THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

MAY 10, 2011 and JULY 2, 2012

IN THE

# Nebraska Court of Appeals

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## NEBRASKA APPELLATE REPORTS

## VOLUME XIX

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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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JOHN F. IRWIN, Associate Judge
RICHARD D. SIEVERS, Associate Judge
FRANKIE J. MOORE, Associate Judge
WILLIAM B. CASSEL, Associate Judge[1]
MICHAEL W. PIRTLE, Associate Judge[2]

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

[1]Until May 8, 2012
[2]As of July 6, 2011

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(Author judge listed first.)

(† Indicates opinion selected for posting on Web site.)

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†No. A-09-1280: **Wedgewood v. U.S. Filter/Whittier**. On motion for rehearing, reargument granted. Original memorandum opinion withdrawn. Affirmed in part, and in part reversed and remanded for further proceedings. Sievers, Irwin, and Cassel, Judges.

†No. A-09-1309: **Estate of Teague v. Crossroads Co-op Assn**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-10-376: **In re Interest of Kyjsha T. et al**. Affirmed as modified. Inbody, Chief Judge, and Sievers, Judge. Cassel, Judge, participating on briefs.

No. A-10-418: **Soto v. Hansen**. Former opinion vacated. Affirmed in part, and in part reversed and remanded. Inbody, Chief Judge, and Sievers and Cassel, Judges.

†No. A-10-472: **State v. Novascone**. Affirmed. Per Curiam.

†No. A-10-516: **Strelko v. Larson**. Affirmed as modified. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-10-545: **Madgett v. Madgett**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-10-581: **State v. Bruna**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

†No. A-10-583: **Keller, L.L.C. v. Gearhart**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-614: **Stafford v. Omaha Admin. Board of Appeals**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-10-621: **State v. Even**. Affirmed. Cassel and Irwin, Judges, and Hannon, Judge, Retired.

†No. A-10-652: **No Frills Supermarkets v. Brookside Omaha Ltd**. Affirmed. Irwin and Cassel, Judges, and Hannon, Judge, Retired.

†No. A-10-662: **Mlakar v. Union Pacific RR. Co**. Affirmed. Irwin and Cassel, Judges, and Hannon, Judge, Retired.

†No. A-10-670: **In re Interest of A.M**. Affirmed. Irwin and Cassel, Judges, and Hannon, Judge, Retired.

No. A-10-678: **Euchner v. Euchner**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-10-699: **Willow Creek Farms v. Burton Plumbing Servs**. Reversed and remanded for further proceedings. Cassel and Irwin, Judges, and Hannon, Judge, Retired.

†No. A-10-708: **Knuth v. Hull**. Affirmed. Irwin and Cassel, Judges, and Hannon, Judge, Retired.

No. A-10-709: **Matthes v. Matthes**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-10-737: **State v. Matchett**. Affirmed. Sievers, Irwin, and Moore, Judges.

Nos. A-10-755, A-10-769: **State v. Ross**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

†No. A-10-775: **Hill v. Wimer**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-782: **Matlock v. Matlock**. Affirmed as modified. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-10-791: **Rogers v. Rogers**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-10-792: **State v. Coutts**. Conviction affirmed. Sentence vacated, and cause remanded for resentencing. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-10-793: **State v. Gillpatrick**. Affirmed. Irwin and Cassel, Judges, and Hannon, Judge, Retired.

No. A-10-795: **Shea v. Shea**. Affirmed as modified. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-10-805: **First National Bank v. Eatherton**. Affirmed. Sievers, Judge, and Inbody, Chief Judge. Cassel, Judge, participating on briefs.

No. A-10-806: **Ostermeier v. Shriner**. Reversed and vacated, and cause remanded with directions. Inbody, Chief Judge, and Moore, Judge. Irwin, Judge, participating on briefs.

†No. A-10-813: **State v. Rudnick**. Affirmed. Cassel, Irwin, and Sievers, Judges.

Nos. A-10-817, A-10-818: **WOW Life Ins. Soc. v. Douglas Cty. Bd. of Equal**. Affirmed. Cassel and Irwin, Judges, and Hannon, Judge, Retired.

†No. A-10-833: **Justesen v. Justesen**. Affirmed. Irwin, Cassel, and Pirtle, Judges.

†No. A-10-837: **State v. Mukoma**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-10-845: **Tiefenthaler v. Citywide Ins**. Affirmed as modified. Inbody, Chief Judge, and Sievers and Cassel, Judges.

†No. A-10-849: **Johnson v. Johnson**. Appeal dismissed. Irwin, Sievers, and Cassel, Judges.

No. A-10-862: **In re Interest of Arthur L**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-10-869: **State on behalf of Philby v. Philby**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-10-870: **Schlichtman v. Jacob**. Affirmed in part, and in part dismissed and remanded for further proceedings. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-10-886: **Berry v. Wells Fargo Bank**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-10-887: **State ex rel. Friedrichsen v. Bergmeier**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-10-889: **Smith v. Smith**. Affirmed. Irwin, Sievers, and Cassel, Judges.

†No. A-10-900: **Lopez v. Austin Maintenance**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-10-901: **Baker v. Baker**. Affirmed in part, and in part reversed and remanded with directions. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-10-908: **Prokop v. McClurg**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Cassel, Judge.

Nos. A-10-919, A-10-920: **Friedman v. Friedman**. Affirmed in part as modified, and in part reversed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-923: **State on behalf of Nice v. Benes**. Affirmed. Moore, Sievers, and Cassel, Judges.

†No. A-10-926: **Carlson v. Carlson**. Affirmed as modified. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

Nos. A-10-938, A-10-939: **State v. Garcia**. Sentences vacated, and cause remanded with directions. Inbody, Chief Judge, and Sievers and Moore, Judges.

Nos. A-10-938, A-10-939: **State v. Garcia**. Former opinion modified. Motion for rehearing denied. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-10-940: **Bettin v. Bettin**. Affirmed. Cassel, Irwin, and Moore, Judges.

†No. A-10-941: **Kennedy v. Kennedy**. Affirmed in part, and in part reversed and remanded with directions. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-10-942: **Moninger v. Andrews**. Affirmed. Irwin, Moore, and Cassel, Judges.

†No. A-10-951: **Paltani v. Limited Fill Corp**. Affirmed. Cassel and Irwin, Judges, and Hannon, Judge, Retired.

†No. A-10-952: **State v. Mazzulla**. Sentence vacated, and cause remanded for resentencing. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-10-954: **Woodle v. Curlis**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-10-958: **Bolte v. Bolte**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-10-959: **Johnson v. Johnson**. Affirmed as modified. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-10-971: **Senstock v. Senstock**. Affirmed. Irwin, Cassel, and Pirtle, Judges.

No. A-10-980: **Clark v. Department of Corr. Servs**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-10-987: **Weiss v. Weiss**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-991: **Bull v. Bull**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-10-998: **State v. Britt**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-10-999: **In re Estate of Tully**. Affirmed in part, and in part reversed and vacated, and cause remanded with directions. Sievers, Judge, and Inbody, Chief Judge. Moore, Judge, participating on briefs.

No. A-10-1000: **Randy Brown Architects v. Hrdlicka Photography**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-10-1003: **O'Donnell-States v. States**. Affirmed. Irwin, Cassel, and Pirtle, Judges.

No. A-10-1012: **State v. Summers**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-1014: **Burmood v. Burmood**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-10-1015: **In re Interest of Jesse M. et al**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-10-1017: **Jones v. Jones**. Affirmed in part, and in part reversed and remanded for further proceedings. Pirtle, Irwin, and Cassel, Judges.

†No. A-10-1018: **Vital Learning Corp. v. Talent Plus**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-10-1019: **Vital Learning Corp. v. Point One**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-10-1021: **Lowery v. Lowery**. Affirmed. Cassel, Irwin, and Moore, Judges.

†No. A-10-1031: **Miller v. Crooked Creek Farms**. Affirmed. Cassel, Irwin, and Moore, Judges.

†No. A-10-1033: **Wainio Enters. v. Fern Acres**. Affirmed. Pirtle, Irwin, and Cassel, Judges.

†No. A-10-1036: **In re Interest of Dut A. & Akon A**. Affirmed. Irwin and Cassel, Judges, and Hannon, Judge, Retired.

No. A-10-1037: **In re Interest of Martha M**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

†Nos. A-10-1038, A-10-1039: **In re Interest of Erika J. & Tyler J**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-10-1044: **McCown v. Sarris**. Reversed and remanded with directions. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-10-1047: **Stekr v. Beecham**. Remanded with directions. Pirtle, Irwin, and Cassel, Judges.

No. A-10-1050: **State v. Shannon**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-10-1051: **In re Interest of Tyler D**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-1053: **State v. Pope**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-1059: **Tyler v. Denker**. Affirmed as modified. Cassel, Irwin, and Moore, Judges.

†No. A-10-1063: **Adams v. Logan Contractors Supply**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-10-1068: **Jackson v. Hasselbalch**. Affirmed. Irwin, Cassel, and Pirtle, Judges.

No. A-10-1075: **Flory v. Frazier**. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Irwin, and Cassel, Judges.

No. A-10-1078: **Halac v. Girton**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-1084: **In re Interest of Kristion T. et al**. Affirmed. Cassel and Irwin, Judges, and Hannon, Judge, Retired.

†No. A-10-1085: **State v. Segura**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-10-1087: **Bruna v. G & D Appel**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-10-1088: **Rogers Development v. L.C. Development**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-10-1089: **Sodoro v. Board of Equal. of City of Omaha**. Reversed and remanded for further proceedings. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-10-1091: **State v. Wistrom**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-10-1096: **State v. Wolfe**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-10-1104: **Whitney v. Doak**. Affirmed. Cassel, Irwin, and Pirtle, Judges.

†No. A-10-1114: **In re Interest of Baby Girl F**. Affirmed. Irwin and Cassel, Judges, and Hannon, Judge, Retired.

†No. A-10-1115: **In re Interest of Maurice B. II**. Affirmed. Irwin, Cassel, and Pirtle, Judges.

No. A-10-1116: **In re Interest of Giavonni P. & Estevan P**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-10-1117: **State v. Bellis**. Affirmed. Cassel, Irwin, and Sievers, Judges.

†No. A-10-1121: **In re Guardianship & Conservatorship of Coleman**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-10-1122: **In re Estate of McDonald**. Affirmed. Moore, Irwin, and Cassel, Judges.

No. A-10-1123: **Ducharme v. Ducharme**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-10-1124: **Allstate Ins. Co. v. Maillet**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-1125: **Hurlbut v. Bock**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-10-1126: **In re Interest of Lochlainn H. & Zeppelin J**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-10-1130: **Wyatt v. Drivers Mgmt**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-10-1131: **White v. Smolik**. Reversed and remanded with directions. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-1132: **Selzer v. Owen**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-10-1133: **In re Interest of Nature B**. Affirmed in part, and in part reversed and remanded with directions. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-10-1139: **Minden Country Club v. Kearney Cty. Bd. of Equal**. Affirmed. Cassel, Irwin, and Moore, Judges.

†No. A-10-1144: **Gonzalez v. Husker Concrete**. Affirmed in part, and in part reversed and remanded for further proceedings. Pirtle, Irwin, and Cassel, Judges.

†No. A-10-1151: **In re Interest of Kaden S**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-10-1159: **In re Interest of Arlayha W. et al**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-10-1160: **Leffers v. Leffers**. Affirmed as modified. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-10-1161: **State on behalf of Wells v. Wells**. Affirmed as modified. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-10-1162: **State v. Gonzalez-Maldonado**. Affirmed. Inbody, Chief Judge, and Sievers and Pirtle, Judges.

†No. A-10-1165: **Stacy v. Great Lakes Agri Mktg**. Affirmed. Pirtle, Irwin, and Cassel, Judges.

†No. A-10-1169: **In re Gilbert M. Gibreal Residuary Trust**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

No. A-10-1171: **Weber v. Weber**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-10-1172: **Barrett v. Winsor**. Reversed and remanded for further proceedings. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-10-1179: **West Plains Co. v. Jelinek**. Affirmed. Moore, Irwin, and Cassel, Judges.

†No. A-10-1183: **Zimmerman v. Zimmerman**. Affirmed. Irwin, Cassel, and Pirtle, Judges.

No. A-10-1184: **In re Interest of Michael P**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-10-1194: **Brown v. Rainbow Dental Centers**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

No. A-10-1197: **State v. Glassco**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-10-1205: **Robb v. Robb**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-10-1211: **Associated Engineering v. Arbor Heights**. Affirmed. Irwin, Moore, and Cassel, Judges.

†No. A-10-1212: **State v. Davis**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-10-1218: **Stadler v. Stadler**. Affirmed in part, and in part reversed and remanded with directions. Irwin, Cassel, and Pirtle, Judges.

No. A-10-1224: **Kwik Stop v. Aurora Co-op Elev. Co**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-1226: **State v. Pearson**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-10-1233: **In re Interest of DeNasjha P**. Affirmed. Irwin, Moore, and Cassel, Judges.

†No. A-10-1234: **In re Interest of Onyashy A. et al**. Affirmed. Irwin, Moore, and Cassel, Judges.

†No. A-10-1236: **State v. Johnson**. Affirmed. Cassel, Irwin, and Pirtle, Judges.

No. A-10-1237: **In re Interest of Jesse S**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-1243: **Konwinski v. Konwinski**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-11-001: **In re Interest of Amari G**. Reversed and remanded. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-11-012: **State v. Dhalk**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-11-015: **Davenport Ltd. Partnership v. 75th & Dodge I, L.P**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-11-016: **Katzer v. Katzer**. Affirmed. Irwin, Sievers, and Moore, Judges.

†No. A-11-019: **State v. Tucker**. Affirmed. Pirtle, Irwin, and Cassel, Judges.

No. A-11-021: **Sutton v. Sutton**. Reversed and remanded with directions. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-11-025: **Legge v. AC Lightning Protection Co**. Affirmed. Cassel, Irwin, and Pirtle, Judges.

No. A-11-026: **Werner v. Werner**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

No. A-11-028: **In re Interest of Trevon M. et al**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-11-049: **Rykken v. Rykken**. Affirmed. Moore, Irwin, and Sievers, Judges.

†No. A-11-056: **Klingelhoefer v. Monif**. Affirmed. Irwin, Moore, and Cassel, Judges.

†No. A-11-062: **tenBensel v. tenBensel**. Affirmed. Moore, Irwin, and Cassel, Judges.

†No. A-11-063: **Duba v. Blacketer**. Reversed and remanded with directions. Irwin, Moore, and Cassel, Judges.

†No. A-11-068: **Hallsted v. Hallsted**. Affirmed in part, and in part reversed and remanded with directions. Pirtle, Irwin, and Cassel, Judges.

†No. A-11-072: **Valencia v. Mitchell**. Appeal dismissed. Pirtle, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-11-073: **Wright v. Wright**. Affirmed. Inbody, Chief Judge, and Sievers and Pirtle, Judges.

†No. A-11-074: **State v. Allen**. Affirmed. Irwin, Sievers, and Moore, Judges.

†No. A-11-075: **In re Interest of Jeffrey P**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-11-076: **In re Interest of Kayden C**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-11-087: **Vance v. Southwest Airlines**. Affirmed in part, and in part reversed and remanded with directions. Inbody, Chief Judge, and Sievers and Pirtle, Judges.

†No. A-11-091: **21st Century Equip. v. Pryor Auctioneering**. Reversed and remanded for further proceedings. Cassel, Irwin, and Pirtle, Judges.

No. A-11-093: **State v. Ross**. Reversed and remanded with directions. Inbody, Chief Judge, and Sievers and Moore, Judges.

Nos. A-11-095, A-11-096: **Nebraska Leasing Servs. v. Child Care Mgmt. Servs**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-11-106: **State on behalf of Paulson v. Paulson**. Reversed and remanded for further proceedings. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-11-114: **Oregon Trail Equip. v. United Fire & Cas. Co**. Affirmed. Sievers, Irwin, and Moore, Judges.

†No. A-11-115: **In re Interest of Tyler W**. Affirmed. Cassel, Sievers, and Moore, Judges.

†No. A-11-116: **In re Interest of Landon W**. Affirmed. Cassel, Sievers, and Moore, Judges.

†No. A-11-126: **State v. Bredemeier**. Affirmed as modified. Sievers, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-11-127: **State v. Bruckner**. Affirmed. Irwin, Sievers, and Moore, Judges.

†No. A-11-131: **Klein v. Klein**. Affirmed. Pirtle, Irwin, and Cassel, Judges.

No. A-11-133: **Dangberg v. Kirby**. Appeal dismissed. Moore, Irwin, and Sievers, Judges.

†No. A-11-140: **Ajeti v. Madonna Rehab. Hosp**. Affirmed. Irwin, Sievers, and Moore, Judges.

†No. A-11-146: **State v. Kruger**. Affirmed. Cassel, Irwin, and Sievers, Judges.

†No. A-11-147: **State v. Medina-Liborio**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-11-149: **Horton v. Ali**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-11-159: **In re Interest of LaKeiara J**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-11-160: **State v. Kilmer**. Affirmed in part, and in part sentence vacated and cause remanded with directions. Moore, Irwin, and Cassel, Judges.

†No. A-11-167: **In re Interest of Michael M**. Affirmed. Irwin, Moore, and Cassel, Judges.

†No. A-11-169: **In re Interest of Jamar F**. Affirmed. Pirtle, Irwin, and Cassel, Judges.

†No. A-11-172: **In re Interest of Mia V**. Affirmed. Pirtle, Irwin, and Cassel, Judges.

†No. A-11-183: **Johnson v. Johnson**. Reversed and remanded with directions. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-11-184: **Obrecht v. Hansen**. Affirmed. Pirtle, Irwin, and Cassel, Judges.

No. A-11-190: **In re Interest of Gregory H**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-11-191: **In re Guardianship & Conservatorship of Leitner**. Affirmed. Irwin, Sievers, and Moore, Judges.

No. A-11-195: **Purdie v. NAC Servs. & Investments**. Affirmed in part, and in part reversed and remanded for further proceedings. Cassel, Irwin, and Moore, Judges.

†No. A-11-204: **Begley v. Harkins**. Reversed and remanded with directions. Irwin, Moore, and Cassel, Judges.

†No. A-11-213: **In re Guardianship & Conservatorship of Mayhue**. Affirmed. Cassel, Irwin, and Moore, Judges.

†No. A-11-215: **In re Interest of Cheyenne C**. Affirmed. Pirtle, Irwin, and Cassel, Judges.

No. A-11-216: **Pascucci v. Wal-Mart Stores**. Affirmed. Moore, Irwin, and Cassel, Judges.

†No. A-11-223: **Lambertz v. Kaup**. Affirmed. Cassel, Irwin, and Pirtle, Judges.

No. A-11-225: **Ivey v. City of Omaha**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

†No. A-11-231: **State v. Runningbear**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-11-234: **DeWitt v. State**. Affirmed. Moore, Irwin, and Sievers, Judges.

†No. A-11-237: **Robey v. Robey**. Affirmed in part, affirmed in part as modified, reversed in part, and in part vacated and set aside. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-11-242: **State v. Heredia**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-11-244: **State v. Balvin**. Affirmed. Irwin, Sievers, and Cassel, Judges.

Nos. A-11-246, A-11-247: **In re Interest of Michael S**. Affirmed. Inbody, Chief Judge, and Sievers and Pirtle, Judges.

†No. A-11-256: **In re Interest of Bruce N**. Affirmed. Pirtle, Irwin, and Cassel, Judges.

†No. A-11-262: **In re Interest of Jal C. et al**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-11-265: **Rogman v. Rogman**. Affirmed. Moore, Irwin, and Cassel, Judges.

†No. A-11-268: **State v. Martin**. Affirmed. Moore, Irwin, and Cassel, Judges.

†No. A-11-271: **Spady v. Spady**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

No. A-11-274: **State v. Brown**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-11-278: **McAlexander v. McAlexander**. Affirmed in part, and in part reversed and remanded with directions. Inbody, Chief Judge, and Sievers and Pirtle, Judges.

†No. A-11-282: **In re Interest of Jay S. & Paige B**. Affirmed. Cassel, Irwin, and Moore, Judges.

†No. A-11-284: **State v. Johnson**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-11-295: **Duin v. Duin**. Affirmed. Moore, Irwin, and Sievers, Judges.

No. A-11-308: **State v. Broussard**. Affirmed. Sievers, Irwin, and Cassel, Judges.

†No. A-11-313: **In re Interest of Autumn L. et al**. Reversed and remanded for further proceedings. Inbody, Chief Judge, and Cassel and Pirtle, Judges.

†No. A-11-317: **Richards v. Richards**. Affirmed as modified. Moore, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

No. A-11-318: **In re Interest of Antonio A**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-11-321: **State v. Christensen**. Affirmed. Irwin, Sievers, and Moore, Judges.

†No. A-11-322: **Wurdeman v. Wells Fargo Bank**. Affirmed. Irwin, Moore, and Cassel, Judges.

†No. A-11-324: **State v. Handsaker**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-11-330: **Jaeger v. Jaeger**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-11-336: **Ivy v. Webb**. Affirmed. Sievers, Irwin, and Moore, Judges.

No. A-11-345: **State v. Gonzalez**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-11-356: **In re Interest of Kenyetta C**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-11-360: **Horne v. Krejci**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-11-368: **State v. Ellis**. Affirmed. Inbody, Chief Judge, and Cassel and Pirtle, Judges.

No. A-11-371: **State v. Shoemaker**. Affirmed. Irwin, Sievers, and Moore, Judges.

No. A-11-375: **In re Interest of Cassandra B**. Affirmed. Moore, Irwin, and Cassel, Judges.

†No. A-11-377: **State v. Medina**. Reversed. Cassel, Judge (1-judge).

†No. A-11-384: **State v. McMorris**. Affirmed. Cassel, Irwin, and Moore, Judges.

†No. A-11-398: **In re Interest of Shyan W**. Affirmed. Cassel, Irwin, and Moore, Judges.

No. A-11-399: **In re Interest of Aireion S**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-11-400: **In re Interest of Cameron L**. Affirmed. Moore, Irwin, and Cassel, Judges.

†No. A-11-409: **Kirkpatrick v. Kirkpatrick**. Reversed and remanded for further proceedings. Cassel, Irwin, and Moore, Judges.

No. A-11-411: **State v. Kelley**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-11-417: **In re Interest of Justice B**. Affirmed. Irwin, Moore, and Cassel, Judges.

†No. A-11-425: **State v. Ricehill**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-11-441: **State v. Nonnamaker**. Affirmed. Inbody, Chief Judge, and Moore and Pirtle, Judges.

No. A-11-444: **State v. Slater**. Affirmed. Sievers, Irwin, and Cassel, Judges.

†No. A-11-446: **Stark v. Weatherholt**. Affirmed. Moore, Irwin, and Sievers, Judges.

No. A-11-453: **In re Estate of Ditloff**. Affirmed. Sievers, Irwin, and Cassel, Judges.

†No. A-11-460: **Murphy v. Murphy**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-11-462: **Mann v. Rich**. Reversed. Irwin, Sievers, and Cassel, Judges.

†No. A-11-466: **Cada v. Love**. Affirmed in part, and in part reversed and remanded for further proceedings. Irwin, Moore, and Pirtle, Judges.

Nos. A-11-467, A-11-468: **Purdie v. Dohmen**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-11-483: **Houchin v. Houchin**. Affirmed. Inbody, Chief Judge, and Moore and Pirtle, Judges.

†No. A-11-484: **Witmer v. Nebraska Dept. of Corr. Servs**. Affirmed. Irwin, Sievers, and Cassel, Judges.

†No. A-11-489: **Dulaney v. Drivers Mgmt**. Reversed and remanded with directions. Inbody, Chief Judge, and Cassel and Pirtle, Judges.

†No. A-11-502: **Smithpeter v. Smithpeter**. Affirmed. Moore, Irwin, and Sievers, Judges.

No. A-11-512: **Crawford v. Crawford**. Affirmed as modified. Inbody, Chief Judge, and Moore and Pirtle, Judges.

†No. A-11-513: **Disney v. Douglas County**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-11-517: **Tirado v. Tirado**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-11-520: **In re Interest of Alyssa B**. Affirmed. Inbody, Chief Judge, and Sievers and Pirtle, Judges.

No. A-11-521: **State v. Hernandez**. Affirmed in part, and in part vacated and remanded for further proceedings. Cassel, Irwin, and Sievers, Judges.

No. A-11-524: **State v. Colby**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-11-531: **State v. Isakson**. Reversed and remanded with directions. Cassel, Irwin, and Pirtle, Judges.

†No. A-11-534: **Fritzen v. Fritzen Trucking**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-11-535: **In re Interest of Ashley W**. Affirmed. Inbody, Chief Judge, and Cassel and Pirtle, Judges.

†No. A-11-556: **State v. Parker**. Appeal dismissed. Pirtle, Moore, and Cassel, Judges.

†No. A-11-565: **In re Interest of Marcus C. et al**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-11-572: **Akkad v. Nebraska Heart Institute**. Affirmed. Sievers and Cassel, Judges. Inbody, Chief Judge, participating on briefs.

†No. A-11-577: **State v. Ellis**. Reversed and remanded with directions. Inbody, Chief Judge, and Cassel and Pirtle, Judges.

†No. A-11-587: **Barrett v. Keep Kimball Beautiful**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-11-590: **Keiser v. Hohenthaner**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-11-591: **Zimmerman v. Zimmerman**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-11-592: **State on behalf of Lily N. v. Billy N**. Affirmed. Irwin, Sievers, and Moore, Judges.

†No. A-11-593: **In re Interest of Jasminiah S**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-11-594: **In re Interest of Akol M. et al**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-11-599: **Antoniak Consulting & Training v. Turnkey Solutions**. Affirmed. Irwin, Sievers, and Cassel, Judges.

†No. A-11-606: **In re Interest of Haley P**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

No. A-11-613: **Bliven v. Psota**. Affirmed. Moore, Cassel, and Pirtle, Judges.

†No. A-11-624: **Montoya v. Tyson Foods**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-11-629: **State v. Kitt**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-11-630: **Atiqullah v. El-Touny**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-11-634: **In re Interest of Blessing S. & Phillip S**. Affirmed. Inbody, Chief Judge, and Cassel and Pirtle, Judges.

†No. A-11-641: **Cuba v. Furnas Cty**. Affirmed in part, and in part reversed. Pirtle, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-11-645: **State v. Crawford**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-11-653: **Smith-Dugan, Inc. v. Dugan**. Affirmed. Cassel, Irwin, and Sievers, Judges.

†Nos. A-11-659, A-11-660: **In re Interest of Zylena R. & Adrionna R**. Affirmed. Sievers, Irwin, and Cassel, Judges.

†No. A-11-661: **Backen v. Backen**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-11-663: **In re Interest of Patrick N. et al**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

No. A-11-668: **Jones v. Jones**. Affirmed. Inbody, Chief Judge, and Irwin and Pirtle, Judges.

†No. A-11-671: **In re Interest of Taylor S. & Maddison S**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-11-691: **Murillo v. Tellez**. Affirmed. Irwin, Sievers, and Cassel, Judges.

†Nos. A-11-699, A-11-700: **In re Interest of Delana S. & Mark G**. Affirmed. Cassel, Irwin, and Sievers, Judges.

†No. A-11-701: **Professional Collection Serv. v. Stuthman**. Affirmed. Pirtle, Irwin, and Moore, Judges.

†No. A-11-706: **State v. Swierczynski**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-11-710: **In re Interest of Kevin H. & Kaylee H**. Affirmed. Sievers, Irwin, and Cassel, Judges.

†No. A-11-714: **Ruhge v. Schwede**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-11-720: **Cook v. Nebraska Unified Sch. Dist. No. 1**. Affirmed. Cassel, Irwin, and Sievers, Judges.

†No. A-11-722: **Morehead v. Morehead**. Affirmed. Cassel, Moore, and Pirtle, Judges.

†No. A-11-733: **State v. Laware**. Affirmed as modified. Inbody, Chief Judge, and Moore and Pirtle, Judges.

No. A-11-735: **State v. Jelen**. Affirmed. Cassel, Moore, and Pirtle, Judges.

†No. A-11-751: **In re Interest of Deziree K. et al**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-11-767: **State v. Schuster**. Affirmed. Irwin and Sievers, Judges, and Cheuvront, District Judge, Retired.

†No. A-11-768: **State v. Engle**. Affirmed. Moore, Irwin, and Sievers, Judges.

Nos. A-11-770, A-11-771: **State v. Barker**. Affirmed. Inbody, Chief Judge, and Cassel and Pirtle, Judges.

†No. A-11-774: **State v. Riedel**. Affirmed. Cheuvront, District Judge, Retired, and Moore and Pirtle, Judges.

†No. A-11-782: **In re Interest of Addison F. et al**. Appeal dismissed. Irwin, Sievers, and Cassel, Judges.

No. A-11-784: **In re Interest of Kade T**. Affirmed. Moore, Sievers, and Pirtle, Judges.

No. A-11-785: **In re Interest of Ryder S**. Affirmed. Moore, Sievers, and Pirtle, Judges.

No. A-11-786: **In re Interest of Javen D**. Affirmed. Moore, Sievers, and Pirtle, Judges.

No. A-11-787: **In re Interest of Niko B**. Affirmed. Sievers, Irwin, and Cassel, Judges.

†No. A-11-788: **Griswold v. Mowbray**. Affirmed. Moore, Cassel, and Pirtle, Judges.

†No. A-11-808: **Medrano v. Medrano**. Affirmed in part, and in part reversed and remanded with directions. Sievers, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-11-810: **Burbee v. Burbee**. Affirmed. Cassel, Moore, and Pirtle, Judges.

†No. A-11-827: **Stone v. Neth**. Appeal dismissed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-11-832: **In re Interest of Elijah F**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-11-833: **In re Interest of Penelope F**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-11-838: **Mallet v. Mallet**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-11-840: **Mach v. Mach**. Affirmed as modified. Moore and Pirtle, Judges, and Cheuvront, District Judge, Retired.

†No. A-11-848: **State v. Wiedel**. Affirmed. Moore, Irwin, and Sievers, Judges.

No. A-11-850: **In re Interest of Jaylyn B**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-11-851: **In re Interest of Jontaia W**. Affirmed. Cassel, Moore, and Pirtle, Judges.

†No. A-11-852: **State v. Jones**. Affirmed. Irwin and Sievers, Judges, and Cheuvront, District Judge, Retired.

†No. A-11-856: **Tyler v. O'Reilly Auto. Stores**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-11-866: **State v. Balvin**. Affirmed. Moore, Cassel, and Pirtle, Judges.

No. A-11-874: **State v. Scoville**. Affirmed. Cassel, Irwin, and Sievers, Judges.

†No. A-11-884: **In re Interest of Elijah D**. Affirmed as modified. Irwin, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-11-886: **Haltom v. Haltom**. Affirmed. Cassel, Moore, and Pirtle, Judges.

†No. A-11-890: **State v. Muhammad**. Affirmed in part, and in part reversed and remanded for further proceedings. Irwin, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-11-899: **Soderquist v. Soderquist**. Affirmed. Pirtle, Moore, and Cassel, Judges.

†No. A-11-917: **State v. Brown**. Affirmed as modified, and cause remanded for further proceedings. Moore, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-11-923: **Miller v. Regional West Med. Ctr**. Affirmed. Cheuvront, District Judge, Retired, and Moore and Pirtle, Judges.

No. A-11-930: **Lange v. Engle**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

†No. A-11-944: **State v. Davis**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-11-946: **In re Interest of Jeffrey S. & Ronnie S**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

No. A-11-949: **Evans v. Thatcher**. Reversed and remanded for further proceedings. Inbody, Chief Judge, and Moore and Pirtle, Judges.

No. A-11-954: **In re Interest of Anton L**. Reversed. Sievers, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-11-1010: **State v. Smith**. Affirmed. Pirtle, Irwin, and Moore, Judges.

No. A-11-1015: **In re Interest of Ashlyn G**. Affirmed. Cassel, Moore, and Pirtle, Judges.

†No. A-11-1016: **In re Interest of Imelda H**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

†No. A-11-1071: **Castonguay v. Nebraska Dept. of Corr. Servs**. Appeal dismissed. Pirtle, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-11-1113: **State v. Corbett**. Affirmed. Inbody, Chief Judge, and Moore and Pirtle, Judges.

# LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-10-658: **State v. Muhammad**. Affirmed. See § 2-107(A)(1).

No. A-10-824: **State v. Yager**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009); *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

No. A-10-847: **State v. Fletcher**. Affirmed. See § 2-107(A)(1).

No. A-10-866: **In re Estate of Clark**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-10-890: **Drivers Mgmt. v. Free**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

Nos. A-10-896 through A-10-899: **State v. Schlotfeld**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

No. A-10-995: **State v. Hinson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-997: **State on behalf of Miller v. Miller**. Affirmed. See § 2-107(A)(1).

No. A-10-1001: **State on behalf of Koenig v. Koenig**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, Neb. Rev. Stat. § 25-1301(1) (Reissue 2008); *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009); *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000).

Nos. A-10-1006, A-10-1007: **State v. Ibarra-Alcantara**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-1009: **State v. Wells**. Motion of appellee for summary affirmance sustained. See *Heathman v. Kenney*, 263 Neb. 966, 644 N.W.2d 558 (2002).

No. A-10-1041: **State v. Coutts**. Conviction and sentence affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 29-2221 (Reissue 2008); *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

No. A-10-1066: **State v. Kovar**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-1079: **State v. Hernandez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-10-1101, A-10-1102: **State v. Thomas**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

No. A-10-1109: **State v. Olinger**. Motion of appellee for summary dismissal sustained in part, and appeal affirmed in part.

No. A-10-1113: **State v. Burbach**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-1127: **Widtfeldt v. Tax Equal. & Rev. Comm**. Affirmed. See, § 2-107(A)(1); *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007).

No. A-10-1134: **State v. Greuter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-10-1149, A-10-1150: **State v. Ballard**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

No. A-10-1175: **State v. Loyd**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

Nos. A-10-1177, A-10-1178: **State v. Moore**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

No. A-10-1188: **State v. Dillon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-1191: **State v. Layton**. Affirmed. See § 2-107(A)(1).

No. A-10-1193: **State v. McIntire**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-1198: **State v. Torres**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-1199: **State v. Polen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-1203: **State v. Crawford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-1209: **State v. Caudy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

No. A-10-1210: **Cox v. Applied Underwriters**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-1222: **In re Interest of Blain S**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-1223: **In re Interest of Aydin S**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-1229: **State v. Burns**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-1239: **Lash v. City Nat. Investment Ltd. Partnership**. Affirmed. See § 2-107(A)(1).

No. A-10-1242: **State v. Ford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-11-002: **State v. Milledge**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-004: **State v. Knipp**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-11-007: **State v. Fitzgerald**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-11-008: **State v. DeSantiago**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-011: **State v. Wilson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-014: **State v. Mackey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-11-017: **State v. Uden**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-018: **State v. Panassie**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-020: **State v. Hudson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009).

No. A-11-024: **State v. Meeker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-027: **State v. Brooks**. Affirmed. See § 2-107(A)(1).

No. A-11-032: **Gragert v. Central Valley Ag Coop**. Stipulation allowed; appeal dismissed.

No. A-11-033: **State v. Delgado**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011); *State v. Anderson*, 279 Neb. 631, 781 N.W.2d 55 (2010); *State v. Macek*, 278 Neb. 967, 774 N.W.2d 749 (2009); *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009); *State v. McCaslin*, 240 Neb. 482, 482 N.W.2d 558 (1992).

No. A-11-034: **State v. Jensen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009).

No. A-11-036: **State v. Schwen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-037: **State on behalf of Aunre T. v. Henry P**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-040: **State v. Tafolla**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009); *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005).

No. A-11-046: **State v. Back**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-047: **State v. Guzman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-048: **State on behalf of Joplin M. v. Travis N**. Affirmed. See §§ 2-107(A)(1) and 2-109(D)(1)(d), (e), and (f).

No. A-11-050: **State v. Thingstad**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-051: **State v. Fraire**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-052: **Sattler v. Oaktree Homes**. Stipulation allowed; appeal dismissed.

No. A-11-053: **US Bank v. Young**. Affirmed. See, § 2-107(A)(1); Rules of Dist. Ct. of Fourth Jud. Dist. 4-10; Neb. Rev. Stat. § 25-1149 (Reissue 2008); *Rasmussen v. State Farm Mut. Auto. Ins. Co.*, 278 Neb. 289, 770 N.W.2d 619 (2009); *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008); *Billups v. Jade, Inc.*, 240 Neb. 494, 482 N.W.2d 269 (1992); *Linch v. Northport Irr. Dist.*, 14 Neb. App. 842, 717 N.W.2d 522 (2006).

No. A-11-054: **Tyler v. Parks**. Affirmed. See, § 2-107(A)(1); *Hooper v. Freedom Fin. Group*, 280 Neb. 111, 784 N.W.2d 437 (2010).

No. A-11-058: **Nelson v. Nelson**. Appeal dismissed, and cause remanded for further proceedings. See, § 2-107(A)(2); Neb. Rev. Stat. § 43-2929 (Reissue 2008); *Bhuller v. Bhuller*, 17 Neb. App. 607, 767 N.W.2d 813 (2009).

No. A-11-061: **State v. Mendez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Nos. A-11-064, A-11-065: **State v. McDaniel**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-11-067: **State v. Perry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-078: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-079: **State v. Running Thunder**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. §§ 28-105 and 29-2261 (Reissue 2008); *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

No. A-11-080: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-081: **Twait v. Twait**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-083: **Sutton v. Killham**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315 (Reissue 2008).

No. A-11-083: **Sutton v. Killham**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-11-084: **State v. Cullinane**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-086: **State v. Voter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-088: **State v. Holloway**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-089: **State v. Hatten**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-097: **Mazzulla v. Mazzulla**. Affirmed. See § 2-107(A)(1).

Nos. A-11-099, A-11-117: **State v. Hawkins**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009).

No. A-11-102: **State v. Schmale**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-11-103: **State v. Ridpath**. Affirmed. See, § 2-107(A)(1); *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995).

No. A-11-104: **State v. Fletcher**. Motion of appellee for summary affirmance sustained. See, *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010); *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

No. A-11-107: **State v. Lewis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009).

No. A-11-109: **State v. Jordan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-110: **State v. Fahey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-111: **Larsen v. Department of Motor Vehicles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-112: **State v. Williamson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-118: **Mech v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 60-486 (Reissue 2010); *Wilczewski v. Neth*, 273 Neb. 324, 729 N.W.2d 678 (2007).

No. A-11-119: **State v. Luciano**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-120: **State v. Menard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-11-121 through A-11-123: **Nebco Intermodal v. Sarpy Cty. Bd. of Equal**. Remanded with directions.

No. A-11-124: **Nebco Intermodal v. Sarpy Cty. Bd. of Equal**. Remanded with directions.

No. A-11-125: **Nebco, Inc. v. Sarpy Cty. Bd. of Equal**. Stipulation allowed; appeal dismissed.

No. A-11-128: **State v. George**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-130: **Brouse v. Magnuson**. Stipulation allowed; appeal dismissed.

No. A-11-132: **State v. Padilla**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-134: **Landaverde v. Swift Beef Co**. Affirmed. See, § 2-107(A)(1); *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009); *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

Nos. A-11-135 through A-11-137: **State v. Weaver**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-11-138: **Floral Lawns Memorial Gardens Assn. v. Becker**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-142: **Harris v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 25-21,150 (Reissue 2008); *Pierce v. Drobny*, 279 Neb. 251, 777 N.W.2d 322 (2010).

No. A-11-143: **State v. Holton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-144: **In re Interest of Jonah P**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-148: **State v. Beckwith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-152: **State v. Watson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

No. A-11-155: **Garcia v. Tyson**. Summarily affirmed. See § 2-107(A)(1).

No. A-11-156: **Graham v. Zachry Constr. Corp**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-161: **State v. Guandong**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-162: **State v. Harrison**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Blakeman*, 16 Neb. App. 362, 744 N.W.2d 717 (2008); *State v. Hutton*, 11 Neb. App. 286, 648 N.W.2d 322 (2002).

No. A-11-163: **State v. Alsidez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-11-164: **State on behalf of Reece C. v. Keith F**. Affirmed. See, § 2-107(A)(1); *In re Interest of Kochner*, 266 Neb. 114, 662 N.W.2d 195 (2003).

No. A-11-166: **Swanson v. Swanson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-168: **State v. Snyder**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-175: **State v. Chilcott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

Nos. A-11-176, A-11-177: **State v. Herron**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-11-178: **State v. Woster**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-179: **Bank of Nebraska v. Vonn-Robb, L.L.C**. Affirmed. See, § 2-107(A)(1); *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

No. A-11-181: **In re Guardianship of Oliver M**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-181: **In re Guardianship of Oliver M**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-11-185: **Martinez v. Excel Corporation**. Affirmed. See, § 2-107(A)(1); *Ladd v. Complete Concrete*, 13 Neb. App. 200, 690 N.W.2d 416 (2004).

No. A-11-188: **Steindorf v. Midwest Renewable Energy**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315 (Reissue 2008).

No. A-11-189: **Rohde v. Russell Repair**. Affirmed. See, § 2-107(A)(1); *Tapia-Reyes v. Excel Corp.*, 281 Neb. 15, 793 N.W.2d 319 (2011).

No. A-11-192: **21st Century Partners v. Northwest Conservation Part**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-196: **In re Interest of Onyashy A. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-197: **State v. Billups**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011); *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

No. A-11-198: **State v. Manning**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-199: **State v. Moss**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-201: **State v. Harper**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-206: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-207: **State v. Curry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-208: **Witmer v. Britten**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Weiler v. Purkett*, 137 F.3d 1047 (8th Cir. 1998); *State ex rel. Wagner v. Gilbane Bldg. Co.*, 280 Neb. 223, 786 N.W.2d 330 (2010).

No. A-11-209: **State v. Earley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-211: **In re Guardianship & Conservatorship of Jessica W**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-212: **State v. Lipsys**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-218: **Parker v. Omaha Public Schools**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-11-219: **Harris v. Harris**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-221: **State v. Buckingham**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007); *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002); *State v. Biloff*, 18 Neb. App. 215, 778 N.W.2d 497 (2009).

No. A-11-224: **Bank of Nebraska v. Vonn-Robb, L.L.C**. Affirmed. See § 2-107(A)(1).

No. A-11-226: **In re Estate of Hue**. Motion of appellee Looby for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 30-1601(3) (Reissue 2008).

No. A-11-228: **State v. Guthrie**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-229: **Central Neb. Pub. Power v. Midway Wildlife**. Summarily reversed. See § 2-107(C).

No. A-11-230: **Leslie v. Russell**. Appeal dismissed. See §§ 2-107(A)(2) and 2-101(B)(4).

No. A-11-232: **Wentland v. Wentland**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-240: **Duerr v. Cortesano**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-11-241: **Brundo v. Claus**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-245: **Hernandez v. Saline County**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-245: **Hernandez v. Saline County**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-11-245: **Hernandez v. Saline County**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, Neb. Rev. Stat. § 13-919(1) (Reissue 2007); *Gard v. City of Omaha*, 18 Neb. App. 504, 786 N.W.2d 688 (2010).

No. A-11-249: **Bac Siding & Windows v. Weber**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-250: **State v. Pope**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-253: **Leach v. State**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996); *Scott v. Hall*, 241 Neb. 420, 488 N.W.2d 549 (1992).

No. A-11-255: **AT&T Communications of Midwest v. Public Serv. Comm**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-261: **DeLeon v. Reinke Mfg. Co**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *McQuinn v. Douglas Cty. Sch. Dist. No. 66*, 259 Neb. 720, 612 N.W.2d 198 (2000); *Ladd v. Complete Concrete*, 13 Neb. App. 200, 690 N.W.2d 416 (2004).

No. A-11-264: **State v. Taylor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-11-266, A-11-267: **State v. Nyhoff**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-11-269: **State v. Meyers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-11-272: **Obermiller v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 60-498.01(5)(a) (Reissue 2010); *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005).

No. A-11-275: **State v. McCormick**. Stipulation allowed; appeal dismissed.

No. A-11-276: **McSwine v. Health & Human Servs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-11-277: **State v. Burr**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-11-281: **State v. Bower**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

No. A-11-283: **Vargas v. Castellanos**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-11-285: **State v. Johnson**. Motion of appellee for summary dismissal sustained; appeal dismissed. See *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005).

No. A-11-286: **Penigar v. Gilmore**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-287: **State v. Austin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-288: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-11-289: **State v. Washington**. Appellee's suggestion of remand sustained; judgment of district court reversed and case remanded with directions. See, Neb. Rev. Stat. § 28-511.01 (Cum. Supp. 2010); *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

No. A-11-290: **State v. Washington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-291: **State v. Ebberson**. Affirmed. See, § 2-107(A)(1); *State v. Anderson*, 18 Neb. App. 329, 779 N.W.2d 623 (2010); *State v. Antoniak*, 16 Neb. App. 445, 744 N.W.2d 508 (2008).

No. A-11-292: **Howard v. Department of Roads**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-11-296: **State v. Nix**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-297: **Esch v. Neth**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 60-498.01 (Reissue 2010). See, e.g., *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006).

No. A-11-298: **In re Interest of Paul K**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-11-299: **State v. Washington**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-300: **State v. Palma**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-302: **State v. Nielsen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-11-304: **State v. Bonow**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-305: **Nelson v. Housing Authority of City of Omaha**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-11-309: **State v. Inness**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-310: **State v. Frese**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-311: **State v. Jaramillo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010); *State v. Stranghoener*, 208 Neb. 598, 304 N.W.2d 679 (1981).

No. A-11-312: **In re Adoption of Jaxon O**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-315: **State v. Lako**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-11-316: **State v. Robles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

No. A-11-325: **State v. Simms**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-326: **State v. Gould**. Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-11-327: **In re Interest of Alaina P**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-328: **Brooks v. Brooks**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-329: **Toth v. Toth**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-331: **American Nat. Bank v. Woodward-Prickett**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-11-332: **Carney v. Leypoldt**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-334: **In re Interest of Isabella W. et al**. Affirmed. See § 2-107(A)(1).

No. A-11-337: **In re Interest of Ashley W**. Stipulation allowed; appeal dismissed.

No. A-11-338: **State v. Phillips**. Motion of appellee for summary affirmance sustained. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-11-339: **State v. Gordon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008).

No. A-11-342: **Jensen v. Jensen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-343: **State v. Vas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-344: **State v. J.M**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3703 (Reissue 2008); *State v. Simants*, 248 Neb. 581, 537 N.W.2d 346 (1995).

No. A-11-346: **Wells Fargo Bank v. Chudy**. Order vacated, and appeal dismissed. See, § 2-107(A)(2); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007); *Halac v. Girton*, 17 Neb. App. 505, 766 N.W.2d 418 (2009); *Murphy v. Brown*, 15 Neb. App. 914, 738 N.W.2d 466 (2007).

No. A-11-347: **Molina v. Salgado-Bustamante**. Remanded with directions. See, *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009); *Jones v. Belgum*, 17 Neb. App. 750, 770 N.W.2d 667 (2009).

No. A-11-348: **Tyler v. Ross**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-349: **State v. Boyce**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-351: **State v. Ahlers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-352: **Strode v. Saunders Cty. Bd. of Equal**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-353: **Strode v. Saunders Cty. Bd. of Equal**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-354: **Strode v. Saunders Cty. Bd. of Equal**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-355: **Strode v. Saunders Cty. Bd. of Equal**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-357: **State v. Jordan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

No. A-11-359: **State v. Wright**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-362: **State v. Derr**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-363: **State v. Cirrito**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 29-824 and 29-825 (Reissue 2008). See, also, *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-11-365: **Harris v. Frazier**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

Nos. A-11-366, A-11-367: **State v. Atkinson**. Stipulations allowed; appeals dismissed.

No. A-11-369: **State v. Ramirez**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-370: **In re Interest of Edward B**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-372: **State v. Ruffin**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-2001 (Reissue 2008); *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999).

No. A-11-374: **Morgan v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-376: **Deckard v. Board of Parole**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-381: **State v. Chapman**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-11-382: **Rodriguez v. Willbros Constr**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 48-185 (Reissue 2010).

No. A-11-385: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

No. A-11-387: **State v. Schumann**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-11-388: **State v. Rauch**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-11-389: **State v. Sheperd**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011); *State v. Balvin*, 18 Neb. App. 690, 791 N.W.2d 352 (2010).

No. A-11-390: **First National Bank of Omaha v. Matulka**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-21,219 (Reissue 2008); *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

No. A-11-391: **Haynes v. Haynes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-392: **Blum v. Plog**. Motion of appellee Mackie for summary dismissal sustained; appeal dismissed.

No. A-11-393: **Jacobsen v. Rubens**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-11-394: **State v. Salinas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011); *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011); *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011); *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

No. A-11-395: **Hodgin-Bremer v. Bremer**. Motion of appellee for summary remand sustained; cause remanded with directions. See *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009).

No. A-11-396: **State v. Armstrong**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-397: **State v. Ryken**. Stipulation allowed; appeal dismissed.

No. A-11-401: **State v. Castonguay**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Reissue 2008).

No. A-11-402: **State v. Washington**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-403: **Castonguay v. Castonguay**. Appeal dismissed. See § 2-107(A)(2).

Nos. A-11-404, A-11-405: **State v. Johnson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-11-406: **State v. Cusick**. Remanded for resentencing.

No. A-11-408: **Ceja v. Tyson Fresh Meats**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 48-179 (Reissue 2010); *Davis v. Crete Carrier Corp.*, 274 Neb. 362, 740 N.W.2d 598 (2007); *State v. Soto*, 11 Neb. App. 667, 659 N.W.2d 1 (2003).

No. A-11-410: **State v. Kelley**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-412: **State v. Rooks-Byrd**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

No. A-11-413: **Mumin v. State**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-416: **State v. Washington**. Summarily reversed and remanded. See, § 2-107(A)(3); *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000); *State v. Cousins*, 208 Neb. 245, 302 N.W.2d 731 (1981).

No. A-11-418: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-11-419: **Myers v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 81-8,227 (Reissue 2008); *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006).

No. A-11-423: **State v. Heidelberg**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-426: **State v. Erickson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-427: **State v. Hardy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

No. A-11-428: **State v. Sullivan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

No. A-11-429: **State v. Matlock**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Wollam*, 280 Neb. 43, 783 N.W.2d 612 (2010).

No. A-11-430: **Hillard v. Bryan**. Motions of appellees for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994); *Billups v. Troia*, 253 Neb. 295, 570 N.W.2d 706 (1997).

No. A-11-431: **State v. Homp**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-11-433: **State v. Grant**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-435: **State v. Grant**. Affirmed in part, and in part appeal dismissed.

No. A-11-436: **State v. Barradas**. Affirmed. See § 2-107(A)(1).

No. A-11-437: **In re Guardianship & Conservatorship of Evelyn C**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-440: **Hatch v. BryanLGH Medical Center East**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011).

No. A-11-442: **State v. House**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-443: **Smith v. Smith**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-445: **In re Guardianship & Conservatorship of Elvera K**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-447: **Harris v. Harris**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-448: **State v. Santos**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-449: **In re Interest of Jacqueline K. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-452: **DeHart v. DeHart**. Affirmed. See § 2-107(A)(1).

No. A-11-454: **Herring v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-455: **Tyler v. Omaha Chief of Police**. Appeal dismissed. See, § 2-107(A)(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-11-456: **Gengenbach v. Gengenbach**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-11-457: **State v. Candler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-458: **State v. Smith**. Appeal dismissed. See, § 2-107(A)(2); *State v. Lauck*, 261 Neb. 145, 621 N.W.2d 515 (2001).

No. A-11-463: **Cook v. City of Norfolk**. Appeal dismissed. See, § 2-107(A)(2); *Jacobson v. Jacobson*, 10 Neb. App. 622, 635 N.W.2d 272 (2001).

No. A-11-465: **State v. Mariscal**. Stipulation allowed; appeal dismissed.

No. A-11-480: **In re Interest of Edward B**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-481: **State v. Sahm**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-485: **State v. Perman**. Stipulation allowed; appeal dismissed.

No. A-11-487: **City Realty Solutions v. Burk Smith Mktg**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-488: **State v. Ticnor**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-490: **State v. Daisley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-11-491: **FirsTier Bank v. Enderson**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-11-492: **Nunez v. Drivers Mgmt**. Stipulation allowed; appeal dismissed.

No. A-11-493: **State v. King**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-11-496: **Schledewitz v. Schledewitz**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-497: **In re Guardianship & Conservatorship of Jace N**. Stipulation allowed; appeal dismissed.

No. A-11-498: **State v. Monarrez**. Stipulation allowed; appeal dismissed.

No. A-11-499: **Celestin v. Yosiya**. Appeal dismissed. See, § 2-107(A)(2); *Kosiske v. Kosiske*, 8 Neb. App. 694, 600 N.W.2d 840 (1999).

No. A-11-500: **State v. Perez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-11-501: **Goeden v. Klimisch**. Stipulation allowed; appeal dismissed.

No. A-11-503: **Hillard v. Sorenson**. Motion of appellees for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 29-2801 (Reissue 2008); *Gallion v. Zinn*, 236 Neb. 98, 459 N.W.2d 214 (1990).

No. A-11-505: **State v. McCarty**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-506: **State v. Allen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-507: **State v. Balvin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Agee*, 274 Neb. 445, 741 N.W.2d 161 (2007).

No. A-11-510: **Quintero v. State**. Appeal dismissed. See, § 2-107(A)(2); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-11-511: **State v. Hubbard**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-514: **Stewart v. Bridge of Faith Outreach**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

No. A-11-518: **Looby v. Cameron**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *County of Scotts Bluff v. Frank*, 144 Neb. 512, 13 N.W.2d 900 (1944).

No. A-11-522: **State v. Givens**. Stipulation allowed; appeal dismissed.

No. A-11-523: **State v. Workman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-525: **Kibler v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-536: **In re Guardianship of Vida C**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-537: **Fritz v. Neth**. Appeal dismissed. See, § 2-107(A)(2); *VanHorn v. Nebraska State Racing Comm.*, 273 Neb. 737, 732 N.W.2d 651 (2007).

No. A-11-538: **Sherrod v. Lacey**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-11-540: **State v. Bloomer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-542: **Moore v. Christ**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-543: **State v. Crouch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-545: **State v. Madut**. Summarily affirmed. See § 2-107(A)(1).

No. A-11-546: **In re Interest of Nyarout T. et al**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-11-547: **State v. Mueller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-552: **State v. Reynolds**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-554: **State v. Billups**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-555: **State v. Parker**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-557: **State v. Holladay**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3004 (Reissue 2008); *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011); *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997); *State v. Victor*, 242 Neb. 306, 494 N.W.2d 565 (1993).

No. A-11-563: **In re Interest of Luka W. et al**. Appeal dismissed. See, § 2-107(A)(2); *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009).

No. A-11-564: **In re Guardianship & Conservatorship of Oliver M**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-566: **State v. Dahir**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Moore*, 274 Neb. 790, 743 N.W.2d 375 (2008).

Nos. A-11-568, A-11-569: **State v. Dobbs**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-11-571: **State v. Hovendick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-573: **Jones v. B Y Excavating**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-574: **In re Interest of Kaytlynn R**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-578: **State v. Bates**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-579: **State v. Smith**. Appeal dismissed. See, § 2-107(A)(2); *State v. York*, 278 Neb. 306, 770 N.W.2d 614 (2009); *State v. Costanzo*, 242 Neb. 478, 495 N.W.2d 904 (1993).

No. A-11-580: **State v. Stafford**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-581: **State v. Rich**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

No. A-11-582: **Boyce v. Sladek**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-11-583: **Jones v. Fraternal Order of Eagles**. Affirmed. See, § 2-107(A)(1); *Linch v. Northport Irr. Dist.*, 14 Neb. App. 842, 717 N.W.2d 522 (2006).

No. A-11-585: **Walton v. Department of Motor Vehicles**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-11-586: **Havranek v. Christensen Family Farms**. Appeal dismissed with prejudice; each party to pay own costs.

No. A-11-588: **State v. Holliday**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-589: **Doe v. Health & Human Servs**. Appeal dismissed. See, § 2-107(A)(2); *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

No. A-11-595: **State v. Balderas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-596: **State v. Simpkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-600: **State v. Frazier**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-601: **Ceballos v. Ceballos**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-603: **Davila v. Fitzgerald Railcar Specialists**. Stipulation allowed; appeal dismissed.

Nos. A-11-605, A-11-609: **State v. Bonham**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

Nos. A-11-607, A-11-608: **State v. Akol**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

No. A-11-611: **State v. Hurlbut**. Stipulation allowed; appeal dismissed.

No. A-11-612: **Kelliher v. Soundy**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-615: **State on behalf of Darrell B. v. Tiffany T**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-617: **Edwards v. Centaur Electrical Contractors**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-618: **State v. Ketchum**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-619: **State v. Kissack**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-622: **Steece v. Neth**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-11-623: **State v. Frazier**. Summarily affirmed. See § 2-107(A)(1).

No. A-11-627: **State v. German**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-628: **State v. McDougald**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-631: **In re Interest of Jessica J**. Stipulation allowed; appeal dismissed.

No. A-11-632: **State v. Uthum**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-633: **Hillard v. Heineman**. Motions of appellees for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-635: **Olsberg v. Olsberg**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-636: **State v. Perry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-638: **Gorham v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

No. A-11-639: **State v. Livingston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

No. A-11-640: **State v. Livingston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-642: **State v. Pennisi**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-11-643: **State v. Stokes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Kuhl*, 16 Neb. App. 127, 741 N.W.2d 701 (2007).

No. A-11-644: **Peterson v. Peterson**. Motion of appellee for summary dismissal sustained; appeal dismissed.

No. A-11-646: **Sulhoff v. Union Pacific RR**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-647: **Becerra v. Sulhoff**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-650: **State v. Vetter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010); *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004).

No. A-11-656: **Mid City Bank v. Hastings State Bank**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-11-665: **State v. Vicars**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-11-667: **Dimmitt v. Dimmitt**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-669: **State v. Kuiper**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-11-670: **Schmidt v. Chapman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-109(D)(1)(e); *State v. Bruna*, 12 Neb. App. 798, 686 N.W.2d 590 (2004).

No. A-11-672: **Lopez v. Houston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-673: **State v. Mitchell**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-677: **Melroy v. Melroy**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-11-678: **State v. Warrack**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-679: **State on behalf of McDonald v. McDonald**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-680: **State v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-682: **Vana v. Harlow**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-684: **Surratt v. Salts**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-687: **State v. Boatwright**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-690: **Hamell v. Kone, Inc**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-693: **State v. Greuter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-694: **State v. Butler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-696: **State v. Bush**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-11-697, A-11-698: **State v. Carr**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

No. A-11-703: **State v. Webster**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-11-705: **In re Interest of Jesus B**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-708: **Carper v. Carper**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Reissue 2008); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

No. A-11-709: **State v. King**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-711: **State v. Kolter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

No. A-11-716: **State on behalf of Hart v. Schmid**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-11-719: **State v. Hansen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-724: **State v. Bradshaw**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-11-725: **Tyler v. Tyler**. Affirmed. See § 2-107(A)(1).

No. A-11-726: **Tyler v. O'Reilly Auto Parts**. Appeal dismissed. See, § 2-107(A)(2); *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009); *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997).

No. A-11-727: **Harris v. Bowie**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-11-728: **State v. Tyma**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

No. A-11-730: **State v. Johnson**. Stipulation allowed; appeal dismissed.

No. A-11-731: **State v. Milenkovich**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-11-732: **State v. Hudson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. McKinney*, 279 Neb. 297, 777 N.W.2d 555 (2010); *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

No. A-11-736: **State v. Thompson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-11-738: **State v. Picket Pin**. Appeal dismissed as moot. See, § 2-107(D); *State v. York*, 278 Neb. 306, 770 N.W.2d 614 (2009).

No. A-11-740: **State v. Smith**. Stipulation allowed; appeal dismissed.

No. A-11-742: **Sitzman v. Sitzman**. Stipulation allowed; appeal dismissed.

No. A-11-743: **State v. Wright**. Stipulation allowed; appeal dismissed.

No. A-11-745: **Fulton v. Hall County**. Motion of appellees for summary dismissal sustained; appeal dismissed for lack of jurisdiction. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1912 (Reissue 2008); *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

No. A-11-746: **State v. Peterson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007); *State v. Biloff*, 18 Neb. App. 215, 778 N.W.2d 497 (2009).

No. A-11-750: **State v. Harris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Glover*, 3 Neb. App. 932, 535 N.W.2d 724 (1995).

No. A-11-752: **In re Interest of Dominic C**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-753: **State v. Strickland**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-754: **State v. Corey**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-11-755 through A-11-757: **State v. Churchill**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-758: **State v. Churchill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-759: **State v. Campbell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

No. A-11-761: **Southwest Omaha Hospitality v. Werner-Robertson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315 (Reissue 2008).

No. A-11-763: **State v. Hamburger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011); *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010); *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008).

No. A-11-769: **Tyler v. Denker**. Affirmed. See § 2-107(A)(1).

No. A-11-772: **State v. Christensen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-773: **Wehrle v. Neth**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-11-780: **State v. Aboud**. Stipulation allowed; appeal dismissed.

No. A-11-781: **State v. Divis**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-11-783: **State v. Schumacher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-789: **Goly Young Home Repair v. City Council**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1). See, also, *Back Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 443 N.W.2d 604 (1989).

No. A-11-790: **Dennis v. Moore**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-791: **State v. Romero**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-792: **State v. Zarinana**. Stipulation allowed; appeal dismissed.

No. A-11-793: **State v. Potter**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-11-794: **State v. Mitchell**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-11-795: **State v. Lukoff**. Stipulation allowed; appeal dismissed.

No. A-11-797: **Ivey v. State**. Appeal dismissed. See, § 2-107(A)(2); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-11-799: **State v. Montiel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-11-800: **State v. Stuart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-802: **Putnan v. Shanahan Mechanical & Electrical**. Appeal dismissed. See, § 2-107(A)(2); *Tlamka v. Parry*, 16 Neb. App. 793, 751 N.W.2d 664 (2008).

No. A-11-802: **Putnan v. Shanahan Mechanical & Electrical**. Motion for rehearing granted. Appeal dismissed for lack of subject matter jurisdiction, and cause remanded with directions.

No. A-11-803: **Onuachi v. Meylan Enterprises**. Affirmed. See, § 2-107(A)(1); *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002).

No. A-11-807: **On v. Robak**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-809: **Scover v. Ramsey**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-811: **State v. Junge**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-813: **In re Interest of David L**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-815: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989).

No. A-11-816: **In re Interest of Jacob W. et al**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999); *Hammond v. Hammond*, 3 Neb. App. 536, 529 N.W.2d 542 (1995).

No. A-11-818: **In re Interest of Det D**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-821: **In re Interest of Det D**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-825: **State v. Simpson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-826: **Goodwin v. Denker**. Appeal dismissed. See, § 2-107(A)(2); *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

No. A-11-828: **In re Interest of Mia S**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-829: **In re Estate of Tully**. Motion of appellee for summary dismissal sustained; appeal dismissed.

No. A-11-830: **State v. Shchuko**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-831: **State v. Range**. Appellee's suggestion of remand granted; cause remanded with instructions to reverse and dismiss conviction and to vacate sentence.

No. A-11-834: **State v. Mesa**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-835: **Seldin Company v. Hunt**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-11-837: **Kendel Homes Corp. v. SID No. 439**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-11-839: **State v. Mills**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-841: **State v. Perdue**. Appeal dismissed. See § 2-107(A)(2). See, also, *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-11-842: **State v. Albadri**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-843: **State v. Martin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010). See, also, *State v. Rodriguez*, 272 Neb. 930, 762 N.W.2d 157 (2007).

Nos. A-11-844, A-11-845: **State v. Davidson**. Affirmed. See § 2-107(A)(1).

No. A-11-846: **State v. Partridge**. Appellee's suggestion of remand considered; cause remanded for resentencing. See, Neb. Rev. Stat. § 28-320.01 (Reissue 2008); *State v. Alba*, 270 Neb. 656, 707 N.W.2d 402 (2005).

No. A-11-849: **Castonguay v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. §§ 29-3001, 29-1420, and 25-824 (Reissue 2008). See, also, *Mayfield v. Hartmann*, 221 Neb. 122, 375 N.W.2d 146 (1985); *Sileven v. Tesch*, 212 Neb. 880, 326 N.W.2d 850 (1982).

No. A-11-853: **State v. Aguilar**. Stipulation allowed; appeal dismissed.

No. A-11-854: **State v. Rauch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-858: **Robertson v. Jacobs Cattle Co**. Appeal dismissed. See, § 2-107(A)(2); *Shoemaker v. Shoemaker*, 275 Neb. 112, 745 N.W.2d 299 (2008).

No. A-11-859: **State v. Cleveland**. Stipulation allowed; appeal dismissed.

No. A-11-860: **State on behalf of Oliver M. v. Kirk B**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-861: **Bornhoft v. Bornhoft**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-862: **Simpson v. Simpson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-863: **Stacy S. on behalf of Xavier S. v. Travis S**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-864: **Jensen v. Farmers' Ins. Group**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-865: **Onuachi v. Western Waterproofing Co**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-867: **Osborn v. Osborn**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-871: **State v. Gilliland**. Stipulation allowed; appeal dismissed.

No. A-11-873: **State v. Zierke**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-11-875: **State v. Turnell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-11-876: **Kikic v. Swift & Company**. Affirmed. See, § 2-107(A)(1); *Tapia-Reyes v. Excel Corp.*, 281 Neb. 15, 793 N.W.2d 319 (2011).

No. A-11-877: **State v. Sweatte**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-11-878: **Garro v. Martinez**. Remanded with directions. See, *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009). See, also, *Jones v. Belgum*, 17 Neb. App. 750, 770 N.W.2d 667 (2009).

No. A-11-880: **State v. Turnell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-881: **In re Interest of J.H**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-883: **In re Estate of Oppliger**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-11-885: **Dorsey v. Werner Enters**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-887: **State v. Gallegos**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-11-893: **State v. Rodriguez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-895: **State v. Hickerson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-896: **Ochieng v. Ochieng**. Affirmed. See, § 2-107(A)(1); *Myhra v. Myhra*, 16 Neb. App. 920, 756 N.W.2d 528 (2008).

No. A-11-901: **Thiems v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-11-902, A-11-903: **State v. Bowens**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

Nos. A-11-904, A-11-905: **State v. Kelly**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-11-907: **State v. Stack**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011); *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008).

No. A-11-910: **State v. Schlotfeld**. Stipulation allowed; appeal dismissed.

No. A-11-911: **State v. Schlotfeld**. Stipulation allowed; appeal dismissed.

No. A-11-915: **Gaytan v. Wal-Mart**. Appeal dismissed. See, § 2-107(A)(2); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-11-918: **State v. Cook**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-920: **State v. Pelc**. Motion of appellee for summary affirmance sustained; judgment affirmed. See Neb. Rev. Stat. § 83-1,106(1) (Reissue 2008).

No. A-11-922: **State v. Guillot**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-926: **Esquivel v. Swift & Company**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-927: **State v. Myaskovsky**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-928: **State v. Marshall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-11-929: **State v. Almery**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-932: **Musich v. Musich**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-934: **Green v. Legon**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-937: **Gallagher v. Dolt**. Appeal dismissed. See, § 2-107(A)(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-11-939: **Jackson v. Brown**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-942: **Village of Union v. Bescheinen**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004); *Trainum v. Sutherland Assocs.*, 263 Neb. 778, 642 N.W.2d 816 (2002).

No. A-11-943: **Draper v. Smith**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-11-950: **State v. Miller**. Appeal dismissed. See, § 2-107(A)(2); *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002).

No. A-11-956: **State v. Njokanma**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-957: **State v. Harmel**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-11-961: **R.L. Tiemann Constr. v. City of Wymore**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-11-963: **Farmers Mut. Ins. Co. v. Parr**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-964: **State v. Dia**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-11-965: **State v. States**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-966: **Van Severen v. Planned Parenthood**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-967: **State v. Hughes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Landis*, 281 Neb. 139, 794 N.W.2d 151 (2011); *State v. Hudson*, 279 Neb. 6, 775 N.W.2d 429 (2009).

No. A-11-969: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-971: **Segelberg v. Department of Roads**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-11-973: **Kramer v. Wells Fargo Home Mortgage**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. §§ 25-1301(1) and 25-1902 (Reissue 2008). See, also, *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

No. A-11-975: **State v. Gonzalez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-109(D)(1)(e); *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-11-977: **State v. Holmes**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-11-978: **State v. Valdivia**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-980: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-11-982: **State v. Leiting**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-983: **State v. Martin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

Nos. A-11-984, A-11-985: **State v. Harrington**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-11-986: **Agee v. Bakewell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See Neb. Rev. Stat. § 29-2801 (Reissue 2008). See, also, *Janet K. v. Kevin B.*, 5 Neb. App. 169, 556 N.W.2d 270 (1996).

No. A-11-991: **In re Interest of Jerome C**. Stipulation allowed; appeal dismissed.

No. A-11-994: **State v. Vidal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-995: **Bopp v. Security State Bank**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1902 (Reissue 2008); *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002).

No. A-11-997: **State on behalf of Chamiyah M. v. Dennis M**. Summarily affirmed. See § 2-107(A)(1).

No. A-11-998: **Caton v. Houston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *Moore v. Grammer*, 232 Neb. 795, 442 N.W.2d 861 (1989).

No. A-11-1000: **First Express Servs. Group v. Easter**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007); *Murphy v. Brown*, 15 Neb. App. 914, 738 N.W.2d 466 (2007).

No. A-11-1001: **In re Estate of Crawford**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-1004: **Tyler v. OPPD**. Appeal dismissed. See, § 2-107(A)(2); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

No. A-11-1005: **Vandelay Investments v. Smith**. Appeal dismissed. See § 2-107(A)(2). See, also, *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003).

No. A-11-1007: **Johnson v. Department of Corr. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-1008: **Johnson v. Department of Corr. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-1009: **In re Interest of Nevaeh W**. Appeal dismissed. See, § 2-107(A)(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-11-1011: **State v. King**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Nos. A-11-1012 through A-11-1014: **State v. Navejar**. Stipulations allowed; appeals dismissed.

No. A-11-1017: **In re Guardianship of Kristopher M**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-1018: **State v. Rodriguez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-1020: **Duff v. Duff**. Appeal dismissed. See, § 2-107(A)(2); *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011). See, also, *Meadows v. Meadows*, 18 Neb. App. 333, 789 N.W.2d 519 (2010).

No. A-11-1025: **McCullough v. McCullough**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-1027: **State v. Estell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-1028: **Maus v. Maus**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-1031: **Snow T. on behalf of Christopher M. v. Ashley M**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-11-1034, A-11-1035: **State v. Felder**. Motions of appellant to dismiss appeal sustained; appeals dismissed.

