:

> [I]n a moment I was kind of getting drunk and I state[d] to my friend that I'm going outside to get some fresh air. So I decided to go down to my truck because I said if I pass out, I don't want to pass out here outside of the apartment, you know. So I say I go to my truck and if I pass out, I pass out in my truck.

Casillas testified that when Rennerfeldt arrived, he was listening to music. He testified that his radio had an independent battery and that he never placed the keys in the ignition. Casillas' friend with whom he had been drinking did not testify at the trial. The jury found Casillas guilty of both charges.

Pretrial Motions

Before the trial, defense counsel had unsuccessfully sought to exclude all evidence of Rennerfeldt's observations of and conversations with Casillas, as well as the breath test results. At the pretrial hearing on his motions to suppress, defense counsel alleged that Rennerfeldt lacked reasonable suspicion or probable cause to stop Casillas. Defense counsel asserted there was nothing unusual about the fact that Casillas had parked his truck somewhat poorly alongside the curb, and he objected to Rennerfeldt's hearsay testimony concerning the 911 call. The caller did not appear for the suppression hearing, although she did testify at the trial.

The court also denied Casillas' motion to suppress statements made by Casillas during the stop on the grounds that they were involuntarily made and in violation of *Miranda v. Arizona*.[1] Rennerfeldt testified that he did not give Casillas *Miranda* warnings until he arrived at the detoxification center. The court found that Rennerfeldt's initial contact with Casillas was a first-tier encounter. Regardless, the court concluded that

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

before making contact with Casillas, Rennerfeldt had both reasonable suspicion and probable cause based upon what he was told by his dispatcher and his observation that Casillas' truck was improperly parked. With regard to Casillas' statements to Rennerfeldt, the court concluded that they were voluntarily made despite the fact that Rennerfeldt likely made the decision to arrest Casillas when he asked Casillas to exit the vehicle. The court implicitly concluded that at the time of the statements, Casillas was not yet in custody.

Defense counsel had asked for an evidentiary hearing to challenge the reliability of the HGN test results before allowing that evidence at trial and had filed a motion in limine to exclude the HGN results. The court withheld its ruling on the motions until after the hearing on the motions to suppress. At the suppression hearing, Rennerfeldt was examined as to the foundation for the HGN test results. In addition to outlining his training and experience as he did at trial, Rennerfeldt expressed what he had been told concerning the scientific validity of the test. Rennerfeldt testified that he was not certain, but he believed that nystagmus occurred naturally in less than 3 percent of the population. Rennerfeldt testified that according to the National Highway Traffic Safety Administration, however, such naturally occurring nystagmus was never observable. Accordingly, he did not believe that the HGN test had any official margin of error.

On cross-examination, Rennerfeldt elaborated that his training in Arizona involved, in addition to the first wet workshop, 3 months of field training, where a log was kept to test his accuracy at predicting whether the subject was over the legal limit based on the HGN test. Arizona required a 90-percent accuracy rate of such predictions with a minimum of 35 subjects and then required attendance at a second wet workshop before an officer was considered proficient at conducting the test. Rennerfeldt stated that he has continued to keep a field log of the accuracy of his HGN testing, which he had in his possession, but defense counsel did not inquire further, and the log was not entered into evidence. Rennerfeldt admitted that he had not personally participated in the development of any standardized field sobriety tests, including HGN.

After the hearing, defense counsel argued that Rennerfeldt's testimony failed to adequately demonstrate the reliability of the HGN test. After giving the parties time to brief the matter, the court denied defense counsel's request for any further evidentiary hearing on the validity of the HGN test. The court also denied defense counsel's motion in limine to exclude the test. The court noted that Rennerfeldt had demonstrated he had experience and training in conducting the test, and there was no evidence presented by defense counsel suggesting the need for an evidentiary hearing. The court concluded that "the HGN test does not warrant a *Schafersman* [*v. Agland Coop*[2]] analysis."

Jury Instructions

Defense counsel objected to the jury instructions to the extent that they did not require the jury to unanimously determine that Casillas had a breath alcohol level greater than .08 before considering the question of whether his breath alcohol content was greater than .15. The instructions given stated that the jury could reach one of three possible verdicts: (1) not guilty, (2) guilty of driving under the influence of alcoholic liquor, or (3) guilty of driving under the influence of alcoholic liquor and driving while having a concentration of .15 of 1 gram or more by weight of alcohol per 210 liters of breath. The jury was instructed that in order to find Casillas guilty of driving under the influence, it must find either that he was actually under the influence of alcoholic liquor or that he had a concentration of .08 of 1 gram or more by weight of alcohol per 210 liters of his breath while operating a motor vehicle. The jury was instructed that it need not agree unanimously on whether Casillas was guilty by virtue of being under the influence or by virtue of having an alcoholic liquor concentration of .08. But if it found Casillas guilty of driving under the influence, it must then decide whether the State proved, beyond a reasonable doubt, the additional element that at the time Casillas was operating a motor vehicle, he had a

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[2] *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

concentration of .15 of 1 gram or more by weight of alcohol per 210 liters of breath.

Defense counsel's proposed instruction stated in relevant part:

> Only if you agree unanimously that the state proved beyond a reasonable doubt that . . . Casillas had a concentration of eight-hundredths (.08) of one gram or more by weight of alcohol per two hundred ten (210) liters of his breath, need you then decide whether the state has proven beyond a reasonable doubt that . . . Casillas had a concentration of fifteen-hundredths (.15) of one gram or more by weight of alcohol per two hundred ten (210) liters of his breath . . . .

Sentences

After the jury's guilty verdict, the trial court sentenced Casillas to 360 days' imprisonment and a 15-year license revocation. The court explained that imprisonment was necessary for the protection of the public because the risk was substantial that during any period of probation, Casillas would engage in additional criminal conduct. The court stated further that lesser sentences would depreciate the seriousness of Casillas' crimes and promote disrespect for the law.

ASSIGNMENTS OF ERROR

Casillas argues that the trial court erred in (1) ruling that HGN testing does not warrant analysis under *Schafersman v. Agland Coop*[3] and permitting such evidence and testimony at trial, (2) overruling his motions to suppress the traffic stop and all evidence obtained therefrom, (3) overruling his motion to suppress statements made following the traffic stop, (4) refusing to give his proposed instructions, and (5) imposing excessive sentences.

STANDARD OF REVIEW

[1] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska

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[3] *Id.*

Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[4]

[2,3] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[5] We review the record de novo to determine whether a trial court has abdicated its gatekeeping function when admitting expert testimony.[6]

[4] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[7]

[5] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[8]

[6] Whether jury instructions given by a trial court are correct is a question of law.[9]

Traffic Stop

Casillas argues that all of the evidence relating to the evening in question should have been suppressed because it was obtained by an illegal search and seizure. Casillas' argument is based on the premise that Rennerfeldt's act of walking toward Casillas' parked vehicle was a seizure under the Fourth Amendment. And, according to Casillas, Rennerfeldt lacked reasonable suspicion to make such a seizure, because the court should have disregarded the 911 dispatch call as unreliable and as inadmissible hearsay.

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[4] *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

[5] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

[6] *Id.*

[7] *State v. Daly, supra* note 4.

[8] *State v. Scheffert, ante* p. 479, 778 N.W.2d 733 (2010).

[9] *State v. Bormann, ante* p. 320, 777 N.W.2d 829 (2010).

Without lending any credence to Casillas' argument regarding the weight to be given the dispatch call, we find no merit to his conclusion that before Rennerfeldt had reached the driver's-side window, Casillas had been stopped for purposes of the Fourth Amendment. Rather, we agree with the trial court that Rennerfeldt and Casillas were involved in a tier-one encounter.

[7,8] A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.[10] A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of the liberty of the citizen involved.[11]

[9] Rennerfeldt approached Casillas on foot. He did not turn on the overhead lights of his police cruiser. Rennerfeldt did not interfere with Casillas' prior activity of sitting in the truck. Instead, he asked for identification and posed a few questions to Casillas. We have explained that a seizure does not occur simply by reason of the fact that a police officer approaches an individual, asks him or her for identification, and poses a few questions to that individual, so long as the officer does not indicate that compliance with his or her request is required and the questioning is carried on without interrupting or restraining the person's movement.[12]

[10] The cases upon which Casillas relies, *State v. Pickinpaugh*[13] and *State v. Benson*,[14] involved drivers whose vehicles were pulled over by law enforcement. Such is not the case here. In this case, there has been no restraint of movement, and thus, there was no detention or seizure. If there is no detention or seizure within the meaning of the Fourth Amendment to the U.S. Constitution, then the Fourth Amendment safeguard

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[10] *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997).

[11] See *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

[12] See *id.*

[13] *State v. Pickinpaugh*, 17 Neb. App. 329, 762 N.W.2d 328 (2009).

[14] *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659 (1977).

against an unreasonable search and seizure is not implicated and reasonable suspicion is not required.[15]

Only when Casillas was asked to step out of his truck and submit to field sobriety tests did the encounter rise to a tier-two investigatory stop as defined by *Terry v. Ohio*.[16] At that point, however, it is uncontested that Rennerfeldt had reasonable suspicion that criminal activity was afoot. Not only was Rennerfeldt privy to the 911 dispatch call, but he testified that he observed Casillas' truck parked partially up the curb and on the grass and that the truck was running. Rennerfeldt also testified that he observed indicia of impairment through Casillas' speech and odor and that Casillas told Rennerfeldt he had had too much to drink. Thus, we agree with the trial court that the evidence obtained from Casillas was not the product of an illegal search and seizure.

Miranda

Casillas next argues that the trial court erred in admitting Rennerfeldt's testimony concerning statements he made on the evening in question. According to Casillas, he was effectively "in custody" for purposes of *Miranda* and, since he was not advised of his *Miranda* rights at that time, the statements were inadmissible. The only statements presented to the jury were Casillas' statements that he had too much to drink and that he did not wish to continue with the field sobriety tests.

[11,12] As already discussed, the most damaging of the statements—that he had had too much to drink—was uttered during a tier-one encounter while Casillas was being informally questioned as he sat in his vehicle. Thus, *Miranda* does not apply. But neither does *Miranda* apply to Casillas' statements made during the field sobriety testing. Persons temporarily detained pursuant to an investigatory traffic stop are not "in custody" for the purpose of *Miranda*.[17] Temporarily detaining a driver to submit to routine field sobriety tests does not ordinarily rise

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[15] See *State v. Soukharith, supra* note 10.

[16] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). See, also, *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008).

[17] See *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996).

to the level of custody so as to implicate *Miranda*.[18] While Casillas asserts that Rennerfeldt made the decision to arrest Casillas before the statements were made, we find this point irrelevant. The officer's unexpressed thoughts have no impact on whether a reasonable person would feel free to leave. Rennerfeldt's behavior toward Casillas during the field sobriety testing indicated a merely temporary detention. We find that neither of Casillas' statements were subject to *Miranda* and were thus properly admitted at trial.

HGN Test

Casillas' principal argument regarding the admission of evidence against him focuses on the HGN test. Casillas argues that HGN involves scientific testimony and should have been subjected to a hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[19] and *Schafersman v. Agland Coop*[20] before being presented to the jury. According to Casillas, Rennerfeldt's own testimony at the suppression hearing called into question the factual basis, data, principles, and application of the HGN testing of Casillas, and the trial court erred in placing the burden upon Casillas to present evidence of unreliability before a *Daubert*/*Schafersman* hearing would even be conducted.

[13] We agree that the trial court failed to carry out its gatekeeping duties under *Daubert*/*Schafersman.* But we note at the outset that the admission of Rennerfeldt's testimony concerning the HGN test was harmless. In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse

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[18] See *id.* See, also, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); *State v. Bayer*, 229 Or. App. 267, 211 P.3d 327 (2009); *Thomas v. State*, 294 Ga. App. 108, 668 S.E.2d 540 (2008); *State v. Warren*, 957 A.2d 63 (Me. 2008); *Brown v. State*, 171 Md. App. 489, 910 A.2d 571 (2006); *State v. Mellett*, 642 N.W.2d 779 (Minn. App. 2002); *State v. Garbutt*, 173 Vt. 277, 790 A.2d 444 (2001).

[19] See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[20] See *Schafersman v. Agland Coop, supra* note 2.

to a substantial right of the defendant.[21] In this case, even though the HGN test carried the weight of scientific evidence, it was presented as but a small part of Rennerfeldt's observations which led him to conclude that Casillas was intoxicated. The Breathalyzer test results confirmed these observations. We conclude that the jury's determination that Casillas was operating a vehicle with at least .15 of 1 gram of alcohol per 210 liters of breath was unattributable to the admission of the HGN test results.

[14-16] Nevertheless, we will discuss the trial court's error in order to provide future guidance for the courts and how the trial court erred in this case. Neb. Rev. Stat. § 27-702 (Reissue 2008) states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Under the principles set forth in *Daubert*[22] and *Schafersman*,[23] the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.[24] The purpose of the gatekeeping function is to ensure that the courtroom door remains closed to "junk science" that might unduly influence the jury, while admitting reliable expert testimony that will assist the trier of fact.[25] As stated in *Daubert*, "'Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.'"[26]

Before *Daubert* and *Schafersman*, this gatekeeping function was carried out in Nebraska trial courts under the principles of *Frye v. United States*.[27] In *Frye*, the single question that

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[21] *State v. Ford, ante* p. 453, 778 N.W.2d 473 (2010).

[22] *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra* note 19.

[23] *Schafersman v. Agland Coop, supra* note 2.

[24] *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004).

[25] *Adesina v. Aladan Corp.*, 438 F. Supp. 2d 329 (S.D.N.Y. 2006).

[26] *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra* note 19, 509 U.S. at 595.

[27] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

determined admissibility was whether the evidence had become generally accepted in its field.[28] After *Daubert/Schafersman*, the question became whether the evidence was reliable. Several nonexclusive factors are considered in making this determination: (1) whether a theory or technique can be (and has been) tested; (2) whether it has been subjected to peer review and publication; (3) whether, in respect to a particular technique, there is a high known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within a relevant scientific community.[29]

The intent of *Daubert* was to be more in keeping with the "'liberal thrust'" of the Federal Evidence Rules and their general approach of relaxing the traditional barriers to opinion testimony—to let in good science before it became generally accepted.[30] But, in some instances, *Daubert* can be more conservative. It might preclude the admission of evidence that would have been accepted under *Frye* because, while most science generally accepted in the relevant scientific community will be good science, it is not necessarily so.[31]

[17] Because the court must independently evaluate whether the evidence is based in good science, *Daubert* is generally considered to have imposed a more rigorous gatekeeper function on trial courts than *Frye* did.[32] And the trial court does not have the discretion to abdicate its gatekeeping duty.[33] "[U]nder the *Daubert/Schafersman* . . . framework, the burden to weed out unreliable expert testimony is placed directly on the trial court."[34] Before admitting any expert opinion testimony, the trial court must determine whether the expert's knowledge,

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[28] See *Schafersman v. Agland Coop, supra* note 2.

[29] See, e.g., *State v. Daly, supra* note 4.

[30] *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra* note 19, 509 U.S. at 588.

[31] *Schafersman v. Agland Coop, supra* note 2.

[32] See *State v. Coon*, 974 P.2d 386 (Alaska 1999).

[33] See *Zimmerman v. Powell, supra* note 24.

[34] *Id.* at 428, 684 N.W.2d at 8.

skill, experience, training, and education qualify the witness as an expert.[35] If the opinion involves scientific or specialized knowledge, trial courts must also determine whether the reasoning or methodology underlying the expert's opinion is scientifically valid.[36] In order to properly conduct appellate review, it is the duty of the trial court to adequately demonstrate by specific findings on the record that it has performed its gatekeeping functions.[37]

[18] All specialized knowledge falls generally under the rules of *Daubert*/*Schafersman*. HGN involves scientific knowledge.[38] Thus, the trial court erred insofar as it indicated that HGN fell outside of *Daubert*/*Schafersman.* But even as to specialized evidence, what specific duties *Daubert*/*Schafersman* impose depends on the circumstances. A pretrial hearing under *Daubert*/*Schafersman* is not always mandated, and the extensiveness of any such hearing is left to the discretion of the trial court.[39]

[19] It also appears from the trial court's order that it denied a hearing, because Casillas did not present affirmative evidence of unreliability to trigger it. We have said that the initial task falls on the party opposing expert testimony to sufficiently call into question its reliability.[40] However, we have never said that the initial burden to produce evidence disproving reliability is upon the opponent. And even if we had, it is unclear how the opponent would present such evidence if not in a hearing. Fundamentally, it is always the burden of the

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[35] *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 762 N.W.2d 24 (2009).

[36] *Id.*

[37] See *id.* See, also, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

[38] See, e.g., *Commonwealth v. Sands*, 424 Mass. 184, 675 N.E.2d 370 (1997) (and cases cited therein). But see *Hulse v. State, Dept. of Justice*, 289 Mont. 1, 961 P.2d 75 (1998).

[39] See *State v. Daly, supra* note 4.

[40] *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007). See, also, *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006); *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006).

proponent of the evidence to establish the necessary foundation for its admission, including its scientific reliability under *Daubert/Schafersman*.[41]

[20] To sufficiently call specialized knowledge into question under *Daubert/Schafersman* is to object with enough specificity so that the court understands what is being challenged and can accordingly determine the necessity and extent of any pretrial proceeding.[42] Assuming that the opponent has been given timely notice of the proposed testimony, the opponent's challenge to the admissibility of evidence under *Daubert* should take the form of a concise pretrial motion. It should identify, in terms of the *Daubert* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case. In order to preserve judicial economy and resources, the motion should include or incorporate all other bases for challenging the admissibility, including any challenge to the qualifications of the expert.[43]

In this case, Casillas pointed out in his motion in limine that the State had presented no evidence as to the underlying reliability of the HGN test—that there was a complete absence of foundation for its admission. Specifically, Casillas made a particular point of the fact that there was no reliable evidence on the margin of error for the test and the rate of naturally occurring nystagmus. Although Rennerfeldt testified as to his personal testing of HGN in his training classes and while on the job, such experience did not establish, by scientific method, the correlation between nystagmus and intoxication

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[41] See, *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987); *King v. Burlington Northern Santa Fe Ry. Co., supra* note 35; *State v. Mason, supra* note 40. See, also, *U.S. v. Nacchio*, 555 F.3d 1234 (10th Cir. 2009); *U.S. v. Frazier*, 387 F.3d 1244 (11th Cir. 2004); *U.S. v. Mooney*, 315 F.3d 54 (1st Cir. 2002); *Moore v. Ashland Chemical Inc.*, 151 F.3d 269 (5th Cir. 1998); *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994).

[42] See, *State v. Mason, supra* note 40. See, also, *State v. Kuehn, supra* note 40; *Kinney v. H.P. Smith Ford*, 266 Neb. 591, 667 N.W.2d 529 (2003).

[43] 60 Am. Jur. *Trials* 1, § 19 (1996).

levels.[44] And he was unable to testify with any degree of certainty as to the margin of error. Rennerfeldt, while qualified to testify that he properly conducted the test, was unqualified to establish its underlying reliability. The State did not attempt to present any further documentary or testamentary evidence relevant to any of the *Daubert*/*Schafersman* factors.

[21] Granted, as we have said, courts need not reinvent the wheel each time that specialized evidence is adduced.[45] The proponent need not continuously go through the exercise of re-proving reliability of the same evidence in every case. Instead, once a Nebraska trial court has actually examined and assessed the reliability of a particular scientific wheel under *Daubert*, and its determination has been affirmed on appeal, then other courts may simply take judicial notice and ride behind.[46] In such cases, the proponent establishes a prima facie case of reliability by relying on precedent, and the burden shifts to the opponent to show that recent developments raise doubts about the validity of previously relied-upon theories or techniques.[47]

The State points out that HGN testing is not novel to this or any other court and that it is generally found to be admissible.[48] HGN testing has not been affirmed in Nebraska since we adopted the *Daubert* test. So the trial court could not have taken judicial notice of precedent to satisfy its gatekeeping findings. Even if such precedent had existed, Casillas was never put on notice that by virtue of precedent, the burden had shifted to him.

Because scientific acceptance remains an important factor under *Daubert*/*Schafersman*, the State can rely, in part, on our

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[44] See *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986), *overruled on other grounds, State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

[45] *State v. Mason, supra* note 40.

[46] See *Stovall v. State*, 140 S.W.3d 712 (Tex. App. 2004).

[47] See *Schafersman v. Agland Coop, supra* note 2.

[48] *State v. Baue, supra* note 44; *State v. Borchardt, supra* note 44. See, generally, 5 David L. Faigman et al., Modern Scientific Evidence: The Law and Science of Expert Testimony § 41:8 (2009). See, also, *State v. Daly, supra* note 4.

case law under *Frye* in making its prima facie case. But a history in this jurisdiction of prior acceptance under *Frye* does not relieve the trial courts of their fundamental gatekeeping duties or the proponent of its burden to lay foundation under *Daubert/Schafersman.* It is not the opponent's burden to come forth with evidence proving a negative.[49] Only once a prima facie case of reliability has been presented, does the burden shift.[50] As the court in *Weinberg v. Geary*[51] explained:

> Of course, the proponent of the evidence must establish at least a minimal foundation for receipt of the expert opinion. When he does so the burden of coming forward shifts to the opponent of the evidence, ordinarily through the use of preliminary questions, to attack the basis for receiving the evidence.

To the extent that the trial court in this case placed the initial burden upon the opponent of the evidence and concluded that HGN was not a *Daubert/Schafersman* issue, it erred. Again, given the overwhelming evidence of intoxication well above .15 and the minimal role that the HGN test played in Rennerfeldt's evaluation, we conclude that the error was harmless.

Jury Instructions

[22] We next address the jury instructions. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[52] We understand Casillas' argument regarding the jury instructions to be that the jury had to first determine, unanimously, that Casillas had a breath alcohol content of over .08 before determining, unanimously, that he had a breath alcohol content of over .15. Casillas acknowledges

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[49] *Craig ex rel. Craig v. Oakwood Hosp.*, 471 Mich. 67, 684 N.W.2d 296 (2004).

[50] See, *Hoult v. Hoult*, 57 F.3d 1 (1st Cir. 1995); Michael J. Saks, *Expert Admissibility Symposium: Reliability Standards—Too High, Too Low, or Just Right?* 33 Seton Hall L. Rev. 1167 (2003).

[51] *Weinberg v. Geary*, 686 N.E.2d 1298, 1301 (Ind. App. 1997).

[52] *State v. Vela, ante* p. 94, 777 N.W.2d 266 (2010).

that a driving-under-the-influence offense can generally be shown either by evidence of physical impairment and well-known indicia of intoxication or simply by excessive alcohol content shown through a chemical test and that the jury need not be unanimous in its determination of under which means the offense was committed.[53] But Casillas asserts that when the jury must subsequently consider the aggravated offense of being over .15, then such an instruction is inappropriate. Casillas argues that it was inappropriate and inconsistent for the court not to require a unanimous decision that Casillas' breath alcohol level was greater than .08 before determining, unanimously, that his breath alcohol level was greater than .15. This is so because, otherwise, the jury might convict him of being over .15 when it never agreed he was over .08. We find no merit to this argument. If the jury unanimously agrees that Casillas had a breath alcohol content of over .15, then it also unanimously agrees that Casillas had a breath alcohol content of at least .08.

Excessive Sentences

Finally, Casillas argues that his sentences were excessive. Casillas notes that he expressed remorse and a desire to overcome his substance abuse. In addition, an offender selection worksheet indicated that Casillas would be suitable for intensive supervision probation. After the jury's guilty verdict, the trial court sentenced Casillas to 360 days' imprisonment and a 15-year license revocation.

[23-25] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.[54] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.[55] The

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[53] See, e.g., *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008).

[54] *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

[55] *Id.*

appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[56]

Having reviewed the trial record and the presentence investigation report, we find no evidence that the court imposed excessive sentences. The court explained that imprisonment was necessary for the protection of the public because the risk was substantial that during any period of probation, Casillas would engage in additional criminal conduct. This was not an unreasonable conclusion given the extent of Casillas' intoxication and the fact that this was his third offense. The court further stated that lesser sentences would depreciate the seriousness of Casillas' crimes and promote disrespect for the law. We find no error.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

AFFIRMED.

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[56] *Id.*

STATE OF NEBRASKA, APPELLEE, V.
TERRENCE K. GORUP, APPELLANT.
782 N.W.2d 16

Filed May 14, 2010. No. S-09-086.

1. **Search and Seizure: Police Officers and Sheriffs: Evidence.** When an illegal search precedes a consent to search, law enforcement officers must have obtained the consent through means sufficiently distinguishable from the illegal search to be considered an independent act of free will. If the consent to search was not sufficiently attenuated, it is invalid as an exploitation of the prior illegal act and a court must exclude both the consent and the evidence found as a result of that consent as fruit of the poisonous tree.
2. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** When a consensual search is preceded by a Fourth Amendment violation, the prosecution must prove two things: (1) the consent was voluntary; and (2) the police obtained the statement through means sufficiently distinguishable to be purged of the primary taint of that illegality.

3. **Constitutional Law: Search and Seizure.** Even if a consent to search is voluntary, a court must consider the evidence's admissibility in the light of the Fourth Amendment's distinct policies and interests.
4. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. It reviews the trial court's findings of historical facts for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that it reviews independently of the trial court's determination.
5. **Constitutional Law: Search and Seizure: Appeal and Error.** In determining whether the exclusionary rule applies, an appellate court is concerned not only with the Fourth Amendment's privacy interests, but also with deterrence and judicial integrity.
6. **Constitutional Law: Evidence: Appeal and Error.** When the State seeks to submit evidence as sufficiently attenuated from a previous Fourth Amendment violation, an appellate court will review the trial court's findings of historical facts for clear error but review de novo the court's ultimate attenuation determination based on those facts.
7. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.
8. **Warrantless Searches.** The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
9. **Constitutional Law: Police Officers and Sheriffs: Confessions.** Attenuation analysis assumes that a statement is voluntary under the Fifth Amendment and asks whether the connection between the illegal police conduct and the statement nevertheless requires suppression to deter Fourth Amendment violations.
10. **Constitutional Law: Search and Seizure.** There are three relevant factors for determining whether a consent to search is sufficiently attenuated from a previous Fourth Amendment violation: (1) the temporal proximity between the illegal action and the consent to search, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct.
11. ____: ____. Each attenuation factor should be determined separately and then weighed together.
12. **Search and Seizure: Police Officers and Sheriffs.** Consent to search given in very close temporal proximity to the official illegality is often a mere submission or resignation to police authority and not necessarily an act of free will.
13. **Search and Seizure.** Dissipation of the taint resulting from an illegal entry ordinarily involves showing that there was some significant intervening time, space, or event.
14. **Search and Seizure: Evidence.** If only a short period of time has passed, a court is more likely to consider the consent to search as a poisonous fruit of the illegal act.

15. **Search and Seizure: Police Officers and Sheriffs: Evidence: Motor Vehicles.** Even when suspects do not observe law enforcement officers search for or discover contraband, their subsequent consent to search can be tainted when they observed the officers illegally enter their residence or vehicle and would have reasonably concluded that refusing consent was pointless because the officers had already discovered the contraband.
16. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** Absent any other intervening circumstance, an officer's advisement, given shortly after a Fourth Amendment violation, that a suspect may refuse consent to a search does not weigh against exclusion, particularly when the other factors strongly favor exclusion.
17. **Search and Seizure: Police Officers and Sheriffs.** The purpose and flagrancy of the official misconduct is the most important attenuation factor because it is directly tied to the exclusionary rule's purpose—deterring police misconduct.
18. ____: ____. Purposeful and flagrant conduct can be found when (1) the impropriety of the official's misconduct was obvious or the official knew, at the time, that his conduct was likely unconstitutional but engaged in it nevertheless; and (2) the misconduct was investigatory in design and purpose and executed in the hope that something might turn up.
19. **Constitutional Law: Police Officers and Sheriffs.** Even if law enforcement officers do not subjectively know that their conduct is illegal, they are also chargeable with knowing when their conduct is an obvious violation of the Fourth Amendment under an objective standard of reasonableness.
20. **Search and Seizure: Warrantless Searches.** In evaluating the reasonableness of a search or seizure without a warrant, it is imperative that the facts be judged against an objective standard.
21. **Constitutional Law: Warrantless Searches: Police Officers and Sheriffs.** Grounding the exceptions to the warrant requirement in objective reasonableness retains the value of the exclusionary rule as an incentive for members of the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment.
22. **Constitutional Law: Police Officers and Sheriffs: Appeal and Error.** Avoiding varied results and setting clear precedent for law enforcement officers to follow are the reasons for de novo review in Fourth Amendment cases.
23. **Constitutional Law: Warrantless Searches: Police Officers and Sheriffs.** Investigatory shortcuts cannot justify Fourth Amendment violations.
24. **Constitutional Law: Evidence: Appeal and Error.** An appellate court will not uphold the admission of evidence that encourages Fourth Amendment violations.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Reversed and remanded for a new trial.

Ann C. Addison-Wageman for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

CONNOLLY, J.

SUMMARY

This is Terrence K. Gorup's second appeal from his conviction and sentence for possession of a controlled substance, methamphetamine. In *State v. Gorup* (*Gorup I*),[1] Gorup argued that the court erred in failing to suppress evidence because his consent was an exploitation of a prior illegal search. We vacated his conviction and sentence and remanded the cause for the court to consider two issues: (1) whether the search-incident-to-arrest exception to the warrant requirement applied; and (2) whether Gorup's consent was tainted by a prior illegal search.

Following remand, the court heard additional evidence. It concluded that the initial search of Gorup's apartment was illegal but that Gorup's consent was not an exploitation of a prior illegality.

We reverse, and remand for a new trial. We conclude that Gorup's consent was not sufficiently attenuated from the purported search incident to arrest to dissipate the taint of the illegal search. Because his consent to search was the fruit of the poisonous tree, the court erred in failing to exclude evidence seized under his consent.

BACKGROUND

In *Gorup I*, we stated the underlying facts as follows:

> In July 2006, the Bellevue Police Department conducted an investigation of Gorup, who was suspected of dealing narcotics from his apartment. When it was discovered that Gorup had a warrant outstanding for failure to appear on a previous drug violation, two detectives formulated a plan to go to Gorup's apartment and conduct a "knock-and-talk investigation" with Gorup concerning suspected drug trafficking. Their objective was to obtain Gorup's consent to search his apartment.

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[1] *State v. Gorup*, 275 Neb. 280, 745 N.W.2d 912 (2008).

On July 31, 2006, the detectives arrived at Gorup's apartment in an unmarked police vehicle. As they approached the apartment, a male was seen leaving. When asked if Gorup was home, the man replied in the affirmative. The man returned to the apartment, opened the door, and informed Gorup that someone was there to see him. Gorup appeared and began to exit the apartment. As he approached the threshold of the doorway, a detective informed Gorup that he was under arrest. At that point, Gorup, who was standing directly outside his apartment door, was placed in handcuffs. He was not transported from the scene immediately because a marked police car was not available.

While standing at the door, a detective noticed a person sitting on a couch inside the apartment. He also observed some blade-edged weapons. Gorup informed the detectives that a couple of people were in the apartment. After waiting for a uniformed officer to arrive, the detectives performed what they described as a "protective sweep" of the apartment. The individuals in the apartment were escorted to the living room. A detective then performed what he described as a "search incident to arrest." In doing so, he searched a "small black zippered-type case" located on a table just inside the doorway, 4 or 5 feet away from Gorup. The case was not zipped shut, and inside, the detective saw "a couple [of] bags" that he recognized from his "training and experience as [being] methamphetamine." He left the bags inside the case on the table.

During this time, Gorup remained in the hallway with his hands cuffed behind his back. It is unknown whether Gorup could observe the detectives' activity. One detective testified that a wall probably would have obstructed Gorup's view of the detectives' activity inside the apartment. Though not specified in the record, the parties stated at oral argument that this activity continued for about 30 minutes.

After this search, one of the detectives directed the uniformed officer to escort Gorup to the marked police car. The same detective followed Gorup to the car, and

while Gorup was seated in the police car, the detective requested Gorup's consent to search the apartment. Gorup was informed several times that he did not have to provide his consent. The detective testified that Gorup gave his consent to a search of the apartment.

This subsequent search revealed several items of contraband in addition to the bags of methamphetamine in the black zippered case. After the search, the detective returned to the police car and read Gorup his *Miranda* rights. The detective told Gorup about the black zippered case. Gorup admitted that he knew of the case but denied that it was his. The detective stated Gorup told him that Gorup had been selling methamphetamine to raise money so he could move from his apartment.

Before trial, Gorup moved to suppress all items of physical evidence seized from his apartment. The district court overruled the motion. The court found that the initial warrantless search of Gorup's apartment was not lawful as a protective sweep and might have been unlawful as a search incident to arrest. It found that the subsequent consent to the search of the apartment was voluntary and therefore served as an adequate basis for the seizure of the "hygiene case" and the contents thereof. It found that although Gorup knew that the detectives had entered his apartment, he did not know whether incriminating evidence had been found when he gave his consent to search the apartment.