No. A-11-1036: **State v. Lewis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-1037: **State v. Frazier**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-1038: **State v. Reichert**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-1039: **Castonguay v. Castonguay**. Appeal dismissed. See, § 2-107(A)(2); *Davis v. Davis*, 265 Neb. 790, 660 N.W.2d 162 (2003).

No. A-11-1040: **State v. Vasquez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-1043: **Prince v. Prince**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 43-2929 (Supp. 2011); *Bhuller v. Bhuller*, 17 Neb. App. 607, 767 N.W.2d 813 (2009).

No. A-11-1044: **State v. Henderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008); *State v. Juarez*, 3 Neb. App. 398, 528 N.W.2d 344 (1995).

Nos. A-11-1045 through A-11-1047: **State v. Bridgeford**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-1049: **State v. Hausmann**. Stipulation allowed; appeal dismissed.

No. A-11-1052: **In re Interest of Diamond B**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-1053: **State v. Fisher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-1057: **Tyler v. Moss**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-11-1058 through A-11-1060: **State v. Loya**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-11-1062: **State on behalf of Maureen T. v. Willie T**. Stipulation allowed; appeal dismissed.

No. A-11-1063: **Onewest Bank v. Madej**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-1064: **In re Interest of Titus W**. Summarily affirmed. See § 2-107(A)(1).

No. A-11-1067: **State v. Murillo**. Stipulation allowed; appeal dismissed.

No. A-11-1067: **State v. Murillo**. Dismissal of appeal vacated; appeal reinstated.

No. A-11-1069: **Kelley v. Department of Motor Vehicles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011); *Taylor v. Wimes*, 10 Neb. App. 432, 632 N.W.2d 366 (2001).

No. A-11-1073: **Tran-Villarreal v. Villarreal**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-1074: **State v. O'Neal**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-1075: **State v. Thompson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-11-1078: **Faden v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-1081: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-11-1083: **Marks v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2). See, also, *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010).

No. A-11-1089: **State Bank of Odell v. City of Beatrice**. Stipulation allowed; appeal dismissed.

No. A-11-1090: **State v. Blackhawk**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-1091: **George v. Barrera**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-11-1092: **Contreras v. Tyson Fresh Meats**. Affirmed. See, § 2-107(A)(1); *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007).

No. A-11-1093: **State v. McCandless**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-1096: **State v. Gibbs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-11-1100: **Mourad v. Farmland Foods**. Affirmed. See § 2-107(A)(1).

No. A-11-1104: **Nielsen v. Khalaf**. By order of the court, appeal dismissed for failure to file briefs.

No. A-11-1115: **Prychitko v. Olmer**. Stipulation allowed; appeal dismissed.

No. A-11-1118: **State v. Hearn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-002: **In re Interest of Kandaru J**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-003: **Payne v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained.

No. A-12-004: **State v. Kurtzhals**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-12-008, A-12-009: **State v. Kovanda**. Motions of appellee for summary affirmance granted.

No. A-12-010: **Gray v. Department of Corrections**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-013: **Davis v. Airlite Plastics Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-014: **State v. Hoelting**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-015: **State v. Thurman**. Appeal dismissed. See, § 2-107(A)(2); *Robertson v. Rose*, 270 Neb. 466, 704 N.W.2d 227 (2005). See, also, § 2-102(F)(1); Neb. Rev. Stat. § 24-1107 (Reissue 2008).

No. A-12-018: **Young v. Wells Fargo Bank**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-021: **State v. Sutton**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-026: **McHenry v. K Farms**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-027: **State v. Cruz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-028: **Anderson v. Health & Human Servs**. Stipulation allowed; appeal dismissed.

No. A-12-029: **Mulder v. Mulder**. Remanded with directions. See *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009). See, also, *Jones v. Belgum*, 17 Neb. App. 750, 770 N.W.2d 667 (2009).

No. A-12-030: **State v. Poloncic**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-031: **State v. Applewhite**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-032: **Woodside v. Teledyne Isco**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 48-1,112 (Supp. 2011).

No. A-12-033: **State v. Corey**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-12-034: **In re Estate of Campbell**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2729(1) (Reissue 2008).

No. A-12-036: **Nuno-Ramirez v. Tenneco, Inc**. Stipulation allowed; appeal dismissed.

No. A-12-037: **Sea-Hubbert Farms v. Boston**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1912(3) and 25-1329 (Reissue 2008).

No. A-12-044: **Junker v. Maruska**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-12-048: **State v. Kosiski**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

Nos. A-12-049, A-12-051, A-12-052: **State v. Kulm**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-057: **Brooks v. Lancaster County Jail**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-061: **In re Interest of Angel P**. Stipulation allowed; appeal dismissed.

No. A-12-065: **State v. Sides**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

No. A-12-066: **State v. Sides**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

No. A-12-071: **Campbell v. Campbell**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Reissue 2008). See, also, Neb. Rev. Stat. §§ 25-1329 and 25-1315.02 (Reissue 2008).

No. A-12-072: **Svitak v. JBS USA L.L.C**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 48-1,112 (Supp. 2011).

No. A-12-076: **State v. Willhoite**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

Nos. A-12-077, A-12-078: **State v. Wagner**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-090: **Mitchell v. Aseracare Home Health-Omaha**. Motion of appellee for summary affirmance sustained. See *Pearson v. Archer-Daniels-Midland Milling Co.*, 282 Neb. 400, 803 N.W.2d 489 (2011).

No. A-12-092: **State v. Beard**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-094: **Hurlbut v. Hahn**. Stipulation allowed; appeal dismissed.

No. A-12-097: **Hall v. Houston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008); *Stetson v. Silverman*, 278 Neb. 389, 770 N.W.2d 632 (2009); *Thompson v. Nebraska Dept. of Corr. Servs.*, 263 Neb. 463, 640 N.W.2d 671 (2002).

Nos. A-12-098, A-12-099: **State v. Ramirez**. Stipulations allowed; appeals dismissed.

No. A-12-102: **Cook v. City of Norfolk**. Appeal dismissed. See § 2-107(A)(2). See, also, *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

No. A-12-104: **Klawitter v. Midlands Foot Specialists**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

Nos. A-12-108, A-12-109: **State v. Hooker**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-111: **Cox v. K & B Transportation**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-113: **Haskin v. Haskin**. Remanded with directions. See *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009). See, also, *Jones v. Belgum*, 17 Neb. App. 750, 770 N.W.2d 667 (2009).

No. A-12-114: **Tyler v. City of Omaha**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-120: **Rosenboom v. Neth**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-12-133: **State v. Jarosz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

No. A-12-134: **Damewood v. Damewood**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-143: **In re Name Change of Harris**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-144: **State v. Lindsey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-146: **State v. Groat**. Motion of appellee for summary dismissal sustained; appeal dismissed at cost of appellant. See *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-12-171: **Roemer v. Roemer**. Appeal dismissed. See, § 2-107(A)(2); *Platte Valley Nat. Bank v. Lasen*, 273 Neb. 602, 732 N.W.2d 347 (2007).

No. A-12-172: **Dunker v. LaBelle**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-174: **State v. Ruegge**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 29-826 (Reissue 2008). See, also, *State v. McArthur*, 12 Neb. App. 657, 685 N.W.2d 733 (2004).

No. A-12-179: **Wegner v. Wegner**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-180: **Elton v. Elton**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-180: **Elton v. Elton**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-12-181: **Billups v. State**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-12-187: **Guzman v. Leal**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1144.01 (Reissue 2008); *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998).

No. A-12-190: **Fitzgerald-Aliaga v. Fitzgerald**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-194: **Kelley v. Health & Human Servs**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-195: **State on behalf of Aunre T. v. Henry P**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-205: **State v. Smothers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-207: **Gray v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-12-209: **In re Interest of Devi T**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Hailey M.*, 15 Neb. App. 323, 726 N.W.2d 576 (2007); *In re Interest of Zachary L.*, 4 Neb. App. 324, 543 N.W.2d 211 (1996).

No. A-12-214: **State v. Workman**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-217: **Robert B. v. Health & Human Servs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1329 and 25-1912(3) (Reissue 2008); *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

No. A-12-220: **State v. Martinez-Morales**. Motion of appellee for summary affirmance sustained. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-225: **Scover v. Ramsey**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315 (Reissue 2008).

No. A-12-226: **Jesse v. Jesse**. Appeal dismissed. See, § 2-107(A)(2); *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011).

Nos. A-12-238, A-12-239: **Hall Cty. Bd. of Equal. v. New Holland**. Motions of appellant to dismiss appeal sustained; appeals dismissed.

No. A-12-240: **Gill v. Vetter Holding**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002).

No. A-12-240: **Gill v. Vetter Holding**. Motion of appellant for rehearing granted. Appeal reinstated.

No. A-12-245: **Deutsche Bank v. Wright**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-252: **Hillard v. Heineman**. Motions of appellees for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-260: **Parsons v. Parsons**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-266: **Petersen v. City of Blair on behalf of Airport Auth**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315 (Reissue 2008).

No. A-12-300: **State v. Fieldgrove**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005).

No. A-12-301: **State v. Fieldgrove**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005).

No. A-12-305: **In re Guardianship of Dimetria F.-P. & Angelina F**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-310: **Lepper v. Lepper**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-333: **American Nat. Bank v. Woodward-Prickett**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-369: **Lieding v. Rogers**. Appeal dismissed. See, § 2-107(A)(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-12-383: **Porter v. Porter**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-418: **Pittman v. Rivera**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-33-120003: **State v. Obermiller**. Appeal dismissed. See *State v. Larkins*, 276 Neb. 603, 755 N.W.2d 813 (2008).

# LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-09-1042: **Lenners v. St. Paul Fire & Marine Ins. Co.**, 18 Neb. App. 772 (2010). Petition of appellee St. Paul Fire & Marine Ins. Co. for further review denied on May 11, 2011.

No. A-09-1042: **Lenners v. St. Paul Fire & Marine Ins. Co.**, 18 Neb. App. 772 (2010). Petition of intervenor-appellee for further review denied on May 11, 2011.

No. A-09-1210: **In re Interest of P.A**. Petition of appellant for further review denied on May 11, 2011.

No. A-09-1280: **Wedgewood v. U.S. Filter/Whittier**. Petition of appellant for further review denied on August 24, 2011.

No. A-09-1280: **Wedgewood v. U.S. Filter/Whittier**. Petition of appellee for further review denied on August 24, 2011.

No. S-09-1309: **Estate of Teague v. Crossroads Co-op Assn**. Petition of appellant for further review sustained on July 13, 2011.

No. A-10-011: **Monica S. v. Nguyen**. Petition of appellant for further review denied on May 25, 2011.

No. A-10-135: **Estate of Donahue v. WEL-Life at Papillion**, 19 Neb. App. 158 (2011). Petition of appellees for further review denied on November 9, 2011.

No. A-10-160: **Salumbides v. Salumbides**. Petition of appellant for further review denied on August 24, 2011.

No. A-10-170: **Shuck v. Shuck**, 18 Neb. App. 867 (2011). Petition of appellant for further review denied on May 11, 2011.

No. A-10-170: **Shuck v. Shuck**, 18 Neb. App. 867 (2011). Petition of appellee for further review denied on May 11, 2011.

No. A-10-244: **Craig v. State**, 19 Neb. App. 78 (2011). Petition of appellant for further review denied on August 24, 2011.

No. S-10-295: **State v. Alfredson**. Petition of appellant for further review sustained on June 15, 2011.

No. A-10-303: **Sims v. Sims**. Petition of appellant for further review denied on May 11, 2011.

No. A-10-357: **State v. Thomas**, 19 Neb. App. 36 (2011). Petition of appellee for further review denied on October 26, 2011.

No. A-10-418: **Soto v. Hansen**. Petition of appellee for further review denied on October 12, 2011.

No. S-10-442: **State v. Smith**, 19 Neb. App. 708 (2012). Petition of appellant for further review sustained on May 16, 2012.

No. S-10-442: **State v. Smith**, 19 Neb. App. 708 (2012). Petition of appellee for further review sustained on May 16, 2012.

No. A-10-451: **J.S. v. State**. Petition of appellant for further review denied on August 31, 2011.

No. A-10-452: **In re Interest of Jalen D**. Petition of appellant for further review denied on June 8, 2011.

No. A-10-461: **Schmitt v. Schmitt**. Petition of appellant for further review denied on May 25, 2011.

No. A-10-472: **State v. Novascone**. Petition of appellant for further review denied on March 14, 2012.

No. A-10-492: **Arlt v. Farmers Co-op**. Petition of appellant for further review denied on June 29, 2011.

No. A-10-511: **Marvel Precision v. Marvel**. Petition of appellant for further review denied on May 11, 2011.

No. A-10-525: **Johnson v. Trident Builders**. Petition of appellants for further review denied on May 18, 2011.

No. A-10-541: **King v. Rolin K. Farms & Trucking**. Petition of appellee for further review denied on October 26, 2011.

No. A-10-581: **State v. Bruna**. Petition of appellant for further review denied on July 13, 2011.

No. A-10-638: **Northern Agri-Services v. Prokop**. Petition of appellant for further review denied on October 3, 2011, as filed out of time.

No. A-10-652: **No Frills Supermarkets v. Brookside Omaha Ltd**. Petition of appellant for further review denied on August 24, 2011.

No. A-10-658: **State v. Muhammad**. Petition of appellant for further review denied on May 25, 2011.

No. A-10-662: **Mlakar v. Union Pacific RR. Co**. Petition of appellant for further review denied on November 23, 2011.

No. A-10-670: **In re Interest of A.M**. Petition of appellant for further review denied on August 31, 2011.

No. A-10-678: **Euchner v. Euchner**. Petition of appellant for further review denied on August 24, 2011.

No. A-10-712: **Oppliger v. Vineyard**, 19 Neb. App. 172 (2011). Petition of appellee for further review denied on November 23, 2011.

No. A-10-725: **State v. Porter**. Petition of appellant for further review denied on June 8, 2011.

No. S-10-734: **In re Interest of Breana M.**, 18 Neb. App. 910 (2011). Petitions of appellees for further review sustained on June 15, 2011.

No. A-10-737: **State v. Matchett**. Petition of appellant for further review denied on December 14, 2011.

No. A-10-782: **Matlock v. Matlock**. Petition of appellant for further review denied on June 15, 2011.

No. A-10-786: **State v. Tyler**. Petition of appellant for further review denied on June 29, 2011.

Nos. A-10-817, A-10-818: **WOW Life Ins. Soc. v. Douglas Cty. Bd. of Equal**. Petitions of appellant for further review denied on August 31, 2011.

No. A-10-845: **Tiefenthaler v. Citywide Ins**. Petition of appellant for further review denied on April 18, 2012.

No. A-10-862: **In re Interest of Arthur L**. Petition of appellant for further review denied on December 14, 2011.

No. A-10-870: **Schlichtman v. Jacob**. Petition of appellant for further review denied on July 13, 2011.

No. A-10-875: **In re Interest of Jaiden D**. Petition of appellant for further review overruled on January 9, 2012, for lack of jurisdiction.

No. A-10-876: **In re Interest of Ashton D**. Petition of appellant for further review overruled on January 9, 2012, for lack of jurisdiction.

No. A-10-877: **In re Interest of Sean D**. Petition of appellant for further review overruled on January 9, 2012, for lack of jurisdiction.

No. A-10-886: **Berry v. Wells Fargo Bank**. Petition of appellant for further review denied on January 11, 2012.

No. A-10-889: **Smith v. Smith**. Petitions of appellant for further review denied on August 24, 2011.

No. A-10-893: **In re Interest of Corey W. et al**. Petition of appellant for further review denied on May 11, 2011.

No. A-10-900: **Lopez v. Austin Maintenance**. Petition of appellant for further review denied on August 31, 2011.

No. A-10-906: **In re Interest of Javontae T**. Petition of appellant for further review denied on May 18, 2011.

No. A-10-908: **Prokop v. McClurg**. Petition of appellant for further review denied on August 31, 2011.

No. A-10-910: **State v. Buckley**. Petition of appellant for further review denied on June 29, 2011.

No. A-10-914: **Commercial Flooring Systems v. Denenberg**. Petition of appellant for further review denied on June 22, 2011.

No. A-10-915: **K & L Decks & Remodeling & Custom Painting v. Denenberg**. Petition of appellant for further review denied on June 22, 2011.

No. A-10-936: **In re Interest of Leland B.**, 19 Neb. App. 17 (2011). Petition of appellee State for further review denied on June 29, 2011.

Nos. S-10-938, S-10-939: **State v. Garcia**. Petitions of appellee for further review sustained on February 23, 2012.

No. S-10-945: **Sherman v. Neth**, 19 Neb. App. 435 (2011). Petition of appellee for further review sustained on February 15, 2012.

No. A-10-956: **State v. Echols**. Petition of appellant for further review denied on May 11, 2011.

No. A-10-959: **Johnson v. Johnson**. Petition of appellant for further review denied on December 21, 2011.

No. A-10-965: **Sickler v. Kirby**, 19 Neb. App. 286 (2011). Petition of appellants for further review denied on March 14, 2012.

No. A-10-965: **Sickler v. Kirby**, 19 Neb. App. 286 (2011). Petition of appellees for further review denied on March 14, 2012.

No. A-10-967: **Hohertz v. Estate of Hohertz**, 19 Neb. App. 110 (2011). Petition of appellee for further review denied on August 31, 2011.

No. S-10-968: **In re Interest of David M. et al.**, 19 Neb. App. 399 (2011). Petition of appellee for further review sustained on February 15, 2012.

No. A-10-971: **Senstock v. Senstock**. Petition of appellant for further review denied on October 12, 2011.

No. S-10-973: **Bock v. Dalbey**, 19 Neb. App. 210 (2011). Petition of appellant for further review sustained on November 30, 2011.

No. A-10-975: **Petersen v. Nebraska Dept. of Health & Human Servs.**, 19 Neb. App. 314 (2011). Petition of appellant for further review denied on January 11, 2012.

No. A-10-976: **In re Interest of Renan P. et al**. Petition of appellant for further review denied on May 11, 2011.

No. S-10-981: **State v. Nadeem**, 19 Neb. App. 565 (2012). Petition of appellee for further review sustained on May 16, 2012.

No. A-10-982: **State v. King**, 19 Neb. App. 410 (2011). Petition of appellant for further review denied on January 25, 2012.

No. A-10-983: **State v. Hansen**. Petition of appellant for further review denied on May 11, 2011.

No. A-10-991: **Bull v. Bull**. Petition of appellant for further review denied on December 14, 2011.

No. S-10-998: **State v. Britt**. Petition of appellant for further review sustained on October 26, 2011.

No. A-10-999: **In re Estate of Tully**. Petition of appellee for further review denied on May 9, 2012.

No. S-10-1015: **In re Interest of Jesse M. et al**. Petition of appellant for further review sustained on November 30, 2011.

No. S-10-1015: **In re Interest of Jesse M. et al**. Petition of appellant for further review dismissed on March 30, 2012, as having been improvidently granted.

No. A-10-1016: **In re Interest of Cole G. et al**. Petition of appellant for further review denied on June 8, 2011.

Nos. A-10-1038, A-10-1039: **In re Interest of Ericka J. & Tyler J**. Petitions of appellant for further review denied on August 31, 2011.

Nos. A-10-1038, A-10-1039: **In re Interest of Ericka J. & Tyler J**. Petitions of appellee Tonya J. for further review denied on August 31, 2011.

No. S-10-1043: **State v. Vela-Montes**, 19 Neb. App. 378 (2011). Petition of appellant for further review sustained on January 19, 2012.

No. A-10-1050: **State v. Shannon**. Petition of appellant for further review denied on September 6, 2011, as untimely.

No. A-10-1078: **Halac v. Girton**. Petition of appellant for further review denied on November 16, 2011.

No. A-10-1081: **Lyons-Meyer v. Health & Human Servs**. Petition of appellant for further review denied on May 18, 2011.

No. A-10-1084: **In re Interest of Kristion T. et al**. Petition of appellant for further review denied on September 14, 2011, as untimely. See, § 2-102(F)(1); Neb. Rev. Stat. § 24-1107 (Reissue 2008); *Robertson v. Rose*, 270 Neb. 466, 704 N.W.2d 227 (2005).

No. A-10-1085: **State v. Segura**. Petition of appellant for further review denied on November 9, 2011.

No. A-10-1091: **State v. Wistrom**. Petition of appellant for further review denied on September 20, 2011, as filed out of time. See § 2-102(F)(1).

No. S-10-1106: **Midwest Renewable Energy v. Lincoln Cty. Bd. of Eq.**, 19 Neb. App. 441 (2011). Petition of appellant for further review sustained on February 23, 2012.

No. A-10-1112: **In re Interest of Lokani M**. Petition of appellant for further review denied on June 15, 2011.

No. A-10-1117: **State v. Bellis**. Petition of appellant for further review denied on July 13, 2011.

No. A-10-1125: **Hurlbut v. Bock**. Petition of appellant for further review denied on October 26, 2011.

No. A-10-1127: **Widtfeldt v. Tax Equal. & Rev. Comm**. Petition of petitioner-appellant for further review denied on June 8, 2011, as having been prematurely filed. See § 2-102(F)(1).

No. A-10-1130: **Wyatt v. Drivers Mgmt**. Petition of appellant for further review denied on February 2, 2012.

No. A-10-1130: **Wyatt v. Drivers Mgmt**. Petition of appellee for further review denied on February 2, 2012.

No. A-10-1134: **State v. Greuter**. Petition of appellant for further review denied on October 12, 2011.

No. A-10-1138: **In re Guardianship & Conservatorship of Elvera K**. Petition of appellant for further review denied on October 12, 2011.

No. A-10-1144: **Gonzalez v. Husker Concrete**. Petition of appellee for further review denied on November 23, 2011.

No. A-10-1145: **State v. Coufal**. Petition of appellant for further review denied on May 11, 2011.

Nos. A-10-1149, A-10-1150: **State v. Ballard**. Petitions of appellant for further review denied on June 29, 2011.

No. A-10-1159: **In re Interest of Arlayha W. et al**. Petition of appellant for further review denied on October 26, 2011.

No. A-10-1164: **State v. Witmer**. Petition of appellant for further review denied on June 22, 2011.

No. A-10-1165: **Stacy v. Great Lakes Agri Mktg**. Petition of appellant for further review denied on December 14, 2011.

No. A-10-1166: **State v. Castonguay**. Petition of appellant for further review denied on July 1, 2011, for lack of jurisdiction.

No. A-10-1174: **Hendrix v. Sivick**, 19 Neb. App. 140 (2011). Petition of appellant for further review denied on September 28, 2011.

No. A-10-1185: **State v. Seizys**. Petition of appellant for further review denied on May 11, 2011.

No. A-10-1188: **State v. Dillon**. Petition of appellant for further review denied on August 24, 2011.

No. A-10-1193: **State v. McIntire**. Petition of appellant for further review denied on June 22, 2011.

No. A-10-1197: **State v. Glassco**. Petition of appellant for further review denied on October 26, 2011.

No. A-10-1199: **State v. Polen**. Petition of appellant for further review denied on August 24, 2011.

No. A-10-1200: **State v. McBride**, 19 Neb. App. 277 (2011). Petition of appellant for further review denied on December 14, 2011.

No. A-10-1208: **State v. Mortensen**, 19 Neb. App. 220 (2011). Petition of appellant for further review denied on December 14, 2011.

No. A-10-1211: **Associated Engineering v. Arbor Heights**. Petition of appellant for further review denied on February 2, 2012.

No. A-10-1237: **In re Interest of Jesse S**. Petition of appellant for further review denied on October 26, 2011.

No. A-10-1239: **Lash v. City Nat. Investment Ltd. Partnership**. Petition of appellant for further review denied on December 14, 2011.

No. A-11-012: **State v. Dhalk**. Petition of appellant for further review denied on October 26, 2011.

No. A-11-014: **State v. Mackey**. Petition of appellant for further review denied on July 13, 2011.

No. A-11-019: **State v. Tucker**. Petition of appellant for further review denied on November 23, 2011.

No. A-11-025: **Legge v. AC Lightning Protection Co**. Petition of appellant for further review denied on November 16, 2011.

No. A-11-028: **In re Interest of Trevon M. et al**. Petition of appellant for further review denied on November 16, 2011.

No. A-11-037: **State on behalf of Aunre T. v. Henry P**. Petition of appellant for further review denied on October 26, 2011.

No. S-11-042: **Turbines Ltd. v. Transupport, Inc.**, 19 Neb. App. 485 (2012). Petition of appellee for further review sustained on May 16, 2012.

No. A-11-044: **Krupicka v. Village of Dorchester**, 19 Neb. App. 242 (2011). Petition of appellant for further review denied on November 30, 2011.

No. A-11-053: **US Bank v. Young**. Petition of appellant for further review denied on October 12, 2011.

No. A-11-056: **Klingelhoefer v. Monif**. Petition of appellant for further review denied on March 21, 2012.

No. S-11-060: **Henderson v. City of Columbus**, 19 Neb. App. 668 (2012). Petition of appellee for further review sustained on June 13, 2012.

No. A-11-073: **Wright v. Wright**. Petition of appellant for further review denied on January 25, 2012.

No. A-11-074: **State v. Allen**. Petition of appellant for further review denied on March 28, 2012.

No. A-11-075: **In re Interest of Jeffrey P**. Petition of appellant for further review denied on September 28, 2011.

No. A-11-078: **State v. Johnson**. Petition of appellant for further review denied on August 24, 2011.

No. A-11-085: **State v. Milton**. Petition of appellant for further review denied on May 11, 2011.

No. S-11-093: **State v. Ross**. Petition of appellee for further review sustained on January 19, 2012.

No. A-11-104: **State v. Fletcher**. Petition of appellant for further review denied on December 14, 2011. See *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010).

No. A-11-106: **State on behalf of Paulson v. Paulson**. Petition of appellee for further review denied on September 28, 2011.

No. A-11-126: **State v. Bredemeier**. Petition of appellant for further review denied on December 14, 2011.

No. A-11-131: **Klein v. Klein**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-133: **Dangberg v. Kirby**. Petition of appellant for further review denied on April 25, 2012.

No. A-11-134: **Landaverde v. Swift Beef Co**. Petition of appellant for further review denied on October 12, 2011.

No. A-11-139: **Centurion Stone of Nebraska v. Trombino**, 19 Neb. App. 643 (2012). Petition of appellee for further review denied on June 6, 2012.

No. A-11-140: **Ajeti v. Madonna Rehab. Hosp**. Petition of appellant for further review denied on March 28, 2012.

No. A-11-141: **State ex rel. Jacob v. Houston**. Petition of appellant for further review denied on May 18, 2011.

No. A-11-152: **State v. Watson**. Petition of appellant for further review denied on November 9, 2011.

No. A-11-159: **In re Interest of LaKeiara J**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-160: **State v. Kilmer**. Petition of appellee for further review denied on April 11, 2012.

No. A-11-161: **State v. Guandong**. Petition of appellant for further review denied on August 31, 2011.

No. A-11-164: **State on behalf of Reece C. v. Keith F**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-165: **Hong's, Inc. v. Grand China Buffet**, 19 Neb. App. 331 (2011). Petition of appellant for further review denied on January 11, 2012.

No. A-11-167: **In re Interest of Michael M**. Petition of appellee for further review denied on January 11, 2012.

No. A-11-172: **In re Interest of Mia V**. Petition of appellant for further review denied on November 9, 2011.

No. S-11-182: **Engler v. Accountability & Disclosure Comm**. Petition of appellant for further review sustained on November 30, 2011.

No. A-11-184: **Obrecht v. Hansen**. Petition of appellant for further review overruled on December 23, 2011, as premature. See § 2-102(F)(1).

No. A-11-184: **Obrecht v. Hansen**. Petition of appellant for further review denied on February 2, 2012.

No. A-11-185: **Martinez v. Excel Corporation**. Petition of appellant for further review denied on December 14, 2011.

No. A-11-187: **State v. Wells**. Petition of appellant for further review denied on October 12, 2011.

No. A-11-197: **State v. Billups**. Petition of appellant for further review denied on October 12, 2011.

No. A-11-198: **State v. Manning**. Petition of appellant for further review denied on September 21, 2011.

No. A-11-201: **State v. Harper**. Petition of appellant for further review denied on August 24, 2011.

No. A-11-204: **Begley v. Harkins**. Petition of appellee for further review denied on February 2, 2012.

No. A-11-213: **In re Guardianship & Conservatorship of Mayhue**. Petition of appellant for further review denied on January 25, 2012.

No. A-11-222: **Titus v. Titus**, 19 Neb. App. 751 (2012). Petition of appellant for further review denied on June 6, 2012.

No. A-11-225: **Ivey v. City of Omaha**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-226: **In re Estate of Hue**. Petition of appellants for further review denied on January 11, 2012.

No. A-11-235: **State v. Mick**, 19 Neb. App. 521 (2012). Petition of appellee for further review denied on May 16, 2012.

No. S-11-236: **State v. Mick**, 19 Neb. App. 521 (2012). Petition of appellee for further review sustained on May 16, 2012.

No. S-11-236: **State v. Mick**, 19 Neb. App. 521 (2012). Petition of appellee for further review dismissed on June 14, 2012, as having been improvidently granted.

No. A-11-241: **Brundo v. Claus**. Petition of appellant for further review denied on August 24, 2011.

No. A-11-242: **State v. Heredia**. Petition of appellant for further review denied on February 15, 2012.

No. A-11-244: **State v. Balvin**. Petition of appellant for further review denied on January 25, 2012.

No. A-11-248: **State v. Flynn**. Petition of appellant for further review denied on June 8, 2011.

No. A-11-251: **Collins v. Collins**, 19 Neb. App. 529 (2012). Petition of intervenor-appellee for further review denied on May 16, 2012.

No. A-11-253: **Leach v. State**. Petition of appellant for further review denied on January 19, 2012.

No. A-11-261: **DeLeon v. Reinke Mfg. Co**. Petition of appellant for further review dismissed on September 20, 2011, as premature.

No. A-11-261: **DeLeon v. Reinke Mfg. Co**. Petition of appellant for further review denied on November 23, 2011.

No. A-11-262: **In re Interest of Jal C. et al**. Petition of appellant for further review denied on March 14, 2012.

No. A-11-262: **In re Interest of Jal C. et al**. Petition of appellee Lazarus L. for further review denied on March 14, 2012.

No. A-11-268: **State v. Martin**. Petition of appellant for further review denied on December 14, 2011.

No. A-11-271: **Spady v. Spady**. Petition of appellant for further review denied on May 16, 2012.

No. A-11-272: **Obermiller v. Neth**. Petition of appellant for further review denied on November 23, 2011.

No. A-11-276: **McSwine v. Health & Human Servs**. Petition of appellant for further review denied on June 29, 2011.

No. A-11-279: **Benell v. Ross**, 19 Neb. App. 514 (2012). Petition of appellee for further review denied on June 13, 2012.

No. A-11-285: **State v. Johnson**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-307: **Beckman v. Federated Mut. Ins. Co.**, 19 Neb. App. 656 (2012). Petition of appellant for further review denied on May 16, 2012.

No. A-11-308: **State v. Broussard**. Petition of appellant for further review denied on May 16, 2012.

No. A-11-313: **In re Interest of Autumn L. et al**. Petition of appellee State for further review denied on May 16, 2012.

No. A-11-315: **State v. Lako**. Petition of appellant for further review denied on September 14, 2011.

No. A-11-316: **State v. Robles**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-321: **State v. Christensen**. Petition of appellant for further review denied on April 11, 2012.

No. A-11-322: **Wurdeman v. Wells Fargo Bank**. Petition of appellant for further review denied on February 15, 2012.

No. A-11-324: **State v. Handsaker**. Petition of appellant for further review denied on May 16, 2012.

No. A-11-332: **Carney v. Leypoldt**. Petition of appellant for further review denied on September 14, 2011.

No. A-11-339: **State v. Gordon**. Petition of appellant for further review denied on December 14, 2011.

No. A-11-340: **Zoubenko v. Zoubenko**, 19 Neb. App. 582 (2012). Petition of appellant for further review denied on May 23, 2012.

No. A-11-341: **Nebraska Pub. Advocate v. Nebraska Pub. Serv. Comm.**, 19 Neb. App. 596 (2012). Petition of appellant for further review denied on June 13, 2012.

No. A-11-344: **State v. J.M**. Petition of appellant for further review denied on December 14, 2011.

Nos. S-11-352 through S-11-355: **Strode v. Saunders Cty. Bd. of Equal**. Petitions of appellants for further review sustained on November 9, 2011.

No. A-11-356: **In re Interest of Kenyetta C**. Petition of appellant for further review denied on January 25, 2012.

No. A-11-368: **State v. Ellis**. Petition of appellant for further review denied on April 11, 2012.

No. A-11-383: **In re Interest of Emerald C. et al.**, 19 Neb. App. 608 (2012). Petition of appellee Jeffrey A. Wagner for further review denied on May 23, 2012.

No. A-11-389: **State v. Sheperd**. Petition of appellant for further review denied on January 11, 2012.

No. S-11-394: **State v. Salinas**. Petition of appellant for further review sustained on February 15, 2012.

No. A-11-396: **State v. Armstrong**. Petition of appellant for further review denied on March 14, 2012.

No. A-11-401: **State v. Castonguay**. Petition of appellant for further review denied on October 12, 2011.

No. A-11-440: **Hatch v. BryanLGH Medical Center East**. Petition of appellant for further review denied on December 21, 2011.

No. A-11-440: **Hatch v. BryanLGH Medical Center East**. Petition of appellant for further review denied on January 23, 2012.

No. A-11-457: **State v. Candler**. Petition of appellant for further review denied on December 21, 2011.

No. A-11-458: **State v. Smith**. Petition of appellant for further review denied on September 14, 2011.

No. A-11-460: **Murphy v. Murphy**. Petition of appellant for further review denied on June 6, 2012.

No. A-11-483: **Houchin v. Houchin**. Petition of appellant for further review denied on April 25, 2012.

No. A-11-489: **Dulaney v. Drivers Mgmt**. Petition of appellee for further review denied on May 9, 2012.

No. A-11-503: **Hillard v. Sorenson**. Petition of appellant for further review denied on September 21, 2011.

No. A-11-506: **State v. Allen**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-507: **State v. Balvin**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-512: **Crawford v. Crawford**. Petition of appellant for further review denied on June 13, 2012.

No. S-11-535: **In re Interest of Ashley W**. Petition of appellant for further review sustained on May 16, 2012.

No. A-11-549: **Citta v. Facka**, 19 Neb. App. 736 (2012). Petition of appellant for further review denied on June 13, 2012.

No. A-11-554: **State v. Billups**. Petition of appellant for further review denied on December 14, 2011.

No. A-11-555: **State v. Parker**. Petition of appellant for further review denied on February 2, 2012.

No. A-11-557: **State v. Holladay**. Petition of appellant for further review denied on February 23, 2012.

No. A-11-565: **In re Interest of Marcus C. et al**. Petition of appellant for further review denied on June 13, 2012.

No. A-11-589: **Doe v. Health & Human Servs**. Petition of appellant for further review denied on October 26, 2011.

No. A-11-594: **In re Interest of Akol M. et al**. Petition of appellant for further review denied on May 16, 2012.

No. A-11-596: **State v. Simpkins**. Petition of appellant for further review denied on November 9, 2011.

No. A-11-600: **State v. Frazier**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-604: **Bonn v. City of Omaha**, 19 Neb. App. 874 (2012). Petition of appellant for further review denied on June 22, 2012, as untimely filed.

Nos. A-11-605, A-11-609: **State v. Bonham**. Petitions of appellant for further review denied on January 25, 2012.

No. A-11-606: **In re Interest of Haley P**. Petition of appellant for further review denied on March 14, 2012.

No. S-11-629: **State v. Kitt**. Petition of appellant for further review sustained on June 20, 2012.

No. A-11-640: **State v. Livingston**. Petition of appellant for further review denied on December 21, 2011.

Nos. S-11-659, S-11-660: **In re Interest of Zylena R. & Adrionna R**. Petitions of appellant for further review sustained on June 6, 2012.

No. A-11-703: **State v. Webster**. Petition of appellant for further review denied on April 18, 2012.

No. A-11-711: **State v. Kolter**. Petition of appellants for further review denied on January 11, 2012.

No. A-11-722: **Morehead v. Morehead**. Petition of appellant for further review denied on June 20, 2012.

No. A-11-728: **State v. Tyma**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-751: **In re Interest of Deziree K. et al**. Petition of appellants pro se for further review denied on May 23, 2012.

No. A-11-782: **In re Interest of Addison F. et al**. Petition of appellant for further review denied on May 16, 2012.

No. A-11-800: **State v. Stuart**. Petition of appellant for further review denied on May 9, 2012.

No. A-11-832: **In re Interest of Elijah F**. Petition of appellant for further review denied on June 6, 2012.

No. A-11-833: **In re Interest of Penelope F**. Petition of appellant for further review denied on June 6, 2012.

No. A-11-849: **Castonguay v. Department of Corr. Servs**. Petition of appellant for further review denied on February 15, 2012.

No. A-11-854: **State v. Rauch**. Petition of appellant for further review denied on June 6, 2012.

No. A-11-861: **Bornhoft v. Bornhoft**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-865: **Onuachi v. Western Waterproofing Co**. Petition of appellant for further review denied on March 14, 2012.

No. A-11-928: **State v. Marshall**. Petition of appellant for further review denied on March 28, 2012.

No. A-11-937: **Gallagher v. Dolt**. Petition of appellant for further review denied on March 20, 2012. See § 2-102(F)(1).

No. A-11-956: **State v. Njokanma**. Petition of appellant for further review denied on March 14, 2012.

No. A-11-967: **State v. Hughes**. Petition of appellant for further review denied on June 6, 2012.

No. A-11-998: **Caton v. Houston**. Petition of appellant for further review denied on April 18, 2012.

No. A-11-1011: **State v. King**. Petition of appellant for further review denied on June 13, 2012.

No. A-11-1036: **State v. Lewis**. Petition of appellant for further review denied on April 13, 2012, as untimely filed.

No. A-11-1038: **State v. Reichert**. Petition of appellant for further review denied on June 13, 2012.

No. A-11-1075: **State v. Thompson**. Petition of appellant for further review denied on April 18, 2012.

No. A-12-003: **Payne v. Department of Corr. Servs**. Petition of appellant for further review denied on May 9, 2012.

Nos. A-12-049, A-12-051, A-12-052: **State v. Kulm**. Petitions of appellant pro se for further review denied on June 19, 2012, as untimely.

No. A-12-102: **Cook v. City of Norfolk**. Petition of appellant for further review denied on June 6, 2012.

No. A-12-214: **State v. Workman**. Petition of appellant for further review denied on May 18, 2012, as filed out of time.

Nebraska Court of Appeals

# In Memoriam

## Judge Theodore Carlson

Nebraska Supreme Court Courtroom
State Capitol
Lincoln, Nebraska
June 20, 2012
1:30 p.m.

Proceedings before:
COURT OF APPEALS
Chief Judge Everett O. Inbody
Judge John Irwin
Judge Richard Sievers
Judge Frankie Moore
Judge Michael W. Pirtle

In attendance:
SUPREME COURT
Chief Justice Michael G. Heavican
Justice William M. Connolly
Justice Kenneth C. Stephan
Justice Michael McCormack
Justice Lindsey Miller-Lerman
Justice William B. Cassel

Judge Theodore Carlson

# Proceedings

CHIEF JUDGE INBODY: Good afternoon. The Nebraska Court of Appeals is sitting today in a special ceremonial session to honor the life and memory of our friend and colleague Judge Theodore L. Carlson. My name is Everett Inbody and I will serve as the presiding judge today. We appreciate the Nebraska Supreme Court sitting with us at this special ceremony. To my right is Chief Justice Michael Heavican. Next to him is Justice William Connolly, who is a former member of the Court of Appeals. Justice Kenneth Stephan is sitting next to him. Justice Michael McCormack is sitting with the presenters. And we will be hearing from him in a few moments. Next to Justice Stephan is Justice Lindsey Miller-Lerman, who is also a former member of the Court of Appeals, and when she was appointed to the Supreme Court, Judge Carlson took her place on our Court. Judge William Cassel is then at the end, and he formerly served on the Court of Appeals with Judge Carlson.

I would also like to introduce my colleagues on the Court of Appeals. To my left is Judge Richard Sievers. Next to him is Judge John Irwin. Next to him is Judge Frankie Moore. And then at the end on my right is Judge Michael Pirtle. Judge Pirtle was appointed to take Judge Carlson's place on our Court.

On behalf of the Court of Appeals, I express our thanks to the Supreme Court for allowing us to have this ceremony here today in their courtroom. It is always an honor to sit in this courtroom and makes this ceremonial session even more special. Several months ago, the Court of Appeals decided that we would like to have a special ceremonial session to remember Judge Carlson, and Judge Pirtle immediately volunteered to organize this ceremonial session, and I thank him for his good work.

I also want to recognize Janet Hammer — excuse me, Janet Bancroft — same person, different name —

(Laughter.)

— and the staff of the Court Administrator's Office for their efforts behind the scenes. I appreciate all they have done and thank them for their assistance.

One of the tasks that Judge Pirtle had was to contact a person who would act as the moderator to introduce the speakers that will appear at this special proceeding. Eugene Hillman is a 1974 graduate of the Creighton School of Law and is currently a partner in the Omaha law firm of Hillman, Forman, Childers and McCormack. He has known and worked with Judge Carlson since the '70s. We are pleased that he has agreed to serve as the moderator today. The Court recognizes Eugene Hillman.

Good afternoon.

MR. HILLMAN: Good afternoon.

CHIEF JUDGE INBODY: You may proceed whenever you're ready.

MR. HILLMAN: Thank you.

Chief Judge, members of the Court of Appeals, and Chief Justice and members of the Supreme Court, I am indeed honored to serve as the moderator on this occasion in memory of the life and service of Judge Theodore Carlson.

Before introducing our guest speakers, I'd like to take a moment to share some of my own recollections of Judge Carlson. When I was thinking about appearing here today and on reflection, I think a description used by Northwestern head football coach, Pat Fitzgerald, applies to Judge Carlson. Last fall when he was asked by a reporter after Northwestern's win over Ted's beloved Cornhuskers, whether it was Northwestern's greatest road win ever, he replied, "It's always best to be a humble winner." To me, that's what Ted Carlson was, a humble winner. I don't mean to say the Judge didn't like to talk, because those who knew him know otherwise.

(Laughter.)

But his conversation was never about him or his doings or his decisions. And that, notwithstanding, he decided, I dare say, thousands of cases over his many years of service from minor

traffic infractions to major civil disputes and cases involving heinous crime and capital punishment.

I first met Ted Carlson when I was a young law clerk at the then firm of McCormack, Cooney, and Mooney, and he was a young judge on the Omaha Municipal Court. Even then his conversation was always directed to and about me and my family, never himself. Through the years, he was always genuinely interested in the lives and families of his friends and acquaintances. It was never about him. Let me give you an example. I went to see him in the hospital on Christmas Day, 2010. At the time, he'd been diagnosed with terminal cancer. Debbie was there, Zack was there, along with their dog, Molly, which surprised me but Molly was in the room also. After an exchange of greetings and an introduction to Molly, he said to me, "Now, you go home and be with your family." I saw him again over the next few months, but all too soon he was gone. Nebraska lost an outstanding jurist and a humble winner.

Our first speaker today is the Honorable Michael McCormack, Justice of the Nebraska Supreme Court. Justice McCormack was a law school classmate of Judge Carlson's and they were longtime close personal friends. He's been a member of the Nebraska Supreme Court since 1997, and prior to that he was a law partner of mine in the Omaha law firm of McCormack, Cooney, Mooney, Hillman, and Elder.

Justice McCormack?

JUSTICE McCORMACK: Thank you, Gene.

CHIEF JUDGE INBODY: Good afternoon, Justice McCormack.

JUSTICE McCORMACK: Judge Inbody, Chief Justice, members of the Supreme Court, members of the Court of Appeals, I am truly honored to have been asked to speak today in this memorial service for my dear friend of almost 50 years, Ted Carlson. Ted Carlson, Justice Bill Connolly, Mike Mooney, we were all classmates at Creighton Law School.

Ted was a very interesting guy. He was very outgoing. Liked to talk, as Gene said. And he was also a very bright guy. I think he graduated second in our class. I used to like to kid him, you know, that he never spent a dime on tuition.

He went to the University of Nebraska — it was University of Nebraska at Omaha then — it was University of Omaha, on a full scholarship and then he went to Creighton University Law School on a full scholarship. That's how bright he was. He was able to obtain these scholarships. He applied that throughout his career to the law business for the short time he was in it, and to his long, long judicial career. I think he was probably a judge as long as anybody in the state of Nebraska. It was over 40 years, I believe. When he was appointed, he was just over the minimum age for appointment as a judge and he was appointed as a judge in the Municipal Court in Omaha. Prior to that, when he got out of school — Teddy always liked San Francisco and he always wanted to travel and he went out to San Francisco and worked for the Bank of America as a trust officer for a while, about a year. Then he came back and he went with a law firm of Miller, Moldenhauer, and Vandenack in Omaha. I think Keith Miller is the only person in that whole firm who's still alive today. He then left there and he became a city prosecutor. And in those days down at 11th and Dodge, the Omaha Municipal Court, it was quite a place. Teddy and Gary Buchino, famed Gary Buchino, were the two prosecutors. Dick Dunning came along in there somewhere after that.

After a few years of that, Teddy, he got to know a guy by the name of Pat Cooney, who became a partner of mine at a later time. Pat Cooney was one of the campaign managers for Jim Exon. Pat really liked Teddy. He thought a lot of him. He convinced Governor Exon to appoint Ted to the Municipal Court at a very early age, I want to say 30 years old. Teddy served on the Municipal Court for several years, and then the Municipal Court was merged into the County Court. Now, his biography says he was never a county court judge, and I disagree with Janet Bancroft about that.

(Laughter.)

And the reason I remember that is that he bitched continuously about how great the benefits were with the City of Omaha — the health insurance, they paid for his Bar dues, he got to take a lot of trips to conventions and stuff — and how tight the

State was. Once he became a State employee, he didn't get any of that.

(Laughter.)

He was a county judge for a while and then Governor Kerrey appointed him to the district bench where he served for several years. He served with Judge Coffey who's going to be one of the speakers here today.

When there was an opening on the Court of Appeals, that was, I think when, Lindsey, when you were appointed to the Court — to the Supreme Court, Teddy applied for that. And Governor Nelson appointed him to that role when he joined the rest of you in serving on the Court of Appeals and he served that until the day he died.

Ted was a very outgoing person. He used that awesome intellect of his that saved him all that money of tuition. When the rest of us were working to pay tuition, he could keep his money in his pocket. He used that throughout his career to decide cases and to always be fair and honest with all the people that appeared in front of him.

I traveled extensively with Teddy. Teddy didn't get married until late in life, in his 40s. His wife, Debbie, is here today, and his brother, Jim, his son, Zack, who is in law school at Creighton University, I believe is out of the country and is not able to be here with us today. But prior to his marriage, I traveled extensively with him. On these Creighton trips, we went all over the world together.

Teddy and I had lunch almost every week at least, together, and I still find myself grabbing for a phone and I'll call up Teddy and see what he's doing for lunch. It's hard to break an old habit.

For myself and for, I think the judiciary as a whole, Debbie, we thank you. We thank you very much for sharing Teddy with us and we're all the better for it. Thank you.

CHIEF JUDGE INBODY: Thank you, Justice McCormack.

Mr. Hillman?

MR. HILLMAN: Well, first of all I have to respectfully disagree with my former partner. I think I'm right, as usual, and he's not right.

(Laughter.)

I researched the County Court System versus the Omaha Municipal Court System and according to the red books, the statutes, the County Court merged with the Municipal Court on July 1st, 1985, and I believe Judge Carlson began service as a district judge in 1983. I think Janet would agree with me.

CHIEF JUSTICE McCORMACK: Bad memory.

(Laughter.)

MR. HILLMAN: Janet would agree with me that that's what his judicial bio says.

So, our next speaker is the Honorable J. Michael Coffey. He's a judge of the District Court of Douglas County. Judge Coffey has served as a district judge for the past 14 years and prior to that was a partner in the Omaha law firm of Staubee, Coffey, Schotts, Swinson, and Daugherty. While on the district bench, he served a number of months with Judge Carlson before Judge Carlson was appointed to the Court of Appeals. He, too, was a close personal friend of Judge Carlson, and I might also add that Judge Coffey is a law school classmate and a friend of mine.

Judge Coffey?

JUDGE COFFEY: Thanks, Gene.

CHIEF JUDGE INBODY: Good afternoon, Judge Coffey.

JUDGE COFFEY: Good afternoon, Judge, thanks. May it please the Court, it's hard to get rid of that.

(Laughter.)

Anyway, I'd like to acknowledge as Mike did, Debbie, Ted's brother, other members of his family, and all his friends and colleagues. I haven't known Ted as long as Judge Connolly or Judge McCormack or Mike Mooney, because they're a lot older than I am.

(Laughter.)

But I first met Ted in the summer of 1974 after I'd gotten out of law school with Gene. And by the way, we went to school together, graduated together, but there was a great distance between our rankings in the class. And I'll let you guess as to who was on top.

(Laughter.)

But I had started with Emil Sodoro's firm and that summer I had my first trial. It was a subrogation case and it was in the Municipal Court, which was in the old Elk's Building, because they were still constructing the City/County Building. The courtrooms were very small. They were latrine green. You sat at a small table. Counsel opposite each other with the judge on sort of a bench. At any rate, my opponent was another classmate of Gene and mine, Bob O'Connor, and I believe it was his first trial, too. And of course, he had the best defense you can have to a petition, which is a counterclaim. So we tried the case, and for whatever reason, O'Connor thinks — I'm sorry, I'm not used to having you behind me like this, but I apologize for that — O'Connor thinks he's a comedian. So during this trial, he starts making faces across the table at me. Things like this, and —

(Laughter.)

— I'm going, knock it off, and I don't know — this is the first time I've met Ted when I really met him and I don't know if he can see this or not, but I'm really getting nervous. We finish up and, by God, I was so relieved that Ted leaves the bench, goes into his chambers, which was a hallway five feet wide, also latrine green, about ten feet deep. And we're leaving and I'm just happier than heck and then I hear this, "Can I see counsel in chambers?" So I turn around and I start giving it to O'Connor while we're walking back. We get in, we sit down, and Ted puts his robe away and the first thing he says to us is, "Let me give you some tips." Well, obviously, that caused another moment of great relief and he did give us tips. And quite honestly, that tips session I believe lasted longer than our trial.

(Laughter.)

But from then on, Ted and I started to develop a friendship which continued until April of last year. I think part of the reason that that happened was, even though he was considerably older than I, we were both single. And we would get together occasionally and have a couple of beers and then try to find some way to meet some nice young ladies, to the point that one night in a blizzard, Ted drove the two of us to a fashion

show rehearsal in that car of his. You probably can remember the make of it, but it was huge.

MRS. CARLSON: The big blue Buick?

JUDGE COFFEY: Yes. And he's bound and determined we're going to get to Elaine Jabenis's, Jon Jabenis's mother's fashion show rehearsal. Well, we got there, and we saw a lot of ladies, but as usual, we met none.

(Laughter.)

So that's how you became a friend of Ted Carlson's. You enjoyed his company. He enjoyed yours, and as the years progressed, you just became closer to him if you were a friend. Well, our nights out about on the town changed when he met Debbie. And I knew from my experiences with him that this was a little different. And if things went the way Ted wanted, this was going to be a long-term relationship, which it was. I think that Ted's happiest day was when he married Debbie. His next happiest day was when his son, Zack, was born. I don't think I've ever seen a guy so proud and happy to be a father. That's another aspect of Ted. He was a very good husband and an extremely good father.

Now, Ted did like to talk. If you had a 10:00 hearing, you knew that you could not have anything else scheduled until 11:30. There were two reasons for this. Your 10:00 hearing wouldn't start until 10:30, and even though it was set for 15 minutes, it wouldn't end until 11:00. And if it was Nebraska football season, it wouldn't end until 11:15. Now, part of that problem is that Ted's Nebraska football season ran from September 1st of each year to August 31st of the next.

(Laughter.)

It didn't matter if you went to Notre Dame or LSU, you were going to listen to his Nebraska football stories.

Now, when he got appointed to the Court of Appeals, we were very proud of him, because I had been able — I would have the honor to serve with him for, like, six or seven months on the district bench. But the down side for Ted was that we couldn't fit him in and he wanted desperately to be in our courthouse. We couldn't find space for him. We had to put him in the City/County Building on the seventh or eighth floor

somewhere up there. And I know that the social interaction that he loved so much with the lawyers and the judges kind of ended then. He wasn't able to come over and talk to us too much, didn't see the lawyers that much, even though I think he was very proud and happy to be on that bench.

Now, his propensity for speech was quite amazing, but it was also amazing that he could do the things he did, socialize the way he did, and still manage a heavy docket, which is another aspect of Ted. He was a good and fair judge. He was a mentor to me, as I mentioned my first trial. But when I was appointed to the district court bench, he made sure that I was involved in judges' meetings where certain big issues were being decided even before I'd actually been sworn in. When I got sworn in and took my position, he was willing to answer questions, give me advice. That was another aspect of Ted. He didn't mind spending time with young lawyers and new judges.

Ted was diverse. Two of his favorite places to eat lunch were the Amarillo Barbecue joint down in Bellevue, and any Hooters that we happened to drive by.

(Laughter.)

He really loved their wings.

In closing, I will say as he would, "My friend, thanks for your friendship, your service, and the memories." Thank you.

CHIEF JUDGE INBODY: Thank you, Judge Coffey.

Mr. Hillman?

MR. HILLMAN: You know that class ranking thing that Judge Coffey referred to? Well, he won, but we were both holding up a lot of other people.

(Laughter.)

Our final speaker this afternoon is Michael Mooney. Mr. Mooney is well known I'm sure to all of you as a principal in the Omaha law firm of Gross & Welch, and before that was a law partner of mine. He, too, was a law school classmate of Judge Carlson's, and they, too, were longtime personal friends.

Mr. Mooney?

MR. MOONEY: Thank you, Gene.

CHIEF JUDGE INBODY: Good afternoon, Mr. Mooney.

MR. MOONEY: Good afternoon, Your Honor. May it please the Courts, I guess I've never said that before. Members of Judge Carlson's family, and all his friends that are here, acquaintances. I'd like to share a few memories of Ted. My first meeting with Ted was when Justice McCormack and Justice Connolly and Ted and I started what became the 1963 graduating class at Creighton University. Now, I have two sons who went to law school and they married two girls who went to law school in more modern times. And in the modern times, law school is quite different from what it was when we went to law school. For example, competition for jobs is impossible these days, and as a result, class ranking is much more important to the kids today than it was to the Creighton class of 1963. And although Judge Carlson ranked very high in our class, it spoke to his personality that he worked his way through University of Nebraska at Omaha, and I think part of the time when he was in law school, at the Stroh's Brewery delivering beer.

(Laughter.)

Ted was just an ordinary guy in law school and we had a great class. I'm sure most of you know former — or retired Dean Rod Shkolnick. Rod Shkolnick's first teaching experience in law school was the class of 1963 at Creighton University. He started teaching the year we were freshmen. And I must say, I think we did a good job of educating him. After all, he became dean.

(Laughter.)

Ted was always a good conversationalist. You heard that he was a good talker, but in the early days, before he got on the bench, he was a conversationalist. You could literally carry on a conversation with him. When he got on the bench, he was severely limited as to what he could say, mostly sustained or overruled. And I think that was the impetus for him becoming a great talker. When he wasn't on the bench, he could talk. And we all knew it and we all loved it.

He was a football fan emeritus. I mean, Nebraska football, as Judge Coffey said, was his principal hobby, talked about it constantly. A little known fact about Ted is that he kind of liked

golf at one point in his life, and I actually played golf with him one day. And it was painful.

(Laughter.)

You've all seen Jim Furyk's swing on the professional tour today which I've seen compared to the ampersand. Well, Judge Carlson had a very peculiar swing, too. And he wondered if I could help him. Well, in those days, one of the top professionals was a fellow named Julius Boros, and Julius Boros had the most beautiful slow, soft swing that propelled the ball way down the fairway. And he wrote a book, and the book was called *Swing Easy, Hit Hard*, which I had purchased and had in my library. So I thought, maybe, I could loan the book to Ted and he could learn something about golf from the book. Sometime later, I asked if he was finished because I'd like to have it back, and he said, "Yeah, I'll bring it to you." And when he did, the corners — it was a hardbound book and the corners of the book were all chewed. I suspected he did that as he tried to play golf, but he claimed the puppy caught —

(Laughter.)

Well, Ted married late in life. I think he was 49 when Zack was born, and I got to tell you, he became a great father and he's a good husband. And, you know, can you imagine at age 51 or 2 going to PTA meetings and teacher's conferences, coaching little kids in their athletics? He did it all. He was a great father. And to Ted and Debbie's credit, Zack has grown up to be a fine young man.

The Omaha Bar Association has had several folks in and associated with it who like to party. Ron Henningsen was the principal example. Threw many parties a year. Ted, maybe following that example, used to have a Christmas party at his house. He and Debbie would have a Christmas party. You all know that Ted's heritage was Swedish. Ted's mother, Florence, would make this homemade sausage that's a Swedish sausage. It's a traditional Swedish Christmas recipe and it's called potatis korv, k-o-r-v, which translated means potato sausage. I absolutely love this sausage, see. And so, years later, I talked to Ted about getting the recipe, because I started making sausage as a hobby and I got the recipe from Debbie and I've made it several times. It's just beef and pork and potatoes and

onions and salt and pepper and sometimes a little allspice. That's the whole number of ingredients. And you grind them all up, stuff it in a casing and boil it, serve it with a little mustard on a piece of bread, and it is outstanding. It's become a tradition in my family and that's one of the things that will always remind me of Judge Carlson and his wonderful mother who made that sausage.

My last experience with Judge Carlson on the judiciary was an appeal that I had from — that I was the appellant — appellee. I had won a summary judgment and the appellant was trying to get that overturned. And we came to the Court of Appeals for argument and there sat Ted on the panel. Now, our law school class started out with 52 or 3 or 4 people as I remember, and we graduated 28. As a result of that attrition, the 28 of us got pretty close to each other. We were pretty collegial. And that continued, continues to this day, especially the Omaha folks, the ones who did stay in Omaha. We still get together periodically and have lunch or maybe a cocktail or something. And Teddy was one of us. So here he is sitting on the end of the bench up here on the Court of Appeals and I'm up giving the appellee's argument and waxing eloquently when Judge Carlson interrupted me with a smile on his face that I recognized that I was about to get teased in some fashion, and he said, "Mr. Mooney, what is the appellant's best argument?" I said, "Judge, I'm not going to make the other argument for them. They've got their own lawyer." And he says, "But you got to answer the question," with that grin on his face.

(Laughter.)

I'll never forget that. It's never happened to me since, it's never happened to me before, and I've been here a few times. He let me off the hook, though.

I think the last time that I saw Teddy in person, I was coming out of my oncologist's office. I'd been in for a shot for my prostate cancer and as I was walking out, Ted was walking in. And I was shocked to see him. And of course, we spoke for a second. I said, "You got trouble, Ted?" And he said, "Yeah, I do and it's not good." Before I got back to my office, I got a phone call, Ted on the cell phone. And he told me that he'd been diagnosed with esophageal cancer and the prognosis was

not good, and he asked me if I would keep it quiet because he wasn't sure how things were going to go. So I may have been, other than his family, one of the first few people that knew about it. I think Judge McCormack knew about it before I did, but I was just shocked. And that was in November of 2010, and he was gone in April of the following year. Much too fast.

Judge Carlson was a good father, a good husband, a good man, a fair man, and a good judge. And I miss him. Thank you very much.

CHIEF JUDGE INBODY: Thank you, Mr. Mooney.

MR. HILLMAN: Thank you, Mike.

That concludes our presentation of speakers this afternoon. At this time, Judge, I'd like to move that the foregoing remarks be memorialized in the permanent records of this Court and that a copy of those records be presented to the family of Judge Theodore L. Carlson.

CHIEF JUDGE INBODY: Thank you, Mr. Hillman. The motion of Mr. Hillman is granted. Today's entire proceeding will be transcribed and copies will be distributed to the family members and to members of the bench. In addition, the entire proceeding will be published in a volume of the *Northwestern Reporter*. The *Northwestern Reporter* is a national publication that consists of several hundred volumes. All of the published cases by the state appellate courts in the seven-state area are included in the *Northwest Reporter*. This includes all of the published opinions that are written by the Nebraska Supreme Court and the Court of Appeals, including opinions written by Judge Carlson. Now, in addition to those opinions, there will be a transcript of this special ceremonial session.

Judge Carlson is the second member of the Court of Appeals to pass away while in office. Judge Wesley Mues, who passed in 1999, served with Judge Carlson for four years. By conducting this special ceremonial session to honor the life and memory of our friend and colleague, Judge Theodore L. Carlson, we know that his contributions will be memorialized for future generations.

The Court thanks all of the family and friends of Judge Carlson, in addition to the lawyers and members of the

judiciary who are here today. This will conclude this special ceremonial session to honor Judge Carlson. I would invite all of you to stay for as long as you would like to greet and visit with each other.

The special ceremonial session of the Court of Appeals is now adjourned, thank you.

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# JAMES JELINEK ET AL., APPELLEES, V. LAND O'LAKES, INC., DOING BUSINESS AS HYTEST SEEDS, APPELLANT.

797 N.W.2d 289

Filed May 10, 2011. No. A-10-367.

1. **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.
2. **Directed Verdict: Evidence: Appeal and Error.** 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. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
3. **Uniform Commercial Code: Warranty.** The existence and scope of an express warranty under the Uniform Commercial Code are ordinarily questions to be determined by the trier of fact.
4. ____: ____. The existence of an express warranty depends upon the particular circumstances in which the language is used and read. A catalog description or advertisement may create an express warranty in appropriate circumstances.
5. ____: ____. The trier of fact must determine whether the circumstances necessary to create an express warranty are present in a given case. The test is whether the seller assumes to assert a fact of which the buyer is ignorant or whether the seller merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment.
6. ____: ____. Disclaimers of warranty made on or after delivery of the goods by means of an invoice, receipt, or similar note are ineffectual unless the buyer assents or is charged with knowledge as to the transaction.

Appeal from the District Court for Box Butte County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Roger G. Steele, of Steele Law Office, for appellant.

Steven W. Olsen and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellees.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

## INTRODUCTION

James Jelinek, Kenneth Jelinek, James Jelinek as personal representative of the estate of Edward Jelinek, and Kirk Keder (collectively the Appellees) purchased "sorghum-sudangrass" seed from a dealer, D and S Hansen Farms, Inc. (Hansen Farms). The seed was produced and marketed by Land O'Lakes, Inc., doing business as Hytest Seeds (Hytest). The Appellees brought suit against Hansen Farms and Land O'Lakes in the district court for Box Butte County, claiming the seed did not produce the warranted yield. Following a jury trial, the court entered judgment for each of the Appellees against Land O'Lakes. Judgments for dismissal were entered in favor of Hansen Farms. Land O'Lakes has appealed to this court, assigning error only to the district court's denial of its motion for directed verdict. Because we find that reasonable minds could differ with respect to the existence of a warranty concerning the seed, we find no error in the denial of the motion for directed verdict, and we affirm.

## BACKGROUND

*Initial Pleadings.*

In the Appellees' amended complaint, they alleged that in 2002, upon Hansen Farms' recommendation, they purchased "Hytest BMR Sorghum Sudan grass seed," which was produced and marketed by Land O'Lakes; that Hansen Farms and Land O'Lakes warranted the seed to be free from defects and fit for the particular purpose intended by the Appellees; that Hansen Farms and Land O'Lakes expressly warranted that by using normal farming practices and proper maintenance, the Appellees would obtain yields of 4½ tons per acre; that the seed was defective, producing reduced yields and an inferior quality crop; and that the Appellees suffered damages as a result

of the defective seed and Hansen Farms' and Land O'Lakes' breaches of warranties. In Land O'Lakes' answer, it alleged, among other things, that the Appellees were barred from recovery because they failed to notify it of any alleged breach after they discovered or should have discovered any alleged breach. Land O'Lakes also alleged that the Appellees misused the seed by planting it in soil with a pH level that was greater than recommended in the Hytest brochures or pamphlets or by failing to provide adequate water during a period of severe drought. Finally, Land O'Lakes alleged that certain text on the seed bags and on the invoices from Hansen Farms excluded all warranties, express or implied, of merchantability, fitness for a particular purpose, or otherwise and that such text on the seed bags contained a limitation of damages which excluded incidental or consequential damages, including loss of profits.

*Trial.*

A jury trial was held on February 10 through 13, 2010. Land O'Lakes made a motion for directed verdict at the close of the Appellees' evidence, which motion was denied by the district court. Land O'Lakes renewed its motion at the close of all the evidence, and the court again denied the motion.

*The Appellees.*

The Jelineks are longtime family farmers from Alliance, Nebraska. James is Kenneth's son, and he is also the personal representative for the estate of his grandfather, Edward. Keder farmed in the Alliance area from 1982 until 2003. The Appellees had all purchased seed from Brad Hansen of Hansen Farms for many years at the time of the events in question.

*Hansen's Relationship With Land O'Lakes.*

Prior to 2002, Hansen Farms had never sold the Hytest sorghum-sudangrass seed. Hansen learned about the seed from a Nebraska farmer, who indicated that it produced a good yield in a dry year. The farmer referred Hansen to Rick Madl, the district sales manager for Land O'Lakes at the time. Hansen thereafter met with Madl and a person who was involved in the breeding of the Hytest seed. The contents of the Hytest brochure were discussed during the meeting. Hansen agreed to

Hansen Farms' being a sales distributor for Land O'Lakes in the Alliance area. Prior to that time, Hansen Farms had not sold much sorghum-sudangrass seed, but Hansen expected it to be a crop that farmers would turn to as an alternative type of forage during a drought when hay prices were high.

*Sale of Seed and Brochure Language.*

James met with Hansen the first week of April 2002 to discuss the Hytest seed. Hansen showed James the Hytest brochure and discussed with him the portion which reads in part as follows:

> HT311 BMR PPS-SS is another forage breakthrough from [Hytest] offering the dual benefits of the Brown MidRibbed trait and Photo-Sensitive gene. This Double-Stacked sorghum-sudan hybrid provides all the benefits of BMR including exceptional yield potential, significant increase in palatability and forage fiber digestibility over normal sorghum-sudan. . . . Highest yield and quality have been obtained on a 65 to 70 day first cut schedule.
>
> . . . .
>
> • Exceptional yield potential and high quality forage.
> • Extended window of harvest.
> • More PROFIT $$$ per acre return.

The second page of the brochure contains a chart, based upon "1999 Texas Research Data," showing yield comparisons between the Hytest seed and other varieties. The second page of the brochure mentions the seed's "[l]ow water requirement" and "good drought stress tolerance," and again references its "[e]xceptional high yield potential." The brochure further discusses soil temperature at planting and planting depth and warns against planting in soils "with pH greater than 7.5 to 8.0" as "[c]hlorosis can be a severe problem." Chlorosis will stunt a crop, retard its growth, and cause it to yellow. The brochure also warns against large nitrogen applications prior to expected drought periods.

James stated that in discussing the brochure, Hansen told him that the seed was "a very high yielder" and was "producing very good" and that it had "the potential for a very good net income." With respect to the statements in the brochure

that the seed had "[e]xceptional high yield potential" and had "[s]uperior forage quality," James testified that Hansen reported Land O'Lakes had seen "good results down south" and were "having very good tons" and "very high yields." Although James agreed that Hansen did not expressly warrant, promise, or guarantee anything in his discussion about the seed with James, James testified that Hansen represented to James that, according to Madl and Land O'Lakes, the seed was going to get "double the yields."

James testified about the yield comparison chart shown on the second page of the brochure, showing the Texas research data. The chart shows that the seed had a "drymatter yield" of 15,600 pounds. James testified that 15,600 pounds is about 8 tons and is almost double the yield over standard sorghum for two cuttings. James testified that traditional sorghum yields 2 to 2½ tons per cutting. James assumed that Hytest had researched the compatibility of the seed for Nebraska. James was persuaded to purchase the seed due to the statements in the brochure, Hansen's emphasis on the yield potential, and Hansen's use of the seed on his own farm. The seed cost about one-third more than traditional seed, which cost James was willing to pay to receive a higher yield.

After James met with Hansen, James discussed the brochure with Kenneth, and they decided to order the Hytest sorghum-sudangrass seed. Kenneth testified that he spoke with Hansen, who told him the seed had the potential to be "double in quantity." But Kenneth agreed that Hansen never explicitly guaranteed or promised a double yield.

Keder testified that in 2002, hay was worth a premium because of the drought and he was investigating other avenues of producing a crop. Keder testified that he spoke with Hansen at a local business where Hansen was promoting the sorghum-sudangrass seed. The district sales manager for Hytest, who Keder later learned was Madl, was also at this meeting. Hansen went through the brochure with Keder, discussing fertilizer needs, drought tolerances, the necessary ground temperature for planting, and planting depth. According to Keder, Madl said that with the Hytest seed, "it was not unreasonable to expect four and a half tons per cutting per acre." Keder

agreed that neither Madl nor Hansen said that a yield was promised, guaranteed, or warranted, but he stated that Madl told him "how fantastic it was and that they were getting super yields off it."

Hansen has been selling seed for over 20 years and sells seed, including seed for corn, wheat, grass, and soybeans, for five or six companies. Hansen testified that in his opinion, the Hytest brochure did not contain any language that promised, guaranteed, or warranted a particular yield. Hansen stated that "yield potential" means how seed would perform at its best under ideal or perfect conditions.

*Planting and Harvest.*

Kenneth's seed order was delivered on June 1 or 2, 2002, and planted during the first 2 or 3 days of June. James planted the seed on Kenneth's property. The ground was prepared, a dry fertilizer was applied to the soil, the seed was drilled to a depth of three-quarters of an inch to an inch, and the sprinklers were started at one-quarter of an inch of water every other day for three or four times, then slowed down the next week to three-tenths of an inch of water every 2 to 4 days until the crop started to come up. Kenneth's crop was slow in coming up, and by the end of June, the crop was "kind of erratic" with high spots, low spots, and a little "yellowing." At that point, nitrogen fertilizer was injected through the pivot system and the watering was increased. James testified that the nitrogen and watering helped "a little bit" with continued growth, but that the taller grass started to "lodge," or fall over, as it got "closer to waist high." Kenneth's crop was harvested during the third week of July. At that point, James had not discussed any problems with the crop with Hansen. In describing the first cutting of Kenneth's crop, James stated that it was not a good crop and did not yield 4½ tons. James described it as stunted in places, "laid back," and yellow, with some bare spots. After the first cutting, Kenneth's crop did start growing again.

James still had wheat on his property when Kenneth's grass seed was planted, so he had to wait until July to plant his seed. The seed was planted on James' and the estate's property

in late July or early August 2002. The seed was planted to a depth of an inch, and James followed a similar watering plan to what he used on Kenneth's crop. James observed that the seed planted on his property and the estate property was also slow and erratic in its growth. James described it as a "poor stand," with one field on the estate property that never came up. The crop on James' and the estate's property was very poor when compared to the crop of a neighbor who planted "traditional sudangrass."

During the third week of August 2002, James called Hansen, told him of the problem with all of the Jelinek sorghum-sudangrass crops, and asked him to contact Land O'Lakes. Hansen told James that he would inform Land O'Lakes. Hansen told James that he had similar issues in both the first and second stands of his own crop from the Hytest seed, with sparse growth, yellowing, and lodging. During several subsequent contacts, Hansen informed James that he had contacted Land O'Lakes, that Land O'Lakes was supposed to be sending a representative, and that he had observed the problems with the Jelineks' crops. A Land O'Lakes representative did not arrive until November 2002.

In the meantime, James simply continued to water the crop on his property and the estate property. Because fertilizer had been applied when the seed was planted, James did not feel that he needed to inject any nitrogen. Harvest of James' and the estate's grass, as well as Kenneth's second cutting, occurred between the last week of September 2002 and approximately October 10.

In March or April 2002, when the Jelineks were planning to plant the seed, they arranged for the sale of the grass at $100 a ton. By the end of October or the first of November, when the buyer needed hay, he was willing to pay only $60 or $65 per ton because of the poor quality of the grass. James calculated the Jelineks' losses based on an expected yield of 4½ tons per acre per cutting (i.e., 9 tons per acre for Kenneth because of two cuttings), the expected sale price of $100 per ton, the actual sale price of $65, and the actual yields received. James calculated his net loss at $165,053, the estate's net loss at $114,607.50, and Kenneth's net loss at $105,426.25.

Keder ordered his seed from Hansen and planted it in mid- to late May 2002. He began watering the seed to germinate it and then kept watering it as needed. Keder testified that when the grass began to grow in June, there were a few thin spots and some yellowing, and that he was concerned about the vigor or early growth of the crop. He did nothing to try to stimulate the growth other than irrigation. The growth continued to be erratic, and around the first part of July, the grass started to lodge. Keder observed similar conditions in the field of another individual who had planted the seed. Keder's first cutting of the grass was in early to mid-July and yielded three-quarters of a ton to a ton per acre.

Keder testified that, prior to his first cutting, he had mentioned to Hansen a couple of times that the grass was not getting as tall as he thought it would. Keder admitted that in his answers to interrogatories, he did not state whether he "gave the defendant notice of any alleged breach" or "problem with the sorghum grass." Hansen testified that the first time he learned that Keder had any complaints with the seed was when his name showed up in the initial complaint filed in this lawsuit in March 2006.

After the first cutting, Keder observed some weeds beginning to grow, so he applied herbicide after the bales were removed and he began watering again to promote regrowth. The grass began to grow again, and by the end of August, Keder observed similar issues with yellowing and erratic growth. In September 2002, the grass again began to lodge. At that point, Keder swathed the grass so that it could be baled. The yield of the second cutting was similar to the first. Keder testified that during the second growth period, he again mentioned to Hansen that the grass was not growing and looked like it would lodge again. According to Keder, Hansen reported that he had yellowing in his own crop.

Keder testified that he had an agreement to sell the grass for $100 a ton to an individual who needed hay. He took a load of grass to this individual, who had to quit using the grass after one of his cows died because of high nitrate levels in the grass. Keder had the hay analyzed, which revealed high nitrate levels. Keder testified that he was then unable to market the

grass despite attempts to do so. Keder calculated his loss at $118,800 (based on an expected yield of 9 tons per 132 acres for two cuttings and the price of $100 a ton, but with an actual yield of 0).

*Other Factors Affecting the Appellees' Yield.*

There was evidence about other factors which may have affected the Appellees' losses, including the pH levels of the soil, nitrogen application, and drought. The record shows that 2002 was the second year of a drought in Box Butte County.

Soil samples taken from James' and the estate's property between 2001 and 2007 showed pH levels ranging from 7.5 to 8.0 (the acceptable range noted in the Hytest brochure), with the exception of one test showing a pH level of 8.1 on James' property in 2003. Land O'Lakes took additional soil samples from James' property in 2007, which samples all showed pH levels of 8.1 or higher. At trial, James expressed concern that Land O'Lakes had taken samples from higher ground, which contains greater concentrations of lime. Keder testified that the last pH test of his soil was in 2000 with a result of 7.9. Kenneth testified that the pH level in the field where he planted the Hytest seed was 7.7.

Dale Flowerday, a crop consultant with a doctorate in agronomy and soil fertility, testified for the Appellees. Flowerday was critical of the use of the brochure with Texas field data to promote the sale of a product in Nebraska. He also stated that the phrasing of the statement in the brochure regarding pH levels was ambiguous as to whether a farmer could plant in soils with pH levels that fell between 7.5 and 8.0. Flowerday would have been reluctant to grow sorghum-sudangrass in soils with a pH level of 7.5 or greater. According to Flowerday, pH levels, however, do not affect germination. Flowerday opined, based on his review of facts in this case, that pH levels had no effect on the germination issues in the Appellees' crops but could have had an effect on the growth of the plants. Because of the symptoms, he assumed that some of the problems were due to pH levels. After reviewing the relevant information, Flowerday eliminated as causes of the growth problems in this case any issues involving planting, irrigation, and fertilizer or

herbicide application. Flowerday testified that he had eliminated all other concerns or considerations and concluded that problems with seed germination led to the poor seedling growth and vigor. Flowerday agreed that weather is a critical factor to consider in determining why a crop fails and that various sources showed a very severe drought in Box Butte County in 2002.

Hansen testified that Land O'Lakes tested a sample of the sorghum-sudangrass seed kept at their plant from the same lot as the seed sold to the Appellees and that Hansen was told by Land O'Lakes that the testing showed the seed had good germination and good vigor, although Hansen never saw any written test results.

*Statements on Seed Bags.*

Land O'Lakes relies on an exclusion of warranties found on the Hytest seed bags, which exclusion states in part as follows:

> Notice to Buyer:
> Exclusion of Warranties
>
> Seller warrants that this seed conforms to the label description, as required by federal and state seed laws. Seller makes no other warranties, express or implied, of merchantability, fitness for a particular purpose, or otherwise.
>
> Limitations of Damages and Remedies
>
> Liability for damages for any cause, including breach of contract, breach of warranty, and negligence, with respect to this sale of seeds is limited to a refund of the purchase price of the seeds. This remedy is exclusive. In no event shall the seller be liable for any incidental or consequential damages, including loss of profits.

*Limitation of Warranties on Invoices.*

There is reference to a limitation of warranties on the invoices sent by Hansen to the Appellees as follows:

> Limited Warranty - In lieu of all other warranties, express or implied (including any implied warranty of merchantability or fitness for a particular purpose) and

> all other obligations or liabilities . . . Hansen Farms . . . warrants to the extent of the purchase price that the seeds we sell are as described by us on our container with recognized tolerances. Our liability, whether contractual for negligence or otherwise, is limited in amount to the purchase price of the seeds under all circumstances and regardless of the nature, cause or extent of the loss, and as a condition to any liability on our part, we must receive notice by registered mail of any claim that the seed is defective, 30 days after the defect in the seed becomes apparent. Seeds not accepted under these terms and conditions must be returned at once in original unopened containers and the purchase price will be refunded.

*Verdict and Posttrial Proceedings.*

On February 13, 2010, the jury returned verdicts against Land O'Lakes and in favor of James for $47,199; in favor of Kenneth for $34,983; in favor of James as personal representative of Edward's estate for $40,469; and in favor of Keder for $44,220. Verdicts of dismissal were entered in favor of Hansen Farms against all four of the Appellees. The district court accepted the jury's verdicts.

Land O'Lakes filed a motion for new trial, which was denied by the district court on March 23, 2010. Land O'Lakes subsequently perfected its appeal to this court.

## ASSIGNMENT OF ERROR

Land O'Lakes asserts that the district court erred in overruling its motion for a directed verdict.

## STANDARD OF REVIEW

[1,2] 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. *Walton v. Patil*, 279 Neb. 974, 783

N.W.2d 438 (2010). 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. *Id.* When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court. *Shepherd v. Chambers*, 281 Neb. 57, 794 N.W.2d 678 (2011).

## ANALYSIS

Land O'Lakes asserts that the district court erred in overruling its motion for a directed verdict. In this case, we must determine whether reasonable minds could differ on whether Land O'Lakes made any express warranties concerning the sorghum-sudangrass seed sold to the Appellees. In making this determination, we must resolve all factual issues in favor of the Appellees. See *Walton v. Patil, supra*.

[3] The existence and scope of an express warranty under the Uniform Commercial Code are ordinarily questions to be determined by the trier of fact. *Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 55 (1990). Pursuant to Neb. U.C.C. § 2-313 (Reissue 2001):

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make

> a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Land O'Lakes argues that the words "exceptional yield potential" and the yield comparison chart in the brochure are not an affirmation or promise of a specific yield that would be an express warranty. Land O'Lakes also takes issue with James' calculation of the yield potential.

[4,5] With respect to whether catalog descriptions or advertisements may create express warranties, the Nebraska Supreme Court has stated:

> "The existence of an express warranty depends upon the particular circumstances in which the language is used and read. . . . A catalog description or advertisement may create an express warranty in appropriate circumstances. . . . *The trier of fact must determine whether the circumstances necessary to create an express warranty are present in a given case. . . . The test is* '*whether the seller assumes to assert a fact of which the buyer is ignorant, or whether he merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment.*' (Citation omitted.) (Emphasis in original.)"

*Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 310, 363 N.W.2d 155, 161 (1985), quoting *Peterson v. North American Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984).

In *Peterson, supra*, the Nebraska Supreme Court considered whether the express warranty issue was properly submitted to the jury in connection with sales literature regarding the qualities of hybrid seed corn. The court in *Peterson* stated:

> In connection with the fact question here, the sale of hybrid seed corn is unusual in that it is delivered to the ultimate buyer-user in sealed bags, inspection of the seed by the buyer will generally not reveal any of its growing qualities, and the first notice of the seed's worth and performance is after planting and well into the growing season. Consequently, in the absence of a prior planting

> experience or other reliable information, the buyer may be justified to rely on the claims of the producers as more than puffing; it is a fact question. Here, plaintiffs had no prior knowledge of or planting experience with [the hybrid seed in question]. The express warranty issue was properly submitted to the jury.

218 Neb. at 263, 354 N.W.2d at 630. In the interest of conciseness, we will not repeat the statements found in the advertising materials in that case, but observe that the statements are similar to those found in the brochure in this case. See, also, *Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 55 (1990) (statements in letter from seller to buyer that roofing material would last 20 years constituted express warranty under Uniform Commercial Code); *Mennonite Deaconess Home & Hosp., supra* (representations contained in advertising brochure for roofing system designed, manufactured, and supplied by seller constituted express warranty under Uniform Commercial Code); *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973) (representations of load capacity in manufacturer's pamphlet constituted express warranty), *disapproved on other grounds, National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983).

Resolving the controverted facts in favor of the Appellees in this case, we find that reasonable minds could differ on the question of whether the statements contained in the brochure were assertions of "a fact of which the buyer is ignorant." The comparison chart in the brochure supports the conclusion that, at least based on 1999 Texas research data, the Hytest seed produced yields double the production of some other varieties. James' calculations of the yield potential were derived from the information in the brochure and were consistent with the representations from Hansen and Land O'Lakes that James could receive double the yield over traditional sorghum-sudangrass seed. The brochure also stresses that the Hytest seed is a "forage breakthrough," provides "[e]xceptional yield potential and high quality forage" with an "[e]xtended window of harvest," provides "[m]ore PROFIT $$$ per acre return," has "high quality over the entire growing season," is

"[h]ighly palatable," and has "[l]ow water requirement, good drought stress tolerance." These assertions were supported by Hansen's statements to the Appellees as well as by Madl's statements to Keder. Land O'Lakes stresses the fact that the words "warranty" and "guarantee" do not appear in the brochure, but it was not necessary for it to use such words or for Land O'Lakes to have a specific intention in order to create a warranty. The Appellees did not have previous experience with the Hytest seed. The express warranty issue was properly submitted to the jury.

Land O'Lakes argues that the warranty of fitness for a particular purpose, an issue also raised by the Appellees in their complaint, does not apply when goods are purchased and used for ordinary purposes. Because we have already determined that the issue of an express warranty was properly submitted to the jury, we need not further consider Land O'Lakes' arguments in connection with the implied warranty of fitness for a particular purpose. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

*Limitation or Exclusion of Warranties.*

Next, Land O'Lakes argues that the Appellees were aware of the limited warranty on Hansen's invoices and of the warranty exclusion on the seed bags. With respect to the exclusion or modification of warranties, Neb. U.C.C. § 2-316 (Reissue 2001) provides:

> (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.
>
> . . . .
>
> (4) Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy (sections 2-718 and 2-719).

Comment 1 to § 2-316 provides:

> This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties, express or implied". It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.

[6] In *Pfizer Genetics, Inc. v. Williams Management Co.*, 204 Neb. 151, 155, 281 N.W.2d 536, 539 (1979), the Nebraska Supreme Court stated:

> Although this court has not specifically addressed the question, other jurisdictions have generally held that disclaimers [of] warranty made on or after delivery of the goods by means of an invoice, receipt, or similar note are ineffectual unless the buyer assents or is charged with knowledge as to the transaction.

The court found this proposition to be an equitable and logical interpretation of the Uniform Commercial Code. *Pfizer Genetics, Inc., supra.*

Resolving the controverted evidence in favor of the Appellees, we conclude that reasonable minds could differ as to whether any limitation or exclusion of warranties was effectual in this case. The issue of exclusion of warranties was properly submitted to the jury in this case.

*Notice of Defect.*

Finally, Land O'Lakes argues that Keder did not notify it or Hansen Farms in a reasonable time and is barred from recovery under Neb. U.C.C. § 2-607(3) (Reissue 2001), which provides that "[w]here a tender has been accepted," the buyer "must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." There is conflicting evidence as to whether Keder notified Hansen Farms of the problems with his crop. The motion for directed verdict was properly denied on this point.

## CONCLUSION

The district court did not err in denying the motion for directed verdict.

AFFIRMED.

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# IN RE INTEREST OF LELAND B., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. RONALD B., APPELLANT.

797 N.W.2d 282

Filed May 10, 2011. No. A-10-936.

1. **Parental Rights: Abandonment.** In termination of parental rights cases, it is proper to consider a parent's inability to perform his or her parental obligations because of imprisonment.
2. **Parental Rights.** A parent's incarceration, standing alone, does not provide grounds for termination of parental rights.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Reversed and remanded for further proceedings.

Beau G. Finley, of Finley & Kahler Law Firm, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, Amy Schuchman, and Geoffrey Thomas, Senior Certified Law Student, for appellee.

Lynnette Z. Boyle, of Tietjen, Simon & Boyle, guardian ad litem.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Ronald B. appeals from the order of the separate juvenile court of Douglas County which terminated his parental rights to his son, Leland B. On appeal, Ronald challenges the juvenile court's finding that his parental rights should be

terminated pursuant to Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2010) and the court's finding that termination of his parental rights is in Leland's best interests. Upon our de novo review of the record, we find that the State failed to adduce sufficient evidence to clearly and convincingly demonstrate that termination of Ronald's parental rights is warranted pursuant to § 43-292(2), and accordingly, we reverse, and remand for further proceedings.

## II. BACKGROUND

These proceedings involve Ronald's son, Leland, born in December 2005. Leland's mother died in April 2009 during the pendency of these juvenile court proceedings, and as a result, her involvement in this case is not a subject of this appeal.

In May 2008, Ronald was incarcerated after being convicted of possession of and intent to distribute cocaine. At the time of Ronald's incarceration, Leland was residing with his mother. However, shortly after Ronald's incarceration, she requested assistance from the Department of Health and Human Services (the Department) because she was severely depressed and struggling to take care of her three children.

In October 2008, the State filed a petition alleging that Leland was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) as a result of his mother's mental health problems. Leland was placed in the custody of the Department. Then, in April 2009, his mother died. After her death, the Department sent Ronald a letter notifying him that Leland was in the custody of the Department. In response, Ronald sent the Department a letter indicating that he wanted Leland placed with Ronald's sister and that he wanted custody of Leland upon his release from prison.

On June 24, 2009, the State filed a supplemental petition alleging that Leland was a child within the meaning of § 43-247(3)(a) by reason of the faults or habits of Ronald. Specifically, the petition alleged that Leland's mother is deceased; that Ronald is incarcerated and unable to provide Leland with proper parental care and support and with safe, stable, and adequate housing; and that Leland is at

risk for harm. At the adjudication hearing held in August 2009, Ronald admitted to the allegations in the petition and Leland was adjudicated to be a child within the meaning of § 43-247(3)(a).

On June 15, 2010, the State filed a motion for termination of Ronald's parental rights. In the motion, the State alleged, among other things, that Leland was a child within the meaning of § 43-292(2) because Ronald has substantially and continuously or repeatedly neglected and refused to give Leland necessary parental care and protection. The motion also alleged that termination of Ronald's parental rights is in Leland's best interests.

On August 16, 2010, a hearing was held on the State's motion to terminate Ronald's parental rights. At the hearing, the State called three witnesses to testify: Leland's foster mother, Leland's therapist, and the Department caseworker assigned to the family.

Leland's foster mother testified that she has been his foster mother since December 2009. She testified that Leland has behavioral problems, including nightmares and trouble sleeping. She also indicated that Leland gets "very upset" after visits with his relatives and that "it can last a good hour, if not longer, of just flailing, crying, just screaming." She testified that Leland is "not easy to console when he gets too worked up about something." She testified that these problems have improved somewhat since Leland first came to live with her. She also testified that the only contact Ronald has had with Leland since December 2009 is through letters. Ronald has sent Leland approximately six letters since December 2009. In those letters, Ronald promised that one day Ronald and Leland will have a house together.

Leland's therapist testified that she has provided therapy to Leland since February 2010. She confirmed his foster mother's testimony that he suffers from behavioral problems. The therapist described these problems as grief issues, tantrums, impulsivity, poor eye contact, and poor listening skills. In addition, she opined that Leland may suffer from an attachment disorder. She testified that it is important for Leland to have a consistent placement because he needs stability and trustworthy

caregivers to assist him in building his confidence and self-esteem. She indicated that Leland has made good progress with his foster family and that he feels safe with them and loves them very much.

The therapist testified that when she asks Leland about Ronald, he does not know anything except that his father is "in jail." Leland cannot describe Ronald and cannot identify an activity that they enjoyed doing together prior to Ronald's incarceration. The therapist recommended that Ronald write letters to Leland because she did not believe it would be appropriate for Leland to visit Ronald in prison. She indicated that Leland does not have a bond with Ronald, but that he does have a bond with his foster family. Ultimately, she opined that termination of Ronald's parental rights is in Leland's best interests because Leland needs a stable caretaker now and Ronald is not in a position to be that caretaker and because she has no information about what kind of parent Ronald will be after his release from prison.

The Department caseworker testified that she has been assigned to Leland's case since approximately July 2008. She testified that it appears that Leland is happy with his foster parents and that he is "like a different little boy" because of his time there. She testified that Ronald's projected release date from prison is in March 2011. At that time, he will reside in a halfway house. She indicated that she is concerned about Ronald's ability to parent after his release from prison due to the length of time Leland has been separated from Ronald, Leland's behavioral problems, and questions about whether Ronald will be able to obtain appropriate employment and housing. She opined that it would be in Leland's best interests to terminate Ronald's parental rights.

In addition to the State's evidence, Ronald testified at the termination hearing. He testified that he is currently incarcerated at a prison in Yankton, South Dakota, but he may be released to a halfway house located in Council Bluffs, Iowa, as early as March 2011. Ronald admitted that this release date is not "an absolute" and that "anything can happen." Ronald testified that prior to his incarceration, he was one of Leland's

primary caregivers and either resided with Leland or had visitation with him on a regular basis. Ronald also admitted that during the time he was caring for Leland, he was dealing crack cocaine, was an associate of a gang, and had used and abused marijuana, alcohol, and crack cocaine.

Ronald's mother also testified. She testified that Ronald was Leland's primary caregiver prior to his incarceration and that Leland was a healthy and happy child. She indicated that she believed Ronald to be a capable father.

After the hearing, the juvenile court filed an order terminating Ronald's parental rights to Leland. The court found that Leland is a child within the meaning of § 43-292(2) and that termination of Ronald's parental rights is in Leland's best interests.

Ronald timely appeals from the juvenile court's decision to terminate his parental rights.

## III. ASSIGNMENTS OF ERROR

On appeal, Ronald challenges the juvenile court's finding that his parental rights should be terminated pursuant to § 43-292(2) and the court's finding that termination of his parental rights is in Leland's best interests.

## IV. ANALYSIS

### 1. Standard of Review

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 Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.*

For a juvenile court to terminate parental rights under § 43-292, it must find that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests. See *In re Interest of Jagger L., supra*. The State must prove these facts by clear and convincing evidence. *Id.* Clear and convincing evidence is

that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proven. *Id.*

### 2. Statutory Grounds for Termination

In Ronald's first assignment of error, he alleges that the juvenile court erred in finding that the State presented clear and convincing evidence to prove the statutory grounds for termination of his parental rights. Specifically, he challenges the juvenile court's determination that termination of his parental rights is warranted pursuant to § 43-292(2). Upon our de novo review of the record, we determine that the evidence does not clearly and convincingly establish that Ronald neglected Leland pursuant to § 43-292(2). We reverse the order of the juvenile court terminating Ronald's parental rights and remand the matter for further proceedings.

[1,2] Section 43-292(2) provides that the court may terminate parental rights when the parent has "substantially and continuously or repeatedly neglected and refused to give the juvenile . . . necessary parental care and protection." The Nebraska Supreme Court has recognized that in termination of parental rights cases, it is proper to consider a parent's inability to perform his or her parental obligations because of imprisonment. *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999). A parent's incarceration may be considered along with other factors in determining whether parental rights can be terminated based on neglect. *Id.* However, a parent's incarceration, standing alone, does not provide grounds for termination of parental rights. *Id.*

In this case, the State's evidence concentrated on Ronald's drug-related convictions and sentences. This evidence reveals that Ronald was convicted of possession of and intent to distribute cocaine and was incarcerated for that conviction beginning in May 2008, when Leland was 2 years old. The evidence also reveals that Ronald may be released from prison as early as March 2011.

The State did present evidence to demonstrate that Ronald has not seen Leland since May 2008, when he began serving his sentence. However, there was also evidence that Leland's

therapist recommended that Leland not visit Ronald in prison and that their interaction be restricted to letter writing. Ronald complied with this restriction and began writing letters to Leland on a regular basis.

The State also offered expert testimony from Leland's therapist and the Department caseworker concerning termination of Ronald's parental rights. Both witnesses opined that termination was in Leland's best interests. However, their opinions were based entirely on Ronald's being incarcerated and not on any information about Ronald's ability to parent Leland. In fact, many of their concerns were speculative in nature. The therapist indicated that she had concerns about what type of father Ronald might be after he was released from prison. Similarly, the caseworker testified that she had concerns about whether a bond still existed between Ronald and Leland and whether Ronald would be able to cope with Leland's behavioral problems.

It is clear from the evidence presented by the State that as a result of his time in prison, Ronald has not been able to provide Leland with necessary parental care and protection since May 2008. It is also clear that Leland may not have a strong bond with Ronald because of the time Ronald has spent apart from Leland and because of Leland's young age when Ronald began his incarceration. Taken together, this evidence seems to demonstrate that Ronald has neglected Leland pursuant to § 43-292(2). Yet, all of this evidence is anchored on Ronald's incarceration, and as we explained above, Ronald's incarceration, standing alone, does not provide grounds for termination of his parental rights.

The State offered no evidence other than Ronald's incarceration to prove that Ronald has neglected Leland pursuant to § 43-292(2). Moreover, the State appears to disregard that Ronald is likely to be released from incarceration in the very near future and will be able to participate in a reunification plan.

We are aware that Ronald will not be in a position to immediately regain custody of Leland upon his release. However, the evidence suggests that Ronald has a strong desire to be a parent to Leland. In May 2009, when the Department sent

Ronald a letter notifying him that Leland had been placed in the Department's custody, Ronald immediately responded to the letter, asking that Leland be placed with a relative and indicating that he desired to regain custody of Leland when he was released from prison. Since that time, Ronald has remained in contact with the Department.

During his incarceration, Ronald made efforts to improve his ability to parent Leland. He testified that he participated in a parenting class. And, although Ronald admitted at the termination hearing that prior to his incarceration, he dealt cocaine, used and abused alcohol and other controlled substances, and was an associate of a gang, he testified that while incarcerated, he enrolled in and participates in a "drug program." His completion of this program reduces his sentence by 1 year.

Ronald also testified that prior to his incarceration, he was one of Leland's primary caregivers and spent a great deal of time with Leland for the first 2½ years of his life. Ronald was present for Leland's birth and had almost daily contact with Leland from his birth through the time of Ronald's incarceration. Ronald indicated that he wanted to continue to parent Leland when he was released, and he provided the juvenile court with a plan to achieve reunification.

Specifically, Ronald testified that his plan was to obtain employment as soon as possible after his release to the halfway house, in Council Bluffs, in March 2011. He indicated that he was currently researching available jobs that were posted in a local newspaper. Ronald testified that once he obtained employment and received his first paycheck, he would be placed on house arrest. Ronald indicated that he could be placed on house arrest as soon as 2 to 3 weeks after being released from prison. For the period of house arrest, he planned to move in with his grandmother, who, he testified, had a previous relationship with Leland. Ronald indicated that he had spoken with his grandmother and that she was willing to have Ronald and Leland come live with her. Ronald testified that he would be released from house arrest in September 2011. At that time, he would be in a position to obtain his own residence, where he and Leland could reside together.

Upon our de novo review of the record, we conclude that the State failed to present clear and convincing evidence to demonstrate that Ronald has neglected Leland pursuant to § 43-292(2). The State's evidence focused exclusively on Ronald's current incarceration, and as we stated above, a parent's incarceration, standing alone, does not provide grounds for termination of parental rights. We reverse the order of the juvenile court terminating Ronald's parental rights and remand the matter for further proceedings.

### 3. Best Interests

Ronald also alleges that the juvenile court erred in determining that termination of his parental rights is in Leland's best interests. However, because we conclude that the State failed to provide sufficient evidence to prove that termination of Ronald's parental rights was warranted pursuant to § 43-292(2), and because we accordingly remand for further proceedings, we do not address Ronald's second assignment of error. An appellate court is not obligated to engage in an analysis which is not necessary to adjudicate the case and controversy before it. *Curtis v. Curtis*, 17 Neb. App. 230, 759 N.W.2d 269 (2008).

## V. CONCLUSION

Upon our de novo review of the record, we find that the State failed to adduce sufficient evidence to clearly and convincingly demonstrate that termination of Ronald's parental rights is warranted pursuant to § 43-292(2). As such, the juvenile court erred in terminating Ronald's parental rights, and we reverse, and remand for further proceedings.

Reversed and remanded for further proceedings.

# STATE OF NEBRASKA, APPELLEE, V. LERON L. OBLEY, APPELLANT.

798 N.W.2d 151

Filed May 17, 2011. No. A-10-657.

1. **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.
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.** 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: 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.
5. **Constitutional Law: Criminal Law: Right to Counsel.** A defendant has the right under the federal and state Constitutions to be represented by an attorney in all critical stages of a criminal prosecution.
6. **Criminal Law: Words and Phrases.** Critical stages of a criminal prosecution are those stages at which the substantial rights of a defendant may be affected.
7. **Criminal Law: Right to Counsel: Words and Phrases.** A hearing on a motion to withdraw a guilty plea is a critical stage in the proceedings, carrying with it the right to counsel.
8. **Constitutional Law: Right to Counsel: Waiver.** A defendant may waive the constitutional right to counsel, so long as the waiver is made knowingly, voluntarily, and intelligently.
9. ____: ____: ____. A waiver of the Sixth Amendment right to counsel is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege; therefore, the key inquiry is whether one who waived the Sixth Amendment right was sufficiently aware of the right to have counsel and of the possible consequences of a decision to forgo the aid of counsel.
10. **Right to Counsel: Presumptions.** Prejudice is presumed where an accused is completely denied counsel at a critical stage of the proceedings.

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

Gregory A. Pivovar for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired.

CASSEL, Judge.

## INTRODUCTION

Leron L. Obley appeals from the denial of his motion for postconviction relief. Although the district court properly denied an evidentiary hearing on most of Obley's claims, we conclude that the hearing on Obley's motion to withdraw his plea was a critical stage at which Obley had the right to counsel and that the record does not show Obley knowingly waived such right. Because Obley's postconviction motion asserted claims of ineffectiveness of both trial and appellate counsel concerning his lack of counsel at that hearing, the court erred in denying an evidentiary hearing on those claims. We therefore affirm in part, and in part reverse and remand for further proceedings.

## BACKGROUND

The State charged Obley with first degree sexual assault and first degree false imprisonment. On August 19, 2008, pursuant to plea negotiations, Obley pled no contest to first degree sexual assault and the other charge was dismissed. He was represented by an assistant public defender. The next day, Obley signed a pro se motion to withdraw his no contest plea, which motion was filed on August 25. Obley alleged that on the morning of August 19, he told his attorney that he believed he should go to trial on the matter, that his attorney set a hearing for that same day "in an attempt to scare or threaten" Obley, and that Obley was upset and under duress at the time of his no contest plea. Obley further alleged that his plea was not knowingly or intelligently made.

At the beginning of the October 29, 2008, hearing on Obley's motion, the assistant public defender representing Obley stated that "Obley is requesting to proceed on this matter on his own without counsel." This attorney then asked for leave to

withdraw. Without ruling on the request to withdraw, the court first asked Obley if he had any evidence to present. The following colloquy occurred:

> [Obley]: Your Honor, the day on August 19, when [defense counsel] came to see me that morning, it was agreed we were going to trial. I never gave him any indication or said anything about pleading guilty or no contest to any sexual assault or any of the charges. So it was my understanding we wanted to go to a trial the next day, August 20. But against my wishes and my knowledge, I had a hearing later that day, so I didn't know — when I got here, I just assumed that the charges were being dropped, until he told me that they had a deal for me, and it was a good deal and I should deal. So at the time, I was really surprised. I didn't know what was going on. I was shocked. I didn't even me [sic] come here to plead no contest or make a deal, so I said that I wanted to go to trial the next day.
>
> THE COURT: Well, it says — are you comfortable going forward on your own, . . . Obley?
>
> [Obley]: For the motion?
>
> THE COURT: Right.
>
> [Obley]: Yes.

The court inquired further as to why Obley entered his no contest plea, and Obley offered his explanations. The prosecutor stated that Obley had not met his burden to show that he was not properly informed of his rights, that the court erred in accepting his waiver of those rights, that he was not competent to stand trial, or that there was not a factual basis. The court then stated to Obley that "you have done this without assistance of counsel. And you haven't presented any evidence to show that your plea was not made freely, knowingly, voluntarily and intelligently, and that you were incompetent to enter the plea, or the factual basis was insufficient." The court overruled Obley's motion to withdraw his plea and proceeded to sentencing. The assistant public defender was not discharged by the court, and he represented Obley during sentencing. Obley was sentenced to 15 to 20 years' imprisonment.

On direct appeal, represented by the public defender's office, Obley asserted only that his sentence was excessive. On March 13, 2009, we summarily affirmed the sentence in case No. A-08-1233.

Obley subsequently filed a pro se motion for postconviction relief and motion for appointment of counsel. Obley's motion for postconviction relief alleged that (1) the district court engaged in judicial misconduct because at the time of the hearing on his motion to withdraw his plea, the district court failed to inquire if Obley was waiving his right to counsel; (2) his trial counsel was ineffective in failing to investigate and interview the State's witnesses and in "induc[ing]" Obley to plead no contest; (3) his appellate counsel was ineffective in failing to pursue Obley's claims regarding the hearing on Obley's motion to withdraw his plea; (4) the district court did not obtain jurisdiction because the information was invalid; and (5) his no contest plea was not intelligently and understandingly made. The district court denied the motion without an evidentiary hearing. The court found that Obley's judicial misconduct claim was procedurally barred. It determined that Obley's claim that he received ineffective assistance of counsel during the hearing on his motion to withdraw his plea was without merit because Obley elected to represent himself. It found that Obley's claim that counsel was ineffective in coercing him to enter his plea was without merit because the court found the plea to be entered freely, knowingly, voluntarily, and intelligently. The court found Obley's claim that counsel failed to investigate to be without merit because Obley entered a plea of no contest in which he declined to contest the facts upon which the charge was based. As to Obley's claim of ineffective assistance of appellate counsel for failing to raise the other claims on direct appeal, the district court stated that "[t]here is no evidence contained in the bill of exceptions which would form a basis from which appellate counsel would raise these arguments." Finally, the court found Obley's jurisdictional claim to be meritless.

Obley timely filed a motion to reconsider. While that motion was pending, Obley filed a notice of appeal, docketed as our case No. A-09-904. In due course, on March 24, 2010, we

dismissed the appeal for lack of jurisdiction, determining that the pending motion for rehearing constituted a motion to alter or amend the judgment and terminated the running of the time for appeal.

Thereafter, the district court overruled the motion to reconsider and Obley, through appellate counsel, timely filed a new notice of appeal, which was docketed as the instant case.

## ASSIGNMENTS OF ERROR

Obley assigns that the district court erred in (1) denying an evidentiary hearing, (2) denying his motion for postconviction relief, and (3) finding Obley's plea was knowingly and voluntarily entered.

## STANDARD OF REVIEW

[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. 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. *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

[2,3] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *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. *State v. McGhee, supra*.

## ANALYSIS

Obley's brief argues his three assignments of error collectively: Because Obley alleged facts in his motion for postconviction relief which would constitute a denial of his constitutional rights, the district court erred in denying his motion without an evidentiary hearing. Although Obley's assignments

of error are broad enough to encompass the district court's denial of all the claims raised in his motion for postconviction relief, we limit our review to those claims that were raised in his motion and also argued in his brief. See *State v. McGhee, supra* (alleged error must be both specifically assigned and specifically argued in brief of party asserting error to be considered by appellate court). See, also, *State v. Gunther*, 278 Neb. 173, 768 N.W.2d 453 (2009). Thus, we do not address the allegations of the motion regarding judicial misconduct, the purported invalidity of the information, and Obley's understanding of the no contest plea.

Obley's arguments in his brief are limited to his claims for relief that trial counsel provided ineffective assistance of counsel by inducing him to enter a plea, by failing to investigate, and by failing to adequately represent him at the hearing on the motion to withdraw his plea. He also argues that appellate counsel was ineffective in not discussing the appeal with Obley resulting in the withdrawal of plea issue not being raised on direct appeal. Because Obley was represented by the public defender's office at the trial level and on direct appeal, this postconviction proceeding is his first opportunity to raise claims of ineffective assistance of counsel. See *State v. McGhee, supra*.

[4] 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, supra*, to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *Id.* Because Obley'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. See *id.*

Most of Obley's arguments relate to his postconviction claims that trial counsel was ineffective in failing to defend and protect Obley's interests during the hearing on his motion

to withdraw his no contest plea and that appellate counsel was ineffective in failing to pursue any claims regarding the hearing on Obley's motion to withdraw his plea.

We consider Obley's lack of representation at the time of the hearing on his motion to withdraw his plea. Without the assistance of counsel, Obley filed the motion to withdraw his no contest plea. At the start of the hearing on Obley's motion, the public defender stated that Obley was requesting to proceed on the matter "on his own without counsel" and the public defender asked for leave to withdraw. After Obley explained that he had not wanted to plead no contest but wanted to go to trial, the court asked Obley if he was "comfortable going forward on [his] own." Obley answered that he was.

[5,6] A defendant has the right under the federal and state Constitutions to be represented by an attorney in all critical stages of a criminal prosecution. See *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007). Critical stages of a criminal prosecution are those stages at which the substantial rights of a defendant may be affected. *State v. Gray*, 8 Neb. App. 973, 606 N.W.2d 478 (2000), *overruled on other grounds, State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001).

Our review of Nebraska case law has not uncovered any cases explicitly deciding whether a hearing on a motion to withdraw a plea is a "critical stage" of a criminal proceeding.

[7] Other jurisdictions have considered the issue and held that a hearing on a motion to withdraw a guilty plea is a critical stage in the proceedings, carrying with it the right to counsel. See, e.g., *U.S. v. Sanchez-Barreto*, 93 F.3d 17 (1st Cir. 1996); *U.S. v. Garrett*, 90 F.3d 210 (7th Cir. 1996); *United States v. White*, 659 F.2d 231 (D.C. Cir. 1981); *United States v. Crowley*, 529 F.2d 1066 (3d Cir. 1976); *Ducker v. State*, 986 So. 2d 1224 (Ala. Crim. App. 2007); *Fortson v. State*, 272 Ga. 457, 532 S.E.2d 102 (2000); *State v. Harell*, 80 Wash. App. 802, 911 P.2d 1034 (1996); *Browning v. Com.*, 19 Va. App. 295, 452 S.E.2d 360 (1994); *Randall v. State*, 861 P.2d 314 (Okla. Crim. App. 1993); *Martin v. State*, 588 N.E.2d 1291 (Ind. App. 1992); *Beals v. State*, 106 Nev. 729, 802 P.2d 2 (1990); *Lewis v. United States*, 446 A.2d 837 (D.C. App.

1982); *People v. Holmes*, 12 Ill. App. 3d 1, 297 N.E.2d 204 (1973). Cf. *State v. Hartshorn*, 149 Idaho 454, 235 P.3d 404 (2010) (postjudgment hearing on motion to withdraw guilty pleas was not critical stage of proceedings at which right to counsel attached).

[8] The same constitutional right to counsel also guarantees the right of a defendant to represent himself or herself. See *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001). A defendant may waive the constitutional right to counsel, so long as the waiver is made knowingly, voluntarily, and intelligently. *State v. Figeroa*, 278 Neb. 98, 767 N.W.2d 775 (2009). Formal warnings do not have to be given by the trial court to establish a knowing, voluntary, and intelligent waiver of the right to counsel. *Id.*

[9] However, in the case before us, the district court did not resolve the uncertainty. The court did not ask Obley whether he intended to waive his right to counsel or whether he wanted the assistance of appointed counsel. Rather, the court merely asked Obley if he was comfortable proceeding on his own without giving Obley any options. The court in *Fortson v. State, supra*, considered a similar situation in which the defendant filed a pro se motion to withdraw his plea and appeared pro se at the hearing on the motion. The *Fortson* court determined that the trial court was obligated to inform the defendant of his right to counsel or to obtain a constitutionally valid waiver of counsel and that the absence of counsel was prejudicial. It therefore reversed, and remanded the cause for another hearing on the defendant's motion to withdraw his plea. Similarly, the district court in this case should have advised Obley that he had a right to counsel. Because Obley was not advised of a right to counsel, we question how he could have effectively waived that right. A waiver of the Sixth Amendment right to counsel is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege; therefore, the key inquiry is whether one who waived the Sixth Amendment right was sufficiently aware of the right to have counsel and of the possible consequences of a decision to forgo the aid of counsel. *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997).

[10] We agree with the jurisdictions cited above that the hearing on Obley's motion to withdraw his plea was a critical stage of the proceeding at which the right to counsel attached. The lack of representation by counsel at this hearing is the linchpin of Obley's appeal. Prejudice is presumed where the accused is completely denied counsel at a critical stage of the proceedings. *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003). Because Obley's counsel asked to withdraw at the beginning of the hearing, Obley proceeded to represent himself at the hearing, and the record does not clearly show a knowing waiver of the right to counsel. We conclude that the district court erred in not granting an evidentiary hearing on this issue, which was couched in terms of Obley's claims of ineffective assistance of trial and appellate counsel. Accordingly, we reverse, and remand for further proceedings on those claims.

Obley also alleged in his motion for postconviction relief that his trial counsel was ineffective in failing to investigate and interview the State's witnesses. Obley alleges that counsel failed to interview specific witnesses who were endorsed on the information and who were involved in treating the victim, but Obley does not indicate what information these witnesses would have provided. Recently, in *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010), the Nebraska Supreme Court reiterated that in assessing postconviction claims that trial counsel was ineffective in failing to call a particular witness, it had upheld dismissal without an evidentiary hearing where the motion did not include specific allegations regarding the testimony which the witness would have given if called. Because Obley's motion lacked specific allegations regarding the nature of these individuals' testimonies, the district court did not err in denying an evidentiary hearing on this claim.

Obley claims that trial counsel was ineffective in failing to "investigate and gather" the sexual assault examination report "to determine if the victim was actually sexually assaulted and whether there was exculpatory evidence on the report" because a hospital laboratory result summary indicated the absence of "spermatozoom" and had no mention of redness, swelling, or irritation around the victim's vagina. Obley

implies that the sexual assault examination report would similarly show the absence of sperm and no evidence of trauma to the victim's vaginal area. According to the factual basis provided by the State, the evidence would show that Obley subjected the victim to penile-vaginal penetration without the victim's consent.

Because the district court's ruling on this claim relied upon Obley's plea and we have already determined that he is entitled to an evidentiary hearing regarding his claims of ineffective assistance of counsel as to the alleged denial of counsel at the hearing to withdraw the plea, the course of proceedings on this claim may turn upon the outcome of the evidentiary hearing. The district court found this claim to be without merit because Obley "entered a plea of 'no contest' to the charge of first degree sexual assault in which he declined to contest the facts upon which the charge was based." If the evidentiary hearing shows that Obley was not aware of his right to counsel at the hearing to withdraw his plea, he would be entitled to a hearing on the motion with the assistance of counsel. If he then prevailed at such a hearing, the plea would be withdrawn and this claim of ineffective assistance of counsel regarding the sexual assault report would become moot.

On the other hand, if the evidentiary hearing were to show that Obley was aware of his right to counsel at the hearing to withdraw his plea and that he voluntarily waived the right by going forward "on [his] own," then on the claim regarding the sexual assault report he would have the usual burden of showing both that counsel's performance was deficient and that he was prejudiced—that is, that but for the ineffective assistance of counsel he would have insisted on going to trial. The court erred in denying an evidentiary hearing on this issue.

## CONCLUSION

Because we conclude that the district court erred in denying an evidentiary hearing on Obley's claims of ineffective assistance of counsel relating to the hearing on his motion to withdraw his plea, we reverse, and remand for an evidentiary hearing on those claims. We further reverse, and remand for an evidentiary hearing on Obley's claim of ineffective

assistance of counsel regarding counsel's alleged failure to obtain the sexual assault examination report. We affirm the denial of postconviction relief on all other claims.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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STATE OF NEBRASKA, APPELLEE, V.
CLIFFORD D. THOMAS, APPELLANT.
798 N.W.2d 620

Filed May 31, 2011. No. A-10-357.

1. **Rules of Evidence: Other Acts: Proof.** Evidence of other bad acts allegedly committed by a criminal defendant are not excludable under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2008), which prohibits propensity evidence, in situations where the evidence is so blended or connected with the actions charged that proof of one incidentally involves proof of the other, explains the circumstances of the charged conduct, or tends to prove an element of the charged conduct.
2. **Rules of Evidence: Other Acts.** The State is entitled to present a coherent picture of the facts of the crime charged and is entitled to present evidence of other bad acts where the evidence is so closely intertwined with the charged crime that the evidence completes the story or provides a total picture of the charged crime; such evidence is intrinsic evidence not governed by Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2008).
3. **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.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Reversed and remanded for a new trial.

Chad M. Brown for appellant.

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

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Clifford D. Thomas appeals his convictions and sentences for terroristic threats, use of a deadly weapon to commit a felony,

felon in possession of a deadly weapon, and being a habitual criminal. On appeal, Thomas asserts numerous potential errors. We conclude that the district court erred in admitting evidence concerning other bad acts allegedly committed by Thomas, and because that error requires reversal and remand, we decline to address the rest of Thomas' assignments of error.

## II. BACKGROUND

Vincent Haynes is an automobile mechanic who owns his own automobile repair shop in Omaha, Nebraska. Haynes was acquainted with Thomas and had done repair work on Thomas' automobiles in the past. In late December 2007, Thomas hired Haynes to install a used transmission in Thomas' automobile. Thomas provided the used transmission, and one of the mechanics working for Haynes performed the installation.

Thomas returned to Haynes' repair shop approximately a week later and complained that the transmission was leaking. Another of the mechanics working for Haynes performed the repair work. Thomas returned again approximately 2 weeks later, and again complained that the transmission was leaking.

When Thomas returned for the second time and complained that the transmission was leaking, the mechanic who had worked on the automobile was not in the shop. Haynes testified that Thomas "started talking out loud . . . and said, you gonna do — you gonna fix my vehicle today." Haynes testified that Thomas "was cussing, you gonna fix my damn car today and this don't make no mother-fucking sense I got to keep bringing it back" and that Thomas was "making a scene." Thomas eventually left and indicated that he would return.

Later the same day, Thomas returned again. Haynes testified that Thomas was wearing "a long trench coat" and "had one of his hands in his pocket." When Haynes approached Thomas, Thomas "punched [Haynes] in the chest. Then he pulled the other hand out [of the trench coat pocket] and pulled this big, old gun out and said, you gonna fix my damn car or you gonna deal with this." Thomas also said, "[T]his ain't no fucking joke" and "you a bitch-ass nigger and everybody know you a bitch." According to Haynes, Thomas said, "I'm gonna

send somebody else up here to rob you and I'm gonna set your building on fire." Haynes testified that he "agreed to everything [Thomas] said he wanted [Haynes] to do" and assured Thomas that the automobile would be fixed. Thomas eventually left again.

Two days later, on a Monday morning, Haynes received a telephone call that prompted him to go to his repair shop. When he arrived at the building, he observed that firefighters had arrived and that the garage door was on fire.

On April 27, 2009, Thomas was charged by amended information with terroristic threats, use of a deadly weapon to commit a felony, and felon in possession of a deadly weapon. The amended information also included a habitual criminal allegation.

On August 14, 2009, the State filed a notice of its intent to introduce evidence under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2008). The State indicated that it intended to offer evidence of Thomas' threat to commit arson at Haynes' business and the subsequent fire that occurred at the business 2 days after the threat. Also on August 14, Thomas filed a motion in limine specifically seeking to prevent the State from introducing evidence concerning the fire. Prior to trial, the State withdrew its intent to introduce rule 404 evidence. At the hearing on Thomas' motion in limine, the State argued that the evidence concerning the fire was intrinsic evidence and was intertwined with the charged crime of terroristic threats and therefore admissible without reference to rule 404. The court agreed with the State and overruled Thomas' motion in limine.

At trial, there was also evidence adduced concerning a conversation had prior to trial between Thomas and Haynes. The conversation was recorded by Thomas. Prior to trial, the State had filed a motion in limine seeking to prevent introduction of evidence concerning the conversation, but the court overruled the motion. The conversation allegedly included discussion of "what it would take for Haynes to help make the charges against Thomas go away" and the possibility of Haynes' taking money from Thomas "in exchange for not showing up in court." Brief for appellee at 16. At trial, an audio recording of

the conversation was played several times, and Haynes testified that the conversation took place and admitted the basic content of the conversation.

The jury deliberated for approximately 3½ hours before returning verdicts of guilty on all charges. An enhancement hearing was scheduled to occur on September 2, 2009. On September 14, the parties appeared for the enhancement hearing, which had been continued, and Thomas' counsel objected that Thomas had not received sufficient notice of the September 2 hearing. The court overruled Thomas' objection, received evidence to establish that Thomas was a habitual criminal, and set a sentencing date.

Thomas filed a motion for new trial on February 3, 2010. In the motion, Thomas asserted that an enhanced version of the audio recording of Thomas and Haynes' conversation about making the charges "go away" constituted newly discovered evidence. The court denied the motion for new trial.

On March 5, 2010, Thomas was sentenced to 10 to 30 years' imprisonment on the terroristic threats conviction, 20 to 40 years' imprisonment on the use of a deadly weapon to commit a felony conviction, and 10 to 30 years' imprisonment on the felon in possession of a deadly weapon conviction. The court ordered the first two sentences to be served consecutively, and the third sentence to be served concurrently. This appeal followed.

## III. ASSIGNMENTS OF ERROR

Among Thomas' assignments of error on appeal is an assertion that the district court erred in allowing the State to introduce evidence concerning the fire that occurred at Haynes' business. Our resolution of this assignment of error obviates the need to discuss the remaining assignments of error.

## IV. ANALYSIS

Thomas challenges the district court's allowance of testimony proffered by the State concerning a fire that occurred at Haynes' repair shop 2 days after Thomas allegedly made terroristic threats, including a threat to set Haynes' "building on fire." Prior to the trial, Thomas filed a motion in limine

objecting to this testimony, and he objected to it during trial on the basis of relevance and Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008). On appeal, Thomas also argues that this evidence constitutes impermissible rule 404 evidence of other bad acts that should not have been admitted.

The State's argument to the district court, and to this court, has been that the evidence was properly admitted because it was intrinsic evidence that is so intertwined with the charged offenses that it completes the picture and is actually part of the charged offense, not extrinsic evidence of other bad acts. The district court agreed, overruled Thomas' objections, and admitted the testimony on this basis.

We conclude that the State's argument that this evidence is intrinsic evidence and intertwined with the charged offenses and the authorities relied on by the State in support of this assertion are inapplicable to this case, because the State has failed to adduce any evidence connecting Thomas with the fire. Evidence of the fire itself would arguably be intrinsic evidence and intertwined with the charged offenses only if there were some evidence that Thomas was involved with the fire, but the State adduced no evidence to make this connection. As such, we reject the State's argument on appeal that "it is without question that the evidence relating to the fire at Haynes' shop was so closely intertwined with the crimes charged that it cannot be considered extrinsic." Brief for appellee at 25-26.

[1,2] In a line of cases dating back to 2001, this court and the Nebraska Supreme Court have repeatedly concluded that evidence of other bad acts allegedly committed by a criminal defendant are not excludable under rule 404's prohibition of propensity evidence in situations where the evidence is so blended or connected with the actions charged that proof of one incidentally involves proof of the other, explains the circumstances of the charged conduct, or tends to prove an element of the charged conduct. See, *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010); *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *State v. Wisinksi*, 268 Neb. 778, 688 N.W.2d 586 (2004); *State v. Powers*, 10 Neb. App. 256, 634 N.W.2d 1 (2001), *disapproved on other grounds, State v.*

*Smith*, 267 Neb. 917, 678 N.W.2d 733 (2004). In such situations, the State is entitled to present a coherent picture of the facts of the crime charged and is entitled to present evidence of other bad acts where the evidence is so closely intertwined with the charged crime that the evidence completes the story or provides a total picture of the charged crime; such evidence is intrinsic evidence not governed by rule 404. See *State v. Powers, supra*.

Every one of those cases, however, shared a common characteristic: there was evidence demonstrating that the other bad acts at issue were actually committed by the defendant so that they did help to complete the story or provide a total picture of the defendant's alleged actions. In *State v. Powers, supra*, the defendant was charged with committing terroristic threats when he sent threatening letters to the victim. The other bad acts evidence at issue was prior letters from the defendant to the victim. *Id.*

In *State v. Wisinski, supra*, the defendant was charged with burglary and theft by unlawful taking. The other bad acts evidence at issue was evidence that the defendant was apprehended several days after the reported burglary in a vehicle containing items stolen during the burglary. *Id.*

In *State v. Robinson, supra*, the defendant was charged with, among other crimes, first degree murder. The evidence adduced against the defendant included testimony of a witness who had been a passenger in a Chevrolet Tahoe driven by the defendant to the crime scene who testified that he waited in the Tahoe while the defendant committed the murder. There was also evidence adduced that the defendant had told another witness that he was going to "'get rid of the truck'" in "'Kansas or Texas.'" *Id.* at 712, 715 N.W.2d at 548. The other bad acts evidence at issue was evidence that a Tahoe registered to the defendant's grandmother was found destroyed by a fire in Texas and that a Kansas City police officer had seen the defendant in Kansas City exiting a bus which had originated in Houston. *Id.*

In *State v. Baker, supra*, the defendant was charged with first degree sexual assault and third degree sexual assault of a child. The other bad acts evidence at issue was evidence concerning

physical abuse and threats of harm committed by the defendant and directed at the victim and her mother. *Id.*

The present case, however, is entirely different from each of these prior cases where this court or the Nebraska Supreme Court has approved of the admission of evidence as intrinsic evidence intertwined with the charged offense. In the present case, the challenged evidence does not include any evidence actually linking Thomas to the subsequent fire at Haynes' repair shop. The State's arguments, both to the district court and to this court, all seem to presuppose such connection, but no such connection was ever demonstrated. Indeed, when an Omaha Fire Department captain testified, over Thomas' objection, concerning his investigation into the fire, he was specifically asked whether he searched for and found any evidence to link any specific suspect to the fire. He testified that he "found no evidence . . . that linked [a possible suspect] to the fire."

Because the evidence that a fire occurred at Haynes' repair shop 2 days after Thomas allegedly threatened to burn the building down did not actually include any evidence to indicate that Thomas was in any way involved in starting the fire, it was not intrinsic evidence intertwined with the charged offense. The district court erred in so finding.

[3] Evidence which is not relevant is not admissible. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010). 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. *Id.* Under rule 403, however, 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. *State v. Sellers, supra.*

In this case, any minimal relevance that the evidence concerning the fire at Haynes' repair shop might have had was outweighed by the substantial danger of unfair prejudice. There was no evidence presented linking Thomas to the fire. In fact, testimony indicated that there was no such evidence. The only way the evidence was of use to the jury was for the jury to hear that Thomas had threatened to burn the building down and then

infer that he must have meant it because somebody actually started a fire at the repair shop 2 days later. Such an inference, without any evidence to connect Thomas to the subsequent fire, is certainly prejudicial and suggests a finding of guilt on improper grounds.

Because there was no connection between Thomas and the subsequent fire, we conclude that there was little or no probative value to the fire evidence, and any minimal probative value would be outweighed by the danger of unfair prejudice. See *State v. Sellers, supra* (evidence of handguns located at time of defendant's arrest lacked probative value and was unfairly prejudicial because there was no connection between handguns and defendant). The district court abused its discretion in not excluding this evidence, and this error requires that we reverse, and remand for a new trial.

## V. CONCLUSION

The district court erred in overruling Thomas' objections to the State's proffer of evidence concerning the fire at Haynes' repair shop, because there was no evidence linking Thomas to the fire. We reverse, and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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# MICHAEL TURNBULL, APPELLANT, V. COUNTY OF PAWNEE, NEBRASKA, APPELLEE.

810 N.W.2d 172

Filed May 31, 2011. No. A-10-489.

1. **Judgments: Appeal and Error.** Neb. Rev. Stat. § 25-1901 (Reissue 2008) provides for a district court to review the judgment rendered or final order made by a tribunal inferior in jurisdiction and exercising judicial functions.
2. **Administrative Law: Public Officers and Employees: Claims: Notice: Breach of Contract: Appeal and Error.** Where an original breach of contract action requires compliance with the county claims statute, Neb. Rev. Stat. § 23-135 (Reissue 2007), to provide sufficient notice to a county of the claim, when an employee seeks judicial review of a final order rendered by an administrative body, the county is on full notice of the claim by virtue of the employee's compliance with agreed-upon procedures for asserting the claim at the administrative level.

3. **Judgments: Appeal and Error.** Neb. Rev. Stat. § 25-1901 (Reissue 2008) specifically provides that a judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court may be reversed, vacated, or modified by the district court.
4. ____: ____. Neb. Rev. Stat. § 25-1903 (Reissue 2008) provides that proceedings to obtain reversal, vacation, or modification of the judgment or final order of an inferior tribunal, board, or officer exercising judicial functions shall be by petition entitled "petition in error," setting forth the errors complained of.
5. **Records: Appeal and Error.** Neb. Rev. Stat. § 25-1905 (Reissue 2008) provides that a plaintiff in error shall file with his or her petition a transcript of the proceedings or a praecipe directing the tribunal, board, or officer to prepare the transcript of the proceedings.
6. **Records: Judgments: Appeal and Error.** Neb. Rev. Stat. § 25-1905 (Reissue 2008) provides that the transcript required to be filed with a petition in error shall contain the final judgment or order sought to be reversed, vacated, or modified.
7. **Administrative Law: Appeal and Error.** A board or tribunal exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner.
8. **Evidence: Proof: Words and Phrases.** Adjudicative facts are facts which relate to a specific party and are adduced from formal proof.
9. ____: ____: ____. Adjudicative facts pertain to questions of who did what, where, when, how, why, and with what motive or intent. They are roughly the kind of facts which would go to a jury in a jury case.
10. **Appeal and Error.** To perfect a petition in error, Neb. Rev. Stat. § 25-1903 (Reissue 2008) directs the petitioner to file the petition to the district court setting forth the errors complained of.
11. **Jurisdiction: Appeal and Error.** Compliance with Neb. Rev. Stat. §§ 25-1903 and 25-1905 (Reissue 2008) is jurisdictional.

Appeal from the District Court for Pawnee County: DANIEL E. BRYAN, JR., Judge. Affirmed.

Timothy S. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellant.

Christine A. Lustgarten and Sophia M. Alvarez, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Michael Turnbull is an employee of Pawnee County, Nebraska (the County). He used an administrative grievance process to

challenge discipline his employer had imposed. Dissatisfied with the result of that process, he brought an action in district court. The district court dismissed Turnbull's action, concluding that Turnbull was required to comply with the petition in error statutes, Neb. Rev. Stat. § 25-1901 et seq. (Reissue 2008). Specifically, the district court concluded Turnbull had failed to provide a record of the proceedings held before the administrative body, as required by § 25-1905. On the record provided to us, we affirm the trial court's conclusion that Turnbull failed to comply with the jurisdictional prerequisites of § 25-1901 et seq. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

## II. BACKGROUND

We initially note that this case presents the court with some peculiar and difficult issues concerning the record and attempting to stitch together what actually happened below. Categorically unnecessary effort, time, and resources were expended by the clerk of the Court of Appeals, Court of Appeals staff, and others to finally retrieve what record was made by the court reporter of the district court. In addition, Turnbull's brief contains very little reference to the record to indicate the source of facts represented as the chronology of the case. Additionally, the unusual procedural history of this case and the lack of any meaningful record of what occurred at the administrative level, as discussed more fully below, have further contributed to the challenges in properly representing the background of this case.

In March 2006, the Nebraska Public Employees, Local No. 251, union and the County executed a collective bargaining agreement concerning, among other things, wages, hours, and terms and working conditions for employees of the Pawnee County Road Department. The agreement was to be in force from and after January 1, 2006, until December 31, 2008. Article 21 of the agreement sets forth the parties' agreement concerning discipline and specifies that "[a]ny disciplinary action or measure imposed upon an employee may be processed as a grievance through the grievance procedure

. . . .” Article 23 of the agreement sets forth the grievance procedure.

On May 28, 2009, the County notified Turnbull by letter that an allegation was made against him and that he was potentially subject to disciplinary action. The County informed Turnbull that an informal hearing was scheduled for June 3 and that he would have an opportunity to respond to the allegations, that he was entitled to attend the hearing with a union or legal representative, and that he was entitled to “present evidence of mitigation” at that time. Turnbull has not provided this court with any record of the hearing or what transpired at the hearing, other than the disciplinary letter discussed below and “[t]yped notes” taken by Turnbull’s union representative.

On June 11, 2009, the County notified Turnbull by letter that he was being suspended without pay for 30 days. In the letter, the County indicated that Turnbull was found to have violated safety policies set forth in the “Pawnee County Handbook.” The letter also detailed Turnbull’s actions that constituted the violation. The letter indicated that there had been two witnesses of the event. The letter also indicated that Turnbull had been present at the informal hearing and set forth what Turnbull had admitted and what he had denied concerning the allegations.

On June 22, 2009, Turnbull executed an official grievance form, authorizing the union to act as his representative in the disposition of his grievance. According to article 23 of the collective bargaining agreement, the grievance process for challenging discipline is a multistep process. The first step requires the grievant to attempt to resolve the matter with the county highway superintendent. The second step requires the grievant to present a formal written grievance to the County’s board of commissioners (the Board). The third step provides that the grievant “may appeal” the decision of the Board through voluntary binding arbitration or that, in cases where the grievant elects not to participate in arbitration, the case “may be processed through the Pawnee County District Court.”

On June 22, 2009, Turnbull’s grievance was presented to his supervisor, the county highway superintendent, in accordance with step one of the grievance process. On June 27, the

supervisor denied the grievance. We have not been provided any record of whether Turnbull had any type of hearing before the supervisor or what actually happened during that step of the grievance process.

On June 30, 2009, Turnbull's grievance was presented to the Board, in conjunction with step two of the grievance process. On July 7, the Board notified Turnbull by letter that the Board would hear his grievance on July 14. On July 14, the Board denied the grievance. We have been presented with no substantial record of what happened during that step of the grievance process, other than the portions of "[t]yped notes" taken by Turnbull's union representative. Those notes indicate that the Board was asked to overturn the discipline and that the Board indicated it would take no action on that date.

On July 21, 2009, Turnbull notified the County by letter that he had "chosen to appeal the Board['s] decision to deny [his] grievance and proceed to Pawnee [County] District Court." On July 30, Turnbull filed a complaint in the district court in which he alleged that the County's discipline of him was a "breach of contract." Turnbull affirmatively alleged that he had complied with the grievance procedure set forth in the collective bargaining agreement, that his grievance was denied, and that he had elected to proceed to the district court as opposed to binding arbitration. Turnbull made no allegations concerning due process or denial of the opportunity to present evidence or have a meaningful hearing at the administrative level. On August 10, the County filed an answer in which it generally admitted the allegations of the complaint, but denied that the discipline imposed constituted a breach of contract.

On April 12, 2010, the parties appeared before the district court. The court initially noted that "[t]his [case] is a review . . . regarding a disciplinary action against . . . Turnbull." Neither party objected to the case's being characterized as a review of a disciplinary proceeding. The court then proceeded to conduct a full evidentiary trial on Turnbull's complaint. The parties stipulated to the introduction of a variety of exhibits, including the collective bargaining agreement and the letters and documents indicating Turnbull's compliance with the grievance procedure that are discussed above. None of the exhibits

offered by either party, however, constituted a transcript of the proceeding before the Board, and the record from the district court does not include such a transcript of the proceeding before the Board. See § 25-1905 (requiring party filing petition in error to also file transcript of proceeding occurring before board). At the conclusion of the trial, the district court took the matter under advisement.

On April 16, 2010, the district court entered an order dismissing Turnbull's complaint. In the order, the district court addressed the issue of jurisdiction, noting that the court was obligated to determine whether it had jurisdiction before proceeding to the merits of the complaint. The court noted that cases of this sort, appealing discipline imposed by administrative bodies, are usually received by the district court through petition in error proceedings under § 25-1901 et seq.

The district court then determined that Turnbull's complaint needed to be considered either (1) an action at law for breach of a contract or (2) a request for review of an administrative action for discipline. The court concluded that it lacked jurisdiction under either characterization. First, the court concluded that if Turnbull's action were considered an action at law for breach of contract, Turnbull would be required to comply with statutory provisions for bringing a claim against a county, including notice provisions that are required to confer jurisdiction on the district court. See *Jackson v. County of Douglas*, 223 Neb. 65, 388 N.W.2d 64 (1986). Next, the court concluded that if Turnbull's action were considered a review of a disciplinary proceeding, Turnbull would be required to comply with statutory provisions for bringing a petition in error, including jurisdictional requirements set forth in § 25-1901 et seq.

The district court ultimately concluded that Turnbull's complaint should be characterized not as an original breach of contract action, but, rather, as seeking a review of disciplinary action taken by his employer. As such, the court concluded that Turnbull was required to comply with statutory provisions for bringing a petition in error. The court then noted that the parties had failed to provide a transcript of the proceedings that occurred before the Board, that its review was limited to

the record created before that tribunal, and that without such a record, it lacked jurisdiction. Having taken the matter under advisement after completion of the trial, the court ultimately dismissed the complaint. This appeal followed.

## III. ASSIGNMENT OF ERROR

Turnbull's sole assignment of error is that the district court erred in dismissing his complaint for lack of jurisdiction.

## IV. ANALYSIS

This case began, at the administrative level, with Turnbull's contention that the discipline imposed upon him by his employer, the County, was inappropriate. Turnbull followed the procedures outlined in the collective bargaining agreement for challenging that discipline. At its core, this action is an appeal from the administrative denial of Turnbull's grievance related to the discipline imposed. Turnbull's attempt to cast this case as a breach of contract action does not change the fact that at its core, the action was brought in the district court to appeal the decision of the administrative body, the Board, denying his grievance.

[1,2] In *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008), the Nebraska Supreme Court recognized the difference between an original breach of contract action filed in the district court contending a breach of a collective bargaining agreement and a review of an administrative decision on a grievance related to employee discipline. Although *Pierce* involved a county of more than 300,000 inhabitants, for which some specific statutory guidance exists in Neb. Rev. Stat. § 23-2501 et seq. (Reissue 2007), the fundamental difference between the two types of proceedings is equally applicable here. As noted in *Pierce*, when an employee brings an original breach of contract action, the employee is not appealing from a final order of the administrative body, especially where the administrative body has no authority to hear appeals unrelated to disciplinary actions. In contrast, § 25-1901 provides for a district court to review the judgment rendered or final order made by a tribunal inferior in jurisdiction and exercising judicial functions. Where an

original breach of contract action requires compliance with the county claims statute, Neb. Rev. Stat. § 23-135 (Reissue 2007), to provide sufficient notice to the county of the claim, when an employee seeks judicial review of a final order rendered by the administrative body, the county is on full notice of the claim by virtue of the employee's compliance with agreed-upon procedures for asserting the claim at the administrative level. See *Pierce v. Douglas Cty. Civil Serv. Comm., supra*.

[3-6] Although § 23-2501 et seq. specifically includes provisions that clearly provide that an employee's request for review of a final decision of the civil service commission in a county of more than 300,000 inhabitants is to be by way of a petition in error pursuant to § 25-1901 et seq., the lack of such specific provisions in Neb. Rev. Stat. § 23-2534 et seq. (Reissue 2007) governing counties of under 150,000 inhabitants does not cause us to conclude that Turnbull was not required to follow the petition in error provisions of § 25-1901 et seq. Section 25-1901 specifically provides that "[a] judgment rendered or final order made by *any* tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court may be reversed, vacated, or modified by the district court . . . ." (Emphasis supplied.) Section 25-1903 provides that the proceedings to obtain reversal, vacation, or modification "shall be by petition entitled petition in error," setting forth the errors complained of. Section 25-1905 provides in part that "[t]he plaintiff in error *shall file with his or her petition a transcript of the proceedings or a praecipe directing the tribunal, board, or officer to prepare the transcript of the proceedings*." (Emphasis supplied.) Section 25-1905 also provides that the transcript "*shall contain the final judgment or order sought to be reversed, vacated, or modified*." (Emphasis supplied.)

The district court concluded that § 25-1901 et seq. applied to Turnbull's action and that his failure to comply with the statutory prerequisites for properly bringing a petition in error prevented the court from obtaining jurisdiction. We agree. Section 25-1901 et seq. statutorily mandates that a party seeking judicial review of an administrative determination must

comply with the petition in error prerequisites when the review sought is of a final order made by a tribunal, board, or officer exercising judicial functions. We conclude that these provisions are applicable to Turnbull's actions because the Board exercised judicial functions.

[7-9] A board or tribunal exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner. *Camp Clarke Ranch v. Morrill Cty. Bd. of Comrs.*, 17 Neb. App. 76, 758 N.W.2d 653 (2008). Adjudicative facts are facts which relate to a specific party and are adduced from formal proof. *Id.* Adjudicative facts pertain to questions of who did what, where, when, how, why, and with what motive or intent. *Id.* They are roughly the kind of facts which would go to a jury in a jury case. *Id.*

In the present case, Turnbull was accused of violating a safety provision. He first received an informal hearing, and when provided notice of the hearing, he was informed that he would have an opportunity to respond to the allegations, have a union or legal representative, and present evidence of mitigation. We have no formal record of what happened at the informal hearing, but Turnbull was suspended without pay for 30 days after the hearing. Turnbull then filed a grievance, as provided for in the collective bargaining agreement. Turnbull's grievance was heard first by his supervisor and then by the Board. We have no formal record of what happened at either step of the grievance process, but the questions to be resolved at each stage involved Turnbull's alleged actions and pertained to questions of what he did, where, when, how, why, and with what motive or intent; the questions concerned whether Turnbull violated a safety provision, whether there was any mitigating evidence, and the appropriate discipline to be imposed. As such, the questions being resolved at each stage of the grievance process were adjudicative in nature.

Because the questions being resolved were adjudicative in nature and because the Board was engaging in a judicial function in hearing Turnbull's appeal of the denial of his grievance related to the discipline imposed, the petition in error statutes were applicable and dictated the proper steps for perfecting jurisdiction in the district court.

[10,11] To perfect a petition in error, § 25-1903 directs the petitioner to file the petition to the district court setting forth the errors complained of. *McNally v. City of Omaha*, 273 Neb. 558, 731 N.W.2d 573 (2007). In addition, § 25-1905 directs the petitioner to file with his or her petition a transcript of the proceedings or a praecipe directing the tribunal, board, or officer to prepare the transcript of the proceedings. *McNally v. City of Omaha, supra*. The Nebraska Supreme Court has held that compliance with these statutory provisions is jurisdictional. *Id.*

A review of the transcript in this case indicates that Turnbull filed a complaint in the district court purporting to set forth a claim for breach of contract. Although he recounted in the complaint that he had filed a grievance and that it had been denied, he did not assert anywhere in the complaint that the Board had committed any errors to be complained of. Even when the complaint is read very liberally to impliedly assert that the Board generally erred in denying his grievance, Turnbull did not file with his complaint a transcript of the proceedings or a praecipe directing the Board to prepare a transcript of the proceedings.

The plain language of the statutes requires that for jurisdiction to attach, the transcript of proceedings or praecipe must be filed specifically with the petition in error in the court requested to review such judgment. *River City Life Ctr. v. Douglas Cty. Bd. of Equal.*, 265 Neb. 723, 658 N.W.2d 717 (2003). Section 25-1905 also plainly indicates that the transcript must contain the final judgment or order sought to be reversed, vacated, or modified. *River City Life Ctr. v. Douglas Cty. Bd. of Equal., supra.* Turnbull's failure to comply with these provisions precluded jurisdiction from being conferred on the district court, and the court correctly concluded that it lacked jurisdiction.