After a stipulated bench trial, the district court convicted Gorup of possession of a controlled substance, methamphetamine, and sentenced him to a term of 1 to 3 years' imprisonment, granting him credit for 249 days spent in jail awaiting disposition of this charge.[2]

In *Gorup I*, Gorup assigned that the court erred in failing to suppress evidence found during the detectives' search of his apartment because the detectives had already illegally searched his apartment before he consented. He argued that the prior illegality tainted his consent for the detectives to search again.

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[2] *Id.* at 282-84, 745 N.W.2d at 914-15.

We concluded that the court failed to determine whether the search was valid as a search incident to arrest and whether the detectives obtained Gorup's consent by exploiting an illegal search.

We explained that when a person gives law enforcement officers consent to search following their illegal entry, a court should admit the evidence only if the consent meets two conditions: (1) the consent was voluntary; and (2) it was not obtained through an exploitation of the illegal entry. We recognized that the court found Gorup's consent was voluntary because the detectives had advised Gorup that he could refuse consent and had not confronted him with the evidence they had uncovered. But we concluded that the court failed to consider the appropriate factors for determining whether Gorup's consent to search was an exploitation of an illegal entry.

We vacated Gorup's conviction and sentence and remanded the cause for the court to consider two issues: (1) whether the search-incident-to-arrest exception to the warrant requirement applied; and (2) if not, whether Gorup's consent was tainted by the illegal search and must be excluded as the "fruit of the poisonous tree." We also set out specific factors for the court to consider in determining whether Gorup's consent was purged of the taint of an illegal search.

Additional Evidence on Remand

Two detectives, Zeb Simones and John Stuck, who investigated drug crimes for the Bellevue Police Department, arrested Gorup. Simones was the only witness to testify at the original suppression hearing. At the second suppression hearing after remand, the court received Stuck's deposition.

Both detectives testified that they immediately handcuffed Gorup after he identified himself. Stuck testified that they first asked Gorup to step outside and that Simones entered the apartment while Stuck was handcuffing Gorup. Stuck stated that he believed at this time there was a valid felony arrest warrant for Gorup. The record fails to show an arrest warrant. Stuck also knew that another police officer had gone to Gorup's apartment about 2 weeks earlier and asked Gorup for consent to search his apartment. Stuck knew that Gorup had refused to give that officer consent to search.

Stuck testified that when he handcuffed Gorup, he was outside the apartment door in the hallway. Stuck stated that he was accompanied by a uniformed officer, who was standing directly in front of Gorup and had a patrol car parked just outside the apartment building. He testified that about 5 minutes after Simones found the methamphetamine in the black bag, Stuck and the officer placed Gorup in the patrol car. Stuck stated that as they were taking Gorup outside the apartment building, Simones showed Stuck the contents of the black bag but that Gorup was far enough away that he could not have seen the bag.

On cross-examination, however, Stuck stated that it was probably closer to 1 to 2 minutes from the time he handcuffed Gorup until he and the officer placed Gorup into the patrol car. He stated that the protective sweep search took 1 to 2 minutes and that the search incident to arrest took 1 minute. Stuck did not state that the detectives had to wait for a uniformed officer to arrive in a patrol car before they could transport Gorup.

Stuck also explained where Gorup was standing while Simones conducted the "search incident to arrest" inside Gorup's apartment. He testified that during this search, Gorup stood handcuffed just outside the door, with the door to Gorup's immediate left. He stated that Simones found the black zippered bag on a table a little over an arm's length from the door. And he said that Gorup was a little in front of the doorjamb and would have needed to lean backward to see inside the apartment. He said that Gorup did not do this.

District Court's Order

[1] We pause to explain why our remand in *Gorup I* required the court to consider whether it must exclude the evidence the detectives obtained during their second search under Gorup's consent. When an illegal search precedes a consent to search, law enforcement officers must have obtained the consent through means sufficiently distinguishable from the illegal search to be considered an independent act of free will.[3] If the

[3] See *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

consent to search was not sufficiently attenuated, it is invalid as an exploitation of the prior illegal act and a court must exclude both the consent and the evidence found as a result of that consent as fruit of the poisonous tree.[4]

On remand, the district court adopted its findings from the first suppression order. The court concluded that the search of the black bag was not a valid search incident to arrest and that no exigent circumstances justified the search of the bag. It then analyzed the three attenuation factors that we set forth in *Gorup I* and concluded that the evidence was admissible.

Considering the temporal proximity factor, the court found that the protective sweep and the search incident to arrest, combined, took about 2 minutes. It further found that the time from the illegal entry to Gorup's consent was, at most, 10 minutes, and that this factor favored exclusion.

Regarding intervening circumstances, the court found that Simones had told Gorup on several occasions that Gorup could refuse consent. It concluded that this factor weighed against exclusion.

The court examined the purpose and flagrancy of the detectives' misconduct and concluded that this factor was neutral. The court concluded that it "cannot find that the search incident to arrest was an obvious violation of [Gorup's] constitutional rights." It further stated that it "cannot find that [the detectives] recognized that such an intrusion was, on its face, unconstitutional." Yet, it also found that the detectives' purpose was "investigatory in design and that the search was executed in the hope that contraband would be found."

But the court concluded that it could consider other factors because of the unique facts of the case. It found that although Gorup likely knew an officer had entered his apartment, Gorup had not observed Simones' discovery of the bag or its contents. And the detectives had not confronted him with the evidence. The court concluded that the evidence established that Gorup "was not aware that the contraband was discovered":

> At best, [Gorup] knew that an officer or officers were inside his apartment for a period of approximately

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[4] See, e.g., *U.S. v. Valentine*, 539 F.3d 88 (2d Cir. 2008).

> two minutes. Following that brief search, consent was requested after [Gorup] was thoroughly informed of his right to refuse consent. *This unique factor* must be considered in conjunction with the foregoing factors as to whether the consent was the fruit of the prior illegal search. Although a close case, based on the totality of the circumstances, including the factors prescribed by the Nebraska Supreme Court in its opinion, this Court finds that Gorup's consent was not an exploitation of the prior search and, therefore, not "fruit of the poisonous tree."

(Emphasis supplied.) Accordingly, the court overruled Gorup's motion to suppress. Gorup waived his right to a jury trial. After a stipulated bench trial, the court found Gorup guilty of the charged offense and sentenced him to 1 to 3 years' imprisonment, with credit for time served.

ASSIGNMENTS OF ERROR

Gorup assigns that the court erred in overruling his motion to suppress and in admitting evidence at trial that the police obtained through an unreasonable search and seizure.

STANDARD OF REVIEW

As noted, in *Gorup I*,[5] we set forth a two-part inquiry for determining whether evidence is admissible based on a suspect's consent to search following an illegal entry. We stated:

> Where a search following an illegal entry is justified based on alleged consent, a court must determine whether that consent was voluntary, and in addition, the court must determine whether the illegal entry tainted that consent.[6] These two questions are not the same, and "'consequently the evidence obtained by the purported consent should be held admissible only if it is determined that the consent was *both* voluntary and not an exploitation of the prior illegality.'"[7] Therefore, in analyzing this consent to

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[5] See *Gorup I, supra* note 1.

[6] *U.S. v. Robeles-Ortega*, 348 F.3d 679 (7th Cir. 2003).

[7] *State v. Lane*, 726 N.W.2d 371 (Iowa 2007).

search, there are two issues presented: (1) the voluntariness of the consent under the totality of the circumstances and (2) exploitation under the fruit of the poisonous tree doctrine.[8]

[2] Federal courts also apply a two-part inquiry. It is true that courts have sometimes considered whether a consent to search was voluntary in their attenuation analysis.[9] But consistent with the U.S. Supreme Court's analysis in *Wong Sun v. United States*[10] and *Brown v. Illinois*,[11] federal courts generally hold that when a consensual search is preceded by a Fourth Amendment violation, the prosecution must prove two things: (1) the consent was voluntary; *and* (2) the police obtained the statement through means sufficiently distinguishable to be purged of the primary taint of that illegality.[12]

[3] In *Brown*, the U.S. Supreme Court stated that even if a statement was voluntary under the Fifth Amendment, the Fourth Amendment issue remains. So even if a consent to search is voluntary, a court must consider the evidence's admissibility in the light of the Fourth Amendment's distinct policies and interests.[13]

[4] We have recently held that in reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we will apply a two-part standard of review. We review the trial court's findings of historical facts for clear error. But whether those facts trigger or violate Fourth

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[8] *Gorup I, supra* note 1, 275 Neb. at 285, 745 N.W.2d at 916.

[9] See, e.g., *U.S. v. Valencia*, 913 F.2d 378 (7th Cir. 1990).

[10] *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), quoting *Nardone v. United States*, 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939).

[11] See *Brown, supra* note 3. See, also, 4 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 8.2(d) (4th ed. 2004).

[12] *U.S. v. Hernandez*, 279 F.3d 302 (5th Cir. 2002); *Robeles-Ortega, supra* note 6; *U.S. v. Barnum*, 564 F.3d 964 (8th Cir. 2009); *U.S. v. Melendez-Garcia*, 28 F.3d 1046 (10th Cir. 1994); *U.S. v. Santa*, 236 F.3d 662 (11th Cir. 2000). See, also, 4 LaFave, *supra* note 11.

[13] See *Brown, supra* note 3.

Amendment protections is a question of law that we review independently of the trial court's determination.[14]

[5,6] More specifically, we have recently applied the same two-part standard to review whether a consent to search was voluntary.[15] In that case, we were not discussing whether a consent to search was voluntary under the Fifth Amendment,[16] but whether the Fourth Amendment required the evidence's exclusion to protect its prohibition against unreasonable searches and seizures. In determining whether the exclusionary rule applies, we are concerned not only with the Fourth Amendment's privacy interests, but also with deterrence and judicial integrity.[17] In the light of our more recent holdings, we conclude that the two-part standard of review should apply to this Fourth Amendment issue also. Accordingly, when the State seeks to submit evidence as sufficiently attenuated from a previous Fourth Amendment violation, we will review the trial court's findings of historical facts for clear error but review de novo the court's ultimate attenuation determination based on those facts.[18]

ANALYSIS

[7,8] Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.[19] The warrantless search exceptions recognized by this court include: (1) searches undertaken with consent or with probable cause,

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[14] See, *State v. Scheffert, ante* p. 479, 778 N.W.2d 733 (2010); *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

[15] *Hedgcock, supra* note 14.

[16] Compare *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[17] See *Robeles-Ortega, supra* note 6.

[18] See, e.g., *U.S. v. Carter*, 573 F.3d 418 (7th Cir. 2009); *U.S. v. Herrera-Gonzalez*, 474 F.3d 1105 (8th Cir. 2007); *U.S. v. Washington*, 387 F.3d 1060 (9th Cir. 2004); *People v. Wilberton*, 348 Ill. App. 3d 82, 809 N.E.2d 745, 284 Ill. Dec. 179 (2004); *Turner v. State*, 12 So. 3d 1 (Miss. App. 2008).

[19] *State v. Wenke*, 276 Neb. 901, 758 N.W.2d 405 (2008).

(2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.[20]

On remand, we directed the court to consider only two exceptions: the search-incident-to-arrest exception and the consent exception. We directed the court to determine whether the consent was an exploitation of the previous illegal search under the factors we set out. The court concluded that the search-incident-to-arrest exception did not apply. The only issue presented by this appeal is whether Gorup's consent to search an area was valid after the police had conducted an illegal search of the same area.

[9] The court again found that Gorup's consent to search was voluntary. But our mandate did not require the court to reconsider whether the consent was voluntary. Thus, we implicitly accepted its determination in *Gorup I* that the consent was voluntary. "Even if given voluntarily, however, consent does not validate a search that is . . . not an independent act of free will sufficiently attenuated to break the chain of events between the Fourth Amendment violation and the consent."[21] That is, "[a]ttenuation analysis *assumes* that the statement is 'voluntary' [under the Fifth Amendment] and asks whether the connection between the illegal police conduct and the statement nevertheless requires suppression to deter Fourth Amendment violations."[22]

[10] To show that the taint of a previous Fourth Amendment violation was dissipated, the State must show a sufficient attenuation, or break in the causal connection, between the illegal conduct and the consent to search.[23] As we indicated in *Gorup I*, there are three relevant factors for determining whether a consent to search is sufficiently attenuated from a previous Fourth Amendment violation: (1) the temporal proximity between the illegal action and the consent to search,

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[20] *Gorup I, supra* note 1.

[21] See, e.g., *U.S. v. Jaquez*, 421 F.3d 338, 342 (5th Cir. 2005).

[22] *New York v. Harris*, 495 U.S. 14, 23, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990).

[23] See, e.g., *Jaquez, supra* note 21.

(2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct.

TEMPORAL PROXIMITY WEIGHED IN FAVOR OF SUPPRESSION

In the court's suppression order, it found that no more than 10 minutes had elapsed from the time of the illegal entry until Gorup consented to a search of his apartment. It concluded that this factor favored exclusion.

The State argues that even this short of a period does not compel the conclusion that the attenuation was insufficient if other circumstances show that the consent was sufficiently an act of free will. Relying on *U.S. v. Herrera-Gonzalez*,[24] it argues that two relevant circumstances mitigated the short time between the illegal search and Gorup's consent to search: (1) Gorup did not know that the detectives had searched the black bag and found drugs; and (2) Simones informed Gorup of his right to refuse consent to search.

[11] In *Herrera-Gonzalez*, a case involving an illegal traffic stop, the Eighth Circuit stated that it had "found consent given a short time after the [traffic] stop sufficient to purge the taint *if other circumstances* indicate the consent was sufficiently an act of free will."[25] There, the other circumstance was the officer's inability to verify the defendant's license plates or driver's license during the stop. This fact was a sufficient intervening circumstance that justified the officer's request to search and thus separated the defendant's consent from the delayed traffic stop, even if illegal. In other words, in some cases, the intervening circumstances factor may outweigh the temporal proximity factor. Whether there were intervening circumstances, however, is a separate issue from whether a suspect gave consent shortly after an illegal act. Assuming that there were valid intervening circumstances, permitting the State to play the same card twice—by considering the same facts as intervening circumstances and as mitigating circumstances under the temporal proximity factor—would always tip the weighing of the attenuation factors in its favor. Rather,

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[24] See *Herrera-Gonzalez, supra* note 18.

[25] *Id.* at 1112 (emphasis supplied).

each attenuation factor should be determined separately and then weighed together.

[12-14] "[C]onsent [to search] given in very close temporal proximity to the official illegality is often a mere submission or resignation to police authority and not necessarily an act of free will."[26] "Dissipation of the taint resulting from an illegal entry, 'ordinarily involves showing that there was some significant intervening time, space, or event.'"[27] So, "'[i]f only a short period of time has passed, a court is more likely to consider the consent [to search] as a "poisonous fruit" of the illegal act.'"[28] We conclude that the court correctly determined that this factor weighed in favor of exclusion.

Intervening Circumstances

The court concluded that the intervening circumstances factor weighed against exclusion. It apparently considered Gorup's lack of actual knowledge that Simones had found the contraband to be a unique, additional factor. Also, it relied on Simones' later advisements that Gorup could refuse consent for a search as a sufficient intervening circumstance.

The State argues that these facts are intervening circumstances that distinguish this case from our decision in *State v. Abdouch*.[29] We disagree. By relying on these consent advisements and Gorup's lack of actual knowledge as a "unique factor," the court has incorrectly placed its thumb on the scale against exclusion. It is hardly unique that officers who have illegally entered a suspect's residence in his presence would not need to show him the contraband they found for the suspect to conclude that refusing to consent to search was pointless.

In *Abdouch*, sheriff's officers and relatives of a deceased man with whom the defendant had resided before his death unlawfully searched the defendant's residence while she was gone. The search uncovered evidence of marijuana cultivation.

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[26] *State v. Cates*, 202 Conn. 615, 622, 522 A.2d 788, 792 (1987).

[27] *U.S. v. Buchanan*, 904 F.2d 349, 356 (6th Cir. 1990) (citation omitted).

[28] *U.S. v. Lopez-Garcia*, 565 F.3d 1306, 1315 (11th Cir. 2009).

[29] *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989).

When the defendant returned, officers lawfully arrested her on a driving under the influence warrant and took her to jail. She did not witness the illegal entry. But 5 hours later, while in custody, narcotics officers confronted the defendant with the contraband and other evidence found at her residence, and she admitted her involvement in the marijuana production.

The district court suppressed all evidence found by the officers without a warrant, which action the State did not contest. But the court admitted the evidence found by the family members and admitted the defendant's custodial statements. We reversed. In concluding that *Miranda* warnings were insufficient to break the causal chain between the illegal search and the confession statement, we quoted extensively from Professor LaFave's treatise:

> "In the typical case in which the defendant was present when incriminating evidence was found in an illegal search or in which the defendant was confronted by the police with evidence they had illegally seized, it is apparent that there has been an 'exploitation of that illegality' when the police subsequently question the defendant about that evidence or the crime to which it relates. This is because 'the realization that the "cat is out of the bag" plays a significant role in encouraging the suspect to speak.'
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> "Because this is the case, the more fine-tuned assessment which the Supreme Court mandated in *Brown v. Illinois* for determination of when a confession is the fruit of an illegal *arrest*, is ordinarily unnecessary when the 'poisonous tree' is instead an illegal search. . . . 'Confronting a suspect with illegally seized evidence tends to induce a confession by demonstrating the futility of remaining silent. On the other hand, the custodial environment resulting from a false arrest is merely one factor to be considered in determining whether a confession is inadmissible.' . . .
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> ". . . [I]t is crystal clear that giving the defendant the *Miranda* warnings will not break the causal chain between an illegal search and a subsequent confession. The Court in *Brown* found the warnings alone insufficient when the

> primary illegality was an illegal arrest, and the warnings have even less impact when the prior Fourth Amendment violation was a fruitful illegal search."[30]

LaFave concludes that the same reasoning applies to consent searches after an illegal search. Regarding the coercive effect of knowing that an illegal search has already taken place, LaFave has stated:

> Unquestionably, if evidence is uncovered in an illegal search and the defendant is "face to face with the incriminating evidence and able to see that the police had firm control over her home," a consent to police seizure of that evidence is not voluntary. The same is true if the police in the course of an illegal search find certain incriminating evidence and then obtain the permission of the person in charge of the place searched to search the balance of that place. The purported consent given in such circumstances is nothing more than "submission or resignation to police authority," for the individual most likely "erroneously believed that it was useless to resist."[31]

[15] Under these facts, it is irrelevant that Simones did not confront Gorup with the contraband that he had seized or that Gorup did not see the actual search or seizure. He knew that the detectives had illegally entered his apartment and would have reasonably inferred that they had searched it. And other courts have similarly concluded that subsequent consents to search were tainted when the suspects observed law enforcement officers illegally enter their residence or vehicle without their consent or a warrant and would have reasonably concluded that refusing consent was pointless because the officers had already discovered the contraband.[32]

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[30] *Id.* at 945-46, 434 N.W.2d at 327-28, quoting 4 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 11.4(c) (2d ed. 1987) (citation omitted).

[31] 4 LaFave, *supra* note 11, § 8.2(d) at 85.

[32] See, e.g., *U.S. v. Vega*, 221 F.3d 789 (5th Cir. 2000); *U.S. v. Haynes*, 301 F.3d 669 (6th Cir. 2002); *U.S. v. Furrow*, 229 F.3d 805 (9th Cir. 2000), *overruled on other grounds, U.S. v. Johnson*, 256 F.3d 895 (9th Cir. 2001).

The suspects in these cited cases had not seen the officers discover or seize incriminating evidence, and the dissent does not contend otherwise. Instead, the dissent disagrees with our analysis because in many attenuation cases cited by LaFave, the suspects had seen law enforcement officers seize the evidence or the officers had told the suspects that they had found the evidence.[33] But that is not the fact pattern here.

Fourth Amendment cases are fact specific. The dissent's generalization misses the point. Relying on cases in which the suspects observed officers seize contraband or learned of the discovery from the officers does not show that the taint of the illegal action is purged unless those facts are present. The federal cases we have cited are on target. They illustrate illegal entry circumstances in which evidence was excluded without any requirement that the suspect have actual knowledge of the officers' discovery or seizure of the evidence. And the dissent relies on no case with similar facts in which a court held that the taint of a prior illegality was purged because the defendants did not see the officers seize incriminating evidence or because they had not been confronted with discovery of the evidence.

In *U.S. v. Furrow*,[34] one of the cases cited above, officers went to a cabin where they suspected a teenage party was underway. Several teenagers, including the cabin owner's son, ran off into the woods upon the officers' approach. After getting the remaining attendees to come out onto the porch, the officers attempted to obtain a search warrant from the county prosecuting attorney based on their observation of underage minors drinking alcohol and their discovery of marijuana in the possession of one or two of the teenagers. The prosecuting attorney informed the officers that they did not have sufficient information for a warrant but suggested that they could conduct a protective sweep of the residence. Two officers entered the

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[33] See, *U.S. v. Thomas*, 955 F.2d 207 (4th Cir. 1992); *Norman v. State*, 379 So. 2d 643 (Fla. 1980); *People v. Clark Memorial Home*, 114 Ill. App. 2d 249, 252 N.E.2d 546 (1969); *State v. Hoven*, 269 N.W.2d 849 (Minn. 1978); *State v. Olson*, 311 Mont. 270, 55 P.3d 935 (2002).

[34] *Furrow, supra* note 32.

house and found marijuana pipes but no other incriminating evidence. At this point, the owner's son returned and consented to a further search. But it was unclear whether the son could have seen the officers' search from where he was previously hiding or had learned from his friends when he returned that the officers had been inside the cabin.

In remanding for the trial court to determine whether the son "was cognizant of the prior illegal entry,"[35] the Ninth Circuit commented on the effect of a suspect's knowledge of an illegal entry:

> In *Howard*[36] and *Suarez*,[37] for example, the party who offered consent to a search had witnessed the illegal entry. The consent, although perhaps voluntary, was a product of the antecedent constitutional violation. In such a case, a person might reasonably think that refusing to consent to a search of his home when he knows that the police have, in fact, already conducted a search of his home, would be a bit like closing the barn door after the horse is out. . . . If a person was completely unaware of the illegal entry, his ability to consent would be unimpaired, and the taint would be effectively purged. A party unaware that the police *might have* already seen incriminating evidence would be in the same posture for considering whether to consent to a search as a person not previously subject to an illegal entry. . . .
>
> Thus, . . . if [the owner's son] knew of the prior search, his consent may be considered tainted, and evidence found must be suppressed if [his] consent was a product of the initial illegal search. If, however, [the son], who was hiding during the time of the initial search, was oblivious to the fact of any earlier search at the time he gave his consent to the second search, then the consent cannot be considered tainted.[38]

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[35] *Id.* at 815.

[36] *U.S. v. Howard*, 828 F.2d 552 (9th Cir. 1987).

[37] *U.S. v. Suarez*, 902 F.2d 1466 (9th Cir. 1990).

[38] *Furrow, supra* note 32, 229 F.3d at 814 (emphasis supplied).

But Gorup was not oblivious. He was aware of the illegal entry. Although Gorup was validly arrested, while he was handcuffed outside the door, Simones conducted an illegal search of his apartment. As Gorup stood just outside his door, Simones was searching just inside the door. It seems inconsistent and implausible for the State to argue that Gorup had knowledge of and control over drugs just inside the threshold but no knowledge that Simones would easily discover the drugs. Even if he could not see Simones discover or seize the contraband, he would have reasonably believed that Simones had done so and that refusing to give his consent to search was pointless. A separation of less than 10 minutes from that illegality did not dissipate the exploitation inherent in Simones' request to search.

We conclude that the district court incorrectly relied on the fact that Gorup did not see, and the police did not confront him with, the evidence Simones discovered during his illegal search before Gorup gave his consent to search again. This was not an intervening circumstance. Accepting this reasoning would permit officers to validate illegal searches and seizures by simply never confronting suspects with evidence they have illegally discovered or seized before obtaining their consent to search again. Our conclusion is not altered because Simones advised Gorup that he could refuse consent to search.

Both the Seventh Circuit and the Ninth Circuit have rejected the argument that a signed consent form, which advises suspects of their right to refuse consent, is a sufficient intervening circumstance to purge the taint of an illegal action when it is obtained shortly after the illegal action: "This would effectively eviscerate the exclusionary rule's goal of deterring police misconduct because it would give officers who recently violated a suspect's constitutional rights a chance to grant themselves a free pass by uttering a few magic words and encourage—rather than discourage—investigatory shortcuts."[39] And the Ninth Circuit further recognized that permitting such advisements to purge the taint of the prior illegal search would be contrary to

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[39] *Washington, supra* note 18, 387 F.3d at 1074. Accord *Robeles-Ortega, supra* note 6.

the U.S. Supreme Court's rejection of an analogous argument in *Brown v. Illinois*.[40]

[16] In *Brown*, the Court rejected the government's argument that *Miranda* warnings, standing alone, were per se sufficient to separate the defendant's subsequent confession from the taint of his illegal arrest.[41] In *State v. Abdouch*, this court similarly concluded that *Miranda* warnings were an insufficient intervening circumstance to separate a subsequent confession from the taint of an illegal search.[42] It is true that knowledge of the right to refuse consent is a factor in determining whether a suspect voluntarily consented to a search.[43] And we recognized that some courts have also considered such advisements as an intervening circumstance in attenuation determinations.[44] But if, under *Brown*, *Miranda* warnings, standing alone, are insufficient to break the causal chain between an illegal search or seizure and a subsequent confession, we conclude that the same reasoning should apply to consent advisements. Absent any other intervening circumstance, an officer's advisement, given shortly after a Fourth Amendment violation, that a suspect may refuse consent to a search does not weigh against exclusion, particularly when the other factors strongly favor exclusion.[45] We conclude that the court erred in concluding that these facts presented a unique factor that weighed against exclusion.

Purpose and Flagrancy of the Official Misconduct

The court concluded that this factor was neutral, weighing neither for nor against exclusion. It found that the detectives' purpose was "investigatory in design and that the search was executed in the hope that contraband would be found." But it concluded that it could not "find that search incident to

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[40] See *Brown, supra* note 3.

[41] *Id.*

[42] See *Abdouch, supra* note 29.

[43] See *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

[44] See 4 LaFave, *supra* note 11 (citing cases).

[45] See *Robeles-Ortega, supra* note 6.

arrest was an obvious violation of [Gorup's] constitutional rights." It further stated that it could not "find that [the detectives] recognized that such an intrusion was, on its face, unconstitutional."

The State argues that the detectives, while mistaken in their belief that their conduct was legal, did not engage in flagrant misconduct. But the State fails to recognize that flagrant misconduct includes investigatory conduct that results in an obvious Fourth Amendment violation.

[17] We agree with federal courts that have stated the purpose and flagrancy of the official misconduct is the most important attenuation factor because it is directly tied to the exclusionary rule's purpose—deterring police misconduct.[46] In applying this factor in *Brown*, the U.S. Supreme Court stated:

> The illegality here . . . had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning." . . . The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which [the petitioner's] arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion.[47]

[18] The Eighth Circuit has stated, consistent with the above quote from *Brown*, that purposeful and flagrant conduct can be found when "'(1) the impropriety of the official's misconduct was obvious *or* the official knew, at the time, that his conduct was likely unconstitutional but engaged in it nevertheless; and (2) the misconduct was investigatory in design and purpose and executed "in the hope that something might turn up."'"[48]

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[46] *U.S. v. Reed*, 349 F.3d 457 (7th Cir. 2003); *U.S. v. Simpson*, 439 F.3d 490 (8th Cir. 2006).

[47] *Brown, supra* note 3, 422 U.S. at 605.

[48] See *Herrera-Gonzalez, supra* note 18, 474 F.3d at 1113 (emphasis supplied).

We agree with this standard. Other courts have also stated that purposeful and flagrant conduct includes "fishing expeditions" in the hope that "'something might turn up.'"[49]

[19] In this case, the court's reliance on whether the detectives knew their conduct was illegal missed the mark because it applied a subjective standard. Obviously, if the detectives had admitted that they knew the search was illegal, their misconduct would have been flagrant. But, here, the detectives were never asked whether they subjectively believed the search was legal. And even if law enforcement officers do not subjectively know that their conduct is illegal, they are also chargeable with knowing when their conduct is an obvious violation of the Fourth Amendment under an objective standard of reasonableness.[50]

[20,21] This court has specifically stated that in evaluating the reasonableness of a search or seizure without a warrant, "it is imperative that the facts be judged against an objective standard. Would the facts available to the officer at the moment of the search or the seizure warrant a man of reasonable caution in the belief that the action taken was appropriate?"[51] Grounding the exceptions to the warrant requirement in objective reasonableness "'retains the value of the exclusionary rule as an incentive for [members of] the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment.'"[52]

[22] The issue here was whether an objectively reasonable law enforcement officer would have known that a search of Gorup's apartment under these circumstances was an obvious violation of the Fourth Amendment. But the court did not apply an objective reasonableness standard. And, because of the extensive case law on this issue, the district court was in

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[49] See *Reed, supra* note 46, 349 F.3d at 465. Accord, *Washington, supra* note 18; *U.S. v. McSwain*, 29 F.3d 558 (10th Cir. 1994).

[50] See, *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

[51] *State v. Nichols*, 189 Neb. 664, 665, 204 N.W.2d 376, 377-78 (1973).

[52] *Leon, supra* note 50, 468 U.S. at 919 n.20.

no better position to determine this issue than is this court. We owe no deference to its conclusion.[53] "Objective reasonableness" cannot turn on different trial judges' individual determinations about whether the facts are sufficient or insufficient to justify a law enforcement officer's conduct. Avoiding such varied results and setting clear precedent for law enforcement officers to follow are the reasons for de novo review in Fourth Amendment cases.[54] So it is our duty to maintain coherent Fourth Amendment principles and determine whether the detectives' actions were objectively reasonable or unreasonable.

Our adherence to solid legal moorings requires that we reverse the trial court's ruling. For 40 years, U.S. Supreme Court case law has prohibited this type of search. In 1969, the U.S. Supreme Court held in *Chimel v. California*[55] that a search incident to arrest is limited to the arrestee's person and the area within his or her immediate control. The following year, the Court specifically held that a warrantless search of a house was invalid as a search incident to an arrest when the defendant was arrested on the front steps of his house.[56] We applied both of these decisions in a 1982 case to conclude that a warrantless search of a house was illegal.[57] Many courts have long held that an arrest must take place within a suspect's residence to justify the search of the residence as an incident to the arrest, even in cases preceding *Chimel*.[58]

Under an objective reasonableness standard, it should have been obvious to the detectives that after they had arrested

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[53] See *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996).

[54] See *id.*

[55] *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

[56] See *Vale v. Louisiana*, 399 U.S. 30, 90 S. Ct. 1969, 26 L. Ed. 2d 409 (1970).

[57] See *State v. Weible*, 211 Neb. 174, 317 N.W.2d 920 (1982).

[58] See, e.g., *Kirkpatrick v. Butler*, 870 F.2d 276 (5th Cir. 1989); *Page v. United States*, 282 F.2d 807 (8th Cir. 1960); *United States v. Goad*, 426 F.2d 86 (10th Cir. 1970); Annot., 19 A.L.R.3d 727 (1968).

Gorup outside the door to his apartment, they were required to have a search warrant before attempting to conduct a search within the apartment.

Moreover, the search suggested a quality of purposefulness, which was shown by the detectives' inconsistent testimony. Simones testified that the narcotics unit officers regularly arrested people with outstanding warrants without having a uniformed officer or patrol car present. Yet, he also testified that the detectives did not immediately transport Gorup to the police station house because they were waiting for a uniformed officer in a patrol car to assist them.

In contrast, Stuck testified that while Simones was entering the apartment, Stuck and the uniformed officer were handcuffing Gorup and that the officer had a patrol car parked just outside the apartment building. The record does not support a finding that the officers could not have transported Gorup to the station if that had been their intent. And despite Simones' statement that they had intended to conduct a knock-and-talk and gain Gorup's consent to search, both Simones and Stuck admitted that they did not ask for Gorup's consent to search before arresting him and conducting a "protective sweep" and "search incident to arrest."

Obviously, the detectives did not have probable cause sufficient to support a search warrant at this point, and the State does not contend otherwise. Most tellingly, Stuck knew that only 2 weeks earlier, an officer had gone to Gorup's apartment and asked for his consent to search the apartment and that Gorup had refused to permit a search. This record compels the conclusion that (1) the detectives intended to conduct a protective sweep or a search incident to arrest, rather than a knock-and-talk investigation that had already failed; and (2) despite the obviousness of the search's illegality, the detectives exploited their search to obtain Gorup's consent after the fact.

[23,24] In sum, none of the attenuation factors show that the causal chain between the detectives' illegal conduct and Gorup's consent to search was broken. Further, suppressing the evidence here would serve the deterrence aim of the exclusionary rule. Investigatory shortcuts cannot justify Fourth

Amendment violations.[59] We will not uphold the admission of evidence that encourages Fourth Amendment violations. To ignore this violation would be setting a low bar for future police conduct.

CONCLUSION

We conclude that the court erred in failing to determine that the detectives obtained Gorup's consent to search his apartment by exploiting their previous illegal search of the same area. Because the second search was not attenuated from the Fourth Amendment violation, the court erred in failing to exclude evidence obtained in the search under Gorup's consent as the fruit of the poisonous tree. Accordingly, we reverse, and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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[59] See, e.g., *Brown, supra* note 3; *Washington, supra* note 18.