On appeal, Turnbull has asserted that he was not required to comply with the petition in error statutes and that he was authorized to file an original breach of contract action because the parties had contractually agreed to such action in the collective bargaining agreement. Without addressing the question of whether the parties could have so contracted to authorize a

grievant to forgo the statutory petition in error procedure, we disagree with Turnbull's characterization of the collective bargaining agreement.

Turnbull asserts that "[t]he parties contractually agreed that if this issue could not be resolved under the first two (2) steps of the Grievance procedure, then it would be treated as a breach of contract action, thereby allowing the employee to file a breach of contract action in the District Court . . . ." Brief for appellant at 6. The language of the collective bargaining agreement, however, does not indicate that the parties had agreed that the matter would be treated as a breach of contract action. Rather, the relevant language of the agreement indicates merely that "[c]ases where the grievant chooses not to participate in binding arbitration may be processed through the Pawnee County District Court." There is no mention whatsoever of "breach of contract" or any right to file an original action at law. Indeed, as the agreement states, actions properly following the petition in error statutes would be "processed through the [relevant county's d]istrict [c]ourt." We thus find no merit to this assertion of Turnbull.

Similarly, we find no merit to Turnbull's assertion that the Nebraska Supreme Court's decision in *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979), somehow supports Turnbull's notion that it is proper to challenge the discipline imposed and the denial of his grievance by way of an original breach of contract action. That case involved a suit by a union asserting that an employer had failed to provide short-term disability benefits as contractually agreed to in a collective bargaining agreement. The union sought a declaratory judgment and an accounting, and it instituted its proceedings before the Commission of Industrial Relations. The Nebraska Supreme Court held that the Commission of Industrial Relations was without authority to grant declaratory or equitable relief and had no authority to hear a breach of contract action.

The present case is markedly distinguishable from *Transport Workers of America*. Unlike the issue in that case, the issue in the present case is purely one of the appropriateness of discipline imposed upon a finding that an employee violated safety

policies. The issues do not involve declaratory relief, equitable relief, or traditional damages matters inherent in breach of contract actions. Moreover, in the present case, the collective bargaining agreement specifically set forth the grievance process and specifically provided for a process of appealing adverse decisions; there is no indication in the Supreme Court's opinion in *Transport Workers of America* that any such provisions existed in that case. Although *Transport Workers of America* might stand for the proposition that a breach of contract action is properly brought in district court, its holding does not support Turnbull's attempt to appeal his discipline under the guise of a breach of contract action in the present case. We find this assertion to be without merit.

We also note that Turnbull also asserts that the proceedings before the Board in step two of the grievance process did not involve an evidentiary hearing or an adjudication hearing in which an aggrieved employee could compel witnesses to testify or subject adversarial witnesses to cross-examination. Turnbull asserts that the only opportunity he had to introduce evidence establishing his position was at the hearing in district court.

As we have noted above, we have no record of what occurred at the informal hearing before Turnbull's supervisor, although the notice of hearing indicated to Turnbull that he would have an opportunity to present mitigating evidence at that hearing. We have no record of what occurred at step one or step two of the grievance process, although the collective bargaining agreement specifies that at step two, the Board is required to "confer" with the grievant and to "consult[] with all necessary levels of supervision" in the preparation of its response. The collective bargaining agreement does not appear to require the conducting of an evidentiary hearing by the Board, but it also does not foreclose such a hearing or indicate that the grievant is not allowed to present evidence, compel witnesses, or cross-examine adversaries. We have no record of what occurred at the hearing before the Board, and on the record presented to us, there is no way for us to conclude whether the lack of a record is a result of Turnbull's failing to attempt to make a record or request a record or a result of the Board's not permitting such a record.

We have concluded above that Turnbull failed to satisfy the jurisdictional prerequisites for perfecting a petition in error proceeding by failing to file a proper petition setting forth the assertions of error committed by the Board and by failing to file a transcript of the proceedings that included the final order of the Board. Had Turnbull cleared those jurisdictional hurdles, there might have arisen a subsequent issue concerning the lack of a record from the hearing before the Board because, as the district court found, when reviewing a petition in error, the district court is restricted to the record created before the lower tribunal. See *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 567 N.W.2d 294 (1997). If Turnbull was denied the opportunity to make a proper record or to present evidence in his defense before the Board, he may well have been able to raise due process concerns before the district court. See *id.*

In the present case, however, we conclude that Turnbull failed to perfect jurisdiction in the district court even aside from the lack of presentation of any record of what actually happened in the hearing before the Board. Moreover, as noted above, Turnbull's complaint in the district court raised no due process assertions of his being denied the opportunity to receive a fair and meaningful hearing or to present evidence before the Board. We find no merit to Turnbull's assertions that his only opportunity to present evidence was in the district court.

Finally, we note that the process advocated by Turnbull would arguably render meaningless the grievance process agreed to by the parties in the collective bargaining agreement. Turnbull has attempted to frame his proceedings in the district court as an original law action for breach of contract, requiring no review of the lower tribunal proceedings and no deference to the administrative conclusions concerning his discipline and his grievance. In a proper petition in error proceeding, the district court determines whether the lower tribunal acted within its jurisdiction and whether the tribunal's decision is supported by sufficient relevant evidence; the review accords substantial deference to the administrative body. See *Crown Products Co. v. City of Ralston, supra*. To permit Turnbull to simply disregard the entire grievance process and start entirely

anew with an evidentiary trial before the district court would be tantamount to encouraging grievants to simply go through the motions of the grievance process and then seek to litigate employee disciplinary matters in the district court. We conclude not only that such action would ignore the intent of the grievance process set forth in the collective bargaining agreement, but also that it would endorse a legal course of action that does not appear to have ever before been endorsed in our jurisdiction. We have discovered no prior authority for litigating under the guise of breach of contract an employee's dissatisfaction with his discipline, and Turnbull has pointed us to none. This further reaffirms our conclusion that Turnbull's action should properly be considered as an appeal of the discipline imposed and the denial of his grievance and not as an original breach of contract action.

## V. CONCLUSION

We conclude that Turnbull's "breach of contract" action is more properly characterized as an attempt to appeal the administrative denial of his grievance concerning discipline imposed for his violation of safety policies. As a result, Turnbull was obligated to satisfy statutory prerequisites for perfecting jurisdiction in the district court through petition in error proceedings. He failed to do so, and the district court properly dismissed his action for want of jurisdiction. We affirm.

AFFIRMED.

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MODEL INTERIORS, APPELLEE AND CROSS-APPELLANT, V.
2566 LEAVENWORTH, LLC, A CORPORATION, AND
MICHAEL MAPES, AN INDIVIDUAL, APPELLANTS
AND CROSS-APPELLEES.
809 N.W.2d 775

Filed May 31, 2011. No. A-10-776.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.

3. ____: ____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the 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. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
5. **Attorney Fees: Appeal and Error.** An appellate court will affirm a trial court's decision awarding or denying attorney fees absent an abuse of discretion.
6. **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.
7. **Breach of Contract: Pleadings: Proof.** In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty.
8. **Breach of Contract: Words and Phrases.** A breach is a nonperformance of a duty.
9. **Breach of Contract.** Whether or not a breach is material and important is a question of degree which must be answered by weighing the consequences of the breach in light of the actual custom of persons in the performance of contracts similar to the one involved in the specific case.
10. **Contracts: Actions: Substantial Performance.** To successfully bring an action on a contract, a plaintiff must first establish that the plaintiff substantially performed the plaintiff's obligations under the contract.
11. **Contracts: Substantial Performance.** Substantial performance may be established as long as any deviations from the contract are relatively minor and unimportant.
12. ____: ____. Substantial performance is shown when the following circumstances are established by the evidence: (1) The party made an honest endeavor in good faith to perform its part of the contract, (2) the results of the endeavor are beneficial to the other party, and (3) such benefits are retained by the other party. If any one of the circumstances is not established, the performance is not substantial and the party has no right to recover.
13. ____: ____. Substantial performance is a relative term and whether it exists is a question to be determined in each case with reference to the existing facts and circumstances.
14. **Unjust Enrichment.** The doctrine of unjust enrichment is recognized only in the absence of an agreement between the parties.
15. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.
16. **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.

17. **Final Orders.** Generally, when a trial court clearly intends its order to serve as a final adjudication of the rights and liabilities of the parties, the order's silence on requests for relief can be construed as a denial of those requests.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

John P. Passarelli and Amy L. Van Horne, of Kutak Rock, L.L.P., for appellants.

Anne Marie O'Brien and Angela J. Miller, of Lamson, Dugan & Murray, L.L.P., for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

## INTRODUCTION

Model Interiors (Model) filed a complaint against Michael Mapes (Michael) and 2566 Leavenworth, LLC (collectively Mapes), in the district court for Douglas County, alleging breach of an oral contract and unjust enrichment. Mapes filed a counterclaim, also alleging breach of an oral contract and unjust enrichment. Cross-claims for fraudulent misrepresentation were voluntarily dismissed by the parties on the second day of trial, and we do not make further reference to these claims. Model was given leave at the start of trial to amend its complaint to include a construction lien foreclosure. The court entered judgment in favor of Model on each of its claims in the total amount of $77,183.62. Mapes has appealed, and Model has cross-appealed. Because we find that the district court was not clearly erroneous in determining Model substantially performed the contract and that the court did not abuse its discretion in failing to award attorney fees to Model, we affirm.

## BACKGROUND

Mapes purchased real property located on Leavenworth Street in Omaha, Nebraska, with an abandoned, roofless shell of a building and began to plan a complete rehabilitation of the site. In June 2008, John and Shelley Biever, the owners of Model, entered into an oral contract with Mapes for interior

design services at the site. Under the terms of this contract, Model was to provide interior design services, materials, furniture, and products to Mapes in exchange for a design fee of $20,000 and a 20-percent markup on selected materials and products. The parties understood this to be a "'cost plus'" contract for services and payment. Mapes paid the $20,000 fee. The record shows that Model obtained approval from Michael or his wife for all decisions prior to ordering materials or services and that Michael was actively involved in every decision Model made on his behalf. After becoming dissatisfied with the progress of the work, Michael ordered Model off the property, leading to the present lawsuit.

Model filed a complaint in the district court, alleging that Mapes had breached the terms of the parties' oral contract and had been unjustly enriched thereby. Model sought judgment for $81,093.58, plus interest and attorney fees.

Mapes answered, generally denying the substantive assertions of Model's complaint, setting forth various affirmative defenses, and setting forth counterclaims for breach of contract and unjust enrichment. Mapes sought actual damages, as well as consequential and incidental damages, to be determined at trial, the return of all sums paid by Mapes to Model for its "incompetent and defective services," interest, and attorney fees.

Trial was held before the district court on January 7 through 8 and March 31, 2010. At the start of trial, Model's attorney sought and obtained leave to amend the complaint to add a claim under the construction lien statutes, Neb. Rev. Stat. §§ 52-125 to 52-159 (Reissue 2010). The court heard testimony from various witnesses and received numerous documentary exhibits into evidence. In addition to the information set forth above, the evidence at trial was as follows:

The record shows that Mapes hired an architect and an onsite general contractor, Jesse Calabretto, to work on the renovation project. There was conflicting evidence presented at trial as to whether Model acted as a general contractor on the aspects of the work with which Model became involved. There was also conflicting evidence about whether a completion date of December 1, 2008, was a material term of the oral contract,

whether payment of the contract was tied to any set deadline, and who was responsible for any missed deadlines.

The building on Leavenworth Street required extensive renovation, including new windows, roof, and floors. The floor of the building required major work, including grinding and filling. Grinding is a process that smoothes rough patches and grinds down raised portions of a floor. The filling process allows for the floor to be leveled by filling in those parts of the floor to be raised to the correct height. The original flooring contractor selected by Calabretto was unable to provide the grinding and filling service. Model contacted Alan's Carpeting (Alan's) in early September 2008 to inquire as to whether it did floor grinding and filling, and Mapes selected Alan's to prepare the building floor. The bid placed by Alan's was an estimate for only grinding work, as an estimate for the fill work was dependent on the grinding. This was communicated to Mapes in writing on the bid form, which stated that "once we do the grinding we are able to give you a more accurate bid."

Alan's began the grinding work in mid-September, which work was supervised by Calabretto. At least once a week, Alan's and Calabretto completed a walk-through of the work then completed. Mapes also inspected the work almost daily, as Mapes would visit the building to inspect the progress of the project. During the day-to-day supervision and walk-throughs, Alan's communicated the extent of the work being done on the floor and the extent of the work yet to be completed. Alan's expressly stated to Mapes and Calabretto that the preparation work was much more extensive than originally estimated, and Mapes agreed to do what was necessary to finish the job completely. Neither Mapes nor Calabretto ever requested Alan's to stop work or communicated any complaints about the work. During the floor-grinding process, Model was not involved in the day-to-day supervision or walk-through inspections of the work completed by Alan's. Alan's obtained permission and authorization for all of its onsite work from Mapes or Calabretto and not from Model. After concluding the grinding process, Alan's began to work on the fill, and during this time, supervision and walk-throughs by Calabretto continued.

Mapes was also onsite during the fill work. The evidence at trial shows that Alan's completed the necessary work of grinding and preparing the floor of the building, that the results of the work completed by Alan's remain in the building and are used on a daily basis, and that the work completed by Alan's remains uncompensated in the amount of $20,431.52.

As part of its contract with Mapes, Model contracted to obtain wood flooring materials for the building. On about August 6, 2008, the Bievers and Mapes met to discuss selecting and purchasing the wood flooring. At the conclusion of the meeting, Mapes selected flooring from Elmwood Reclaimed Timber (Elmwood). During the meeting, Mapes was informed that the selected reclaimed wood flooring would require a special adhesive to install. Calabretto's wood flooring installer did not bid on the wood floor installation work, and as a result, at the request of Mapes, Model presented five separate bids to Mapes for the wood floor installation on about September 15. After reviewing the bids, Mapes selected Matthew Conn to install the wood flooring.

Conn measured the areas of the building to determine the proper amount of wood flooring and adhesive to order, contacting Elmwood representatives in the process to learn more about the adhesive. Model did not assume, control, or supervise Conn's work. Based upon Conn's measurements, Model placed an order with Elmwood for the wood flooring and adhesive selected by Mapes. Prior to ordering the wood flooring, Model informed Mapes that Elmwood required 4 to 6 weeks from the date of ordering to receive the wood flooring. The wood flooring and adhesive required a downpayment of $30,000, which Mapes paid on about September 26, 2008. Model mailed the downpayment to Elmwood on September 27, and Model also paid the remaining invoice amount of $27,298.50 to Elmwood.

Conn began to install the wood floor in October 2008. Conn waited until the other subcontractors had completed their work for the day to install the wood flooring. Additionally, the flooring installation required specific temperature and humidity controls to prevent damage to the floor and allow the adhesive to adhere properly. Both Mapes and Calabretto were aware

of Conn's work schedule for installing the wood flooring. In late November or early December, Michael ordered Conn off the building premises because he felt that Conn was too slow in his work of installing the wood floor. Mapes subsequently contracted Elmwood to install the floor. The record shows that Model designed and ordered materials for the floor in the building, that Mapes has not paid the remaining $27,298.50 owed to Model for the wood flooring provided by Elmwood, and that Mapes accepted and has not rejected the wood flooring. The record revealed some unresolved problems with broken stair nosing, but the cause of this problem was not conclusively established at trial.

Mapes and Model also contracted for the purchase of carpeting, lighting, plumbing, cabinetry, and tile in the building. To determine the proper amount of tile, carpeting, and adhesive to order, Model contracted the carpet and tile installers from Alan's to measure the areas of installation. Alan's measured these areas based upon the design specifications for the tile and carpet. After receiving the measurements, Model ordered the necessary tile, carpeting, and adhesive. The record shows that Model ordered materials as directed by others for the tile, carpeting, and other materials necessary for the installation of such products and that $10,403.87 is owed for this work. A representative of Alan's testified that its work for carpet and tile was substantially completed.

Mapes contracted for the purchase of lights throughout the property. Model ordered light fixtures from Architectural Lighting, after receiving approval from Mapes. The order required a 50-percent downpayment, which Mapes paid. Model then ordered the lighting as specified by Mapes. After installation of the light fixtures, a manufacturing defect was discovered that was in the process of being resolved by the manufacturer at the time of trial. Because of this defect, Mapes refused to pay the remaining 50-percent balance due to Architectural Lighting. The record shows that Model ordered the lighting as approved and specified by Mapes.

Expert testimony at trial established that the unpaid work by Model was of reasonable quality and customary for the services Model provided. Model transmitted bills from vendors

and added a 20-percent markup as agreed upon by Mapes, and expert testimony established that this was also reasonable and customary. Lori Krecji, an architect and interior designer, inspected the building and testified that she did not find any shoddy work or materials. Krecji reviewed the invoices and inspected the work and materials referenced in the invoices. She found the outstanding unpaid charges to be fair and reasonable for what Mapes received. She testified, based upon her inspection as an architect and interior designer and her knowledge of materials and workmanship in the Omaha area, that Model should be paid.

Mapes testified that Model designed portions of a building for Mapes that achieved what it had wanted at the inception of the agreement between Mapes and Model, which was a beautiful and unique interior with a "'wow' factor."

In early December 2008, after becoming dissatisfied with the progress of the work, Michael ordered Model off the property and prevented Model from performing the remainder of its agreement. Shelley Biever testified that the project was "almost substantially completed" at that time. Model and various subcontractors were not paid for their services, materials, and products. The record shows that the total remaining due to Model is $77,183.62.

To recover the amounts due and owing under the oral contract, Model filed a construction lien on January 30, 2009, in the amount of $81,093.58. After filing the lien, Model reduced some amounts due and owing, making adjustments due to the return of some items ordered but not used. Construction liens were also filed by Alan's for $29,131.41 and by Elmwood for $11,184.85.

The district court entered judgment on July 12, 2010, in favor of Model on each of its claims in the total sum of $77,183.62 plus taxable costs. The court made no explicit findings with respect to attorney fees. The court found that Model met its burdens of proof on its claims and that Mapes failed to meet the burdens of proof on the affirmative defenses and counterclaims. The court found that Mapes failed to establish by a preponderance of the evidence that Model acted as a general contractor on the aspects of the work undertaken

by Model. The court concluded that while Mapes "did trim Calabretto's compensation," the contract made with Model did not include responsibility for the work and products of others. The court further concluded that the contract between Model and Mapes was for interior design services, materials, furniture, and products; that Mapes failed to establish that Model agreed to become the general contractor, or that Model accepted the responsibilities of a general contractor; and that Model did not warrant the work by vendors or the products supplied for the building. The court concluded that the outstanding sums due were all customary and reasonable and that Model substantially performed its design work on the project.

## ASSIGNMENTS OF ERROR

Mapes asserts, consolidated and restated, that the district court erred in (1) finding in favor of Model on its breach of contract claim instead of finding in favor of Mapes on Mapes' claim and (2) finding in favor of Model on its unjust enrichment claim instead of finding in favor of Mapes on Mapes' claim.

On cross-appeal, Model asserts that the district court erred in ignoring § 52-157(3) in denying attorney fees and costs to Model after having prevailed on its construction lien claim and foreclosure against Mapes.

## STANDARD OF REVIEW

[1-3] A suit for damages arising from breach of a contract presents an action at law. *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (2010). The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Hooper v. Freedom Fin. Group*, 280 Neb. 111, 784 N.W.2d 437 (2010). In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the 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. *Id.*

[4] The construction of a contract is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002).

[5,6] An appellate court will affirm a trial court's decision awarding or denying attorney fees absent an abuse of discretion. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009). 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. *Behrens v. Blunk*, 280 Neb. 984, 792 N.W.2d 159 (2010).

## ANALYSIS

*Breach of Contract.*

Mapes asserts, consolidated and restated, that the district court erred in finding in favor of Model on its breach of contract claim instead of finding in favor of Mapes on Mapes' claim. Mapes argues that a December 1, 2008, deadline was a material term of the oral contract, which term was breached by Model, that Model failed to substantially perform its obligations under the contract, and that Model's breaches of the contract excused Mapes from performance under the contract.

[7-9] In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty. *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002). A breach is a nonperformance of a duty. *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000). Whether or not a breach is material and important is a question of degree which must be answered by weighing the consequences of the breach in light of the actual custom of persons in the performance of contracts similar to the one involved in the specific case. *Id.*

Viewing the evidence in the light most favorable to Model and resolving evidentiary conflicts in its favor as we must, the evidence shows that the terms of the contract provided

that Model would provide interior design services, material, furniture, and products to Mapes in exchange for a design fee of $20,000 and a 20-percent markup on selected materials and products. There is evidence in the record that when Model and Mapes entered into the contract in June or July 2008, Mapes did not communicate any December 1 deadline. Shelley Biever did not recall hearing about a December 1 deadline until August or September. There is also evidence that Calabretto was the general contractor and was responsible for maintaining the schedule. The district court's determination as to the terms of the parties' contract is not clearly erroneous.

[10-13] In arguing that Model failed to substantially perform its obligations under the contract, Mapes points to the fact that other flooring contractors were hired to finish the work, that there were problems with the stair nosing, that certain fixtures had to be replaced, and that there were problems with the lighting. To successfully bring an action on a contract, a plaintiff must first establish that the plaintiff substantially performed the plaintiff's obligations under the contract. *VRT, Inc. v. Dutton-Lainson Co.*, 247 Neb. 845, 530 N.W.2d 619 (1995). Substantial performance may be established as long as any deviations from the contract are relatively minor and unimportant. *Phipps, supra*. Substantial performance is shown when the following circumstances are established by the evidence: (1) The party made an honest endeavor in good faith to perform its part of the contract, (2) the results of the endeavor are beneficial to the other party, and (3) such benefits are retained by the other party. If any one of the circumstances is not established, the performance is not substantial and the party has no right to recover. *VRT, Inc., supra.* Substantial performance is a relative term and whether it exists is a question to be determined in each case with reference to the existing facts and circumstances. *Id.* The district court found that Model substantially performed its design work on the project; that the results were beneficial in that Mapes received a beautiful, unique interior with a "'wow' factor"; and that the benefits of Model's work were retained by Mapes. With respect to problems with the stair nosing, the record did not establish the cause of this problem. As to the

lighting issues, the record shows that there was a manufacturing defect. The evidence viewed most favorably to Model supports the court's conclusion that Model substantially performed its obligations. Mapes complains that Model relies on self-serving testimony from the Bievers and Model's expert witness. The lower court clearly accepted Model's version of the facts, and it is not our task to reweigh evidence. Model is entitled to every reasonable inference deducible from the evidence. Our standard of review requires us to consider the evidence in the light most favorable to Model and to resolve evidentiary conflicts in its favor. The district court's determination that Model substantially performed its obligations under the contract is not clearly erroneous. Mapes' assignment of error is without merit.

*Unjust Enrichment.*

[14,15] Mapes asserts that the district court erred in finding in favor of Model on its unjust enrichment claim instead of finding in favor of Mapes on Mapes' claim for unjust enrichment. The doctrine of unjust enrichment is recognized only in the absence of an agreement between the parties. *Washa v. Miller*, 249 Neb. 941, 546 N.W.2d 813 (1996). The record clearly shows an agreement between the parties. Accordingly, we need not address this assignment of error further. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

*Attorney Fees.*

[16] On cross-appeal, Model asserts that the district court erred in ignoring § 52-157(3) in denying attorney fees and costs to Model after having prevailed on its construction lien claim and foreclosure against Mapes. 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. *Eikmeier v. City of Omaha*, 280 Neb. 173, 783 N.W.2d 795 (2010). Section 52-157 provides:

> (1) If a person is wrongfully deprived of benefits to which he or she is entitled under sections 52-125 to

> 52-159 by conduct other than that described in section 52-156:
>
> (a) He or she is entitled to damages; and
>
> (b) The court may make orders restraining the owner or other person, or ordering them to proceed on appropriate terms and conditions.
>
> (2) If in bad faith a claimant records a lien, overstates the amount for which he or she is entitled to a lien, or refuses to execute a release of a lien, the court may:
>
> (a) Declare his or her lien void; and
>
> (b) Award damages to the owner or any other person injured thereby.
>
> (3) Damages awarded under this section may include the costs of correcting the record and reasonable attorney's fees.

[17] At trial, Shelley Biever testified that Model had paid attorney fees in connection with this action and was asking the district court for those fees as part of its damages. However, there was no evidence presented at trial regarding the amount of attorney fees incurred. At oral argument, Model's attorney suggested that Model asked the court to reserve the issue of attorney fees for later determination; however, such discussion does not appear in the bill of exceptions. Counsel also indicated that a motion for reconsideration was filed with respect to the failure to award attorney fees and that a journal entry reflects the court's denial of the motion; however, such proceedings are also not contained in the record provided to us on appeal. We deem the court's silence on the issue of attorney fees in its final order to be a denial of the request. Generally, when a trial court clearly intends its order to serve as a final adjudication of the rights and liabilities of the parties, the order's silence on requests for relief can be construed as a denial of those requests. *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009).

While the statute relied upon by Model states that damages awarded under that section "*may* include . . . reasonable attorney's fees," it does not mandate the award of such fees. See § 52-157 (emphasis supplied). An appellate court will affirm a trial court's decision awarding or denying attorney fees absent

an abuse of discretion. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009). Due to the discretionary nature of the statute and the failure to adduce evidence concerning the fees, we find no abuse of discretion by the court in connection with its failure to award attorney fees.

## CONCLUSION

The district court did not err in entering judgment in favor of Model on its breach of contract claim and did not abuse its discretion in failing to award attorney fees.

AFFIRMED.

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## STATE OF NEBRASKA, APPELLEE, V. JOSEPH R. LOWERY, APPELLEE, AND STERLING T. HUFF, APPELLANT.

798 N.W.2d 626

Filed May 31, 2011. No. A-10-789.

1. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal absent an abuse of discretion.
2. **Judges: Words and Phrases.** An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Attorney Fees.** Attorney fees and expenses may be recovered only where provided for by statute, or when a recognized and accepted uniform course of procedure has been to allow recovery of an attorney fee.
4. ____. To determine proper and reasonable fees, it is necessary to consider the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.
5. **Attorney Fees: Proof.** While attorney fees and expenses are ordinarily left to the trial court's discretion, an application for attorney fees and expenses must be granted where the record demonstrates that the amount requested was reasonable and there is no evidence or indication otherwise that the amount is unreasonable.
6. ____: ____. Where the evidence contained in the record supports the fact that the moving party's request for attorney fees and expenses is a reasonable request, and no other contrary evidence exists or is offered into evidence disputing reasonableness, the request for such reasonable attorney fees and expenses must be granted.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge. Reversed and remanded with directions.

Sterling T. Huff, of Island, Huff & Nichols, P.C., L.L.O., pro se.

Jon Bruning, Attorney General, and James D. Smith for appellee State of Nebraska.

IRWIN, MOORE, and CASSEL, Judges.

MOORE, Judge.

## INTRODUCTION

Sterling T. Huff, court-appointed counsel for Joseph R. Lowery, appeals from an order determining the amount of fees and expenses allowed to Huff in connection with his representation of Lowery in his criminal case. The parties stipulated to waive oral argument. We find that the district court abused its discretion in reducing the requested fees. We therefore reverse the district court's order and remand the cause with directions to grant Huff's application for fees.

## BACKGROUND

Huff was originally appointed to represent Lowery in the county court for Scotts Bluff County in September 2009 in connection with a charge of felony false information accessory to second degree murder, a Class IV felony. Thereafter, an information was filed in district court which included the same Class IV felony, as well as a charge of tampering with evidence accessory to second degree murder, a Class III felony. The information was subsequently amended to two felony accessory to second degree murder counts. The charges stemmed from the stabbing of James Mendoza by Lowery's brother, Artie Lowery (Artie), and Mendoza's resulting death. Although Lowery was not present at or involved in the actual stabbing, he was alleged to have aided and abetted the murder by virtue of providing false information during the investigation and attempting to hide one of the weapons used in the murder. Pursuant to a plea agreement, Lowery ultimately pled no contest to one count of false reporting a criminal matter and one

count of attempted tampering with evidence, both Class I misdemeanors, and was sentenced to two consecutive 1-year terms in county jail, with credit given for 297 days served. Following Lowery's convictions and sentences, Huff filed an appeal challenging the sentences as excessive, after which Huff's appointment was terminated and the appeal was handled by the public defender's office. Huff's representation of Lowery ended on July 1, 2010.

On July 6, 2010, Huff filed a motion to approve attorney fees, and a hearing was held before the district court the same day. Testimony was given by Huff, and the court received Huff's application for fees and attached billing statement in evidence. While Huff was questioned by both the county attorney and the court concerning a few of his time entries, there was no evidence offered to disprove the reasonableness of Huff's fee application. The total requested fees were $21,343, which represented 304.9 hours at the court-appointed hourly rate of $70, plus expenses of $3,367.94 and minus a retainer of $14, for a total request of $24,696.94.

On August 5, 2010, the district court entered a detailed six-page order which allowed "[f]ees for attorney services . . . in the amount of $12,000, and [expenses in the requested sum] of $3,367.94 for a total of $15,367.00." Further details regarding the court's findings will be discussed in the analysis below. Huff filed a timely appeal.

## ASSIGNMENTS OF ERROR

Huff asserts that the district court abused its discretion in reducing Huff's court-appointed fees from $21,343 to $12,000 and that the court erred in considering sua sponte the fees billed and approved in a companion case.

## STANDARD OF REVIEW

[1] When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal absent an abuse of discretion. *Schirber v. State*, 254 Neb. 1002, 581 N.W.2d 873 (1998).

[2] An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a

litigant of a substantial right and denying just results in matters submitted for disposition. *Boamah-Wiafe v. Rashleigh*, 9 Neb. App. 503, 614 N.W.2d 778 (2000).

## ANALYSIS

The primary question presented in this appeal is whether the attorney fees requested by Huff in connection with his representation of Lowery were reasonable in amount.

[3] Attorney fees and expenses may be recovered only where provided for by statute, or when a recognized and accepted uniform course of procedure has been to allow recovery of an attorney fee. *Schirber v. State, supra*. Neb. Rev. Stat. § 29-3905 (Reissue 2008) applies in this case and provides:

> Appointed counsel for an indigent felony defendant other than the public defender shall apply to the district court which appointed him or her for all expenses reasonably necessary to permit him or her to effectively and competently represent his or her client and for fees for services performed pursuant to such appointment . . . . The court, upon hearing the application, shall fix reasonable expenses and fees, and the county board shall allow payment to counsel in the full amount determined by the court.

[4,5] To determine proper and reasonable fees, it is necessary to consider the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. *Schirber v. State, supra*; *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997). While such attorney fees and expenses are ordinarily left to the trial court's discretion, an application for attorney fees and expenses must be granted where the record demonstrates that the amount requested was reasonable and there is no evidence or indication otherwise that the amount is unreasonable. *Schirber v. State, supra*; *Koehler v. Farmers Alliance Mut. Ins. Co., supra*.

After recognizing the foregoing principles, the district court analyzed the work performed by Huff. Huff filed 15 motions on behalf of Lowery, and the State also filed 15 motions. Two hearings were held which were lengthy: one being a preliminary hearing after the first amended information was filed and the second being the hearing on the motion to suppress and other pending motions. Two briefs were submitted by Huff: a 6-page brief on the plea in bar and motion to quash and a 26-page brief on the motion to suppress and other pending motions. The district court then applied the factors set forth in *Koehler* and made the following findings:

> 1. Nature of the litigation: This case was initially charged in two counts, one class III and one class IV felony. Summarized, [Lowery] was alleged to have lied to police about his brother's involvement in a homicide, and was alleged to have attempted to dispose of the weapon used. There were four persons charged in connection with the homicide. All of the cases were resolved without trials, this case in a negotiated plea to two class I misdemeanors.
>
> 2. Novelty and difficulty of the questions raised: The case did not present particularly novel or difficult questions of law or fact. Due to the accessory charge, the nature of the underlying crime takes on importance, and considerable time was spent addressing the viability of the underlying homicide.
>
> 3. Skill required to properly conduct the case: The case required an experienced and skilled criminal defense attorney. While not novel or difficult, the case was somewhat complex due to the interaction of the four cases.
>
> 4. The responsibility assumed: The attorney was the sole legal representative of the defendant, whose responsibility was to ensure a fair trial for [Lowery].
>
> 5. Care and diligence exhibited: The attorney exhibited a high level of care and diligence. Numerous motions were filed to address current issues in the case.
>
> 6. Result of the suit: The result obtained was very favorable to [Lowery], avoiding any felony convictions.

> 7. Character and standing of the attorney: . . . Huff is an attorney who has been in practice since 1999. He practices criminal law regularly. No evidence is offered that he is not of good character and high standing.
>
> 8. Customary charges of the bar for similar services - time and labor required: The county rate for appointed counsel is $70.00 per hour. The Court is aware that attorneys of . . . Huff's experience would bill an hourly rate of $125.00 per hour if this were not a court appointment. This awareness is from fee affidavits submitted by attorneys in conjunction with requests for fees in other cases.
>
> The time and labor required has been considered by the Court. This application shows over [300] hours of attorney time. The amount of time would be consistent with a case that had proceeded to jury trial rather than one which was resolved by plea. The total number of the hours billed, despite being actually incurred hours, exceed what is reasonable under *Koehler*.

The court then listed several examples of time billed, totaling 133.7 hours, that it deemed excessive. These entries related to preparing for the initial preliminary hearing (11.1 hours), preparing a plea in abatement and praecipe for transcript (.9 hours), "review[ing] materials and audio/videotapes" (52.3 hours), attending Artie's motion to suppress hearing (4.4 hours), preparing for Lowery's motion to suppress and other motions heard on January 29 and February 3, 2010 (approximately 50 hours), attending and waiting for Artie's sentencing hearing (4.1 hours), and preparing a brief that was not called for or submitted (10.9 hours). The court also noted that fees billed and approved in a companion case by other appointed counsel were $3,266. Finally, the court found that none of the expenses were challenged and did not appear unreasonable.

The court concluded that "by the reasonableness standard which applies in Nebraska, the amount of hours expended, and therefore the billed time submitted, extends beyond the time and labor required for a case of this nature which resulted in a plea before trial." In reaching this conclusion, the court noted that while *Schirber v. State*, 254 Neb. 1002, 581 N.W.2d 873

(1998), holds that a fee application must be granted if it is a reasonable request, the court in *Schirber* also found that such rule did not create a presumption of validity or abdicate the discretion granted to all trial courts to determine reasonable attorney fees and expenses.

While we recognize the deference which we are required to give to the district court's decision under our standard of review, we nevertheless conclude that the holding in *Schirber v. State, supra*, requires us, under the facts of this case, to find that the district court abused its discretion in reducing the requested fees.

First, the district court, in its recitation of examples of excessive time expended, excluded all of the time expended for the noted activities (304.9 hours of time in fee application minus 133.7 hours of excluded time, equals 171.2 hours allowed at $70 per hour for a total fee of $11,984). Some of the time excluded by the court was for matters that the court had previously noted were significant in the case, such as preparation for Joseph's suppression hearing. Further, the court did not state that all of the time for the listed activities was unnecessary; only that the total hours exceeded what is reasonable. To completely exclude all time for the activities listed by the district court amounts to an untenable result. The State in fact conceded in its brief on appeal that Huff should be paid for "some" of the time completely excluded by the court. Brief for appellee at 7.

Second, and of greater import, is that the evidence contained in the record supports the conclusion that Huff's request for fees in connection with the activities excluded by the court, as well as the balance of the time contained in his application, was reasonable. At the hearing on Huff's application for fees, Huff testified about the complexity of the case from the standpoint of the existence of several codefendants, and the fact that Lowery's aiding and abetting charge was dependent upon the outcome of Artie's homicide case. Huff testified that the time he put into Lowery's case was all fair, reasonable, and necessary for his adequate representation. There was no evidence presented to rebut this testimony. The prosecuting attorney asked about the time entries for preparation for the

initial preliminary hearing, for reviewing videotapes and audiotapes, and for letters sent to witnesses. Huff provided detailed responses to these questions indicating that the time listed was actually spent in the particular activity and why the time was necessary. For example, Huff testified that there were significant hours of videotape and audiotape to review, including Artie's and the other codefendant's interrogation by the police and Artie's polygraph examination. The district court also examined Huff, asking about the length of time Huff had been practicing law, the nature of his practice, his hourly charges, the resolution of the case by plea, the level of difficulty of the case, and the relationship of Lowery's case with Artie's case. Huff answered the court's questions thoroughly, again stressing the complexity of the case and the inability to resolve Lowery's case until following Artie's plea and obtaining Artie's proffer agreement and a recording confirming that the victim had been the initial aggressor in the altercation with Artie.

[6] Where the evidence contained in the record supports the fact that the moving party's request for attorney fees and expenses is a reasonable request, per the factors enunciated in *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997), and no other contrary evidence exists or is offered into evidence disputing reasonableness, the request for such reasonable attorney fees and expenses must be granted. *Schirber v. State, supra*. In the case at hand, the record demonstrates that Huff's request for attorney fees and expenses was in fact a reasonable request, and no evidence was offered into evidence to rebut that fact. Accordingly, Huff's application for fees and expenses should have been granted.

Therefore, we reverse the decision of the district court and remand the cause with directions to allow the requested fees and expenses.

Huff also argues that it was error for the district court to consider the fees billed and approved in a companion case, particularly since such fees were not in evidence, the court did not take judicial notice of the fees, and the parties were not notified that such fees would be considered. Given our resolution above, we need not discuss this assignment of error further.

## CONCLUSION

Because the record demonstrates that Huff's application for attorney fees and expenses was reasonable, and no evidence was offered to the contrary, the district court erred in reducing the requested fees. We reverse the decision of the district court and remand the cause with directions to grant Huff's application for fees and expenses.

REVERSED AND REMANDED WITH DIRECTIONS.

CASSEL, Judge, concurring.

I entirely agree with the court's opinion and write only to note the apparent tension between the standard of review for abuse of discretion and the analysis required by *Schirber v. State*, 254 Neb. 1002, 581 N.W.2d 873 (1998).

The definition of abuse of discretion has been frequently repeated. 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. *State v. Mata*, 280 Neb. 849, 790 N.W.2d 716 (2010). While trial courts and appellate courts equally are regarded as experts on the value of legal services, a trial court ordinarily has a better opportunity for practically appraising the situation, and an appellate court will interfere only to correct a patent injustice where the allowance is clearly excessive, or insufficient. *Omaha Paper Stock Co. v. California Union Ins. Co.*, 200 Neb. 31, 262 N.W.2d 175 (1978); *Junker v. Junker*, 188 Neb. 555, 198 N.W.2d 189 (1972); *Specht v. Specht*, 148 Neb. 325, 27 N.W.2d 390 (1947).

However, the *Schirber* opinion mandates that

> where the evidence contained in the record supports the fact that the moving party's request for attorney fees and expenses is a reasonable request, per the factors enunciated in *Koehler* [*v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997)], and no other contrary evidence exists or is offered into evidence disputing reasonableness, the request for such reasonable attorney fees and expenses must be granted.

254 Neb. at 1006, 581 N.W.2d at 876. Although the *Schirber* court asserted that its ruling did not "create a presumption of validity or abdicate the discretion granted to all trial courts to

determine reasonable attorney fees and expenses," 254 Neb. at 1006-07, 581 N.W.2d at 876, I respectfully suggest that this is the practical result.

In the case before us, the trial court judge clearly believed that some of the requested fees were excessive. But the State did not offer any evidence to contradict the applicant's testimony regarding the necessity and reasonableness of the services. Following the analysis prescribed in *Schirber*, we no longer interfere only to correct a patent injustice, but, instead, must reverse to grant the requested fees because "no other contrary evidence exists or is offered into evidence disputing reasonableness." In my opinion, this deprives trial courts of any effective power to review fee applications in all but the most egregious instances.

Vertical stare decisis compels lower courts to follow strictly the decisions rendered by higher courts within the same judicial system. *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009). Because the court's opinion faithfully follows the path mandated by the *Schirber* opinion, I join the court's opinion in full.

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## Richard H. Craig, appellant, v. State of Nebraska, Department of Roads, appellee.

805 N.W.2d 663

Filed June 7, 2011. No. A-10-244.

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. **Constitutional Law: Easements.** The right of an owner of property which abuts on a street or highway to have ingress to and egress from his premises by way of the street is a property right in the nature of an easement in the street and the owner cannot be deprived of such right without due process of law and compensation for loss.

4. **Constitutional Law: Property: Streets and Sidewalks.** The measure of the right of the owner of property abutting a street to access to and from the property by way of the street is reasonable ingress and egress under all the circumstances.
5. **Constitutional Law: Easements: Streets and Sidewalks.** Not only does the owner of property abutting a street possess the right to the use of the street along with other members of the general public, the owner also possesses a private right or easement for the purpose of ingress and egress to and from his property which is a special right not shared with the general public.
6. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Frederick D. Stehlik and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., and Paul F. Peters, of Taylor, Peters & Drews, for appellant.

Jon Bruning, Attorney General, and Martel J. Bundy for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

INBODY, Chief Judge.

## INTRODUCTION

Richard H. Craig appeals the order of the district court for Douglas County granting the motion of the Nebraska Department of Roads (DOR) for summary judgment and dismissing his complaint. For the following reasons, we affirm.

## STATEMENT OF FACTS

In 1979, DOR purchased a portion of property in Douglas County, Nebraska, from R-Lynn Realty in order to construct a southern frontage road to West Dodge Road (Frontage Road). Frontage Road was completed and is still in existence today. R-Lynn Realty maintained ownership of the remainder of the property which abuts Frontage Road (subject property). In 1982, Craig purchased the subject property from R-Lynn Realty, and currently, he leases it to a cellular telephone company. Since its purchase in 1982, the subject property owned by Craig has not had any direct access to West Dodge Road. The subject property is located in the southeast portion of the T-intersection

formed by Frontage Road and 115th Street. In order to reach the subject property, one must exit off of West Dodge Road and enter onto Frontage Road.

In 2004, DOR began construction on the West Dodge Road elevated expressway, which included reconstruction of the existing West Dodge Road, repavement of the frontage roads (there are frontage roads on the north and south sides of West Dodge Road), and construction of the elevated expressway. DOR requested a temporary construction easement from Craig in order to reconstruct the driveway to the subject property after completion of work on Frontage Road. The parties could not reach an agreement regarding the temporary easement, and DOR filed a condemnation action against Craig in order to gain the temporary easement on the subject property. Appraisers were appointed, who subsequently entered an assessment of damages in the amount of $8,598 to Craig. In June 2004, Craig appealed that assessment from Douglas County Court to Douglas County District Court. In March 2005, the parties were notified that the case would be dismissed for lack of prosecution. The parties stipulated to extend the date for Craig to file a certificate of readiness; however, in August 2005, the case was dismissed without prejudice for lack of progression. In September 2005 and March 2006, the parties stipulated to reinstate the case and, again, to extend the date for Craig to file a certificate of readiness. In April 2006, the case was dismissed by the district court. In December 2006, the parties stipulated to reinstate the case, which, in March 2007, was dismissed for the last time for lack of progression. No further reinstatement was sought.

On December 21, 2007, Craig filed a complaint in Douglas County District Court against DOR for inverse condemnation pursuant to Neb. Const. art. I, § 21, seeking damages for loss of visibility as a direct result of the construction of the expressway which rendered his property less convenient, accessible, and desirable. In June 2009, DOR filed a motion for summary judgment and Craig filed a motion for partial summary judgment. The matter came before the district court, which granted DOR's motion for summary judgment and dismissed Craig's complaint.

The district court's order found that summary judgment was proper as a result of res judicata from the prior condemnation proceedings, because Craig was not an abutting property owner, and because the action was barred by the statute of limitations. It is from this order that Craig has timely appealed to this court.

## ASSIGNMENT OF ERROR

Craig assigns, rephrased and consolidated, that the district court erred by granting DOR's motion for summary judgment.

## STANDARD OF REVIEW

[1,2] 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. *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009). 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. *Id.*

## ANALYSIS

Craig argues that the district court erred by finding that Craig was not entitled to compensation for loss of visibility because he was not an abutting property owner. Craig contends that he is an abutting property owner because his property abuts the expressway by virtue of the fact that DOR owns Frontage Road, which his property does abut, and because a portion of the expressway hangs over Frontage Road.

[3-5] The right of an owner of property which abuts on a street or highway to have ingress to and egress from his premises by way of the street is a property right in the nature of an easement in the street and the owner cannot be deprived of such right without due process of law and compensation for loss. *Maloley v. City of Lexington*, 3 Neb. App. 976, 536 N.W.2d 916 (1995). See *Balog v. State*, 177 Neb. 826, 131 N.W.2d 402 (1964). The measure of the right of the owner of property abutting a street to access to and from the property

by way of the street is reasonable ingress and egress under all the circumstances. *Maloley, supra*. See *Balog, supra*. Not only does the owner of property abutting a street possess the right to the use of the street along with other members of the general public, the owner also possesses a private right or easement for the purpose of ingress and egress to and from his property which is a special right not shared with the general public. *Maloley, supra.* See, also, *Balog, supra*.

In the course of the expressway project, Frontage Road was repaved, for which, by virtue of the condemnation proceedings discussed above, Craig was compensated $8,598 for a temporary easement. Although Craig argues that he is an abutting property owner to West Dodge Road and the expressway, we have carefully reviewed the evidence in the light most favorable to Craig, have given him the benefit of all reasonable inferences deducible from the evidence, and find that he clearly is not an abutting property owner to West Dodge Road and the expressway.

Furthermore, prior to Craig's ownership of the subject property, a larger parcel of land was owned by R-Lynn Realty, which land lay south of West Dodge Road. In 1979, DOR purchased a portion of that property from R-Lynn Realty and constructed Frontage Road. In 1982, Craig purchased that remaining portion of property, the subject property, from R-Lynn Realty, which property abutted Frontage Road and 115th Street, not West Dodge Road. Any rights or claims to air, light, and view that were held by R-Lynn Realty in relation to West Dodge Road terminated in 1979, with the purchase of that portion of the property by DOR. See Neb. Rev. Stat. § 39-1327 (Reissue 2008) ("[i]n order to carry out the purposes of this section, [DOR] may acquire . . . such rights of access as are deemed necessary, including but not necessarily limited to air, light, view, egress, and ingress"). Craig acquired the rights he holds to the subject property from R-Lynn Realty, of which air, light, and view are no longer attached. In accordance with Neb. Rev. Stat. § 39-1328 (Reissue 2008), as an abutting property owner to only Frontage Road, Craig was entitled to only ingress and egress of said frontage road, which the record indicates was clearly provided by DOR.

Therefore, we find that Craig does not have a claim for any compensation for loss and that the district court did not err by granting DOR's motion for summary judgment and dismissing Craig's complaint.

## CONCLUSION

[6] Having determined that the district court properly granted summary judgment on the ground that Craig was not an abutting property owner and, as such, does not have a claim for any compensation for loss, we need not address Craig's remaining assignments of error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006). Therefore, we affirm.

AFFIRMED.

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# CHRISTINA B. VRTATKO AND RODNEY VRTATKO, APPELLANTS, v. KARRI M. GIBSON, APPELLEE.

800 N.W.2d 676

Filed June 28, 2011. No. A-10-546.

1. **Visitation: Appeal and Error.** Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
2. **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 a judicial system.
3. **Visitation.** At common law in Nebraska and elsewhere, grandparents lacked any legal right to visitation and communication with their grandchildren if such visitation was denied by the parents.
4. **Visitation: Proof.** The statutory right to grandparent visitation in Nebraska, pursuant to Neb. Rev. Stat. § 43-1802(1) (Reissue 2008), requires the petitioning grandparent to satisfy a steep and significant burden of proof.
5. ____: ____. A court is without authority to grant grandparent visitation unless the petitioning grandparent can prove by clear and convincing evidence the statutory requirements set forth in Neb. Rev. Stat. § 43-1802(1) (Reissue 2008).
6. **Parent and Child: Presumptions.** There is a presumption that fit parents act in the best interests of their children.

7. **Visitation.** A fit parent's decision concerning the denial of grandparent visitation must be accorded at least some special weight.
8. **Visitation: Presumptions.** Notwithstanding the special weight to be accorded a fit parent's decision concerning the denial of grandparent visitation, the presumption in favor of fit parents is rebuttable under the appropriate circumstances.

Appeal from the District Court for Scotts Bluff County: DEREK C. WEIMER, Judge. Affirmed.

Donald J.B. Miller, of Matzke, Mattoon & Miller, L.L.C., L.L.O., for appellants.

On brief, Andrew W. Snyder and Joseph A. Kishiyama, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Christina B. Vrtatko and Rodney Vrtatko appeal an order of the district court for Scotts Bluff County, Nebraska, denying their request for court-ordered grandparent visitation with their now 3-year-old grandchild, Kaylee Gibson. On appeal, the Vrtatkos challenge the district court's findings that they failed to prove the existence of a significant beneficial relationship between themselves and Kaylee and that they failed to prove that it is in the best interests of Kaylee that any such relationship continue. We find that the district court did not abuse its discretion in denying the Vrtatkos' request for grandparent visitation, and we affirm.

## II. FACTUAL BACKGROUND

This case concerns a petition for grandparent visitation filed by the Vrtatkos seeking court-ordered grandparent visitation rights with their grandchild, Kaylee. Kaylee's parents are Karri M. Gibson and the Vrtatkos' son Michael Vrtatko, who is now deceased. Karri and Michael had a brief relationship, during which she became pregnant with Kaylee. Kaylee was born in December 2007, and Karri has had custody of Kaylee since her birth.

In early 2008, Karri and Michael litigated a paternity case to establish that Michael was Kaylee's biological father and to establish Michael's visitation rights. During that litigation, Michael requested that the Vrtatkos not get involved, and they honored that request. Michael was awarded a graduated visitation schedule that started in May 2008, when Kaylee was approximately 6 months of age. Under the graduated visitation schedule, Michael initially was allowed one weekly visit of a few hours at a time in Karri's home. After approximately 6 weeks, Michael was allowed once per week to pick Kaylee up in the morning and return her to Karri in the afternoon. That arrangement continued for 4 to 5 months, after which Michael was allowed overnight visitation for two consecutive nights per week. Michael exercised this overnight visitation on five or six occasions before passing away in July 2009.

Prior to Michael's death, the Vrtatkos spent limited time with Kaylee. The Vrtatkos saw Kaylee at the hospital the day after she was born. They saw her a second time in January 2008, at Karri's home. Throughout the rest of 2008, the Vrtatkos did not have significant contact with Kaylee because paternity, custody, and visitation rights were being litigated between Karri and Michael and because the Vrtatkos honored Michael's request not to get involved in the litigation. Between Christmas 2008 and Michael's death in July 2009, the Vrtatkos saw Kaylee during some of Michael's visitations. Christina testified to approximately eight occasions when the Vrtatkos spent time with Kaylee during Michael's visitations, mostly on holidays or family birthday celebrations. After Michael's death, at the Vrtatkos' request, Karri permitted two visits between the Vrtatkos and Kaylee during September 2009. After the second such visit, the Vrtatkos requested additional visitation, which Karri declined. The Vrtatkos have not seen Kaylee since September 2009.

On March 8, 2010, the Vrtatkos filed an amended petition seeking court-ordered grandparent visitation with Kaylee. A hearing on the amended petition was held on March 17. The evidence adduced established the limited contact the Vrtatkos had with Kaylee during the first 2 years of her life, as set forth above.

Concerning the visits the Vrtatkos had with Kaylee after Michael's death, Christina testified that at the first visit, Kaylee was initially shy and did not recognize who the Vrtatkos were, but eventually warmed up to them. Similarly, Christina testified that on the second visit, she again had to reestablish herself with Kaylee before Kaylee recognized her. Karri's mother testified that at both visits, Kaylee warmed up to Rodney relatively quickly, but really did not want anything to do with Christina.

Karri testified that she had concerns about the Vrtatkos' having visitation with Kaylee based on information Michael had told her about his relationship with the Vrtatkos. She testified that Kaylee is "afraid of" Christina. Karri testified that she did not think visitation was a good idea because of the way Kaylee acted after visits with the Vrtatkos and that she did not want to put Kaylee in a situation where she is uncomfortable. Karri testified that she was not "shutting the door" to Kaylee's having a relationship with the Vrtatkos at some point in time, but that she was opposed to court-ordered visitation rights at this point in Kaylee's young life.

Following the hearing, the trial court entered an eight-page order that includes careful consideration of the factual circumstances of this case, the evidence adduced, and the applicable principles of law governing grandparent visitation. The court found that the Vrtatkos had, in totality, approximately eight interactions with Kaylee during the first 2 years of her life. The court noted that Karri and Michael knew each other only briefly and that Karri and the Vrtatkos have a very limited relationship with one another. The court noted that Kaylee has been hesitant around the Vrtatkos during their limited interactions, that Kaylee does not ask about the Vrtatkos, and that she has no special names for them.

The trial court found that Karri's hesitancy to grant grandparent visitation to the Vrtatkos was based on her belief that it was not in Kaylee's best interests, because she had concerns about Kaylee's reaction after visits with the Vrtatkos, because she felt the Vrtatkos had been overly aggressive and intrusive in pushing for more time with Kaylee, because of Kaylee's young age, and because she personally did not know

the Vrtatkos very well and was not comfortable leaving her very young daughter with people who are essentially strangers to her.

The trial court considered the relevant legal principles that guide grandparent visitation cases in Nebraska and concluded that there was no evidence to suggest that Karri was acting other than in the best interests of Kaylee, that her decision as the natural mother was entitled to special weight, and that her concerns appeared to be reasonable. In light of Kaylee's young age and the Vrtatkos' very limited contact with her during the first 2 years of her life, the court concluded that the Vrtatkos presented insufficient evidence to establish that they had developed a significant beneficial relationship with Kaylee, regardless of the Vrtatkos' laudable desire to be an active resource in Kaylee's life. The court also found that the Vrtatkos had adduced insufficient evidence to demonstrate that Kaylee's best interests would be served by ordering grandparent visitation against the wishes of her natural mother, Karri. The court thus denied the Vrtatkos' petition, and they brought the present appeal.

## III. ASSIGNMENT OF ERROR

On appeal, the Vrtatkos have assigned five errors, which we consolidate for discussion to one. The Vrtatkos assert that the district court erred in denying their request for grandparent visitation.

## IV. ANALYSIS

The Vrtatkos assert that the district court erred in denying their request for court-ordered grandparent visitation rights with Kaylee. Nebraska appellate jurisprudence in the area of grandparent visitation demonstrates both that grandparents must satisfy a substantial burden to demonstrate that their desire for court-ordered visitation should override a fit natural parent's reluctance to grant such visitation and that the trial court's decision concerning grandparent visitation is to be accorded deference. In this case, we find no abuse of discretion by the district court in its conclusion that the Vrtatkos failed to satisfy their substantial burden.

[1,2] Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. *Nelson v. Nelson*, 267 Neb. 362, 674 N.W.2d 473 (2004). 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 a judicial system. *Id.*

[3-5] At common law in Nebraska and elsewhere, grandparents lacked any legal right to visitation and communication with their grandchildren if such visitation was denied by the parents. *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006). Nebraska was the last state in the nation to grant grandparent visitation rights. *Id.* The statutory right to grandparent visitation in Nebraska, pursuant to Neb. Rev. Stat. § 43-1802(1) (Reissue 2008), requires the petitioning grandparent to satisfy a steep and significant burden of proof. Indeed, the Nebraska Supreme Court has indicated that a court is *without authority* to grant grandparent visitation unless the petitioning grandparent can *prove by clear and convincing evidence* the statutory requirements set forth in § 43-1802(1). *Hamit v. Hamit, supra.* The Nebraska Supreme Court has also noted that as part of its legislative findings in regard to § 43-1802(1), the Nebraska Legislature recognized that the State presumes the critical importance of the parent-child relationship in the welfare and development of the minor child and that the parent-child relationship, in the absence of parental unfitness or a compelling state interest, is entitled to protection from intrusion. *Hamit v. Hamit, supra*.

[6-8] The most recent discussion of Nebraska's grandparent visitation statute was in the Nebraska Supreme Court's decision in *Hamit v. Hamit, supra.* In that opinion, the Supreme Court examined Nebraska's grandparent visitation statute in light of the U.S. Supreme Court's plurality opinion in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49

(2000). The Nebraska Supreme Court recognized that in the area of grandparent requests for visitation, natural parents enjoy certain due process rights. *Hamit v. Hamit, supra*. The court set forth a number of relevant principles that are applicable to grandparent visitation cases:

> (1) There is a presumption that fit parents act in the best interests of their children.
>
> (2) In light of this presumption, a fit parent's decision concerning the denial of grandparent visitation must be accorded at least some special weight.
>
> (3) Notwithstanding the special weight to be accorded a fit parent's decision, the presumption in favor of fit parents is rebuttable under the appropriate circumstances.

*Hamit v. Hamit*, 271 Neb. at 671-72, 715 N.W.2d at 524. The district court quoted those principles in its order denying the Vrtatkos' petition. In its extensive and thorough order in this case, the district court carefully considered each of these principles, in conjunction with the specific statutory requirements of § 43-1802(1), including the requirements that the grandparent demonstrate a significant beneficial relationship with the child and that it be in the best interests of the child to continue the relationship.

The Vrtatkos assert that their significant beneficial relationship with Kaylee is illustrated by their attempts to give her love and affection and that "[t]here can be no doubt that the Vrtatkos' love and affection for Kaylee is in Kaylee's best interests." Brief for appellants at 11. This assertion is substantially similar to the policy notion stressed by the trial court in *Nelson v. Nelson*, 267 Neb. 362, 674 N.W.2d 473 (2004). That case concerned a request by grandparents for visitation in a situation where the children's natural father was deceased. In that case, the trial court concluded that it was important for the children to have a relationship with their grandparents; that if it were left to the natural mother to foster the relationship, it was unlikely to occur; and that the policy notion of the importance of the relationship between the grandparents and children was sufficient to constitute a significant beneficial relationship. The trial court thus granted grandparent visitation. On appeal, this court reversed.

On further review, the Nebraska Supreme Court affirmed this court's reversal of the trial court's award of visitation to the grandparents. In so doing, the Supreme Court stated:

> While we certainly agree with the general proposition that a strong and healthy relationship with grandparents is in the best interests of children, *that is not the issue before us.* In the legitimate exercise of her parental rights, [the natural mother] has concluded that the interests of her children would not be served by an ongoing relationship with their grandparents at the present time, given the generally strained familial relationship. *Whether or not we agree with that decision, we do not have legal authority to countermand it by ordering grandparent visitation in the absence of clear and convincing evidence that "a significant beneficial relationship exists, or has existed in the past, between the grandparent and the child and that it would be in the best interests of the child to allow such relationship to continue."* See § 43-1802(2). The statutory requirement that grandparents present such evidence *before a court may even consider ordering visitation* gives proper deference to the fundamental right of a fit parent to make decisions regarding [her] children's upbringing. See *Troxel v. Granville*, 530 U.S. 57, . . . 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) . . . .

*Nelson v. Nelson*, 267 Neb. at 372-73, 674 N.W.2d at 481 (emphasis supplied) (emphasis omitted). Thus, while recognizing the validity of this policy notion, the Supreme Court explicitly rejected it as the basis for awarding grandparent visitation and stressed the significant burden on the grandparents seeking visitation to present sufficient evidence to override the decision of a fit parent to deny visitation. Despite the validity of this policy notion, there is no prior case in this state where a trial court has denied grandparent visitation on the basis of insufficient evidence and that decision has been overturned on appeal. See, *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006) (trial court's grant of visitation affirmed); *Nelson v. Nelson*, 267 Neb. 362, 674 N.W.2d 473 (2004) (trial court's grant of visitation reversed); *Morris v. Corzatt*, 255 Neb. 182, 583 N.W.2d 26 (1998) (trial court's denial of visitation affirmed);

*Eberspacher v. Hulme*, 248 Neb. 202, 533 N.W.2d 103 (1995) (trial court's denial of visitation reversed by Court of Appeals and Court of Appeals' decision reversed by Supreme Court); *Beal v. Endsley*, 3 Neb. App. 589, 529 N.W.2d 125 (1995) (trial court's grant of visitation affirmed when not challenged on appeal).

In this case, the Vrtatkos presented evidence suggesting their love for Kaylee and their desire to have a relationship with her. They also presented evidence concerning the interaction they had with Kaylee on the very few occasions on which they saw her. Other witnesses agreed that there was a loving relationship during these brief and limited interactions. However, Karri presented conflicting evidence about the Vrtatkos' interactions with Kaylee. Karri testified that Kaylee was "afraid of" Christina, that she did not think visitation was a good idea because of the way Kaylee acted after visits, and that she had concerns about visitation with the Vrtatkos based on what Michael had told her about them. She testified that she did not want to put Kaylee in a situation where Kaylee is uncomfortable. She testified that she was not "shutting the door" to Kaylee's having a relationship with the Vrtatkos at some point in time.

In *Eberspacher v. Hulme, supra*, the Nebraska Supreme Court recounted evidence about a relatively lengthy and significant relationship between the grandparents and minor child. There was certainly substantially more evidence of interaction between the grandparents and child than in the present case, but the trial court concluded that the grandparents had failed to meet their burden to prove a significant beneficial relationship. The trial court recognized that there was nothing bad to be said about the relationship, but simply concluded that the grandparents had not met their burden.

On appeal, the Supreme Court noted:

> The undisputed evidence of record is that the grandparent-grandchild relationship here is an unremarkable, typical, healthy relationship. The district court, however, which observed the witnesses, did not find clear and convincing evidence that the relationship was such that it would be in the best interests of the children that it continue or that court-ordered grandparent visitation would

> not adversely interfere with the parent-child relationship. Even assuming the Court of Appeals was correct—that there was clear and convincing evidence of the three criteria required by § 43-1802—we cannot say that the district court abused its discretion in denying the grandparents' petition, in light of the litigious relationship in this case.

*Eberspacher v. Hulme*, 248 Neb. at 208-09, 533 N.W.2d at 106-07. Thus, the abuse of discretion standard of review is of significance in our review of these kinds of cases.

This case presents a factual situation in which the natural mother and father of the child had a very brief relationship that resulted in pregnancy and the birth of the minor child. After the child's birth, the father himself had limited contact with the child and requested that the paternal grandparents not have significant contact with the child. The grandparents chose to honor his request and chose not to have a substantial relationship with the child. The trial court found that in totality, the grandparents had approximately eight interactions with the child. The trial court found that there was evidence that the child is hesitant around the grandparents until she "warms up" to them, that she does not ask about them, and that she has no special names for them. The grandparents are virtually strangers to the mother because of the limited relationship between the mother and father prior to the child's birth. The trial court found that the mother has resisted granting visitation to the grandparents at this time because she does not feel it is in the child's best interests, because she has concerns about the child's reaction after visits, because she feels that the grandparents have been overly aggressive and intrusive in pushing for more time with the child, because of the child's young age, and because she does not personally know the grandparents well enough to be comfortable letting her very young daughter go with people who are essentially strangers to her. The mother also acknowledged that she was not foreclosing the possibility of fostering a relationship between the grandparents and the child at a later time, when the child is older and in a better position to understand their relationship to her.

The trial court heard and observed all of the witnesses, carefully reviewed all of the relevant jurisprudence in this area, and issued a thorough and well-reasoned opinion addressing the legal requirements imposed on grandparents in the Vrtatkos' position and the evidence adduced in this case. The trial court concluded that the Vrtatkos failed to adduce clear and convincing evidence that they had a significant beneficial relationship with Kaylee, based on their very limited contact with her, and it concluded that they failed to adduce clear and convincing evidence that judicially imposing more of a relationship at the present time was in Kaylee's best interests when opposed by the wishes of Karri, a fit natural parent. We cannot conclude that this decision is an abuse of discretion.

## V. CONCLUSION

This case presents an unusual and difficult factual situation, where the natural father of the minor child passed away during the first few years of the child's life and after having only a brief relationship with the natural mother. The child's paternal grandparents desire to have a relationship with the child, but the mother has resisted court-ordered grandparent visitation rights. We certainly do not dispute the potential importance of relationships between children and their grandparents, but the law imposes a substantial burden on grandparents seeking court-ordered visitation rights, and the trial court's conclusion after seeing and hearing the witnesses and weighing the evidence is entitled to deference. In this case, we find no abuse of discretion, and we affirm the district court's decision.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
RICHARD R. HARPER, APPELLANT.
800 N.W.2d 683

Filed July 12, 2011. No. A-10-257.

1. **Motor Vehicles.** Neb. Rev. Stat. § 60-696(1) and (2) (Cum. Supp. 2008) sets forth two separate and distinct offenses.

2. ____. Neb. Rev. Stat. § 60-696 (Cum. Supp. 2008) establishes that a driver involved in an accident has separate and distinct responsibilities, depending on whether the other vehicle involved is attended or unattended.
3. **Motor Vehicles: Legislature: Misdemeanors.** Neb. Rev. Stat. § 60-696 (Cum. Supp. 2008) is drafted such that each violation is its own separate subsection, and the Legislature noted that a person violating either is guilty of a Class II misdemeanor.

Appeal from the District Court for Lancaster County, KAREN B. FLOWERS, Judge, on appeal thereto from the County Court for Lancaster County, JEAN A. LOVELL, Judge. Judgment of District Court reversed and remanded with directions.

Randall Wertz and John F. Recknor, of Recknor, Wertz & Associates, for appellant.

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

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Richard R. Harper appeals an order of the district court for Lancaster County, Nebraska, affirming an order of the county court convicting and sentencing him on a charge of leaving the scene of an accident with an unattended vehicle. This appeal presents two issues. The first issue is whether Neb. Rev. Stat. § 60-696(1) and (2) (Cum. Supp. 2008) creates a single offense that can be committed in multiple ways or creates separate offenses. The second issue is the meaning of the phrase "unattended vehicle" in the context of § 60-696(2), leaving the scene of an accident with an unattended vehicle. On review, we conclude that § 60-696(1) and (2) creates separate offenses and that the evidence was insufficient to support a conviction under § 60-696(2), the provision Harper was charged and tried under. We therefore reverse the district court's order and remand the matter to the district court with directions to reverse the county court's order and remand the matter to the county court with directions to dismiss.

## II. BACKGROUND

The events giving rise to this action occurred in the evening hours of February 14, 2009, outside a bar in Lincoln, Nebraska. On that evening, Nathan Eilers was at the bar with a group of people to wish farewell to an individual who was being deployed in the military. Eilers received a call on his cellular telephone and stepped outside of the bar to take the call. While Eilers was outside the bar and talking on his cellular telephone, he observed Harper in a "white pickup" and observed Harper back his vehicle and strike a parked vehicle.

Eilers testified that he did not actually know the name of the owner of the struck vehicle, but believed it belonged to the person who was being deployed. Other evidence at trial indicated that it belonged to another member of the group. Nonetheless, Eilers approached Harper and knocked on the passenger side window of Harper's vehicle. Eilers told Harper that the struck vehicle belonged to Eilers.

According to Eilers, he told Harper that he wanted to notify law enforcement of the accident and wanted to "get [Harper's] plate number first." Harper testified that he and Eilers looked at the damage caused to the struck vehicle and that Harper then offered to give Eilers his insurance information, but that Eilers did not take the insurance information. After taking Harper's license plate number, Eilers went inside the bar. Eilers testified that he told Harper to wait outside. Eilers testified that he went back outside the bar after about "three minutes" and that Harper was gone.

Harper testified that he did not wait very long after Eilers went back inside the bar, but that he knew that Eilers had his license plate number before he left. Harper also testified that he called the police on February 16, 2009, which was a Monday, approximately 36 hours after the accident, and made a report of it. He offered evidence of his telephone records, showing that he placed a telephone call to the police station at that time and that the telephone call lasted for approximately 4 minutes. The State offered testimony from a police officer who testified that he had been unable to locate any report of the accident by Harper in the police database.

The evidence adduced at trial indicated that the damage caused by Harper's collision with the parked vehicle was approximately $800. The damage was repaired and paid for by insurance in Harper's name.

Approximately a week after the accident, a police officer looked up Harper's license plate number as provided by Eilers and made contact with Harper. Harper told the officer that he had spoken with somebody he believed was the owner of the struck vehicle immediately after the accident, that the person had gone into the bar and not come back out, and that he had called the police station and reported the accident. The officer gave Harper a citation charging him with leaving the scene of an accident, pursuant to § 60-696(2), and unsafe backing, pursuant to Neb. Rev. Stat. § 60-6,169 (Reissue 2010).

At trial, Harper moved to dismiss the charge related to leaving the scene of an accident with an unattended vehicle. Harper argued that he had been charged with violating the specific prohibition of leaving the scene of an accident with an unattended vehicle and that the uncontroverted evidence offered by the State demonstrated that the vehicle Harper had struck was not unattended, because Eilers witnessed the accident, spoke with Harper, and affirmatively represented to Harper that he was the owner of the struck vehicle. The State argued that "whether it [was] an unattended vehicle is not really relevant as far as dismissal, because [Harper] didn't" comply with either the provision in § 60-696(2) dealing with unattended vehicles or in § 60-696(1) dealing with attended vehicles. The court specifically commented that it believed there was evidence to support a finding that the other vehicle was unattended and overruled the motion to dismiss.

The county court found Harper guilty on both charges set forth in the citation. The court sentenced Harper to 7 days in jail and imposed a 1-year license revocation for the violation of § 60-696(2), although the court later ordered the jail sentence to be served under house arrest.

On September 29, 2009, Harper filed a notice of appeal to the district court. Harper, however, failed to file a statement of errors. As a result, the district court limited its review to a

review for plain error. The district court found no plain error and affirmed. This appeal followed.

## III. ASSIGNMENT OF ERROR

Harper's assignments of error on appeal can all be restated as an assertion that the district court erred in not finding that there was insufficient evidence adduced at trial to sustain the county court's conviction on the alleged violation of § 60-696(2).

## IV. ANALYSIS

### 1. § 60-696(1) AND (2)

The first issue we must address in this appeal is whether § 60-696(1) and (2) creates a single offense that can be committed in multiple ways or creates separate offenses. The citation issued to Harper in this case, which served as the charging document, specifically indicated that he was being charged with violation of § 60-696(2), which prohibits leaving the scene of an accident with an unattended vehicle. As discussed more fully below, we conclude that there was insufficient evidence to support a conviction under § 60-696(2). During oral argument, the State asserted that such insufficiency should not matter because § 60-696(1) and (2) creates a single offense, leaving the scene of an accident, that can be committed in multiple ways and because there was sufficient evidence to support a conviction under § 60-696(1). We disagree.

Section 60-696 governs a driver's obligation to stop, furnish information, and report accidents. Section 60-696(1) provides as follows:

> Except as provided in subsection (2) of this section, the driver of any vehicle involved in an accident upon a public highway, private road, or private drive, resulting in damage to property, shall (a) immediately stop such vehicle at the scene of such accident and (b) give his or her name, address, telephone number, and operator's license number to the owner of the property struck or the driver or occupants of any other vehicle involved in the collision.

Section 60-696(2) provides as follows:

> The driver of any vehicle involved in an accident upon a public highway, private road, or private drive, resulting

> in damage to an unattended vehicle or property, shall immediately stop such vehicle and leave in a conspicuous place in or on the unattended vehicle or property a written notice containing the information required by subsection (1) of this section. In addition, such driver shall, without unnecessary delay, report the collision, by telephone or otherwise, to an appropriate police officer.

Section 60-696(4) provides that any person violating subsection (1) or (2) is guilty of a Class II misdemeanor.

[1-3] We conclude that § 60-696(1) and (2) sets forth two separate and distinct offenses. Section 60-696 establishes that a driver involved in an accident has separate and distinct responsibilities, depending on whether the other vehicle involved is attended or unattended. Section 60-696 is drafted such that each violation is its own separate subsection, and the Legislature noted that a person violating either is guilty of a Class II misdemeanor.

In contrast, in Neb. Rev. Stat. § 60-6,196 (Reissue 2010), the Legislature set forth a single violation, driving under the influence of alcoholic liquor or any drug, which can be committed in multiple ways. See *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008) (driving under influence violation is single offense that can be proven in more than one way). Section 60-6,196(1) provides as follows:

> It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:
>
> (a) While under the influence of alcoholic liquor or of any drug;
>
> (b) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood; or
>
> (c) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.

Section 60-6,196(2) provides that any person who operates or is in the actual physical control of any motor vehicle while in a condition described in subsection (1) shall be guilty of a crime and punished according to separate statutory provisions.

Unlike § 60-696, the Legislature drafted § 60-6,196 in such a fashion to indicate that driving under the influence was a single violation, but that it could be proven in multiple ways, either through evidence that the driver was under the influence or through evidence of prohibited concentrations of alcohol in the driver's blood or breath. In § 60-696, the Legislature separately specified a driver's obligations when involved in an accident, depending upon whether the other vehicle was attended or unattended—specifying different obligations for each.

We additionally note that our review of the bill of exceptions in this case makes it apparent that Harper's defense at trial was premised entirely on the notion that he was specifically charged with violating § 60-696(2) and that the vehicle he had struck was not an unattended vehicle. The evidence adduced by the State at trial was clearly intended to prove a violation of § 60-696(2), as the State attempted to demonstrate that he failed to leave a written notice on the vehicle and failed to sufficiently report the accident to law enforcement without unnecessary delay, both of which are exclusive to § 60-696(2). The State's closing argument to the trial court was almost entirely concerned with assertions that Harper had failed to timely report the accident to law enforcement, a requirement exclusive to § 60-696(2). The charging document in this case specified that Harper was being charged under § 60-696(2), the evidence adduced at trial was intended to prove a violation of § 60-696(2), Harper defended specifically against a violation of § 60-696(2), and when he moved to dismiss for insufficiency of the evidence, the court even commented that there was sufficient evidence to support a finding that the vehicle was unattended.

We decline to address the question of whether a citation generally alleging violation of § 60-696, without specifying subsection (1) or (2), would be sufficient under separate factual circumstances. On the specific facts of the present case, the charging document alleged a violation of § 60-696(2) and trial was had on an alleged violation of § 60-696(2), and we are unpersuaded by the State's assertion during oral argument on appeal that it is sufficient to evaluate the sufficiency of the

evidence adduced to demonstrate a violation of either subsection (1) or (2). We conclude that Harper's conviction can be upheld only if there was sufficient evidence to demonstrate a violation of § 60-696(2).

### 2. Sufficiency of Evidence

On appeal, Harper's assertions of error all challenge the sufficiency of the evidence adduced by the State at trial to prove beyond a reasonable doubt that he had violated the statutory provision for which he was cited, § 60-696(2). Specifically, he has challenged the sufficiency of the evidence to demonstrate that he had an accident with an unattended vehicle, which evidence is a prerequisite to the obligations imposed by § 60-696(2). We find that the evidence adduced at trial was insufficient, and we find such insufficiency to be plain error.

We initially note that our review in this case is limited to reviewing for plain error. Harper did not file a statement of errors when he appealed the judgment of the county court to the district court. Where no timely statement of errors is filed in an appeal from a county court to a district court, appellate review is limited to plain error. *State v. Burns*, 16 Neb. App. 630, 747 N.W.2d 635 (2008). Plain error will be noted 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. *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). We conclude that if the evidence adduced by the State was legally insufficient to support Harper's conviction, such insufficiency would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

In this case, the citation issued to Harper specifically charged him with violation of § 60-696(2). As noted above, that section provides as follows:

> The driver of any vehicle involved in an accident upon a public highway, private road, or private drive, resulting in damage to an unattended vehicle or property, shall

> immediately stop such vehicle and leave in a conspicuous place in or on the unattended vehicle or property a written notice containing [his or her name, address, telephone number, and operator's license number]. In addition, such driver shall, without unnecessary delay, report the collision, by telephone or otherwise, to an appropriate peace officer.

A plain reading of § 60-696(2) reveals that the threshold matter that triggers a driver's obligation to provide written notice of the required information and to report the accident to law enforcement is that the driver be involved in an accident with "an unattended vehicle or property." As such, the State was obligated to demonstrate that Harper was, in fact, involved in an accident with an unattended vehicle before Harper's failure to provide written notice of the required information would constitute a violation of the statute and before it would become necessary to determine whether Harper reported the collision to law enforcement without unnecessary delay.

There appears to be no prior authority in Nebraska addressing what constitutes an unattended vehicle. Similarly, our review of authority outside of Nebraska concerning other states' statutes similar to the one involved in this case reveals very little discussion of what constitutes an unattended vehicle. One case we have found addressing the issue, although not designated for publication, provides some helpful discussion that is consistent with a plain meaning understanding of the term "unattended vehicle." See *Kirby v. State*, No. 12-01-00081-CR, 2002 WL 1163795 (Tex. App. May 31, 2002) (not designated for publication).

In *Kirby v. State*, the Texas Court of Appeals reviewed a defendant's conviction in county court for violating his legal duty under a Texas statute setting forth the duties when one strikes an unattended vehicle. The statute imposed a duty upon a driver colliding with and damaging an unattended vehicle to locate the owner of the vehicle or to leave in a conspicuous place a written notice giving the name and address of the operator of the vehicle that struck the unattended vehicle. See Tex. Transp. Code Ann. § 550.024 (Vernon 1999).

Similar to the case at bar, one of the issues in *Kirby v. State* was whether the vehicle struck by the defendant was an unattended vehicle. In *Kirby v. State*, the evidence indicated that a welding truck was parked in front of a residence and that the defendant collided with the welding truck. The evidence indicated that, although nobody was outside and present near the welding truck at the time of the accident, there were people inside the residence who heard the crash, went outside upon hearing it, and observed that the defendant's vehicle had collided with the welding truck.

The Texas Court of Appeals noted that the word "attend" means "to be present at." See Webster's Encyclopedic Unabridged Dictionary of the English Language 96 (1994). The court concluded that because nobody was present to see the accident, the welding truck was an unattended vehicle for purposes of the statute.

In the present case, the uncontroverted evidence adduced by the State and by Harper is that Eilers was physically present at the time of the accident, witnessed the accident, approached and spoke with Harper, and affirmatively represented to Harper that Eilers was the owner of the damaged vehicle. Eilers then took down Harper's license plate number. On these facts, we conclude that the vehicle Harper collided with cannot reasonably be construed to have been an unattended vehicle giving rise to the specific obligations of § 60-696(2). The evidence at trial was legally insufficient to prove beyond a reasonable doubt the threshold matter in the statute.

Our resolution of this case should in no way be construed as condoning Harper's conduct of leaving the scene of this accident without providing additional information, nor do we reach the issue of whether Harper actually reported the accident to law enforcement approximately 36 hours later, as he has asserted, or whether such would constitute reporting without unnecessary delay. It may well be the case that Harper's conduct was in violation of § 60-696(1). However, in this case, Harper was specifically cited and charged with violating only § 60-696(2), concerning accidents with unattended vehicles. Our narrow ruling is only that the State failed to demonstrate

beyond a reasonable doubt that Harper violated the specific provision he was cited and charged with violating.

Harper was cited and charged with violating a specific statute, and the evidence adduced by the State was insufficient to prove beyond a reasonable doubt the threshold matter that Harper was involved in a collision with an unattended vehicle. We find this insufficiency to be plain error. We therefore reverse the district court's order affirming the conviction and remand the matter to the district court with directions to reverse the county court's order and remand the matter to the county court with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

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CHRISTINE A. WILSON, APPELLANT, V.
TERRY P. WILSON, APPELLEE.
803 N.W.2d 520

Filed July 12, 2011. No. A-10-969.

1. **Courts: Jurisdiction: Divorce: Judgments: Alimony: Child Support.** A trial court retains jurisdiction to determine the amounts due for alimony and child support and to enforce its prior judgment, and included in that power to enforce its judgment is power to determine any amounts due under the initial decree.
2. **Modification of Decree.** Material changes in circumstances and developments not contemplated are at the heart of proceedings to modify dissolution decrees.
3. ____. A party seeking to modify a dissolution decree must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification which was not contemplated when the prior order was entered.
4. **Modification of Decree: Words and Phrases.** In the context of marital dissolutions, a material change of circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Reversed and remanded with directions.

Frederick D. Stehlik and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellant.

Terry P. Wilson, pro se.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Christine A. Wilson brings this appeal from an order of the district court for Douglas County, Nebraska, in which the court granted relief to Terry P. Wilson on his motion to determine amounts due under the decree. In granting relief, the district court adjusted amounts due Christine under the decree and gave Terry credit for a number of financial payments made by Terry after the decree was entered. On appeal, Christine argues that the court's order amounted to an unauthorized modification of the decree, rather than a determination of amounts due under the terms of the decree. We agree and reverse, and remand with directions to reinstate the provisions in the initial decree concerning amounts due Christine in the property settlement award. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

## II. BACKGROUND

On or about October 22, 2009, the district court entered a decree dissolving the marriage of the parties. In the decree, the district court divided, among other items, an "Oppenheimer" fund, a "SEP/IRA" fund, and equity in the parties' marital home and another parcel of real property; the court concluded that the marital home itself was Terry's premarital property. The court provided that each party was to receive one-half of the value of the Oppenheimer fund, but also ordered Christine to pay certain marital debt. As a result, the court determined that Christine's share of the value of the Oppenheimer fund was to be $11,574.50. The court provided that each party was to receive one-half of the SEP/IRA fund, with each party to be awarded $67,500. The court provided that Christine was entitled to 40 percent of the net equity in the marital home, as well as $6,305 as her share of the equity in another parcel of real property owned by the parties. The court ordered Christine to vacate the marital home by October 31, 2009, or whenever the property was sold, whichever occurred first. There was no appeal from the decree.

After the decree was entered, Christine continued to reside in the marital home and she failed to vacate the property by October 31, 2009, as ordered in the decree. On February 9, 2010, Terry filed a motion requesting the court to determine amounts due under the decree. Terry asserted in the motion that he had been required to make additional mortgage payments on the marital home.

On March 1, 2010, the district court held a hearing on Terry's motion, at which Terry was represented by counsel and Christine appeared pro se. Terry offered various evidence, including an exhibit in which he had calculated what Christine was awarded in the decree and had proposed subtracting from that award amounts he had incurred as a result of Christine's failure to vacate the marital home as ordered in the decree, as well as various temporary support payments he had made to Christine. Where the amounts in the decree, set forth above, would have resulted in an award to Christine of nearly $85,500, Terry's calculations resulted in that award's being reduced to $53,880. At the conclusion of the hearing, the court indicated that the motion to determine amounts due was sustained and asked counsel to prepare an order consistent with Terry's exhibit. The court also found Christine to be in contempt and sustained a motion to have the sheriff remove her from the marital home. The court entered an order on March 8. This order did not dispose of other relief requested in Terry's initial motion, including attorney fees and visitation matters.

On March 12, 2010, Christine filed a motion to vacate or set aside the March 8 order. At an April 1 hearing, Christine was represented by counsel and her counsel argued to the district court that its March 8 order amounted to a modification of the decree, because the decree did not provide for amounts awarded to be reduced by other alleged payments made by Terry and did not provide for reducing Christine's award for any temporary support payments. Christine's counsel also objected to the March 8 order, because Terry's counsel had served notice of the motion and hearing on Christine personally and Christine's counsel was never provided notice. On April 19, the court entered an order overruling the motion to vacate.

Christine initially tried to appeal after the court overruled her motion to vacate. On June 25, 2010, this court dismissed that appeal, finding that the district court had not yet resolved issues raised in Terry's motion, including attorney fees and visitation issues.

On August 3, 2010, Christine filed a motion requesting that the district court enter a final order. On September 16, the court entered an order finding that Terry had withdrawn all outstanding issues and finding that the order on Terry's motion to determine amounts due was final. This appeal followed.

## III. ASSIGNMENTS OF ERROR

Christine has assigned three errors on appeal, which we consolidate for discussion to two. First, Christine asserts that the district court erred in sustaining Terry's motion to determine amounts due and reducing her award set forth in the decree by giving Terry credit for various payments he made. Second, Christine asserts that the court erred in denying her motion to vacate on the basis of Terry's failure to provide notice to her counsel.

## IV. ANALYSIS

Christine first challenges the district court's sustaining of Terry's motion to determine amounts due and reducing her award set forth in the decree. Christine argues that the decree did not provide for the award to be reduced for payments made by Terry or as a result of her failure to vacate the marital home as ordered in the decree and that the court's action amounted to a modification of the decree without following the proper procedure for an application to modify the decree. We agree.

Terry points to the Nebraska Supreme Court's decision in *Roach v. Roach*, 192 Neb. 268, 220 N.W.2d 27 (1974), in support of his assertion that it was proper for the district court to "determine amounts due" under a dissolution decree after the decree has become unappealable. In *Roach v. Roach*, the court entered a dissolution decree in 1961 in which the court ordered the husband to pay support money for a term of years and each year's payments were to consist of one-half of the husband's adjusted gross income. The wife came to suspect that the

husband was not paying her all to which she was entitled, and in 1971, she filed a motion asking for an order compelling the husband to produce tax returns. In response, the husband filed an action to modify the decree. The court ruled that the husband owed the wife $56,000 in past support through December 1970 and set forth new support provisions to commence in January 1972. The omission of the year 1971 in the court's order left confusion as to what the husband owed the wife for the year 1971, and the wife brought an action seeking to have the court "determine the amount of support due" for that year. *Id.* at 269, 220 N.W.2d at 28.

[1] The husband argued to the Supreme Court that the wife should not be able to bring an action to determine the amount of support due, asserting that the court's prior order constituted a final adjudication of the issue. The Supreme Court concluded that res judicata was inapplicable because of the specific issues raised in the wife's motion to compel and the husband's application to modify. The court held that the trial court retained jurisdiction to determine the amounts due and to enforce its prior judgment. *Roach v. Roach, supra*. The court held that included in that power to enforce its judgment was power to determine any amounts due the wife under the initial decree. *Id.*

The present case, however, is markedly different in posture than *Roach v. Roach, supra*. Where that case presented a situation where the trial court had jurisdiction and authority to determine the amounts actually due under the initial decree because of some confusion or ambiguity about what those amounts actually ordered were, the present case involves no ambiguity or lack of clarity concerning what was actually ordered in the decree. Despite Terry's assertion that the obligations of the parties were uncertain, the decree was clear in providing what amounts were due Christine and that Christine was to vacate the marital home. Her failure to vacate the home as ordered did not make the amounts ordered to her unclear or ambiguous.

Similarly, we find this case to be distinct from the situation presented in *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). In that case, the dissolution decree

entered by the court contained a settlement provision providing the husband an additional $75,000 judgment if, during his lifetime, the wife voluntarily or involuntarily sold, transferred, gifted, conveyed, or foreclosed upon property granted to her. The wife subsequently executed a warranty deed to herself and her new husband, and the husband brought a motion to determine amounts due seeking to have the court determine that her execution of the deed satisfied the condition precedent and entitled him to the additional $75,000 judgment. In holding that the husband could proceed with a motion to determine amounts due instead of a separate proceeding for declaratory judgment, the Supreme Court relied heavily on principles of law concerning instances where a decree is ambiguous and the parties are left at their peril to know what they are authorized to do. The court also noted that district courts, in the exercise of their jurisdiction over dissolution actions, retain jurisdiction to enforce terms of approved property settlement agreements and have the power to enter such orders as are necessary to carry the decree into effect.

In the present case, as noted, there is no ambiguity apparent in the decree. Unlike the situation in *Strunk v. Chromy-Strunk, supra*, where it was not clear whether a conveyance to the wife and her new husband constituted a conveyance of the property as contemplated by the condition precedent set forth in the decree, there is no provision in the decree in the instant case that was unclear. Where a motion to determine amounts due was proper in *Strunk v. Chromy-Strunk* to determine whether the additional $75,000 provided in the decree was due and owing, the motion in this case actually sought to offset amounts clearly and unambiguously awarded as a result of actions of Christine that were not contemplated at the time of the decree—her failure to vacate the marital home as ordered.

[2-4] Such material changes in circumstances and developments not contemplated are at the heart of proceedings to modify decrees. See, *Collett v. Collett*, 270 Neb. 722, 707 N.W.2d 769 (2005); *Kramer v. Kramer*, 15 Neb. App. 518, 731 N.W.2d 615 (2007). A party seeking to modify a dissolution decree must show a material change of circumstances which

occurred subsequent to the entry of the original decree or a previous modification which was not contemplated when the prior order was entered. See *id.* A material change of circumstances in this context means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Id.*

In the present case, Terry's motion to determine amounts due sought to have the court modify the amount of money Christine was entitled to from the Oppenheimer fund, the SEP/IRA fund, and the equity in the parties' marital home, because she had failed to vacate the marital home as ordered in the decree and because her failure to vacate had resulted in his inability to sell the property and incurring of additional mortgage payments and expenses. Terry has not demonstrated that any provision in the initial decree was unclear or ambiguous or required a judicial order to determine the amount due. Rather, he is seeking relief as a result of Christine's failure to comply with the provisions of the decree, a circumstance that was not within the contemplation of the parties at the time of the decree.

We note that the district court did retain jurisdiction to enforce the terms of the initial decree. In fact, in this case, the district court sustained a motion to hold Christine in contempt and to direct the sheriff to remove her from the property. The court held Christine in contempt, provided a purge period during which she could purge the contempt by vacating the property, and authorized the sheriff to remove her from the property if she did not so purge the contempt. There has been no appeal from those holdings, and they demonstrate an appropriate means for the court to enforce the terms of its decree. Modifying the amounts awarded to Christine in the decree, without following the appropriate procedures for bringing and resolving an application to modify the decree, was not appropriate in this action to determine amounts due. As such, we reverse the district court's order and remand with directions to reinstate the provisions of the dissolution decree concerning the amounts awarded to Christine under the decree's property settlement.

Christine also challenges the district court's denial of her motion to vacate on the basis of improper notice and challenges Terry's serving of notice on her personally for the motion and hearing, rather than on her dissolution counsel. In light of our resolution of the merits of Christine's assertion concerning the motion to determine amounts due, we need not resolve this issue and decline to comment on it further.

REVERSED AND REMANDED WITH DIRECTIONS.

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HELGA K. HOHERTZ, APPELLEE, V. ESTATE OF GENE E. HOHERTZ, DECEASED, APPELLEE, VETTA HOHERTZ, ALSO KNOWN AS DIANNE HOHERTZ, APPELLANT, AND AID ASSOCIATION FOR LUTHERANS, AND ITS SUCCESSOR, THRIVENT FINANCIAL FOR LUTHERANS, A FRATERNAL BENEFIT ORGANIZATION, APPELLEE.

802 N.W.2d 141

Filed July 19, 2011. No. A-10-967.

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. **Divorce: Judgments: Appeal and Error.** The meaning of a decree presents a question of law, in connection with which an appellate court reaches a conclusion independent of the determination reached by the court below.
3. **Divorce: Final Orders: Intent.** Once a decree for dissolution becomes final, its meaning is determined as a matter of law from the four corners of the decree itself.
4. **Divorce: Property Settlement Agreements: Insurance.** Where a property settlement agreement validly provides for the disposition of life insurance benefits, the subsequent execution of a change of beneficiary form absent consent of the other party to the agreement is ineffective.
5. **Contracts.** Ambiguity exists in a document when a word, phrase, or provision therein has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
6. **Divorce: Intent.** If the contents of a dissolution decree are unambiguous, the decree is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the decree.
7. **Divorce.** If the contents of a dissolution decree are unambiguous, the effect of the decree must be declared in the light of the literal meaning of the language used.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Reversed and remanded with directions.

Timothy J. Buckley, of Adams & Sullivan, P.C., for appellant.

Richard W. Whitworth, of Reagan, Melton & Delaney, L.L.P., for appellee Helga K. Hohertz.

IRWIN and CASSEL, Judges, and HANNON, Judge, Retired.

CASSEL, Judge.

## INTRODUCTION

The decree dissolving Helga K. Hohertz' marriage to Gene E. Hohertz obligated Gene to pay alimony until either he or Helga died and to name Helga as the beneficiary of $100,000 of his life insurance during such time "to secure [his] alimony obligation." Shortly before Gene's death, he changed the beneficiary to his new wife, and after his death, Helga obtained a summary judgment that she was entitled to $100,000 of the death benefit. We conclude that the decree unambiguously limited the insurance beneficiary requirement to securing any unpaid alimony. Because there was none at the time of Gene's death, Helga was not entitled to any of the insurance proceeds. We reverse the summary judgment in Helga's favor and remand the cause with directions.

## BACKGROUND

Helga and Gene married in July 1965. On April 28, 1988, Gene acquired a flexible premium adjustable life insurance policy with a total death benefit of $200,000. A court dissolved Helga and Gene's marriage by decree on May 27, 1992. The decree recited that Helga and Gene entered into an oral settlement agreement resolving issues of alimony and property division, which agreement the court accepted. The decree provided:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that [Gene] shall pay to [Helga] the sum of $1,000.00 per month as alimony, such sum to commence on the 1st day of June, 1992, with a like sum due

> on the first day of each and every month thereafter for twenty-four (24) consecutive months at which time the alimony shall automatically decrease to $775.00 payable on the 1st day of June, 1994, and continue until the death of either party. If [Helga] shall remarry at any time between the finalization of this divorce and June 1, 1994, the alimony shall automatically reduce to $775.00 per month, but such remarriage will not be grounds to terminate alimony.
>
> . . . .
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in order to secure [Gene's] alimony obligation, [Gene] shall maintain his present [life insurance policy] naming [Helga] as beneficiary of $100,000.00 of death benefit for so long as he is obligated to pay support to [Helga] as described hereinabove, and [Gene] shall show proof of such insurance and beneficiary designation at least once annually to [Helga]; provided, however, that if [Gene] fails to maintain such insurance naming [Helga] as beneficiary of $100,000.00 of death benefit, [Gene] shall be liable to [Helga] for the sum of $100.00 per month for each and every month such insurance remains ineffective, or that [Helga] is not named as beneficiary for $100,000.00 of death benefit, which payment shall be in the form of alimony and, therefore, non-dischargeable in bankruptcy and shall be paid in accordance with the alimony obligation described hereinabove. [Gene] shall also maintain the Survivor's Benefit Plan connected to his military retired pay for the benefit of [Helga].

On December 6, 1992, Gene remarried. Sometime after this marriage but still in accordance with the terms of the decree, Gene changed the beneficiary designation of his life insurance policy to provide payment of $100,000 to Helga and the balance of the proceeds to his new wife, Vetta Hohertz, also known as Dianne Hohertz.

Gene was diagnosed with lung cancer in June 2009, and on July 13, he changed the beneficiary designation on his life insurance policy to name Vetta as the primary beneficiary. He paid an additional $100 in alimony to Helga on August 3.

Gene died on August 17. At the time of Gene's death, he had paid Helga a total of $100,075 in alimony and was not in arrears.

After Gene's death, Helga filed a complaint for declaratory judgment and for declaration of a constructive trust concerning $100,000 of the life insurance proceeds. Helga subsequently filed a motion for partial summary judgment, and Vetta later filed a similar motion.

Following a hearing on the motions, the district court entered an opinion and order which found that Helga was entitled to judgment as a matter of law upon her motion and that Vetta was not entitled to judgment. The court reasoned: "[Vetta's] claim that all Gene . . . had to do to escape the provisions of the decree was to make one monthly payment of $100.00, makes a complete mockery of the spirit of that provision, which clearly seeks to protect the financial interests of his former wife of 27 years." The court concluded that "Gene had no authority to change the beneficiary of the policy" while both Helga and Gene were alive. The court further stated that "reading the $100.00 per month clause as creating an either/or scenario for Gene to exercise at his whim would lead to an absurd result, such as the very situation now before this [c]ourt."

Vetta timely appeals.

## ASSIGNMENTS OF ERROR

Vetta assigns two errors. First, she alleges that the district court erred in finding that Gene's change of beneficiary on his life insurance policy prior to his death violated the terms of the decree of dissolution. Second, she claims that the court erred in finding that Gene's change of beneficiary on the life insurance policy contrary to the terms of the divorce decree voided the beneficiary change as a matter of law.

## STANDARD OF REVIEW

[1] 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. *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011).

[2] The meaning of a decree presents a question of law, in connection with which an appellate court reaches a conclusion independent of the determination reached by the court below. *Fry v. Fry*, 18 Neb. App. 75, 775 N.W.2d 438 (2009).

## ANALYSIS

[3] The facts are undisputed, and the questions presented are purely matters of law. Once a decree for dissolution becomes final, its meaning is determined as a matter of law from the four corners of the decree itself. *Id.*

The decree, which incorporated an oral settlement agreement of the parties, included two paragraphs touching on Gene's alimony obligation to Helga. One paragraph obligated Gene to pay $775 per month "until the death of either party." The other paragraph began by stating that "in order to secure [Gene's] alimony obligation," Gene was to maintain his life insurance policy naming Helga as the beneficiary of $100,000 of the death benefit "for so long as he is obligated to pay support to [Helga] as described hereinabove," i.e., until the death of either party. That paragraph required Gene to show proof of such beneficiary designation to Helga at least once a year and stated that "if [Gene] fails to maintain such insurance naming [Helga] as beneficiary of $100,000.00 of death benefit, [Gene] shall be liable to [Helga] for the sum of $100.00 per month for each and every month . . . that [Helga] is not named as beneficiary for $100,000.00 of death benefit." The $100 payment was to be in the form of alimony and paid in accordance with the alimony obligation. Finally, that paragraph ordered Gene to maintain a Survivor's Benefit Plan connected to his military retired pay for Helga's benefit.

The parties emphasize separate provisions contained in the latter paragraph. Vetta relies on the phrase "in order to secure [Gene's] alimony obligation" to support her argument that naming Helga a beneficiary was to ensure payment of current and delinquent amounts of alimony and not as additional alimony upon Gene's death. Helga, on the other hand, calls our attention to the inclusion of the requirement that Gene's Survivor's Benefit Plan be maintained in favor of Helga within the same paragraph obligating Gene to maintain his life insurance

policy, which Helga contends "indicat[es] a commonality of purpose." Brief for appellee at 14. Thus, Vetta claims the life insurance policy provision was intended as security of Gene's alimony obligation, while Helga claims that the $100,000 of life insurance death benefit was intended for her, independent of alimony.

[4] While in some circumstances the law prevents a change of beneficiary from having effect, the application of the rule depends upon the specific language of the dissolution decree. Where a property settlement agreement validly provides for the disposition of life insurance benefits, the subsequent execution of a change of beneficiary form absent consent of the other party to the agreement is ineffective. *Metropolitan Life Ins. Co. v. Beaty*, 242 Neb. 169, 493 N.W.2d 627 (1993). However, in the case before us, the decision turns upon whether the agreement (as incorporated into the decree) vested the policy proceeds in Helga or merely used the policy to protect Helga's right to receive the alimony to which she was entitled.

[5-7] The principles of law regarding the meaning of a judgment are well settled. Ambiguity exists in a document when a word, phrase, or provision therein has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). If the contents of a dissolution decree are unambiguous, the decree is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the decree. *Boyle v. Boyle*, 12 Neb. App. 681, 684 N.W.2d 49 (2004). In such a case, the effect of the decree must be declared in the light of the literal meaning of the language used. See *Bokelman v. Bokelman*, 202 Neb. 17, 272 N.W.2d 916 (1979).

We find no ambiguity in the decree. The provision concerning $100,000 in life insurance proceeds stated that it was "in order to secure [Gene's] alimony obligation." Black's Law Dictionary 1475 (9th ed. 2009) defines "security" as "[c]ollateral given or pledged to guarantee the fulfillment of an obligation." The literal language used—"in order to secure"—provided security for any unpaid alimony at the time of Gene's death rather than awarding $100,000 of life insurance proceeds

to Helga outright. Further, Gene was only obligated to keep Helga as a named beneficiary on the policy for as long as he owed alimony—in this case, until his death.

Although Gene changed the beneficiary contrary to the decree's requirement, he satisfied the additional obligation specifically imposed by the decree in such circumstance. Gene violated his obligation to keep Helga named as the beneficiary of $100,000 of the death benefit when he changed the primary beneficiary to Vetta approximately 1 month before his death. The decree, however, provided a remedy in such a situation—the additional alimony of $100 for each month of violation. Gene complied with the decree when he paid the additional $100 for the month that Helga was not named the beneficiary.

We reject Helga's argument that the requirement to maintain an additional benefit relating to Gene's military retirement introduced ambiguity into the decree. As we have already explained, the plain meaning of the words used in the decree limited the insurance maintenance requirement to the purpose of securing Gene's alimony obligation. While the requirement to maintain the Survivors' Benefit Plan was placed in the same paragraph as the requirement to maintain life insurance, we disagree with the notion that the mere proximity of the two provisions created an ambiguity. We read the paragraph as imposing two separate obligations—one involving life insurance and the other relating to a military benefit. The decree expressly limited the purpose of the life insurance provision but made no similar provision regarding the other benefit.

Gene's changing the beneficiary of the policy to Vetta while both he and Helga were alive was in contravention of the decree. However, because (1) the decree explicitly imposed the life insurance requirement only to secure Gene's alimony obligation, (2) Gene complied with the only remedy specified in the dissolution decree by paying the additional $100 amount, and (3) there was no unpaid alimony at the time of Gene's death, Helga is not entitled to any of the proceeds of the insurance policy.

## CONCLUSION

We conclude that Gene's obligation to name Helga as the beneficiary of $100,000 of the death benefit was to merely secure unpaid alimony. Although Gene violated the terms of the decree by removing Helga as the beneficiary prior to his death, he complied with the provision requiring payment of $100 for every month that Helga was not named as the beneficiary. Because there was no unpaid alimony at the time of Gene's death—when his support obligation ended—Helga was not entitled to any of the proceeds. Accordingly, the court erred in granting Helga's motion for summary judgment and in denying Vetta's motion. We reverse the order of the district court and remand the cause with directions to vacate its order entering summary judgment in favor of Helga and to enter summary judgment in favor of Vetta.

REVERSED AND REMANDED WITH DIRECTIONS.

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THOMAS P. STACKHOUSE AND KIMBERLY A. STACKHOUSE, APPELLANTS, V. TODD GAVER, DOING BUSINESS AS GAVER CUSTOM HOMES AND/OR GAVER CONSTRUCTION, AND JAMES MARRIOTT, APPELLEES.

801 N.W.2d 260

Filed August 2, 2011. No. A-10-846.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the 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.** When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy that is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.
3. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
4. **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.

5. **Contracts.** A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties.
6. **Contracts: Evidence: Intent.** 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. In contrast, the meaning of an unambiguous contract is a question of law. When a contract is unambiguous, the intentions of the parties must be determined from the contract itself.
7. **Contracts.** The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
8. **Real Estate: Loans: Words and Phrases.** In the realm of the residential housing market, the term "conventional financing" is commonly known and understood to mean long-term financing provided by a bank, savings and loan company, mortgage company, or similar organization that is in the business of loaning money for housing purchases by consumers, and such loans are evidenced by a promissory note and secured by a mortgage or deed of trust executed by the buyers in favor of the lender.
9. **Contracts: Breach of Contract.** Broken contractual promises give rise to actions for breach of contract, whereas unfulfilled conditions mean that an enforceable contract was never formed.
10. **Contracts: Intent.** Where the intent of the parties is not clear, the disputed language is generally deemed to be promissory rather than conditional.
11. **Breach of Contract.** In the context of a breach of contract, inconvenience or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful.
12. **Contracts: Rescission.** A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform. Difficulties, even if unforeseen and however great, are no excuse, and the fact that a contract has become more burdensome in its operation than was anticipated is not ground for its rescission.
13. **Contracts: Parties.** Nebraska law recognizes that there is an implied covenant of good faith and fair dealing that exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.
14. **Real Estate: Contracts: Parties.** The purchaser must exercise good faith in attempting to secure the financing required by a real estate purchase contract.
15. **Contracts: Parties.** Where a "subject to financing" clause is held to be a valid condition precedent, the courts have recognized that a purchaser has an implied obligation to attempt to obtain the requisite financing through the application of reasonable effort, good faith effort, bona fide effort, or reasonable diligence. If the purchaser's attempt is unavailing and the court determines that a sufficient effort was made, the purchaser is not required to perform his contractual obligations, because of the failure of a condition precedent. However, if financing is not secured as a result of what the court determines to be an insufficient effort, the purchaser's contractual performance may be enforced.
16. **Parol Evidence: Contracts.** The general rule is that unless a contract is ambiguous, parol evidence cannot be used to vary its terms.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Richard A. Drews, of Taylor, Peters & Drews, for appellants.

George E. Martin III, of Baird Holm, L.L.P., and, on brief, Aimee C. Bataillon, of Spencer, Fane, Britt & Browne, L.L.P., for appellee Todd Gaver.

Susan M. Napolitano, of The Hoppe Law Firm, L.L.C., for appellee James Marriott.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

Thomas P. Stackhouse and Kimberly A. Stackhouse, a married couple, entered into two written agreements with Todd Gaver, doing business as Gaver Custom Homes and/or Gaver Construction (collectively Gaver), the result of which was to have been the purchase of a lot and the construction of a home for the Stackhouses. The contracts were not performed, and this litigation ensued between the parties over who was entitled to the $45,000 in earnest money paid by the Stackhouses. The determinative language is that performance of the agreements was "**Conditioned Upon Financing:** Balance of $840,170," by "**Conventional**" financing. The Stackhouses claim that they did not obtain such financing and that thus, the contracts are null and void and they are entitled to a return of their $45,000 in earnest money. Gaver contends that because the Stackhouses did not apply for such financing as they had agreed to, they breached the contracts, which provided that he was entitled to retain the earnest money as liquidated damages. The district court for Sarpy County found in favor of Gaver, ruling that he was entitled to keep the $45,000 in earnest money. The Stackhouses appeal.

## FACTUAL BACKGROUND

This dispute begins with the execution of a "Uniform Purchase Agreement" on a Realtor's preprinted form dated

May 26, 2005. The handwritten portions of this agreement, hereinafter the "lot purchase agreement," provided that the Stackhouses would purchase from Gaver "LOT 17, CHEYENNE COUNTRY ESTATES," Sarpy County, Nebraska, for the sum of $115,000 with an earnest deposit in the amount of $500. Paragraph 6.2 of the agreement provided that the balance of $114,500 would be paid all in cash, and none of the blanks for provisions relating to financing found in paragraphs 6.3 and 6.3.1 were filled in. An earnest money deposit of $500 was provided for, and was made.

On March 29, 2006, a second purchase agreement, which shall be referenced as "house purchase agreement," was executed by the parties for property at lot 17, Cheyenne Country Estates, with an address of 16307 Sedona Circle, Omaha, Nebraska. Collectively, as appropriate, we shall reference the two contracts as "the agreements." The house purchase agreement provided for consideration of $884,670, with an earnest money deposit of $44,500 as detailed in paragraph 6.1. The evidence is that this sum was paid directly to Gaver and then used by him to apply to the acquisition of lot 17. At paragraph 6.3, the house purchase agreement provides that it is "**Conditioned Upon Financing:** Balance of $840,170." The immediately following paragraph, 6.3.1, provides, "**The financing will be**" and then five choices with a box in front of each. The choices are "**FHA**," "**VA**," "**Conventional with PMI**," "**Conventional**," and "**Other**." The box for "**Conventional**" is checked. Paragraph 6.3.1 also has blanks wherein one could fill in such items as a maximum interest rate per annum, a minimum number of years for the note, a minimum number of years for amortization, and an initial payment amount excluding taxes and insurance. None of these blanks are filled in, other than with a handwritten "dash" through each to indicate that these details of the loan form were no part of terms of the agreement—and apparently of no great consequence to the Stackhouses. Paragraph 6.3.2 provides, "Buyer agrees to make application for financing within five (5) days of final acceptance of this offer to" and then two choices with a box in front of each. The choices are "'The Mortgage Group'" and "other." There is a blank following the word "other," and in

that blank is handwritten "T.B.D."—the parties agree that such means "to be determined." Paragraph 6.3.2 further provides, "This offer shall be null and void, and the Deposit will be returned to Buyer, if the financing is not approved within ___ days from the date of acceptance." No number is filled in at the blank for the number of days, but, rather, a handwritten dash appears, indicating that such is not specified. Then the paragraph contains language that provides for automatic extension of any designated time limit for "processing of the application," so that "such time limit shall be automatically extended until the lending agency has, in the normal course of its business, advised either approval or denial." The final portion of paragraph 6.3.2 provides that "[u]pon notification of denial, the contract shall be void and the Deposit will be refunded to Buyer unless Seller and Buyer mutually agree" that another loan application will be made.

The Stackhouses filed suit against Gaver on November 7, 2008, and the operative amended complaint was filed on March 2, 2009. The Stackhouses' core contention is that they did not obtain acceptable conventional financing for the required amount and that thus, the agreements are null and void and they are entitled to the return of their earnest money. Gaver filed an answer and counterclaim, asserting a number of affirmative defenses, seeking a finding that the Stackhouses breached both the lot purchase agreement and the house purchase agreement in that they never applied for conventional financing, and asserting that as a result, under paragraph 6.1 of the agreements, he is entitled to retain the earnest money as liquidated damages for the Stackhouses' failure to complete the terms of the agreements.

We note that at the same time the lot purchase agreement was signed, the Stackhouses and Gaver entered into an "Informed Written Consent and Limited Dual Agency Agreement" with James Marriott, a real estate agent. The Stackhouses have also sued Marriott, alleging that with respect to the $44,500 earnest money provided for in the house purchase agreement, Marriott did not deposit such with an escrow agent as provided for in the agreement, and that they have thereby been damaged. However, the undisputed evidence is that the Stackhouses made

the earnest money check payable directly to Gaver and delivered it to him.

## PROCEDURAL BACKGROUND

Ultimately, after a period of discovery which we will not detail, the parties all filed motions for summary judgment. In its decisional order, the district court sets forth the procedural background and operative facts similar to our foregoing recitation. The analytical framework used by the district court is illustrated by the following observation in the court's decision: "While [the Stackhouses] are quick to rely on the contractual language in regard to obtaining financing as a prerequisite to going forward with the agreement, they seem to overlook their own contractual obligation, which clearly delineates a requirement upon [them] to actually make application for such financing." After that observation, the court finds that the testimony of Thomas Stackhouse supports Gaver's claim that the Stackhouses never applied for financing, be it conventional or otherwise, and the court quotes Thomas Stackhouse's deposition testimony in response to questions by Gaver's attorney, which colloquy we repeat in part:

> Q. And it's my understanding that you never applied for financing in connection with this particular transaction.
>
> A. Because the [initial public offering] never happened.
>
> Q. And after you signed [the house purchase agreement] you didn't think you had any obligation to go apply for some conventional financing? . . .
>
> A. No, nor did I think that we needed to. I was never contacted by . . . Gaver, was never contacted by . . . Marriott[, saying,] "Hey, five days is up, two weeks is up, 30 days, 60 days is up. How you coming on the financing?" Was never contacted.
>
> . . . .
>
> Q. If you didn't think you had any duty to go apply for conventional financing or any financing at all, why did you go to Sharp Pencil and get your letter . . . ?
>
> A. If I remember right, it was because you or — somebody's legal team said "You don't have any denial

> letter." If you look at our W-2's, you don't really need a denial letter.

(Emphasis omitted.) This testimony makes more sense if we explain how the initial public offering (IPO) and "Sharp Pencil" relate to this case. During the timeframe when the agreements were executed, Thomas Stackhouse was working for a company formed by a longtime acquaintance. The company's function "was to locate companies that had a special little niche in their market that wanted to be taken public, to raise anywhere from a million to five million dollars for them and assist them through the public process," according to Thomas Stackhouse's testimony. (Emphasis omitted.) In addition to the IPO assistance company, the same acquaintance also had a separate company, Sharp Pencil Investments (Sharp Pencil), whose business was, according to Thomas Stackhouse's testimony, to "acquire funds from companies, . . . pool investors. It operated like a mutual fund." (Emphasis omitted.) Thomas Stackhouse was also a director of Sharp Pencil.

Direct Pharmacy Services, Inc. (Direct Pharmacy), a private company which was working with the IPO assistance company to go public through an IPO, is mentioned in the evidence because the deposition testimony of both Stackhouses is that their housebuilding project and the two agreements at issue in this case were "contingent" on the occurrence of the Direct Pharmacy IPO. That IPO did not happen, and thus, they further contend that they were excused from completing any of their obligations under the agreements. This claim is also asserted in the Stackhouses' affidavits offered on summary judgment, including the claim that Gaver and Marriott were aware of the need for the IPO to happen in order for the Stackhouses to build the house. However, such condition was not mentioned in the agreements; nor does either agreement contain any mention of an IPO involving Direct Pharmacy, or any other IPO.

The Stackhouses' affidavits aver that in October 2007, they "applied for financing of the purchase of the home with Sharp Pencil . . . , but . . . were denied such financing." However, the evidence shows that no written application was ever made to Sharp Pencil and that the "application" to Sharp Pencil was simply a conversation with one of the principals of Sharp

Pencil which produced a letter on Sharp Pencil stationery, dated October 8, 2007, to "Mr. & Mrs. Stackhouse" (without any address), stating, "It is with regret that I will not be able to provide your mortgage needs at this time." While the letter is unsigned, it closes with "Sincerely, [the named principal], President." There is no evidence that Sharp Pencil was in any way involved in making home mortgages.

With reference to the Stackhouses' claim against Marriott, the court found that even if there had been some breach of Marriott's duty with respect to the handling of the earnest money, such did not proximately cause any damage to the Stackhouses, given that once entitlement to the funds was contested, an escrow agent would not have released the funds absent a court order or a mutual release signed by both parties. Thus, even if Marriott did not place the $44,500 earnest money with an escrow agent as required by the house purchase agreement, no damage resulted to the Stackhouses.

## ASSIGNMENTS OF ERROR

The Stackhouses assign four errors, restated as follows: (1) The trial court erred in granting summary judgment because there were genuine issues of material fact regarding the terms of the agreements and the Stackhouses' efforts and inability to obtain acceptable financing, (2) the trial court erred in finding no genuine issues of material fact as to Gaver's entitlement to retain the earnest money deposits as liquidated damages, (3) the trial court erred in granting summary judgment for Marriott because there were genuine issues of material fact regarding his breach of contractual duties and the damages caused thereby, and (4) the trial court erred in overruling the Stackhouses' motion for summary judgment, as they were entitled to recover their earnest money as a matter of law. In short, the trial court allegedly erred in granting summary judgment to Gaver and Marriott, and therefore, much of the discussion of the assignments of error can be combined.

## STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the 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. See Neb. Rev. Stat. § 25-1332 (Reissue 2008). See, also, *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002). 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. *Egan v. Stoler*, 265 Neb. 1, 653 N.W.2d 855 (2002).

[2] When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy that is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *Eastlick v. Lueder Constr. Co.*, 274 Neb. 467, 741 N.W.2d 628 (2007).

## ANALYSIS

[3-6] We begin with some well-established principles of law relating to contracts. In *Ruble v. Reich*, 259 Neb. 658, 664-65, 611 N.W.2d 844, 849-50 (2000), the Nebraska Supreme Court provides a "roadmap" for analysis of contract disputes:

> In interpreting a contract, we must first determine, as a matter of law, whether the contract is ambiguous. . . . When an appellate court is deciding questions of law, the court has an obligation to resolve the questions independent of the conclusions reached by the trial court. . . .
>
> 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. . . . A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the

> parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous. . . . 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. . . . In contrast, the meaning of an unambiguous contract is a question of law. . . . When a contract is unambiguous, the intentions of the parties must be determined from the contract itself. . . .
>
> . . . .
>
> We view a contract as a whole in order to construe it. . . . A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. . . . The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.

(Citations omitted.)

*Does Language "Subject to Acceptable Financing," Previously Delineated as "Conventional Financing," Create Condition Precedent to Existence of Enforceable Contract?*

Paragraph 32 of the house purchase agreement, as opposed to its other numbered paragraphs, does not have a printed heading or any printed language—simply printed blank lines. Therein appears the handwritten phrase, "SUBJECT TO ACCEPTABLE FINANCING PRIOR TO CLOSING." The Stackhouses argue that paragraph 32 creates an unmet condition precedent in that they had to obtain financing that was "acceptable" to them, which they did not do, and that thus, the house purchase agreement was not enforceable against them. Brief for appellants at 15.

[7] A contract's meaning is to be ascertained by reading the contract as a whole. See *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988). Therefore, paragraph 32 cannot be read in isolation, but, rather, must be read in conjunction with paragraph 6.3, which provides, "**Conditioned Upon Financing:** Balance of $840,170," as well as with paragraph 6.3.1, which

provides, "**The financing will be . . . Conventional**." As the court in *Ruble v. Reich, supra*, said, the terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. Thus, when these principles are applied to paragraphs 32, 6.3, and 6.3.1, it is clear that the condition "acceptable financing" contemplated and intended by the house purchase agreement at paragraph 32 is defined by the term "conventional financing" specified in paragraph 6.3.1. Therefore, the words of paragraph 32—"acceptable financing"—do not allow the Stackhouses to avoid their obligation simply by asserting, for example, "Because Warren Buffet would not give us $840,000 at 1-percent interest with a 75-year amortization, we did not get 'acceptable financing,' and thus, there is no contract."

[8] That said, we note that while the house purchase agreement requires "conventional financing," the agreement does not have an express definition of what that is. But, when the agreement is read as a whole in its proper factual context—an agreement to purchase a lot upon which Gaver would build a house for purchase by the Stackhouses—the term "conventional financing" has a clear and commonly understood meaning. When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them, and in such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract. *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002). To that end, we examine the agreement's paragraph 6.3.1, which in printed language provides the buyers with five choices for financing and a box to check for the type of financing selected—"**FHA**," "**VA**," "**Conventional with PMI**," "**Conventional**," and "**Other**." The box for "**Conventional**" is checked, whereas hypothetical financing from Warren Buffet would obviously be "**Other**" financing. In the realm of the residential housing market where this case occurs, the term "conventional financing" is commonly known and understood to mean long-term financing provided by a bank, savings and loan company, mortgage company, or similar organization that is in the business of loaning

money for housing purchases by consumers, and such loans are evidenced by a promissory note and secured by a mortgage or deed of trust executed by the buyers in favor of the lender. Accordingly, we find that this is the type of financing for which the Stackhouses agreed to apply when they checked the box for "conventional" in paragraph 6.3.1 of the house purchase agreement and that "acceptable financing" in paragraph 32 is "conventional" financing according to the terms we have outlined above.

[9,10] We now turn to the issue of whether the conventional financing as described above was a condition precedent to formation of enforceable agreements. In *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991), the court discussed the difference between contractual promises and conditions precedent. We summarize that discussion: Broken contractual promises give rise to actions for breach of contract, whereas unfulfilled conditions mean that an enforceable contract was never formed. The *Harmon Cable Communications* court said that "[t]erms such as 'if,' 'provided that,' 'when,' 'after,' 'as soon as,' 'subject to,' 'on condition that,' or some similar phrase are evidence that performance of a contractual provision is a condition." 237 Neb. at 883, 468 N.W.2d at 359. In *Harmon Cable Communications*, the court also observed that where the intent of the parties is not clear, the disputed language is generally deemed to be promissory rather than conditional. Here, the house purchase agreement is clear and uses words that denote a condition under *Harmon Cable Communications*. We conclude that the obtaining of conventional financing for the sum of $840,170 was a condition precedent to the existence of an enforceable contract. See, also, *Parker v. Averett*, 114 Ga. App. 401, 151 S.E.2d 475 (1966); *Airport Inn Enterprises, Inc. v. Ramage*, 679 N.W.2d 269 (N.D. 2004).

*Did Trial Court Err in Finding That There Were No Genuine Issues of Material Fact and in Granting Summary Judgment Against Stackhouses?*

[11,12] There is no dispute that the Stackhouses did not obtain the financing in excess of $800,000 required by the

house purchase agreement. However, this was because the Stackhouses never applied for "conventional" financing as required by paragraph 6.3 of that agreement. Gaver argues that such failure does not mean a contract never existed and has not been breached, and that he is entitled to retain the earnest money as liquidated damages per the agreement. Initially, the Stackhouses argue that there is no evidence that they had the financial wherewithal to obtain a loan of this size and that "[a]bsent any evidence of the ability to obtain such financing, the financing contingency could never have been met, and the agreement should have been declared null and void." Brief for appellants at 18-19. However, no authority whatsoever is cited to support this proposition. Nonetheless, it appears that the Stackhouses may be alluding to the "impossibility of performance defense." There is such a defense, but its application is quite limited. In *Wilson & Co., Inc. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 177, 43 N.W.2d 657, 666-67 (1950), a case involving a suit for damages due to a breach of contract, the court said:

> "Inconvenience or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful. Parties sui juris bind themselves by their lawful contracts, and courts cannot alter them because they work a hardship. . . . A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform. It has been said that difficulties, even if unforeseen and however great, are no excuse, and that the fact that a contract has become more burdensome in its operation than was anticipated is not ground for its rescission." . . .
>
> ". . . A contract which is possible of performance when made does not become invalid or unenforceable because conditions afterwards arise which render performance impossible. . . . If a party by his own contract creates a duty or imposes a charge on himself, he must

> under any and all conditions substantially comply with the undertaking."

(Citation omitted.)

[13] Thus, we hold to the general view that the Stackhouses have bound themselves unconditionally to apply for conventional financing. Gaver argues that not only does the evidence show that the required application for financing was never made by the Stackhouses, but that the law imposes a duty that they act in "good faith" to perform their agreement to attempt to obtain conventional financing—which they did not do. Nebraska law recognizes that there is an implied covenant of good faith and fair dealing that exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract. See *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002). In *Airport Inn Enterprises, Inc. v. Ramage*, 679 N.W.2d 269 (N.D. 2004), the defendant agreed to purchase a hotel from the plaintiff, paying $25,000 in earnest money. After failing to complete the contract and being sued, the defendant filed a counterclaim for the return of his earnest money. While the trial court awarded the plaintiff the earnest money on the basis of a contract clause providing for liquidated damages if the defendant failed to complete the purchase, the North Dakota Supreme Court reversed because the defendant's obtaining financing acceptable to him was a condition precedent to a binding contract. The North Dakota court reasoned:

> In this case, the language in . . . the agreement states, "this Agreement is contingent upon Buyer(s) obtaining financing acceptable to Buyer(s)." No bad faith has been alleged in [the defendant's] attempt to obtain acceptable financing. We conclude this financing contingency is a condition precedent to the contract's becoming effective. Because obtaining financing is a condition precedent, the contract is conditioned upon Ramage's obtaining financing acceptable to him, and there can be no enforceable contract until financing is obtained. Because the condition precedent in this case never materialized, the agreement

> was not binding on the parties, and the liquidated-damages clause never became effective.

679 N.W.2d at 273.

[14,15] From this decision, Gaver argues, in effect, that if it was important to the North Dakota court that no bad faith on the part of the purchaser of the property was alleged, then it naturally follows that the purchaser must exercise good faith in attempting to secure the requisite financing. That view certainly has support in the cases and treatises. In an annotation entitled "Sufficiency of Real-Estate Buyer's Efforts to Secure Financing Upon Which Sale Is Contingent," Annot., 78 A.L.R.3d 880 § 2[a] at 883-84 (1977), the summary states:

> Since most buyers of real estate find it necessary to finance a major part of the price of their purchase, normally by obtaining a loan for which the purchased property serves as security, it is not unusual to find "subject to financing" clauses included in contracts or agreements of sale and purchase of real estate. These clauses, which contain provisions referring to the financing arrangements proposed to be made by the purchaser, may create a condition precedent to performance of the contract, depending upon the intention of the parties, as deduced from the language of the contract, the surrounding circumstances at the time of execution, and the purpose sought to be accomplished by the contract.
>
> As indicated by a number of representative cases, where a "subject to financing" clause is held to be a valid condition precedent, the courts have recognized that the purchaser has an implied obligation to attempt to obtain the requisite financing through the application of reasonable effort, good-faith effort, bona fide effort, or reasonable diligence. If the purchaser's attempt is unavailing and the court determines that a sufficient effort was made, the purchaser is not required to perform his contractual obligations, because of the failure of a condition precedent. However, if financing is not secured as a result of what the court determines to be an

> insufficient effort, the purchaser's contractual performance may be enforced.

There are numerous cases, albeit none from Nebraska's appellate courts that we can find, holding that a purchaser in a land or house purchase contract that is conditioned upon obtaining financing has an implied obligation to seek or apply for such financing before the lack of such financing excuses nonperformance by the purchaser. These cases speak in terms of a good faith effort or reasonable efforts or due diligence to obtain the required financing. See, *Jamieson v. MacRae*, 599 A.2d 1359 (R.I. 1991); *Housley v. Mericle*, 57 S.W.3d 360 (Mo. App. 2001); *Bushmiller v. Schiller*, 35 Md. App. 1, 368 A.2d 1044 (1977); *Liuzza v. Panzer*, 333 So. 2d 689 (La. App. 1976); *Fry v. George Elkins Co.*, 162 Cal. App. 2d 256, 327 P.2d 905 (1958).

In this case, the house purchase agreement required that the Stackhouses apply for conventional financing, but clearly, the telephone conversation with a work associate at Sharp Pencil about the Stackhouses' finances is not an application for conventional financing—there was no real application proved, nor is Sharp Pencil a "conventional real estate lender." Therefore, the evidence is undisputed that the Stackhouses did not apply for conventional financing, which they were obligated to do under the house purchase agreement. Moreover, even the above-mentioned telephone conversation did not occur until the Stackhouses had already told Gaver that they were not going to go through with the agreements. As earlier mentioned, the Stackhouses' evidence was that their performance was contingent on there being an IPO of Direct Pharmacy. However, in the Stackhouses' answer to Gaver's counterclaim for summary judgment that he was entitled to retain the $45,000 in earnest money, there is no allegation that the agreements were contingent on the happening of an IPO for Direct Pharmacy. Under our current pleading rules, the key for claims and for affirmative defenses is whether the opponent is given "fair notice of the nature of the defense." See *Weeder v. Central Comm. College*, 269 Neb. 114, 125, 691 N.W.2d 508, 516 (2005). The Stackhouses' answer to Gaver's counterclaim is simply that they "did not obtain conventional financing"

in the amount of $884,670, that they notified Gaver of such fact, and that the house purchase agreement "was null and void," entitling them to the return of their earnest money. This allegation can hardly be read as "fair notice" of a defense that the performance of the agreements was contingent upon the occurrence of an IPO for Direct Pharmacy—in addition to the house purchase agreement's stated contingency of obtaining conventional financing. Moreover, in addition to the failure of the Stackhouses to plead such a contingency, the agreements themselves contain no reference to, or mention of, an IPO of Direct Pharmacy.

[16] In short, the Stackhouses' evidence was, "Everybody involved knew we could not do this unless the Direct Pharmacy IPO happened." But, aside from neither pleading it nor having such contingency in the agreements, their evidence about such would constitute the modification of a clear and unambiguous agreement by parol evidence. The general rule is that unless a contract is ambiguous, parol evidence cannot be used to vary its terms. *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000). The agreements at issue here are not ambiguous. We find the case of *Cosgrove v. Mademoiselle Fashions*, 206 Neb. 275, 292 N.W.2d 780 (1980), to be instructive. In *Cosgrove*, the Supreme Court rejected the plaintiffs' claim that the contract with the defendant was subject to a condition precedent that the plaintiffs be able to obtain a Small Business Administration loan. The Supreme Court reasoned:

> It appears to be the general rule that, even though parol evidence is admissible to show conditions precedent which relate to the delivery or taking effect of a written instrument, if the condition precedent is inconsistent with, or contradictory to, the written instrument, parol evidence thereof is not admissible. 30 Am. Jur. 2d *Evidence* § 1038 (1967); 32A C.J.S. *Evidence,* § 935 (1964). See, also, *Meadow Brook Nat. Bank v. Bzura,* 20 App. Div. 2d 287, 246 N.Y.S.2d 787 (1964). In this case, the contract signed by the parties specifically provided: "This order is NOT subject to cancellation." Even if we were to find in this case that the contract was subject to

> a condition that the purchasers obtain [a Small Business Administration] loan, such condition, we believe, would be inconsistent with, or contradictory to, the provision against cancellation in the contract; and hence, under the rules above cited, parol evidence would not be admissible to show the condition.

*Cosgrove v. Mademoiselle Fashions*, 206 Neb. at 282, 292 N.W.2d at 785. The house purchase agreement in the case at bar provides that it is conditioned on "acceptable financing" at paragraph 32, which financing, as we have found, is defined in paragraph 6.3.1 as "conventional" financing. The occurrence of a successful IPO so that one has the financial wherewithal to build a nearly $900,000 house is more akin to winning the lottery than to "conventional" financing. That the agreements had a second condition precedent—the occurrence of a successful IPO—is clearly inconsistent with, and contradictory to, the condition precedent of obtaining conventional financing. Thus, under *Cosgrove*, this additional condition precedent cannot be added to the agreements by parol evidence—even if one overlooks the failure to plead such as an affirmative defense.

Therefore, in conclusion, we find that the Stackhouses were obligated to at least apply for conventional financing, and the evidence is undisputed that they did not. As such, they have breached the agreements entered into with Gaver, and under the agreements, Gaver is entitled to retain the earnest money deposits as the district court determined.

Finally, it is apparent from the evidence that Marriott did not comply with the terms of the house purchase agreement with the Stackhouses by depositing the $44,500 of earnest money from that agreement with an escrow agent. However, while there is some dispute in the evidence as to how that money came to be delivered to Gaver, this is of no consequence, as under the facts of this case, an escrow agent would be obligated to deliver the funds to Gaver—either voluntarily (an unlikely event) or by virtue of a court order resolving the entitlement to such funds in Gaver's favor. Thus, Marriott's failures did not cause the Stackhouses any damage, and the trial court properly entered judgment in his favor.

## CONCLUSION

We find that there were no genuine issues of material fact for trial and that Gaver was entitled to retain the $45,000 of earnest money under the lot and house purchase agreements as a matter of law. Therefore, we affirm the decision of the district court in all respects.

AFFIRMED.

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# IN RE INTEREST OF KARLIE D., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. GARY D., APPELLEE, AND MARTHA D., INTERVENOR-APPELLEE.

809 N.W.2d 510

Filed August 2, 2011. No. A-11-323.

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. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.
3. **Final Orders: Appeal and Error.** An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
4. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a "special proceeding" for appellate purposes.
5. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
6. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.

Appeal from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge. Appeal dismissed.

Donald W. Kleine, Douglas County Attorney, Jennifer C. Clark, and Amy Schuchman for appellant.

Chad M. Brown, of Chad Brown Law Offices, for intervenor-appellee.

IRWIN, MOORE, and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

The State attempts to appeal from a juvenile court's order making a finding that a grandparent was a reputable citizen of good moral character, but neither removing the State nor appointing the grandparent as the child's guardian. Having considered the parties' written responses to our inquiry regarding jurisdiction, we conclude that the order does not affect a substantial right and thus does not constitute a final order. We therefore dismiss the appeal for lack of jurisdiction.

## BACKGROUND

This case has a complicated procedural history, involving two juveniles in two different juvenile courts. The instant appeal, however, involves only Karlie D., who has been the subject of some dispute between her foster parents and her paternal grandmother, Martha D., who was permitted to intervene in the proceedings in November 2009. Karlie's father died during the pendency of the proceedings. In March 2010, Martha filed a motion seeking Karlie's placement in Martha's home. An amended motion asked that the paternal grandparents, i.e., Martha and her husband, be appointed as Karlie's guardians. In the midst of these proceedings, a number of continuations were granted and a number of motions and amended motions for termination of parental rights were being filed.

In an order entered on March 31, 2011, the juvenile court stated that the issues before it were whether Karlie should remain in the custody of the Nebraska Department of Health and Human Services (DHHS), whether Martha was a reputable citizen of good moral character as defined in Neb. Rev. Stat. § 43-284 (Reissue 2008), and, if so, whether Martha should be appointed guardian for Karlie. After a lengthy analysis, the court stated that it

> cannot find by a preponderance of the evidence that it would be inconsistent with the best interest, safety, and welfare of Karlie if permanency occurs with Martha . .

> . . By a preponderance of the evidence, the court finds Martha . . . to be a reputable citizen of good moral character. . . .
>
> However, before the court removes [DHHS] as the guardian, [DHHS] shall submit a transition plan to the court by May 15, 2011.

The court scheduled a further hearing for June 16, 2011. The State appealed on April 18.

In order to identify jurisdictional defects at the outset and to conserve the resources of both the court and the parties, we review each appeal for jurisdictional defects at the earliest possible time. Noting such an issue in the case before us, we directed the parties to submit written responses. Having now considered their submissions, we dispose of the jurisdictional issue.

## 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. *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011), *modified on denial of rehearing* 281 Neb. 978, 802 N.W.2d 420.

## ANALYSIS

[2] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken. *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010).

[3] The parties agree upon the proper analytical framework for determining whether the juvenile court's order was final, but they disagree how the framework applies to this particular order. An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered. *StoreVisions v. Omaha Tribe of Neb., supra*. Both Martha and the State respond that we must look to the second category of final orders, i.e., orders affecting a substantial right made in a special proceeding.

[4] Further, the parties agree that the juvenile court's order was made in a special proceeding and that the question therefore turns upon whether the order affected a substantial right. A proceeding before a juvenile court is a "special proceeding" for appellate purposes. *In re Interest of T.T.*, 18 Neb. App. 176, 779 N.W.2d 602 (2009). Thus, we examine whether this particular order affected a substantial right.

The State argues that the order was final because "although the [o]rder did not entirely dispose of the merits of the case, it is clear the [c]ourt had its mind made up as to who would be the permanent guardian of Karlie and who would take over the parental rights and responsibilities." Brief for appellant on jurisdiction at 8. Further, the State urges that the June 16, 2011, hearing "should be understood as an occasion to discuss whether the subsidy or Medicaid coverage is consistent with Karlie's best interests, safety, and welfare, not as an occasion to discuss whether a transition plan had been submitted." *Id.* at 9. According to the State, the juvenile court's order "show[ed that] the [c]ourt had made up its mind as to who would be Karlie's legal guardian and who would acquire parental rights and responsibilities as to Karlie." *Id.* Thus, the State argues, "For all intents and purposes, a substantial right was affected in the [c]ourt's . . . [o]rder, and the [o]rder should be considered final for purposes of appeal." *Id.* at 9-10.

Martha responds that the juvenile court "left for another day to determine the transition plan. The [c]ourt's [o]rder does not completely close the door as to the juvenile case. The timeframe is not indefinite, but actually specific and leaves [sic] for another day and another hearing." Brief for appellee on jurisdiction at 2.

[5,6] Although it is the State rather than a parent which is taking the appeal, we look to the well-established definition of a substantial right. A substantial right is an essential legal right, not a mere technical right. *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010). A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken. *Id.* Whether a substantial right of a parent has been

affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed. *Id.* In the context of a parent, the substantial right affected is the parent's liberty interest in raising his or her children. See *In re Interest of Anthony G.*, 6 Neb. App. 812, 578 N.W.2d 71 (1998). In contrast to a parent's rights, the State's rights flow from its parens patriae interest in setting standards for the care and protection of children. See *id.*

Our quotation of the State's argument exposes its obvious flaw—the State speculates about the juvenile court's state of mind instead of focusing on the actual effect of the court's order. The order implemented only two requirements. First, it required the State to submit a transition plan. Second, it directed the State to "assess whether a subsidy or Medicaid coverage for the care of Karlie is consistent with Karlie's best interests, safety, and welfare." Contrary to the State's belief, the order did not remove the State or appoint Martha as guardian. In this context, the State's interpretation seems analogous to a conditional interlocutory order, which cannot mature into a final, appealable order without further court consideration regarding the task or obligation to be performed. See *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000). According to the Nebraska Supreme Court, parties should not be left to guess or speculate as to the final effect of a conditional interlocutory order. *Id.* Similarly, we decline to speculate regarding the juvenile court's ultimate order. Because the juvenile court's order was interlocutory, the court was not committed to a transfer of guardianship and was free to change its mind after reviewing the transition plan required by the order. Thus, we conclude that the instant order did not affect a substantial right.

We also analogize the order's content to one in a contempt proceeding making findings of contempt but imposing no sanction. Where a court makes findings of contempt but imposes no sanction, there is no final order from which to appeal. See, *Meisinger v. Meisinger*, 230 Neb. 37, 429 N.W.2d 721 (1988); *State ex rel. Kandt v. North Platte Baptist Church*, 225 Neb.

657, 407 N.W.2d 747 (1987), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010); *Hammond v. Hammond*, 3 Neb. App. 536, 529 N.W.2d 542 (1995), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier, supra*. In the case before us, the juvenile court makes findings of suitability but does not make an order either appointing Martha or removing the State as guardian. Thus, the order makes no change in the status of the child's placement or guardian. This order, like the order in a contempt proceeding making findings but imposing no sanction, is not a final, appealable order.

## CONCLUSION

The juvenile court's order made findings of Martha's suitability as a potential guardian but did not remove the State or appoint Martha as guardian. The order left that question for a later day. Although the order was made in a special proceeding, it did not affect a substantial right of the State. Thus, it was not a final, appealable order and we lack jurisdiction of the instant appeal.

APPEAL DISMISSED.

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MARCENA M. HENDRIX, APPELLEE, V.
ROBERT J. SIVICK, APPELLANT.
803 N.W.2d 525

Filed August 9, 2011. No. A-10-1174.

1. **Divorce: Judgments: Appeal and Error.** The meaning of a decree presents a question of law, in connection with which an appellate court reaches a conclusion independent of the determination reached by the court below.
2. **Judges: Recusal: Appeal and Error.** A motion to recuse for bias or partiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Courts: Jurisdiction.** A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect.

5. **Statutes: Intent: Words and Phrases.** While the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done.
6. **Child Support: Rules of the Supreme Court.** The main principle behind the child support guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes.
7. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child.
8. **Actions.** Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.
9. **Appeal and Error.** A party that assigns error in a proceeding must point out the factual and legal bases that show the error.
10. **Judges: Recusal.** A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.

Appeal from the District Court for Douglas County: PAUL D. MERRITT, JR., Judge. Affirmed.

Robert J. Sivick, pro se.

Edith T. Peebles and Jessica L. Finkle, of Brodkey, Cuddigan, Peebles & Belmont, L.L.P., for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

Robert J. Sivick appeals from a judgment entered against him for his share of his child's childcare and uninsured medical expenses, which expenses were incurred by his ex-wife, Marcena M. Hendrix. Although Hendrix failed to submit documentation supporting childcare expenses on a monthly basis as directed by the decree, we conclude that such failure did not excuse Sivick's obligation to reimburse her for his proportionate share. Finding no error in the other respects urged by Sivick, we affirm.

## BACKGROUND

A decree filed in February 2005 dissolved the parties' marriage. As pertinent to this appeal, the decree provides in part:

> e. ***CHILD-CARE EXPENSES***. The Court finds that the parties shall pay child care expenses actually incurred by [Hendrix] for employment purposes in proportion to their net monthly incomes as the same is determined for child support purposes. Accordingly, [Sivick] shall reimburse [Hendrix] for said expenses in the following manner:
>
> i. Monthly [Hendrix] shall submit to [Sivick] copies of all statements and/or receipts for employment-related daycare.
>
> ii. Regardless of whether [Hendrix] has paid said statements or not, [Sivick] shall reimburse [Hendrix] for 23% of the total monthly expenses incurred by [Hendrix] within ten days.
>
> . . . .
>
> j. ***UNINSURED MEDICAL/DENTAL EXPENSES***. [Hendrix] shall be responsible for the first $480.00 of medical related expenses incurred on behalf of the minor child annually. Thereafter, any uncovered medical, dental, orthodontia, pharmaceutical, or optical expenses shall be paid 77% by [Hendrix] and 23% by [Sivick]. Said medical expenses shall specifically include psychological or therapeutic treatment of the parties' minor daughter. [Sivick] shall reimburse [Hendrix] within ten days of a request that accompanies documentation demonstrating the expense.

A December 2009 order of modification changed the allocation of childcare expenses and uninsured medical expenses so that Hendrix was to pay 68 percent of such expenses and Sivick was to pay 32 percent.

On March 12, 2010, Sivick filed a motion to recuse. The court addressed the motion during a hearing on March 18 and overruled it.

On May 28, 2010, Hendrix filed a "Verified Motion to Liquidate to a Sum Certain Unreimbursed Expenses Owed to Plaintiff by Defendant." Hendrix alleged that for the years 2007

to 2009, Sivick's allocation of the expenses was $1,647.18 for childcare expenses and $2,203.62 for uninsured medical expenses. Hendrix alleged that on May 17, 2010, she sent Sivick a request for reimbursement of the childcare and uninsured medical expenses incurred from 2007 to date and that she submitted receipts and other verifying documentation of the expenses. She stated that Sivick refused to reimburse her for expenses other than childcare expenses for March and April 2010 and a $20 medical bill incurred on April 2, claiming that the request was untimely. Hendrix requested judgment in her favor "in a sum certain representing the sums owed by [Sivick] to [Hendrix]."

The district court conducted a hearing on July 13, 2010, and received evidence. On November 8, the court entered judgment in favor of Hendrix against Sivick in the amount of $3,130.50.