STEPHAN, J., dissenting.

I respectfully dissent. While I agree with the analytical framework utilized by the majority, application of that framework to the facts of this case leads me to a different result.

The attenuation analysis flows from the following statement in the seminal case of *Wong Sun v. United States*[1]:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Here, the question is whether the detectives exploited their brief but illegal search of Gorup's apartment in order to obtain his consent to search. As we noted in our prior opinion,[2] to

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[1] *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

[2] *State v. Gorup*, 275 Neb. 280, 745 N.W.2d 912 (2008).

resolve this question, the three-part test identified in *Brown v. Illinois*[3] should be considered. But we also noted that all relevant facts should be considered, as the purpose of the analysis is "to determine whether *under all the circumstances presented*, the consent was obtained by exploitation of the prior illegal search."[4]

I agree with the majority's determination that we review the district court's findings of fact for clear error. Here, the district court found that at the time he gave his consent, Gorup knew only that the detectives had been in his apartment for 2 minutes. The court found that Gorup "never saw nor was ever confronted" with the contraband discovered during that brief entry and "was not aware" of any discovered contraband prior to giving his consent to search.

The majority assumes on these facts that Gorup consented only because he realized that resistance was futile. In support of this assumption, the majority cites Professor LaFave's treatise for the proposition that "knowing that an illegal search has already taken place" has a coercive effect on a party's consent to search.[5] But cases cited by LaFave in support of this proposition involve facts very different from those before us here. In those cases, the person giving the consent was aware of both the prior illegal search and the incriminating evidence that search had yielded.

For example, in *People v. Clark Memorial Home*,[6] a representative of a service club knew that police officers had entered the club and had seen illegal bingo equipment materials before the representative consented to a search which produced illegal slot machines. In *U.S. v. Thomas*,[7] the occupant of a hotel room knew that officers had entered the room and that they had

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[3] *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

[4] *State v. Gorup, supra* note 2, 275 Neb. at 286, 745 N.W.2d at 917 (emphasis supplied).

[5] See 4 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 8.2(d) (4th ed. 2004).

[6] *People v. Clark Memorial Home*, 114 Ill. App. 2d 249, 252 N.E.2d 546 (1969).

[7] *U.S. v. Thomas*, 955 F.2d 207 (4th Cir. 1992).

found contraband before he consented to a search of the room which yielded additional contraband. In *Norman v. State*,[8] the defendant knew that a sheriff had entered his property and had seen marijuana stored in the defendant's barn before the defendant consented to a search of the premises. In *State v. Hoven*,[9] the defendant knew officers had partially searched his vehicle and found a bag of marijuana before he consented to a search of the vehicle. In *State v. Olson*,[10] the defendant knew that officers had already entered her home and found drugs and drug paraphernalia before she consented to a search of her home.[11] In each of these cases, one can logically conclude that because the individual knew that a prior entry had occurred and that the entry had disclosed incriminating evidence, the subsequent consent was "nothing more than 'submission or resignation to police authority,'" because "the individual most likely 'erroneously believed that it was useless to resist.'"[12]

But the facts in this case are different, and as the majority notes, Fourth Amendment cases are fact specific. The district court found that all Gorup knew prior to giving his consent was that detectives were inside his apartment for 2 minutes. There is no evidence that he knew that a search was conducted during these 2 minutes or, even more importantly, that any evidence was discovered during these 2 minutes. The record shows that the incriminating evidence that was ultimately discovered was inside a bag and thus was not in the plain view of any officer or otherwise readily discoverable. Given these facts, I cannot logically conclude that Gorup consented to the search of his apartment only because he believed it was useless to resist.

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[8] *Norman v. State*, 379 So. 2d 643 (Fla. 1980).

[9] *State v. Hoven*, 269 N.W.2d 849 (Minn. 1978).

[10] *State v. Olson*, 311 Mont. 270, 55 P.3d 935 (2002).

[11] See, also, *U.S. v. Howard*, 828 F.2d 552 (9th Cir. 1987) (occupant of house observed armed officers search home for 30 minutes prior to consenting to search); *Burton v. State*, 204 P.3d 772 (Okla. Crim. App. 2009) (occupant of house knew officers had entered home and had observed evidence prior to consenting to search).

[12] 4 LaFave, *supra* note 5, § 8.2(d) at 85.

And on these facts, the detective's repeated advisements that Gorup was not required to consent to the search carries additional significance in that it reinforced the fact that Gorup had real choice. Gorup did not testify at the suppression hearing, and there is nothing in this record from which I can conclude that at the time those warnings were given, Gorup knew or reasonably could have believed that consent would be futile because the detectives had already found the incriminating evidence which had been concealed in the bag in his apartment. Therefore, I would affirm the judgment of the district court.

HEAVICAN, C.J., joins in this dissent.

TROY AND SHARI STONACEK, APPELLEES,
V. CITY OF LINCOLN, A POLITICAL
SUBDIVISION, APPELLANT.

BRADLEY E. SHEAFF AND JENNIFER K. SHEAFF, APPELLEES,
V. CITY OF LINCOLN, A POLITICAL
SUBDIVISION, APPELLANT.

GEORGE BRISTOL AND LORI BRISTOL, APPELLEES,
V. CITY OF LINCOLN, A POLITICAL
SUBDIVISION, APPELLANT.

782 N.W.2d 900

Filed May 14, 2010. Nos. S-09-230 through S-09-232.

1. **Statutes.** The meaning of a statute is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong. When determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can be deduced from the evidence.
4. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.

5. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** The Political Subdivisions Tort Claims Act allows a limited waiver of a political subdivision's sovereign immunity. This waiver is limited by specifically delineating claims that are exempt from being brought against a political subdivision.
6. **Negligence.** The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.
7. **Statutes: Legislature: Intent: Torts: Liability.** A court may determine that a statute gives rise to a tort duty to act in the manner required by the statute where the statute is enacted to protect a class of persons which includes the plaintiff, the statute is intended to prevent the particular injury that has been suffered, and the statute is intended by the Legislature to create a private liability as distinguished from one of a public character.
8. **Statutes: Legislature: Intent: Torts.** Consideration of the Legislature's purpose in enacting a statute is central to the analysis of whether the statute defines a duty in tort and creates private civil liability.
9. **Negligence: Federal Acts: Liability.** The federal misrepresentation exception insulates the government against liability for conveying false or inaccurate information, whether that information was conveyed based on willful or negligent misrepresentation.
10. **Tort Claims Act: Negligence.** Where the gravamen of the complaint is negligent performance of operational tasks rather than misrepresentation, the State cannot rely upon the misrepresentation exception in the State Tort Claims Act.
11. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.

Appeals from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded with directions to dismiss.

John V. Hendry, Lincoln City Attorney, and Steven Huggenberger for appellant.

Gary J. Nedved, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellees.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

This appeal involves three separate lawsuits brought by homeowners, appellees, who built homes in an area near a

tributary of the Cardwell Branch stream and experienced flooding in their homes. The lawsuits were consolidated by the district court for Lancaster County. Numerous parties named as defendants settled prior to trial, leaving the City of Lincoln, appellant, as the sole defendant at trial. Appellees claimed that the city was negligent when it did not give them the most recent information regarding the flood elevations of their properties prior to building their homes and issued various permits relating to the development in which their homes were located. The city argued, inter alia, that it was immune from suit based on exceptions to Neb. Rev. Stat. § 13-910 (Reissue 1997) of the Political Subdivisions Tort Claims Act (Tort Claims Act) and that it did not owe appellees a duty under the flood plain management statutes, Neb. Rev. Stat. § 31-1001 et seq. (Reissue 1998), and the State of Nebraska Department of Natural Resources (Department) administrative regulations promulgated thereunder or the Lincoln Mun. Code § 27.55.040(g) (1996). The district court determined that the city owed appellees a duty and therefore the city was liable, and the court awarded damages. The district court denied the city's consolidated motion for new trial, and the city appeals. We reverse the district court's decisions and remand the causes with directions to dismiss the complaints.

STATEMENT OF FACTS

Appellees, Troy and Shari Stonacek, Bradley E. Sheaff and Jennifer K. Sheaff, and George Bristol and Lori Bristol, each purchased a home in the Cardwell Woods development, which was located near a tributary to the Cardwell Branch stream. Appellees have all experienced flooding in their homes and claim that the city was negligent in managing information regarding the base flood elevations for the Cardwell Woods development and issuing various permits related to the development.

In designating its flood zones, the city has adopted the Federal Emergency Management Agency's "Digital Flood Insurance Rate Map" (FEMA map). The FEMA map was developed as part of the National Flood Insurance Program and shows several different flood zones.

Because some of the zones on the FEMA map that are generally designated as flood plains have not been studied, when a building permit application is made for a property in or near an area designated on the FEMA map, it has been the practice of the city to request that the Department conduct a flood plain study.

In December 1996, the city requested that the Department conduct a flood plain study of the previously unstudied tributary to the Cardwell Branch stream. The request was made based on building permit applications for homes in the Cardwell Woods development, an area that was adjacent to the tributary. These permits were not sought by appellees.

In response to this request, in January 1997, the Department provided the city with a flood plain map which contained flood elevations along with other data for the tributary to the Cardwell Branch stream. The map did not show all of the property that was being developed in the subdivision, but, rather, showed the property near and adjacent to the tributary of the Cardwell Branch stream. The district court determined that the study conducted by the Department found flood plain elevations along the tributary that were substantially different from the flood plain elevations which had been found in the FEMA map. The FEMA map showed a flood plain elevation for the area of 1201 feet above sea level, whereas the Department's map showed a flood plain elevation ranging from 1206 to 1209 feet above sea level.

Subsequent to the December 1996 Department study, appellees purchased land and built homes along the tributary. The Stonaceks purchased their lot in May 1998. The Sheaffs purchased their lot in August 1999. The Bristols purchased their lot in October 2003. The Bristols' lot was one of the lots adjacent to the tributary to the Cardwell Branch stream. The Stonaceks' and Sheaffs' lots were not adjacent to the tributary. The record shows that in January 2006, the Lincoln City Council adopted changes to the local flood plain maps which included all of appellees' properties as being within the flood-prone area.

Troy Stonacek directly requested flood plain information on his lot from the city before building commenced. The city's

flood plain administrator provided Stonacek with only the FEMA map information showing a flood plain elevation of 1201 feet above sea level. The Sheaffs and the Bristols received flood plain information through their builders. All appellees acquired building permits from the city's building and safety office. In each case, appellees were told either directly or through their builders that their lots were not located in the flood plain. Each appellee's building permit was issued based on the FEMA map which showed a flood plain elevation of 1201 feet above sea level rather than the Department map which showed a flood plain elevation of 1206 to 1209 feet above sea level. Appellees were not informed that the Department map existed or that the study had been conducted.

The three homes were constructed. The Stonaceks' basement was built at an elevation of 1201.8 feet above sea level. The Bristols' basement was built at an elevation of 1202.9 feet above sea level. The Sheaffs' basement was built at an elevation of 1201.2 feet above sea level. Each home experienced flooding.

At trial, there was evidence that for at least some period of time, the Department's map was kept in the Cardwell Woods development file in the city's building and safety office. The city acknowledged that the map had been misplaced and that the city had requested a replacement. The information on the map was not incorporated into the FEMA map. At trial, it was the city's position that the Department map contained no information pertinent to the inquiries of appellees or their building permit applications, because the map did not establish a flood plain elevation different from the FEMA map, and, as to the Stonaceks and Bristols, did not include their lots on the map.

In 2004, the U.S. Geological Survey undertook a remapping of the Cardwell Branch area as part of a project to study the flood plain elevations on the FEMA map. The remapping showed that along the tributary, the elevation of the 100-year flood event corresponded with the Department map. Appellees testified that when the U.S. Geological Survey's study was presented to them in 2005, that was the first time they became aware that the flood elevations of their properties were different from those which had been provided by the city.

The Stonaceks filed a complaint against the developer, the engineer who did the engineering work related to the subdivision, the Realtor who sold their lot to them, and the realty company of the Realtor. In April 2006, the complaint was amended to add the city as a defendant.

The Sheaffs and the Bristols filed complaints against the developer, the engineer who did the engineering work related to the subdivision, the Realtor who sold their lots to them, the realty company, and the city. All of the defendants except the city were dismissed from the suits after a settlement agreement was reached. Shortly thereafter, the three cases were consolidated.

The controlling complaints alleged that the city was negligent in the following ways:

> a. In failing to advise [appellees] of the study provided by the [Department] and the base flood elevation information for the Cardwell Woods development.
>
> b. In failing to follow the minimum standards for flood plain management programs enacted by the [Department].
>
> c. In violating Neb. Rev. Stat. § 31-1019.
>
> d. In issuing a permit to construct a residence on [appellees'] property . . . .
>
> e. In failing to require that the final plat for Cardwell Woods contain[s] base flood elevation data . . . .

The pretrial order reflected these five allegations.

The district court bifurcated the proceedings as to liability and damages. The liability trial was held on June 25 and 26 and July 25, 2007. At trial, the court considered appellees' five claims of negligence. The city asserted various defenses, including that the complaints were barred by the statute of limitations, the statutory and other provisions relied on by appellees did not create a duty to appellees, and it was immune from suit based on exceptions to the Tort Claims Act. The city made various motions seeking dismissal of the complaints. The motions were denied.

On September 25, 2007, the district court issued a consolidated order finding liability against the city. In its order, the district court stated the following: (1) that the city had in its

possession from the Department more detailed and accurate flood plain elevations than that displayed on the FEMA map prior to, and at the time when, appellees built their homes; (2) that the director of the city's building and safety office had a duty to acquire from the Department the information contained on the Department map; (3) that once obtained, the director of the city's building and safety office had a duty to provide the data obtained from the Department to appellees and their builders; (4) that had the city provided each appellee with the map it possessed, appellees would either have constructed their homes above the flood plain elevation shown on the Department map or would not have purchased the property where their homes are located; and (5) that the city was negligent and the city's negligence was a proximate cause of damages to appellees.

After making these determinations, the district court concluded that § 31-1001 and Lincoln Mun. Code § 27.55.040(g) created a duty that the city owed to appellees and that given such duty, these provisions created a basis for civil liability. With respect to the defenses under the Tort Claims Act, the district court concluded that because the city had proved an "adequate defense" for the claims of negligence identified in the complaints as (d) and (e), based on the building permit exception to the Tort Claims Act at § 13-910(4), it was immune from liability as to claims (d) and (e) but that the city was not immune from suit under other exceptions to the Tort Claims Act. Claims (d) and (e) were effectively dismissed. For its conclusion, the district court decided that the city "is negligent in one of the ways alleged by the plaintiffs, and that the City's negligence has caused some damage to the plaintiffs."

After the issuance of the order finding liability, the cases came before the district court on the issue of damages on December 1, 2008. In a subsequent consolidated order, the court awarded appellees monetary damages. The city moved for a new trial, and the motion was denied. The city appeals.

ASSIGNMENTS OF ERROR

The city asserts, restated and summarized, that the district court erred (1) when it failed to conclude that all claims were

exempt from suit under the Tort Claims Act after it properly concluded that two permit-based claims were exempt; (2) when it concluded that § 31-1001 et seq. and 258 Neb. Admin. Code, ch. 1 (2005), created a duty by the city to appellees; (3) when it concluded that Lincoln Mun. Code § 27.55.040(g) created a duty to appellees and that no exception in the Tort Claims Act, including the misrepresentation exception, applied to this negligence claim; and (4) when it denied the city's consolidated motion for new trial. Because the resolution of these assignments of error disposes of the cases, we do not recite or consider the city's remaining assignments of error.

STANDARDS OF REVIEW

[1,2] The meaning of a statute is a question of law. *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

[3] In actions brought pursuant to the Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong. When determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can be deduced from the evidence. See *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 267 Neb. 958, 679 N.W.2d 198 (2004).

[4] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Poppe v. Siefker*, 274 Neb. 1, 735 N.W.2d 784 (2007).

ANALYSIS

The Dismissal of Claims (d) and (e) Did Not Require Dismissal of All Five Claims Because Appellees' Negligence Claims Are Not All Permit Based.

The city asserts that given the allegations and evidence, all of appellees' negligence claims stemmed from the issuance of

the building permits and that therefore, all five claims, not just two, should have been dismissed under the permit-based exception to the Tort Claims Act at § 13-910(4). The city asserts that the district court erred when it allowed three of appellees' negligence claims identified as (a), (b), and (c) to go forward after properly dismissing the two negligence claims identified as (d) and (e) based on the permit exception to the Tort Claims Act. We do not agree with the city's characterization of the negligence claims or its proposition that immunity under one exception to the Tort Claims Act necessarily should have resulted in a dismissal of these complaints in their entirety.

[5] The Tort Claims Act allows a limited waiver of a political subdivision's sovereign immunity. This waiver is limited by specifically delineating claims that are exempt from being brought against a political subdivision such as the city. See § 13-910(1) to (12). The exception relative to permit-based claims is found at § 13-910(4) and provides that the Tort Claims Act shall not apply to "[a]ny claim based upon the issuance, denial, suspension, or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, or order."

Based on this exception in the Tort Claims Act, the district court determined that appellees' claims of negligence in their complaints identified as "d. . . . issuing a permit to construct a residence" and "e. . . . failing to require that the final plat for Cardwell Woods contain[s] base flood elevation data," were permit-based claims barred by the Tort Claims Act and thus effectively dismissed these claims. See *Rohde v. City of Ogallala*, 273 Neb. 689, 731 N.W.2d 898 (2007). Appellees did not file a cross-appeal challenging this ruling, and we need not address the substantive correctness of this ruling.

At issue on appeal relative to § 13-910(4) is the argument by the city that all of the claims of negligence flow from the issuance of the building permits and, therefore, all of the claims were barred by this provision of the Tort Claims Act and that the district court erred when it failed to dismiss all the claims. We find this assignment of error to be without merit.

After the dismissal of the two claims identified as (d) and (e) in the complaints, three claims remained. The remaining

three allegations, (a), (b), and (c), set forth in appellees' amended complaints, alleged that the city was negligent: "a. In failing to advise [appellees] of the study provided by the [Department] and the base flood elevation information for the Cardwell Woods development. b. In failing to follow the minimum standards for flood plain management programs enacted by the [Department]. c. In violating Neb. Rev. Stat. § 31-1019."

These three negligence claims do not arise out of the issuance, denial, suspension, or revocation of or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, or order. See § 13-910(4). Rather, these claims and the evidence surrounding them relate to the city's compliance with various statutory provisions and the city's alleged duty to advise appellees of accurate flood plain information. The plain language of § 13-910(4) does not exempt these claims from suit, and we conclude that the district court did not err when it did not dismiss negligence claims (a), (b), and (c) under the permit exception to the Tort Claims Act at § 13-910(4).

The City Did Not Owe Appellees a Duty Based on § 31-1019 or the Department's Regulations, and Claims (b) and (c) Should Have Been Dismissed.

Appellees' amended complaints and the trial record show that appellees claimed the city was negligent in failing to follow the minimum standards for flood plain management programs, the flood plain management statutes at § 31-1019, and the Department's regulations. The district court concluded that these authorities created a duty to appellees to maintain accurate mapping giving rise to civil liability. The city asserts the district court erred in concluding that these authorities created a duty and that the district court erred when it failed to dismiss appellees' negligence claims (b) and (c) based on these provisions. We agree with the city and conclude that the district court erred as a matter of law when it concluded these provisions created a duty for negligence purposes and failed to dismiss claims (b) and (c).

At issue in this assignment of error are the following provisions:

Section 31-1019, which stated in part:

> When the [Department], a federal agency, or any other entity has provided a local government with sufficient data and maps with which to reasonably locate within its zoning jurisdiction any portion of the flood plain for the base flood of any watercourse or drainway, it shall be the responsibility of such local government to adopt, administer, and enforce flood plain management regulations which meet or exceed the minimum standards adopted by the [Department] pursuant to subdivision (5) of section 31-1017.

The Department's "Minimum Standards for Floodplain Management Programs" are standards "for the adoption, administration, and enforcement of floodplain management regulations by cities, villages, and counties in Nebraska in accordance with section 31-1019, R.R.S. 1943." See 258 Neb. Admin. Code, ch. 1, § 001.

The district court concluded that under the standard set forth in this court's decision in *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001), the flood plain management statutes found at § 31-1001 et seq. and the Department's administrative regulations created a general duty to the public at large and a private right of action.

[6,7] In addressing the city's assignment of error, we note that the threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff. See *Claypool, supra*. If there is no legal duty, there is no actionable negligence. See *id*. In determining whether a statute or ordinance creates a duty, we stated in *Claypool* that

> [a] court may determine that a statute gives rise to a tort duty to act in the manner required by the statute where the statute is enacted to protect a class of persons which includes the plaintiff, the statute is intended to prevent the particular injury that has been suffered, and the statute is intended by the Legislature to create a private liability as distinguished from one of a public character.

261 Neb. at 825, 626 N.W.2d at 545. See, also, *Fimple v. Archer Ballroom Co.*, 150 Neb. 681, 35 N.W.2d 680 (1949) (considering duty owed under city ordinance).

[8] In *Claypool*, we recognized that where the Legislature has not by its express terms or by implication provided for civil tort liability, under principles of judicial restraint, it is prudent that we not do so. In *Claypool*, we made clear that consideration of the Legislature's purpose in enacting a statute is central to the analysis of whether the statute defines a duty in tort and creates private civil liability.

Section 31-1001 sets forth the legislative purpose for the flood plain management statutes as follows:

> (2) The purposes of sections 31-1001 to 31-1023 shall be to:
>
> (a) Accelerate the mapping of flood-prone areas;
>
> (b) Assist local governments in the promulgation and implementation of effective flood plain management regulations and other flood plain management practices;
>
> (c) Assure that when state lands are used and state-owned and state-financed facilities are located and constructed, flood hazards are prevented, flood losses are minimized, and the state's eligibility for flood insurance is maintained; and
>
> (d) Encourage local governments with flood-prone areas to qualify for participation in the national flood insurance program.

The foregoing language of the legislative purpose deals with the general duties of the governmental entities in managing flood plains and remaining eligible for insurance. The focus of the statute is on state-owned lands and projects. The language of the statute does not explicitly create a private civil tort liability based on a failure to properly implement the requisite flood plain management.

In addition to the language regarding purpose, we consider the explicit remedies provided in the flood plain management statutes, because the remedy informs us about the scope of the duty. As the city points out, § 31-1020 sets forth a remedy for landowners where a city fails to follow § 31-1019. Section 31-1020 stated in part:

> If a local government does not adopt and implement flood plain management regulations in accordance with section 31-1019 within one year after flood hazard data and maps have been provided to it pursuant to such section, the [Department] shall, upon petition of at least ten percent of the owners of the land located within the flood plain of the base flood delineated in such maps, or upon the written request of the board of directors of the natural resources district in which such land is located, conduct a public hearing after providing notice pursuant to section 31-1022. If the [Department] finds after such hearing that the data and maps available are sufficient to reasonably locate the boundaries of the base flood, the [Department] shall determine and fix by order the boundaries of the base flood and, where deemed appropriate, the boundaries of the floodway within the zoning jurisdiction of such local government. If within three months after the date of such order the local government still has not adopted and implemented flood plain management regulations for the area subject to such order in accordance with section 31-1019, the [Department] shall be vested with the power and authority to adopt flood plain management regulations for the area and shall adopt and promulgate such regulations for the identified base flood within the zoning jurisdiction of such local government.

We believe that the foregoing provisions of a statutory remedy for landowners under § 31-1020 are inconsistent with a purported legislative intention to create a tort duty. Further, the plain language of § 31-1019 does not intend to prevent the particular injury that has been suffered by appellees. See *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001).

We apply a similar analysis to title 258, chapter 1, of the Nebraska Administrative Code, which merely instructed the Department to implement the statutory requirements regarding flood plain management found in § 31-1019 and did not create a duty giving rise to civil tort liability.

Because these authorities do not expressly or by implication indicate that they create a private tort liability, the district court erred in concluding that appellees had a private action

in which the city owed appellees a duty under § 31-1019, and 258 Neb. Admin. Code, ch. 1. Accordingly, because there is no duty owed under these authorities, appellees' negligence claims based on these authorities fail and the district court erred when it failed to dismiss negligence claims (b) and (c).

Appellees' Claims Based on Lincoln Mun. Code § 27.55.040 Regarding Alleged Failure To Advise Appellees of the Department Map Is a Claim for Negligent Misrepresentation and Is Barred by the Tort Claims Act, and Claim (a) Should Have Been Dismissed.

The city asserts that the district court erred when it found liability and awarded damages to appellees based on appellees' negligence claim (a), which alleged that the city was negligent for failing "to advise [appellees] of the study provided by the [Department] and the base flood elevation information for the Cardwell Woods development." The city refers us to the exception to the Tort Claims Act found at § 13-910(7), which excepts from the Tort Claims Act claims for misrepresentation. Specifically, the city argues that the gravamen of negligence claim (a) is that the city negligently misrepresented the flood plain data and that this claim is exempt from being actionable under the misrepresentation exception of the Tort Claims Act. Given the jurisprudence surrounding the misrepresentation exception, we agree with the city and conclude that the district court erred when it failed to dismiss claim (a), which alleged a failure to advise appellees.

In reaching its conclusion that the city was liable to appellees based on its purported failure to advise appellees of the Department map as alleged in claim (a), the district court relied primarily on Lincoln Mun. Code § 27.55.040 as a source of this duty to appellees. At the time appellees' building permits were issued, § 27.55.040 provided:

> It shall be the duty of the Director of Building and Safety to enforce this chapter. His duties shall include, but not be limited to:
>
> . . . .
>
> (g) When base flood elevation data have not been provided on the official map, obtain, review, and reasonably

> utilize any base flood elevation and floodway data available from a federal, state, or other source, as criteria for requiring that new construction, substantial improvements, or other developments in flood plain meet the standards of this chapter.

The district court declined to characterize the failure to advise alleged in claim (a) as a "misrepresentation" and therefore concluded that the Tort Claims Act provision exempting claims for misrepresentation was inapplicable. See § 13-910(7). The district court erred as a matter of law when it deemed § 13-910(7) inapplicable and failed to dismiss claim (a).

We need not decide whether the city owed a duty to advise appellees of the existence of the Department map. Assuming but not deciding that the city did owe appellees such a duty under the city code at issue, any breach of that duty falls within the Tort Claims Act's misrepresentation exception.

The Tort Claims Act's misrepresentation exception immunizes political subdivisions from claims of "misrepresentation, deceit, or interference with contract rights." § 13-910(7). The leading U.S. Supreme Court case considering this exception under the Federal Tort Claims Act is *United States v. Neustadt*, 366 U.S. 696, 81 S. Ct. 1294, 6 L. Ed. 2d 614 (1961). In that case, a home buyer reasonably relied on an erroneous Federal Housing Administration appraisal and the Supreme Court determined that the plaintiff's negligence claim was barred by the misrepresentation exception to the Federal Tort Claims Act. We find cases under the Federal Tort Claims Act to be instructive and join other states employing the *Neustadt* reasoning to the analysis of the misrepresentation exception under state tort claims acts. See, e.g., *Gibson v. Evansville Vanderburgh Bldg.*, 725 N.E.2d 949 (Ind. App. 2000).

[9] In addressing the claims in *Neustadt*, the U.S. Supreme Court observed that the federal misrepresentation exception insulates the government against liability for conveying false or inaccurate information, whether that information was conveyed based on willful or negligent misrepresentation. In determining that the Federal Tort Claims Act excepts acts of misrepresentation, the Supreme Court defined negligent misrepresentation as the breach of "the duty to use due care in obtaining and

communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs." *Neustadt*, 366 U.S. at 706. It has been observed that the "prophylaxis of the misrepresentation exception extends to failures of communication." *Muniz-Rivera v. U.S.*, 326 F.3d 8, 13 (1st Cir. 2003).

After *Neustadt*, the U.S. Supreme Court again addressed the misrepresentation exception in *Block v. Neal*, 460 U.S. 289, 103 S. Ct. 1089, 75 L. Ed. 2d 67 (1983). In *Block*, the Supreme Court focused on the distinction between the duty to obtain and communicate accurate information from the duty to perform a separate task. In *Block*, the plaintiff received a loan from the Farmers Home Administration (FmHA) to build her home. The loan agreement provided that the FmHA should approve all plans and could inspect and test all materials. The completed house was defective, and plaintiff sued the FmHA alleging that it had failed to properly inspect and supervise construction. The FmHA defended by arguing that the suit was barred by the misrepresentation exception in the Federal Torts Claims Act. The Supreme Court determined that the claim was not barred because the FmHA was subject to suit for allegedly breaching a separate duty to supervise the construction and that this duty was independent of its duty to communicate information. The Supreme Court in *Block* distinguished *Neustadt*, concluding that the gravamen of the action against the government in *Neustadt* was that the plaintiffs were misled by the appraisal statement of the Federal Housing Administration prepared by the government, whereas *Block* involved a separate duty to act. *Block, supra*.

[10] This court has made a similar distinction in *Wickersham v. State*, 218 Neb. 175, 354 N.W.2d 134 (1984) *disapproved on other grounds, D.K. Buskirk & Sons v. State*, 252 Neb. 84, 560 N.W.2d 462 (1997). In *Wickersham*, we stated that where the gravamen of the complaint is negligent performance of operational tasks rather than misrepresentation, the State cannot rely upon the misrepresentation exception in the State Tort Claims Act. We concluded that a misrepresentation was not at issue in *Wickersham*.

In considering whether dissemination of information or a separate duty to act is at issue in a case, courts have noted that when government misinformation is at issue, a plaintiff must allege injury independent of that caused by the erroneous information to avoid dismissal based on the misrepresentation exception. See, e.g., *Block, supra*; *Guild v. United States*, 685 F.2d 324 (9th Cir. 1982); *Rich Products Corp. v. U.S.*, 804 F. Supp. 1270 (E.D. Cal. 1992).

In the instant case, appellees urged and the district court concluded that their negligence claim (a) regarding a failure to advise is not barred by the misrepresentation exception because it is an actionable event akin to *Block* and *Wickersham*. We are not persuaded by this argument, and we conclude that the gravamen of the allegation of negligence in claim (a) in this case involved a failure by city employees to advise appellees of the accurate flood plain information for their homes and not a failure to "utilize" the data under the Lincoln Municipal Code, as the district court erroneously concluded.

This case centers around what flood plain elevation information was provided to appellees, either directly or indirectly by way of their builders, and what information the city failed to communicate. See *Muniz-Rivera, supra*. Appellees did not claim that the city owed them a separate duty to inspect or supervise the building of their homes. Compare *Block, supra*. In this case, appellees alleged in claim (a) that the city had failed to properly advise them of information. As the U.S. Supreme Court has stated, "[w]hile we do not condone carelessness by government employees in gathering and promulgating . . . information, neither can we justifiably ignore the plain words Congress has used in limiting the scope of the Government's tort liability." *United States v. Neustadt*, 366 U.S. 696, 710-11, 81 S. Ct. 1294, 6 L. Ed. 2d 614 (1961). We are similarly constrained.

Because the gravamen of claim (a) alleging a failure to advise involves the improper communicating of the flood plain information relevant to appellees' properties, the claim is based on a misrepresentation. As a matter of law, the actions of the city are shielded by the immunity provided by the

misrepresentation exception in § 13-910(7) of the Tort Claims Act, and the district court erred when it did not dismiss negligence claim (a).

The District Court Erred When It Denied the City's Consolidated Motion for New Trial.

[11] The city moved for a new trial. The district court denied the motion. A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Poppe v. Siefker*, 274 Neb. 1, 735 N.W.2d 784 (2007). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Id.*

The complaints contained five claims. The district court effectively dismissed claims (d) and (e) based on the permit exception to the Tort Claims Act. We have concluded that no duty exists as to claims (b) and (c) and that based on the misrepresentation exception to the Tort Claims Act, the city was immune from suit with respect to claim (a). Because all five claims should have been dismissed, the district court abused its discretion when it denied the city's consolidated motion for new trial seeking that the judgments in favor of appellees be vacated. Such rulings are, therefore, reversed.

CONCLUSION

After dismissing negligence claims (d) and (e) based on the permit exception to the Tort Claims Act, the district court correctly determined that not all of appellees' negligence claims were barred by the permit exception. The district court erred when it concluded that the city owed appellees a duty under § 31-1001 et seq., and the Department's regulations thereunder, and that these provisions created a private cause of action as sought in claims (b) and (c). Finally, appellees' allegation in claim (a) that the city was negligent for failing to advise them of the Department map, grounded in Lincoln Mun. Code § 27.55.040, is barred by the misrepresentation

exception to the Tort Claims Act, regardless of whether a duty exists under the code. The district court erred when it failed to dismiss claim (a). All five claims of negligence should have been dismissed. Accordingly, the rulings of the district court denying the city's motions to dismiss were error and the denial of the city's consolidated motion for new trial asking that the judgments in favor of appellees be vacated is reversed. The judgments entered in favor of appellees are vacated, and the causes remanded with directions to dismiss the complaints.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

IN RE ESTATE OF LYLE L. FRIES, DECEASED. MARGARET FRIES, APPELLANT, V. KATHLEEN HURST, PERSONAL REPRESENTATIVE OF THE ESTATE OF LYLE L. FRIES, DECEASED, APPELLEE, AND JAMES FRIES ET AL., INTERVENORS-APPELLEES.

782 N.W.2d 596

Filed May 21, 2010. No. S-08-1189.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Decedents' Estates: Judgments: Appeal and Error.** When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.
3. **Statutes.** The meaning of a statute is a question of law.
4. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.
6. **Decedents' Estates: Valuation.** Under Neb. Rev. Stat. § 30-2314 (Reissue 2008), the probate estate is augmented by first reducing the estate by specified obligations and liabilities and then increasing the estate by the value of specified properties and transfers.

7. **Decedents' Estates.** The purpose of the concept of augmenting the probate estate in computing the elective share is twofold: (1) to prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share and (2) to prevent the surviving spouse from electing to a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets, and other nonprobate arrangements.
8. **Decedents' Estates: Intent: Wills.** The combined effect of the statutory elective share and augmented estate concepts is intended to protect the surviving spouse of a decedent against donative inter vivos transfers by devices which would deprive the survivor of a "fair share" of the decedent's estate and at the same time prevent the surviving spouse from receiving more than such share by allowing the acceptance of certain transfers and insurance proceeds and also yet elect against the will.
9. **Statutes.** Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
10. **Statutes: Appeal and Error.** An appellate court will not read into a statute a meaning that is not there.
11. ____: ____. When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
12. **Statutes: Intent: Appeal and Error.** In construing a statute, an appellate court looks to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served.
13. **Decedents' Estates.** Under Neb. Rev. Stat. § 30-2314(a)(1)(i) (Reissue 2008), a transfer under which the decedent retained at death the possession or enjoyment of, or the right to income from, the property does not require that the decedent's right to possession of, enjoyment of, or income from the property be recorded in the instrument of transfer.
14. ____. Under Neb. Rev. Stat. § 30-2314(a)(1)(i) (Reissue 2008), a decedent retains possession or enjoyment of, or the right to income from, property when it is understood that the decedent will retain such an interest despite the transfer. And such an understanding need not be express; it can be implied from the circumstances surrounding the transfer.
15. **Summary Judgment.** On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.

Appeal from the County Court for Hall County: DAVID A. BUSH, Judge. Reversed and remanded with directions.

Andrew J. Hoffman, of Krotter Hoffman, P.C., L.L.O., and Jason D. Mielak, of Fehringer, Mielak & Fehringer, P.C., L.L.O., for appellant.

Thomas L. Kovanda, of Anderson, Vipperman, Kovanda & Wetzel, for appellee.

Mark Porto and Ronald S. Depue, of Shamberg, Wolf, McDermott & Depue, for intervenors-appellees.

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

GERRARD, J.

Lyle and Margaret Fries were married in 1991. At the time of marriage, Lyle owned three parcels of land (the Properties). In 1993, Margaret executed quitclaim deeds on the Properties in favor of Lyle. Lyle then conveyed the Properties to his children from a previous marriage. After Lyle died, Margaret chose to take an elective share of his augmented estate. The issue in this case is whether the value of the Properties should be part of Lyle's augmented estate. We conclude that there is a genuine issue of material fact as to whether the Properties should be included in the augmented estate for calculating Margaret's elective share, and we reverse the county court's summary judgment dismissing Margaret's claim.

BACKGROUND

Lyle and Margaret were married in 1991 and remained married until Lyle's death in 2006. At the time they were married, Lyle owned the Properties—three separate parcels of land located in Howard County, totaling approximately 224 acres. On November 16, 1993, Margaret executed quitclaim deeds for each of the Properties, transferring her interest to Lyle. On December 2, Lyle recorded the quitclaim deeds and separately signed and caused to be recorded joint tenancy warranty deeds of the Properties for the benefit of his children from a prior marriage, namely, James Fries, William Fries, Dennis Fries, Daniel Fries, and Kathleen Hurst (the children). Kathleen is the personal representative of Lyle's estate; James, William, Dennis, Daniel, and Kathleen, individually, are intervenors in this case. We will refer to the personal representative and intervenors collectively as the "appellees."

In the deed transferring the Properties to the children, Lyle retained no legal interest in the Properties. Nevertheless, Lyle continued to perform management functions for, receive income from, and pay taxes on the Properties until his death. Lyle's last will and testament provided that both Margaret and the children were to receive certain assets belonging to Lyle, but there was no mention of the Properties.

After Lyle died, Margaret filed a petition in the county court for an elective share of Lyle's augmented estate. In her petition, Margaret claimed that the Properties were part of Lyle's augmented estate and requested that the court award her a spousal elective share of 50 percent of the Properties. Kathleen, as personal representative of the estate, and the children, as intervenors, objected. Margaret and the appellees filed cross-motions for partial summary judgment concerning whether the Properties should be included in the augmented estate. The county court sustained the appellees' motion, and, after other proceedings that are not pertinent to our analysis of this appeal, the court dismissed Margaret's petition for an elective share as augmented by the Properties. Margaret now appeals.

ASSIGNMENTS OF ERROR

Margaret assigns, consolidated and restated, that the county court erred in determining that there was no genuine issue of material fact as to whether Lyle retained at death the possession or enjoyment of, or right to income from, the Properties. Margaret also argues that she did not consent in writing to the December 2, 1993, transfer of the Properties from Lyle to his children.

STANDARD OF REVIEW

[1-3] An appellate court reviews probate cases for error appearing on the record made in the county court.[1] But when reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination

[1] *In re Guardianship & Conservatorship of Karin P.*, 271 Neb. 917, 716 N.W.2d 681 (2006).

reached by the court below.[2] The meaning of a statute is a question of law.[3]

[4,5] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[4] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.[5]

ANALYSIS

Genuine Issue Whether Lyle Retained at Death Possession or Enjoyment of, or Right to Income From, the Properties

[6] Under Neb. Rev. Stat. § 30-2313(a) (Reissue 2008), a surviving spouse has a right to take an elective share of a decedent's estate "in any fraction not in excess of one-half of the augmented estate under the limitations and conditions hereinafter stated." At issue in this appeal is the application of Neb. Rev. Stat. § 30-2314 (Reissue 2008), which establishes the content of a decedent's augmented estate. Under § 30-2314, the probate estate is augmented by first reducing the estate by specified obligations and liabilities and then increasing the estate by the value of specified properties and transfers.[6] The augmented estate also includes several categories of inter vivos transfers made by the decedent.[7]

[7,8] The purpose of the concept of augmenting the probate estate in computing the elective share is twofold: (1) to

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[2] *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009).

[3] *INA Group v. Young*, 271 Neb. 956, 716 N.W.2d 733 (2006).

[4] *Schuyler Co-op Assn. v. Sahs*, 276 Neb. 578, 755 N.W.2d 802 (2008).

[5] *Id.*

[6] *In re Estate of Chrisp, supra* note 2.

[7] See, § 30-2314; *In re Estate of Myers*, 256 Neb. 817, 594 N.W.2d 563 (1999).

prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share and (2) to prevent the surviving spouse from electing to a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets, and other nonprobate arrangements.[8] The combined effect of the statutory elective share and augmented estate concepts is intended to protect the surviving spouse of a decedent against donative inter vivos transfers by devices which would deprive the survivor of a "fair share" of the decedent's estate and at the same time prevent the surviving spouse from receiving more than such share by allowing the acceptance of certain transfers and insurance proceeds and also yet elect against the will.[9]

In her first assignment of error, Margaret argues that the value of the Properties should be included in the augmented estate pursuant to § 30-2314(a)(1), which provides, in relevant part, that the augmented estate includes

> [t]he value of property transferred by the decedent at any time during marriage . . . for the benefit of any person other than a bona fide purchaser or the surviving spouse, but only to the extent to which the decedent did not receive adequate and full consideration in money or money's worth for such transfer, if such transfer is . . . :
>
> (i) Any transfer under which the decedent retained at death the possession or enjoyment of, or right to income from, the property.

It is undisputed that the Properties were not transferred to a bona fide purchaser or surviving spouse and that they were not transferred for adequate and full consideration. And there is very little question that the record presents a genuine issue of material fact as to whether, at the time of his death, Lyle actually *had* possession of the Properties and disposition of their

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[8] *In re Estate of Myers, supra* note 7.

[9] *Id.*

income. The dispute is over whether those facts are enough to satisfy § 30-2314(a)(1)(i).

The appellees argue that the plain language of the statute limits the property included in the augmented estate to that in which the decedent retained an interest under a "transfer" document. In other words, the appellees argue that a "transfer" is the legal instrument by which the property is conveyed and that a decedent retains possession or enjoyment of, or right to income from, property "under" the "transfer" only if the legal instrument secures the decedent's right to possession, enjoyment, or income. And in this case, the warranty deed transferring the Properties from Lyle to his children did not.

[9,10] But absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[10] And § 30-2314(a)(1)(i) does not include the word "document" or even require a writing evidencing the transfer. An appellate court will not read into a statute a meaning that is not there.[11] A transfer encompasses "[*a*]*ny* mode of disposing of or parting with an asset or an interest in an asset."[12] What is significant for purposes of § 30-2314(a)(1)(i) is whether the parties to the transfer intended the decedent to functionally retain possession or enjoyment of, or the right to income from, the property—not whether the written instrument of transfer reflects that intent.

[11,12] And when construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.[13] We look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served.[14] The statutory comments to § 30-2314 specifically state that

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[10] *In re Estate of Chrisp, supra* note 2.

[11] *Id.*

[12] Black's Law Dictionary 1636 (9th ed. 2009) (emphasis supplied).

[13] *TracFone Wireless v. Nebraska Pub. Serv. Comm., ante* p. 426, 778 N.W.2d 452 (2010).

[14] *Id.*

transfers within the meaning of subsection (a)(1) "are transfers by the decedent during his lifetime which are essentially will substitutes, arrangements which give him continued benefits or controls over the property."[15] One of the purposes of the augmented estate provisions, as noted above, is to prevent the surviving spouse's right to an elective share to be defeated by a decedent's arrangements to transfer property outside probate. That purpose could hardly be well served if enforcement of the surviving spouse's rights depended upon a decedent's being foolish enough to record his or her intent in a written legal instrument.

Moreover, as noted by the Legislature, the augmented estate resembles the gross estate for federal estate tax purposes.[16] The language "possession or enjoyment of, or right to income from, the property" is almost identical to language in the Internal Revenue Code that defines a decedent's gross estate.[17] And courts have emphasized that this language "describes a broad scheme of inclusion in the gross estate, not limited by the form of the transaction, but concerned with all inter vivos transfers where outright disposition of the property is delayed until the transferor's death."[18]

Therefore, to satisfy that language, "[t]he donor's interest need not be reserved by the instrument of transfer, nor need it be legally enforceable."[19] It is well settled that the terms "enjoy" and "enjoyment," as used in various estate tax statutes, are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estates.[20] And in the case of real property, the terms "possession" and

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[15] See § 30-2314 (Reissue 1975) (statutory comment). Accord Unif. Probate Code, prior art. II, § 2-202, comment, 8 (part I) U.L.A. at 299 (1998).

[16] Working Papers and Preliminary Interim Study Report on a Revised Nebraska Probate Code, L.B. 354, Judiciary Committee, 83rd Leg. (Aug. 30, 1973).

[17] See I.R.C. § 2036(a)(1) (2006).

[18] *Guynn v. United States*, 437 F.2d 1148, 1150 (4th Cir. 1971).

[19] *Id.*, citing *McNichol's Estate v. C.I.R.*, 265 F.2d 667 (3d Cir. 1959).

[20] *United States v. Byrum*, 408 U.S. 125, 92 S. Ct. 2382, 33 L. Ed. 2d 238 (1972).

"enjoyment" have been interpreted to mean "the lifetime use of the property."[21] The language encompasses an interest retained pursuant to an understanding or arrangement, which need not be express, but may be implied from all the circumstances surrounding the transfer.[22]

So, for purposes of determining whether a decedent retained "possession or enjoyment of, or right to income from, the property," a transferor retains the enjoyment of property if there is an express or implied agreement at the time of the transfer that the transferor will retain the present economic benefits of the property, even if the retained right is not legally enforceable.[23] And a transferor retains the right of enjoyment of property if, at the time of transfer, there was an express or implied agreement that the interest or right would later be conferred.[24]

For instance, in *Guynn v. United States*,[25] the decedent, an 81-year-old woman, conveyed a residence to her daughter, but remained in the residence without an express agreement that entitled her to do so, paid no rent to the daughter, and paid for improvements and certain expenses to the residence. The decedent's daughter testified that the decedent's remaining in the property was not discussed, because it was understood by all involved that she would stay in the property until her death. The Fourth Circuit noted that "[f]rom every outward indication, [the decedent's] relationship to the property was no different after the transfer to her daughter than before. Conversely, [the daughter's] possession and economic enjoyment of the property was totally postponed until her mother's death."[26] Therefore, the Fourth Circuit held that the evidence established an implied understanding that the decedent would retain

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[21] *Estate of Tehan v. C.I.R.*, 89 T.C.M. (CCH) 1374 (2005). See, *Byrum, supra* note 20; *Estate of Maxwell v. C.I.R.*, 3 F.3d 591 (2d Cir. 1993).

[22] *Guynn, supra* note 18, citing *Skinner's Estate v. United States*, 316 F.2d 517 (3d Cir. 1963).

[23] *Estate of Reichardt v. Commissioner*, 114 T.C. 144 (2000).

[24] *Kimbell v. U.S.*, 371 F.3d 257 (5th Cir. 2004); *Estate of Reichardt, supra* note 23.

[25] *Guynn, supra* note 18.

[26] *Id.* at 1150.

"the possession or enjoyment" of the property for her lifetime despite the transfer.[27]

[13,14] We find the foregoing reasoning persuasive, and consistent with our own reading of the identical language of § 30-2314(a)(1)(i). We conclude that under § 30-2314(a)(1)(i), a transfer "under which the decedent retained at death the possession or enjoyment of, or right to income from, the property" does not require that the decedent's right to possession of, enjoyment of, or income from the property be recorded in the instrument of transfer. A decedent retains possession or enjoyment of, or the right to income from, property when it is understood that the decedent will retain such an interest despite the transfer. And such an understanding need not be express; it can be implied from the circumstances surrounding the transfer.[28]

Based on our review of the record, the circumstances of this case could support such an implication. It is not disputed that Lyle received income from the Properties, or that Lyle paid taxes on that income and on the Properties themselves. The evidence also establishes that Lyle used the Properties for recreational purposes, like hunting and fishing, until he was physically unable to do so, and held himself out to friends, tenants, and government agencies as the owner of the Properties. And more important, the personal representative testified that when Lyle told her about his plan to transfer the Properties, she asked about "the income and the tenants and he goes well, you know, since I've always done it I would like to continue doing that." Some of the children continued paying Lyle rent to farm the Properties, and the personal representative agreed that Lyle "made the final decision" when it came to the Properties, up until his death.

[15] Granted, there is evidence in the record to the contrary—for instance, James averred that the children gave Lyle the Properties' income because they wanted to, not because they had to, and that Lyle had never indicated that he expected

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[27] *Id.*

[28] See *id.*

to receive that income. However, on a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.[29] The evidence in this case, taken in the light most favorable to Margaret, could support an inference that Lyle was intended to retain possession and enjoyment of, and the right to income from, the Properties, despite their transfer to the children. Therefore, the county court erred in concluding, as a matter of law, that the Properties should not be included in the augmented estate. Upon further proceedings on remand, the court should conduct an analysis based on the principles set forth above.

Genuine Issue Whether Margaret Consented to Transfer of the Properties to the Children

As an alternative basis for summary judgment, the appellees argue that the Properties are excluded from the augmented estate because Margaret consented to their transfer. Central to the appellees' argument is § 30-2314(c)(2), which provides, in pertinent part, that property otherwise includable in the augmented estate should not be included if it was

> transferred by the decedent to any person other than the surviving spouse by any bill of sale, conveyance, deed, or gift or by any other means of transfer either by an instrument of transfer joined in by the surviving spouse of the decedent or with the consent to transfer manifested before or after death of the decedent by a writing signed by the surviving spouse of the decedent before, contemporaneously with, or after the transfer[.]

The appellees contend that Margaret conveyed all of her interests in the Properties to Lyle when she executed the quitclaim deeds in November 1993 and that because Lyle acquired the Properties prior to his marriage to Margaret, the only interest Margaret had in the Properties was a possibility of inheritance. As a result, the appellees contend, the quitclaim deeds can only be interpreted as Margaret's consent to divest herself of any inheritance interest in the Properties. We disagree.

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[29] *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006).

Here, it is undisputed that Margaret executed three quitclaim deeds in favor of Lyle in November 1993. In all three quitclaim deeds, after a legal description of the property, the deed states, "GRANTOR covenants with GRANTEE that GRANTOR: 1. Is lawfully seized of such real estate; 2. Has legal power and lawful authority to convey the same; 3. Warrants that Grantor will convey all interest that she possesses in said property to Grantee." The quitclaim deeds, however, do not set forth any intent by Margaret to give up her rights to dissent from Lyle's will or claim an elective share of Lyle's estate. Moreover, the record also contains evidence indicating that Margaret did not intend to do so. Margaret averred that in November 1993, Lyle presented three documents for her signature and

> informed me that they were for tax purposes and asked that I sign them. He did not discuss with me what they were for or why I was signing them other then [sic] to tell me that they were for tax purposes. . . . Nobody was with Lyle when I signed these documents nor did he tell me what he was planning to do subsequent to my signing. It wasn't until many years later, that I learned that these documents were actually quitclaim deeds.

More important, Margaret did not sign the December 1993 deeds transferring title of the Properties to the children. And contrary to the appellees' assertion, Lyle's later transfer of the Properties to the children—not Margaret's execution of the quitclaim deeds—is the decisive transfer. Section 30-2314(c)(2) clearly sets forth that the pertinent transfer is one in which property is transferred by the decedent "to any person other than the surviving spouse." There is no evidence that Margaret expressly manifested her consent—"by a writing signed" or otherwise—to the transfer of the Properties to the children. Margaret stated that she "had no knowledge of these deeds and I never consented to them in writing, I never consented to them verbally, or otherwise." In fact, Margaret said that she was unaware of the fact that Lyle executed joint tenancy warranty deeds with the children, because Lyle continued to retain all of the incidences of ownership and all of the benefits from owning the property.

Furthermore, the appellees' construction of § 30-2314(c)(2) is inconsistent with the purpose of the augmented estate statutes. As mentioned above, the dual purpose of the elective share provisions is to prevent a spouse from being denied a fair share of the decedent's estate and also to prevent the surviving spouse from obtaining more than a fair share of the estate when he or she has already received a share of the estate through some other means. To achieve this purpose, the value of certain property transferred by the decedent during marriage is included in the decedent's augmented estate.[30]

If, however, a spouse had agreed to the transfer, the value of the transferred property is not included in the transferring spouse's augmented estate.[31] Logically, when a spouse agrees to a transfer of property that diminishes the eventual decedent's estate, the surviving spouse should not be allowed to reclaim the value of the transferred property in the augmented estate.[32] But that principle is not implicated if a transfer did not remove the property from the decedent spouse's estate, because the consent of the surviving spouse to the transfer was *not* a consent to any corresponding diminution in the estate.[33] And the transfer that is at issue here is the one that actually removed the Properties from Lyle's possession.

The appellees' argument seems to be that the quitclaim deeds should be read as evidence that Margaret consented to the later transfers as well. That interpretation is strained, given the evidence, and is certainly insufficient to establish consent *in writing* to the later transfers *as a matter of law*, given the paucity of evidence that Margaret was even informed of the later transfers. The evidence establishes, at the very least, a genuine issue of material fact regarding whether Margaret's execution of the quitclaim deeds to Lyle should be interpreted as her written consent to the later transfer of the Properties to the children. Therefore, we find no merit to the appellees'

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[30] See § 30-2314(a)(1).

[31] See § 30-2314(c)(2).

[32] *Chappell v. Perkins*, 266 Va. 413, 587 S.E.2d 584 (2003).

[33] See *id.*

argument that the court's summary judgment can be affirmed based on that reasoning.

CONCLUSION

The record establishes a genuine issue of material fact as to whether it was understood that Lyle would retain possession and enjoyment of, and income from, the Properties, despite transferring them to his children. And the record does not establish as a matter of law that Margaret consented in writing to Lyle's transfer of the Properties to his children. Therefore, the county court erred in entering summary judgment and dismissing Margaret's petition for an elective share of Lyle's augmented estate. We reverse the judgment of the county court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF SIR MESSIAH T., ALSO KNOWN AS SIR MESSIAH M., ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. YOLANDA A., APPELLANT.

782 N.W.2d 320

Filed May 21, 2010. No. S-09-749.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
3. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.
4. **Constitutional Law: Due Process.** Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.
5. **Parental Rights: Proof.** In Nebraska statutes, the bases for termination of parental rights are codified in Neb. Rev. Stat. § 43-292 (Supp. 2009). Section 43-292

provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child.

6. **Juvenile Courts: Parental Rights.** A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
7. **Parental Rights.** Past neglect, along with facts relating to current family circumstances which go to best interests, are all properly considered in a parental rights termination case under Neb. Rev. Stat. § 43-292(2) (Supp. 2009).

Appeal from the Separate Juvenile Court of Douglas County: CHRISTOPHER KELLY, Judge. Affirmed.

Christine P. Costantakos for appellant.

Donald W. Kleine, Douglas County Attorney, and Amy Schuchman for appellee.

Thomas K. Harmon, of The Law Offices of Thomas K. Harmon, guardian ad litem.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

On June 30, 2009, the separate juvenile court of Douglas County terminated Yolanda A.'s parental rights to her four children, Sir Messiah T., also known as Sir Messiah M.; Mirage T., also known as Mirage M.; Carlieon T.; and Crystasia T., under Neb. Rev. Stat. § 43-292(2) and (6) (Reissue 2008). Section 43-292(2) generally provides for termination of parental rights when the parent has neglected and refused to give the necessary care to the juvenile or a sibling of the juvenile. Section 43-292(6) generally provides for termination of parental rights after a failure of efforts to preserve and reunify the family. Yolanda appeals.

Yolanda challenges the constitutionality of § 43-292(2). Yolanda also claims, inter alia, that, even if § 43-292(2) is constitutional, the State of Nebraska did not meet its burden of proof to establish the termination of her parental rights based on either § 43-292(2) or § 43-292(6) and further failed to establish

that termination was in the best interests of the minor children. Because we conclude that § 43-292(2) is constitutional and that Yolanda's parental rights were properly terminated under this section, we affirm.

STATEMENT OF THE FACTS

On May 5, 2003, the separate juvenile court of Douglas County terminated Yolanda's parental rights to her three older children pursuant to § 43-292(2). The termination of parental rights as to these three children was based on neglect, not a relinquishment by Yolanda. Sir Messiah and Mirage, two of the children involved in this current case, had been born, but Yolanda's parental rights to these two children were not terminated in the 2003 proceeding.

On September 9, 2007, the police arrested Yolanda for slashing the tires on a car belonging to a friend of her ex-boyfriend. After Yolanda's arrest, the police discovered that the four children involved in the current case had been left at home alone with a knife wedged in the door so they could not escape the home. The four children were all under the age of 9. The dates of birth of the children are Sir Messiah, born in July 1999; Mirage, born in December 2000; Crystasia, born in February 2005; and Carlieon, born in April 2006. After this incident, the children were removed from the home and placed in foster care. During the pendency of this case, the children have remained in foster care and Yolanda's contact with the children has been limited to supervised visitation.

On November 1, 2007, the children were adjudicated as being within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2006). After that determination, the parties attended multiple court hearings. Various plans of rehabilitation with the intent to preserve and reunify the family were filed on: January 7, March 14, May 28, and August 27, 2008. After these reasonable efforts had been made, the State filed a motion to terminate Yolanda's parental rights to her four children based on § 43-292(2) and (6). The motion was filed on October 2 in the separate juvenile court of Douglas County.

The juvenile court held an evidentiary hearing on April 27, 2009. The evidence established that Yolanda had been through

three chemical dependency programs since 2007 and has had five documented uses of alcohol since March 2008. Further, the evidence showed that it was likely that contrary to Yolanda's self-report, she had used alcohol as recently as January 2009, according to the testimony of the case manager of the Nebraska Department of Health and Human Services. The evidence shows that under the various rehabilitation plans, Yolanda was required to submit to random urinalysis but that Yolanda had missed many of these tests. According to the record, Yolanda was largely unavailable in person or on the telephone for the administration of these tests. Yolanda evidently "made up" these tests at a time of her choosing.

Yolanda's rehabilitation plans also required her to attend therapy, which she has attended with some regularity. However, it was shown that Yolanda withheld information from her therapist for approximately 6 months with respect to reporting a driving under the influence of alcohol charge that she experienced in May 2008. Yolanda's therapist testified that she would have expected her clients to be forthcoming sooner with this type of information.

Testimony at trial showed that two of Yolanda's minor children, Sir Messiah and Mirage, are high-needs children and that based on those needs, Sir Messiah has been placed in treatment-based foster care and Mirage has been placed in agency-based foster care. Sir Messiah has indicated to his therapist that he wishes to stay in his foster care placement, and Mirage stated to her therapist, in September and October 2008, that she "wants a new mom." Both children have been engaged in ongoing therapy and have made progress in dealing with their emotional and behavioral issues. Both children's therapists testified that during the course of their therapy, the children stated that Yolanda had physically abused them. Mirage's therapist further testified that Mirage indicated that Sir Messiah and Mirage had kissed and touched each other inappropriately at Yolanda's home.

There was testimony at trial that Yolanda had an ongoing relationship with Carl T., the father of Carlieon and Crystasia. On February 13, 2009, Carl voluntarily relinquished his rights to these two children. Testimony at the hearing on Yolanda's

termination of parental rights revealed that Carl engaged in domestic violence with Yolanda in the presence of the minor children and that the children have been negatively affected by these experiences. Yolanda's ongoing relationship with Carl allows him to enter the home and have telephone contact with the minor children.

Both Mirage's therapist and a specialist who worked with Sir Messiah testified at the hearing. Each testified that it was not in the children's best interests to be left in foster care long term. Furthermore, each testified that Sir Messiah and Mirage both needed specialized care and a structured, stable, and permanent home environment due to their special needs. Yolanda's case manager testified that in her view, termination was proper, because Yolanda was making limited progress in achieving the goals set for her. There was other testimony regarding all four children, not repeated here, all of which went to the needs and best interests of each child.

A family support worker who supervised Yolanda's visits with her children testified that Yolanda continued to struggle with parenting effectively and consistently for a 3-hour timespan. Further, there was testimony that in August 2008, during a supervised visit with her children, Yolanda was intoxicated and acted out to the extent that the police were called to intervene in the visit.

A witness was called on Yolanda's behalf. However, upon further examination, the witness acknowledged that Yolanda did not have the ability to handle the children and that it was unrealistic to believe that Yolanda could parent all four children at this time.

Based on this evidence, in an order filed June 30, 2009, the juvenile court found by clear and convincing evidence that the children were within the meaning of § 43-292(2) and (6) and that it was in their best interests that Yolanda's parental rights be terminated. Yolanda appeals.

ASSIGNMENTS OF ERROR

Yolanda assigns numerous errors. Yolanda claims, restated and summarized, that the juvenile court erred (1) in overruling her motion for judgment on the pleadings in which she

challenged the constitutionality of § 43-292(2); (2) in terminating her parental rights under § 43-292(2), because the State's evidence failed to clearly and convincingly establish the existence of this statutory ground; and (3) in finding that the evidence clearly and convincingly established that termination of Yolanda's parental rights is in the best interests of the minor children. Because our resolution of these assignments of error resolves the case, we do not recite or reach Yolanda's remaining assignments of error.

STANDARDS OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *Garey v. Nebraska Dept. of Nat. Resources*, 277 Neb. 149, 759 N.W.2d 919 (2009).

[2,3] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009). However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *Id*.

ANALYSIS

Section 43-292(2) Does Not Violate Yolanda's Constitutional Right to Due Process.

Yolanda makes numerous arguments challenging the constitutionality of § 43-292(2) all to the effect that § 43-292(2) denies her procedural due process. Yolanda raised her constitutional objection to § 43-292(2) prior to the termination hearing in a motion for judgment on the pleadings. The court rejected her claim. As Yolanda reads § 43-292(2), prior neglect of a sibling without more can result in termination of parental rights in the present case. Under Yolanda's reading of § 43-292(2), she is denied procedural due process because she is denied an opportunity to present evidence of current circumstances. We determine that Yolanda misreads § 43-292(2) and conclude that

§ 43-292(2) is not unconstitutional. Thus, the juvenile court did not err in its ruling.

Section 43-292 states:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection.

Yolanda's overall claim is that § 43-292(2) of the parental rights termination statutes is unconstitutional because it allows the State to terminate parental rights based solely upon a finding that a parent has previously neglected and refused to care for a sibling. We logically read "sibling" to include a child of the parent under review, regardless of whether the parental rights to that sibling have been terminated. Yolanda claims that if her reading is correct, § 43-292(2) violates her rights under the Due Process Clause of the 14th Amendment to the U.S. Constitution, because it fails to afford her an opportunity to present evidence showing that her current circumstances do not warrant termination. Yolanda misreads § 43-292(2), and we reject her argument.

[4] Yolanda correctly asserts that she is entitled to procedural due process in connection with these termination of parental rights proceedings. In the context of both adjudication and termination hearings, this court has stated that

> "'[p]rocedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.'"

In re Interest of Mainor T. & Estela T., 267 Neb. 232, 247-48, 674 N.W.2d 442, 457 (2004).

[5] In Nebraska statutes, the bases for termination of parental rights are codified in § 43-292. Section 43-292 (Supp. 2009) currently provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child. Section 43-292, which is applicable to each of the 11 bases, states:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist[.]

Basis number two, § 43-292(2), is at issue in this assignment of error and states that termination is authorized where "[t]he parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection."

[6] By its terms, § 43-292 requires a showing of best interests plus 1 of the 11 statutory bases for termination. See *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). Section 43-292(2) involves the neglect of the child or a sibling of the child at issue. Unlike the reading urged by Yolanda, § 43-292(2) does not dictate that whenever a parent has neglected a sibling in the past, parental rights to any future children will automatically be terminated without giving the parent an opportunity to present evidence of current circumstances. Instead, the statute as a whole states that prior neglect can be a basis for termination only in conjunction with proof by the State which establishes that termination is in the best interests of the minor children involved in the current proceedings. Indeed, as we have emphasized, and we take this opportunity to repeat, a juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *In re Interest of DeWayne G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). In deciding best interests, the court is obligated to review the

evidence presented by all parties relative to the parent's current circumstances and determine if termination is in the best interests of the minor children based on those circumstances.

For completeness, we note that at trial and on appeal, Yolanda has suggested what may be characterized as a substantive due process claim. Yolanda effectively claims that the neglect of a sibling as provided for in § 43-292(2) is not a proper fact for consideration in the current proceeding as it bears on her fitness and that such consideration automatically results in termination and prevents her from receiving due process. Yolanda suggests that due to the termination of parental rights as to her three older children, she should be given a "clean slate" with respect to the four juveniles now under consideration, and that prior neglect should be ignored. The intermediate appellate court of this state rejected a similar argument in *In re Interest of Andrew S.*, 14 Neb. App. 739, 714 N.W.2d 762 (2006), and we reject it in the instant case.

In *In re Interest of Andrew S.*, the Nebraska Court of Appeals considered prior relinquishments as they related to the adjudication then at issue. The Court of Appeals stated that the previous relinquishments

> do not bode well for [the parents'] stability and ability as parents, and they serve to convince us that [the current juvenile] is at risk. The fact that a parent has previously relinquished an adjudicated child is relevant evidence in an adjudication proceeding concerning a child born soon thereafter. In short, given the purpose of the juvenile code, one's history as a parent is a permanent record and may serve as a basis for adjudication depending on the circumstances. Relinquishments of parental rights are not any sort of "pardon," which is how [the parents] would have us treat the relinquishments they made. They cite no authority on point for such notion, and while we have found none either, we suggest that one's history as a parent speaks to one's future as a parent.

Id. at 749, 714 N.W.2d at 769-70.

[7] Courts in other jurisdictions have similarly reasoned in related contexts. In *State ex rel. Children, Youth v. Amy B.*, 133 N.M. 136, 141, 61 P.3d 845, 850 (N.M. App. 2002), the

court in a juvenile matter reviewed the jurisprudence in this area and stated that "in most of the reported cases, there is a very real relationship between the past conduct and the current abilities." In a juvenile case considering the prospects of future success as a parent, the California Court of Appeals stated, "Experience has shown that with certain parents . . . the risk of recidivism is a very real concern. Therefore, when another child of that same parent is adjudged a dependent child, it is not unreasonable to assume [that future parenting] efforts will be unsuccessful." *In re Baby Boy H.*, 63 Cal. App. 4th 470, 478, 73 Cal. Rptr. 2d 793, 799 (1998). We agree with this reasoning which recognizes that one's history as a parent speaks to one's future as a parent and reject Yolanda's suggestion that past parenting outcomes should be ignored. Along with other courts, we believe that neglect of a prior sibling is relevant to the current inquiry and that past neglect, along with facts relating to current family circumstances which go to best interests, are all properly considered in a parental rights termination case under § 43-292(2).