Sivick timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

## ASSIGNMENTS OF ERROR

Sivick assigns that the court erred in entering a judgment against him for childcare and uninsured medical expenses because (1) the terms of the decree were not followed by Hendrix in making demand for such expenses, (2) Hendrix acted in bad faith in making and litigating the demand for such expenses, (3) Hendrix presented insufficient evidence to support the judgment, and (4) the court acted in a biased manner in favor of Hendrix and refused to recuse itself.

## STANDARD OF REVIEW

[1] The meaning of a decree presents a question of law, in connection with which an appellate court reaches a conclusion independent of the determination reached by the court below. *Fry v. Fry*, 18 Neb. App. 75, 775 N.W.2d 438 (2009).

[2] A motion to recuse for bias or partiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion. *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010).

## ANALYSIS

*Jurisdiction.*

[3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Carmicheal v. Rollins*, 280 Neb. 59, 783 N.W.2d 763 (2010).

[4] In *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006), a 2001 decree provided that the husband would receive an additional $75,000 judgment if the wife sold or conveyed certain marital property awarded to her. She later conveyed the property to her new husband and herself in joint tenancy, and the former husband thereafter filed a "Motion to Determine Amounts Due," requesting the court to determine the amount due to him based upon the dissolution settlement and decree. *Id.* at 922, 708 N.W.2d at 829. On appeal, the wife argued that the proper method to satisfy the controversy was through a separate action for declaratory judgment. The Nebraska Supreme Court stated:

> A district court, in the exercise of its broad jurisdiction over marriage dissolutions, retains jurisdiction to enforce all terms of approved property settlement agreements. See *Zetterman v. Zetterman*, 245 Neb. 255, 512 N.W.2d 622 (1994). A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect. *Laschanzky v. Laschanzky*, 246 Neb. 705, 523 N.W.2d 29 (1994). [The husband's] motion to determine amounts due was proper under the circumstances in this case.

*Strunk v. Chromy-Strunk*, 270 Neb. at 925, 708 N.W.2d at 831. See, also, *Davis v. Davis*, 265 Neb. 790, 660 N.W.2d 162 (2003) (characterizing ex-husband's application to determine amounts due pursuant to decree as attempt to enforce decree).

Under the circumstances of this case, we see nothing improper about Hendrix's motion to liquidate to a sum certain the unreimbursed expenses owed to her. Her motion was an attempt to enforce the terms of the decree, over which the district court had jurisdiction. Accordingly, we also have jurisdiction.

*Terms of Decree.*

Sivick first argues that the court erred in entering judgment against him for childcare and uninsured medical expenses pursuant to the terms of the decree because Hendrix did not follow the terms of the decree in making demand for those expenses.

The decree contained separate provisions for childcare expenses and for uninsured medical expenses. The childcare provision stated in part that "[m]onthly [Hendrix] shall submit to [Sivick] copies of all statements and/or receipts for employment-related daycare" and that Sivick shall reimburse Hendrix for his percentage of the total monthly expenses incurred by Hendrix within 10 days. The provision for uninsured medical expenses similarly stated that "[Sivick] shall reimburse [Hendrix] within ten days of a request that accompanies documentation demonstrating the expense," but it did not require Hendrix to submit copies of statements on a monthly basis or other timeframe.

[5] Even though the evidence shows that Hendrix did not submit any statements to Sivick on a monthly basis, we conclude that Sivick is not entitled to relief because the language of the decree was directory. We are guided by principles of statutory construction, which we find equally applicable here as both the meaning of a statute and meaning of a decree present questions of law. See, *Ricks v. Vap*, 280 Neb. 130, 784 N.W.2d 432 (2010) (meaning of statute is question of law); *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006) (meaning of decree presents question of law). As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *Forgey v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 191, 724 N.W.2d 828 (2006). Nonetheless, while the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done. *Id.*

> "'If the prescribed duty is essential to the main objective of the statute, the statute ordinarily is mandatory and a violation will invalidate subsequent proceedings under

> it. If the duty is not essential to accomplishing the principal purpose of the statute but is designed to assure order and promptness in the proceeding, the statute ordinarily is directory and a violation will not invalidate subsequent proceedings unless prejudice is shown.'"

*State v. $1,947*, 255 Neb. 290, 297, 583 N.W.2d 611, 616-17 (1998).

[6] The time limitation contained in the decree for Hendrix to submit documentation of expenses to Sivick is not essential to the purpose of the decree. The main principle behind the child support guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. Neb. Ct. R. § 4-201. Thus, like in *State v. $1,947, supra*, it appears that the time limitation was included to ensure order and promptness. In *Forgey*, this court concluded that the requirement that a peace officer shall forward to the director a sworn report within 10 days was directory and not mandatory and we noted that "there is no sanction attached to an officer's failure to file the sworn report with the Department within 10 days." 15 Neb. App. at 197, 724 N.W.2d at 833. Similarly, the decree does not state that Hendrix forfeits her right to reimbursement for failing to send a request and supporting documentation on a monthly basis. Further, the provision for uninsured medical expenses did not require Hendrix to submit documentation within any particular timeframe.

[7] Obviously, the parties should abide by the terms of the decree, but it is the obligations of support and not the procedures for documentation which are critical to the child's best interests. It is in the best interests of the child for each parent to pay his or her proportionate share of the child's childcare and uninsured medical expenses. This is best accomplished by Hendrix's timely submitting requests and documentation for reimbursement and by Sivick's then promptly paying his share. Both requirements are enforceable by contempt proceedings, but as a practical matter, Sivick is unlikely to be aware of expenses that Hendrix has incurred but failed to communicate to Sivick. The paramount concern and question in determining child support, whether in the initial marital dissolution action

or in the proceedings for modification of decree, is the best interests of the child. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). The support of one's children is a fundamental obligation which takes precedence over almost everything else. *Id.* Hendrix's failure to timely provide such documentation may be relevant to a court's determination of whether Sivick's subsequent failure to timely pay is willful and contumacious, but it provides no reason to entirely discharge Sivick's reimbursement obligation.

Although Hendrix did not timely submit her requests for reimbursement to Sivick, we conclude that the court did not err in ordering Sivick to reimburse her for Sivick's proportionate share of childcare and uninsured medical expenses.

*Bad Faith.*

[8] Sivick next contends that judgment should not have been entered against him because Hendrix acted in bad faith in making and litigating the demand for reimbursement. He speculates that Hendrix waited "for years before suddenly making a claim for thousands of dollars in childcare and uninsured medical expenses," brief for appellant at 19, so that Sivick "would be required to pay that claim within 10 days, . . . would likely not be able to do so, and ultimately . . . would be held in contempt and incarcerated," *id.* at 20. Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question. *TFF, Inc. v. SID No. 59*, 280 Neb. 767, 790 N.W.2d 427 (2010). Although we do not condone Hendrix's failing to submit requests for reimbursement in a timely manner, we cannot say that she instituted this enforcement proceeding in bad faith. Hendrix is entitled to reimbursement from Sivick for his share of the expenses incurred on their child's behalf, and it was Sivick's action in declining to pay the expenses that led to this proceeding. This assignment of error lacks merit.

*Insufficient Evidence.*

Sivick argues that Hendrix presented insufficient evidence to support the judgment. During the July 13, 2010, hearing, the court received into evidence exhibit 53, a 98-page document

containing 8 pages of an "unreimbursed expenses grid" covering years 2007 to 2009 and various statements to support the expenses. The court also received exhibit 58, an unreimbursed expenses grid for expenses incurred in 2010, and exhibit 59, composed of documents to support the expenses listed in exhibit 58.

The district court's calculation of Sivick's contribution amount for childcare expenses as of April 15, 2010, can be summarized as follows:

| | | | | | |
|---|---|---|---|---|---|
| 2007: | $2,328.22 | × | .23 | = | $ 535.49 |
| 2008: | 2,591.68 | × | .23 | = | 596.09 |
| 2009: | 2,241.75 | × | .23 | = | 515.60 |
| 2010: | 509.00 | × | .32 | = | 162.88 |
| | | | | | $1,810.06 |

The court stated that Sivick's contribution toward uninsured medical expenses was more difficult to calculate. Hendrix claimed total uninsured expenses of $12,859.99 as of April 2, 2010 ($2,882.68 for 2007, $5,591.24 for 2008, $2,547.02 for 2009, and $1,839.05 for 2010). However, the district court agreed with Sivick that expenses incurred for the child's private tutoring were not medical expenses under the terms of the decree and that Sivick was not required to contribute money toward that expense. The district court therefore excluded those expenses, and its calculation of Robert's contribution is summarized as follows:

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 2008: | $5,591.24 | – | $480 | – | $ 871.25 | × | .23 | = | $ 975.20 |
| 2009: | 2,547.02 | – | 480 | – | 1,312.50 | × | .23 | = | 173.54 |
| 2010: | 1,839.05 | – | 480 | – | 822.50 | × | .32 | = | 171.70 |
| | | | | | | | | | $1,320.44 |

[9] Sivick's argument refers to testimony during an earlier proceeding for contempt and complains of the absence of statements from Hendrix's health insurance carrier. However, he has not directed us to any particular expenses that should not be included in the calculation. In such circumstance, it is not our duty to sift through the numerous pages of documentation to find expenses that Sivick speculates might be excludable if only we would find them—when he has not found, or could not find, any of such. A party that assigns error in a proceeding must point out the factual and legal bases that show the error.

*Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011). We conclude that the record, particularly the exhibits identified above, supports the court's determination.

*Bias.*

[10] Finally, Sivick asserts that the court acted in a biased manner in favor of Hendrix and erred in refusing to recuse itself. A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown. *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010). After reviewing the record, we find nothing demonstrating bias or demonstrating that a reasonable person aware of the circumstances would question the judge's impartiality. We conclude that the judge did not abuse his discretion in denying Sivick's motion for recusal.

## CONCLUSION

We conclude that Hendrix's failure to submit documentation supporting childcare expenses on a monthly basis as directed by the decree did not relieve Sivick of his obligation to reimburse her for his proportionate share of childcare and uninsured medical expenses within 10 days of the request. We determine that Hendrix presented sufficient evidence to support the court's award of expenses and that Hendrix did not act in bad faith in bringing this action to obtain reimbursement from Sivick. Finally, we conclude that the district court judge did not display bias and did not abuse his discretion in denying Sivick's motion for recusal. Accordingly, we affirm.

AFFIRMED.

CHARTER WEST NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, APPELLANT, V. WELLS FARGO BANK, N.A., APPELLEE.

802 N.W.2d 146

Filed August 23, 2011. No. A-10-727.

1. **Equity: Trusts: Agents.** Equity will not allow a trust to fail for want of a trustee.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Jeffrey A. Silver for appellant.

Donald J. Pavelka, Jr., and Michelle D. Epstein, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellee.

IRWIN and CASSEL, Judges, and HANNON, Judge, Retired.

IRWIN, Judge.

## I. INTRODUCTION

Charter West National Bank (Charter West) appeals an order of the district court for Douglas County, Nebraska, granting summary judgment in favor of Wells Fargo Bank, N.A. (Wells Fargo), in this action for declaratory judgment concerning the validity and priority of a deed of trust executed to the benefit of Wells Fargo. Charter West asserts that the deed of trust's designated trustee's lack of consent to being named as a trustee rendered the Wells Fargo deed of trust void and without priority until a later date when a substitute trustee was named. We find that the deed of trust should not be rendered void for lack of an accepting trustee and should not lose its priority status from the date it was created, and that the district court's grant of summary judgment in favor of Wells Fargo should be affirmed.

## II. BACKGROUND

There is no dispute between the parties about the essential factual background of this case. The case concerns the validity and priority of deeds of trust issued by Kevin D. Hebner

and Amanda J. Hebner for the benefit of Wells Fargo and Charter West.

On November 5, 2004, Wells Fargo loaned $333,700 to the Hebners. The loan was secured by a deed of trust for certain real property. The Wells Fargo deed of trust listed John S. Katelman as the trustee and Wells Fargo as the beneficiary. On May 14, 2008, Wells Fargo caused a "Substitution of Trustee" to be filed, naming another individual as the successor trustee.

On May 3, 2007, Charter West loaned $181,775.09 to Kevin Hebner. The loan was secured by a deed of trust for the same real property as the Wells Fargo deed of trust. The Charter West deed of trust named Charter West as the trustee and also as the beneficiary.

On November 13, 2008, the Hebners filed for chapter 11 bankruptcy protection. Charter West was granted relief from the automatic stay of the bankruptcy court and, on June 8, 2009, exercised its right under the Charter West deed of trust to conduct a trustee's sale of the Hebners' real property. Thereafter, Charter West purchased the property for $180,247.01.

On July 9, 2009, Charter West filed a complaint for declaratory judgment. In the complaint, Charter West alleged that the Wells Fargo deed of trust was not valid. Charter West alleged that the Wells Fargo deed of trust was not valid when first executed in 2004, because Katelman was "not a qualified Trustee . . . because he never consented, authorized, permitted, or ratified his agreement or designation to act as the Trustee for the Wells Fargo Deed of Trust." Charter West also alleged that the Wells Fargo deed of trust was not valid when the substitute of trustee was executed in 2008, because it lacked an affidavit attesting that a copy had been mailed to Katelman. Charter West thus sought a declaration that the Wells Fargo deed of trust was null and void and that Charter West's title to the property pursuant to the 2009 trustee's sale should not be encumbered by the Wells Fargo deed of trust.

On April 23, 2010, Charter West moved for summary judgment. On April 27, Wells Fargo also moved for summary judgment. On May 13, the district court held a hearing on the

cross-motions for summary judgment and the parties offered various affidavits, depositions, and exhibits in support of their respective motions.

In a deposition, Katelman testified that he had first begun doing legal work for Wells Fargo's predecessor in 1991, primarily concerning construction lending. He testified that he served as trustee for deeds of trust executed to the benefit of Wells Fargo. He testified that except with respect to construction loans, he was usually advised that he had been named trustee on a deed of trust when Wells Fargo requested a deed of reconveyance. He testified that he did not have any recollection of having particular discussions with Wells Fargo with respect to acting as trustee for residential home mortgage deeds of trust. A Wells Fargo loan administration manager testified by deposition that Wells Fargo's computer system automatically selects a trustee and places his or her name in a blank on deeds of trust Wells Fargo executes to its benefit. She was not aware of how the available trustees' names were placed in Wells Fargo's computer system. Katelman testified that he "got th[e] impression" his name was automatically being included on deeds of trust, but that he recalled no specific communications with Wells Fargo about it. He testified that he knew nothing about the Wells Fargo deed of trust concerning the Hebners' real property. Katelman also testified that he generally had not minded being named as trustee on Wells Fargo's deeds of trust until it became an irritation and that if Wells Fargo had contacted him requesting legal action regarding the deed of trust concerning the Hebners' real property, he "d[id]n't know why [he] wouldn't" have accepted the referral.

In April 2005, Katelman contacted Wells Fargo and asked that Wells Fargo discontinue naming him as trustee for deeds of trust. In August 2006, he provided Wells Fargo with a form to use for requesting deeds of reconveyance on deeds of trust on which he had been named trustee.

On June 30, 2010, the district court entered an order granting summary judgment in favor of Wells Fargo. The district court noted that the primary argument present in the dispute was whether a trustee designated on a deed of trust must agree and consent to taking that position before the deed of trust

could be considered valid. The district court noted that the parties agreed that the question was not explicitly addressed in the Nebraska Trust Deeds Act (NTDA), see Neb. Rev. Stat. §§ 76-1001 to 76-1018 (Reissue 2009 & Cum. Supp. 2010). The court concluded that the NTDA's silence concerning issues of formation and administration evidenced a legislative intent to defer to the Nebraska Uniform Trust Code, see Neb. Rev. Stat. § 30-3801 et seq. (Reissue 2008 & Cum. Supp. 2010). The court thus concluded that the Nebraska Uniform Trust Code and common law governed the fundamental operations of the trust.

The district court assumed that Katelman did not consent to being the trustee, through either words or actions, rather than resolving the issue of whether Katelman actually did agree to serve as the trustee. The court concluded that a designated trustee must consent to serve as a trustee, but that the failure of a designated trustee to accept the position did not invalidate the trust. The court held that equity would not allow a trust to fail for want of a trustee and that, instead, the trustee position lays fallow until filled. The court noted that the NTDA provides a specific mechanism for appointing a successor trustee to fill vacancies, that Wells Fargo successfully did so, and that the substitute of trustee was valid. The court thus held that the Wells Fargo deed of trust was valid, even assuming Katelman did not consent to act as the trustee, and that it maintained its priority lien position over the Charter West deed of trust.

Charter West brought this appeal. On March 14, 2011, Wells Fargo filed a suggestion of mootness and sought dismissal of Charter West's appeal. Wells Fargo alleged that Charter West had sold the real property listed in the deeds of trust to purchasers who are not parties to the appeal, that Charter West no longer has an interest in the property or the resolution of the appeal, and that the appeal was therefore rendered moot.

## III. ASSIGNMENT OF ERROR

Charter West assigns as error that the district court erred in finding the Wells Fargo deed of trust valid and effective prior to the naming of the successor trustee.

## IV. ANALYSIS

### 1. Validity of Wells Fargo Deed of Trust

Charter West asserts on appeal that the consent of the designated trustee to serve as a trustee is an essential element to the effective creation of a deed of trust. Charter West asserts that Katelman, the designated trustee in the Wells Fargo deed of trust, never consented to serve as trustee and that as a result, the Wells Fargo deed of trust was invalid at its creation. We decline to adopt Charter West's reasoning.

Section 76-1001 contains definitions of terms relevant to the NTDA. That section defines beneficiary, trustor, and trustee as those terms are used in the NTDA, but does not include any indication that the consent of a designated trustee is a prerequisite to the validity of a deed of trust. Similarly, § 76-1003 sets forth the qualifications necessary to serve as a trustee for a deed of trust, but also does not include any indication that the consent of a designated trustee is a prerequisite to the validity of a deed of trust. Indeed, Charter West does not direct the court to any provision in the NTDA which indicates that the consent of a designated trustee is a prerequisite to the validity of a deed of trust. The NTDA does not include any provision that specifies the necessary prerequisites for creation of a valid deed of trust.

Although we generally agree with Charter West's assertions that the NTDA includes provisions which impose significant responsibilities and duties upon trustees, we do not accept Charter West's assertion that these responsibilities somehow dictate that a designated trustee's consent is a prerequisite to validity. As the district court recognized, it is certainly possible that administration of the trust might be delayed or hampered by the designated trustee's failure to consent to act as trustee, but such should not preclude the effective creation of a trust or equitable matters such as priority of lien based on the trust's creation date.

[1] The district court pointed to the Restatement (Third) of Trusts § 31 (2003) as support for the notion that equity will not allow a trust to fail for want of a trustee. We note that the Nebraska Supreme Court has looked to the Restatement in

numerous prior cases, either to specifically adopt its provisions or to cite to it as additional authority in support of particular principles. See, *Schlatz v. Bahensky*, 280 Neb. 180, 785 N.W.2d 825 (2010) (citing provisions of Restatement); *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009) (citing several sections of Restatement and recognizing that portions of Nebraska Uniform Trust Code are patterned after Restatement); *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009) (citing provisions of Restatement); *Chebatoris v. Moyer*, 276 Neb. 733, 757 N.W.2d 212 (2008) (citing provisions of Restatement); *In re Trust Created by Hansen*, 274 Neb. 199, 739 N.W.2d 170 (2007) (adopting Restatement (Third), *supra*, § 50 (2003), and citing other provisions of Restatement).

We note that the Restatement (Third), *supra*, § 5 (2003), specifically indicates that deeds of trust and other security arrangements are not considered "trusts" for purposes of the provisions of the Restatement. The comments to § 5 indicate that the provisions of the Restatement are not generally applicable to deeds of trust, but also recognize that the law governing deeds of trust may borrow from this Restatement. We conclude that the provision of the Restatement (Third), *supra*, § 31, that equity will not allow a trust to fail for want of a trustee, is a provision that is appropriately borrowed in the context of deeds of trust.

Just as the Restatement (Third), *supra*, § 35 (2003), recognizes that a designated trustee in a standard trust relationship may accept or decline to serve as trustee, a designated trustee for a deed of trust is free to accept or decline to serve. The NTDA specifically includes provisions that provide for the appointment of a substitute trustee. See § 76-1004. It is axiomatic that if the NTDA specifically allows for the appointment of a substitute trustee, there will quite likely be situations where a designated trustee who has consented to serve as trustee withdraws from such service, is unable to render service, or is removed from service, and a substitute trustee must be appointed. In such situations, Charter West's logic would seem to suggest that any gap in the time period between the withdrawal of the designated trustee and the appointment and consent to serve of the substitute trustee would result in the

deed of trust no longer being valid and the appointment of a substitute trustee effectively resulting in the creation of an entirely new deed of trust, without any priority status enjoyed by the initial deed of trust. Charter West has cited us to no authority that would support such a conclusion, and we conclude that equity would not allow such a result.

A similar issue was addressed and resolved by the Arizona Supreme Court in *In re Bisbee*, 157 Ariz. 31, 754 P.2d 1135 (1988), a case in which a man executed and recorded a deed of trust naming a beneficiary but failing to designate any trustee. The man later filed for bankruptcy protection and sought to invalidate the security interest of the named beneficiary by arguing that the failure of the deed of trust to include a designated trustee rendered it and the security interest created by it invalid. The court held that the determinative issue in the case was whether the failure to designate a trustee precluded the named beneficiary's successor in interest from enforcing the deed of trust against later claimholders.

In *In re Bisbee, supra*, the court noted that Arizona statutes specifically provide that if a deed of trust designates a trustee who fails to qualify or is unwilling or unable to serve, the deed of trust is not invalidated. The court noted that the only effect of the absence of a valid trustee is that no action required to be taken by a trustee may be taken until a successor trustee is appointed. The court concluded that there was no logical distinction between a failure to designate a trustee and a failure to designate a legally qualified trustee, and the court perceived no policy reason to treat the two situations differently. In addition to the specific statutory guidance, however, the court also referenced traditional trust law as being helpful, while not directly controlling, and noted that under prevailing traditional trust law, a valid trust is created notwithstanding the failure to designate a trustee. Finally, the court also noted that the deed of trust, despite its failure to designate a trustee, was properly recorded and indexed and provided notice to subsequent claimholders of the lien created by the deed of trust.

As the Arizona Supreme Court did in *In re Bisbee, supra*, we conclude that in the instant case, the deed of trust was valid and created a priority interest despite the designated

trustee's failure to consent to serve, and that such is consistent with prevailing law. Charter West has provided no authority which would indicate that the consent of a designated trustee is a prerequisite to the validity of a deed of trust. Although the trustee's consent is certainly necessary to allow the trustee to act, we agree with the district court that the deed of trust remains valid despite the designated trustee's failure to consent to act as trustee. If the designated trustee does not consent to act as trustee, a substitute trustee may be appointed, as provided in the NTDA. In the present case, a substitute trustee was effectively appointed, and we conclude that the district court correctly found that the Wells Fargo deed of trust, created in 2004, has priority over the Charter West deed of trust, created in 2007. We affirm the district court's grant of summary judgment in favor of Wells Fargo.

### 2. Mootness

We find no merit to Wells Fargo's assertion that this appeal should be dismissed for mootness. Although Charter West acknowledges that it has, in fact, sold its interest in the real property listed in the deeds of trust at issue in this case, we conclude that the appeal was not rendered moot as a result. The determination of the validity of Wells Fargo's deed of trust and its priority status remains an important legal right that could impact the interest Charter West transferred. Additionally, inasmuch as Charter West's successors were not capable of participating at trial, a finding that the appeal is moot would seem to render the district court's summary judgment a final order which could not later be challenged by Charter West's successors, causing the issue to evade review. As such, we overrule Wells Fargo's suggestion of mootness.

## V. CONCLUSION

We find that Wells Fargo's deed of trust was valid, even assuming Katelman did not consent to serve as trustee as designated. The deed of trust will not fail for want of a trustee. We reject Charter West's challenge to the validity of the deed of trust, and we affirm the district court's summary judgment.

Affirmed.

# ESTATE OF ALICE I. DONAHUE, BY AND THROUGH VICKI L. BROWN, SPECIAL ADMINISTRATOR, APPELLANT, V. WEL-LIFE AT PAPILLION, INC., AND LANTIS ENTERPRISES, INC., APPELLEES.

810 N.W.2d 418

Filed August 30, 2011. No. A-10-135.

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. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
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. **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.
6. ____. Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.
7. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
8. ____: ____. Once a party moving for summary judgment makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
9. **Joint Ventures.** Whether a joint or common enterprise exists is generally a question of fact.
10. ____. The elements essential to a joint enterprise are (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.
11. **Joint Ventures: Proof.** To establish a joint venture or enterprise, the burden is on the plaintiff to show its existence by clear and convincing evidence.
12. **Words and Phrases.** A pecuniary interest is also termed a financial interest.
13. **Joint Ventures: Summary Judgment.** A broad reading of the pecuniary interest requirement for the existence of a joint venture or enterprise is the most appropriate and logical, especially in a summary judgment proceeding.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Reversed and remanded for a new trial.

Richard F. Hitz, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellant.

Thomas J. Culhane, Matthew V. Rusch, and Heather B. Veik, of Erickson & Sederstrom, P.C., and Edward C. Prieto, of Quintairos, Prieto, Wood & Boyer, P.A., for appellees.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

## I. INTRODUCTION

The estate of Alice I. Donahue, by and through Vicki L. Brown, special administrator (the Estate), sued WEL-Life at Papillion, Inc. (WEL-Life), and Lantis Enterprises, Inc. (Lantis), for negligence and wrongful death relating to the care of Donahue. During summary judgment proceedings, the district court for Douglas County found that the Estate failed to prove that WEL-Life and Lantis were involved in a joint enterprise. However, at the conclusion of the trial, the district court instructed the jury that if it found in favor of WEL-Life, then it must also find in favor of Lantis—thereby linking the fates of the two companies. The jury did find in favor of WEL-Life on both causes of action, and in accordance with the instructions, it also found in favor of Lantis. The district court accepted the jury's verdict and entered judgment in favor of WEL-Life and Lantis.

## II. FACTUAL BACKGROUND

We begin with a brief recitation of facts. Donahue was hospitalized from June 15 through 25, 2004, for treatment of upper gastrointestinal bleeding, blockage of her colon, a rectovaginal fistula, and a urinary tract infection. After her release from the hospital, Donahue was admitted into a nursing home for rehabilitation. She remained there until July 10. From July 10 through September 7, Donahue was a resident of WEL-Life, an assisted living facility. While a resident at WEL-Life, Donahue continued to suffer numerous health problems. She developed

pressure ulcers, including a significant pressure ulcer on her sacral area which became infected, and she became increasingly malnourished and dehydrated. On September 7, Donahue left WEL-Life and was hospitalized due to pressure ulcers and "'excruciating pain.'" On September 14, Donahue was discharged to another nursing home, where she died on November 2. The Estate alleges that Donahue's death was the result of negligent care that she received while a resident at WEL-Life from July 10 through September 7. During Donahue's stay at WEL-Life, Lantis was the "manager" of WEL-Life's facility pursuant to a management agreement signed on October 1, 2002. A more detailed factual background is not necessary given our disposition of this case, except as may be contained within our analysis.

## III. PROCEDURAL BACKGROUND

On September 12, 2008, the Estate filed its second amended complaint against WEL-Life and Lantis, seeking damages for negligence and wrongful death. The Estate alleged that WEL-Life and Lantis were engaged in a "joint (common) venture/enterprise" during Donahue's residency at WEL-Life from July 10 through September 7, 2004. The Estate alleged that WEL-Life and Lantis were negligent in their care of Donahue. The Estate alleged that as a result of such negligence, Donahue developed pressure ulcers and urinary tract infections and was severely malnourished and dehydrated. The Estate alleged that the negligence of WEL-Life and Lantis led Donahue to suffer injuries that ultimately caused her death on November 2.

WEL-Life and Lantis filed a motion for partial summary judgment alleging that there was no genuine issue of material fact as to the liability of Lantis and that Lantis was entitled to judgment as a matter of law. We point out that at the hearing on the motion, it was made clear that the basis of Lantis' motion was that it was not engaged in a joint enterprise with WEL-Life. This was the basis for the district court's ruling and our discussion of joint enterprise which follows.

After a summary judgment hearing, the district court filed its order on July 28, 2009, denying Lantis' motion for summary

judgment in part, and in part granting such motion. The district court held that there were genuine issues of material fact as to the Estate's "'direct participation'" allegations and that therefore, Lantis was not entitled to judgment as a matter of law on that theory. However, the district court held that the Estate had not met its burden in proving that WEL-Life and Lantis were engaged in a joint venture, which would make Lantis responsible for any alleged liability of WEL-Life. Accordingly, the district court held that there were no genuine issues of material fact as to the Estate's joint enterprise allegations. The matter then proceeded to trial.

After a 2-week trial on the merits of the negligence and wrongful death claims, the case was submitted to the jury upon instructions—some of which are at issue in this appeal. Despite having found during summary judgment that WEL-Life and Lantis were not engaged in a joint venture or enterprise, the district court instructed the jury that if it found in favor of WEL-Life, then it must also find in favor of Lantis—thereby linking the fates of the two companies for purposes of a verdict. The jury returned a nonunanimous verdict of 10 to 2 in favor of "the Defendants" on the claim of negligence. The jury returned a unanimous verdict in favor of "the Defendants" on the claim of wrongful death. In an order filed on December 14, 2009, the district court accepted the verdict of the jury and entered judgment in favor of WEL-Life and Lantis.

On January 26, 2010, the district court entered an order overruling the Estate's motion for new trial. The Estate has perfected this timely appeal.

## IV. ASSIGNMENTS OF ERROR

The Estate assigns, summarized and restated, that the district court erred in (1) finding there was insufficient evidence prior to trial to show the essential elements of a joint enterprise between WEL-Life and Lantis, in short, assigning error to the order of summary judgment; (2) failing to allow the jury to determine if there was a joint or common enterprise between WEL-Life and Lantis; (3) giving conflicting jury instructions; and (4) rejecting the Estate's proposed jury

instruction No. 1, which provided that the jury could find against WEL-Life or Lantis for the personal injury and wrongful death of Donahue.

## V. 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. *Bamford v. Bamford, Inc.*, 279 Neb. 259, 777 N.W.2d 573 (2010). 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. *Id.*

[3,4] Whether a jury instruction is correct is a question of law, which an appellate court independently decides. *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 799 N.W.2d 249 (2011). 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. *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007).

## VI. ANALYSIS

### 1. Summary Judgment—Joint Enterprise

The Estate argues that the district court erred in finding as a matter of law that WEL-Life and Lantis were not engaged in a joint venture or enterprise. The Estate argues that material issues of fact existed and that a jury should have determined whether WEL-Life and Lantis were engaged in a joint venture or enterprise.

[5-8] 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. *Kotlarz v. Olson Bros., Inc.*, 16 Neb. App. 1, 740 N.W.2d 807 (2007). Where reasonable minds differ as to whether an inference supporting the ultimate

conclusion can be drawn, summary judgment should not be granted. *Id*. Moreover, a party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Id*. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id*.

At the hearing on the motion for summary judgment, WEL-Life and Lantis offered into evidence (1) the affidavit of Lantis' chief financial officer, with a copy of the management agreement between WEL-Life and Lantis attached, and (2) the deposition of Lantis' vice president of operations, Larry Klarenbeek. The Estate offered into evidence (1) the management agreement between WEL-Life and Lantis, (2) the deposition of Lantis' chief financial officer, and (3) the deposition of Lantis' chief operations officer. These five exhibits were received into evidence.

### (a) Were WEL-Life and Lantis Engaged in Joint Enterprise?

[9-11] We begin with the fact that we have previously held that whether a joint or common enterprise exists is generally a question of fact. *Bahrs v. R M B R Wheels, Inc.*, 6 Neb. App. 354, 574 N.W.2d 524 (1998). In 1995, the Nebraska Supreme Court adopted the definition of joint enterprise set forth in the Restatement (Second) of Torts § 491, comment *c*. (1965). See *Winslow v. Hammer*, 247 Neb. 418, 527 N.W.2d 631 (1995). As a result, the elements essential to a joint enterprise are (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control. See *id*. To establish a joint venture or enterprise, the burden is on the plaintiff to show its existence by clear and convincing evidence. *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999).

*(i) Was There an Agreement?*

The first element essential to a joint enterprise is that there be an agreement, express or implied, among the members of the group. The evidence showed that WEL-Life and Lantis entered into a "management agreement," whereby Lantis agreed to manage WEL-Life, "a 48 bed assisted living facility." Pursuant to the agreement, Lantis' duties included, but were not limited to, "the overall supervision of the facility, supervision of the administration, assisting with the financial management of the facility, maintaining all accounting records of the facility and preparation of financial reports for the facility." Certainly, this management agreement satisfies the first element of a joint venture or enterprise, as a matter of law.

*(ii) Was There Common Purpose?*

The second element essential to a joint enterprise is that there be a common purpose to be carried out by the group. The common purpose between WEL-Life and Lantis is rather obviously the effective and presumably profitable operation of WEL-Life's assisted living facility. Accordingly, the second element of a joint venture or enterprise is satisfied as a matter of law.

*(iii) Was There Common Pecuniary Interest?*

[12] The third element essential to a joint enterprise is that there be a common pecuniary interest. A pecuniary interest is also termed a financial interest. See Black's Law Dictionary 829 (8th ed. 2004). See, also, *Haynes v. Dover*, 17 Neb. App. 640, 768 N.W.2d 140 (2009). The management agreement states that each month, Lantis "shall receive[,] as compensation for [its] services as manager, an amount equal to 6.5 percent of gross revenue derived by the [WEL-Life] facility." Obviously, Lantis has a pecuniary, or financial, interest in WEL-Life.

In finding that WEL-Life and Lantis did not have a common pecuniary interest, the district court relied on this court's opinion in *Bahrs v. R M B R Wheels, Inc.*, 6 Neb. App. 354, 574 N.W.2d 524 (1998). In *Bahrs*, we said:

> Regarding the common pecuniary interest requirement for a joint venture, the Restatement, *supra*, provides that

> it entails participants' having a financial stake in the endeavor. Other authorities explain the common pecuniary interest requirement for a joint venture includes an agreement to share in profits and losses. . . . In the context of the landlord and tenant relationship, even an agreement between landlord and tenant that the landlord will receive as rent a stipulated portion of the income or net profits derived by the lessee through its business conducted on the premises does not create a joint enterprise.

6 Neb. App. at 361, 574 N.W.2d at 529.

However, we believe that reading *Bahrs* as standing for the proposition that whether there is an agreement to share both profits and losses is conclusive on whether a joint enterprise exists is incorrect for a number of reasons. What the Nebraska Supreme Court had said prior to *Winslow v. Hammer*, 247 Neb. 418, 527 N.W.2d 631 (1995), was: "The absence of *mutual interest* in the profits or benefits is conclusive that a partnership or joint venture does not exist." *Global Credit Servs. v. AMISUB*, 244 Neb. 681, 691, 508 N.W.2d 836, 844 (1993) (emphasis supplied), citing *Frisch v. Svoboda*, 182 Neb. 825, 157 N.W.2d 774 (1968). Thus, it was the mutual interest in the profits or benefits, not the presence or absence of an agreement to share such, that was key. And, when *Bahrs* is closely read, we note that the trial court therein decided sua sponte that the property-owner lessor and the bar-operator lessee were in a joint enterprise as a matter of law. In reversing the trial court's decision, our conclusion in *Bahrs* was that "[t]here was no evidence to support a finding of joint enterprise, let alone to find as a matter of law the existence of joint enterprise." 6 Neb. App. at 362, 574 N.W.2d at 529. Finally, what *Winslow, supra*, spoke of was a community of pecuniary interest in the common purpose being carried out by the group. Thus, this is the concept we apply in the case before us.

[13] The Restatement (Second) of Torts § 491, comment *c*. at 548 (1965), adopted by the Supreme Court in *Winslow*, simply states that for a joint enterprise to exist, there must be "a community of pecuniary interest in that purpose, among the members." And, as stated previously, "pecuniary interest" is

also termed "financial interest." Neither the Restatement nor *Winslow* further defined pecuniary interest. Thus, we find that a broad reading of the pecuniary interest requirement is the most appropriate and logical, especially in a summary judgment proceeding, where the plaintiff—here, the Estate—is to have the evidence viewed most favorably to it. Thus, because Lantis received 6½ percent of WEL-Life's gross revenues, it did have a common pecuniary interest with WEL-Life, satisfying the third element required for a joint venture or enterprise. Moreover, in the case before us, the agreement, for all practical purposes, eliminates profit as a part of the calculus for determining Lantis' compensation. This is simply because Lantis gets 6½ percent of the gross revenues. Thus, whether WEL-Life makes a profit (revenues exceeding the costs of doing business) is essentially immaterial. But both parties obviously have a community of pecuniary interest—that there be a continuing stream of revenue, irrespective of whether a profit is made by WEL-Life. Thus, the district court erred in not concluding that this third element of joint enterprise was established as a matter of law.

*(iv) Did Parties Have Equal Right of Control?*

The fourth element essential to a joint enterprise is that the parties have an equal right of control. The management agreement itself gives rise to a question of fact regarding Lantis' right of control at WEL-Life. Initially, we note with interest that the management agreement between WEL-Life and Lantis was signed by "Will Lantis, President [of Lantis]," and "Will Lantis, President [of WEL-Life]." Above those signatures, under "Description of Services," the management agreement states that Lantis "shall manage WEL-Life" and that Lantis' management duties included, but were not limited to, "the overall supervision of the facility, supervision of the administration, assisting with the financial management of the facility, maintaining all accounting records of the facility and preparation of financial reports for the facility." Thus, because Lantis provided the overall supervision of the WEL-Life facility and the same person was the president of both entities, there clearly exists a material question of fact

regarding whether Lantis had an equal right to control at the WEL-Life facility.

Furthermore, in his deposition, Klarenbeek testified that as the vice president of operations at Lantis, he oversees nine assisted living facilities and two nursing homes operated by Lantis, including WEL-Life's facility. Klarenbeek testified that he does the hiring and firing for the program director position at WEL-Life and that the program director reports directly to him. The program director's responsibilities include overseeing the building and the day-to-day operations of the facility.

When presented with discovery evidence that WEL-Life's service coordinator had signed a Lantis confidentiality agreement—and that such document had also been signed by the program director as a "Lantis employee, witness"—Klarenbeek acknowledged that the document had Lantis' company name on it, but denied knowing who generated such document. If the service coordinator and the program director, who are actively involved in the day-to-day operations and decisions at WEL-Life, are in fact Lantis employees, then this would bolster the Estate's argument that Lantis had equal control at WEL-Life. Viewing the evidence in the light most favorable to the Estate, we determine there is clearly a material issue of fact, regarding control, which prevents summary judgment.

Furthermore, in his deposition, Klarenbeek seems to admit that both WEL-Life and Lantis were responsible for meeting the regulation and licensing standards for WEL-Life as an assisted living facility:

> Q. [(by the Estate's counsel)] I'm going to make this Exhibit 9 to the deposition, and it is the State of Nebraska — a copy of the State of Nebraska Health and Human Services Regulation and Licensure for assisted living facilities.
>
> . . . [I]f you could flip over to Page 19, down in the right-hand corner . . . [i]t's got a thing there for staff requirements, 4-006.03; do you see that sir?
>
> A. [(by Klarenbeek)] Yes.
>
> Q. Can you read that to us, please, sir?

> A. The facility must maintain a sufficient number of staff with the required training and skills necessary to meet the resident population's requirements for assistance or provision of personal care, activities of daily living, health maintenance activities, supervision and other support services, as directed in the resident service agreements.
>
> Q. So do you take that to mean that it was the responsibility of Lantis and WEL-Life . . . to make sure there was enough personal service aides and certified medication aides there to meet the needs of the resident population in terms of what they needed in terms of personal care, ADLs, health maintenance, et cetera?
>
> A. That would be correct, within the scope of assisted living —
>
> Q. Yes, sir.
>
> A. — needs.
>
> . . . .
>
> A. . . . And this doesn't speak to a third-party need for home health; this would strictly be our component of the care.

(Emphasis omitted.) Again, Klarenbeek's deposition testimony gives rise to a material question of fact regarding Lantis' control at WEL-Life, since he seemingly admits that one of Lantis' responsibilities is to ensure sufficient staffing at WEL-Life.

There was also ample evidence offered at the summary judgment hearing regarding Lantis' control over WEL-Life's finances. WEL-Life deposited residents' payments into a WEL-Life account. However, all of WEL-Life's account funds were then swept into a central account owned by Lantis—although Lantis' chief financial officer testified that the money still belonged to WEL-Life. All of WEL-Life's bills, including payroll, were paid out of the central account by Lantis' accounting department. Lantis' chief financial officer testified that no employees at WEL-Life had a checking account from which they could write their own checks. Furthermore, WEL-Life's budget was ultimately approved by Lantis' chief executive officer and president. Again, given Lantis' apparent control over

WEL-Life's finances, a material issue of fact exists, regarding the fourth element of joint venture, which prevents summary judgment as a matter of law.

*(v) Summary*

Whether a joint or common enterprise exists is generally a question of fact. *Bahrs v. R M B R Wheels, Inc.*, 6 Neb. App. 354, 574 N.W.2d 524 (1998). We have found that three of the four elements required to establish a joint venture or enterprise have been satisfied and that there are material issues of fact regarding the fourth element, equal control. Thus, the district court erred in finding as a matter of law that WEL-Life and Lantis were not engaged in a joint venture or enterprise. The matter should have proceeded to trial for a factual determination by a jury as to the element of control for establishment of a joint enterprise.

(b) Was the Estate Prejudiced by Grant of Summary Judgment?

The Estate was most certainly prejudiced by the district court's grant of summary judgment in favor of WEL-Life and Lantis, as evidenced by the confusing and conflicting instructions given to the jury at the end of trial as discussed below.

2. Jury Instructions

The jury was given 24 instructions by the district court. Of particular importance in this appeal are instructions Nos. 2 and 4. The relevant portions of instruction No. 2 were given as follows:

**INSTRUCTION NO. 2**
**STATEMENT OF THE CASE—NEGLIGENCE**
**A. ISSUES**

. . . .

The Defendants are Wel-Life . . . and Lantis . . . . The Court has determined as a matter of law that Lantis . . . is the manager and consultant to Wel-Life providing oversight and ensuring Wel-Life does its job properly. But Wel-Life and Lantis are two separate corporate entities.

. . . .

> **EFFECT OF FINDINGS—Negligence Against Wel-Life** . . .
>
> If the [Estate] *has not* met [its] burden of proof, then your verdict must be for . . . Wel-Life . . . on [the Estate's] claim for Negligence and you should record your verdict on Verdict Form No. 1. If the [Estate] *has not* met [its] burden of proof in regard to Wel-Life . . . then your verdict must also be in favor of . . . Lantis . . . as to [the Estate's] claim for Negligence against Lantis . . . .
>
> . . . .
>
> **EFFECT OF FINDINGS—Wrongful Death Against Wel-Life** . . .
>
> If the [Estate] *has not* met [its] burden of proof, then your verdict must be for . . . Wel-Life . . . on [the Estate's] claim for Wrongful Death and you should record your verdict on Verdict Form No. 3. If the [Estate] *has not* met [its] burden of proof in regard to Wel-Life . . . then your verdict must also be in favor of . . . Lantis . . . as to [the Estate's] claim for Wrongful Death against Lantis . . . .
>
> . . . .
>
> **EFFECT OF FINDINGS—Negligence Against Lantis** . . .
>
> If the [Estate] *has not* met [its] burden of proof, then your verdict must be for . . . Lantis . . . on [the Estate's] claim for Negligence and you should record your verdict on Verdict Form No. 1. . . .
>
> . . . .
>
> **EFFECT OF FINDINGS—Wrongful Death Against Lantis** . . .
>
> If the [Estate] *has not* met [its] burden of proof, then your verdict must be for . . . Lantis . . . on [the Estate's] claim for Wrongful Death and you shall record your verdict on Verdict Form No. 3.

The jury instructions were conflicting in more ways than one. First, despite finding during summary judgment that WEL-Life and Lantis were not engaged in a joint venture or enterprise, the district court's instructions tied the fates of the two companies together, by stating that if the jury finds in favor of WEL-Life, then it must also find in favor of Lantis

(see sections of instruction No. 2 entitled "**EFFECT OF FINDINGS—Negligence Against Wel-Life**" and "**EFFECT OF FINDINGS—Wrongful Death Against Wel-Life**"). Second, despite tying the fates of the two companies together, the district court initially instructed the jury that WEL-Life and Lantis are two separate corporate entities (see last sentence of instruction No. 2's subheading entitled "**A. ISSUES**"). And in instruction No. 4, the district court again instructed the jury to consider each defendant separately. Instruction No. 4 was given as follows:

> **INSTRUCTION NO.** 4
>
> There are two Defendants in this lawsuit.
>
> You should decide the case of each Defendant separately as if they were separate lawsuits. Unless a specific Instruction states that it applies to a specific Defendant, the Instructions apply to each Defendant.

Certainly, these instructions were prejudicial to the Estate, because the jury was told that the two defendants were separate but in the next breath was told that if it found in favor of WEL-Life, it had to also decide in favor of Lantis—even if the jury may have thought that Lantis was separately negligent for Donahue's alleged injuries and resulting death. The jury instructions were certainly prejudicial or otherwise adversely affected a substantial right of the Estate, and thus, a reversal is warranted. See *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007).

Because we have already found that the district court erred in granting summary judgment in favor of Lantis and in its instructions to the jury—both of which require a reversal and remand for new trial—we need not discuss the Estate's assignment of error regarding its proposed jury instruction. See *Concrete Indus. v. Nebraska Dept. of Rev.*, 277 Neb. 897, 766 N.W.2d 103 (2009) (appellate court is not obligated to engage in analysis which is not needed to adjudicate controversy before it).

## VII. CONCLUSION

Viewing the evidence in the light most favorable to the Estate, we find that genuine issues of material fact existed

regarding whether or not WEL-Life and Lantis were engaged in a joint venture or enterprise, although three of the four elements of joint enterprise should have been determined to have been established as a matter of law. Therefore, the issue of control should have proceeded to trial to be decided by a jury.

We further find that the Estate was prejudiced by the decision on summary judgment and by the jury instructions given at trial, because, despite having found via summary judgment that WEL-Life and Lantis were not engaged in a joint venture, the district court instructed the jury that if it found in favor of WEL-Life, then it must also find in favor of Lantis—thereby linking the fates of the two companies. Clearly, this was prejudicial to the Estate, because the jury was not allowed to find that only Lantis was liable, bearing in mind that there was evidence from which a jury could find by reasonable inference that Lantis had not properly carried out its oversight duties with respect to WEL-Life's operations. We therefore reverse, and remand the matter for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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DONALD LEE OPPLIGER AND JOI MICHELE OPPLIGER, HUSBAND AND WIFE, APPELLEES, V. BRIAN J. VINEYARD AND JANET K. VINEYARD, HUSBAND AND WIFE, APPELLANTS.

803 N.W.2d 786

Filed September 20, 2011. No. A-10-712.

1. **Appeal and Error.** An appellate court considers only those assignments of error which are both specifically assigned and specifically argued.
2. **Equity: Boundaries: Appeal and Error.** An action to ascertain and permanently establish corners and boundaries of land under Neb. Rev. Stat. § 34-301 (Reissue 2008) is an equity action.
3. **Equity: Appeal and Error.** In an equity action, an appellate court reviews the record de novo and reaches an independent conclusion without reference to the conclusion reached by the trial court, except that where credible evidence is in conflict, the appellate court will give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying.

4. **Actions: Equity: Boundaries: Appeal and Error.** When one or more owners of land, the corners and boundaries of which are in dispute, desire to have the same established, they may bring an action in the district court of the county where such land is situated, against the owners of the other tracts which will be affected by the determination or establishment thereof, to have such corners or boundaries ascertained and permanently established, which issue shall be tried before the district court under its equity jurisdiction without the intervention of a jury, and appeals from such proceedings shall be had and taken in conformity with the equity rules.
5. **Waters: Boundaries: Easements.** Subject to the easement of navigation, riparian owners are entitled to the possession and ownership of an island formerly under waters of the stream as far as the thread of the stream.
6. **Real Estate: Waters: Boundaries: Words and Phrases.** The thread of the stream is the deepest groove or trench in the bed of a river channel, the last part of the bed to run dry, and where the thread of a stream is the boundary between estates and that stream has two channels, the thread of the main channel is the boundary between the estates.
7. **Real Estate: Waters: Words and Phrases.** Avulsion is a sudden and perceptible loss of or addition to land by the action of water, or a sudden change in the bed or course of a stream.
8. **Waters: Words and Phrases.** Avulsion is a change in a stream that is violent and visible and arises from a known cause, such as a freshet or a cut through which a new channel has formed.
9. **Real Estate: Waters: Words and Phrases.** Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shoreline out by deposits made by contiguous water; reliction is the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.
10. **Real Estate: Waters: Boundaries.** The changes wrought by accretion versus avulsion involve markedly different processes, and each process has a different consequence for the boundary between the landowners on opposite banks of the river.
11. **Boundaries: Time.** Nebraska law provides that boundaries that have been mutually recognized and acquiesced in for a period of 10 years can be legal boundaries.
12. **Boundaries.** In order to claim a boundary line by acquiescence, both parties must have knowledge of the existence of a line as the boundary, and therefore, the mere establishing of a line by one party and the taking by that party of possession up to that line are insufficient.
13. **Waters: Boundaries.** The mean centerline of a river, determined by dividing the distance between meander lines of the river, is an arbitrary location of the center of the stream and is not a determination of the thread of the stream in this jurisdiction.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS, Judge. Reversed.

Allen L. Fugate for appellants.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellees.

INBODY, Chief Judge, and SIEVERS, Judge.

SIEVERS, Judge.

## I. INTRODUCTION

This action is a boundary dispute concerning accretion land of the North Platte River in Lincoln County, Nebraska, which began with the filing of a complaint seeking to establish corners and boundaries of property in dispute pursuant to Neb. Rev. Stat. § 34-301 (Reissue 2008). While a number of other landowners were originally parties to the litigation, in this appeal, only Donald Lee Oppliger and Joi Michele Oppliger, who were among the plaintiffs, and Brian J. Vineyard and Janet K. Vineyard, who were among the defendants, are now involved. The Oppligers own land located on the north side of the North Platte River, "Section 9, with all accretions thereto, all in Township 14 North, Range 34 West of the 6th P.M." in Lincoln County. The Vineyards, as of the time of trial, own only accretion land in section 16 located directly to the south of the Oppligers' land on the south side of the North Platte River. The litigation and appeal involve where the boundary between these two properties is located and, consequently, who owns what accretion land adjacent to the river.

The matter consumed over 5 days of trial to the court, producing a more than 1,200-page trial record and well over 100 exhibits. On April 23, 2010, the district court entered its decision, concluding that it was impossible at that point in time to determine the thread of the North Platte River other than to conclude that the geographic centerline thereof as depicted in the Government Land Office (GLO) survey filed May 24, 1870, establishes the boundary between the north-bank and south-bank land. Additionally, the trial court rejected the Vineyards' claims of adverse possession as well as the Vineyards' alternative claim that a fence line established the boundary. We find that the thread of the stream can be located

and that it is in the north channel of the North Platte River. Thus, we reverse.

## II. DISPUTED LAND

The original numerous parties to this lawsuit all owned land adjacent to the North Platte River, generally to the east of the lands owned by the Oppligers and the Vineyards. On the north side of the river, those parties were Joseph V. Herrod and Janice M. Herrod. On the south side of the river, those parties were Chester T. Binegar and Wanda L. Binegar, Harley C. Gries and Nona Jean Gries, and Steven W. Binegar. The north-bank land had previously been owned by Bar B Cattle Company, a Nebraska corporation. On March 8, 2007, Bar B Cattle Company was conveyed to Osborne Cattle Company, L.L.C., a Nebraska limited liability corporation. Thereafter, section 9 was conveyed by Osborne Cattle Company to the Oppligers.

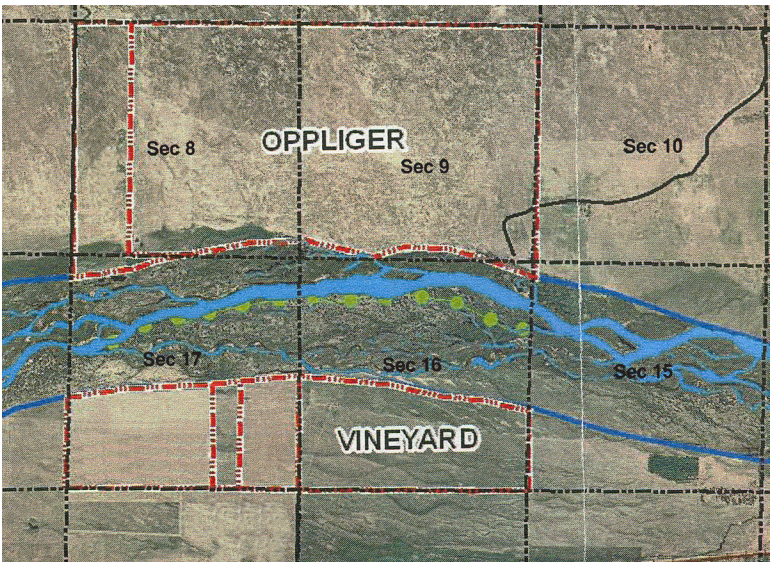
As set forth by the district court, the Vineyards are the record owners of

> [g]overnment Lots 2, 3, 4, and 5 and the South half of the South half of Section 16, Township 14 N[orth], Range 34 West of the 6th P.M. in Lincoln County, Nebraska and all accretions thereto except parts conveyed in two warranty deeds and one quitclaim deed shown in [the trial record].

(Emphasis omitted.) This south-bank land involves legal descriptions in extensive and complicated metes and bounds descriptions that we need not set forth. The Oppligers are the record owners of "[t]he North half of the North half of Section 16, and the North half of the North half of Section 17, with all accretions thereto," and "the East half of the West half and the East half of Section 8, and all of Section 9, with all accretions thereto," "all in Township 14 North, Range 34 West of the 6th P.M. in Lincoln County, Nebraska." (Emphasis omitted.) The Oppligers claim ownership of all of the accretion ground to the thread of the south channel of the North Platte River—which they claim is the thread of the stream of the North Platte River.

Conversely, the Vineyards claim ownership of the accretion ground to the center of the north channel of the North Platte River—which they contend is the thread of the stream of the North Platte River. Additionally, the Vineyards assert, apparently as a "back-up position," that the boundary is the "existing fence located along the south side of the north channel of the North Platte River." This fence was surveyed, legally described by metes and bounds, and platted during the course of this litigation by a surveyor, Bonita Edwards.

As an aid to the reader, we have reproduced a portion of a 2006 aerial photograph of the land, received in evidence by the district court. The area involved is frequently called the project reach, and we shall use that term. The 2006 aerial photograph has superimposed on it the meander lines of the North Platte River from the 1870 GLO survey, indicated by dark blue lines. The land originally owned by the Vineyards is designated with their name and red-and-white borders, although by the time of trial, the Vineyards had conveyed away all of such land except what they might own of the accretion lands located north of the northern boundary of what is designated as "VINEYARD"



within certain of the red-and-white borders in the photograph. The Oppligers' land, as well as that of former parties to the litigation, is also outlined in the red-and-white borders. The various channels of the river are discernible. Shown as green dots is the fence line that was surveyed and platted by Edwards, as detailed hereafter, which we call the north fence.

## III. DISTRICT COURT DECISION

In its decision of April 23, 2010, the district court for Lincoln County noted the Nebraska Supreme Court's decision in *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000), which the trial court described as a similar boundary line dispute located in Dawson County, Nebraska, and which happened to have been tried before the same trial judge as in this case. The trial judge noted that in *Anderson*, he found it was impossible to ascertain the location of the current thread of the Platte River because of the construction of a series of bridges across the Platte River and because the flow had also been affected by the construction of Kingsley Dam, which created Lake McConaughy. On appeal, the Supreme Court in *Anderson* noted that there was no evidence that either channel of the river had ever completely dried up. The trial judge here noted that the Supreme Court in *Anderson* agreed with the establishment of the boundary at the geographic centerline of the Platte River as measured by an 1869 U.S. government survey, although for reasons different from the trial judge's. We shall discuss *Anderson* in more detail later.

The trial court in the case before us then noted that to the west of the Sarben Bridge, there is one main channel of the North Platte River, but that approximately one-quarter mile east of such bridge, the North Platte River splits into two channels, described as the north and south channels, that flow through the project reach. The court noted that a relatively short distance east of the disputed accretion ground, the two channels merge again into one channel. The trial court found that neither the north channel nor the south channel has ever dried up and that "[n]o credible evidence was introduced to prove which channel will completely dry up in times of severe drought." The court then found:

> In my opinion, the construction of Kingsley Dam which totally obstructed the flow of the North Platte River by creating Lake McConaughy, as well as the construction of the Sarben Bridge[,] caused the North Platte River to bifurcate west of the disputed accretion ground and to form two separate and distinct channels. It is impossible at this point in time to determine the thread of the North Platte River other than to conclude that the geographical centerline thereof as measured by the [GLO] Survey . . . filed May 24, 1870 . . . established the boundary line between the lands owned by the respective Plaintiffs and the respective Defendants.

The trial judge said that he rejected the testimony of the Vineyards' expert, Dr. Michael D. Harvey, that the construction of the Sarben Bridge did not cause the bifurcation. He likewise rejected Harvey's opinion that the construction of Kingsley Dam in 1941 changed the amount of flow but not the location of the main channel of the North Platte River. The trial court accepted and adopted the opinion of the Oppligers' expert, Mark Mainelli, that it is "reasonable [to] assume" that the thread of the main channel of the North Platte River in 1870 was at or near the geographic centerline of the river. The trial court then found that any change in the original location of the main channel of the North Platte River after the 1870 GLO survey was caused by avulsive events including but not limited to construction of the Sarben Bridge and Kingsley Dam, floods in 1971 and 1973, and artificial flows from Kingsley Dam for irrigation purposes and generation of hydroelectric power.

Further, the court rejected each party's claimed ownership by virtue of adverse possession, finding that the accretion ground is used primarily for hunting and recreational purposes, although it can be used to pasture cattle and horses, but was not continuously used for such purposes during the statutory period required to prove adverse possession. The court concluded that neither party could establish exclusive use, for the requisite 10-year timeframe, of the accretion ground which they were claiming. Finally, the court accepted the testimony

of the president of Bar B Cattle Company that the north fence, surveyed and legally described by Edwards, was never intended to define the boundary lines between the landowners' properties to the north and to the south of the North Platte River in the project reach.

Therefore, the court found that "[t]he boundary line between the accretion ground adjacent to each party's deeded real estate is fixed and determined to be the geographical centerline of the North Platte River as measured from the original meander line[s] of the North Platte River according to the [GLO] Survey filed May 24, 1870 . . . ." The Vineyards have perfected this timely appeal.

## IV. ASSIGNMENTS OF ERROR

[1] Because of the extensive number of assignments of error asserted by the Vineyards, we have very carefully compared the alleged assignments of error with the arguments asserted by the Vineyards in their brief, given the well-known rule that an appellate court considers only those assignments of error which are both specifically assigned and specifically argued. See *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009). Therefore, rather than setting forth all of the assignments of error, we list only the assignments of error for which there is a corresponding argument made in the appellants' brief. Those assignments of error, renumbered, are as follows: (1) The district court erred in considering evidence outside the record, (2) the district court erred by abdicating its gatekeeping responsibility with respect to expert witnesses and relying upon expert opinion that was incompetent under Neb. Rev. Stat. § 27-702 (Reissue 2008), (3) the district court erred in admitting the expert opinion of Mainelli, (4) the district court erred in admitting certain photographs, and (5) the district court erred in admitting Mainelli's testimony concerning a formula used in hydraulic studies and admitting a chart generated by Mainelli.

It is clear that the other nine assignments of error can be reduced to the assertion that the district court erred in establishing the boundary between the lands of the Vineyards and

the Oppligers at the geographic centerline of the North Platte River meander lines as measured by the 1870 GLO survey. There is no cross-appeal.

## V. STANDARD OF REVIEW

[2,3] An action to ascertain and permanently establish corners and boundaries of land under § 34-301 is an equity action. *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000); *Babel v. Schmidt*, 17 Neb. App. 400, 765 N.W.2d 227 (2009). In an equity action, an appellate court reviews the record de novo and reaches an independent conclusion without reference to the conclusion reached by the trial court, except that where credible evidence is in conflict, the appellate court will give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying. See *Sila v. Saunders*, 274 Neb. 809, 743 N.W.2d 641 (2008).

## VI. ANALYSIS

### 1. Applicable Water Law

We believe that before detailing additional evidence, we should first put in place some basic principles of water law that have been well established by the Nebraska appellate courts. This is particularly true given the size and complexity of the trial record. The record contains aerial photographs taken of the North Platte River at various times—beginning in 1938 and up to 2006, as well as various rectified overlaid images derived therefrom. There are numerous surveys, beginning with the 1870 GLO survey; data compilations by the experts; many photographs; and various documents evidencing transactions in the project reach. In short, the evidence is not easily reduced to a concise narrative. That being said, at least the central issue can be simply stated: Where is the boundary in the area where the North Platte River flows between the properties owned by the Oppligers and the Vineyards? The answer, and thus the evidence, is complicated by the fact that in the project reach, the North Platte River is bifurcated into a north channel and a south channel.

[4] Section 34-301 is the statute under which this action is brought, and it provides in pertinent part:

> When one or more owners of land, the corners and boundaries of which are . . . in dispute, desire to have the same established, they may bring an action in the district court of the county where such [land is] situated, against the owners of the other tracts which will be affected by the determination or establishment thereof, to have such corners or boundaries ascertained and permanently established. . . . Either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years, which issue shall be tried before the district court under its equity jurisdiction without the intervention of a jury, and appeals from such proceedings shall be had and taken in conformity with the equity rules.

[5,6] Subject to the easement of navigation, riparian owners are entitled to the possession and ownership of an island formerly under waters of the stream as far as the thread of the stream. *Summerville v. Scotts Bluff County*, 182 Neb. 311, 154 N.W.2d 517 (1967). The thread or center of a channel is the line which would give the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow. *State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782 (1946). In other words, the thread of the stream is the deepest groove or trench in the bed of a river channel, the last part of the bed to run dry, and where the thread of a stream is the boundary between estates and that stream has two channels, the thread of the main channel is the boundary between the estates. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994). See *Hardt v. Orr*, 142 Neb. 460, 6 N.W.2d 589 (1942). However, it is well known that the course of rivers and streams can change by avulsion or accretion.

[7-10] Avulsion is a sudden and perceptible loss of or addition to land by the action of water, or a sudden change in the bed or course of a stream. *Monument Farms, Inc. v. Daggett, supra*. Avulsion is a change in a stream that is violent and visible and arises from a known cause, such as a freshet or a cut through which a new channel has formed. See *Conkey v.*

*Knudsen*, 141 Neb. 517, 4 N.W.2d 290 (1942), *vacated on other grounds* 143 Neb. 5, 8 N.W.2d 538 (1943). On the other hand, accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shoreline out by deposits made by contiguous water; reliction is the gradual withdrawal of the water from the land by the lowering of its surface level from any cause. *Monument Farms, Inc. v. Daggett, supra.* The changes wrought by accretion versus avulsion involve markedly different processes, and each process has a different consequence for the boundary between the landowners on opposite banks of the river. *Babel v. Schmidt*, 17 Neb. App. 400, 765 N.W.2d 227 (2009). See *Monument Farms, Inc. v. Daggett, supra.*

In *Babel v. Schmidt*, 17 Neb. App. at 407-08, 765 N.W.2d at 234, we discussed avulsion and accretion at some length:

> A party who seeks to have title in real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence. *State v. Matzen*, 197 Neb. 592, 250 N.W.2d 232 (1977). The burden to show that the channel of the river changed by avulsion obviously would be the same. [The plaintiff] argues that there is a presumption of accretion if avulsion is not shown. However, we disagree that such presumption exists under Nebraska law and find the reasoning of *United States v. Wilson*, 433 F. Supp. 57 (N.D. Iowa 1977), on this point persuasive where the court applied Nebraska law to land altered by the changing course of the Missouri River.
>
> Past cases have illustrated the sorts of events that constitute avulsion. See, *Anderson v. Cumpston, supra* (party admitted that change in thread of Platte River was brought about suddenly by artificial structures and diversion, thus doctrine of avulsion applied and boundary remained in center of old channel); *Ziemba v. Zeller*[, 165 Neb. 419, 86 N.W.2d 190 (1957)] (based on photographs and eyewitness reports, construction of diversion dam and riprapped dike some 700 to 800 feet long, which shut off main channel, constituted avulsion); *Ingraham v. Hunt*, 159 Neb. 725, 68 N.W.2d 344 (1955) (flash floods that

suddenly, violently, and visibly moved channel of river far toward north of original channel can be considered avulsion); *Conkey v. Knudsen, supra* (evidence was sufficient to show ice gorge created by spring floods in 1910 altered course of Missouri River and constituted avulsion, not accretion).

### 2. Expert Testimony—Where Is Thread of Stream?

#### (a) Oppligers' Expert—Mainelli

The Oppligers' expert was Mainelli, a consulting engineer operating his own civil engineering firm located in Lincoln, Nebraska. Mainelli obtained a bachelor of science degree in civil engineering from the University of Nebraska at Omaha in 1986 and is licensed as an engineer in Nebraska and Iowa. After college, Mainelli worked for Nebraska's Department of Roads in Columbus, Nebraska, and then Norfolk, Nebraska, for about 3 years. He then came to the Department of Roads' bridge unit in Lincoln. His principal work there was appraising the status of bridges in the state with respect to their condition, including structural or environmental situation, as well as with respect to "scour." Scour relates to the degradation, aggregation, or contraction that occurs in riverbanks and riverbeds as a result of the flow of water, particularly around obstacles such as bridges. After his time with the Department of Roads, Mainelli worked for an engineering firm in Lincoln from 1992 to 2001. He testified that the primary function of that business was to study river hydraulics and do structural river environment work. In 2001, Mainelli formed his own civil engineering company, continuing to work on bridges and river environments and doing hydraulic studies relating to rivers and flood plains. Mainelli is also a Nebraska-licensed Class A highway superintendent, and he has worked for some of the smaller counties in the state that did not have a person in that position.

Mainelli was retained by the plaintiffs, all of whom have resolved their claims except the Oppligers, to "formulate an opinion on where [he] felt the thread of the stream was in this [project reach]." He defined the thread as being the last part of the stream to dry up. The North Platte River in the project

reach comprises a north channel and a south channel by virtue of a bifurcation in the river approximately 1½ miles east of the Sarben Bridge. That bifurcation extends through the project reach, and then the two channels join several miles east of the project reach. The project reach is located approximately halfway between the bifurcation and the confluence of the north and south channels of the North Platte River.

The first time Mainelli inspected the project reach was on May 2 and 3, 2007. At that time, Mainelli and his survey party chief walked both channels north to south as well as east to west. They collected data in order to construct three cross sections of what Mainelli described as "typical channels at the edges of the properties." The locations of these three cross sections were the west Herrod property line, the east Herrod property line, and the east Oppliger property line, as such lines crossed the north and south channels of the North Platte River.

To construct and ultimately graph these cross sections, Mainelli took a series of measurements using a global positioning system (GPS) mounted on top of a rod which had a 1-foot by 1-foot plate welded to the bottom of it. The purpose of the plate was to ensure that when the rod was set on the river floor, it was not pushed deeper into the riverbed. Reduced to the simplest explanation, the cross sections of the north and south channels were produced by taking GPS readings of elevations at the top of the riverbank, at the water's edge, and at the flow line (i.e., top surface) of the river. Mainelli made it clear that the purpose was not to "compare elevations [of the earth]" but to "look[] for . . . the depth of [the channels]." Mainelli testified that the method he employed is the generally accepted method of cross sectioning of rivers in Nebraska. Once the field data is gathered, it is placed on grid paper where points are plotted and connected, which produces, in Mainelli's words, a view of the river as "if you took a slice of pie and lifted it up and looked at the cross section of it."

Mainelli testified that he made a second visit to the project reach in April 2008, explaining that he wanted to examine the river earlier in the spring, prior to "green-up." On this occasion, GPS data was not collected, but, rather, the channels

were walked in approximately the same locations as the previous May and photographs were taken of a person standing in the channels at the general locations where the cross sections were measured the previous May in order to show approximate water depth at the time of Mainelli's second visit.

Mainelli was asked to render his opinion with a reasonable degree of certainty in the field of hydrology and hydraulics "as to which channel the thread of the stream is located [in]." His opinion was that it was located in the south channel, which he described as the last place to dry up. He explained that he arrived at that conclusion by taking from the cross sections the algebraic difference between the high flow and the low flow in each channel. He testified that at his first data point, the water in the south channel, when compared to that of the north channel, is about a foot deeper; that at the second data point, it is at least one-half foot deeper; and that at the third data point, it is 1½ feet deeper. The result of these algebraic comparisons was supported, in his opinion, by his "eyeball observation" of the two channels in May 2007 and April 2008, in that "when you walk into that north channel on that west boundary of the Herrod property and get into that south channel, there is no question of where the majority of the flow is and the depth of the flow." Thus, he opined, the thread of the North Platte River is in the south channel in the project reach.

(b) Mainelli's Rebuttal Testimony

For continuity, we turn to Mainelli's rebuttal testimony, although such occurred after the testimony of the Vineyards' expert, Harvey—whose testimony we shall shortly detail. Mainelli testified that he had reviewed Harvey's report, which was critical of Mainelli's conclusions. As a result, Mainelli used "the Manning formula" as an alternate method to determine the thread of the North Platte River, which formula he described as "a relationship between area of wetted perimeter, velocity and flow rates" that was developed in the 1800's by a man named "Manning" and is a commonly used tool in hydraulic studies. The Manning formula uses the slope of the water as it flows downstream, which typically parallels the slope of the adjacent flood plain. Mainelli testified that

he has previously used the Manning formula and that it is a standard engineering practice used in almost every hydraulic study. Mainelli testified that the use of the Manning formula revealed that the south channel had significantly more flow than the north channel, whose flow rate he described as 17 cubic feet per second (cfs), whereas the south channel's flow rate was "in the neighborhood of . . . mid-70 cfs." According to Mainelli's testimony on rebuttal, the use of the Manning formula confirmed his previously testified opinion that the thread of the stream of the North Platte River in the project reach was located in the south channel. Mainelli indicated that his criticism of Harvey's analysis was that Harvey had used high riverflows rather than low riverflows, the latter of which Mainelli used to arrive at his conclusion that the thread of the stream was in the south channel.