Focusing on the procedural due process Yolanda was accorded herein, the record shows that Yolanda was adequately notified in the "Motion for Termination of Parental Rights and Notice of Hearing" that the State sought to terminate her parental rights to the four children in question on the basis, inter alia, of § 43-292(2) and that the factual basis alleged under § 43-292(2) was prior neglect, i.e., the involuntary termination of parental rights for the neglect of three siblings. Pursuant to the statute, Yolanda was accorded a full evidentiary hearing, at which hearing she was represented by counsel and had the opportunity to present evidence and cross-examine the witnesses, and the State was required to present clear and convincing evidence of neglect of prior siblings and current best interests. The earlier termination of parental rights to the three siblings for neglect was readily established. With respect to best interests, the evidence showed the needs of the four children involved. The evidence also showed that Yolanda was offered numerous reunification plans, and there was ample current evidence that she was not successful in rehabilitation and reunification. This evidence went to present circumstances.

As the Supreme Court of Montana noted in a similar context under a statute with comparable features, "[t]he statutes . . . do not limit the decision to the facts of the prior [neglect]. The district court also considers any available evidence relating to present family circumstances and the specific child at issue." *In re Custody and Parental Rights of A.P.*, 340 Mont. 39, 46, 172 P.3d 105, 109 (2007). Like the Montana statute, Nebraska's § 43-292(2) requires proof of both best interests and neglect of either the child at issue or a sibling. Unlike Yolanda's reading of § 43-292(2), termination of parental rights under this section is not based exclusively on neglect of another sibling. Proof of best interests is also required. The State proffered evidence of both, and Yolanda presented evidence on her own behalf. Given the terms of the statute and the scope and safeguards of the evidentiary hearing which were accorded Yolanda, we reject Yolanda's constitutional challenge to § 43-292(2).

The State Provided Sufficient Evidence to Warrant Termination Under § 43-292(2).

Yolanda also claims that the State failed to prove by clear and convincing evidence that termination of her parental rights was appropriate under § 43-292(2). We consider this juvenile appeal de novo on the record. *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009). Because we conclude that the evidence is sufficient, we reject this assignment of error.

In order to terminate an individual's parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the children's best interests. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). The State sought to terminate Yolanda's parental rights under § 43-292(2). At trial, the State showed without contradiction that Yolanda's parental rights to her three older children were terminated by reason of neglect. With respect to the children currently under consideration, the State also presented sufficient evidence of their neglect recited above, including, but not limited to, the physical abuse reported by the children, their exposure to the domestic turmoil occasioned by Yolanda's

continued relationship with Carl, and Yolanda's inability to care and provide for her children. Because the State met its burden with respect to neglect, we turn to whether the State established by clear and convincing evidence that termination was in the best interests of the minor children.

The evidence related to best interests of the children was voluminous and was largely derived from the history associated with the various rehabilitative and reunification services which had been accorded to Yolanda and her children. The record shows that the four children have remained in foster care with only limited supervised visitation with Yolanda since September 9, 2007. The needs of the children were described at length, and the testimony showed that Yolanda cannot meet her children's needs. Each of the service providers involved with the family agreed that Yolanda is unable to parent all four of these children on a regular basis, particularly given the special needs required to care for Sir Messiah and Mirage.

The record also shows that Yolanda has had a long history of alcohol abuse and has continued to struggle with abstaining from alcohol use throughout the attempted reunification process. Yolanda was cited for driving under the influence of alcohol in May 2008, which she did not report to her therapist. According to the record, Yolanda was drinking at one of her visitations with her children and had to be removed from the visit by law enforcement. Indeed, although Yolanda has submitted to random urinalysis tests, she has been absent for many of these tests. The tests have been rescheduled at her convenience, effectively eliminating the random nature of the alcohol testing.

While we agree with the juvenile court that the record shows that Yolanda has made recent progress in achieving the goals set forth in the rehabilitation plans, these efforts have largely come after the State filed the petition to terminate her parental rights. Even taking these efforts into account, Yolanda has been unable to keep a job, abstain from alcohol, or successfully parent her children unsupervised. We must agree with the testimony of the service providers involved with this family that indefinite foster care is not advisable for these children. Based on the record, the State established by clear and convincing

evidence that it is in the best interests of the four minor children that Yolanda's parental rights be terminated. Given the evidence, we reject Yolanda's assignment of error in which she claimed that the evidence was insufficient to terminate her parental rights under § 43-292(2).

CONCLUSION

We reject Yolanda's constitutional challenge to § 43-292(2) and conclude that the evidence was sufficient to terminate Yolanda's parental rights to the four children at issue under § 43-292(2). We therefore affirm the order of the juvenile court terminating the parental rights of Yolanda to the four children in this case.

AFFIRMED.

IN RE PETITION OF ANONYMOUS 3, A MINOR.

782 N.W.2d 591

Filed May 21, 2010. No. S-33-100006.

1. **Abortion: Minors: Judgments: Appeal and Error.** Neb. Rev. Stat. § 71-6904(6) (Reissue 2009) provides that the Supreme Court hears this appeal de novo on the record. Accordingly, the court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
2. **Abortion: Minors: Notice: Waiver.** Neb. Rev. Stat. § 71-6903 (Reissue 2009) may authorize a waiver of the parental notification requirement if the court determines that the "pregnant woman" is mature and capable of giving informed consent to the proposed abortion or if it determines that the performance of an abortion without notification would be in her best interests.
3. **Abortion: Minors: Proof.** In a proceeding brought under the provisions of Neb. Rev. Stat. § 71-6901 et seq. (Reissue 2009), the burden of proof on all issues rests with the petitioner, and such burden must be established by clear and convincing evidence.
4. **Minors: Emancipation: Words and Phrases.** Emancipation means the freeing of the child from the care, custody, control, and service of his or her parents.
5. **Minors: Emancipation: Proof.** The emancipation of a minor may be proved by circumstantial evidence or may be implied from the conduct of the parties.
6. **Minors: Emancipation.** Either acts solely initiated and performed by a minor child or acts of a parent inconsistent with the performance of parental obligations may effectuate a minor's emancipation.
7. ____: ____. Where a minor is emancipated, the parental notification statutes are inapplicable.

Appeal from the District Court for Dakota County: WILLIAM BINKARD, Judge. Reversed and vacated.

Cindy Weber-Blair and Lori Ubbinga for petitioner.

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

PER CURIAM.

NATURE OF CASE

This proceeding was instituted under the provisions of Neb. Rev. Stat. § 71-6901 et seq. (Reissue 2009) by petitioner, who will be 18 years old in less than 2 months, seeking authorization for her physician to perform an abortion without prior notification to a parent or guardian. The district court denied her request, and pursuant to the expedited procedures outlined in § 71-6904, she appeals to this court.

The issue in this case is not whether petitioner can obtain an abortion,[1] but whether, pursuant to § 71-6902, a parent must be notified 48 hours before the abortion is performed. Parental notification is required under § 71-6902 where the pregnant woman is "an unemancipated woman under eighteen years of age,"[2] unless notification is waived by a court under § 71-6903 or not required under § 71-6906. We determine that petitioner is an emancipated woman and that the notification requirements of § 71-6902 do not apply. We reverse and vacate the judgment of the district court.

BACKGROUND

Petitioner currently lives with her boyfriend of 2 years and their 2-month-old son. She will turn 18 in less than 2 months. She testified that she has lived primarily with her boyfriend since their son was born, although, until recently, she would also stay with her mother a few days a week.

Petitioner has graduated from high school and has enrolled in college. She testified that she will move into her own

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[1] See *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976).

[2] § 71-6901(5).

apartment this summer with the assistance of a local service organization. She testified that she does not expect her boyfriend to live with her there. She works two jobs, owns a vehicle, and has a cellular telephone. She pays for her own gas, food, and other personal bills. She also pays for expenses incurred in raising her son and helps her boyfriend pay the bills for the apartment.

Petitioner does not know her father, and her mother does not help support her. To the contrary, petitioner testified that her mother demands money from her whenever the mother needs it. In the past, her mother has simply taken all the money out of a shared checking account into which petitioner had deposited her earnings.

Petitioner and her mother have a strained relationship. Petitioner explained that her mother's new boyfriend does not like her. Also, when petitioner's mother learned of her first pregnancy, her mother became very angry and did not speak to petitioner until after the birth of her son. Petitioner stated that, even now, her mother mostly yells at her and that they do not speak often.

Petitioner described in detail for the court how she and her boyfriend had considered all their options and the possible long-term and short-term consequences before making the decision to have an abortion. Petitioner explained that she had decided not to tell her mother about the pregnancy because she did not believe her mother would provide any support or guidance. Petitioner stated that if her mother knew about this pregnancy, she would continue to treat her poorly, and "[p]robably worse."

The hearing was conducted on April 28, 2010, during which the court and an attorney representing petitioner asked her questions. The court filed its written findings of fact and conclusions of law on April 30, 2010. The district court denied petitioner's request for a waiver of parental notification. The court concluded that petitioner was not mature or capable of giving informed consent. It also determined that an abortion without parental notification was not in her best interests.

The court found petitioner had "some minimal level of experience at entry level employment," living away from

home, and handling her own finances. The court noted that petitioner was not paying rent at her boyfriend's apartment, and thus, it concluded that she was not able to provide for her own residence. The court noted that petitioner did not detail the amount of income she earns or how she apportions and applies her income to her various living expenses. We note that at the hearing, she was not asked to do so. The court stated that although petitioner expressed the desire to be an "independent person," "[s]he did not elucidate how she intended to attain that particular status as a single, 17-year-old mother of a two month old baby," and, to the contrary, had "made some arrangements toward being dependent on agencies and assistance from others."

The petition for waiver was denied. Petitioner appeals.

STANDARD OF REVIEW

[1] Section 71-6904(6) provides that we hear this appeal de novo on the record. Accordingly, we reappraise the evidence as presented by the record and reach our own independent conclusions with respect to the matters at issue.[3]

ANALYSIS

[2] A "[p]regnant woman" is defined in § 71-6901(5) as an "unemancipated woman under eighteen years of age who is pregnant." Under § 71-6902, no abortion shall be performed upon a "pregnant woman" until at least 48 hours after written notice to a parent of the pending abortion. Section 71-6903 may authorize a waiver of the parental notification requirement if the court determines that the "pregnant woman" is mature and capable of giving informed consent to the proposed abortion or if it determines that the performance of an abortion without notification would be in her best interests.[4] As an initial matter, we must determine if the parental notification requirements in § 71-6901 et seq. apply to petitioner. Because we conclude that petitioner is emancipated, she is not a "pregnant woman"

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[3] See, *In re Petition of Anonymous 2*, 253 Neb. 485, 570 N.W.2d 836 (1997); *In re Petition of Anonymous 1*, 251 Neb. 424, 558 N.W.2d 784 (1997).

[4] *In re Petition of Anonymous 2, supra* note 3.

as defined by § 71-6901(5) of the parental notification statutes. Therefore, parental notification is not required if petitioner elects to have an abortion.

[3-5] In a proceeding brought under the provisions of § 71-6901 et seq., the burden of proof on all issues rests with the petitioner, and such burden must be established by clear and convincing evidence.[5] Petitioner will be 18 years old in less than 2 months, and based on the record before us, which is all we may consider, it is clear that petitioner is emancipated. Emancipation means the freeing of the child from the care, custody, control, and service of his or her parents.[6] The emancipation of a minor may be proved by circumstantial evidence or may be implied from the conduct of the parties.[7]

[6] Either acts solely initiated and performed by a minor child or acts of a parent inconsistent with the performance of parental obligations may effectuate a minor's emancipation.[8] In *Accent Service Co., Inc. v. Ebsen*,[9] we concluded that the minor was emancipated when he had departed from the family home with parental consent after a fight with his mother, taken his personal belongings with him, and thereafter furnished his own support and received nothing from his parent. In *Wulff v. Wulff*,[10] we concluded that giving birth may also be a factor to be considered in the determination of whether a minor has achieved emancipation, although that factor alone is not dispositive. Other courts have determined that a minor is emancipated when she has borne a child and is living away from her parents in a conjugal relationship with the father of her child.[11]

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[5] *Id.*

[6] See *Palagi v. Palagi*, 10 Neb. App. 231, 627 N.W.2d 765 (2001).

[7] See *Accent Service Co., Inc. v. Ebsen*, 209 Neb. 94, 306 N.W.2d 575 (1981).

[8] See, 67A C.J.S. *Parent and Child* § 23 (2002); Annot., 55 A.L.R.5th 557 (1998).

[9] *Accent Service Co., Inc. v. Ebsen, supra* note 7.

[10] *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993).

[11] 55 A.L.R.5th, *supra* note 8.

The evidence is clear and convincing that petitioner is in no manner dependent on a parent or guardian. Petitioner holds employment that pays her own bills, as well as the bills she incurs in the care of her 2-month-old son. Petitioner is not currently living with her mother and has no intention of returning to live with her mother. She currently lives with her boyfriend and their son as an independent family unit. Petitioner stated that her mother has not provided her with any support; instead, she has occasionally given her mother financial assistance. Petitioner makes her own decisions regarding herself and the care of her son.

Petitioner's independence is not diminished because she has sought assistance from her boyfriend or from outside organizations in her pursuit of a college education and a better life. To the contrary, this shows that, without parental guidance, petitioner is able to identify and find other resources and solutions to the difficulties inherent in her current situation. Courts have frequently observed that a minor's receipt of public assistance in the minor's own name evidences emancipation.[12]

[7] It is not for this court to determine the correctness of petitioner's decision[13]; because petitioner is emancipated, the parental notification statutes are inapplicable. Petitioner has demonstrated that the parental ties of care and support between petitioner and her mother have been broken, and petitioner is living an independent life. She is an emancipated woman, and as such is not required to notify her mother of her decision to have an abortion.

CONCLUSION

We reverse and vacate the judgment of the district court. For the reasons stated above, we conclude that petitioner is emancipated and, therefore, does not fall within the parental notification statutes.

REVERSED AND VACATED.

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[12] *Id.*

[13] See *Planned Parenthood of Missouri v. Danforth*, *supra* note 1.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM E. SMITH, APPELLANT.

782 N.W.2d 913

Filed May 28, 2010. No. S-09-375.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Search and Seizure.** To determine whether an individual has an interest protected by the Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, § 7, one must determine whether the individual has a legitimate or justifiable expectation of privacy in the invaded place. Ordinarily, two inquiries are required. First, the individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable.
3. ____: ____. An expectation of privacy is reasonable if it has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.
4. ____: ____. The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.
5. ____: ____. The constitutional protection against an unreasonable search and seizure proscribes only governmental action and is inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any governmental official.
6. ____: ____. A search is subject to the constitutional safeguard against an unreasonable search if the search is a joint endeavor involving a private person and a state or government official.
7. **Search and Seizure.** In determining what is a joint endeavor between a private person and a government official, it is not essential that the government official be involved in the endeavor at the very outset.
8. ____. The question whether a search is a private search or a government search is one that must be answered taking into consideration the totality of the circumstances.
9. **Police Officers and Sheriffs: Public Health and Welfare.** A police officer on "off-duty" status is obligated to preserve the public peace and to protect the lives and property of the public in general, as police officers are considered to be under a duty to respond as police officers 24 hours a day.
10. **Police Officers and Sheriffs.** A police officer may provide security to a commercial establishment while off duty and make arrests or take other authoritative action in connection therewith.

11. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications. The warrantless search exceptions include searches undertaken with consent, searches justified by probable cause, searches under exigent circumstances, inventory searches, searches of evidence in plain view, and searches incident to a valid arrest.
12. **Warrantless Searches: Search and Seizure: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.
13. **Probable Cause: Words and Phrases.** Probable cause escapes precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.
14. ____: ____. Probable cause is a flexible, commonsense standard. It merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.
15. **Probable Cause: Appeal and Error.** Appellate courts determine probable cause by an objective standard of reasonableness, given the known facts and circumstances.
16. **Police Officers and Sheriffs: Search and Seizure: Warrantless Searches.** Under the "plain feel" doctrine, a law enforcement officer may make a warrantless seizure of contraband detected during a lawful pat-down search.
17. **Probable Cause.** Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.
18. **Search and Seizure.** The legality of a seizure under the "plain feel" doctrine depends upon the incriminating character of an object being immediately apparent.
19. **Search and Seizure: Probable Cause.** A search or seizure of a person must be supported by probable cause particularized to that person.
20. ____: ____. The fact that a person belongs to a class which contains some members who violate the law does not create probable cause to search that person.
21. **Search and Seizure.** Once given, consent to search may be withdrawn. Withdrawal of consent need not be effectuated through particular "magic words," but an intent to withdraw consent must be made by unequivocal act or statement.
22. **Police Officers and Sheriffs: Search and Seizure.** If equivocal, a defendant's attempt to withdraw consent is ineffective and police may reasonably continue their search pursuant to the initial grant of authority.
23. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?
24. **Police Officers and Sheriffs: Search and Seizure.** Conduct withdrawing consent must be an act clearly inconsistent with the apparent consent to search, an

unambiguous statement challenging the officer's authority to conduct the search, or some combination of both.

25. **Search and Seizure.** A consensual search is circumscribed by the extent of the permission given, as determined by the totality of the circumstances.
26. **Police Officers and Sheriffs: Search and Seizure.** An officer conducting a consensual search has no authority to command the person being searched to stop interfering with the search.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Reversed and remanded for a new trial.

Kevin J. Oursland for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

I. NATURE OF CASE

William E. Smith appeals his conviction for possession of a controlled substance with intent to deliver. Smith argues that the district court erred in denying his motion to suppress evidence of illegal drugs that was discovered in his pocket during a pat-down search outside a nightclub. There are two issues presented in this appeal: whether the evidence obtained was the product of a search within the meaning of the Fourth Amendment and, if so, whether the search was reasonable under the Fourth Amendment.

II. BACKGROUND

We have examined the record and find no clear error in the historical factual findings of the district court,[1] nor does either party take issue with the court's factual findings. The pertinent historical facts are as follows.

Force Protection Services, a private security company owned and operated by Joseph South, provided security outside the Manhattan Club (the Club), a dance club in Omaha, Nebraska.

[1] See *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

Pursuant to a contract with the Club, Force Protection Services was to conduct a pat-down search of every patron for narcotics or weapons before they entered the Club. At the entrance of the Club is a sign stating that patrons are subject to a pat down and search. It is not uncommon for people in line, who observe the pat down, to get out of line and go back to their car. In addition to Force Protection Services, supplemental police officers are present, pursuant to an agreement with the Club.

On the night of the arrest, the Club was featuring the performance of a local diskjockey, and South and Calvin Harper, a uniformed and armed off-duty police officer, were providing security outside the Club. Smith and his cousin walked up to the Club's entrance. After Smith's cousin was patted down and permitted entry, he turned to Smith and said, "[S]orry, I forgot they pat down." South started to pat down Smith and felt a bulge in Smith's left front pocket.

South started to place his hand toward Smith's pocket and asked Smith twice what was in his front pocket, but Smith did not answer. Smith grabbed South's wrist to prevent South from reaching into his pocket. South instructed Smith to keep his hands in the air. South reached for Smith's pocket again, and again, Smith pushed South's hand away. Harper intervened at that point and told Smith to keep his hands in the air. Harper placed his arm under Smith's wrist, and South reached into Smith's pocket. South pulled out three cellophane bags containing pills that appeared to be "MDMA," also known as Ecstasy, a Schedule I controlled substance.[2] South handed the bags to Harper, who completed the search and arrested Smith.

The State filed an information charging Smith with possession of a controlled substance with intent to deliver.[3] Smith filed a motion to suppress alleging that he was unlawfully searched and arrested in violation of the U.S. and Nebraska Constitutions. After a hearing, the district court denied Smith's motion to suppress, and thereafter, a bench trial based on the

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[2] See Neb. Rev. Stat. § 28-405(c)(27) (Reissue 2008).

[3] See Neb. Rev. Stat. § 28-416 (Reissue 2008).

stipulated facts was held. Smith renewed the objections raised in his motion to suppress. The district court found Smith guilty of possession of a controlled substance with intent to deliver and sentenced him to 3 to 5 years' imprisonment. Smith appeals.

III. ASSIGNMENT OF ERROR

Smith assigns that the district court erred in finding the warrantless search was reasonable.

IV. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review.[4] Regarding historical facts, we review the trial court's findings for clear error.[5] But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination.[6]

V. ANALYSIS

The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable search and seizure.[7] We note that we have not construed article I, § 7, of the Nebraska Constitution to provide greater rights than those afforded a defendant by the Fourth Amendment.[8] Smith argues that in this case, the district court erred in finding that the search was reasonable. Before we address the reasonableness of the search, however, we must address whether the search came under the purview of the Fourth Amendment or article I, § 7. The State claims it did not.

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[4] *Hedgcock, supra* note 1.

[5] *Id.*

[6] *Id.*

[7] *State v. Bakewell*, 273 Neb. 372, 730 N.W.2d 335 (2007).

[8] See, *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995); *State v. Vermuele*, 234 Neb. 973, 453 N.W.2d 441 (1990).

1. Smith Was Searched Within Meaning of Fourth Amendment

The State's primary argument is that Smith was searched by South, a private actor, not the government. But as a threshold matter, we first consider the State's argument that the Fourth Amendment is not implicated because Smith was not "searched" or "seized." We agree with the district court's conclusion that Smith was searched.

[2] To determine whether an individual has an interest protected by the Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, § 7, we must determine whether the individual has a legitimate or justifiable expectation of privacy in the invaded place. Ordinarily, two inquiries are required. First, the individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable.[9]

[3] For reasons that will be explained more fully below with respect to consent, Smith clearly exhibited an actual expectation of privacy. The State seems to be arguing that because Smith knew the Club patted down patrons, his expectation of privacy was unreasonable. But whether an expectation of privacy is reasonable does not turn on notice.[10] Rather, an expectation of privacy is reasonable if it has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.[11]

We have little difficulty in concluding that Smith's expectation that the contents of his pockets were private was reasonable and that the invasion of that privacy was a search. Generally speaking, courts have implicitly assumed that an individual has a reasonable expectation of privacy with respect to those portions of his or her person that are hidden from

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[9] *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000).

[10] See *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979).

[11] See, *Minnesota v. Carter*, 525 U.S. 83, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998); *Smith, supra* note 10; *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978).

public view, including hidden recesses in both one's clothing and body.[12] For example, rummaging through an individual's pockets and other inner recesses of one's clothing constitutes a Fourth Amendment search of the person.[13] Likewise, patting down an individual's outer clothing so as to discover hidden objects therein is also a Fourth Amendment search.[14] In this case, the evidence in question was retrieved from a location hidden from public view, namely Smith's pocket. Such a search is unquestionably a Fourth Amendment search.

2. Search of Smith Was Government Search

[4-6] Having concluded that a search took place, we turn next to whether the search was a government search. The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.[15] The constitutional protection against an unreasonable search and seizure proscribes only governmental action and is inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any governmental official.[16] But a search is subject to the constitutional safeguard against an unreasonable search if the search is a joint endeavor involving a private person and a state or government official.[17]

[7] In determining what is a joint endeavor between a private person and a government official, it is not essential that the government official be involved in the endeavor at the very outset.[18] In fact, it is "'immaterial'" whether the government

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[12] Phillip A. Hubbart, Making Sense of Search and Seizure Law, a Fourth Amendment Handbook 137 (2005).

[13] *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968).

[14] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[15] See *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992).

[16] *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991).

[17] See *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989).

[18] See *id.*

official originated the idea or joined in it while the search was in progress.[19] It is sufficient that the official "'was in it before the object of the search was completely accomplished.'"[20] The government may become party to a search through nothing more than tacit approval.[21] In this case, the State argues that the search was not a joint endeavor between South and the government. Essentially, the State asserts that Harper's actions were a matter of preserving the peace, not a participation in the search of Smith. The facts lead us to conclude otherwise.

[8-10] The question whether a search is a private search or a government search is one that must be answered taking into consideration the totality of the circumstances.[22] On the record before us, it is clear that the search of Smith was a joint endeavor involving a private person and a state or governmental official. First, we conclude that Harper, although off duty at the time, was acting as a governmental official in his capacity as a police officer. A police officer on "off-duty" status is obligated to preserve the public peace and to protect the lives and property of the public in general.[23] Police officers are considered to be under a duty to respond as police officers 24 hours a day.[24] It has been widely held, based both on common law and statute, that a police officer is not relieved of his or her obligation to preserve the peace while off duty.[25] In Nebraska, it has

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[19] *Id.* at 939, 434 N.W.2d at 324, quoting *Lustig v. United States*, 338 U.S. 74, 69 S. Ct. 1372, 93 L. Ed. 1819 (1949).

[20] *Id.*

[21] 1 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 1.8(b) (4th ed. 2004). See, also, *Abdouch, supra* note 17.

[22] *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[23] *Hauser v. Nebraska Police Stds. Adv. Council*, 269 Neb. 541, 694 N.W.2d 171 (2005). See, *State v. Wilen*, 4 Neb. App. 132, 539 N.W.2d 650 (1995); 16A Eugene McQuillin, The Law of Municipal Corporations § 45.15 (3d ed. 2002).

[24] *Wilen, supra* note 23.

[25] *Id.*

long been the case that a police officer may provide security to a commercial establishment while off duty and make arrests or take other authoritative action in connection therewith.[26] At the time of the search, Harper was in full police uniform and was carrying a firearm. Although Harper was off duty and employed by the Club, he was acting in his official capacity as a police officer, not as a private citizen.

And the search was a joint endeavor between Harper and South. After South started the pat-down search of Smith and attempted to reach into Smith's pocket, Harper directed his attention to the pat down and reminded Smith to keep his hands in the air. Harper also testified that he reached out his arm and placed his wrist under Smith's arm in order to keep Smith's arm raised. Harper placed his wrist under Smith's arm before South inserted his hand into Smith's pocket. Harper was clearly involved in the search before the object of the search was completely accomplished. It is without question that Harper's involvement—by directing Smith to hold his hands up and by placing his arm underneath Smith's wrist to prevent him from interfering with South—was more than tacit approval.

Taking all of these circumstances into account, we conclude that Smith established that the search meets the test for a government search. The totality of the facts shows that Harper and South were engaged in a joint endeavor.

3. Search of Smith Was Not Reasonable

[11,12] The remaining question is whether the search was reasonable. The Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, § 7, prohibit only unreasonable searches and seizures.[27] These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions.[28] Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to

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[26] See, e.g., *State v. Groves*, 219 Neb. 382, 363 N.W.2d 507 (1985); *State v. Munn*, 203 Neb. 810, 280 N.W.2d 649 (1979); *State v. Williams*, 203 Neb. 649, 279 N.W.2d 847 (1979).

[27] *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001).

[28] *Id.*

a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.[29] The warrantless search exceptions recognized by this court include searches undertaken with consent, searches justified by probable cause, searches under exigent circumstances, inventory searches, searches of evidence in plain view, and searches incident to a valid arrest.[30] In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.[31]

(a) There Was No Probable Cause to Search Smith

[13-15] In this case, the only warrantless search exceptions that are potentially applicable are for searches undertaken with consent or with probable cause. First, we consider whether there was probable cause for the search. Probable cause escapes precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.[32] Probable cause is a flexible, commonsense standard. It merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.[33] We determine probable cause by an objective standard of reasonableness, given the known facts and circumstances.[34]

The facts and circumstances here are not sufficient to warrant a belief that evidence of a crime would be found in Smith's pocket. We note that the search at issue occurred when South reached into Smith's pocket—not South's initial pat down. Smith argues that even after the pat down, there was no probable cause to extend the search into Smith's pocket. We

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[29] *State v. Wenke*, 276 Neb. 901, 758 N.W.2d 405 (2008).

[30] See *State v. Gorup*, 275 Neb. 280, 745 N.W.2d 912 (2008).

[31] *Id.*

[32] *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006).

[33] See *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

[34] See *Voichahoske, supra* note 32.

agree. Under the "plain feel" doctrine, the findings of a lawful pat down can establish probable cause to extend the scope of a search.[35] But the legality of the search depends upon the incriminating character of an object being immediately apparent,[36] and in this case, it was not.

[16] In *Minnesota v. Dickerson*,[37] the U.S. Supreme Court held that an officer may make a warrantless seizure of contraband detected during a lawful pat-down search. The Court reached this conclusion by drawing an analogy to the previously recognized "plain-view" doctrine, which permits police officers to seize an object without a warrant if they are lawfully in a position from which they can view the object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object.[38] The Court explained:

> The same can be said of tactile discoveries of contraband. If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.[39]

When we adopted the "plain feel" doctrine in *State v. Craven*,[40] we examined two cases from the District of Columbia Circuit Court of Appeals that help illustrate the doctrine's principles. In *U.S. v. Gibson*,[41] the court held that an officer who

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[35] See, *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993); *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997).

[36] *State v. Runge*, 8 Neb. App. 715, 601 N.W.2d 554 (1999) (single-judge opinion).

[37] *Dickerson, supra* note 35.

[38] See *id.*

[39] *Id.*, 508 U.S. at 375-76.

[40] See *Craven, supra* note 35.

[41] *U.S. v. Gibson*, 19 F.3d 1449 (D.C. Cir. 1994).

felt a hard, flat, angular object in a suspect's pocket during a pat down did not have probable cause for an extended search which revealed cocaine in a second pair of trousers worn by the suspect. The officer testified that the object he touched "did not feel like anything a person might normally carry in his pocket,"[42] but did not relate anything from his experience to correlate such an object to criminal activity. Noting the government's difficulty in "explaining how a hard, flat, angular object in someone's pocket would lead a law enforcement officer of reasonable caution to believe an offense had been or is being committed,"[43] the court stated that such an object did not resemble contraband and that thus, its detection did not provide probable cause to extend the search. By contrast, in *U.S. v. Ashley*,[44] the same court held that probable cause for seizure of drugs from a suspect's underwear existed where an officer experienced in the packaging and transportation of narcotics testified that when he felt a hard object under the suspect's trousers while patting down his groin area, he immediately associated the object with crack cocaine even though he was not absolutely certain that the object was cocaine until conducting a more invasive search.

The facts of this case resemble those of *Gibson* far more closely than those of *Ashley*. In this case, when South was performing the search, he "felt something suspicious" in Smith's pocket, and Smith twice failed to answer South's question about the contents of his pocket. Harper testified that his experience supported his suspicion that Smith might have been engaging in criminal activity, because "nine times out of ten" when South asks patrons what is in their pocket and "the people start reaching for that pocket, it's something he don't want 'em pulling out."

[17] But Smith did not reach for his pocket—he reached for South's arm, to stop South from reaching into his pocket. And probable cause to search requires that the known facts and

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[42] *Id.* at 1451.

[43] *Id.*

[44] *U.S. v. Ashley*, 37 F.3d 678 (D.C. Cir. 1994).

circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.[45] Based on our review of the record, neither South nor Harper had the knowledge necessary to objectively warrant the belief that contraband or evidence of a crime would be found in Smith's pocket. As South admitted, he did not know what was in Smith's pocket—"it . . . could have been medication, could have been drugs, could have been beads, it could have been a number of things, could have even been candy. We just don't know."

[18-20] As noted above, the legality of a seizure under the "plain feel" doctrine depends upon the incriminating character of an object being immediately apparent.[46] Here, the extension of the search into Smith's pocket was grounded on intuition, not facts and circumstances known to law enforcement supporting a reasonable belief that Smith was carrying contraband.[47] Furthermore, a search or seizure of a person must be supported by probable cause particularized to that person.[48] South admitted that it was policy to search the pockets of everyone who refused to answer the question of what was in their pockets and to refuse to permit them to leave once a pat down had begun. In this case, Harper's generalized suspicions could not justify a warrantless search of Smith. "The fact that a person belongs to a class . . . which contains some members who violate the law does not create probable cause to search that person."[49]

The State also suggests that the search was reasonable because of the Club's practical interest in providing security to its patrons, arguing that "'[w]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable" — for example, searches now routine at airports and at entrances to courts and other

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[45] *Id*.

[46] See *Runge, supra* note 36.

[47] See *id.*

[48] *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

[49] *Gaioni v. Folmar*, 460 F. Supp. 10, 13 n.9 (D.C. Ala. 1978).

official buildings.'"[50] But that is not the issue here. The State's comparison of a search conducted at a dance club to one conducted at an airport or courthouse is not particularly apt.[51] The Club may have been within its rights to condition entry into the Club upon consent to a search. We need not decide that issue, however, because that condition would only authorize the Club to refuse entry to a person who is unwilling to be searched. It would not justify searching an unwilling person without probable cause.

(b) Smith Did Not Consent to Search of His Pocket

But that implicates the State's remaining argument that Smith consented to the search. The district court found that Smith had been notified of the Club's policy of patting down customers and made no attempt to leave before South patted him down, and Smith concedes that he consented to the initial pat down. But while Smith consented to the pat-down search, he did not consent to South's searching his pocket.