After cross-examination, the court asked whether Mainelli had an opinion to a reasonable degree of certainty in his field of expertise as to whether in 1870, at the time of the original GLO survey, the geographic centerline between the original meander lines was at or near the center of the stream, to which question counsel for the Vineyards objected "as to foundation; lack of personal knowledge, [§] 27-702." The objection was overruled, and the court granted a continuing objection to the two additional questions from the court which we recount below. To the question above, Mainelli responded, "Without any additional information and [with] the lack of detail, that would be a reasonable assumption." The court also asked Mainelli whether he had an opinion as to whether the construction of the Sarben Bridge caused the bifurcation of the North Platte River into the two channels involved in the project reach. Mainelli responded: "I can't say positively that it caused the bifurcation, but I will tell you that constrictions in the floodplain do impact the downstream and the upstream conditions of the river." Finally, in response to the court's next question, Mainelli said he had no opinion on whether the construction of Kingsley Dam in 1941 was an avulsive event which caused the channel of the North Platte River to change.

(c) Vineyards' Expert—Harvey

Harvey, of Fort Collins, Colorado, testified at length on behalf of the Vineyards. At the time of his testimony, Harvey was the program manager for both the geomorphology section and the surface water group of a corporation with which his previous employer, an engineering firm, had recently merged. Harvey received his bachelor's degree in 1969 from the University of Canterbury, New Zealand, in soil and water engineering; a master's degree from the same institution in 1973 in soils and hydrology; and a Ph.D. from Colorado State University in 1980 in fluvial geomorphology. He explained that "fluvial geomorphology" comes from the Greek terms "[g]eo," meaning earth; "morphe," meaning shape; and "ology," meaning study, and from the Latin word "fluvial," meaning of rivers. Thus, Harvey explained, a fluvial geomorphologist works on river dynamics and processes, i.e., how rivers move, change, and behave. When Harvey completed his Ph.D., he began working for Colorado State University on research projects dealing with rivers all over the United States as well as several international projects. From 1983 to 1988, he was a senior research scientist and associate professor of geology at Colorado State University. In that capacity, his work involved teaching graduate-level courses in geomorphology, hydrology, hydraulics, and river mechanics. In 1988, Harvey left Colorado State University. Since then, he has worked for several companies doing "hydrology, hydraulics, sediment transport, modeling river analysis, [and] geomorphic studies of rivers" throughout the United States.

Harvey was hired by the Vineyards, in his words, "to identify the location of the main channel and hence the thread of the [North Platte R]iver through time" and "to determine whether the thread of the river has moved to its current location as a result of the gradual process of accretion or as a result of sudden change by avulsion." According to Harvey, the thread of the stream is "the deepest portion of the cross section or the lowest elevation." He defined accretion as the process of continuing slow migration or adjustment of a river, whereas avulsion is a sudden change of the location of the river over a very short period of time. Harvey defined the project reach as

being from the Sarben Bridge on the west to the confluence of the north and south channels to the east.

In connection with his analysis of the project reach, Harvey was provided with a copy of the original 1870 GLO survey as well as aerial photographs of the North Platte River taken at the project reach for the first time in 1938 and then again in 1958, 1965, 1970, 1971, 1978, 1985, 1999, and 2006—all of which were taken in the spring or summer, when "green-up" had occurred and the river was flowing freely. Additionally, Harvey examined three primary publications about the river's history written in 1977, 1978, and 1983, which he recognized as authoritative, and we note no challenge was made to his reliance thereupon. He testified, without objection, that in the 1860's, the North Platte River was a "braided river system [and the] change [to the river] is the result primarily of large flood flows" that he said were avulsive events. The term "braided river system" clearly implies the existence of more than one channel. By way of context, Harvey testified that the peak flows in the North Platte River were approximately 25,000 cfs between 1909 and 1927. Thereafter, dams were built upstream on the North Platte River northwest of the project reach, and the average peak flow ultimately dropped to approximately 2,400 cfs. Harvey testified that the North Platte River, which was roughly 2,500 feet wide at the time of the original GLO survey, had shrunk to approximately 290 feet in width by 1965. Harvey testified that this reduction in flow and width promoted the growth of riparian vegetation which provided resistance to the channel banks that had not previously existed. Harvey's testimony was that the North Platte River changed from being a "multi-channeled, multi-sandbar braided" river in the 1860's as the impact of flow reduction took place and vegetation developed so as to form a stable "anastomose river planform" where there might be coexisting channels that are separated by essentially stable flood plain elements with anastomose channels. We understand anastomose river or streams to consist of multiple channels that divide and reconnect and are separated by such cohesive material that they would likely not be able to migrate from one channel position to another. Regarding such a system,

Harvey testified that the "primary mode of change is nonprogressive[,] . . . avulsive," and that such avulsive change occurs during infrequent, large flood events.

Harvey used the aerial photographs, the 1870 GLO survey map, and a U.S. Department of Agriculture quadrangle map in a process whereby various reference points on the sequential aerial photographs were georeferenced and then, through a computer program (which we will not try to explain), the images were rectified with one another as to size and location. Through this process, a reproduction of a single aerial photograph of the project reach was produced with the locations of channel flow from the sequential aerial photographs being placed thereupon in different colors. This produced images of the changes in the river's channels from 1938 to 2006 all within the 1870 GLO survey meander lines in the project reach. From such exhibit, it is clear that since at least 1938, the river has been channelized in the project reach. Additionally, on that exhibit, the "north fence" (to be discussed shortly in more detail), as surveyed and platted by Edwards, is shown as a series of green dots.

Harvey also examined data from two flow gauges located downstream of Kingsley Dam—at Keystone, Nebraska, and Sutherland, Nebraska—the latter being approximately 5 miles downstream of the project reach. This flow data revealed that since Kingsley Dam was built in 1941, peak flows have generally been around 4,000 cfs. The evidence shows that a cubic foot of water contains approximately 7½ gallons. Using the records of the flows at such gauges, Harvey identified certain times of high flow as follows: Harvey testified that in 1971, the peak flow of the North Platte River going by the Sutherland gauge was 9,090 cfs or 68,175 gallons per second, or approximately 4.1 million gallons per minute. Harvey identified another instance of peak flow in 1973, at 7,620 cfs, and elsewhere in his testimony, Harvey referred to these high flows in the 1970's as "floodflows." Harvey also identified other times of peak flow in 1983 of 6,540 cfs; another in 1984 of 6,390 cfs; and another in 1994 of 5,230 cfs. These flows were all measured at the Sutherland gauge. When Harvey was at the project reach on September 9, 2009, the flow at the Sutherland

gauge was 194 cfs, which provides us with some context with reference to the floodflows.

Harvey began his field investigation at the Sarben Bridge because he knew at that location the entire flow of the North Platte River was in a single channel. Harvey walked and waded in the channels at the point of bifurcation, looking for a number of things such as a rough estimate of how the flow was splitting into the north and south channels—his estimate was roughly 50-50. Harvey also wanted to examine the vegetation that has grown in the North Platte River since the dams were erected. According to Harvey's testimony, the significance of vegetation is that it binds soil particles and enables the banks of the channel to become more or less fixed and erosion resistant, whereas historically, before the dams, they were not. Harvey testified that at one location, he found a "cut-across channel" where there was flow from the south channel to the north channel. His opinion as to the amount of that flow, based on measurement of the depth and width of the cut-across channel plus his estimate of the rate of flow, was 18 cfs or 8,100 gallons per minute.

Harvey then moved downstream in the north channel of the North Platte River to the point where East Clear Creek feeds into that channel. He estimated a flow from East Clear Creek into the north channel at 5 to 7 cfs or 2,250 to 3,150 gallons per minute.

Using the 1970 aerial photograph, Harvey opined that the thread of the stream of the North Platte River in sections 16 and 17 was somewhere in the main channel, which was located north of the north fence, and that there was no channel south of the north fence line at that time in section 17. Thus, according to Harvey, there simply was not a south channel in the project reach in 1970. He noted that to the east of the project reach, there was a small channel or braid that came from the north down to the south, but by the time of his fieldwork in September 2009, that braid was one of the abandoned or "relic" channel segments that he encountered during the field inspection. He observed that these relic channels contain standing water rather than flowing water even at times of high flow, in effect forming ponds or small lakes.

With reference to the 1974 aerial photograph, Harvey's opinion was that the north channel was still the main channel, but that by then, a channel had opened up to the south of the north fence. His opinion was that the thread of the stream would have been located within the north channel in 1974. It is worth noting that Harvey was asked whether the flow data for the North Platte River as measured at the Sutherland gauge correlated with his opinions using the 1970 and 1974 aerial photographs. Harvey responded:

> The presence of the formation of a channel south of the [north] fenceline between 1970 and 1974 coincides with the period where there were high flows on the North Platte River, flood flows. And in the early '70s and in an anastomose river system, high flows are most likely to cause an avulsion. And that south channel is avulsive, it's not progressive.

Harvey's testimony was that he held the same opinions with respect to the location of the dominant channel and the thread of the stream when looking at the 1978 aerial photograph: that they had been in the north channel. Harvey testified that the north channel remained the main or dominant channel, and the site of the thread of the stream, in regard to the 1985, the 1999, and the 2006 aerial photographs. Harvey noted that the peak flow data earlier referenced from 1983 and 1984 was reflected in the fact that the south channel had increased in width in the 1985 aerial photograph, although it was still not the main or dominant channel.

Harvey next testified about his use of "basic hydraulic geometry equations" that are found in Luna B. Leopold & Thomas Maddock, Jr., Dept. of Interior, The Hydraulic Geometry of Stream Channels and Some Physiographic Implications, U.S. Geological Survey Professional Paper 252 (1953). We will not try to "do or explain the math" of such equations other than to describe them as formulas that use the amount of flow and the width of the channel, given that there is an established and recognized proportional relation between the two. Harvey testified about those equations: "[T]he wider the channel is, effectively, the more flow it is, the more flow it conveys and, therefore, the more dominant a channel it is." Harvey's bottom-line opinion

was that the data and the math show that between 1938 and 2006, the bulk of the flow in the wetted channel area was to the north of the north fence, and that in fact, between 1938 and 1958, the south channel was pretty much closed off. While Harvey admitted that the south channel got larger in the 1970's because of high flows, he determined that the bulk of the wetted area was still to the north of the north fence line and has been that way ever since, as shown on the aerial photographs since the first such photograph in 1938. In summary, Harvey's opinion was that the thread of the North Platte River is located in the north channel.

Harvey testified that in forming his opinions as to the thread of the stream's being located in the north channel, he employed the following 10-step methodology:

- Identify the project reach.
- Obtain the background information on the geomorphology and dynamics of the river within the project reach.
- Gather the time-sequential data in the form of maps and aerial photographs of the project reach.
- Gather and analyze annual peak flows and mean daily flow records within the channel project reach.
- Compare mean daily flows to actual measured flows at the time when the aerial photographs within the project reach were taken.
- Identify annual peak flows that could be expected to cause channel changes in the project reach.
- Do a field inspection, making personal observations of the project reach.
- Analyze the channel migration.
- Analyze the width of the channel from the digitized photographs and the "GIS" software at 500-foot intervals to determine width.
- Apply hydraulic geometry to compare the average widths and conveyance capacities.

Harvey testified that the methodology that he employed has been reviewed in the scientific literature and is generally accepted in the field of fluvial geomorphology in determining the location of the main channel and the thread of a stream, including reliance by similarly situated experts upon

materials, data, and equations about rivers similar to those that he used.

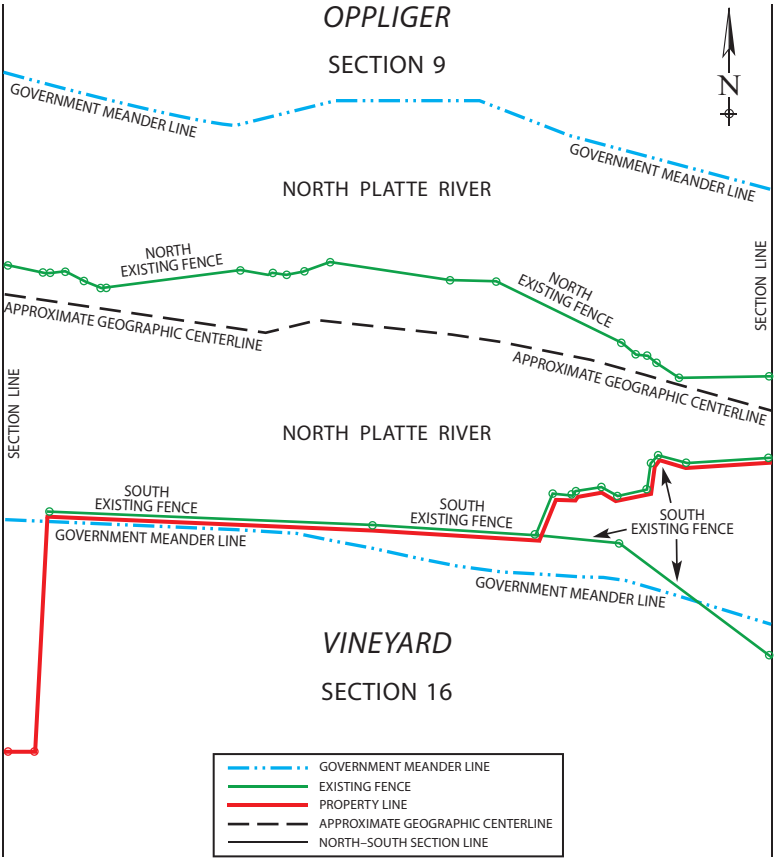
### (d) North Fence—Edwards, Lincoln County Land Surveyor

For more than 6 years, Edwards has been the Lincoln County land surveyor, a part-time position. Additionally, she operates a surveying company along with her husband and son. Edwards has over 30 years of surveying experience. To help the reader make sense of some of what we have already written about, plus grasp the general "lay of the land" (and river), we have reproduced a simplified plat map below. This plat map shows the location of the north and south existing fences in green and the 1870 GLO survey meander lines in blue. (The southern boundary of the Vineyards' land in section 16, shown in red, essentially follows the southernmost "existing fence.") Edwards surveyed and plotted the location of the north fence at the Vineyards' request, and such is shown in green on the plat map below. Edwards testified that the Vineyards had requested that she survey "a fence running east and west along the south side of the north channel of the North Platte River."

This north "existing fence" is located north of the geographic centerline of the North Platte River using the 1870 GLO survey meander lines, but the fence is clearly located on accretion ground as evidenced by Edwards' photographs of the points she used for the metes and bounds description of her survey. She photographed each point she used in mapping the north fence—and all such points are on land. We cannot help but observe at this juncture that the trial court's decision that the thread of the North Platte River is the geographical centerline of the river using the 1870 meander lines means that the trial court has located the thread where there no longer is a river. This fact is also shown on the Edwards survey locating the north fence as reflected by the green dots on the 2006 aerial photograph, reproduced earlier in this opinion, which run alongside the south side of the north channel of the river.

On July 6, 2008, Edwards performed another survey for the Vineyards in section 16, and a copy of that survey was

received in evidence. It plotted the south "existing fence," also shown in green on the plat map below, located to the south of the north fence. For most of its course, that "south fence" follows the south meander line of the North Platte River from the 1870 GLO survey. Edwards testified that this survey was done because the Vineyards were trying to sell their property located to the south of the south fence. The sale occurred, but we skip the details of such except to describe the land the Vineyards retained in section 16 after the sale. After the sale, the Vineyards owned a rectangular strip of land on the western edge of section 16 (approximately 210 feet wide by 1,860 feet



long), apparently for access to whatever accretion land the Vineyards owned in section 16. This strip of land is outlined in red on the plat map above, as is the balance of their southern boundary that mostly follows the south fence. After the sale, other than the described and outlined strip of land, they owned only accretion land in section 16 lying north of the south fence—as ultimately established via this litigation.

At this point—in view of the Vineyards' alternative claim that they own land up to the north fence as an agreed boundary, if not to the thread of the stream located in the north channel, we digress to tie these surveys into some other evidence. At the time of these surveys, section 9 was owned by the Bar B Cattle Company. The evidence is that a real estate agent or broker was working to sell the Vineyards' land south of the south fence and that he contacted the Bar B Cattle Company's president and presented her with a copy of the survey of the north fence. He then asked her to sign a boundary agreement stating that the north fence, as platted on the first survey by Edwards as shown on the plat map above, was the boundary between the Bar B Cattle Company's land in section 9 north of the river and the Vineyards' section 16 land south of the river. She informed him that she did not agree that the fence was the boundary. According to her testimony, she never signed the boundary agreement and the north fence was not a boundary fence; it was only to keep cattle out of the river. The trial court expressly adopted this testimony in its factual findings.

Additionally, Edwards conducted another survey at the request of the Vineyards for the purpose of "locat[ing] the existing north channel of the North Platte River." Her methodology was to locate the north and south sides of the north channel and survey the channel using the water's edge. Using that data, Edwards computed a geographic centerline of the north channel of the North Platte River, which centerline was then laid over a copy of the 2006 aerial photograph to produce a composite survey map. She also platted the other surveys that she had done in the accretion land between sections 16 and 9 onto the same composite map. This centerline of the north channel as she plotted it is shown on that map. In her

testimony, Edwards indicated that the term "geographic center line" is a term of art in the surveying business to indicate the center between the two meander lines on a GLO survey. In describing her methodology, Edwards said: "We shot the north bank and the south bank and then I just took the mean divide, you know, from point to point, divided it in half."

### 3. Did Trial Court Err by Relying on Evidence Outside Trial Record?

The Vineyards argue that the trial court erred by considering evidence outside the record. This argument derives from the trial court's discussion, in its written decision, of the case of *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000), a boundary dispute case in Dawson County involving the Platte River and its multiple channels. *Anderson* was decided at the trial level by the same trial judge as in the present case. In the section of our opinion entitled "District Court Decision," we have set forth what the trial judge's written decision had to say about *Anderson*. The appellants' brief does not identify any place in the voluminous trial record where the trial judge improperly mentioned the *Anderson* decision or, for example, took judicial notice of some piece of evidence from that trial—and our review of the record does not turn up any such instance of improper reliance upon, or use of, *Anderson*.

Rather, it is apparent that the trial judge was using A*nderson* as precedent, and whether we agree with his application thereof is a different question from that which the assignment of error presents and is one which we will ultimately address. We find no use of evidence outside the record, and thus, the assignment of error is without merit.

### 4. Is Boundary Established by North Fence?

[11,12] Relying on the testimony of Bar B Cattle Company's president, the trial court found that the north fence as surveyed and platted by Edwards was not a boundary fence. Nebraska law provides that boundaries that have been mutually recognized and acquiesced in for a period of 10 years can be legal boundaries. See § 34-301. In order to claim a boundary line by acquiescence, both parties must have knowledge of the existence of a line as the boundary, and therefore, the

mere establishing of a line by one party and the taking by that party of possession up to that line are insufficient. *Kraft v. Mettenbrink*, 5 Neb. App. 344, 559 N.W.2d 503 (1997). Here, there is evidence from the prior owner (until 2007) of the Oppligers' land that she did not recognize the north fence as a boundary, it was never intended as such, and it was to keep the cattle out of the river. Further, she refused to sign an agreement identifying the north fence as the boundary when asked to do so by the Vineyards' real estate agent when he was attempting to establish boundaries in connection with the sale of the Vineyards' land. The trial court "accept[ed her] testimony," and under our standard of review, we give weight to the fact that the trial court heard the witnesses testify and observed their demeanor. After our review of the record, we are likewise persuaded that the north fence is not a boundary line by acquiescence, and we too find the testimony of Bar B Cattle Company's president determinative on this issue. Thus, the north fence is not the boundary between the lands of the Vineyards and the Oppligers.

### 5. Is Boundary Established by Adverse Possession of Accretion Lands?

The discussion that follows in the next section of our opinion effectively moots the Vineyards' claim that they have acquired the accretion land from the southern boundary to the north fence surveyed by Edwards. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (holding that appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

### 6. Can Thread of Stream of North Platte River Be Reliably Determined, and If So, Where Is It?

The question posed in the subheading above is the essence of this case. The north-bank landowners, the Oppligers, produced an expert who placed the thread of the stream in the south channel, giving them the lion's share of the accretion land. The south-bank landowners had an expert witness who placed the thread in the north channel, which gives them the majority of the accretion land. And, there was a survey plat

offered and received which purports to plot the "geographical centerline" of the north channel. Upon a finding of "impossibility" of locating the thread of the stream of the North Platte River, the trial court rejected the ultimate opinions of both experts and located the boundary between the north-bank and south-bank landowners' properties at the geographic centerline of the North Platte River meander lines as surveyed in 1870 by the GLO.

While *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000), at first blush may appear to be authority for the district court's decision, that case and this case are materially different in a number of important ways. First, it was the Platte River that was involved in *Anderson*, not the North Platte River. But, most significantly, there was a judicial admission in *Anderson* by the south-bank landowner that "'the Platte River flowed seasonally bank to bank and the geographical center line roughly corresponded to the thread of the stream.'" 258 Neb. at 893, 606 N.W.2d at 820. Additionally, the south-bank landowner admitted that "'artificial structures and diversions led to sudden reductions and shifts in the flow of the stream resulting in the Platte River becoming a braided stream with many small channels.'" *Id.* at 893-94, 606 N.W.2d at 820. The trial court then found that for all practical purposes, it was impossible to ascertain the present location of the thread of the Platte River, but the court did not need to actually determine such location, because the doctrine of avulsion means that the boundary of the south-bank landowner's property should remain "as it was[,] in the center of the old channel." *Id.* at 899, 606 N.W.2d at 823, citing *Ziemba v. Zeller*, 165 Neb. 419, 86 N.W.2d 190 (1957). Additionally, the Supreme Court cited the testimony of the adjoining landowners, who testified that the boundary between the north and south banks was long believed to be the geographic centerline. Finally, there was evidence that landowners in the area had long paid taxes on land to that centerline, and, while the south-bank landowner said he did not know he was being so taxed,

> [e]quity would not be done by taking land away from those who have paid taxes thereon, and regarded and treated it as their own for so long, and granting the land

> to another who has absolutely no reason, on the record before us, to believe that the land was his property.

*Anderson*, 258 Neb. at 900, 606 N.W.2d at 824.

In the case before us, we have no judicial admissions of the sort present in *Anderson*, nor are there equities associated with payment of taxes, and the competing landowners here are not owners of long standing. While the *Anderson* opinion contains considerable information about the nature and dynamics of the Platte River when originally surveyed, as well as in more modern times after dams, diversions, and bridges had been built, we are dealing with a different river in a different location. Thus, while rules of law from *Anderson* are obviously precedential, the ultimate conclusion of that case cannot simply be grafted onto this case, given the distinguishing factors we have cited. As we emphasized above, *Anderson* involves a different river and a different evidentiary record. Moreover, our record contains substantial evidence from two experts that the trial court deemed qualified to testify as to where the thread of the North Platte River was located in the instant case.

We have de novo review, and our review of this voluminous record has been exhaustive. The Vineyards' expert, Harvey, is a Ph.D. fluvial geomorphologist with what can only be described as substantial educational, teaching, publishing, and testimonial experience. Harvey has authored a comprehensive and compelling report supported by graphs, charts, maps, and various data concerning the evolution of the North Platte River over time as well as supporting his ultimate opinion as to the location of the thread of the stream. And he articulated and followed a concise scientific analytic path to reach his conclusion. In short, Harvey's experience and credentials, as well as his fieldwork and calculations in the course of this case, make him a credible witness when he testifies that in his opinion, the thread of the North Platte River is located in the north channel. Thus, we reject the trial court's finding that in the project reach involved in this case, it is "impossible" to locate the thread of the stream.

Moreover, it is impossible to ignore the superior educational, academic, and experiential qualifications of Harvey when compared to those of Mainelli. To the extent that the trial

court relied on its questioning of Mainelli in placing the thread at the geographic center of the meander lines from the 1870 GLO survey, we find that conclusion fundamentally flawed. In answering the court's question about the thread of the North Platte River in 1870, Mainelli assumed that the geographic centerline of the 1870 meander lines would equal the thread of the river without any knowledge, or testimony, of what the river actually looked like or what type of river it was in 1870. And the only evidence in the record on that score does not establish that when the surveyors in 1870 drew the meander lines, the river flowed "bank to bank" between those lines—which is the implicit prerequisite in Mainelli's answer to the court's question whether the geographic center in 1870 was the thread of the river. However, there is an assignment of error dealing with the question of the location of the thread of the stream in 1870 that we must deal with.

During the trial, the judge asked whether Mainelli had an opinion to a reasonable degree of certainty in his field of expertise as to whether in 1870, at the time of the original GLO survey, the geographic centerline between the original meander lines was at or near the center of the stream, to which question counsel for the Vineyards objected "as to foundation; lack of personal knowledge, [§] 27-702." The objection was overruled, and Mainelli responded, "Without any additional information and [with] the lack of detail, that would be a reasonable assumption." We note that the 1870 GLO survey does not portray the North Platte River as a braided stream; nor does it reflect any channels or islands whatsoever in the project reach. On the 1870 survey, the river appears simply as a wide single-channel river running between the north and south meander lines.

However, the Vineyards' counsel attempted to have Harvey address the same issue—the location of the thread of the stream at the time of the 1870 GLO survey. Objections were made by the Oppligers' counsel which the court sustained, saying, "I think we are making a lot of assumptions based on a[n] 1870 survey that doesn't show where the channel was." An offer of proof was made in which Harvey explained that when water travels through a curved channel, the water on the

outside of the curve travels at a higher velocity than the water on the inside of the curve, resulting in more scour of the riverbed and making it deeper on the outside of the curve—which asymmetry he described as a "fundamental characteristic of flows in fluvial channels." Thus, it was Harvey's opinion with a reasonable degree of certainty that "because of the macroscale meander patterns shown between the meander lines"—meaning, we assume, the curve to the north and then back south—"and the presence of river-eroded bluffs on the north side, . . . the main conveyance channels would more likely than not have been in the northern portions of Sections 16 and 17 at the time of the [1870] government survey."

Initially, it was obviously inconsistent for the court to let Mainelli opine on this issue and then to exclude Harvey's opinion. The Vineyards assign error to the trial court's sustaining of the objection to Harvey's testimony. We agree that the objection was not properly sustained. If Mainelli was qualified to opine on where the thread of the North Platte River was in 1870, then Harvey would obviously also be qualified, given his superior education, experience, and academic qualifications. Moreover, he provided a scientific explanation as to why the deepest part of the river would be located on the north side, whereas Mainelli merely said that putting it in the middle was a "reasonable assumption" but provided nothing as to why it was reasonable. In contrast, Harvey explained why Mainelli's opinion ran counter to fluvial science. Accordingly, we sustain this assignment of error, and in our de novo review, we consider Harvey's testimony that the thread of the stream of the North Platte River in 1870 was located near the north meander line because that is where the outside of the curve in the river is clearly shown on the 1870 GLO survey. And we also note that Harvey provides credible evidence that since 1870, the river has changed by avulsive events—high flows or floodflows—meaning that the thread of the stream now is generally where it was in 1870: near the north meander line. We now turn to Harvey's research and ultimate opinion on where the thread was located at the time of this litigation.

Harvey's analytic work in reaching his conclusions was detailed, comprehensive, and supported by the science of his

field: fluvial geomorphology. Harvey's qualifications and experience are more precisely targeted at the issue being litigated when compared to Mainelli's bachelor's degree in the more general field of civil engineering. Accordingly, we reject Mainelli's conclusion that the thread of the North Platte River is in the south channel.

We now detail the aspects of Harvey's report in evidence and his testimony, which tracks that extensive report, that compel us in our de novo review to accept his conclusion that the thread of the North Platte River is in the north channel. We begin with what the North Platte River was like when first surveyed in 1870. Harvey opines that the river's morphology and dynamics have changed significantly from the 1860's to the present. The flows have substantially decreased, as one might expect, because of upstream dam construction and peak flow storage. Harvey cites an 88-percent reduction in average peak flow of 20,355 cfs between 1909 and 1927 to a 2,407 cfs average between 1957 and 1970, as well as a 66-percent reduction in mean annual flows over the same timeframe—all flow measurement data coming from the Sutherland flow gauge. The flow reduction produced an order-of-magnitude reduction in the width of the channel from 2,591 feet in 1865 to 295 feet in 1965. In short, the river is a much smaller and different river than when surveyed in 1870. And, Mainelli's opinion that the thread was located in the geographic center of the 1870 meander lines does not account for the significant changes in the nature of the river.

Harvey testified that this narrowing of the channel produced vegetation growth, noting that flows below 4,000 cfs are not capable of scouring the vegetation from the sandbars. Thus, the result was that the sandbars were reinforced by the roots of the vegetation. As stated by Harvey, "the increased erosion resistance of the banks and the reduced flood peaks significantly reduce the potential for channel changes except during infrequent larger floods." Prior to the construction of the upstream dams, the river was characterized by constantly shifting sandbars and numerous braid channels around the bars, but after dams were built, the river became "island braided" with more stable vegetated bars and less channel shifting, and by the

1960's, the planform of the river had changed to "anastomosing with stable vegetated bars and a limited number of relatively stable channels." Harvey noted that in such a river as the North Platte River has become, channel changes generally occur as a result of avulsion during infrequent large floods.

Harvey explained that the geomorphic characteristics of the north channel suggest that it is the older of the two channels in the project reach. He cites the fact that in the south channel, there are fewer sandbars and less evidence of bank erosion, which are indicative of reoccupation of former channels where the banks are heavily vegetated and, therefore, erosion resistant. On the other hand, the north channel contains deposits of coarser gravel at the points of the bars, indicative of more reworking over time than in the south channel. In other words, the north channel has, over time, carried more water than the south—remembering that in the 1970 aerial photograph, there was no south channel to be seen, and that such reappeared after the floodflows in 1971 and 1973. Harvey found that there is conveyance of flow from the south channel to the north channel, which flow, coupled with the addition of groundwater from the north and water from East Clear Creek into the north channel, clearly supports Harvey's opinion that the north channel would be the last of the two channels to dry up—meaning that the north channel is the main channel.

With respect to Mainelli's work on this case, which produced his opinion that the thread of the stream is in the south channel, Harvey noted that Mainelli did not gauge the flow in each channel, and therefore, Mainelli was not able to know which was carrying the greater flow. Harvey observed that of the three cross sections taken by Mainelli, the data revealed that in two of the locations, the north channel was lower—noting that water always flows to the lowest point, thereby supporting Harvey's testimony that water would flow from the south channel to the north channel and again supporting the proposition that the north channel would be the last to dry up.

Harvey testified about the aerial photographs of the project reach, and he said that the first photograph, taken in 1938, shows the majority of the wetted channels to be in the north portion of the river and north of the north fence surveyed by

Edwards. Moreover, he noted that while there were channels to the south in 1938, they were carrying considerably less water than the north channel, as evidenced by the 1938 photograph. In the 1958 photograph, all of the wetted channels were to the north of the north fence, and in this photograph, the wetted channels south of the north fence that had been wet in 1938 were no longer carrying flow and had been closed off—they had dried up, yet the north channel was still carrying flow. In the 1965 aerial photograph, the river appears as island braided, all of the wetted channels were north of the north fence surveyed by Edwards, and no active channels were located south of the north fence. The 1970 aerial photograph shows that all wetted channels in section 16 were to the north of the north fence except for a single braided channel located south of the fence line in the eastern portion of section 16. Harvey testified the 1974 aerial photograph shows that avulsion had occurred between the time of the 1970 and 1974 photographs and that relic channels south of the north fence had been reoccupied by flow—although the bulk of the wetted channels was located north of the north fence. And, we recall that at the time of his field inspection, those relic channels were no longer flowing but merely had standing or static water.

Harvey noted that the flow data shows peaks of 9,090 and 7,620 cfs, in 1971 and 1973 respectively, of relatively long duration and that "it is reasonably probable that [the peak flows] were the cause of the avulsion to [create] what is now[,] in general terms, the South channel." As indicated in our initial summary of applicable water law, changes in the location of the river or its channels caused by avulsion do not change the boundary, whereas changes by accretion would change the boundary.

According to Harvey, the 1978 aerial photograph shows that the majority of the flow of the river in sections 16 and 17 was located north of the north fence. Harvey's examination of the 1985 aerial photograph led him to conclude that the high flows in 1983 (6,540 cfs) and 1984 (6,390 cfs) were likely the cause of the reopening of the south channel shown in that photograph, but that nonetheless, the majority of the flow was north of the north fence. When the 1999 aerial photograph was taken, the flow data at the time indicates a fairly even split between

wetted channel areas—55 percent north and 45 percent south. By the time of the 2006 aerial photograph, the split between the wetted channel areas was 58 percent north and 42 percent south. Below, we have reproduced Harvey's chart showing the division of the wetted channel area at the time of the aerial photographs discussed above.

Table 2.3. Wetted channel areas within Sections 16 and 17 from 1938 to 2006.

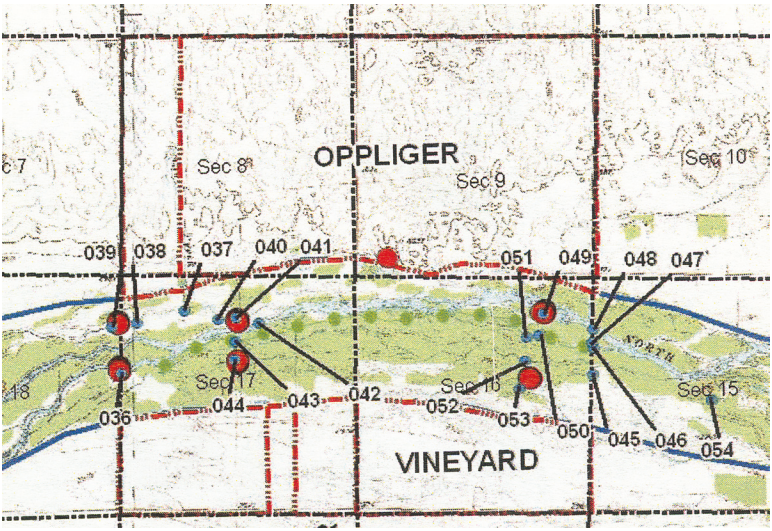
| Year | Total Wetted Area (acres) | North Channel Area (acres) | Percent Total | South Channel Area (acres) | Percent Total |
|---|---|---|---|---|---|
| 1938 | 328.5 | 220.6 | 67% | 107.9 | 33% |
| 1958 | 87.2 | 84.0 | 96% | 3.2 | 4% |
| 1965 | 67.6 | 63.3 | 94% | 4.3 | 6% |
| 1970 | 106.9 | 98.4 | 92% | 8.5 | 8% |
| 1974 | 195.7 | 126.2 | 64% | 69.5 | 36% |
| 1978 | 130.4 | 98.3 | 75% | 32.1 | 25% |
| 1985 | 211.8 | 134.8 | 64% | 77.0 | 36% |
| 1999 | 149.1 | 82.3 | 55% | 66.9 | 45% |
| 2006 | 153.1 | 88.7 | 58% | 64.4 | 42% |

Additionally, we have reproduced below Harvey's chart showing flow of the North Platte River at the time of the various aerial photographs discussed above as measured in mean daily flow, the data again supporting the fundamental fact that the river is smaller and different than it was in 1938—and certainly than it was when surveyed in 1870, when only meander lines were plotted.

Table 2.1. Summary of aerial photography and flow data, North Platte River, Lincoln County, Nebraska.

| Year of Photography | Date of Photography | Mean Daily Flow (cfs) at North Platte River near Sutherland Ga[u]ge (No. 6691000) |
|---|---|---|
| 1938 | 7-21-1938 | 938 |
| 1958 | 7-6-1958 | 108 |
| 1965 | 10-2-1965 | 163 |
| 1970 | 11-15-1970 | 242 |
| 1974 | 10-15-1974 | 146 |
| 1978 | 10-8-1978 | 589 |
| 1985 | 7-5-1985 | 1480 |
| 1999 | 5-7-1999 | 82 |
| 2006 | 5-15-2006 | 25 |

Harvey used hydraulic geometry, citing a recognized authority: Luna B. Leopold & Thomas Maddock, Jr., Dept. of Interior, The Hydraulic Geometry of Stream Channels and Some Physiographic Implications, U.S. Geological Survey Professional Paper 252 (1953). Hydraulic geometry is used in fluvial geomorphology to describe the relationships between discharge, flow width, depth, and velocity in a channel. Harvey used a formula defined by the authors of the above-stated authority, using the static values as the authors determined such for Midwestern rivers as the North Platte River. In order to use the formula, channel widths have to be determined, which Harvey did based on the 2006 aerial photograph. His channel width values were based on 21 measurements of the channels' width taken at 500-foot intervals along the river from the west line of section 17 to the east line of section 16, a distance of 2 miles. The reproduction which appears below, from an exhibit excerpted from Harvey's report, shows the river in sections 8 and 9 on the north and 17 through 15 on the south—looking left to right. The larger red dots are the places where Mainelli took his three cross sections, and the small blue dots are the locations visited by Harvey on September 9, 2009, as he recorded



them by GPS, which dots are numbered 036 through 054. The green dots depict the north fence as surveyed by Edwards, as previously discussed.

Harvey stated that he determined that the flow capacity of the north channel in 2006 was about 40 percent greater than that of the south channel, using average widths of 133.6 feet for the north channel and 81.2 feet for the south channel. Harvey then opined that "therefore, the North channel was the dominant channel in 2006."

We note that in the trial of this case, the terms "dominant channel" and "main channel" were used interchangeably. The rule is well established that where the thread of a stream is the boundary between estates and that stream has two channels, the thread of the main channel is the boundary between the estates. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994), citing *Hardt v. Orr*, 142 Neb. 460, 6 N.W.2d 589 (1942). Clearly, Harvey's opinion about which channel is the main or dominant channel is crucially important, and we find that conclusion well supported by the data and the science which we have set forth above in considerable detail.

Because we accept Harvey's opinion that the north channel is the main or dominant channel, we necessarily must reject the trial court's conclusion that "[i]t is impossible at this point in time to determine the thread of the North Platte River" other than to use the geographic centerline as measured by the GLO in 1870. As we understand the trial judge's rationale, it is because there is no credible evidence to "prove which channel will completely dry up" first. That conclusion clearly ignores the evidence from Harvey that the north channel is wider and is lower in elevation and that there is flow from the south channel to the north channel, as well as water coming into the north channel from East Clear Creek as well as from groundwater which flows to the south, plus the simple fact that the north channel carries more flow—all reasons Harvey cited for his conclusion that the north channel would be the last to dry up.

With all due respect to Mainelli, we find that Harvey's work in locating the thread of the North Platte River at the thread of

the north channel has a level of complexity, completeness, and sophistication that significantly exceeds that of the work done by Mainelli. Harvey's ultimate conclusion is supported by a multilayered analysis using various aspects of hydrology and hydraulics that makes his conclusion compelling and undermines the trial court's finding that the thread of the stream is impossible to locate. And, as outlined earlier, this case is different in many material respects from *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000), the case from which the trial court's finding seems to have been derived. Having rejected the trial judge's conclusion that locating the thread of the stream of the North Platte River is impossible, acceptance of Harvey's findings and ultimate conclusion as to the thread's location naturally follows. Harvey is obviously well qualified by education and experience to do the work he did and reach the conclusion that we now accept. There is nothing in the record or the trial court's decision that explains why the opinion of Harvey, a Ph.D. fluvial geomorphologist, should be rejected, and we have explained a number of reasons why Harvey was more persuasive and credible than Mainelli. This is not merely a difference of opinion between equally qualified and experienced experts. Harvey's opinion has a much more solid foundation in science; plus, he possesses education, training, and experience superior to Mainelli's.

Therefore, we hold that the boundary in the accretion lands of the North Platte River between the Oppligers' land in section 9 and the Vineyards' land in section 16 is the thread of the stream of the north channel of the North Platte River. As to precisely and exactly where that is in a metes and bounds description, such is not before us and is inherently impractical, and in reality, such would rarely be subject to precise measurement and legal description beyond the conceptual definition we have employed for the thread of the stream throughout our opinion. Therefore, the thread of the stream of the North Platte River is found in the north channel, and it fits the definition of "thread of the stream" from *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 995, 520 N.W.2d 556, 562 (1994):

> The thread or center of a channel, as the term is employed, must be the line which would give the owners on either

> side access to the water, whatever its stage might be, and particularly at its lowest flow. *State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782 (1946). In other words, the thread of the stream is the deepest groove or trench in the bed of a river channel, the last part of the bed to run dry.

[13] Although there is in evidence a composite survey map by Edwards that plats the geographic centerline of the north channel superimposed on the 2006 aerial photograph with a metes and bounds description, it is clear that she simply platted the middle of the north channel measured bank to bank. While that could be the thread, as a matter of law, it is not such by virtue of simply being the centerline. In *Hartwig v. Berggren*, 179 Neb. 718, 725-26, 140 N.W.2d 22, 27 (1966), the court observed:

> Plaintiff contends that the mean line of the center of the river is a factor in determining ownership by a riparian owner of unplatted islands in a river. We think not. The meander lines of the river as fixed by the original government survey are not boundary lines unless designated as such in the instrument of conveyance. The mean center line of a river, determined by dividing the distance between meander lines of the river, is an arbitrary location of the center of the stream and is not a determination of the thread of the stream in this jurisdiction.

We observe that as a practical matter, the precise and exact location of the thread would become important only in times of drought and extremely low flow. Of the numerous Nebraska cases involving the thread of a stream, none contains a precise metes and bounds legal description of its location. See, e.g., *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000); *Babel v. Schmidt*, 17 Neb. App. 400, 765 N.W.2d 227 (2009); *Madson v. TBT Ltd. Liability Co.*, 12 Neb. App. 773, 686 N.W.2d 85 (2004). We conclude that such a description is neither required nor practical given that the thread of the stream is a legal concept and that pinpointing its exact location is inherently difficult, if not impossible, until a river actually dries up, which event would then reveal the thread's precise location, i.e., where the last little bit of flowing water could be found.

## VII. CONCLUSION

The Vineyards have asserted other assignments of error, mostly involving evidentiary issues that we have not discussed because we need not do so. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Spanish Oaks v. Hy-Vee, Inc.*, 265 Neb. 133, 655 N.W.2d 390 (2003). Accordingly, we reverse the decision of the district court for Lincoln County. We hold that the boundary between sections 9 and 16, "Township 14 North, Range 34 West of the 6th P.M.," is the thread of the stream of the North Platte River, which thread is located in the river's north channel as it runs between those two sections.

REVERSED.

CASSEL, Judge, participating on briefs.

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MATTHEW JOHN BOCK, APPELLEE, V.
JENNIFER LYNN DALBEY, APPELLANT.
809 N.W.2d 785

Filed September 27, 2011. No. A-10-973.

1. **Divorce: Property Division: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determination of property division; this determination, however, is initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Divorce: Property Division.** If premarital property can be identified, it is typically set off to the spouse who brought the property into the marriage.
4. **Constitutional Law: Statutes.** Under the Supremacy Clause of the U.S. Constitution, state law that conflicts with federal law is invalid.
5. **Divorce: States.** The whole subject of domestic relations is generally considered a state law matter outside federal jurisdiction.
6. **Divorce: Taxation.** It is within the discretion of the trial court in a dissolution of marriage proceeding to order the parties to file a joint income tax return.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Amy Sherman Geren for appellant.

Brent M. Kuhn, of Harris Kuhn Law Firm, L.L.P., for appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

CASSEL, Judge.

## INTRODUCTION

The district court dissolved the marriage of Matthew John Bock to Jennifer Lynn Dalbey, divided the marital estate, and ordered the parties to file joint income tax returns for 2008 and 2009. We find no abuse of discretion in the court's determination and division of the marital estate. We further conclude that federal tax law does not preclude a trial court from exercising its discretion to order parties to file a joint income tax return. Accordingly, we affirm.

## BACKGROUND

Prior to the parties' marriage in June 2006, each party owned a home. After marriage, Dalbey moved into Bock's home and began renting out her house after unsuccessfully trying to sell it. The parties subsequently purchased a house in 2009. Shortly thereafter, on July 6, Bock filed a complaint to dissolve the marriage.

In January 2009, the parties signed a contract for the purchase of a house on South 185th Circle in Omaha, Nebraska, and they closed on the house in late April. The $289,000 purchase price was "a hundred percent financed" by a first mortgage of approximately $235,000 and a second mortgage of approximately $55,000. As of November 2009, the balance of the first mortgage was $230,227.41.

Bock also acquired a $130,000 line of credit to help pay for renovations on the parties' house. Soon after moving in, he used the line of credit to pay off the second mortgage. The line of credit was also used to make $40,000 to $45,000 in repairs and to pay other debts of Bock: approximately $2,300 was used to make a payment on Bock's furniture store account, $8,466 was applied to Bock's credit card, and $28,447.72 was applied

to the line of credit Bock had secured with his premarital home and used to pay for living expenses. To Dalbey's knowledge, Bock did not use the line of credit to pay any of her debt. The balance on the line of credit was $118,778.06 on July 7, 2009; $128,790.96 as of November 27; and nearly $129,000 at the time of trial.

Bock requested to be awarded the house on South 185th Circle and its corresponding debt. He believed that the house was worth $335,000 at the time of trial. By that time, he had spent $333,076.83 on the purchase price, closing costs, and repairs. He believed that the debt exceeded the value of the house by $30,000. Bock testified that when he moved into the house, it had an assessed value of approximately $487,000; that he protested the valuation; and that it was reduced to $385,000. Bock protested the $385,000 assessment and asked that it be valued at $335,000. But in a personal financial statement signed by Bock on May 6, 2009, he valued the home at $525,000. A bank's May 28 loan memorandum for Bock's equity line of credit request contained a collateral analysis on the property in which the bank determined that the net value of the property for purposes of lending money against it was $487,000. The memorandum lists the valuation source as "Tax Assessed." A licensed real estate appraiser valued the property at $335,000 on August 6, using a comparable sales approach. The appraiser noted that the renovation was incomplete and testified that he was unable to find any houses in the neighborhood that had sold which were in worse condition than the subject property.

On August 6, 2010, the district court entered a decree dissolving the marriage. The court valued the house on South 185th Circle at $370,000 and determined that the equity in the house was $19,447.63. With regard to the parties' premarital homes, the court stated that it was "unable to find that either of these properties have equity that experienced a gain during the term of the parties' marriage." In order to equalize the marital estate, the court assigned all the marital debts to Bock. The court ordered the parties to file joint tax returns for 2008 and 2009.

Dalbey timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

## ASSIGNMENTS OF ERROR

Dalbey alleges that the district court erred in (1) entering judgment contrary to the evidence and the law, (2) determining the marital estate, (3) valuing and dividing the marital estate, and (4) ordering the parties to file joint tax returns for 2008 and 2009.

## STANDARD OF REVIEW

[1] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determination of property division; this determination, however, is initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion. See *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009).

[2] An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Davis v. Davis*, 275 Neb. 944, 750 N.W.2d 696 (2008).

## ANALYSIS

*Premarital Homes.*

Dalbey argues that the court erred in determining that the homes the parties owned prior to the marriage were nonmarital assets. Specifically, she claims that Bock failed to provide proof of his home's value at the time of marriage or at the time the parties separated.

Bock testified that he purchased his premarital home for $182,000, using a first and second mortgage totaling $160,000 to $165,000. He also took out a line of credit secured with the home, and the balance at the time of trial was around $20,000 to $25,000. As of July 8, 2009, the balance of the first mortgage on this house was $134,451.44 and the balance of the second mortgage was $20,889.51. During the marriage, Bock made minor improvements costing $4,000 to $5,000 to the home.

The improvements included new carpeting in the basement and two rooms, drywall work in the basement, and a kitchen countertop replacement. The money for the improvements came out of Bock's individual checking account. In a personal financial statement signed by Bock on May 6, 2009, he valued the home at $195,000. Dalbey subtracted from that figure the approximately $155,340 of mortgage debt and asserted that there was $39,660 in marital equity in the home.

Dalbey believed that the value of her premarital home at the time of marriage was $117,700. She had two mortgages on the home which exceeded its value by $14,634.48. She tried to sell her house prior to the marriage without success, so she began renting it after the marriage. The rental price was about $50 less than the mortgage payment. Bock testified that during the marriage, he paid some of the expenses of Dalbey's premarital home, which amounted to $9,732.31. At the time of trial, Dalbey believed that the value of her home was $132,500 and that she had $10,000 in equity in the property.

[3] The law is that if premarital property can be identified, it is typically set off to the spouse who brought the property into the marriage. *Charron v. Charron*, 16 Neb. App. 724, 751 N.W.2d 645 (2008). Each party's premarital house still exists, can easily be identified, and should be set off to the party who owned it prior to marriage. Although marital funds were used to make mortgage payments and repairs on each house during the parties' 3-year marriage, we cannot say that the district court abused its discretion in finding that neither property had equity that experienced a gain during the marriage.

*Marital House.*

Dalbey next argues that the court erred in valuing and determining the equity in the house the parties purchased during the marriage. She points out that the home was in disrepair at the time of the appraisal and otherwise would likely have been appraised higher.

The court found that the house's fair market value was $370,000 and that it had secured debt of $359,018.37—which appears to be the combination of the debts owed in November 2009 on the first mortgage and the line of credit, which were

$230,227.41 and $128,790.96, respectively. The court reduced that amount by $8,466—the amount of the line of credit that Bock used to make a payment on his credit card. Thus, the court determined that the house's equity was $19,447.63. Dalbey asserts that the court should have valued the house at $487,000 with debt of $319,130. Dalbey also quarrels about Bock's use of the $130,000 line of credit. Bock applied $28,447.72 of that line of credit to the line of credit secured with his premarital home, but Bock testified that that money was typically used for living expenses.

Here, the court valued the property at an amount higher than that requested by Bock but lower than that sought by Dalbey. The figure urged by Bock was based on a licensed appraiser's comparative sales approach. In contrast, Dalbey relied on the bank's loan memorandum in which the bank valued the house at $487,000, because that was its tax-assessed value. However, Bock protested the tax-assessed valuation, resulting in a reduced assessment of $385,000. We cannot say that the court abused its discretion in valuing the house at $370,000 or in determining its equity to be $19,447.63.

*Dividing Marital Estate.*

Dalbey also argues that the court erred in dividing the marital estate. According to her proposed division, the court should have ordered Bock to pay her $109,343.70 to equalize the division.

The court awarded the parties half of their three retirement accounts and Bock's equity in his law firm's partnership, which amounted to an award of $24,600.51 to each. In contrast, Dalbey's proposed division of those items would result in an award to her of $24,102.49 and an award to Bock of $25,111.97. The court ordered Bock to pay all the marital debt, which amounted to approximately $14,100, in addition to the debt on the house and his vehicle. Further, the court ordered that each party be responsible for any debts he or she incurred since July 6, 2009. Dalbey's proposed division of debt would have her paying $7,344.82 and Bock's paying $3,809.05, plus the $5,020.08 owed on his vehicle. The chief difference between Dalbey's proposed division and the court's division

is the asserted equity in the three homes: Dalbey contends that her premarital property had $10,554.37 in marital equity, that the house purchased during the marriage had $167,870 in equity, and that Bock's premarital home had $39,660 in marital equity. But above, we rejected these same contentions. And it appears that the court's division of the marital estate without these amounts would not be significantly different from Dalbey's proposal and would certainly fall within the general award of one-third to one-half to the spouse. See *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995) (division of property is not subject to precise mathematical formula, but general rule is to award spouse one-third to one-half of marital estate). We find no abuse of discretion by the court in its division of the marital estate.

*Joint Tax Return.*

Finally, Dalbey argues that the court erred in ordering her to file a joint tax return with Bock because "the decision as to whether or not to do that is a matter of federal law and the a [sic] judge of a state court cannot order a citizen to file only jointly when federal law allows her to choose how she wishes to file." Brief for appellant at 19. She contends that the court's order violates the Supremacy Clause.

[4] Under the Supremacy Clause of the U.S. Constitution, state law that conflicts with federal law is invalid. *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010). Federal law preempts state law when it conflicts with a federal statute or when the U.S. Congress, or an agency acting within the scope of its powers conferred by Congress, explicitly declares an intent to preempt state law. *Id.*

[5] While federal law prevails over state law in the event of a conflict, there is no conflict present here. Further, the whole subject of domestic relations is generally considered a state law matter outside federal jurisdiction. See *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009).

We first summarize the parties' history of filing tax returns and what the record discloses concerning the tax years for which returns have not yet been filed. The last tax return that

the parties filed was a joint return for the 2007 tax year in which they opted to have their $4,060 federal refund applied to the next year's taxes and to have $2,000 of their state refund applied to the next year's taxes. The parties had not filed a tax return for 2008 because Bock had not received Dalbey's tax information. Bock testified that he had made "four quarterly tax deposits" to the Internal Revenue Service and the State of Nebraska for the 2008 tax year. He requested that the court order the parties to file a joint income tax return for 2008 and 2009 and that the parties be responsible for the tax, penalties, and interest in proportion to the amount of income attributed to each on that return. Bock testified that the parties could have a mutually agreed-upon third party prepare the return and that they could each pay half of the cost of preparation. Dalbey testified that she simply would prefer not to file a joint tax return.

We have found no controlling precedent in Nebraska on a court's ordering divorcing parties to file a joint tax return, but this court has rejected an identical argument in an unpublished opinion. In *Hilmer v. Hilmer*, No. A-96-1146, 1997 WL 527671 (Neb. App. Aug. 19, 1997) (not designated for permanent publication), this court analogized the determination of filing status to the allocation of dependency exemptions for income tax purposes—noting that both have economic consequences—and concluded that "the determination of filing status for income tax purposes is also within the ambit of a state court's conduct of a legal separation or dissolution proceeding." *Id.* at *8.

This is consistent with the Nebraska Supreme Court's precedent regarding dependency tax exemptions. In *Hall v. Hall*, 238 Neb. 686, 472 N.W.2d 217 (1991), the court noted that the exemptions were governed by 26 U.S.C. § 152 (1988) and that under that section, as amended in 1984, the custodial parent was automatically granted the tax exemptions, except in three circumstances. Despite the federal law on the issue, Nebraska joined the majority of jurisdictions and determined that a state court may exercise its equity power to allocate the tax exemptions to a noncustodial parent. See *Hall v. Hall, supra*. Thus, the court held that any Nebraska state court having jurisdiction

in a divorce action shall have the power to allocate tax dependency exemptions as part of the divorce decree. *Id.*

[6] We now expressly hold that it is within the discretion of the trial court in a dissolution of marriage proceeding to order the parties to file a joint income tax return.

Although other jurisdictions are split on the issue, we conclude that the weight of authority and the better reasoning support the rationale of the *Hilmer* decision. See, e.g., *Bursztyn v. Bursztyn*, 379 N.J. Super. 385, 879 A.2d 129 (2005) (concluding trial courts should have discretion to compel filing of joint tax returns); *Oldham v. Oldham*, 677 N.W.2d 196 (N.D. 2004) (finding no abuse of discretion in court's order directing parties to file joint income tax returns and noting that courts are to consider tax consequences of divorce proceedings); *In re Marriage of LaFaye*, 89 P.3d 455 (Colo. App. 2003) (court acted within its discretion in ordering parties to file joint tax returns); *Bowen v. Bowen*, 132 Ohio App. 3d 616, 725 N.E.2d 1165 (1999) (court has discretion to order parties to file joint tax return); *Teich v. Teich*, 240 A.D.2d 258, 658 N.Y.S.2d 599 (1997) (it is outside court's equitable powers to order parties to file joint tax returns because federal tax law gives each spouse unqualified freedom to decide whether to file joint return); *Kane v. Parry*, 24 Conn. App. 307, 588 A.2d 227 (1991) (court has authority to order party to file joint tax return only if there was prior agreement between parties to do so); *Matlock v. Matlock*, 750 P.2d 1145 (Okla. App. 1988) (permitting trial court to order spouse to file joint return would be tantamount to removing right of election conferred upon married couples under Internal Revenue Code); *Theroux v. Boehmler*, 410 N.W.2d 354 (Minn. App. 1987) (concluding it was within trial court's discretion and authority to require joint tax return be filed in order to avoid unnecessary tax burden which would deplete funds available for support of family); *Cox v. Cox*, 17 Ark. App. 93, 704 S.W.2d 171 (1986) (as part of court's equitable powers, court may compel parties to execute joint federal income tax returns); *Lewis and Lewis*, 81 Or. App. 22, 723 P.2d 1079 (1986) (courts do not have authority to order spouses to file joint tax returns); *In re Marriage of Butler*, 346 N.W.2d 45 (Iowa App. 1984) (vacating part of ruling ordering parties to

file joint income tax return because taxation laws give parties option of filing joint or separate return), *overruled on other grounds, In re Marriage of Wertz*, 492 N.W.2d 711 (Iowa App. 1992); *Leftwich v. Leftwich*, 442 A.2d 139 (D.C. 1982) (finding portion of order making wife's receipt of her share of marital property conditioned on her signing two joint tax returns to be erroneous because it exceeds mandate of Internal Revenue Code provisions governing joint returns and bounds of trial court's equitable powers).

One such court articulated a number of factors to be considered in determining whether the trial court's order was an abuse of discretion. In *Bursztyn v. Bursztyn, supra*, the New Jersey appellate court determined that the trial court did not abuse its discretion in ordering the parties to file joint returns for six reasons: (1) There was a significant financial benefit to doing so, (2) there was no evidence that the husband had filed fraudulent returns in the past or that he intended to do so, (3) the husband was the source of all income to be reported, (4) the wife provided no principled reason why she should file a separate return under the circumstances, (5) the court had little alternative means to alter the equitable distribution to compensate the husband for the adverse tax consequences of filing separate returns because most of the marital assets were needed to pay marital debts, and (6) there was no basis to disapprove the trial court's ruling that the wife's alimony payments be held in escrow until she complied with the court's order regarding tax returns.

Similarly, when we view the evidence in the instant case in light of these factors, we find no abuse of the trial court's discretion. The parties filed a joint return in 2007 and elected to have their federal tax refund applied to their 2008 tax return. Bock had made four quarterly tax "deposits" for 2008. And the parties will incur penalties and interest for their failure to timely file a return. There was no evidence that Bock had filed fraudulent tax returns in the past or that he intended to do so. Further, federal tax law provides relief from joint and several liability on a joint return for an "innocent spouse." See I.R.C. § 6015(b) (2006). Moreover, Dalbey simply stated without elaboration that she would prefer not to file a joint return.

Under the circumstances of this case, we find no abuse of discretion by the district court in ordering the parties to file joint income tax returns for 2008 and 2009.

## CONCLUSION

We conclude that the district court did not abuse its discretion in treating the parties' premarital homes as nonmarital assets, in valuing the house bought during the marriage, in dividing the marital estate, or in ordering the parties to file joint income tax returns. Accordingly, we affirm.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
RANDY L. MORTENSEN, APPELLANT.
809 N.W.2d 793

Filed September 27, 2011. No. A-10-1208.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
3. **Speedy Trial: Indictments and Informations: Time.** Neb. Rev. Stat. § 29-1207(1) (Reissue 2008) requires that every person indicted or informed against for any offense shall be brought to trial within 6 months, unless the 6 months are extended by any period to be excluded in computing the time for trial.
4. **Speedy Trial.** Under Neb. Rev. Stat. § 29-1208 (Reissue 2008), if a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge.
5. **Speedy Trial: Motions for Continuance.** The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel shall be excluded from the calculation of the time for trial.
6. **Speedy Trial.** The last date to try a defendant, before consideration of excludable timeframes, is calculated by excluding the date of the filing of the information, moving forward 6 months, and then backing up 1 day.
7. **Speedy Trial: Pretrial Procedure: Appeal and Error.** The motion to discharge is a tolling motion, and the speedy trial clock remains tolled until the motion to discharge is finally resolved, including during the appeal until action is taken on the appellate court's mandate.

8. **Speedy Trial: Waiver.** A waiver of speedy trial rights, if explicitly stated, can be for a limited time or purpose.
9. ____: ____. A defendant may terminate his waiver of a speedy trial by filing a written request for trial with the clerk of the court in which the defendant is to be tried. The defendant shall serve a copy of the written request for trial upon the prosecutor. The clerk of the court, immediately upon receipt of the request for trial, shall also forward a copy of it, together with the date of filing, to the trial judge and to the prosecutor's office.
10. **Speedy Trial: Pretrial Procedure: Time.** From the date a defendant files his written request for trial, the 6-month period for the State to bring a defendant to trial provided in Neb. Rev. Stat. § 29-1207 (Reissue 2008) shall begin anew.
11. **Speedy Trial: Waiver: Pretrial Procedure.** After a defendant's unlimited waiver of speedy trial rights, it is not the setting of a trial date by the court, but, rather, the defendant's request for a trial, that starts the speedy trial clock running again—but running anew.
12. **Motions for Continuance: Notice.** When a defendant requests an indefinite continuance, it is his or her affirmative duty to end the continuance by giving notice of his or her request for trial.

Appeal from the District Court for Butler County: MARY C. GILBRIDE, Judge. Affirmed.

Robert J. Bierbower for appellant.

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

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

On October 27, 2009, an information was filed in the district court for Butler County, Nebraska, charging Randy L. Mortensen with the offense of assault while being incarcerated, in violation of Neb. Rev. Stat. § 28-932 (Reissue 2008), and asserting that he was a habitual criminal. On October 25, 2010, Mortensen filed his motion for absolute discharge on the ground that his speedy trial rights had been violated under Neb. Rev. Stat. § 29-1208 (Reissue 2008). The district court denied Mortensen's motion via a signed and file-stamped journal entry of November 15. Mortensen perfected a timely appeal to this court.

The State has filed a motion for summary affirmance, which we hereby overrule. Briefing in the matter is complete. Pursuant

to our authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), we have ordered this case submitted for decision without oral argument.

## PROCEDURAL BACKGROUND

The chronology of the procedural occurrences in this case is as follows, and necessary additions will be provided in our discussion:

- 10/27/2009 Information is filed.
- 01/04/2010 Mortensen moves to continue trial and files waiver of speedy trial right.
- 01/05/2010 Trial is continued to March 16.
- 02/23/2010 Mortensen's counsel moves to continue trial.
- 03/02/2010 Mortensen files written waiver of speedy trial rights.
- 03/09/2010 Trial is set for June 22.
- 05/18/2010 Mortensen moves to continue trial, and trial is set for August 17.
- 05/20/2010 Mortensen files written waiver of speedy trial rights.
- 07/26/2010 Mortensen moves to continue trial and files written waiver of speedy trial rights.
- 08/02/2010 Trial is set for October 26.
- 10/25/2010 Mortensen moves for absolute discharge.

In its November 15, 2010, ruling on the motion to discharge, the court found that the time period from October 28, 2009, to January 4, 2010, 68 days, counts against the State, but that no additional days have run on the speedy trial clock since January 4 because of the motions to continue and waivers of speedy trial filed by Mortensen. Accordingly, the court found that there were 112 days left to bring Mortensen to trial. The trial court overruled the motion; set the matter for trial on January 27, 2011; and set a status hearing for December 22, 2011 (we assume that this is a typographical error and that the status hearing was to be December 22, 2010). Mortensen filed his timely notice of appeal on December 15, 2010.

## ASSIGNMENT OF ERROR

Mortensen asserts that the trial court erred in denying his motion for discharge.

## STANDARD OF REVIEW

[1,2] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007); *State v. Vasquez*, 16 Neb. App. 406, 744 N.W.2d 500 (2008). However, to the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. See *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002).

## ANALYSIS

We begin by noting that the speedy trial claim being advanced is statutory and that the constitutional right to a speedy trial is not implicated in this case.

[3-5] Neb. Rev. Stat. § 29-1207(1) (Reissue 2008) requires that every person indicted or informed against for any offense shall be brought to trial within 6 months, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. Cox*, 10 Neb. App. 501, 632 N.W.2d 807 (2001). Under § 29-1208, if a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge. Section 29-1207(4)(b) provides that the period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel shall be excluded from the calculation of the time for trial.

Mortensen does not quibble with the procedural background and timeline we have set forth above, although his briefing ignores the fact that he signed and filed four different waivers of speedy trial rights, a crucial procedural fact. Mortensen asserts with respect to the first motion to continue, filed on January 4, 2010, that the time excludable for that motion ceased on March 9, the date on which the trial court set the matter for a status hearing on May 4 and trial on June 22. He applies this same rationale and calculation to his motion to continue filed May 18. Thus, he asserts that the time period to be "added" is 49 days, as the time for the latter motion ended July 6 when

the court held a status conference. Brief for appellant at 9. The same method is asserted for the motion to continue filed July 26; he claims the time attributable to this motion ended September 7, when the court held a status conference, resulting in 49 days attributable to this motion and thus excludable in calculating the time in which to bring him to trial. We quote Mortensen's final conclusion:

> The total amount of time which must be added as the result of the three Motions To Continue is 161 days. Adding 161 days to the April 27, 2010, date, results in October 5, 2010, being the last day within which [Mortensen] must have been brought to trial; this was not done and [Mortensen] is entitled to an absolute discharge.

*Id*.

[6] The information was filed October 27, 2009. We have long calculated the last date to try the defendant, before consideration of excludable timeframes, by excluding the date of the filing of the information, moving forward 6 months, and then backing up 1 day. See, *State v. Vrtiska*, 227 Neb. 600, 418 N.W.2d 758 (1988); *State v. Kriegler*, 225 Neb. 486, 406 N.W.2d 137 (1987), *overruled on other grounds, State v. Petty*, 269 Neb. 205, 691 N.W.2d 101 (2005). Therefore, we exclude October 27, move forward 6 months to April 28, 2010, and back up to April 27 for the last day to begin Mortensen's trial, before adding excludable timeframes. See *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007). The trial court correctly found that the timeframe from October 28, 2009, to January 4, 2010, the date when Mortensen filed a motion to continue and a "Waiver of Speedy Trial," was chargeable to the State—meaning that 68 days, as the trial court found, had run off of the 6-month speedy trial clock.

[7] Mortensen filed four separate written "Waiver[s] of Speedy Trial" signed by him, dated, and file stamped by the clerk of the district court. In each, he states that he "informs the Court that he has been advised of the effect of" the corresponding motion to continue "upon his right to a speedy trial and [t]hereby knowingly, voluntarily, and intelligently waives his right to a speedy trial for the purposes of such [m]otion." The first of these effectively identical waivers was

filed January 4, 2010, and on that day, a motion to continue was filed. A nearly identical waiver was filed March 2, after a motion to continue on behalf of Mortensen had been orally made by his counsel on February 23. Mortensen moved to continue the June 22 trial by a written motion filed May 18, and Mortensen's signed "Waiver of Speedy Trial" was filed May 20, with the same language as quoted above. And on July 26, a motion to continue the trial then set for August 17 was filed and another "Waiver of Speedy Trial" signed by Mortensen was filed on the same date. After the last two filings, the court entered an order on August 2 setting a status hearing for September 7 and a trial for October 26. The status hearing of September 7 resulted only in the scheduling of another status hearing for October 5. The court's journal entry of October 5 reflects, "Matter remains as set." On October 25, the motion for discharge was filed. We note that the motion to discharge is a tolling motion and that the speedy trial clock remains tolled until the motion to discharge is finally resolved, including during the appeal until action is taken on our mandate. See *State v. Miller*, 9 Neb. App. 617, 616 N.W.2d 75 (2000).

When one examines the procedural history as outlined at the outset of our opinion, it is clear that after January 4, 2010, up to the time of the filing of the motion to discharge on October 25, there was never any time during which the cause was not continued by Mortensen's request for a continuance and during which there was not also an operative waiver of his speedy trial rights "for the purposes of such [m]otion" to continue. Mortensen's waivers apparently were intended to have a limited scope and purpose—for the motions to continue. We note that the only mention we can find in Nebraska case law of a "limited waiver" of speedy trial rights is in *State v. Knudtson*, 262 Neb. 917, 636 N.W.2d 379 (2001), where the court said that the defendant did not waive his right to a speedy trial for an indefinite period and that his waiver was for a 120-day continuance only. The *Knudtson* court then said:

> The State argues that [the defendant's] waiver was absolute and cannot be limited in time. Section 29-1207

> does not mention a waiver or suggest that a waiver cannot be limited in time. In addition, the statute provides that the 6-month period shall exclude "[t]he period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel." § 29-1207(4)(b). The statute does not provide that requesting a continuance results in a complete waiver of the right to a speedy trial; rather, it provides that the delay caused by a continuance granted for the defendant is excluded from the 6-month period and counted against the defendant.

262 Neb. at 923, 636 N.W.2d at 384.

[8] From the *Knudtson* court's discussion, we conclude that under Nebraska precedent, a waiver of speedy trial rights, if explicitly stated, can be for a limited time or purpose. Here, the waivers were expressly "for the purposes of" the motion for continuance that was filed simultaneously with, or within days of, each of the four waivers—but no time limit for such waivers was specified. Therefore, the waivers, like the continuances simultaneously requested, were for an indefinite period of time.

[9,10] The Nebraska Supreme Court's opinion in *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989), essentially resolves the issues presented here as a matter of law. The *Andersen* court pronounced two significant holdings of law relating to speedy trial and waivers. The court announced a specific procedure for a criminal defendant to terminate an unconditional waiver of his or her speedy trial rights as well as the effect of a termination of an indefinite waiver:

> We hold that a defendant may terminate his waiver of a speedy trial by filing a written request for trial with the clerk of the court in which the defendant is to be tried. The defendant shall serve a copy of the written request for trial upon the prosecutor. The clerk of the court, immediately upon receipt of the request for trial, shall also forward a copy of it, together with the date of filing, to the trial judge and to the prosecutor's office. From the date the defendant files his written request for trial, the

> 6-month period for the State to bring a defendant to trial provided in § 29-1207 shall begin anew.

232 Neb. at 195, 440 N.W.2d at 211.

Thus, when this holding is applied to the present case, there are four different unlimited waivers of speedy trial rights, the last of which was filed July 26, 2010, and which was still effective at the time of the filing of the motion for discharge on October 25. And, after January 4, 2010, there was never a time that there was not a knowing, intelligent, and voluntary waiver of speedy trial rights in effect. And, even if one of such waivers could be considered as terminated, although none were via the specific procedure provided for in *Andersen*, the speedy trial clock starts anew after termination, meaning the State had another 6 months in which to bring Mortensen to trial. See, also, *State v. Dailey*, 10 Neb. App. 793, 802, 639 N.W.2d 141, 148 (2002) (defendant secured indefinite continuance and never provided "notice of any sort that she was ready for trial," which notice would have terminated her waiver of speedy trial rights). Finally, the motion for discharge, as said earlier, operates as a complete tolling of the speedy trial clock until finally resolved. Thus, the only time that has run off of the speedy trial clock is the 68 days from October 28, 2009, to January 4, 2010, as correctly calculated by the district court.