[21-23] Once given, consent to search may be withdrawn.[52] Withdrawal of consent need not be effectuated through particular "magic words," but an intent to withdraw consent must be made by unequivocal act or statement.[53] If equivocal, a defendant's attempt to withdraw consent is ineffective and police may reasonably continue their search pursuant to the initial grant of authority.[54] The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "'objective'" reasonableness—what would the typical

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[50] Brief for appellee at 20-21, quoting *Chandler v. Miller*, 520 U.S. 305, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997).

[51] See, *Wilkinson v. Forst*, 832 F.2d 1330 (2d Cir. 1987); *Gaioni, supra* note 49; *Wheaton v. Hagan*, 435 F. Supp. 1134 (D.C.N.C. 1977); *Jacobsen v. Seattle*, 98 Wash. 2d 668, 658 P.2d 653 (1983); *State v. Carter*, 267 N.W.2d 385 (Iowa 1978); *State v. Iaccarino*, 767 So. 2d 470 (Fla. App. 2000).

[52] See, *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996); *State v. French*, 203 Neb. 435, 279 N.W.2d 116 (1979).

[53] *U.S. v. Sanders*, 424 F.3d 768 (8th Cir. 2005).

[54] *Id.*

reasonable person have understood by the exchange between the officer and the suspect?[55] Accordingly, we must determine whether a reasonable person would have concluded that Smith's repeated attempts to thwart South's attempts to search his pocket amounted to a withdrawal of consent.

[24-26] Conduct withdrawing consent must be an act clearly inconsistent with the apparent consent to search, an unambiguous statement challenging the officer's authority to conduct the search, or some combination of both.[56] And because a consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances,[57] an officer conducting a consensual search has no authority to command the person being searched to stop interfering with the search.[58] So, while a suspect's mere reluctance to facilitate a consensual search may not serve to withdraw consent,[59] the suspect's deliberate interference with the search—actions designed to prevent law enforcement from searching further—are clearly sufficient to communicate a withdrawal of consent, because no reasonable observer could conclude that the suspect wanted the search to continue.[60]

For example, in *Lowery v. State*,[61] the court held a defendant withdrew his consent to search by "twice attempt[ing] to reach into his pockets at the same time that the officer was attempting to search the pockets." Similarly, in *Jiminez v. State*,[62] a defendant who twice grabbed a deputy's hand in an attempt to stop him from searching a pack of cigarettes was held to have withdrawn his earlier consent, and "it was

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[55] *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991).

[56] *Sanders, supra* note 53.

[57] See *State v. Rathjen*, 16 Neb. App. 799, 751 N.W.2d 668 (2008).

[58] See *Sanders, supra* note 53.

[59] See *Burton v. U.S.*, 657 A.2d 741 (D.C. 1994).

[60] See *Sanders, supra* note 53.

[61] *Lowery v. State*, 894 So. 2d 1032, 1034 (Fla. App. 2005).

[62] *Jimenez v. State*, 643 So. 2d 70, 72 (Fla. App. 1994).

improper for the officer to continue the search over the defendant's objections."

Here, the record is undisputed that Smith twice lowered his hand at the same time South was attempting to search his pocket. Smith grabbed South's wrist to prevent South from reaching into his pocket. And when South reached for Smith's pocket a second time, Smith pushed South's hand away. Only after Harper intervened and prevented Smith from interfering was South able to reach into Smith's pocket. That search cannot be characterized as consensual. Before any item was confiscated by South or Harper, Smith indicated that his consent to the initial pat down was being withdrawn, by grabbing South's wrist and later pushing South's hand away. Furthermore, South and Harper used their authority to restrict Smith's freedom of movement during the search. And as explained above, no probable cause to suspect criminal activity had been detected before Smith's pocket was searched.

Smith's actions made it apparent he did not intend to permit South or Harper to search his pockets. In fact, the only way South could complete the search was for Harper to physically restrain Smith. Any objective observer watching this scenario would conclude Smith was not consenting to the search of his pocket. Stated another way, if a suspect had to be physically restrained to prevent interference with a search of his person, the search was not consensual. Smith's actions were clearly inconsistent with the apparent consent to search.

Nonetheless, the State argues that Smith could not withdraw his consent once the pat down had begun. But as explained above, that is not the law. The case cited by the State in support of its argument stands for the proposition that while consent may be withdrawn or limited at any time before the completion of the search, it "cannot be withdrawn, however, after criminal activity has been detected."[63] But that is simply another way of saying that law enforcement does not need consent to search once probable cause has been established,

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[63] See *People of Virgin Islands v. Nadal*, No. F195/2006, 2007 WL 703494 at *4 (V.I. Super. Feb. 5, 2007).

which we have already concluded did not happen in this case.[64] And it is axiomatic that Smith's refusal to consent to the search of his pockets did not provide probable cause to continue. The Fourth Amendment's protections would be meaningless if refusal to consent to a search could itself justify a nonconsensual search.

Finally, the State suggests that Smith impliedly consented to the search because he was aware that Club patrons were subject to a pat down and search. That may have been the case when Smith got in line, but as noted above, Smith withdrew his consent before his pocket was searched. The Club may have been free to turn him away—but it was not free to turn out his pockets.

As noted above, whether the established historical facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination. Based on these undisputed facts, we conclude that the Fourth Amendment was violated in this case. The court erred in not suppressing evidence resulting from the unlawful search. We also note that the unlawful search in this case was contrary to established law and was sufficiently culpable to be susceptible to meaningful deterrence by suppression of the evidence.[65] And in any event, the State has not questioned whether the exclusionary rule should apply under these circumstances.

VI. CONCLUSION

For these reasons, we conclude that the district court erred in denying Smith's motion to suppress and that as a result, the court erred in convicting and sentencing Smith. Under the circumstances of this case, however, the concepts of double jeopardy do not forbid the possibility of a retrial.[66] We, therefore,

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[64] Compare, e.g., *State v. Chronister*, 3 Neb. App. 281, 526 N.W.2d 98 (1995) (alert by drug detection dog established probable cause for warrantless search before suspect withdrew consent).

[65] See, *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009); *State v. Nuss, ante* p. 648, 781 N.W.2d 60 (2010).

[66] See *Rogers, supra* note 22.

reverse the judgment of the district court and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

HEAVICAN, C.J., not participating.

ROGER YANT ET AL., APPELLANTS, V. THE CITY OF GRAND ISLAND ET AL., APPELLEES.

784 N.W.2d 101

Filed May 28, 2010. No. S-09-664.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.
3. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
4. ____: ____: ____. The unconstitutionality of a statute must be clearly established before it will be declared void.
5. **Constitutional Law: Statutes: Special Legislation.** The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants special favors to a specific class. A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.
6. ____: ____: ____. The prohibition against special legislation forbids the Legislature from selecting a class from a large number of persons standing in the same relation to the privileges.
7. **Constitutional Law: Special Legislation: Public Policy.** To be valid, a legislative classification must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified.
8. **Special Legislation.** The Legislature has the power to enact special legislation where the subject or matters sought to be remedied could not be properly remedied by a general law and where the Legislature has a reasonable basis for the enactment of the special law.
9. **Constitutional Law: Special Legislation.** Unless specifically prohibited by Neb. Const. art. III, § 18, the Legislature is not prohibited from passing local or special laws.
10. **Constitutional Law: Statutes: Public Purpose.** Incidental benefits do not render a statute unconstitutional when enacted for a public purpose.
11. **Constitutional Law: Statutes.** A grant of administrative authority is not necessarily an unconstitutional delegation of legislative power.

12. **Constitutional Law: Legislature.** Where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority. Those reasonable limitations and standards may not rest on indefinite, obscure, or vague generalities, however, or upon extrinsic evidence not readily available.
13. **Administrative Law: Legislature: Statutes.** It is a well-established principle that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute.
14. **Legislature.** Delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision.
15. **Constitutional Law: Public Purpose.** The Nebraska Constitution does not prohibit the State from doing business or contracting with private institutions in fulfilling a governmental duty and furthering a public purpose.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Raymond E. Walden, of Walden Law Office, James Beckmann, of Beckmann Law Offices, and Kenneth C. Winston for appellants.

Jon Bruning, Attorney General, Dale A. Comer, and Charles E. Lowe for appellees Department of Administrative Services and State Treasurer.

John C. Wiltse and Joel D. Pedersen for appellee Board of Regents.

Dale M. Shotkoski, Grand Island City Attorney, for appellee City of Grand Island.

Jack Zitterkopf, Chief Deputy Hall County Attorney, for appellees Hall County Treasurer and Hall County Board of Supervisors.

Gail S. Perry, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Nebraska State Fair Board.

Michael L. Johnson, of Leininger, Smith, Johnson, Baack, Placzek & Allen, for appellees Hall County Livestock Improvement Association and Hall County Agricultural Society, Inc.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ., and INBODY, Chief Judge.

HEAVICAN, C.J.

I. INTRODUCTION

Roger Yant, Brian Von Seggern, and Jerry Christensen (collectively appellants) appeal the decision of the Lancaster County District Court denying their request for a declaratory judgment declaring 2008 Neb. Laws, L.B. 1116 (LB 1116), unconstitutional. Appellants claim that LB 1116, which provided for the relocation of the Nebraska State Fair from Lincoln, Nebraska, to Fonner Park in Grand Island, Nebraska, is special legislation, and hence unconstitutional and void. We affirm the decision of the district court.

II. FACTS

The facts of this case are not in dispute. According to the record, the location of the state fair has been set by statute since 1901. Prior to the passage of LB 1116, Neb. Rev. Stat. § 2-101(3) (Reissue 2007) provided in part:

> The state fair shall be held at or near the city of Lincoln, in Lancaster County, under the direction and supervision of the Nebraska State Fair Board, upon the site and tract of land selected and now owned by the state for that purpose and known as the Nebraska State Fairgrounds.

At its annual meeting in 2003, the State Fair Board admitted publicly that the State Fair and its campus were "in a dire short term and long term financial crisis."

In 2004, the Nebraska Legislature requested that an investigation be conducted into new models for the state fair. Among the alternatives suggested and considered were to not have a state fair, to relocate the state fair to another site in Lincoln or Lancaster County, or to relocate the state fair to another location in the state. Another study was conducted in 2007, and on December 14, the Legislature held a public hearing on the report generated by the study. LB 1116 was introduced on January 23, 2008, and was then referred to the Legislature's Agriculture Committee for a public hearing.

The Agriculture Committee held a public hearing on LB 1116 on February 26, 2008, giving various parties an opportunity to present arguments for and against relocating the state fair. And over the course of several days, the floor debate on LB 1116 allowed various members of the Legislature to present arguments both for and against relocating the state fair.

LB 1116 was passed and is now codified at § 2-101 (Supp. 2009). Section 2-101(4)(a) states:

> It is the intent of the Legislature that no later than 2010 the Nebraska State Fair be permanently located within the city of Grand Island upon the site and tract of land owned by the Hall County Livestock Improvement Association and known as Fonner Park . . . .

Subsection (b) provides:

> The Nebraska State Fair Board, the Department of Administrative Services, and the Board of Regents of the University of Nebraska shall cooperate with each other and with other appropriate entities to provide for and carry out the plan to relocate the Nebraska State Fair and transfer the Nebraska State Fairgrounds in Lancaster County to the Board of Regents . . . .

While Grand Island, Hall County, and the Hall County Livestock Improvement Association (HCLIA) were tasked with preparing Fonner Park to host the state fair, the University of Nebraska was designated to take over the fairgrounds in Lancaster County for an "Innovation Campus."[1] Thus, the effect of LB 1116 was threefold: The legislation operated to relocate the state fair from Lincoln to Grand Island, it required certain entities associated with the state fair to cooperate in relocating the fair, and it transferred the fairgrounds in Lancaster County to the University of Nebraska.

In 2008, appellants filed suit in Lancaster County District Court asking the district court to issue a declaratory judgment finding that LB 1116 was unconstitutional and void in its entirety. The district court dismissed appellants' action, finding that the statute was constitutional. This appeal followed.

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[1] See Neb. Rev. Stat. § 2-113 (Supp. 2009).

III. ASSIGNMENTS OF ERROR

Appellants assign that the district court erred in finding that (1) LB 1116 did not constitute special legislation in violation of Neb. Const. art. III, § 18, and (2) LB 1116 did not improperly delegate legislative powers to private corporations. Appellants also claim that LB 1116 is unconstitutional in its entirety and that the unconstitutional portions cannot be struck.

IV. STANDARD OF REVIEW

[1-3] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.[2] A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.[3] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.[4]

[4] The unconstitutionality of a statute must be clearly established before it will be declared void.[5]

V. ANALYSIS

Appellants argue that LB 1116 is unconstitutional for two reasons: first, because it violates the prohibition on special legislation found in article III, § 18, of the Nebraska Constitution, and second, because there is an unconstitutional delegation of authority to HCLIA and the State Fair Board. We affirm the decision of the district court.

1. LB 1116 Is Not Unconstitutional Special Legislation

We first note that the burden of proving a statute is unconstitutional is on the party attacking the validity of a statute,[6] and

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[2] *Pavers, Inc. v. Board of Regents*, 276 Neb. 559, 755 N.W.2d 400 (2008).

[3] *Id.*

[4] *Id.*

[5] See *State ex rel. Stenberg v. Omaha Expo. & Racing*, 263 Neb. 991, 644 N.W.2d 563 (2002).

[6] *Pavers, supra* note 2.

unconstitutionality must be clearly established before a statute will be declared void.[7]

Neb. Const. art. III, § 18, provides:

> The Legislature shall not pass local or special laws in any of the following cases . . . .
>
> . . . .
>
> Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . . In all other cases where a general law can be made applicable, no special law shall be enacted.

[5] In support of their argument, appellants cite *Hug v. City of Omaha*.[8] In that case, we stated:

> The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants "special favors" to a specific class. A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.[9]

Appellants argue that LB 1116 both operates upon or affects a closed class and creates arbitrary and unreasonable classifications.

(a) Closed Class

[6,7] The prohibition against special legislation forbids the Legislature from selecting a class "from a large number of persons standing in the same relation to the privileges."[10] To be valid, a legislative classification "'"must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified. . . ."'. . ."[11] We find that LB 1116 does not violate the closed class prohibition of article III, § 18, because the

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[7] *State ex rel. Stenberg, supra* note 5.

[8] *Hug v. City of Omaha*, 275 Neb. 820, 749 N.W.2d 884 (2008).

[9] *Id.* at 826, 749 N.W.2d at 890.

[10] *Id.*

[11] *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 938, 663 N.W.2d 43, 65 (2003).

Legislature had a reasonable basis for enacting a special law in furtherance of a legitimate public policy.

(i) Legislative Classification

[8,9] Appellants argue that LB 1116 benefits a select few by creating closed classes represented by the city of Grand Island and the HCLIA. We have previously held that the Legislature has the power to enact special legislation where "'the subject or matters sought to be remedied could not be properly remedied by a general law, and where the [L]egislature has a reasonable basis for the enactment of the special law.'"[12] In fact, unless specifically prohibited by article III, § 18, the Legislature is not prohibited from passing local or special laws.[13]

In *State, ex rel. Spillman, v. Wallace*,[14] we upheld a law that discriminated between counties that had made efforts to eradicate tuberculosis in cattle and those that had not. We stated that although a general law could have been passed that applied to all counties, to do so would have been to lose the benefits accrued by the efforts of certain counties.[15] Because the matter was one of promoting a reasonable public policy and because special laws pertaining to the regulation of cattle were not specifically prohibited by article III, § 18, the law was found to be constitutional special legislation.

In the case before us, we likewise note that none of the 21 prohibitions on special legislation may be fairly read to apply to designating a site for the state fair or permanently relocating it. Although appellants suggest that LB 1116 should have "set criteria for the State Fair Board or for some state agency to apply in taking and reviewing proposals from any communities interested in hosting the fair,"[16] we stated in *Wallace* that "'[i]t is for the [L]egislature to determine whether the purpose

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[12] *State, ex rel. Spillman, v. Wallace*, 117 Neb. 588, 594, 221 N.W. 712, 714 (1928).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Brief for appellants at 17.

for which it legislated could be properly accomplished by a general law. . . .'"[17]

As appellees noted, the state fair is not the only facility, program, or activity for which a permanent location has been selected by statute. In order to allocate limited resources, the Legislature has also specified the location of prisons,[18] Nebraska veterans' homes,[19] and state colleges.[20] The Legislature also has determined official locations, including setting the city of Lincoln as the permanent seat of state government,[21] and designating the State Capitol and grounds as permanent fixtures in Lincoln.[22] In this same vein, selecting a permanent location for the state fair is also a reasonable allocation of resources.

(ii) Special Privileges and Public Purpose

Appellants further argue that LB 1116 violates article III, § 18, because it gives "specific and exclusive grants of franchise, property, and privileges to specific groups."[23] In support of their argument that LB 1116 constitutes unconstitutional grants of franchise, property, and privileges, appellants cite to *Haman v. Marsh*.[24]

In *Haman*, the statute in question would have paid $33.8 million of state tax money to depositors who had suffered losses due to the failure of industrial loan and investment companies in Nebraska. When it was passed, the statute limited the defined class of recipients to three such companies. We found that the legislation was passed with the sole benefit of those three recipients in mind.[25] The benefit granted in *Haman* was the intended purpose of the statute, whereas the purpose of

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[17] *Wallace, supra* note 12, 117 Neb. at 595, 221 N.W. at 714.

[18] Neb. Rev. Stat. §§ 72-703 (Reissue 2009) and 83-954 (Reissue 2008).

[19] Neb. Rev. Stat. § 80-315 (Reissue 2008).

[20] Neb. Rev. Stat. § 85-301 (Reissue 2008).

[21] Neb. Rev. Stat. § 72-701 (Reissue 2009).

[22] Neb. Rev. Stat. § 72-723 (Reissue 2009).

[23] Brief for appellants at 9.

[24] *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991).

[25] *Id*.

LB 1116 is to designate a permanent location for the state fair. Unlike the situation in *Haman*, the state fair is something of interest to the entire state and is intended to benefit all Nebraskans. Indeed, appellants do not dispute this.

[10] We have upheld expenditures for state fairs and other expositions as expenditures for a public purpose.[26] We have also previously held that incidental benefits do not render a statute unconstitutional when enacted for a public purpose.[27] And, while proximity to the state fair may benefit local businesses, those benefits are incidental to the public purpose behind LB 1116.

Hence, we find that appellants have neither overcome the presumption of constitutionality nor met their burden of showing that LB 1116 is an unconstitutional grant of special privileges or benefits.

(b) Unreasonable and Arbitrary Classification

Appellants also contend that the Legislature's decision to locate the state fair at Fonner Park in Grand Island was unreasonable and arbitrary. Appellants primarily rely on *Cox v. State*,[28] in which this court struck down a law that gave a tort victim a remedy against the state for injury to the victim that occurred on a state highway. Essentially, the statute in question in *Cox* waived sovereign immunity and the statute of limitations for one particular person. The court stated that such a law would require those similarly situated to petition the Legislature to make exceptions for each in turn.[29] Appellants contend that the same is true in this case and that the Legislature granted special favors to the State Fair Board, the HCLIA, and the University of Nebraska when it relocated the state fair to Fonner Park.

First, we note that *Cox* involved the grant of a civil remedy to one person out of a class of many, for no reason other than

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[26] *State v. Cornell*, 53 Neb. 556, 74 N.W. 59 (1898).

[27] See *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979).

[28] *Cox v. State*, 134 Neb. 751, 279 N.W. 482 (1938).

[29] *Id.*

"the peculiar facts and circumstances of the injuries sustained by the plaintiff."[30] In contrast, this case involves selecting a new permanent site for the state fair, which necessarily requires selecting one location. As we noted above, the Legislature may pass a specific law where a general law cannot be made applicable and where it has a reasonable basis to do so.

Appellants argue that "nothing in [LB 1116] describes any means for choosing a new fair site. The Legislature simply put a finger on the map and said this will be the place."[31] The record indicates that quite the opposite is true, however. The State Fair Board first recognized in 2003 that the state fair and its campus were in short- and long-term financial crises that would require action. Over the next 3 years, the Legislature authorized two studies to be conducted to find alternatives for the state fair, and public hearings were held on the findings. After LB 1116 was proposed, hearings and floor debates were held, giving interested parties opportunities to provide input on the potential location of the state fair. Nothing in the record indicates that the Legislature's decision to relocate the state fair, or its choice of location, was arbitrary or capricious.

We therefore find appellants' first assignment of error to be without merit because they have not met their burden of showing that LB 1116 is unconstitutional special legislation.

2. LB 1116 Not Unconstitutional Delegation of Legislative Powers

Appellants next argue that LB 1116 is unconstitutional because it delegates to private corporations the authority to spend tax revenues. LB 1116, § 6, now codified at § 2-113, provides:

> (3) The University of Nebraska and the city of Grand Island shall provide certification to the Department of Administrative Services on October 1, 2008, February 1, 2009, and July 1, 2009, of all funds provided to carry out subsection (4) of section 2-101. All amounts as certified in subdivisions (2)(a) and (c) of this section shall be held

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[30] *Id.* at 758, 279 N.W. at 487.

[31] Brief for appellants at 19.

> and expended as determined by agreement between the [HCLIA] and the Nebraska State Fair Board.

Appellants argue that only the Legislature has the power to expend state funds and that granting authority to the HCLIA to spend state funds was an unconstitutional delegation of that power. We note that in connection with appellants' special legislation assignment, appellants argued that the Legislature *exercised* too much authority in moving the fair, but here, they argue that it *delegated* too much authority. Appellants' argument is inconsistent, and we find that the Legislature acted within the scope of its power to delegate.

[11,12] A grant of administrative authority is not necessarily an unconstitutional delegation of legislative power.[32] "[W]here the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority."[33] Those reasonable limitations and standards may not rest on indefinite, obscure, or vague generalities, however, or upon extrinsic evidence not readily available.[34]

The statutes in question do delegate spending authority, but only for specific purposes. Under LB 1116, § 1, now codified at § 2-101(4)(a), the funds expended were to "provide for and carry out any plan of improvements to [Fonner Park]," and the funds were to come from "the Nebraska State Fair Board, the [HCLIA], and other appropriate entities." LB 1116, § 6, now codified at § 2-113, quoted above, states that the University of Nebraska and the city of Grand Island were to provide certification of all funds used to carry out the move and improvements. According to § 2-113(2)(a) and (c), the funds were to be provided by or on behalf of the University of Nebraska and the city of Grand Island. Under § 2-113(4)(b), the State Fair Board is to be responsible for any remaining costs associated with site improvements involved in relocating the fair.

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[32] See *Blackledge v. Richards*, 194 Neb. 188, 231 N.W.2d 319 (1975).

[33] *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 951, 554 N.W.2d 151, 157 (1996).

[34] See *id.*

[13,14] It is a well-established principle that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute.[35] And in particular, we have said that delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision.[36] In this case, the Legislature set the location of the state fair, then delegated authority to prepare Fonner Park to the entities best suited to make those decisions. The statutes clearly require that all funds be spent to prepare Fonner Park and to make it suitable to house the state fair. It is not the role of the judiciary to interfere with the proper delegation by the Legislature to the State Fair Board in a situation such as this. We find there was no unconstitutional delegation on the part of the Legislature.

[15] Appellants further contend that LB 1116 is unconstitutional because the expenditure of funds was delegated to HCLIA, a "private association."[37] However, "[t]he Nebraska Constitution does not prohibit the State from doing business or contracting with private institutions in fulfilling a governmental duty and furthering a public purpose."[38] Because, as discussed above, the state fair is considered a public purpose, the Legislature is not prohibited from delegating certain duties in connection with such public purpose.

Appellants' second assignment of error is also without merit, because they have not met their burden to show that LB 1116 was an unconstitutional delegation of authority.

3. Remaining Assignment of Error

Appellants' final assignment of error is that LB 1116 is unconstitutional in its entirety and that the unconstitutional portions cannot be struck. Because we find no merit to appellants'

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[35] *Scofield v. State*, 276 Neb. 215, 753 N.W.2d 345 (2008).

[36] *Id.*

[37] Brief for appellants at 22.

[38] *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 690, 724 N.W.2d 776, 797 (2006). See, also, *Nebraska Mortgage Finance Fund, supra* note 27.

argument that LB 1116 is unconstitutional, we need not reach this assignment of error.

VI. CONCLUSION

Appellants have not met their burden of showing that LB 1116 is unconstitutional. We therefore affirm the decision of the district court.

AFFIRMED.

STEPHAN, J., not participating.

WILLIAM MURRAY, APPELLANT, V. BEVERLY NETH, DIRECTOR, STATE OF NEBRASKA DEPARTMENT OF MOTOR VEHICLES, AND THE NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEES.

783 N.W.2d 424

Filed June 4, 2010. No. S-08-806.

1. **Administrative Law: Final Orders: Appeal and Error.** Under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Motor Vehicles: Jurisdiction: Proof: Appeal and Error.** Whether the sworn report of a law enforcement officer is sufficient to confer jurisdiction on the Department of Motor Vehicles is a question of law, and an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Police Officers and Sheriffs: Proof.** An arresting officer's sworn report triggers the administrative license revocation process by establishing a prima facie basis for revocation.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Jurisdiction.** In an administrative license revocation proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the statute in order to confer jurisdiction.
6. **Administrative Law.** As a general rule, administrative agencies have no general judicial powers, even though they may perform some quasi-judicial duties.
7. ____. An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act.

8. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation.** The purpose of administrative license revocation is to protect the public from the health and safety hazards of drunk driving by quickly getting offenders off the road. At the same time, the administrative license revocation statutes also further a purpose of deterring other Nebraskans from driving drunk.
9. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Jurisdiction: Proof.** The Department of Motor Vehicles has the power, in an administrative license revocation proceeding, to evaluate the jurisdictional averments in a sworn report and, if necessary, solicit a sworn addendum to that report if necessary to establish jurisdiction to proceed.
10. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
11. **Motor Vehicles: Licenses and Permits: Revocation.** Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees.
12. **Administrative Law: Motor Vehicles: Licenses and Permits: Due Process.** Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.
13. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial adjudicator.
14. **Administrative Law: Due Process.** In formal agency adjudications, as in court proceedings, due process requires a neutral, or unbiased, adjudicatory decisionmaker.
15. **Administrative Law: Presumptions.** Administrative adjudicators serve with a presumption of honesty and integrity. Factors that may indicate partiality or bias on the part of an adjudicator are a pecuniary interest in the outcome of the proceedings, a familial or adversarial relationship with one of the parties, and a failure by the adjudicator to disclose the suspect relationship.
16. **Administrative Law: Public Officers and Employees.** Without a showing to the contrary, state administrators are assumed to be persons of conscience, capable of judging a particular controversy fairly on the basis of its own circumstances.
17. **Administrative Law: Recusal: Presumptions: Proof.** The party seeking to disqualify an adjudicator on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality.

Petition for further review from the Court of Appeals, IRWIN, CARLSON, and MOORE, Judges, on appeal thereto from the District Court for Scotts Bluff County, RANDALL L. LIPPSTREU, Judge. Judgment of Court of Appeals affirmed.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, Andee G. Penn, and Milissa Johnson-Wiles for appellees.

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

GERRARD, J.

William Murray was stopped and arrested for driving under the influence of alcohol (DUI). The arresting police officer completed a sworn report indicating the reasons for the initial traffic stop but not the facts supporting a DUI arrest. The Nebraska Department of Motor Vehicles (DMV) sent a copy of the report back to the officer, along with a form identifying the deficiency. The officer completed an addendum to the sworn report, and following an administrative revocation hearing, the director of the DMV revoked Murray's operator's license. The primary issues presented in this case are whether the DMV could use an addendum to the sworn report to obtain jurisdiction and whether Murray's due process rights were violated.

BACKGROUND

Scottsbluff police officer Jed Combs stopped a vehicle that had expired license plates and was being driven the wrong way on a public highway. Combs made contact with the driver, Murray, and smelled the odor of alcoholic beverages coming from him. Murray failed field sobriety tests and a breath test, and he was arrested for DUI. Combs completed a sworn report and provided Murray with a temporary operator's license. On the sworn report, the reason stated for the arrest was "report of vehicle driving wrong way on Hwy 26 was advised that vehicle in question [sic]. I observed the vehicle described and observed the expired plate."

After the DMV received the sworn report, a member of the DMV's legal division sent a copy of the sworn report back to Combs, along with a form captioned "Addendum to Sworn Report." The form advised Combs that "the reasons for arrest

on the sworn report sent to you with this addendum may not confer jurisdiction to revoke the arrested person's operators license because it does not explain how you determined the person you arrested was intoxicated." Combs completed the form and returned it to the DMV, sworn and notarized. On the completed form, Combs stated that the reasons for arrest were as follows:

> Report of motor vehicle driving down the wrong lane of travel. Was also advised that vehicle had expired plates. I observed the vehicle matching that description traveling west on Hwy. 26. I conducted a stop on the vehicle and smelled the odor of an alcoholic beverage. Driver consented to [standard field sobriety tests] and showed impairment. William Murray consented to [preliminary breath test]. [Preliminary breath test] a failure.

Murray filed a petition for an administrative hearing. At the hearing, the sworn report and addendum were received into evidence. Following the hearing, the hearing officer recommended that Murray's driving privileges be suspended for the statutory period. The director adopted the recommended order of the hearing officer and revoked Murray's operator's license for 90 days.

Murray appealed to the district court, which affirmed the director's revocation of Murray's driving privileges. Murray appealed, and the Nebraska Court of Appeals also affirmed the revocation.[1] The court concluded that the report and addendum contained the required recitations and were sufficient to confer jurisdiction. And the court rejected Murray's argument that the DMV, in requesting the addendum, denied Murray due process because the DMV's actions were not fair and impartial. Murray petitioned for further review, and we granted his petition.

ASSIGNMENTS OF ERROR

In his petition for further review, Murray assigns that the Court of Appeals improperly determined that (1) the DMV could use an addendum to the sworn report in order to obtain

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[1] *Murray v. Neth*, 17 Neb. App. 900, 773 N.W.2d 394 (2009).

jurisdiction and (2) Murray's due process rights were not violated when the DMV requested an addendum in order to obtain jurisdiction.

STANDARD OF REVIEW

[1,2] Under the Administrative Procedure Act,[2] an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record.[3] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4]

[3] Whether the sworn report of a law enforcement officer is sufficient to confer jurisdiction on the DMV is a question of law, and an appellate court reaches a conclusion independent of that reached by the lower court.[5]

ANALYSIS

Statutory Authority

We first address Murray's argument that the Court of Appeals improperly determined that the DMV could use an addendum to the sworn report to obtain jurisdiction. Murray contends the use of the addendum is beyond the authority granted to the DMV. In order to evaluate this argument, it is necessary to review the process of administrative license revocation (ALR) and the function of the arresting officer's sworn report.

[4,5] Neb. Rev. Stat. § 60-498.01(3) (Reissue 2004) provides, as relevant, that when a person arrested for driving while under the influence of alcohol submits to a chemical test of blood or breath that discloses an illegal presence of alcohol, the arresting officer shall within 10 days forward to the director a sworn report stating (a) that the person was arrested for DUI and the reasons for such arrest, (b) that the person was

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[2] Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009).

[3] *Berrington Corp. v. State*, 277 Neb. 765, 765 N.W.2d 448 (2009).

[4] *Id.*

[5] *Johnson v. Neth*, 276 Neb. 886, 758 N.W.2d 395 (2008).

requested to submit to the required test, and (c) that the person submitted to a test, the type of test to which he or she submitted, and that such test revealed the presence of alcohol in a concentration over the legal limit. The arresting officer's sworn report triggers the ALR process by establishing a prima facie basis for revocation.[6] The sworn report of the arresting officer must, at a minimum, contain the information specified in the statute in order to confer jurisdiction.[7]

In this case, the State does not contend that standing alone, Combs' original sworn report was sufficient to confer jurisdiction on the DMV. And similarly, Murray does not argue that the sworn report and addendum, considered together, do not contain the required information. The parties dispute whether the DMV had the authority to request and consider the addendum.

[6,7] As a general rule, administrative agencies have no general judicial powers, even though they may perform some quasi-judicial duties.[8] An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act.[9] There is no statute expressly authorizing the DMV to request or rely upon an addendum to a sworn report. So, the question presented is whether the authority to use an addendum to remedy a defective sworn report is needed to accomplish the purpose of the act.

[8] The purpose of an ALR is to protect the public from the health and safety hazards of drunk driving by quickly getting DUI offenders off the road.[10] At the same time, the ALR statutes also further a purpose of deterring other Nebraskans

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[6] See *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005).

[7] *Johnson, supra* note 5.

[8] *Hahn, supra* note 6. See, *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004); *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994).

[9] *Hahn, supra* note 6.

[10] *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

from driving drunk.[11] The intent behind the revocation process is clear:

> Because persons who drive while under the influence of alcohol present a hazard to the health and safety of all persons using the highways, a procedure is needed for the swift and certain revocation of the operator's license of any person who has shown himself or herself to be a health and safety hazard . . . .[12]

Here, the DMV's procedures governing the revocation of an operator's license when an individual has been driving a vehicle under the influence of alcohol are in furtherance of this statutory purpose. We conclude that the authority to obtain and consider an addendum to a sworn report is also necessary to further the statutory purpose. The DMV has the power to establish an administrative process to revoke licenses, and that power necessarily encompasses the power to initiate proceedings and evaluate jurisdiction.

The DMV is charged with administering the ALR process as a whole: investigating the initial charge and initiating the proceedings, providing the driver with notice and a hearing on the merits of the charge, and ultimately determining whether the charge is valid and the operator's license should be revoked. The Legislature has specifically assigned those responsibilities to the DMV, not to law enforcement. It would be inconsistent with the DMV's investigatory responsibility if its jurisdiction to proceed with an ALR was left at the mercy of the arresting officer. Instead, when presented with a jurisdictionally deficient sworn report, the DMV's investigatory and administrative power necessarily extends to determining whether the deficiency is due to an actual lack of jurisdiction or is merely an inadvertent omission by the arresting officer. The DMV's authority to administer the ALR process would be incomplete if the DMV was unable to establish its jurisdiction to proceed with an ALR by remedying an inadvertent omission.

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[11] *Id.*

[12] § 60-498.01(1).

[9] In short, the DMV has the power, in an ALR proceeding, to evaluate the jurisdictional averments in a sworn report and, if necessary, solicit a sworn addendum to that report if necessary to establish jurisdiction to proceed. The procedure followed by the DMV in this case, in returning the original sworn report to Combs and asking him to include any omitted information, was proper and necessary to accomplish the plain purpose of the ALR statute.

And contrary to Murray's assertion, the use of an addendum in this case is not an improper attempt to supplement evidence. As the Court of Appeals noted, this is not a situation where the DMV attempted to supplement a sworn report by offering the missing information through testimony from the arresting officer at the revocation hearing.[13] Here, the sworn report and addendum were sent to the DMV, and notice provided to Murray, prior to the revocation hearing, in an attempt to remedy a jurisdictional deficiency. The original sworn report and addendum, when considered together, contained the required recitations and were thus sufficient to confer jurisdiction on the DMV.

Given that the Legislature has found that "swift and certain revocation" of an operator's license is necessary when an individual drives while under the influence, we cannot conclude that the DMV's use of an addendum to cure a jurisdictional defect was improper. Forcing the DMV to take no action in remedying a defective sworn report would seriously undermine the Legislature's goal of protecting the public from the health and safety hazards of drunk driving. We conclude that the DMV is authorized to employ such a procedure, and we find no merit to Murray's argument.

Due Process

Murray next argues that his due process rights were violated because the DMV "pre-adjudicated" his case.[14] Murray

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[13] See *Yenney v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 446, 729 N.W.2d 95 (2007).

[14] Brief for appellant in support of petition for further review at 4.

asserts that the actions of the DMV, in sending an addendum for Combs to complete and explaining why the information found in the original sworn report might not be sufficient to confer jurisdiction, were not the actions of a fair and impartial decisionmaker.

[10,11] Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.[15] Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees.[16] Thus, the property interest involved here is Murray's interest in retaining his driving privileges.

[12,13] Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.[17] In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial adjudicator.[18] In the present case, Murray was provided ample notice of the charges and was afforded sufficient opportunity to rebut the charges when he exercised his right to a hearing with counsel present. Additionally, his counsel, on voir dire, cross-examined the arresting officer and had an opportunity to present evidence in front of a hearing officer where a record was made of the proceedings. Our analysis, therefore, turns on whether the decision to revoke Murray's license was made by an impartial decisionmaker.

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[15] *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008). See, also, *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006), *modified on denial of rehearing* 271 Neb. 683, 716 N.W.2d 44.

[16] *Stenger, supra* note 15.

[17] *Id.*

[18] See *id.*

[14,15] In formal agency adjudications, as in court proceedings, due process requires a neutral, or unbiased, adjudicatory decisionmaker.[19] Administrative adjudicators serve with a presumption of honesty and integrity.[20] Factors that may indicate partiality or bias on the part of an adjudicator are a pecuniary interest in the outcome of the proceedings, a familial or adversarial relationship with one of the parties, and a failure by the adjudicator to disclose the suspect relationship.[21]

In this case, Murray does not argue that the hearing officer or director had any sort of pecuniary interest in the outcome of the proceeding or any familial or adversarial relationship with one of the parties that either official failed to disclose. Instead, Murray contends that the DMV improperly prejudged his case when it reviewed the sworn report and solicited the addendum. These actions, Murray asserts, were not impartial.

[16] But, as discussed above, it is important to distinguish between the investigatory and adjudicative functions of an administrative agency. As the U.S. Supreme Court has explained, while actual bias on the part of a judge or decisionmaker is not constitutionally tolerable,

> [t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.[22]

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[19] *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004).

[20] *Id.*

[21] See *id.*

[22] *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).

The Court acknowledged that the question whether those who have investigated should adjudicate was "substantial."[23] But, the Court noted, courts have generally rejected the idea that the combination of judging and investigating functions is a denial of due process.[24] And without a showing to the contrary, state administrators are assumed to be persons of conscience, capable of judging a particular controversy fairly on the basis of its own circumstances.[25]

The Court reasoned that judges, for example, repeatedly issue arrest warrants and rule at preliminary hearings based upon whether there is probable cause for an arrest or to hold a defendant for trial. Yet neither of these pretrial decisions has been thought to present a constitutional barrier to the same judge presiding over trial or, in the case of a bench trial, determining the guilt of the defendant.[26] Nor does making an initial assessment of the facts in the context of a preliminary injunction disqualify a judge from presiding over the rest of the litigation.[27] Likewise, the Court explained:

> It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law. . . .
>
> . . . .
>
> The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position.

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[23] *Id.*, 421 U.S. at 51.

[24] *Withrow, supra* note 22.

[25] See *id.*

[26] See *id.*

[27] See *id.*

> Indeed, just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute.[28]

So, the Court concluded, "[t]he initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation."[29]

So, while Murray may be correct in arguing that the DMV's original solicitation of the sworn report was not purely impartial, Murray is incorrect in assuming that this undermines the ultimate fairness of the adjudicative process. The DMV is required to initially investigate and evaluate the charge against a driver. This does not, without more, establish that the hearing officer and director of the DMV are not sufficiently fair and impartial, in making the ultimate adjudication of the charge, to provide the driver with due process of law.

[17] The party seeking to disqualify an adjudicator on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality.[30] Here, the record fails to show actual bias, actual partiality, animosity, or financial interest on the part of the hearing officer or director. The sworn report and addendum are essentially fill-in-the-blank documents provided by the DMV to arresting officers. As the Court of Appeals noted, there is no significant difference between the DMV's provision of the sworn report form and provision of the addendum form in the present case. Further, the evidence does not indicate that the DMV instructed the officer on how to fill out the form; rather, the DMV only pointed out what kind of information was missing. The DMV, in its investigatory capacity, was simply attempting to remedy

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[28] *Id.*, 421 U.S. at 56-57.

[29] *Id.*, 421 U.S. at 58.

[30] *Barnett, supra* note 19.

a defective sworn statement in order to obtain jurisdiction to conduct the ALR hearing. On these facts, we find no violation of due process.

Briefly, we note Murray's claim that the DMV denied him due process by making ex parte contact with Combs.[31] Generally, no hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decision-making process of a contested case shall make or knowingly cause to be made an ex parte communication to any party in a contested case or other person outside the agency having an interest in the contested case.[32] But Combs was a witness, not a party in the contested case or a person outside the agency having an interest in the contested case. And the "ex parte" contact between the DMV and Combs was, in actuality, no more substantial than the provision of the sworn report that the law *requires* in the first place. In short, the record fails to show that Murray's due process rights were violated by the DMV's correspondence with Combs.

Given the State's interest as articulated in our statutes in protecting the people of Nebraska from drunk drivers and the presumption of honesty and integrity that is afforded administrative decisionmakers, we conclude that a mere showing that the DMV sent an addendum form to the arresting officer before the hearing and revocation is insufficient to disqualify the hearing officer or director as a matter of due process.[33] Under these facts, the Court of Appeals correctly concluded that Murray did not overcome the presumption of impartiality. Murray has failed to show he was deprived of due process, and his second assignment of error is without merit.

CONCLUSION

For the reasons discussed, we affirm the judgment of the Court of Appeals affirming the revocation of Murray's operator's license.

AFFIRMED.

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[31] But see *Walz v. Neth*, 17 Neb. App. 891, 773 N.W.2d 387 (2009).

[32] § 84-914(6)(b).

[33] See *id.*

MILLER-LERMAN, J., concurring in part, and in part dissenting.

I concur in part and dissent in part. I agree with the majority opinion that the Department of Motor Vehicles (DMV) has authority to solicit an addendum for certain limited purposes and that the analytical framework for evaluating the due process claim in this appeal is found in *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). Unlike the majority, I would conclude that there was a due process violation, and I therefore respectfully dissent from that portion of the opinion that finds to the contrary.

Along with the majority, I recognize that the Court in *Withrow* stated that the combination of investigative and adjudicative functions in a single administrative entity does not necessarily create a due process violation. However, the Court in *Withrow* also stated that where certain "local realities" are present, a court may determine "from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high" and that the risk of bias may rise to an unconstitutional level. 421 U.S. at 58. The Court further warned that "we should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice." 421 U.S. at 54. I believe that the record shows that the actual practice of using an addendum, solicited by the DMV at the director's behest, to shore up the factual content in the sworn report to be used as substantive evidence to establish a case decided by the director, raised the risk of bias to an unconstitutionally high level in this case and that Murray suffered a due process violation thereby.

The majority opinion states that the DMV used its investigatory capacity to remedy a sworn statement in order to obtain jurisdiction. This reference to "jurisdiction" reflects the language in the addendum in which the legal division of the DMV wrote a memorandum to the arresting officer soliciting further information because the "director has determined . . . the sworn report . . . may not confer jurisdiction." The request for further information reads in its entirety as follows:

> The director has determined the reasons for arrest on the sworn report sent to you with this addendum may not

> confer jurisdiction to revoke the arrested person's operators license because it does not explain how you determined the person you arrested was intoxicated.
>
> 1. On the form before [sic], please indicate why you concluded the motorist was operating or in actual physical control of a motor vehicle while intoxicated.
>
> 2. After completing [the] form, please sign it in the presence of a notary and return it to the Director of the Department of Motor Vehicles by (a) mailing it to [address provided] or (b) faxing it [to number provided].
>
> Time is of the essence. Please return the form as soon as possible.
>
> Thank you.

In my view, the DMV request taken in its entirety was not done to remedy an error. Compare *Stoetzel v. Neth*, 16 Neb. App. 348, 744 N.W.2d 465 (2008) (where undisputed missing date was added on sworn report by addendum at director's request, court concluded that there was no jurisdiction based on other grounds). Because the instant request was not a mere request to remedy a technical or objective defect to confer jurisdiction, but was in actual practice a request by the director for substantive information so that the DMV could establish its prima facie case to be decided by the director, I believe "the way [this] particular procedure . . . actually work[s] in practice," see *Withrow*, 421 U.S. at 54, demonstrates an intolerable risk of bias from a constitutional standpoint.

In numerous cases not repeated here, we have recognized that, given Nebraska's particular statutory structure found at Neb. Rev. Stat. § 60-498.01(3) (Reissue 2004), the timely and proper sworn report confers jurisdiction upon the director to revoke a motorist's license. See, e.g., *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). Although the numerous statutory deficiencies in sworn reports have sometimes been collectively referred to as "jurisdictional" defects in our jurisprudence, we have in fact differentiated between the technical formalities of obtaining jurisdiction and the informational content in the sworn report. See *id.* This distinction becomes critical in a due process constitutional analysis. Further, we have long noted that the offer by the DMV of a sworn report establishes the DMV's

prima facie case, *Arndt v. Department of Motor Vehicles*, 270 Neb. 172, 699 N.W.2d 39 (2005), and that the DMV is not required to prove the factual accuracy of recitations in a sworn report which show the prima facie case. *Nothnagel v. Neth*, 276 Neb. 95, 752 N.W.2d 149 (2008). Indeed, because a sworn report, which does not include the information required by statute, may not be supplemented by evidence offered at a subsequent hearing, see *Hahn v. Neth, supra*, the content of the sworn report is crucial to the prosecution of the case, and it is not surprising that the DMV would want the arresting officer to bolster the informational content of the sworn report.

We have noted that because a proper sworn report establishes the prima facie case, the Legislature has conferred a significant procedural benefit on the DMV. *Id*. We have stated that given "the substantial role which the sworn report plays in an administrative license revocation proceeding . . . the report must, at a minimum, contain the information specified in the applicable statute" and that the "statutory requirements are not onerous." *Id*. at 171, 699 N.W.2d at 38. In another case involving a sworn report, the concurring justice stated: "The requirements [for a proper sworn report] are not an onerous burden, given the benefit the DMV receives in establishing its prima facie case by simply complying with this requirement. In golf parlance, the sworn report is a 'gimme.'" *Johnson v. Neth*, 276 Neb. 886, 896, 758 N.W.2d 395, 402 (2008) (Connolly, J., concurring). I agree with the foregoing, and I tend to disagree with the inference in the majority opinion that an arresting officer cannot be expected to adequately fill in the blanks on the sworn report.

For due process purposes, we have been advised to remain alert to "the way particular procedures actually work in practice." *Withrow v. Larkin*, 421 U.S. 35, 54, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). Notwithstanding the presumption of honesty and integrity accorded administrative adjudicators, in my view, the statutory context plus the actual practice revealed in the instant case make the risk of unfairness and thus bias intolerably high.

The administrative case law distinguishes between combining investigative and adjudicative functions on the one hand

and combining prosecutorial and adjudicative functions on the other. See, e.g., *Botsko v. Davenport Civil Rights Com'n*, 774 N.W.2d 841 (Iowa 2009); *Nightlife Partners v. City of Beverly Hills*, 108 Cal. App. 4th 81, 133 Cal. Rptr. 2d 234 (2003). Combining prosecutorial and adjudicative functions presents the greater danger to due process. *Botsko v. Davenport Civil Rights Com'n, supra*. When advocacy and decisionmaking roles are combined, "true objectivity, a constitutionally necessary characteristic of an adjudicator," is compromised. *Howitt v. Superior Court*, 3 Cal. App. 4th 1575, 1585, 5 Cal. Rptr. 2d 196, 202 (1992). It has sometimes been concluded that the prosecutorial and adjudicative combination poses so great a risk that due process has been violated without a showing of actual prejudice. See, e.g., *Gonzales v. McEuen*, 435 F. Supp. 460 (C.D. Cal. 1977).

For purposes of discussion, I accept the majority's characterization of the instant case as one involving a combination of investigative and adjudicative functions. However, the actual facts bear some of the dangers which occur when prosecutorial and adjudicative functions are combined and about which *Withrow* warns. In the matter before us, the director, through her staff, directed the arresting officer to add information to the sworn report which was thereafter to be submitted to the director as adjudicator and which, under Nebraska law, would unfailingly serve to establish the prima facie case against Murray. The role of the director in this case is not neutral. The director works up the evidence which by operation of law is then deemed sufficient. Even if the driver challenges the sworn report, as Murray did, thus necessitating a hearing, it is difficult for the director to objectively reject the informational content contained in the sworn report which she developed. It has been observed that "[i]t is difficult for anyone who has worked long and hard to prove a proposition . . . to make the kind of dramatic change in psychological perspective necessary to assess that proposition objectively . . . ." 2 Richard J. Pierce, Jr., Administrative Law Treatise § 9.9 at 681 (4th ed. 2002).

In the present case, I cannot say that the filing of the sworn report bearing the informational content developed by

the director is merely investigative or ministerial. Compare *Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774 (D.C. Cir. 1983). Instead, I believe that the risk of bias and unfairness was intolerably high and that there was a violation of due process in this case. I would reverse the decision of the Court of Appeals.

CONNOLLY, J., joins in this concurrence and dissent.

STATE OF NEBRASKA, APPELLEE,
V. THOI VO, APPELLANT.
783 N.W.2d 416

Filed June 4, 2010. No. S-09-912.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.
3. **Pleas.** A plea of no contest is equivalent to a plea of guilty.
4. **Pleas: Waiver.** Normally, a voluntary guilty plea waives all defenses to a criminal charge.
5. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal.
6. **Postconviction: Pleas: Effectiveness of Counsel.** In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
7. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
8. **Trial: Pleas: Mental Competency.** A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.

9. ____: ____: ____. The test of mental capacity to plead is the same as that required to stand trial.
10. **Pleas: Mental Competency: Right to Counsel: Waiver.** A court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his or her right to counsel; a competency determination is necessary only when a court has reason to doubt the defendant's competence.
11. **Effectiveness of Counsel.** Defense counsel is not ineffective for failing to raise an argument that has no merit.
12. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

Thoi Vo, pro se.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

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

STEPHAN, J.

Thoi Vo appeals from the denial of his motion for postconviction relief without an evidentiary hearing. We affirm.

I. BACKGROUND

In April 2007, Vo was charged by information with first degree murder and use of a weapon to commit a felony. Represented by counsel and assisted by an interpreter, he entered a not guilty plea. On December 11, the State amended the information to one count of second degree murder, and Vo, again with counsel and the assistance of an interpreter, entered a plea of no contest. Before accepting the plea, the district court found that Vo was not under the influence of alcohol, drugs, narcotics, or other pills. In the course of this determination, Vo informed the court that he had some "mental problems" for which he had last seen a doctor in 2001. Vo stated that he did not take any medication for mental problems. Vo informed the court that he knew that he was appearing before a court in Lincoln for the purpose of entering a plea. The court

specifically found that Vo was following the questions, was giving suitable answers, and appeared physically normal.

The court also informed Vo of the rights and privileges he would be waiving by entering the plea. The court specifically asked whether Vo was freely and voluntarily giving up his rights and stated, "In other words, is this what you want to do?" Vo responded, "Yes." The court also asked, "[O]ther than [the] plea agreement, which may be a promise — the State may have promised you that they would amend this from a first-degree murder to a second-degree murder. Other than that promise, have any other promises been made to you at all? . . . And I mean by anybody." Vo responded, "No." In response to the court's inquiry, Vo's counsel stated that he believed that Vo was waiving his rights freely, voluntarily, knowingly, and intelligently.

The court also asked Vo whether he had told his counsel everything he knew about the case, and Vo responded that he had and that he was satisfied with the efforts of his counsel on his behalf. Regarding the plea agreement, the court told Vo:

> I want you to understand that I'm not bound by plea negotiations. And if I accept your plea of no contest, I don't have to accept any recommendation being made by the County Attorney, [your counsel,] or anyone else as to what the sentence ought to be. Do you understand that?

Vo responded that he did. The court also told Vo that it could take into consideration "all of the circumstances surrounding the charges" in determining the sentence to be imposed. In addition, the court asked Vo, "Has anyone made any promises to you or represented to you in any way what the sentence will be in this case if I accept your plea and find you guilty?" Vo responded, "No."

The State then offered a factual basis for the plea. Summarized, the basis was that Vo and the victim were involved in a minor vehicular accident in Lancaster County. Vo and his passenger argued with the victim, and the confrontation escalated into a fistfight. At one point, onlookers pulled Vo out of the fight, and he then returned to his vehicle, retrieved a knife, and stabbed the victim in the abdomen. Vo then used the same knife to puncture the tires on the victim's car, and then left the

area with his passenger. At least three eyewitnesses saw the crime, and Vo admitted to police that he stabbed the victim. While incarcerated, Vo admitted to several cellmates that he had stabbed the victim.

At the sentencing hearing, Vo's counsel referred to a psychological evaluation performed on Vo at the Lincoln Regional Center in 2000, noting that it had resulted in a diagnosis of "pervasive developmental disorder." Prior to pronouncing the sentence, the court stated that it was aware of this diagnosis and of other reports of Vo's mental health that were included in the presentence report. The court sentenced Vo to 50 years to life in prison.

After his direct appeal was summarily affirmed, Vo filed a pro se verified motion for postconviction relief, in which he alleged that his trial counsel was ineffective (1) in dealing with his mental competency in the trial court and on appeal and (2) in advising him and his family that he would receive a sentence of imprisonment of 20 to 40 years in exchange for his no contest plea. Vo also alleged that the State committed "prosecutorial misconduct" by "hiding the true nature of [Vo's] mental health and physical deformities." The State filed a responsive motion requesting the court to deny the postconviction motion without an evidentiary hearing based upon the files and records of the case. After conducting a hearing on this motion, the district court determined that the files and records of the case established that Vo was not entitled to the postconviction relief he sought and therefore overruled his motion without conducting an evidentiary hearing. Vo perfected this timely appeal.

II. ASSIGNMENTS OF ERROR

Vo's assignments of error include certain general propositions which are not directed to a specific ruling by the district court and therefore are not considered on appeal. Vo properly assigns, restated and consolidated, that the district court erred in denying his motion for postconviction relief without an evidentiary hearing on the issues of (1) whether the State committed prosecutorial misconduct and (2) whether his trial counsel, who also represented him on direct appeal, was ineffective.

We also understand Vo to contend that the district court erred in not appointing counsel to represent him in this postconviction proceeding.

III. STANDARD OF REVIEW

[1,2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.[1] An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[2] However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.[3]

IV. ANALYSIS

1. Prosecutorial Misconduct

[3-5] Vo was convicted and sentenced based upon his plea of no contest to the charge of second degree murder. A plea of no contest is equivalent to a plea of guilty.[4] Normally, a voluntary guilty plea waives all defenses to a criminal charge.[5] Vo's plea waived any claim of prosecutorial misconduct. Moreover, any such claim would be procedurally barred under the principle that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal.[6]

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[1] *State v. Molina, ante* p. 405, 778 N.W.2d 713 (2010); *State v. Nesbitt, ante* p. 355, 777 N.W.2d 821 (2010).

[2] *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009); *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008).

[3] *Id.*

[4] *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008); *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006).

[5] *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

[6] *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006); *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

Accordingly, there is no merit in Vo's argument that the district court erred in dismissing his postconviction claim based upon prosecutorial misconduct.

2. Ineffective Assistance of Counsel

[6,7] In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.[7] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*,[8] to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case.[9] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[10] Because Vo's conviction was the result of a plea, the prejudice requirement is satisfied if he can show a reasonable probability that, but for the errors of counsel, he would have insisted on going to trial rather than pleading.[11]

Vo assigns and briefly argues that his counsel was ineffective in "failing to establish that the victim initiated the fighting," but that issue was not raised in Vo's motion for postconviction relief and therefore is not properly before us on appeal. We therefore address only the claims that Vo's counsel was ineffective in not raising competency issues and in promising Vo that he would receive a specific sentence if he entered a plea of no contest.

(a) Competency

[8-10] Based upon the assertion that he is a person with mental retardation, Vo argues that his counsel was ineffective in failing to seek a competency hearing in the district court and

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[7] *State v. Watkins, supra* note 5; *State v. McLeod, supra* note 5.

[8] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[9] *State v. McKinney, ante* p. 297, 777 N.W.2d 555 (2010).

[10] *Id.*

[11] See *State v. Glover*, 278 Neb. 795, 774 N.W.2d 248 (2009).

in failing to raise a competency issue on appeal. A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.[12] The test of mental capacity to plead is the same as that required to stand trial.[13] A court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his or her right to counsel; a competency determination is necessary only when a court has reason to doubt the defendant's competence.[14]

Vo's allegation that he was incompetent to plead because he is a person with mental retardation is flawed in two respects. First, the files and records do not support and indeed refute Vo's claim that he is a person with mental retardation. Vo contends that the diagnosis was made during a psychological evaluation conducted by the Adolescent and Family Services team at the Lincoln Regional Center in 2000, when Vo was 17 years old and subject to the jurisdiction of a juvenile court. A report of the evaluation is included in the record. The report reflects that Vo "appears to have the characteristics of a pervasive developmental disorder" characterized by "severe and pervasive impairment in reciprocal social interaction skills and in communication skills." The report further indicates that the development disorder "is often associated with some degree of mental retardation" and that while an IQ test was not administered, Vo's performances on other tests "suggest either borderline or retarded mental functioning." In a letter dated January 21, 2008, which was included in the presentence report, the supervising psychologist for the 2000 evaluation stated:

> A pervasive developmental disorder is not the same as an intellectual disorder, as in mental retardation. At the time of the [Adolescent and Family Services] evaluation there was concern with [Vo's] intellectual deficit,

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[12] *State v. Lassek, supra* note 4.

[13] *Id.*

[14] *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007). See, also, *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993).

> but his language and cross-cultural problems made an intellectual test invalid although there was enough evidence to raise the possibility of intellectual problems a[t] that time. However, additional school nonverbal testing reports suggest impaired intelligence is not a primary problem — on some nonverbal tests he scored within the normal range.

The record also reflects that after the 2000 evaluation, Vo was referred to another facility for further evaluation. A psychological report dated March 24, 2001, was completed by a licensed supervising psychologist, a licensed mental health practitioner, and a licensed professional counselor at this facility. That report indicates that after testing, the examiners were "unable to substantiate any of the necessary deficits that would indicate any type of pervasive developmental disorder or to even bring cause for a rule out diagnosis. [Vo's] overall functioning surpasses what would indicate symptoms for pervasive developmental disorder." The examiners diagnosed Vo with a general anxiety disorder and opined that "the prior diagnosis of Pervasive Developmental Disorder does not accurately describe . . . Vo at this time." The presentence report includes Vo's school records, which reflect that he graduated from high school in 2003 and achieved grades which, while not exemplary, sometimes included A's, B's, and C's in math and reading classes. After high school, Vo attended community college and worked for an electrical company performing wiring.

Second, even if a diagnosis of mental retardation were established, it would not necessarily imply incompetence to plead or stand trial.[15] *State v. Bradford*[16] was a postconviction proceeding in which the defendant contended that he was not competent to enter a guilty plea because he was a person with mental retardation. The record reflected that the defendant had been diagnosed with moderate mental retardation, as well as alcohol abuse, mild organic brain syndrome, and a personality

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[15] See, *State v. Tully*, 226 Neb. 651, 413 N.W.2d 910 (1987); *State v. Bradford*, 223 Neb. 908, 395 N.W.2d 495 (1986).

[16] *State v. Bradford, supra* note 15.

encompassing the schizotypal and antisocial personality classifications. Despite this, we concluded that other evidence in the record and the defendant's responses to the court's questioning at the plea hearing were sufficient to establish the defendant's competency at the time of the plea.

[11] As noted, the record establishes that Vo does not have a cognitive mental impairment. In addition, the record of his plea hearing refutes his current claim that he was incompetent to enter his no contest plea. Vo's responses to questions from the court were appropriate and reflected his knowledge that he was appearing in court for the purpose of entering a no contest plea and that he understood the consequences of such action as they were explained to him by the judge. Because the record affirmatively reflects that Vo was competent to enter his plea, his counsel could not have been ineffective in not raising an issue of competency, either in the trial court or on appeal. Defense counsel is not ineffective for failing to raise an argument that has no merit.[17]

(b) Promise of Specific Sentence

Vo also contends that his counsel was ineffective in promising him and his family that if he entered a no contest plea, he would receive a sentence of either 20 to 30 or 20 to 40 years' imprisonment. Vo contends that but for that promise, he would not have entered his plea.

The record of the plea hearing refutes this claim. In response to direct and specific questioning by the judge, Vo affirmed that no one had made any promises, aside from the plea agreement, in exchange for his plea. Vo also affirmed that entering a plea was what he wanted to do, and then again agreed that other than the plea agreement, no "other promises [had] been made to [him] at all . . . by anybody." After the plea agreement was stated to the court, the judge informed Vo:

> I want you to understand that I'm not bound by plea negotiations. And if I accept your plea of no contest, I don't have to accept any recommendation being made by the County Attorney, [your counsel,] or anyone

[17] *State v. McLeod, supra* note 5.

> else as to what the sentence ought to be. Do you understand that?

Vo responded that he did. The judge then specifically asked Vo whether anyone had made any promises to him or represented to him what his sentence would be, and he said, "No." Having unequivocally represented to the court on the record that no promises were made by anyone regarding his sentence, Vo is not entitled to an evidentiary hearing on his postconviction claim to the contrary.

3. Appointment of Counsel

[12] Vo argues that a court should be required to appoint postconviction counsel for any person with mental retardation. As we have noted, the record refutes Vo's claim that he is a person with mental retardation. Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.[18] When the assigned errors in a postconviction petition before the district court contain no justiciable issues of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.[19] Because Vo's postconviction motion presents no justiciable issues, the district court properly refused to appoint postconviction counsel.

4. Plain Error

In his pro se brief, Vo specifically requests that we review the judgment of the district court for plain error. We find none.

V. CONCLUSION

For the reasons discussed, we affirm the judgment of the district court dismissing Vo's motion for postconviction relief without an evidentiary hearing.

Affirmed.

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[18] *Id.*; *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[19] *State v. McLeod, supra* note 5.

MURIEL D. WALTON, APPELLANT, V. ARUN-ANGELO PATIL, M.D., APPELLEE.

783 N.W.2d 438

Filed June 11, 2010. No. S-08-618.

1. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion.
2. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
3. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
5. **Statutes: Presumptions: Legislature: Intent: Appeal and Error.** In construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute.
6. **Statutes: Legislature: Intent.** An appellate court will place a sensible construction upon a statute to effectuate the object of the legislation, as opposed to a literal meaning that would have the effect of defeating the legislative intent.
7. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.
8. **Rules of the Supreme Court: Hearsay: Pretrial Procedure.** Neb. Ct. R. Disc. § 6-332 creates an exception to the hearsay rule, and a deposition need no longer satisfy the requirements of Neb. Rev. Stat. § 27-804(2)(a) (Reissue 2008) to be admissible under the rules of discovery.
9. **Rules of the Supreme Court: Pretrial Procedure: Witnesses.** When a party attempts to introduce deposition testimony under Neb. Ct. R. Disc. § 6-332, it is unnecessary to show that reasonable efforts were made to procure the attendance of the witness.
10. **Rules of the Supreme Court: Pretrial Procedure: Evidence.** Nothing in the Nebraska rules of evidence or the rules of discovery makes a distinction between

a deposition taken for use at trial and one taken for discovery purposes. Thus, a deposition taken during discovery may be used at trial so long as it is otherwise admissible.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Marvin O. Kieckhafer and R. Laubenthal, of Smith Peterson Law Firm, L.L.P., for appellant.

Patrick G. Vipond and William R. Settles, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

PER CURIAM.

NATURE OF CASE

Muriel D. Walton sued Arun-Angelo Patil, M.D., alleging that he breached the applicable standard of care during and after a surgical procedure Patil performed on Walton's lower back. Before trial, Walton notified the court that she intended to enter into evidence the deposition testimony of her expert witness, Leon J. Ravvin, M.D. This deposition was taken by Patil's counsel. Patil objected to the use of the deposition, and on April 9, 2008, 5 days before a trial on the merits, the court announced its decision to disallow Ravvin's deposition because it was taken for discovery purposes only. Walton filed a motion to continue trial, which was also denied by the court. The district court entered a directed verdict in favor of Patil, from which Walton has perfected this appeal.

BACKGROUND

EVENTS LEADING UP TO SUIT

In 2003, Walton was injured in an automobile accident. Following the accident, Walton complained of persistent back and right leg pain, for which she sought medical treatment from Patil. An MRI scan of her lumbar spine revealed moderately severe L4-5 spinal stenosis with facet hypertrophy. On July 2, 2003, Patil performed a surgical procedure known as an L4-5 decompressive laminectomy (L4-5 procedure) in an

attempt to relieve Walton's pain. About 5 days after the L4-5 procedure, Walton experienced cerebrospinal fluid (CSF) leakage and swelling at the surgical site. She also developed severe positional headaches. Walton testified at her deposition that her pain did not decrease after the L4-5 procedure.

Walton went to see Patil and informed him of her symptoms. Patil recommended that Walton wait it out, and he sent her home. Walton's symptoms persisted, and she went to see Patil for a second time. According to Walton, "[Patil] just acted like he didn't see no problem." Walton testified that she "started going to see different doctors, because every time I would go see Patil he would just send me home and tell me to come back later. It's swelling. It will go away."

In July and August 2003, Patil attempted to treat Walton's condition with a "blood patch." However, this procedure was not successful. On October 9, Walton was admitted to the University of Nebraska Medical Center for surgical intervention. At the medical center, Patil performed two surgical procedures on Walton to repair the leak. The first procedure took place on October 9, and the second took place on October 14. Patil did not find the source of the leakage during either procedure, and he did not place a drain during either procedure. Because Walton was experiencing persistent CSF drainage after the first procedure, Patil attempted to have a lumbar drain inserted nonsurgically. According to Ravvin, this was "'unsuccessful'" and Walton continued to experience pain. Walton was discharged from the hospital on October 20, 2003.

Two days after being discharged, Walton was readmitted to the hospital from October 23 through 29, 2003, for symptoms of headache, vomiting, fever due to meningitis, and CSF leakage. By early November, the surgical wound in Walton's back sealed, but she developed a pseudomeningocele that progressively enlarged.

Eventually, Walton came under the care of another surgeon. On December 23, 2003, this surgeon performed a surgical procedure to repair the pseudomeningocele and placed a lumbar drain. Walton recovered well from this procedure, but her back and bilateral leg pain never improved.

SUIT

On June 6, 2005, Walton filed suit against Patil and several other defendants. The other defendants were dismissed from the suit and are not involved in this appeal. Walton alleged that during the L4-5 procedure, the dural covering of her spinal cord was injured, resulting in a CSF leak. Walton also averred that Patil breached the applicable standard of care.

Walton designated Ravvin to be her expert witness against Patil. Ravvin is a neurosurgeon from Lexington, Kentucky. Patil requested the deposition of Ravvin and was advised that Ravvin's fee for giving deposition testimony would be $5,500 for 4 hours. Patil objected to Ravvin's fee, and on February 13, 2007, the court held a hearing regarding Patil's objection to Ravvin's fee. The court ordered Walton to make Ravvin available for a deposition no later than March 30 for an hourly fee of $650 (not including any compensation for preparation) or at an hourly rate determined by Ravvin's adjusted gross income from physician services for the calendar year 2006, divided by 1,850 hours, whichever hourly rate is higher. On March 23, 2007, Patil's counsel deposed Ravvin. Nothing in the record indicates that the parties agreed to use the deposition at trial or that the parties anticipated using the deposition at trial.

In his deposition testimony, Ravvin testified that he was skeptical of the fact that Patil did nothing different in the October 14, 2003, procedure than he did in the October 9 procedure. Specifically, Ravvin was puzzled by the fact that Patil did not put a drain in at the second surgery to stop the leak. Additionally, Ravvin testified at his deposition that in his opinion, Patil deviated from the standard of care by failing to place the drain after Walton's second surgery.

A report summarizing Ravvin's opinions regarding Patil's treatment of Walton was attached and used as a "template" throughout the deposition. In his deposition, Ravvin was asked, "Does this report which is your December 20th, 2006, letter contain all your opinions as to deviations from the standard of care by Dr. Patil?" to which Ravvin responded, "Yes." Ravvin also testified that the report was "an accurate statement of [his] opinions." Additionally, Ravvin testified that he had not

changed any of his opinions as set forth in the report except that he incorrectly noted that a microscope was not used when in fact it was.

According to the report, Walton sought treatment several times from Patil but Patil "avoided the problem and did nothing." And in Ravvin's opinion, Walton should not have been discharged from the hospital on October 20, 2003, after the two surgical procedures. In conclusion, Ravvin stated:

> [Walton] went through countless delays and three operations to repair CSF leakage and pseudomeningocele. She is left with persistent back and leg pain, both in her left and right legs. She may require further surgery in the future.
>
> Dr. Patil's management deviated from the standard of care. This did cause harm to . . . Walton which led to the complications as described.

The court scheduled the case for a jury trial to begin on April 14, 2008. On April 8, Walton filed a "Notice of Intent to Offer Deposition Testimony" of Ravvin at trial. She argued that the deposition was not excludable by the hearsay rule because it fell under an exception contained in Neb. Rev. Stat. § 27-804(1)(e) (Reissue 2008). Section 27-804(1)(e) provides that unavailability as a witness includes situations in which the declarant is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means. Walton maintained that Ravvin's deposition testimony was admissible because (1) Ravvin was not available to appear at the time of trial, (2) his attendance could not be procured by process, and (3) his attendance could not be procured by other reasonable means.

On April 9, 2008, Patil filed his objection to Walton's notice of intent to offer deposition testimony, alleging that Walton did not meet her burden of proof that Ravvin was unavailable to testify live at trial and that Ravvin's deposition testimony was hearsay. A hearing was held regarding the same, and at the hearing, the court sustained Patil's objection, disallowing the deposition to be read into evidence at trial.

Immediately after the court's ruling prohibiting the use of Ravvin's deposition at trial, Walton filed a motion to continue

trial in an attempt to have more time to arrange for Ravvin's testimony. On the morning of April 10, 2008, the court held a hearing regarding Walton's motion to continue. At the hearing, Walton asked the court to reconsider its decision regarding Ravvin's deposition testimony. Walton offered evidence to support her motion to continue and to support the use of Ravvin's deposition testimony.

Specifically, Walton introduced an affidavit of her attorney in support of allowing Ravvin's deposition testimony at trial. The affidavit indicated that Walton was financially unable to procure Ravvin's in-person testimony at trial or by video deposition. Additionally, Walton introduced several letters from Ravvin regarding his fees for taking a video deposition. These letters showed that Ravvin recently raised his fees for testifying as an expert witness. The letters from Ravvin showed that Ravvin's minimum fee for deposition testimony taken at his office was $7,500, which included 4 hours of his time. One letter, dated February 14, 2008, instructed Walton that if she wanted to depose Ravvin the first week of March, she must send payment to his office no later than February 19, and noted that the fee would be nonrefundable because Ravvin had to make schedule changes to accommodate the late request. On February 20, Ravvin sent a letter to Walton indicating that he was no longer available to testify in early March and that he only had a few dates left in March or April.

After considering the evidence, the court again denied Walton's request to read Ravvin's deposition testimony into evidence. The court reasoned that it was Walton's choice to designate Ravvin as an expert witness and that she did so knowing what his fees for testifying were. The court stated that hiring Ravvin "was a choice, an election that occurred in time back up the road a ways" and that therefore, Walton must take responsibility for that choice. Additionally, the court stated:

> I didn't authorize the use of the discovery deposition because essentially a discovery deposition is just — is an affidavit. It's an effort to secure the opinions as comprehensively as an opponent can and to map out the basis, the factual basis for those opinions.

> The purpose of the deposition is not to test those opinions and so what you're left with when it's a discovery deposition is essentially a statement of advocacy.

The court denied Walton's motion to continue, and after a discussion held off the record, the court adjourned.

Later that day, the case was called for trial. At that time, the parties agreed to bifurcate the trial so that liability was the only issue before the court. The parties also agreed that the court should consider Patil's motion for a directed verdict on the issue of liability after Walton presented evidence regarding her case in chief. Walton offered, and the court entered into evidence, her deposition testimony. Based on this evidence, the court sustained Patil's motion for a directed verdict, concluding that Walton failed to establish the existence of triable issues of fact on negligence and causation. Walton filed a motion for new trial, which was heard by the court on May 7, 2008. The court overruled the motion, and Walton appealed.

While this case was pending on appeal, Walton died. The action has since been revived by the personal representatives of Walton's estate.

ASSIGNMENTS OF ERROR

Walton argues that the district court erred in (1) disallowing Ravvin's deposition testimony from being entered into evidence at trial, (2) denying her motion to continue trial, (3) granting Patil's motion for a directed verdict, and (4) denying her motion for new trial.

STANDARD OF REVIEW

[1] A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion.[1]

[2,3] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such

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[1] *Liberty Dev. Corp. v. Metropolitan Util. Dist.*, 276 Neb. 23, 751 N.W.2d 608 (2008).

being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.[2] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.[3]

[4] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.[4]

ANALYSIS

Ravvin's Deposition Was Admissible Evidence

Walton contends that the district court abused its discretion in refusing to admit into evidence Ravvin's deposition testimony based on its conclusion that Walton failed to show that Ravvin was unavailable pursuant to § 27-804(1)(e) and (2)(a). Walton maintains that the deposition is admissible because Ravvin's attendance could not be procured by other reasonable means. For different reasons, we agree that Ravvin's deposition testimony was admissible.

Section 27-804(2)(a) of the Nebraska rules of evidence provides that a deposition may be admitted only if it was taken subject to cross-examination by the party opponent and only if the witness is unavailable. Unavailability, as relevant to the hearsay exception, requires that the deponent be "absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means."[5]

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[2] *State of Florida v. Countrywide Truck Ins. Agency*, 275 Neb. 842, 749 N.W.2d 894 (2008).

[3] *LeRette v. American Med. Security*, 270 Neb. 545, 705 N.W.2d 41 (2005).

[4] *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009).

[5] § 27-804(1)(e).

But Neb. Ct. R. Disc. § 6-332 allows the admission of a deposition where the deponent is either more than 100 miles from the site of the trial or beyond the trial court's subpoena power at the time of trial. The disjunctive language of § 6-332 allows the admission of the deposition where the deponent is more than 100 miles away from the place of trial, regardless of the use of "process or other reasonable means"[6] to secure the deponent's appearance.

In *Maresh v. State*,[7] we were confronted with the conflict between the Nebraska discovery rules and the Nebraska hearsay rules regarding the admission of deposition testimony at trial. In *Maresh*, the trial court allowed the deposition testimony of the plaintiff's expert witness to be read into evidence. The State argued that the trial court erred in this respect because the plaintiff did not make a preliminary showing of unavailability as required by § 27-804(2)(a). Conversely, the plaintiff argued that the deposition was properly admitted under the Nebraska discovery rules. The plaintiff maintained that because the deponent resided more than 100 miles from the trial court site, under what is now codified as § 6-332, his deposition testimony was admissible without further inquiry.

We held that under our rules, depositions were hearsay and, as such, were admissible only if they fit within a hearsay exception.[8] We explained that the unavailability requirement of § 27-804 must be read into § 6-332 so that an independent exception to the hearsay rule was not created by the Nebraska discovery rule.[9] Therefore, we concluded that to be admissible under the Nebraska discovery rule, the requirements of § 27-804 must also be met, and a mere showing that the deponent lived farther than 100 miles from the trial and was beyond the subpoena power of the court was insufficient.

In so concluding, we reasoned that the court had no power, pursuant to Neb. Rev. Stat. §§ 27-802 and 25-1273.01 (Reissue

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[6] *Id.*

[7] *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992).

[8] *Id.* See, also, *Menkens v. Finley*, 251 Neb. 84, 555 N.W.2d 47 (1996).

[9] *Id.*

1989), to create in the Nebraska discovery rules an independent exception to the hearsay prohibition of § 27-802. At the time *Maresh* was decided, § 27-802 provided that hearsay is not admissible "except as provided by these rules or by other rules adopted by the statutes of the State of Nebraska." We noted that § 27-802 was consistent with § 25-1273.01, which then stated, "The Supreme Court shall promulgate rules of procedure for discovery in civil cases, which rules shall not be in conflict with laws governing such matters."

But in 2000, the Legislature amended §§ 27-802[10] and 25-1273.01.[11] Section 27-802 was amended to read, "Hearsay is not admissible except as provided by these rules, by other rules adopted by the statutes of the State of Nebraska, or by the discovery rules of the Supreme Court." Section 25-1273.01 was amended by adding the following italicized language: "The Supreme Court shall promulgate rules of procedure for discovery in civil cases, which rules shall not be in conflict with laws governing such matters. *Rules which provide for the admissibility of depositions shall not be considered as conflicting with the Nebraska Evidence Rules*." (Emphasis supplied.)

[5-7] We adhere to the general presumption that the Legislature, in adopting an amendment, intended to make some change in the existing law and that we should give effect to that change.[12] Furthermore, in construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute.[13] An appellate court will place a sensible construction upon a statute to effectuate the object of the legislation, as opposed to a literal meaning that would have the effect of defeating the legislative intent.[14] In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs

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[10] § 27-802 (Reissue 2008).

[11] § 25-1273.01 (Reissue 2008).

[12] See *Underhill v. Hobelman, ante* p. 30, 776 N.W.2d 786 (2009).

[13] *Foster v. BryanLGH Med. Ctr. East*, 272 Neb. 918, 725 N.W.2d 839 (2007).

[14] *Id.*

sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.[15]

[8,9] The language added to § 25-1273.01, in combination with the amendment made to § 27-802, indicates a clear intention by the Legislature to abrogate the holding in *Maresh* that the Nebraska Rules of Discovery do not create an independent avenue to admit deposition testimony. Based on these amendments, the Legislature validated § 6-332, which allows deposition testimony to be admitted independent of the Nebraska hearsay rule. In other words, § 6-332 creates an exception to the hearsay rule, and a deposition need no longer satisfy the requirements of § 27-804(2)(a) to be admissible under the rules of discovery. And when a party attempts to introduce deposition testimony under § 6-332, it is unnecessary to show that reasonable efforts were made to procure the attendance of the witness.

Based on the foregoing, we conclude the district court erred when it reasoned that the deposition was inadmissible because Walton failed to prove that Ravvin was unavailable. The fact that Ravvin is Walton's paid witness is irrelevant. Likewise, the fact that Walton could have chosen a less expensive witness is immaterial. Section 6-332 merely requires that the deponent reside more than 100 miles from the site of the trial, regardless of whether the proponent has made reasonable efforts to obtain the witness but could not do so. In the present case, it is undisputed that Ravvin resided more than 100 miles from the trial and was outside the court's subpoena power. Because this is all Walton was required to show to admit the deposition testimony under § 6-332, the district court erred in overruling her motion.

[10] The district court also erred in concluding that the deposition was inadmissible because it was a "discovery deposition." Neither our rules nor the Federal Rules of Civil Procedure distinguish between a deposition taken for use at

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[15] *Id.*

trial and one taken for discovery purposes.[16] In fact, the federal courts have universally rejected a "'discovery-use'" dichotomy as a criterion for the admissibility of a deposition taken during the discovery phases of a trial.[17] Nothing in the Nebraska rules of evidence or the rules of discovery makes such a distinction. Thus, a deposition taken during discovery may be used at trial so long as it is otherwise admissible.

Harmless Error

Patil argues that even if Ravvin's deposition and attached report had been admitted, the evidence would have remained insufficient to establish prima facie evidence of legal causation and that thus, the failure to admit Ravvin's evidence was harmless error. We agree.

In his report, Ravvin opined that Patil's deviation from the standard of care caused "harm" to Walton, but the precise nature of that harm is not readily apparent from the report. Clarification was provided by Ravvin's subsequent deposition in which he was questioned about the opinions stated in his report. In the deposition, Ravvin testified that Patil's deviations from the standard of care decreased Walton's chances of a better outcome. But Ravvin did not testify that but for the deviations, a better outcome would have been probable. The distinction is significant. Opinions dealing with proximate causation in a medical malpractice action are required to be given in terms that express a probability greater than 50 percent.[18] While a 49-percent chance of a better recovery may be medically significant, it does not meet the legal requirements for proof of causation.[19]

Ravvin was critical of Patil for not utilizing a lumbar surgical drain in his attempts to repair the complication which developed from the initial surgery. But when asked if earlier

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[16] See, Fed. R. Civ. P. 32; *Tatman v. Collins*, 938 F.2d 509 (4th Cir. 1991); *U. S. v. Intern. Business Machines Corp.*, 90 F.R.D. 377 (S.D.N.Y. 1981); *Rosenthal v. Peoples Cab Company*, 26 F.R.D. 116 (W.D. Pa. 1960).

[17] See *Maresh v. State, supra* note 7, 241 Neb. at 508, 489 N.W.2d at 308.

[18] *Rankin v. Stetson*, 275 Neb. 775, 749 N.W.2d 460 (2008).

[19] *Id.*

placement of a drain would have made a difference in Walton's outcome, Ravvin responded, "It might have and I don't know. I can't say for sure. I would say that the earlier the drain was put in, the better it would be." When pressed on this point and asked specifically if he could state with reasonable medical certainty that proper placement of the drain would have resolved the pseudomeningocele, Ravvin replied, "I can't say with certainty. I think she would have had a better chance." Similarly, Ravvin could not say that Walton would not have developed meningitis if the drain had been placed sooner. Instead, he testified that if the drain had been placed earlier, there "would have been better management" of the meningitis. And Ravvin testified that the most probable cause of Walton's postoperative leg and back pain was the spinal condition for which the initial surgery was done, not any negligence on the part of Patil.

Given Ravvin's testimony that his causation opinion had not changed from the time of his report through the time of his deposition, the only reasonable inference that can be drawn is that the "harm" mentioned in his report is the same as that which he identified more specifically in his deposition: a decreased chance of a better medical outcome. Ravvin does not state in either his report or his deposition that Walton would *probably* have had a better outcome but for the negligence of Patil. This case does not present the circumstances of *Neill v. Hemphill*,[20] where an expert buttresses a prior equivocal opinion with a subsequent, more definite one. In that case, we held that the second opinion could be considered along with the first in resolving a motion for summary judgment. But here, no reasonable inference of legal causation can be drawn from the general "harm" language used in Ravvin's report when his subsequent testimony makes it clear that he was referring only to a loss of chance, not the probability of a different outcome.

For these reasons, the failure to admit Ravvin's deposition and attached report was harmless error. We affirm the judgment of the district court.

AFFIRMED.

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[20] *Neill v. Hemphill*, 258 Neb. 949, 607 N.W.2d 500 (2000).

McCormack, J., dissenting.

I respectfully dissent. I believe that Ravvin's testimony in his report was made with the requisite level of certainty for expert testimony. And I believe the evidence was sufficient to overcome Patil's motion for directed verdict.

In his report, Ravvin listed several instances in which Patil deviated from the standard of care. Ravvin described how Patil had persistent CSF leakage after her first surgery, but that "Patil avoided the problem and did nothing." Ravvin explained how Patil then failed to find the source of the leak in two subsequent operations. Ravvin opined that Patil should have placed a lumbar drain and that he should have consulted with another neurosurgeon if he could not find the source of the CSF leakage on his own. Ravvin opined that Patil should have kept Walton at the hospital until the source of the leakage could be found.

Ravvin described how "[e]ven after two attempts at repair and a bout of meningitis the patient had persistent drainage and then recurrence of pseudomeningocele." Yet, "Patil still ignored the problem." Walton ultimately did not get any relief until she sought out another doctor who, Ravvin explained, performed "an easy repair" and placed a lumbar drain.

Ravvin stated quite clearly in his report that Patil's deviations from the standard of care "did cause harm to . . . Walton which led to the complications as described." Unlike the testimony in *Rankin v. Stetson*,[1] relied upon by the majority, this statement by Ravvin is not expressed in terms of "chance" or "prognosis." Rather, it is expressed with absolute certainty. This more than satisfies the legal requirements for proof of causation.

The "harm" referred to in Ravvin's report should be interpreted from the report itself. It is unnecessary and illogical to interpret this statement in light of a deposition taken 3 months later. Ravvin stated that Patil's deviation from the standard of care had caused Walton harm "which led to the complications as described." Directly prior to this conclusion, Ravvin had described:

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[1] See *Rankin v. Stetson*, 275 Neb. 775, 786, 749 N.W.2d 460, 468 (2008).

> In summary . . . Walton did develop complications of lumbar laminectomy viz CSF leak. This led to a pseudomeningocele, which in turn led to meningitis, and was followed by arachnoiditis. She went through countless delays and three operations to repair CSF leakage and pseudomeningocele. She is left with persistent back and leg pain, both in her left and right legs. She may require further surgery in the future.

In other words, the harm of which Ravvin opined was the delay and the unnecessary and unproductive surgeries that failed to correct a leak, which eventually led to meningitis, arachnoiditis, and persistent pain.

This is a case decided on a directed verdict. And, in that context, we must give Walton the benefit of every inference which can reasonably be deduced from the evidence.[2] The majority relies on the fact that in the deposition taken by opposing counsel, Ravvin's testimony is not so certain. The majority describes what Ravvin's statement of "harm" must really mean by relying on the deposition. But it is for the trier of fact to decide whether Ravvin's statements in his report or, instead, his later statements in his deposition are to be believed. It was for the trier of fact to decide if Ravvin was being truthful when he testified that his opinion had not changed from the time of his report. Walton should not be deprived of her day in court because we believe Ravvin's deposition or because we assume that inconsistencies must be interpreted in a way that makes Ravvin's two statements cohesive.

Reasonable minds could differ as to whether Ravvin had an opinion, within a reasonable degree of certainty, that Patil's breach of the standard of care caused Walton harm. Furthermore, Ravvin's report and his deposition testimony provided sufficient evidence from which a trier of fact could determine what harm resulted. Accordingly, I believe the cause should be remanded for a trial on the merits.

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[2] *State of Florida v. Countrywide Truck Ins. Agency*, 275 Neb. 842, 749 N.W.2d 894 (2008).

SCHUYLER APARTMENT PARTNERS, LLC, APPELLANT, V.
COLFAX COUNTY BOARD OF EQUALIZATION, APPELLEE.

COLUMBUS APARTMENT PARTNERS, LLC, APPELLANT, V.
PLATTE COUNTY BOARD OF EQUALIZATION, APPELLEE.

783 N.W.2d 587

Filed June 11, 2010. Nos. S-09-644, S-09-645.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Statutes: Appeal and Error.** Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Appeals from the Tax Equalization and Review Commission. Affirmed.

Theodore R. Boecker, of Boecker Law, P.C., L.L.O., for appellants.

Edmond E. Talbot III, of Talbot & Truhlsen Law Offices, L.L.P., for appellee Colfax County Board of Equalization.

Carl K. Hart, Jr., Deputy Platte County Attorney, for appellee Platte County Board of Equalization.

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

HEAVICAN, C.J.

I. INTRODUCTION

In two separate proceedings, the Colfax County assessor and the Platte County assessor set the valuations for low-income housing owned by Schuyler Apartment Partners, LLC, and Columbus Apartment Partners, LLC, respectively. In each case, the property owner protested the valuation. In the case of

Schuyler Apartment Partners, the assessor's value was affirmed; in the case of Columbus Apartment Partners, the value was reduced but not to the level sought by the property owner. Those valuations were appealed to the Tax Equalization and Review Commission (TERC), which affirmed. The property owners, which are separate but related entities with the same managing member, now appeal to this court. We affirm.

II. FACTUAL BACKGROUND

1. Schuyler Apartment Partners

Schuyler Apartment Partners owns a multifamily residential parcel located in Schuyler, Nebraska. This property includes four apartment buildings consisting of 24 rental units.

The Schuyler property is low-income housing organized under the Internal Revenue Code at I.R.C. § 42 (2006) and authorized by the federal low-income housing tax credit program (LIHTC). As such, the property is subject to limitations in the amount of rent that may be collected on each unit. In addition, units may only be rented to tenants who earn 60 percent or less of the area's median income. Tax credits are associated with the property and are granted as an incentive to developers to build low-income housing. In Nebraska, LIHTC credits are administered by the Nebraska Investment Finance Authority.

For the 2006 tax year, the Schuyler property was valued by the Colfax County assessor at $59,285 for the land and $893,560 for the improvements, for a total of $952,845. Schuyler Apartment Partners protested the assessor's valuation and instead suggested a valuation between $333,420 and $370,467. The Colfax County Board of Equalization rejected the protest and kept the valuation at the level set by the assessor. Schuyler Apartment Partners appealed to TERC. TERC affirmed.

2. Columbus Apartment Partners

A separate but related organization, Columbus Apartment Partners, also owns a multifamily residential parcel, this one located in Columbus, Nebraska. This property also includes 24 rental units which were constructed in 2002 and 2003. Like the

Schuyler property, the Columbus property is low-income housing organized and restricted as detailed above.

For the 2006 tax year, the Columbus property was valued by the Platte County assessor at $44,000 for the land and $756,000 for the improvements, for a total of $800,000. Columbus Apartment Partners protested the assessor's valuation. In response, the Platte County Board of Equalization lowered the valuation of the improvements to $606,000 for a total valuation of $650,000. Columbus Apartment Partners appealed this reduced valuation to TERC. TERC affirmed.

III. ASSIGNMENTS OF ERROR

On appeal, Schuyler Apartment Partners assigns, restated and renumbered, that TERC erred in (1) failing to find that the valuation of the Colfax County Board of Equalization violated Neb. Rev. Stat. § 77-112 (Reissue 2009), (2) failing to find that Schuyler Apartment Partners' property had not been valued in accordance with Neb. Rev. Stat. § 77-1333 (Cum. Supp. 2006), (3) relying on *Town Sq. v. Clay Cty. Bd. of Equal.*,[1] (4) substituting its own analysis for that of the board, and (5) failing to find that Schuyler Apartment Partners' property was valued too high and thus affirming the board's decision.

Columbus Apartment Partners assigns, restated and renumbered, that TERC erred in (1) relying on *Town Sq. v. Clay Cty. Bd. of Equal.*[2] and (2) failing to find that Columbus Apartment Partners' property was valued too high and thus affirming the decision of the Platte County Board of Equalization.

IV. STANDARD OF REVIEW

[1-3] Appellate courts review decisions rendered by TERC for errors appearing on the record.[3] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor

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[1] *Town Sq. v. Clay Cty. Bd. of Equal.*, 704 N.W.2d 896 (S.D. 2005).

[2] *Id.*

[3] *Fort Calhoun Bapt. Ch. v. Washington Cty. Bd. of Eq.*, 277 Neb. 25, 759 N.W.2d 475 (2009).

unreasonable.[4] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record.[5]

V. ANALYSIS

On appeal, both Schuyler Apartment Partners and Columbus Apartment Partners argue generally that TERC erred in affirming the valuations set by the Colfax and Platte Counties' boards of equalization.

1. Schuyler Apartment Partners

(a) Violations of §§ 77-112 and 77-1333

On appeal, Schuyler Apartment Partners assigns that TERC erred in not finding that the Colfax County Board of Equalization violated both §§ 77-112 and 77-1333. Schuyler Apartment Partners argues that its property was not valued pursuant to the income approach, which it claims is required by § 77-1333.

Section 77-1333 provided:

> (1) The county assessor shall perform an income-approach calculation for all rent-restricted housing projects constructed to allow an allocation of low-income housing tax credits under section 42 of the Internal Revenue Code and approved by the Nebraska Investment Finance Authority when considering the assessed valuation to place on the property for each assessment year. The income-approach calculation shall be consistent with any rules and regulations adopted and promulgated by the Property Tax Administrator and shall comply with professionally accepted mass appraisal techniques. Any low-income housing tax credits authorized under section 42 of the Internal Revenue Code that were granted to owners of the project shall not be considered income for purposes of the calculation but may be considered in determining the capitalization rate to be used when capitalizing the income stream. The county assessor, in determining the actual value of any specific property, may consider other

[4] *Id.*

[5] *Id.*

> methods of determining value that are consistent with professionally accepted mass appraisal methods described in section 77-112.
>
> (2) The owner of a rent-restricted housing project shall file a statement with the county assessor on or before October 1 of each year that details income and expense data for the prior year, a description of any land-use restrictions, and such other information as the county assessor may require.

Section 77-112 provides:

> Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property, the analysis shall include a consideration of the full description of the physical characteristics of the real property and an identification of the property rights being valued.

We first note that contrary to Schuyler Apartment Partners' position, § 77-1333 does not require that property actually be valued by the income approach. Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.[6] And § 77-1333 indicates that the income approach shall be performed, but also specifically provides that the "county assessor, in determining the actual value of any specific property, may consider other methods of determining value," including the cost approach and the sales approach.

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[6] *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009).

And that is exactly what happened in this case. Though the Colfax County assessor ultimately valued the property under the cost-approach method of valuation, the record demonstrates that it first conducted both a cost-approach valuation and an income-approach valuation, as detailed by § 77-112. As such, neither statute was violated and Schuyler Apartment Partners' first and second assignments of error are without merit.

(b) *Town Sq.* Case

Schuyler Apartment Partners also assigns that TERC erred in relying on *Town Sq. v. Clay Cty. Bd. of Equal*.[7] In that case, the South Dakota Supreme Court held that tax credits under LIHTC should be considered in valuing property for tax purposes. TERC cited to *Town Sq.* for the proposition that "LIHTC credits are transferable and a part of the economic reality of parcels subject to the agreements which make their use possible," and it further noted that the "rationale described by the *Town Square* Court for inclusion of value of LIHTC credits in the valuation of real property is persuasive and consistent with Nebraska law." Schuyler Apartment Partners complains on appeal that *Town Sq.* is inconsistent with § 77-1333. This argument is also without merit.

Section 77-1333(1) provides in relevant part as follows:

> Any low-income housing tax credits authorized under section 42 of the Internal Revenue Code that were granted to owners of the project shall not be considered income for purposes of the calculation but may be considered in determining the capitalization rate to be used when capitalizing the income stream.

Schuyler Apartment Partners claims this means that the credits cannot be valued and that thus, TERC's adoption of such holding was in error.

Our reading of § 77-1333 does not comport with Schuyler Apartment Partners' conclusion. While § 77-1333 does indicate that the credits cannot be used as *income* in conducting an income-approach valuation, the language clearly allows for consideration of those credits in the form of the capitalization

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[7] *Town Sq. v. Clay Cty. Bd. of Equal., supra* note 1.

rate used to determine the present value of the property. The *Town Sq.* rationale that such credits are part of the economic reality of the property is applicable here as well. We find Schuyler Apartment Partners' third assignment of error is without merit.

(c) TERC's Affirmance of Board's Valuation

Finally, Schuyler Apartment Partners argues that TERC erred in affirming the value of the property as set by the Colfax County Board of Equalization. Schuyler Apartment Partners' fifth assignment of error, that TERC erred in adopting its own reasoning to justify the board's valuation, is a related assignment of error. As such, the two will be discussed together.

We review TERC for errors appearing on the record. In so doing, we focus our inquiry on whether TERC's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Having engaged in this inquiry, we cannot find that the decision reached by TERC was in error.

William Kaiser, an appraiser with the Colfax County assessor's office, testified as to the methods he undertook to determine the valuation of the Schuyler property. His reports were introduced into evidence. Schuyler Apartment Partners presented the testimony of their own expert, Dwight Whitesides. However, Whitesides' testimony did not consider any benefits flowing from I.R.C. § 42 properties, but instead considered only the liabilities involved in such properties. Whitesides' valuation was not supported by any other valuation approach besides the income approach. Whitesides also failed to value the tax credits.

There was sufficient evidence in the form of Kaiser's testimony to support the valuation placed on the property by the Colfax County Board of Equalization and affirmed by TERC. And Schuyler Apartment Partners bears the burden of showing that the board's decision was incorrect.[8] We cannot conclude that TERC's decision was arbitrary, capricious, or

[8] Neb. Rev. Stat. § 77-5016(8) (Cum. Supp. 2006).

unreasonable, particularly given the deficiencies in Whitesides' testimony. And because that decision was supported by the record, we reject Schuyler Apartment Partners' further argument that TERC substituted its reasoning for the reasoning of the board. Schuyler Apartment Partners' final assignments of error are without merit.

2. Columbus Apartment Partners

On appeal, Columbus Apartment Partners asserts that TERC erred in relying on the *Town Sq.* case and in affirming the decision of the Platte County Board of Equalization. Because whether the *Town Sq.* case was incorrectly applied was previously addressed and rejected, it will not be repeated here.

Columbus Apartment Partners' remaining argument on appeal is that TERC erred in affirming the board's valuation. The crux of this argument is that the board erred in the method it used to capitalize the net operating income of the Columbus property to determine its value. The board used a 7.5-percent capitalization rate, while Columbus Apartment Partners argues that a 9-percent rate should be used. The applied capitalization rate matters, because in employing the income approach, the higher the capitalization rate, the lower the resulting property value. While Columbus Apartment Partners ultimately believes that its property was valued too highly, the focus of its argument is on the capitalization rate applied by the board.

As noted above, we review TERC for errors appearing on the record and focus our inquiry on whether TERC's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. And as found above, we cannot find that the decision reached by TERC was in error.

There was evidence from the Platte County appraiser, Thomas Placzek, that the board utilized an "unloaded" capitalization rate, while the 9-percent rate Placzek had used (and also sought by Columbus Apartment Partners) was a "loaded" rate. An unloaded rate includes the real estate taxes in the net operating income, while a loaded rate does not and instead is higher in order to reflect the tax levy. Placzek and Whitesides both

testified that the use of either method is acceptable and that roughly the same value is reached under either calculation.

Columbus Apartment Partners also argues that the lower rate was not appropriate because the Platte County Board of Equalization lowered the rate in order to value the tax credits and, according to Columbus Apartment Partners, such tax credits cannot be valued. The record indicates that in addition to using an unloaded as opposed to a loaded capitalization rate, the board, in setting the 7.5-percent rate, "offset the 2% tax rate with what [it] felt was a 2% tax credit factor."

[4] As noted above, § 77-1333 provides in relevant part that "low-income housing tax credits . . . shall not be considered income for purposes of the calculation but may be considered in determining the capitalization rate to be used when capitalizing the income stream." Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[9]

Contrary to Columbus Apartment Partners' argument, the plain language of § 77-1333 clearly indicates that the board is permitted to value the tax credits in the manner that it did—by lowering the capitalization rate, resulting in a higher value to the property in question.

Placzek testified as to the appropriateness of the use of unloaded versus loaded capitalization rate, as well as to his appraisal of the property and the Platte County Board of Equalization's general reasoning in the valuation of the property. In response, Columbus Apartment Partners introduced the testimony of Whitesides and the managing member. But the managing member is not a licensed appraiser. And while Whitesides is a licensed appraiser, he did not appraise the Columbus property. In addition, much of Whitesides' testimony was not directly contradictory to Placzek's testimony. TERC's decision was supported by competent evidence and was not arbitrary, capricious, or unreasonable. We therefore conclude

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[9] *State ex rel. Amanda M. v. Justin T., ante* p. 273, 777 N.W.2d 565 (2010).

that Columbus Apartment Partners' second and final assignment of error is without merit.

VI. CONCLUSION

The decisions of TERC are affirmed.

AFFIRMED.

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