[11,12] We understand Mortensen's argument to be that the trial court's action in holding status conferences and making trial settings (all of which Mortensen moved to continue as well as filing a corresponding waiver of speedy trial rights) started the speedy trial clock running again against the State. However, it is clear that after a defendant's unlimited waiver of speedy trial rights, it is not the setting of a trial date by the court, but, rather, the defendant's request for a trial as outlined in *Andersen*, that starts the speedy trial clock running again—but running anew. Moreover, putting aside Mortensen's four waivers of speedy trial rights, the law is that even when the defendant requests, as Mortensen did, an indefinite continuance, it is his or her affirmative duty to end the continuance by giving notice of his or her request for trial, *State v. Dailey, supra*—something Mortensen never did. Accordingly,

the speedy trial clock was continuously tolled starting January 4, 2010, and has never begun to run again.

## CONCLUSION

For the reasons outlined above, we find that the trial court correctly determined that as of the time of the filing of the motion for discharge on speedy trial grounds on October 25, 2010, only 68 days were chargeable to the State. All of the time since January 4, 2010, is chargeable to Mortensen and excluded from the speedy trial clock because of the waivers he filed. And, all of the time after the filing of the motion to discharge until such is finally resolved is chargeable to Mortensen. As a result, 112 days remain on the speedy trial clock, as determined by the district court.

AFFIRMED.

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RYAN J. BRODRICK, APPELLEE, V. SARAH A. BAUMGARTEN, FORMERLY KNOWN AS SARAH A. BRODRICK, APPELLANT.

809 N.W.2d 799

Filed September 27, 2011. No. A-11-082.

1. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.
2. **Modification of Decree: Child Support.** Among the factors to be considered in determining whether a material change of circumstances has occurred are (1) changes in the financial position of the parent obligated to pay support, (2) the needs of the children for whom support is paid, (3) good or bad faith motive of an obligated parent in sustaining a reduction in income, and (4) whether the change is temporary or permanent.
3. ____: ____. Changes in the financial position of the parent obligated to pay support are a factor to be considered in determining whether a material change of circumstances has occurred.
4. **Modification of Decree: Child Support: Rules of the Supreme Court: Presumptions.** Application of the child support guidelines which would result in a variation by 10 percent or more of the current support obligation establishes a rebuttable presumption of a material change of circumstances.

Appeal from the District Court for Dawes County: BRIAN C. SILVERMAN, Judge. Reversed and remanded.

Amy L. Patras, of Crites, Shaffer, Connealy & Watson, P.C., L.L.O., for appellant.

Andrew W. Snyder, of Chaloupka, Holyoke, Snyder, Chaloupka, Longoria & Kishiyama, P.C., L.L.O., for appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Sarah A. Baumgarten, formerly known as Sarah A. Brodrick (Sarah), appeals an order of the district court for Dawes County, Nebraska, which modified a prior custody and support order. On appeal, Sarah asserts that Ryan J. Brodrick (Ryan) failed to demonstrate a material change of circumstances had occurred since the entry of the prior order to warrant modification and that the district court erred in finding otherwise. We agree, and we reverse, and remand. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

## II. BACKGROUND

On June 19, 2001, Sarah and Ryan were divorced pursuant to a dissolution decree. Pursuant to the dissolution decree, the parties had "split legal custody" of their two minor children.

On April 28, 2009, the parties filed a stipulation with the district court. The parties stipulated that a material change of circumstances had occurred since entry of the dissolution decree in that the parties had shared joint physical and legal custody of the children, rather than split custody. The parties stipulated that the court should order joint physical and legal custody. The parties also stipulated that Ryan would pay $200 per month for child support and that the child support amount constituted a deviation from the Nebraska Child Support Guidelines.

On May 5, 2009, the district court entered an order modifying the custody and child support provisions of the dissolution decree. The court found that the parties' stipulation was fair and adopted its provisions. The court ordered joint legal and physical custody of the children and set forth a physical custody schedule which would have resulted in each party having

physical custody approximately 50 percent of the time. The court also ordered Ryan to pay $200 per month in child support and ordered that the support amount constituted a deviation from the Nebraska Child Support Guidelines.

On October 1, 2009, less than 5 months after entry of the May 5 custody and support order, Ryan filed a complaint seeking modification. Ryan alleged, as material changes of circumstances occurring since entry of the prior order, that his employment and income had changed and that he had actually had physical custody of the children more than 50 percent of the time as was originally contemplated in the parties' stipulation and the court's prior order.

On September 16, 2010, the district court conducted a hearing on Ryan's complaint to modify. At the hearing, Ryan adduced evidence establishing that at the time of the May 5, 2009, stipulation and custody and support order, he had been employed full time in a drugstore warehouse and had been earning $10 per hour. He testified that in July or August 2009, he ceased his employment and enrolled in a school for massage therapy. He testified that he was working part time for his father and was earning $10 per hour. He testified that he was not asking the court to use part-time income for calculating child support and that he was willing to have the court impute income to him at $10 an hour for full-time employment.

Ryan also adduced evidence indicating that during some of the time after the May 5, 2009, custody and child support order was entered, he actually had physical custody of the parties' two minor children more than the 50 percent contemplated by the parties' stipulation and the court's order. He testified that in July, he had both children for 25 days; that in August, he had one child for 21 days and the other for 23 days; and that in September, he had both children for 17 days. He acknowledged that starting in October 2009, he "was only having the kids 50 percent of the time," as provided in the prior court order.

Sarah acknowledged that Ryan had physical custody of the children more than 50 percent of the time during June through September 2009. She testified that her employment at that time required her to travel "up to three times a month for two or three nights." She testified that she had conversations with

Ryan about switching days when she had to travel, but that Ryan refused and indicated that "that's not his problem." In late October 2009, Sarah resigned from her employment; she continued with the employer until finding new employment in November. She testified that she changed her employment because she "was worried that it would jeopardize [her] time with [her] kids" because the travel obligations were going to increase. Sarah earned $10.26 per hour at her new employment, which was less than her earnings at her prior employment.

On December 29, 2010, the district court signed an order modifying Ryan's child support obligation. The court noted that the evidence adduced at the hearing demonstrated that Ryan had more custody time than Sarah at one time, that Sarah had more custody time than Ryan prior to that, and that both parties had "about equal" custody time during some of the relevant time period. The court also noted that both parties had changed their employment situations voluntarily and that the changes resulted in Sarah's not having to travel and Ryan's furthering his education.

The court held:

> The Court believes that the best solution for the children, the parties, and in accord with the evidence and the law is the following:
>
> a. The Court will use [Sarah's] salary of $10.26 per hour and [Ryan's] salary at $10.00 per hour, both on a 40-hour basis. The obligation by [Ryan] to [Sarah] is $3.12 per month. . . . It would cost the payment center more to audit the payments and mail a check than it is worth, so the Court finds that . . . [Ryan's] child support payment to [Sarah] is terminated. The Court also finds that a material change of circumstances has occurred justifying this modification.

This appeal followed.

## III. ASSIGNMENT OF ERROR

Sarah has assigned as error that the district court erred in finding a material change of circumstances had occurred warranting modification of Ryan's child support obligation.

## IV. ANALYSIS

Sarah asserts that the district court erred in finding that Ryan demonstrated a material change of circumstances occurred since the May 5, 2009, custody and child support order warranting a modification of Ryan's support obligation. Sarah argues that the evidence adduced at the hearing demonstrated that Ryan's income was imputed to be exactly the same as it was at the time of the prior order and that physical custody of the children was being divided equally, as provided for in the court's prior order. We agree.

[1,2] A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered. *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009). When evaluating a request for modification of child support, among the factors to be considered in determining whether a material change of circumstances has occurred are (1) changes in the financial position of the parent obligated to pay support, (2) the needs of the children for whom support is paid, (3) good or bad faith motive of an obligated parent in sustaining a reduction in income, and (4) whether the change is temporary or permanent. See *id.*

In the present case, the district court specifically held in its modification order that a material change of circumstances had occurred. The court did not, however, indicate what the material change of circumstances was. Our review of the record leaves us unable to discern what the district court believed constituted a material change of circumstances warranting modification of the prior order, and we find no material change of circumstances with respect to either of the grounds proffered by Ryan: change in his employment and income, or change in actual amounts of time each party had physical custody.

First, Ryan's asserted change in employment and income does not constitute a material change of circumstances warranting modification. Ryan asked the district court to impute income to him that was identical to his income at the time of the prior order. Additionally, the fact that application of the

Nebraska Child Support Guidelines using Ryan's income level would result in a different child support amount than the prior order, which was specifically indicated to be a deviation from the guidelines pursuant to stipulation of the parties, does not demonstrate that modification was warranted.

[3] Changes in the financial position of the parent obligated to pay support are a factor to be considered in determining whether a material change of circumstances has occurred. See *Incontro v. Jacobs, supra*. At the time of the court's prior child support order, Ryan was employed and was earning $10 per hour. Although Ryan voluntarily left his employment and enrolled in school, and although his earnings were reduced to $10 per hour for part-time work for his father, Ryan specifically asked the court to impute his income level as $10 per hour for full-time employment for purposes of his complaint to modify. As a result, Ryan's income level for purposes of modification was identical to his earning level at the time of the prior order; there was no material change of circumstances demonstrated concerning his income level because there was no change in his income level.

[4] Ryan argues on appeal that using his imputed income level and utilizing the Nebraska Child Support Guidelines resulted in a change in his support obligation of more than 10 percent, giving rise to a rebuttable presumption that a material change of circumstances occurred. See Neb. Ct. R. § 4-217. Although § 4-217 does provide that application of the guidelines which would result in a variation by 10 percent or more of the current obligation could establish a rebuttable presumption of a material change of circumstances, Ryan's argument ignores the circumstances of the present case. In this case, the existing support order was more than a 10-percent variation from the amount the guidelines would have required, specifically because the parties stipulated to an order of $200 per month and the court entered an order, which was not appealed from, establishing his support obligation to be $200 and indicating that the order was a deviation from the guidelines. If Ryan's argument in this case were valid, then parties would always be able to modify support orders which reflect a deviation from the guidelines merely by demonstrating that

application of the guidelines results in a different support amount than the deviation would impose. Moreover, we conclude that the evidence in this case establishing that Ryan's income level for purposes of the modification hearing was identical to his income level at the time of the prior order effectively rebuts any presumption that might be created. We find no merit to Ryan's assertion that his income level constituted a material change of circumstances.

We also find that the variation in the amount of time that the parties had physical custody of the children during July through September 2009 did not constitute a material change of circumstances warranting modification of the prior order. The evidence adduced at the hearing demonstrated that the situation had been only temporary, was no longer an issue at the time of the hearing, and was allegedly contributed to by Ryan's refusal to change dates with Sarah to accommodate her employment-related travel obligations during those months.

One factor to consider in determining whether a material change of circumstances has occurred is whether the change is temporary or permanent. See *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009). The evidence in this case established that the court's prior custody and support order was entered in May 2009, providing that each party would have physical custody of the children approximately 50 percent of the time. Ryan testified that in July, August, and September 2009, he had physical custody of the children more than 50 percent of the time; Sarah did not dispute this. However, starting in October 2009 and continuing through the time of the hearing in September 2010, there is no dispute that the parties each generally had physical custody of the children approximately 50 percent of the time, exactly as ordered in the court's prior order.

Not only does the record demonstrate that Ryan's having physical custody more than 50 percent of the time was a temporary situation that had resolved itself at about the same time as he filed his complaint for modification, but the record also demonstrates that the issue is not likely to recur. Sarah testified the reason for Ryan's having physical custody of the children more than ordered in the court's prior order

was that her employment at the time required her to travel frequently, her travel dates coincided with dates she was to have physical custody, Ryan refused to switch dates with her to accommodate her travel, and she had ceased that employment to secure new employment which did not require her to travel. We find no merit to Ryan's assertion that this temporary period of increased physical custody was a material change of circumstances warranting permanent modification of child support.

## V. CONCLUSION

The record presented in this case does not demonstrate a material change of circumstances occurring since the entry of the previous child support order. Ryan asked the court to impute income to him that was identical to his earnings at the time of the prior order, and the brief period of time during which Ryan had increased physical custody of the children was a temporary issue that had resolved itself and was not likely to recur. As such, we reverse the district court's order of modification and remand the matter.

REVERSED AND REMANDED.

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# IN RE INTEREST OF MELAYA F. AND MELYSSE F., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MINDY F., APPELLANT, AND YANKTON SIOUX TRIBE, INTERVENOR-APPELLEE.

810 N.W.2d 429

Filed September 27, 2011. No. A-11-200.

1. **Indian Child Welfare Act: Jurisdiction: Appeal and Error.** A denial of a transfer to tribal court is reviewed for an abuse of discretion.
2. **Judges: Words and Phrases: Appeal and Error.** 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 a judicial system.
3. **Indian Child Welfare Act: Jurisdiction: Good Cause.** The party opposing a transfer of jurisdiction to the tribal courts has the burden of establishing that good cause not to transfer the matter exists.

4. **Indian Child Welfare Act: Jurisdiction.** That a state court may take jurisdiction under the Indian Child Welfare Act does not necessarily mean that it should do so, as the court should consider the rights of the child, the rights of the tribe, and the conflict of law principles, and should balance the interests of the state and the tribe.
5. **Indian Child Welfare Act.** The Indian Child Welfare Act does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus.

Appeal from the Separate Juvenile Court of Lancaster County: ROGER J. HEIDEMAN, Judge. Affirmed.

Nancy R. Wynner, of DeMars, Gordon, Olson, Zalewski, Wynner & Tollefsen, for appellant.

Joe Kelly, Lancaster County Attorney, and Shellie D. Sabata for appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

PIRTLE, Judge.

## INTRODUCTION

Mindy F. appeals from a decision of the separate juvenile court of Lancaster County which denied her motions to transfer this juvenile case to the Yankton Sioux Tribal Court. Because the juvenile court did not abuse its discretion in denying Mindy's motions, we affirm. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

## BACKGROUND

Mindy is the mother of Melaya F. and Melysse F. Mindy and Melaya are both enrolled as members of the Yankton Sioux Tribe (the Tribe). Melysse is eligible to be enrolled, although at 1 year of age at the time of the hearing, her enrollment had not yet occurred.

On December 15, 2010, the State filed a petition in the juvenile court alleging that the children came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) in that they lacked proper parental care by reason of the faults and habits of Mindy or that they were in a situation dangerous to life or limb or injurious to their health or morals. The petition stated that

on December 12, law enforcement officers were dispatched to Mindy's home, where they discovered that the home was in an unsanitary and unsafe condition; Mindy was unresponsive and believed to be under the influence of drugs or alcohol; and the children were dirty, crying, and in distress. The petition further alleged that Mindy had a history of involvement in domestic violence, assaultive behavior, and alcohol or drug abuse that had led to the removal of the children in 2006.

On January 18, 2011, Mindy filed a motion to transfer the case to the Tribe's jurisdiction, and the Tribe was subsequently permitted to intervene in the matter. The Tribe also filed a motion to transfer jurisdiction pursuant to the Indian Child Welfare Act (the ICWA).

At a hearing on February 9, 2011, there was testimony from a Lincoln police officer who was involved in the removal of the children from Mindy's home in December 2010 and testimony from Kathy Hohbein, a family permanency specialist who has worked with Mindy almost daily since the children's removal. Both of these witnesses testified that driving from Lincoln to the Yankton Sioux Tribal Court in South Dakota, a round trip taking approximately 10 hours, would pose an undue hardship, both personally and professionally. However, they each stated that they could testify telephonically and could make their written reports in the case available to the tribal court.

The ICWA director for the Tribe testified that the Tribe was not initially seeking to transfer jurisdiction of the case, but that the persistence and adamancy of Mindy's family members resulted in his decision to act on behalf of the family to transfer jurisdiction to the Tribe. The ICWA director stated that the tribal court has, in the past, adjudicated cases based on telephonic testimony as well as written reports and photographs. However, he was unsure whether the Tribe had the power to subpoena Nebraska witnesses to appear in South Dakota.

Mindy testified that she had lived on the reservation in Yankton, South Dakota, when she was a young child. Neither of her children has ever lived on the reservation, although Melaya has visited relatives there and attended "powwows," "sun dances," funerals, and other ceremonies. Mindy has a

large number of extended family members living on the reservation that she described as a "good family support system." She testified that if the Tribe took jurisdiction of her children, she would move to the reservation to be near them, if necessary.

Following the hearing, the juvenile court denied the motions to transfer the case to the Tribe on the basis that forum non conveniens is a recognized reason to deny transfer. The court cited "those practical factors identified" in *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005), and stated that it was clear that those factors that make trial of the case easy, expeditious, and inexpensive require that the matter be heard in Lancaster County. Mindy timely appealed from this order.

## ASSIGNMENT OF ERROR

Mindy asserts that the juvenile court abused its discretion when it found good cause to deny her motion to transfer jurisdiction to the Tribe.

## STANDARD OF REVIEW

[1,2] A denial of a transfer to tribal court is reviewed for an abuse of discretion. *In re Interest of Leslie S. et al.*, 17 Neb. App. 828, 770 N.W.2d 678 (2009). 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 a judicial system. *Id.*

## ANALYSIS

Mindy argues that the juvenile court erred in denying the motions to transfer the proceedings to the tribal court. Both motions to transfer were filed a few weeks after the State filed its petition to adjudicate the children.

Neb. Rev. Stat. § 43-1504(2) (Reissue 2008) provides:

> In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian

> child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe, except that such transfer shall be subject to declination by the tribal court of such tribe.

[3,4] The party opposing a transfer of jurisdiction to the tribal courts has the burden of establishing that good cause not to transfer the matter exists. *In re Interest of Brittany C. et al., supra*. That a state court may take jurisdiction under the ICWA does not necessarily mean that it should do so, as the court should consider the rights of the child, the rights of the tribe, and the conflict of law principles, and should balance the interests of the state and the tribe. *In re Interest of Leslie S. et al., supra.*

The ICWA does not define "good cause," but the Bureau of Indian Affairs has published nonbinding guidelines for determining whether good cause exists. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (1979) (not codified), states in part:

> C.3. Determination of Good Cause to the Contrary
>
> (a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the [ICWA] to which the case can be transferred.
>
> (b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:
>
> (i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
>
> (ii) The Indian child is over twelve years of age and objects to the transfer.
>
> (iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
>
> (iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

> (c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

The juvenile court found good cause to deny the motions to transfer, citing *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005), in which the juvenile court's decision not to transfer a case to a tribal court was affirmed. In that case, the factors cited included forum non conveniens and the facts that the mother and the children were not living on the reservation when the petitions were filed and that the children had lived in Nebraska for most of their lives. The court in *In re Interest of Brittany C. et al.* also found that the transfer would not be in the children's best interests.

Upon our de novo review, we are unable to say that the juvenile court abused its discretion in denying the motions to transfer. One of the stated circumstances set forth in the nonbinding guidelines noted above is clearly present in this case, i.e., the evidence necessary to decide the case cannot be adequately presented without undue hardship to the parties or the witnesses. In determining whether the doctrine of forum non conveniens should be invoked, the trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process. *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992). In the instant case, although the police officer and Hohbein testified that they could present evidence telephonically, the record does not show that the Tribe has subpoena power over them or other Nebraska witnesses. Without such assurances, this court cannot say that the juvenile court abused its discretion in denying the motions to transfer the matter to the tribal court.

[5] In addition, the Nebraska Supreme Court has recognized that the ICWA "does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus." *In re Interest of Bird Head*, 213 Neb. 741, 750, 331 N.W.2d 785, 791 (1983). See, also, *In re Interest of C.W. et*

*al., supra.* The record in this case reveals that Melaya and Melysse have lived in Lincoln throughout their lives, although Melaya has visited the reservation a few times. Lincoln police officers received a report of possible neglect of the children, and when the officers arrived at Mindy's home, an apartment, they heard the children crying and screaming inside. When no one would answer the door, the officers obtained a key from the landlord and entered into the apartment. They found Mindy unconscious on a couch. Mindy was unresponsive even to painful stimuli and woke up only after medical help was summoned. She appeared to the officers to be under the influence of alcohol or drugs. The officers found "old food" on the floor throughout the apartment, "feces in the open toilet," beer cans and trash throughout the apartment, and the door to the electric oven open for heating the apartment despite the obvious danger to the children, who were ages 11 months and 4 years at the time.

Hohbein testified to Mindy's extreme hostility to her as she worked to provide services to the family. Hohbein stated that most telephone conversations ended with her informing Mindy that she would not tolerate being sworn at, to which Mindy responded at one point, "'Go ahead and hang up, you stupid fucking bitch.'" Hohbein stated that Mindy was being adversely affected by her relationship with a worker for the Indian Center, who told Mindy that she need not follow Hohbein's recommendations, referred to the Department of Health and Human Services as "baby snatchers," and believed that the soil and filth depicted in photographs of Mindy's apartment had been planted there by police officers.

Hohbein described a number of Mindy's accusations made against foster families housing the children, including an allegation of sexual abuse, all of which have proved unfounded. She stated that Mindy has been uncooperative with the alcohol and drug services being provided, because Mindy believes that once the Tribe takes jurisdiction, the children will be placed with her mother, and that "all can return to normal." However, the ICWA director for the Tribe testified that Mindy's mother has not been able to be approved for placement of the children because of her criminal history, as well as her inclusion on

a child abuse registry in Nebraska for abuse and neglect. He acknowledged that Melaya had been the subject of a neglect proceeding in 2007 which was transferred to the Tribe and which resulted in placement of Melaya with Mindy's mother and closure of the case. He admitted to being surprised when he later learned that Mindy's mother had immediately returned the child to Mindy.

The record in this case shows that Mindy had not lived on the reservation since she was a young child, that her children had never lived there, and that there was no evidence that the Tribe had the ability to subpoena Nebraska witnesses to appear in its proceedings. In addition to these factors, the record also shows it is in the children's best interests that jurisdiction of this case remain with the juvenile court.

## CONCLUSION

The ICWA does not change the cardinal rule that the best interests of the child are paramount. Based on the factors set forth in *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005), and our finding that it is in the children's best interests for jurisdiction to remain with the juvenile court, we find that the court did not abuse its discretion in denying the motions to transfer jurisdiction to the tribal court. Accordingly, we affirm the juvenile court's decision.

AFFIRMED.

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ROBERT C. KRUPICKA, APPELLANT, V.
VILLAGE OF DORCHESTER,
NEBRASKA, APPELLEE.

804 N.W.2d 37

Filed October 11, 2011. No. A-11-044.

1. **Eminent Domain: Proof.** A good faith attempt and failure to agree prior to the institution of condemnation proceedings must be alleged and proved, and must appear on the face of the petition.
2. ____: ____. The good faith requirement is in the nature of a condition precedent to the right to condemn and is satisfied by proof of an offer made in good faith with a reasonable effort to induce the owner to accept it.

3. **Eminent Domain: Trial: Damages.** If there is an issue between the parties as to whether good faith negotiations took place before condemnation proceedings began, that issue should be tried to the court and determined as a preliminary matter before proceeding to trial on the matter of damages.
4. **Eminent Domain: Appeal and Error.** An appeal from the district court's determination that good faith negotiations occurred prior to the filing of a condemnation petition presents a mixed question of law and fact.
5. **Eminent Domain: Jurisdiction.** Statutory provisions requiring good faith attempts to agree prior to institution of condemnation proceedings are jurisdictional, and objection based on the failure of the record to show that the parties cannot agree may be raised at any time by direct attack.
6. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court; however, findings as to any underlying factual disputes will be upheld unless clearly erroneous.
7. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues.
8. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
9. **Eminent Domain: Final Orders.** Condemnation is a special statutory proceeding.
10. **Eminent Domain.** Condemnation proceedings are void in the case no attempt to agree occurs.
11. ____. Failure to engage in good faith negotiations is a complete defense to the condemnation of one's land.
12. **Eminent Domain: Final Orders: Appeal and Error.** An order finding that good faith efforts were made prior to the condemnation of one's land affects a substantial right and is thus final and appealable under Neb. Rev. Stat. § 25-1902 (Reissue 2008).
13. **Eminent Domain.** Pursuant to Neb. Rev. Stat. § 76-704 (Reissue 2009), if any condemnee fails to agree with the condemnor with respect to the acquisition of property sought by the condemnor, a petition to condemn the property may be filed by the condemnor in the county court of the county where the property or some part thereof is situated.
14. ____. In order to satisfy the statutory requirement set forth in Neb. Rev. Stat. § 76-704.01(6) (Reissue 2009), there must be a good faith attempt to agree, consisting of an offer made in good faith and a reasonable effort to induce the owner to accept it.
15. **Intent: Words and Phrases.** Good faith is a state of mind consisting of honesty in belief or purpose and the absence of intent to defraud.
16. **Eminent Domain: Contracts.** It is not necessary that a good faith offer made as a prerequisite to a condemnation proceeding be made in such a way that if it is accepted by the landowner, a binding contract is thereby effected.

Appeal from the District Court for Saline County: VICKY L. JOHNSON, Judge. Affirmed.

William G. Blake and Jarrod P. Crouse, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Mathew T. Watson, of Crosby Guenzel, L.L.P., and David A. Jarecke, of Blankenau Wilmoth, L.L.P., for appellee.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

In this appeal, the primary issue is whether the Village of Dorchester, Nebraska (Village), satisfied the prerequisite for the institution of a condemnation action by having previously engaged in good faith negotiations with the landowner, Robert C. Krupicka, with respect to the taking of 37.11 acres of his land by the power of eminent domain. After our review of the record, we find that the district court did not err when it found that good faith negotiations occurred, and thus we find Krupicka's appeal of that decision to be without merit. Pursuant to our authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), we have ordered this case submitted for decision without oral argument.

## FACTUAL BACKGROUND

Krupicka is the owner of a 160-acre farm located near Dorchester, which Krupicka uses for custom farming. The Village owns a mechanical wastewater treatment plant adjacent to the northeast portion of Krupicka's land. The land on which the plant is located was apparently obtained by the Village via a previous condemnation action against Krupicka.

On October 8, 2008, the clerk of the Village contacted Krupicka by letter to notify him that the Village had been ordered by the State of Nebraska to alter the current wastewater treatment facility to meet current federal and state standards. The letter recites:

> Please be advised that the Village . . . has determined that the ideal location for these upgrades is on the ground where the current facility is located. This land is located at

> the intersection of County Roads 1450 and E, Dorchester, Nebraska, more specifically described as the Northwest Quarter of Section 29, Township 8, Range 3, Dorchester, Saline County, Nebraska.
>
> At this time, the Village . . . is interested in entering into negotiations with you regarding the purchase of more land at that location. While the Village has certain requirements with regard to size and shape, it certainly can make accommodations in an attempt to make the necessary land purchase as convenient for you as possible.

The legal description provided in the letter is for Krupicka's entire 160-acre parcel, not a specific part thereon.

On October 17, 2008, Krupicka met with the Village's attorney, Scott Gropp, about the acquisition of a portion of his 160-acre parcel for the expansion of the Village's wastewater treatment facility. The Village intended to build several lagoons on land contiguous to the existing mechanical plant to treat wastewater in compliance with government regulations. Gropp sent a letter to Krupicka dated October 21, 2008, in which he responded to various questions he had been unable to answer at the October 17 meeting, most of which required input from the project engineers, JEO Consulting Group, Inc. (JEO). He also offered to discuss compensation for the removal of "core" samples from the northeast portion of Krupicka's land, next to the existing plant, to determine the feasibility of building the lagoons in that proposed location.

On December 31, 2008, Gropp sent Krupicka another letter, stating that after further research, the Village had determined that Krupicka's land was in fact the appropriate location for the wastewater treatment lagoons. In this letter, Gropp explained that he had been authorized by the Village to enter into negotiations for the acquisition of a portion of Krupicka's land. The letter recites:

> As we have discussed in our previous conversations, we are interested in acquiring 40 acres of your land located at [legal description of entire 160-acre parcel]. . . .
>
> The Village . . . is tendering an offer of $2200.00 per acre of land. If this is not acceptable, you may contact me to discuss price and specific land configurations to make

> the acquisition as convenient as possible for you and your remaining ground in that section.
>
> Please respond to me by January 10, 2009 . . . . Should you choose not to respond, I will consider that a refusal of our offer and will begin proceedings to acquire the land through the [Village's] eminent domain rights under the laws of the State of Nebraska.

We note that the exact number of acres desired by the Village is not included in the letter.

Gropp received a telephone call from Barry Hemmerling in early January 2009 indicating that Krupicka had obtained him as legal counsel. Hemmerling told Gropp that Krupicka was unhappy with the proposed layout for the lagoons and asked whether the plan could be adjusted. Hemmerling testified in a deposition, received at trial, that the plan Krupicka originally received was a 40-acre, four-lagoon system adjacent to the existing plant and north of a creek that runs across Krupicka's property. Gropp suggested they meet directly with the JEO project manager to discuss alternative plans, which they did. The first meeting occurred on January 22, 2009. At that meeting, the project manager explained to Krupicka that the necessary water surface area for the lagoons required a land acquisition in the 35- to 40-acre range and told him that there was a September 1 deadline for a final design. Krupicka expressed concern with being able to use a pivot irrigator on his land near the location of the lagoons, as well as other farming issues. At the second meeting, held on February 3, 2009, Krupicka suggested that the lagoons be moved from the northeast portion of his land to the south side of the creek located on his parcel.

The superintendent of sewer, water, and electrical for the Village, Edward Dvorak, was involved with creating alternative lagoon designs to accommodate Krupicka's suggestions and concerns. Dvorak testified that Krupicka "was always wanting to change the design or go to a different area or totally forget about the lagoons and go to a mechanical plant" and that he was "very resistant to having these lagoons placed on his property."

On March 13, 2009, Gropp sent a letter to Hemmerling that contained several enclosures from JEO, including a letter summarizing the problems with locating the lagoon system anywhere other than the north side of the creek. He also enclosed two alternative design layouts produced as a result of their meetings. The letter from JEO recites in part: "Relocation of the proposed lagoon cells to the south of the existing creek is not recommended by our office [and] would not be feasible for the community without incurring excessive costs." The alternative designs enclosed in the letter, which were received into evidence as exhibits 20 and 21, each depict a four-lagoon system in the same approximate part of Krupicka's land as initially proposed—adjacent to the existing wastewater treatment plant and to the north of the creek. The following text appears in the bottom left-hand corner of exhibits 20 and 21: "NOTE: DIMENSIONS ARE APPROXIMATE & WILL VARY. AREA SHOWN = 35.0 ACRES." A third alternative design, received at trial as exhibit 22, was presented to Krupicka at some point thereafter. It depicts a four-lagoon system in approximately the same location as the other two designs. The text in the lower left-hand corner of exhibit 22 states: "NOTE: DIMENSIONS ARE APPROXIMATE & WILL VARY. AREA SHOWN = 36.7 ACRES."

In a letter dated March 25, 2009, Hemmerling wrote to Gropp:

> After considerable consideration, [Krupicka] has decided that if the only option is to place the lagoons on the north side of the creek[,] he wants them placed in the northeast corner.
>
> I believe the Village has previously offered the sum of $2,200 an acre for the land it wishes to take. That offer is hereby rejected and [Krupicka] would counter with an offer of $10,000 per acre.

Gropp sent a letter to Hemmerling, dated April 15, 2009, rejecting Krupicka's $10,000-per-acre offer and countering with an offer of $3,650 per acre "for the land in the northeast quarter of . . . Krupicka's land."

In a letter dated June 18, 2009, Hemmerling informed Gropp that Krupicka wanted to negotiate directly with Gropp and the Village. Gropp was given permission to contact Krupicka directly from then on, although Hemmerling asked, as a courtesy, to be sent a copy of any future communication in the matter. Krupicka testified at trial that the reasons he wanted to negotiate directly with the Village were to speed up the negotiation process and to save money.

Krupicka attended at least two Village board meetings regarding the purchase of his land. One such meeting occurred on August 3, 2009. Krupicka was not on the agenda for that meeting, but he was allowed to speak. He said that he wanted to postpone the decision on the lagoons for another month or two because he was dissatisfied with the plans. Krupicka was told that was not possible due to the September 1 deadline, which he had been told of previously. The Village reiterated its offer of $3,650 per acre, which Krupicka refused, and he walked out of the meeting. The board then authorized the condemnation of approximately 37 acres of Krupicka's land.

Dvorak, who was present at the August 3, 2009, meeting, testified in the district court that the board discussed the 37.11-acre, three-lagoon plan that was ultimately implemented at that meeting, although he could not recall whether that conversation took place before or after Krupicka walked out. In any event, Gropp testified that he was "[a]bsolutely" certain the Village made an offer to Krupicka for approximately 37 acres and that there was no ambiguity as to the location of those 37 acres on Krupicka's land. Gropp testified that he presented Krupicka with an approximately 37-acre, three-lagoon drawing from JEO in late July 2009. Krupicka claims that he never received that document. Instead, he asserts that he received a 35-acre plan and that he was not made aware of the 37-acre plan prior to a September 4, 2009, board hearing, detailed below. Gropp was unable to produce the 37-acre, three-lagoon plan he testified that he gave to Krupicka in late July 2009, as will be discussed shortly.

The next correspondence in evidence is a letter from Gropp to Hemmerling, which contains an enclosed copy of the "Petition to Condemn Property and for Appointment of

Appraisers," filed in the county court for Saline County on August 7, 2009. The petition states that the Village had been presented with several options, including upgrading the existing wastewater treatment facility, but that after discussions with JEO, it determined that the most environmentally sound and cost-effective method was to proceed with a lagoon-type wastewater treatment facility on 37 acres of Krupicka's real property "adjacent to the existing treatment plant." The petition recites that the 37 acres would be located in a section of land legally described as follows: "All located in the Northwest Quarter (NE1/4), Section Seventeen (29), Township Eleven (8) North, Range Eighteen (3), Village of Dorchester, Saline County, Nebraska." The petition requests the county court to appoint three appraisers to view the property and ascertain the damage sustained by Krupicka. Three appraisers were duly appointed on August 14.

We note that the condemnation petition refers to "Attachment A," which purports to be a copy of the "most recent [37-acre] offer from the [Village to Krupicka]." Instead, attachment A is the April 15, 2009, letter from Gropp to Hemmerling discussed above, which contains the Village's $3,650-per-acre offer. Attachments B, C, and D are the alternative four-lagoon designs mentioned above and received into evidence as exhibits 20, 21, and 22. Gropp testified that at some point while he was drafting the petition, he realized the 37-acre, three-lagoon drawing was missing, and that he attempted, unsuccessfully, to locate it. Gropp testified on cross-examination that he could not find the drawing because he gave his only copy to Krupicka in July 2009 and that JEO was unable to reproduce the drawing for him. Gropp further testified that he determined through his legal research that he needed to only make a prima facie case to the county court that good faith negotiations were made. He concluded that the documents he attached to the petition—the letter and the three alternative designs from JEO—met that burden, and that thus, the final design did not need to be included.

At a hearing on September 4, 2009, the Village's final 37.11-acre plan, prepared by JEO on September 3, was provided to the appraisers and to Krupicka. The appraisers

viewed Krupicka's property and, according to the return of appraisers filed September 9, valued his damages at $160,000, or $4,311.51 per acre. The return of appraisers recites that the appraisers "did carefully inspect and view the property which is described in Exhibit 'A' attached hereto and incorporated herein by this reference." "Exhibit 'A'" is not attached, and the return of appraisers does not contain a legal description of Krupicka's condemned property.

On October 6, 2009, Gropp filed an amended petition which incorporates an exact legal description of the 37.11-acre parcel that was being condemned. In a letter to Krupicka sent on that same date, Gropp told Krupicka that he placed the required deposit of $160,000 with the Saline County Court. He also explained that the amended petition contains the final legal description presented to the appraisers at the September 4 hearing prior to viewing the land. The letter recites in part: "At the time of the original filing [on August 7, 2009], that particular legal [description] had yet to be determined as the survey results were not in yet." Why a legal description of the 37.11-acre property was not attached as exhibit A to the return of appraisers filed on September 9 is unclear, since the appraisers and Krupicka were provided with a copy of the final 37.11-acre drawing at the hearing on September 4.

After the condemnation petition was filed, Hemmerling assisted Krupicka in negotiations for a construction easement appurtenant to the lagoons. The negotiations did not specifically delineate the legal description of the easement, but Hemmerling did receive an aerial photograph of the proposed easement. In a letter dated March 2, 2010, Hemmerling informed Gropp that Krupicka would consent to a temporary construction easement for the sum of $8,500. On July 8, 2010, in exchange for consideration of $8,500, Krupicka signed a temporary construction easement that set forth a legal description of the easement.

## PROCEDURAL HISTORY

On October 9, 2009, Krupicka filed his notice to appeal from the return of appraisers. Pursuant to Neb. Rev. Stat.

§ 76-717 (Reissue 2009), the filing of the notice of appeal vested jurisdiction in the district court for Saline County. In his petition on appeal, filed November 24, Krupicka alleged that (1) the $160,000 appraisal of damages was inadequate and (2) the acquisition of his real property by the Village was invalid because there were not good faith negotiations prior to the commencement of condemnation proceedings.

Trial on the sole issue of good faith negotiations was held in the district court on November 23, 2010. At trial, Krupicka, Dvorak, and Gropp testified and a total of 32 exhibits were received into evidence. After the close of evidence, a briefing schedule was announced and the court took the matter under advisement. On December 16, 2010, the district court entered its order, in which it found that the Village entered into good faith negotiations with Krupicka prior to filing the condemnation petition. The order recites:

> Whether the missing 37 acre plan was given to Krupicka, or whether he was given a copy of a 35 acre plan in August, 2009, he was well aware that the Village wanted to purchase a 35-40 acre plot in the northeast corner of his [land]. While the land may not have been described in metes and bounds, due to the uncertainty over which plan would be selected and the exact acreage to be taken, Krupicka had fair notice of what the Village expected to take. It makes sense to delay incurring the expense of a survey until the exact parcel to be taken is determined.
>
> . . . The Village made Krupicka an offer in good faith, and undertook reasonable efforts to induce him to accept it. These efforts included the various changes in placement of the lagoon[s], switching from four to three [lagoons], and the development of three [alternative] plans for the lagoon[s]. . . . The fact that a contract was not presented does not defeat the Village's claim that it engaged in good faith negotiations. In fact, it is clear that the Village engaged in extensive, albeit unsuccessful, negotiations, with Krupicka before filing its petition to condemn.

Krupicka now appeals.

## ASSIGNMENT OF ERROR

Krupicka alleges that the trial court erred in finding that the Village engaged in good faith negotiations prior to filing its condemnation petition.

## STANDARD OF REVIEW

[1-3] A good faith attempt and failure to agree prior to the institution of condemnation proceedings must be alleged and proved, and must appear on the face of the petition. See, *Higgins v. Loup River Public Power Dist.*, 159 Neb. 549, 68 N.W.2d 170 (1955); Neb. Rev. Stat § 76-704.01(6) (Reissue 2009). This requirement is in the nature of a condition precedent to the right to condemn. *Moody's Inc. v. State*, 201 Neb. 271, 267 N.W.2d 192 (1978). The requirement is satisfied by proof of an offer made in good faith with a reasonable effort to induce the owner to accept it. *Id*. If there is an issue between the parties as to whether good faith negotiations took place before condemnation proceedings began, that issue should be tried to the court and determined as a preliminary matter before proceeding to trial on the matter of damages. See, *id.*; *Suhr v. City of Seward*, 201 Neb. 51, 266 N.W.2d 190 (1978).

[4-6] An appeal from the district court's determination that good faith negotiations occurred prior to the filing of a condemnation petition presents a mixed question of law and fact. Statutory provisions requiring good faith attempts to agree prior to institution of condemnation proceedings are jurisdictional, and objection based on the failure of the record to show that the parties cannot agree may be raised at any time by direct attack. See *Higgins v. Loup River Public Power Dist.*, 157 Neb. 652, 61 N.W.2d 213 (1953). The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court. *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010). However, findings as to any underlying factual disputes will be upheld unless clearly erroneous. *Collection Bureau of Grand Island v. Fry*, 9 Neb. App. 277, 610 N.W.2d 442 (2000).

## ANALYSIS

### *Did District Court's Determination Regarding Good Faith Negotiations Affect Krupicka's Substantial Right?*

[7] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues. *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006). The Village contends that we do not have jurisdiction to hear this appeal, because the district court's order deals with only the issue of good faith negotiations, not the matter of damages, and is thus not a final and appealable order under Neb. Rev. Stat. § 25-1902 (Reissue 2008).

[8,9] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998); § 25-1902. The Nebraska Supreme Court has specifically held that condemnation is a special statutory proceeding. *Webber v. City of Scottsbluff*, 155 Neb. 48, 50 N.W.2d 533 (1951). Therefore, since the challenged order arose in a special proceeding, the issue before us is whether the order affects a substantial right of Krupicka.

In *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 919, 573 N.W.2d 460, 463 (1998), the Nebraska Public Power District (NPPD) commenced condemnation actions in the county court for Fillmore County for the purpose of acquiring "'easement right-of-way'" over two tracts of land. The Sanitary and Improvement District No. 1 of Fillmore County, Nebraska (S.I.D. 1), claimed an interest in the land and was awarded two separate amounts for the parcels by the court-appointed appraisers. S.I.D. 1 appealed both awards to the district court for Fillmore County. In its amended petitions on appeal, S.I.D. 1 alleged in part that the subject parcels were public property over which NPPD had no authority to condemn. The district court consolidated this and other issues for

trial, but reserved the issue of the adequacy of the damages awarded to S.I.D. 1 by the appraisers. After a bench trial, the district court found that NPPD had the authority to acquire the two easements by the power of eminent domain under Neb. Rev. Stat. §§ 70-301 and 70-670 (Reissue 1996). (We note that § 70-301, then as now, recites that the "procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724" and, further, that under § 76-704.01(1) (1996), as well as the current version of that statute, a condemnation petition must contain a "statement of the authority for the acquisition.") S.I.D. 1 immediately appealed the district court's decisions to the Nebraska Supreme Court.

While those cases were pending, NPPD filed motions to dismiss for lack of jurisdiction based upon its contention that the orders of the district court were not final because of the pendency of other issues, including the matter of damages. In its examination of this jurisdictional issue, the Supreme Court's opinion recites:

> In a special proceeding, an order is final and appealable if it affects a substantial right of the aggrieved party. *City of Lincoln v. Twin Platte NRD*, [250 Neb. 452, 551 N.W.2d 6 (1996)]; *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993). A substantial right is an essential legal right, not a mere technical right. A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which the appeal is taken. *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996); *Jarrett v. Eichler, supra*. In this case, the orders from which the appeals are taken eliminated what S.I.D. 1 alleged to be a complete defense to condemnation, and thus affected a substantial right. Therefore, we conclude that we have jurisdiction to hear and determine these appeals under § 25-1902.

*SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. at 921, 573 N.W.2d at 465.

In the present case, Krupicka appealed the return of appraisers in the district court, alleging in his brief that (1) the

amount of damages was insufficient and (2) the Village failed to engage in good faith negotiations. Similar to S.I.D. 1, Krupicka's second allegation deals with one of the required components that must appear on the face of a condemnation petition, which he alleged did not occur, namely, "[e]vidence of attempts to negotiate in good faith with the property owner." See § 76-704.01(6) (Reissue 2009). In line with Nebraska Supreme Court cases which direct the issue of good faith negotiations to be tried to the bench separately from the issue of damages, see *Moody's Inc. v. State*, 201 Neb. 271, 267 N.W.2d 192 (1978), and *Suhr v. City of Seward*, 201 Neb. 51, 266 N.W.2d 190 (1978), the district court held a hearing on the sole issue of good faith negotiations and determined that such had occurred. Krupicka appealed from the district court's decision, despite the reservation of the issue of damages for a later trial.

[10-12] The requirement of good faith negotiations is mandatory and jurisdictional, and condemnation proceedings are void in the case no attempt to agree occurs. See, *Prairie View Tel. Co. v. County of Cherry*, 179 Neb. 382, 138 N.W.2d 468 (1965); *Higgins v. Loup River Public Power Dist.*, 159 Neb. 549, 68 N.W.2d 170 (1955). Thus, Krupicka's claim that the Village failed to engage in good faith negotiations would be a complete defense to the condemnation of his land. The order from which Krupicka appeals eliminated this complete defense to condemnation, and thus, under *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998), the order finding that good faith efforts had been made affected a substantial right. Accordingly, we have jurisdiction under § 25-1902 to hear his appeal.

*Did Good Faith Negotiations Occur Prior to Filing of Condemnation Petition?*

Krupicka's substantive allegation is that the district court erred when it determined that he and the Village had engaged in good faith negotiations. His argument is essentially that the Village never provided him with a valid offer because it failed to provide a legal description of the land to be condemned and that, consequently, the good faith negotiation requirement was

not satisfied. As such, he contends that the condemnation of his land is void and that the Village should be required to undertake efforts to negotiate in good faith. However, Krupicka does not seek the return of his land—the taking of the 37.11 acres has already occurred and the three-lagoon wastewater treatment facility has already been built, according to our record. His underlying desire in voiding the condemnation, which is conceded in his brief, is to receive greater compensation from the Village for the land that was taken.

[13-15] Under Neb. Rev. Stat. § 76-704 (Reissue 2009),

> [i]f any condemnee shall fail to agree with the condemner with respect to the acquisition of property sought by the condemner, a petition to condemn the property may be filed by the condemner in the county court of the county where the property or some part thereof is situated.

A condemnation petition must contain evidence of attempts to negotiate in good faith with the property owner. § 76-704.01(6). The Nebraska Supreme Court has said that the statutory requirement that a condemnor make a good faith offer and reasonably attempt to induce settlement is mandatory and jurisdictional. *Prairie View Tel. Co. v. County of Cherry, supra.* The condemnor's unsuccessful attempt to reach an agreement with the condemnee must be alleged and proved in the condemnation proceedings and must appear on the face of the record. *Id.* In order to satisfy this statutory requirement prior to the institution of condemnation proceedings, there must be a good faith attempt to agree, consisting of an offer made in good faith and a reasonable effort to induce the owner to accept it. *Id.* Good faith is a state of mind consisting of honesty in belief or purpose and the absence of intent to defraud. See Black's Law Dictionary 762 (9th ed. 2009).

In his brief, Krupicka argues that good faith negotiations never occurred, citing *Prairie View Tel. Co. v. County of Cherry*, 179 Neb. 382, 138 N.W.2d 468 (1965). In *Prairie View Tel. Co.*, the County of Cherry sought to condemn real estate owned by Edgar Grooms and Martin Grooms for the purpose of a county road. On motion, the district court dismissed the action on the ground that the county did not

attempt to agree with the Groomses by making a good faith offer and a reasonable attempt to induce them to accept said offer for the right-of-way in controversy. The county appealed to the Nebraska Supreme Court, which affirmed the judgment of the district court.

In its rather brief opinion, the *Prairie View Tel. Co.* court found that the only evidence in the record of negotiations between the parties was a letter sent by the Cherry County Board of Commissioners (Board) to the Groomses. In the letter, the Board referred to a prior request that the Groomses appear "'to negotiate the opening of the section lines between sections 31, 32, 30 and 29, Township 35, Range 26, for the purpose of building a public road.'" *Id.* at 384, 138 N.W.2d at 470. The letter continued, "'Since you failed to appear as requested, and the Board failed to find you home after making a trip to your residence, we submit the following offer as required by law . . . .'" *Id.* The county then offered the Groomses $3,000 "'for all damages.'" *Id.* The county never indicated what part of the Groomses' land it intended to take. Three weeks after the letter was written, the county passed a resolution to acquire an 82½-foot right-of-way across the Groomses' property, but that action was never communicated to the Groomses. Nothing further was done in the matter until the county filed its condemnation petition. Based on those facts, the Supreme Court held that "there was no offer made in good faith because the county never informed the [Groomses] as to the amount of land it was taking." *Id.* at 385, 138 N.W.2d at 470. We comment that the inadequacy of good faith efforts appears rather self-evident.

Clearly, *Prairie View Tel. Co.* is distinguishable from the case before us. Here, the Village indicated with reasonable clarity the amount of land, as well as its location, that it wanted to acquire. Throughout the negotiation process, the Village represented that it sought 35 to 40 acres in the northeast quarter of Krupicka's 160 acres, and a legal description of the applicable quarter section was provided. The exact design and location, which would determine the precise legal description, were matters about which the Village sought Krupicka's input, as well as offering reasonable accommodations. This

was still not finally determined by the Village at the time the condemnation petition was filed, due to ongoing negotiations with Krupicka and thus a delay in making a final survey. Nonetheless, Krupicka can hardly be heard to complain he was not fully aware that 35 to 40 acres in the northeast part of his quarter section were at issue—and that the exact amount of land would depend on the final design and survey thereof. We agree with the district court that "[i]t makes sense to delay incurring the expense of a survey until the exact parcel to be taken is determined."

Moreover, although there is a dispute over whether Krupicka received the final JEO drawing with the approximately 37-acre, three-lagoon plan the Village ended up using, the other three drawings Krupicka admittedly received are in evidence and they are in essentially the same location as the portion of Krupicka's land that was ultimately condemned. The first two drawings, exhibits 20 and 21, are for approximately 35 acres. On the bottom of each drawing, the following text is printed: "DIMENSIONS ARE APPROXIMATE & WILL VARY." The third drawing, exhibit 22, is for a 36.7-acre lagoon system, and the same text is printed on the bottom. The record also reveals that Krupicka was initially provided with a drawing depicting 40 acres with the lagoons at about the same location. Unlike the landowners in *Prairie View Tel. Co. v. County of Cherry*, 179 Neb. 382, 138 N.W.2d 468 (1965), the Village gave Krupicka a series of drawings evidencing quite precisely where the lagoons would be—and the variances between the various iterations of the drawings cannot be said to be material.

## CONCLUSION

[16] When the course of this proceeding is recalled, it appears to us that the actions of the Village in trying to reach an agreement are the epitome of good faith. The Village's numerous efforts at altering the design of the lagoons in order to address Krupicka's concerns are ample evidence that it attempted to induce Krupicka to accept its offer. It is important to note: "It is not . . . necessary that the offer be made in such a way that if it is accepted by the owner a binding contract is thereby

effected." 6 Julius L. Sackman, Nichols on Eminent Domain § 24.14[2] at 24-236 (3d ed. 2009). Thus, the district court's finding that the Village engaged in good faith negotiations with Krupicka was not clearly erroneous, and it is affirmed.

AFFIRMED.

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## IN RE INTEREST OF ETHAN M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. THERESA S., APPELLEE, AND DANIEL M., APPELLANT.

809 N.W.2d 804

Filed October 11, 2011. No. A-11-203.

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: Time.** Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not.
3. **Words and Phrases.** A substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover.
4. ____. A procedural right is simply the method by which an already existing right is exercised.
5. **Juvenile Courts: Parent and Child.** Except as provided in Neb. Rev. Stat. § 43-283.01(4) (Cum. Supp. 2010), reasonable efforts shall be made to preserve and reunify families prior to the placement of a juvenile in foster care to prevent or eliminate the need for removing the juvenile from the juvenile's home and to make it possible for a juvenile to safely return to the juvenile's home.
6. **Juvenile Courts: Parental Rights.** Once a plan of reunification has been ordered to correct the conditions underlying an adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), the plan must be reasonably related to the objective of reuniting the parents with the children.
7. **Juvenile Courts: Minors.** The purpose of the juvenile code is to serve the best interests of the juveniles who fall within it.

Appeal from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Judge. Reversed and remanded for further proceedings.

Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Joe Kelly, Lancaster County Attorney, and Jeremy Lavene for appellee State of Nebraska.

Jeri L. Grachek, Special Assistant Attorney General, of Department of Health and Human Services, for appellee State of Nebraska.

David P. Thompson, of Thompson Law, P.C., L.L.O., for appellee Theresa S.

Steffanie J. Garner Kotik, of Kotik & McClure Law, guardian ad litem.

IRWIN, CASSEL, and PIRTLE, Judges.

CASSEL, Judge.

## INTRODUCTION

Daniel M. appeals from a dispositional order of the juvenile court which continued legal custody of Daniel's child with the Nebraska Department of Health and Human Services (DHHS), continued physical custody of the child with the child's mother, and provided no means to help Daniel reunify with the child. Because the case plan adopted by the court was not reasonably related to the objective of reuniting Daniel with his son, we reverse, and remand for further proceedings.

## BACKGROUND

This juvenile case is before us for the fifth time. Ethan M., born in January 2000, is the child of Daniel and Theresa S. Following the dissolution of Daniel and Theresa's marriage in 2002, a California court awarded Daniel custody of Ethan. In January 2005, DHHS removed Ethan from Daniel's home in Nebraska and placed him into foster care. The county court for Sherman County, Nebraska, subsequently adjudicated Ethan as a result of allegations that other children residing within the home had suffered injuries. In January 2006, the court approved an immediate change of Ethan's placement from the home of his paternal grandparents to the home of Theresa in California. Daniel appealed, and in *In re Interest of Ethan M.*, 15 Neb. App. 148, 723 N.W.2d 363 (2006), we found that the State must make reasonable efforts to reunify Ethan and Daniel.

We recognized that under the California divorce decree, Daniel was Ethan's custodial parent. We concluded that Ethan should not be placed in California with Theresa and that he should be placed in a situation in Nebraska that was conducive to reunification with Daniel. We observed that Daniel had complied with all tasks required by the case plan.

DHHS did not return Ethan's custody to Daniel. Rather, Ethan's physical custody remained with Theresa, who moved to Nebraska. In June 2007, Daniel began having weekly supervised visitation with Ethan. But in August, the visitation was changed to therapeutic visitation supervised by a mental health professional. In September, visitation ceased due to the unavailability of a mental health professional to supervise the visitation. DHHS arranged for telephone calls between Ethan and Daniel on Tuesdays and Thursdays, but Ethan often ended the calls quickly or refused to speak. In February 2009, the county court for Sherman County adopted DHHS' case plan which continued telephonic visitation only, found that reasonable efforts to reunify Ethan and Daniel were not necessary, placed custody of Ethan with Theresa, and dismissed the juvenile case. Upon Daniel's appeal, we found plain error in the court's order. In *In re Interest of Ethan M.*, 18 Neb. App. 63, 72, 774 N.W.2d 766, 773 (2009), we held that "where the only issue placed in front of the county court is whether a case plan is in the child's best interests, permanent child custody cannot be modified merely through the adoption of the case plan." We stated, however, that "a case plan could be used to place a child with a noncustodial parent as a dispositional order under the continuing supervision of the juvenile court." *Id.* We reversed the county court's order and remanded the cause for further proceedings.

In February 2010, the county court for Sherman County granted a motion to transfer the case to the separate juvenile court of Lancaster County, Nebraska, because Ethan was residing with Theresa in Lancaster County.

On April 22, 2010, the juvenile court held a hearing. It received a court report prepared April 21, which contained a section detailing the family's prior "service interventions." The report stated that Ethan was not having any contact with

Daniel. Ethan's therapist, Laurie Patton, reported that the last therapeutic telephone conversation between Ethan and Daniel occurred on February 10, 2009. According to the report, Patton did not recommend face-to-face visitation between Daniel and Ethan because of Ethan's "trauma and being 'safe from his dad'. Examples include Ethan's want for having a safety plan in case his father showed up at therapy and having to constantly check the locks on the doors and windows at night." The caseworker opined that "no statement on progress can be made at this time due to the circumstances of the re-opening of this case." The report recommended that Ethan's physical custody remain with Theresa and that his legal custody be returned to her. The case plan contained no goals for Daniel.

Ethan's guardian ad litem recommended in a report that Daniel, Theresa, and Ethan participate in updated evaluations in order to determine whether beginning contact between Daniel and Ethan was in Ethan's best interests.

Katie Adrian, the caseworker assigned to the case since February 26, 2010, had not met or attempted to communicate with Daniel prior to meeting him in the lobby the day of the instant hearing. DHHS had closed Ethan's case after entry of the February 2009 order purporting to transfer custody to Theresa and dismissing the case. Adrian believed that DHHS had made reasonable efforts since reopening Ethan's case on February 11, 2010, but she did not know why DHHS made no efforts following the October 13, 2009, release of this court's decision. She admitted that the current case plan did not recommend any services for Daniel.

Adrian was aware that Daniel had previously engaged in individual therapy, but she was not aware of his satisfactory completion of the therapy. The court received a discharge summary from Daniel's former therapist. According to the exhibit, on December 19, 2007, the therapist discharged Daniel from therapy because "Daniel has attained all of the goals outlined in his treatment plan." The document stated that Daniel

> made steady and consistent progress relative to the attainment of the following goals: 1. Identification and appropriate expression of emotions; 2. Acquisition of effective parenting skills; 3. Developing appropriate and

> effective response to any marital discord related to ongoing legal case; 4. Stress Management; 5. Development of effective coping skills.

It further stated that "[i]t was impossible to work with Daniel on parenting issues due to the fact that this therapist was only allowed to observe Ethan and Daniel interact during two visitations, one of which was Ethan's last visit with Daniel before being placed in California." Adrian believed that after Daniel was apparently successfully discharged by his former therapist, he continued to participate in individual therapy with a different therapist. Adrian did not see anything in the case file noting a successful discharge from that therapy.

Adrian testified that Ethan had not seen Patton since March 17, 2009. Adrian testified that DHHS believed that Ethan should participate in a pretreatment assessment to determine whether contact with Daniel would be appropriate. Adrian testified that DHHS recommended that Ethan's physical custody remain with Theresa because he had been in her care since 2006 and Theresa had shown that she can care for him well, both physically and financially. Adrian believed it was in Ethan's best interests to continue in Theresa's care. She testified that DHHS did not have a recommendation regarding Ethan's contact with Daniel because a pretreatment assessment needed to be done in order to determine what a therapist believed would be the best contact. DHHS was not recommending any contact between Ethan and Daniel until an evaluation was done. Adrian did not believe that Ethan's having contact with Daniel was in Ethan's best interests.

On June 7, 2010, the juvenile court held a further hearing to receive evidence. It received an addendum to a court report, which was prepared June 4. According to the addendum, Adrian performed a home visit on May 6 and met privately with Ethan. When Adrian asked Ethan how he felt about visiting Daniel, Ethan responded, "'He can drop dead.'" Adrian also communicated with Patton to determine whether a pretreatment assessment to determine visitation would be in Ethan's best interests. According to Adrian, Patton thought that "'there would be an increase in Ethan's negative behaviors if Ethan thought visits with his dad were pending'" and that "'the [pretreatment

assessment] could have a negative effect on Ethan based on the dr[e]dging up of past history of trauma and a possibility of increased behaviors.'" Thus, DHHS took the position that a pretreatment assessment for Ethan was not in his best interests. Adrian reported that Patton told her that it was not in Ethan's best interests to have contact with Daniel until Ethan was ready to do so.

The court also received as an exhibit testimony of Patton from a prior hearing held on January 22, 2009. According to that testimony, Patton had last spoken with Ethan 2 days prior to the hearing. Patton testified that Ethan was not interested in having visits with Daniel and that Ethan said it would "'make things worse. A lot, lot worse.'" Patton testified that Ethan said he did not want telephone calls because they would make things "a little worse" and that it made him uncomfortable to speak with Daniel. Ethan told Patton that "maybe a letter would be okay." At that hearing, Patton recommended that telephone calls between Daniel and Ethan "terminate for a period of time." Patton considered whether Theresa was alienating Ethan from Daniel. She testified that after the longest telephone conversation between Ethan and Daniel, "Ethan wanted to immediately run out and tell his mom that he had spoken to his dad. So I think that Ethan feels that he might be disloyal to his mom if he talks to his dad." Patton testified that Ethan seemed unable to move forward and that she felt he needed a break from his weekly contact with Daniel in order to address "those trauma issues that he reports having." Patton recommended that Ethan go 1 year without contact with Daniel so that "he can be at the point where he can have a[n] apology session and be able to deal with his feelings of being in the same room with Dan[iel]."

On July 2, 2010, the juvenile court held another hearing. Daniel testified that he was Ethan's primary caretaker from the time Ethan came home from the hospital after birth until the time DHHS removed him in 2005. Daniel described his "bonding relationship" with Ethan as "very strong." He explained that since his divorce from Theresa, when he was awarded custody of Ethan, Ethan "went everywhere with [Daniel]." Daniel testified that Theresa had one visit with

Ethan from the time of the divorce in 2001 or 2002 until the time that DHHS became involved in 2005. Daniel testified that when DHHS became involved, Ethan was initially placed with Daniel's parents for approximately 1 year to 18 months and that Daniel had supervised visits Monday through Friday which went well. In 2006, DHHS moved Ethan to live with Theresa in California and stopped all visits with Daniel. After a decision of this court, DHHS moved Theresa and Ethan to Lincoln, Nebraska. Daniel lives 165 miles away in Loup City, Nebraska, which is a 3-hour drive from Lincoln. After Ethan and Theresa returned to Nebraska, Ethan had one supervised visit with Daniel in Loup City and a session with a psychologist. Daniel testified that there were no more supervised visits "[b]ecause [D]HHS refused to allow them to happen. There was some sporadic telephone conversations, phone calls between me and Ethan while Ethan was at his therapist's office, but that was very sporadic." Daniel felt that Theresa was "turning [Ethan] against [Daniel] to not like [Daniel]." Daniel testified that Ethan had a good relationship with him when Ethan lived with him and that "[e]ven once he was removed from me we were having supervised visits from a neutral third party and it continued, our bond, our relationship, he wanted to see me, he wanted to come home and live with me again." He testified that no one from DHHS had been to his home nor had he had any telephone conversations with Adrian. Daniel testified that DHHS had told him that he cannot communicate with Theresa or Ethan.

Daniel's mother testified that Ethan had one visit with Theresa during the time that Ethan lived with Daniel's parents. She testified that Ethan had behavioral problems when he returned and that he said things such as "my mom says you guys are mean" and "my mom says that I'm better off with her because you guys don't love me."

Theresa testified that Ethan told her that he did not want to see Daniel. She denied saying things to Ethan in the nature of his not having a relationship with Daniel. Theresa believed that Ethan had some unresolved emotional conflict with Daniel. She believed it would be in Ethan's best interests to have contact with Daniel with the supervision of a therapist.

On July 7, 2010, the court held a continued hearing. Adrian testified that DHHS was not providing any services to Daniel. She acknowledged that Daniel had told her of his desire to have visitation with Ethan and to perform any services necessary to correct the conditions that led to the adjudication. She testified that Ethan had not been in therapy since March 2009 and that the only service being offered to him was a monthly home visit. Adrian testified that when she spoke with Ethan in early June 2010 about Daniel, Ethan was "very hostile about having any type of contact with his father at that time." Adrian testified that DHHS recommended no contact between Ethan and Daniel based on Patton's recommendation. She elaborated that if Ethan's feelings toward Daniel never change, then DHHS' position would be that those visitations never occur. Adrian testified that Patton stated Ethan should not be forced to see Daniel until Ethan was ready to do so. According to Adrian, DHHS was doing nothing to help prepare Ethan to see Daniel.

On February 9, 2011, the juvenile court entered an order of review which approved DHHS' case plan. The court found that Ethan's legal custody should continue with DHHS and that Ethan's physical custody should remain with Theresa. It found that reasonable efforts had been made to prevent or eliminate the need for removing Ethan from his home and that the primary permanency plan was family preservation with an alternative plan of reunification. The juvenile court stated that there had been no evidence to overcome the presumption that DHHS' recommendations were in Ethan's best interests.

Daniel timely appeals.

## ASSIGNMENTS OF ERROR

Daniel alleges that the juvenile court erred in (1) finding that reasonable efforts have been made to prevent or eliminate the need for removing Ethan from Daniel's home and in failing to order services reasonable and necessary to rehabilitate Daniel, (2) finding that there was no evidence presented that would overcome the presumption that DHHS' recommendations were in Ethan's best interests, (3) failing to find that Daniel had completed all services recommended

to reunify him with Ethan, and (4) failing to allow visitation with Daniel.

## STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

## ANALYSIS

*Amendment to Statute.*

First, we observe that there has been a change in a statute within the Nebraska Juvenile Code since the time of the juvenile court's order. Neb. Rev. Stat. § 43-285(2) (Cum. Supp. 2010) granted a juvenile court discretionary power over a recommendation proposed by DHHS, but it granted preference in favor of such proposal, and in order for the juvenile court to disapprove of DHHS' proposed plan, a party had to prove by a preponderance of the evidence that DHHS' plan was not in the child's best interests. See *In re Interest of Sarah L. et al.*, 17 Neb. App. 203, 758 N.W.2d 48 (2008). On May 4, 2011, the Governor approved 2011 Neb. Laws, L.B. 648, which amended § 43-285(2) to strike the following sentence: "If any other party, including, but not limited to, the guardian ad litem, parents, county attorney, or custodian, proves by a preponderance of the evidence that the department's plan is not in the juvenile's best interests, the court shall disapprove the department's plan." The Legislature adjourned sine die on May 26, 2011, and L.B. 648 took effect 3 months later. See, L.B. 648; Neb. Const. art. III, § 27. In the juvenile court's order, it found that there had been no evidence to overcome the presumption that DHHS' recommendations were in Ethan's best interests. The guardian ad litem asserts that L.B. 648 removed the presumption that DHHS' plan was in the best interests of the child such that Daniel is no longer required to prove that the plan was not in Ethan's best interests.

[2-4] Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not. *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 698 N.W.2d 58

(2005). This is because a substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. *Id.* A procedural right is simply the method by which an already existing right is exercised. *Id.* The amendment here does not create a new right or remedy; rather, it alters the way an existing right is exercised. See *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001) (substantive law creates duties, rights, and obligations, whereas procedural law prescribes means and methods through and by which substantive laws are enforced and applied). We conclude the amendment was procedural and is thus applicable to this case. Under the amendment, the State has the burden of proving that a case plan is in the child's best interests.

*Reasonable Efforts.*

Daniel argues that the juvenile court erred in finding that reasonable efforts had been made to prevent or eliminate the need for removing Ethan from his home. We agree. DHHS' position, which the juvenile court's order adopted, essentially attempts to redefine Ethan's "home" to be that of Theresa. However, the home that Ethan was removed from was that of Daniel.

[5] Neb. Rev. Stat. § 43-283.01(2) (Cum. Supp. 2010) states:

> Except as provided in subsection (4) of this section, reasonable efforts shall be made to preserve and reunify families prior to the placement of a juvenile in foster care to prevent or eliminate the need for removing the juvenile from the juvenile's home and to make it possible for a juvenile to safely return to the juvenile's home.

Under § 43-283.01(4), reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that certain circumstances exist. Although the county court for Sherman County found that DHHS was not required to make reasonable efforts to reunify Ethan with Daniel, this court reversed that determination in *In re Interest of Ethan M.*, 15 Neb. App. 148, 723 N.W.2d 363 (2006), noting that Daniel was not the parent of the other children in the home and that there was not clear and convincing evidence of

aggravated circumstances on Daniel's part. Upon remand, the county court for Sherman County again determined that reasonable efforts to reunify were no longer necessary, but in *In re Interest of Ethan M.*, 18 Neb. App. 63, 774 N.W.2d 766 (2009), we found plain error in the county court's order and therefore reversed the order. Thus, there is not a valid order from a court of competent jurisdiction which excuses reasonable efforts to preserve and reunify the family.

In contrast with the earlier appealed orders, the order at issue in this case did not find that reasonable efforts were excused. Rather, the separate juvenile court found that reasonable efforts were made to prevent or eliminate the need for removing Ethan from Theresa's home. We recognize that Theresa's right to custody of Ethan was not extinguished by the divorce decree. See *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996) (placement of child in custody of one parent as opposed to other in divorce action does not extinguish noncustodial parent's right to custody, nor does it constitute adverse determination of fitness of noncustodial parent in that or other proceedings). And as we pondered in *In re Interest of Stephanie H. et al.*, 10 Neb. App. 908, 926, 639 N.W.2d 668, 682 (2002), "[W]hat better and more straightforward method of preserving families could there be, in circumstances such as this, than placement of the children with a fit and willing parent, even if that parent had previously been a noncustodial parent in a divorce."

[6] DHHS has not ended its responsibility in this case by placing Ethan's physical custody with Theresa. Although the primary permanency plan ordered by the juvenile court was family preservation, the juvenile court included an alternative plan of reunification. But there are no services or goals in place for Daniel to work toward reunification. In fact, as of the July 7, 2010, hearing, the only "service" being provided was Adrian's having monthly visits with Ethan. "Unless the provisions in a case plan 'tend to correct, eliminate, or ameliorate the situation or condition on which the adjudication has been obtained,' a court-ordered plan 'is nothing more than a plan for the sake of a plan, devoid of corrective and remedial measures.'" *In re Interest of Mainor T. & Estela T.*, 267 Neb.

232, 254, 674 N.W.2d 442, 461 (2004). Remembering that Ethan was removed from Daniel's home and not Theresa's, a case plan that has no goals or services for Daniel does not correct, eliminate, or ameliorate the situation that led to Ethan's adjudication and removal from Daniel's home. "Once a plan of reunification has been ordered to correct the conditions underlying the adjudication under § 43-247(3)(a), the plan must be reasonably related to the objective of reuniting the parents with the children." *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 163-64, 655 N.W.2d 672, 685 (2003). The case plan here does nothing to help Daniel be reunited with Ethan.

In *In re Interest of Mainor T. & Estela T., supra*, a trial court stated that reunification was contrary to the children's welfare and that reasonable efforts to reunite the family were not made because reasonable efforts were not possible, but the court's written order determined that reunification was the most appropriate permanency objection. The case plan did not contain any rehabilitative goals or tasks related to reunification or to contacting the children's mother. On appeal, the Nebraska Supreme Court determined that, among other problems, the trial court's approval of a permanency objective of reunification without any means for the mother to achieve that goal and without any requirement that DHHS make reasonable efforts to provide services toward that objective was fundamentally unfair. Similarly, in the instant case, the juvenile court ordered an alternative plan of reunification but there is no way for Daniel to achieve that goal when DHHS is not making any reasonable efforts to provide services or to even allow visitation. As the Nebraska Supreme Court has observed, "dispensing with reasonable efforts at reunification frequently amounts to a substantial step toward termination of parental rights." *In re Interest of Jac'Quez N.*, 266 Neb. 782, 789, 669 N.W.2d 429, 435 (2003). We conclude that we must once again reverse the juvenile court's order and remand the cause for further proceedings.

[7] We recognize the purpose of the juvenile code is to serve the best interests of the juveniles who fall within it. See *In re Interest of Tegan V.*, 18 Neb. App. 857, 794 N.W.2d 190 (2011). Although we conclude that DHHS should immediately obtain

updated assessments of Daniel and Ethan and devise rehabilitative goals to facilitate a future reunification between them, any such action must bear in mind Ethan's best interests.

## CONCLUSION

We conclude that the juvenile court erred in adopting a case plan that provided an alternative permanency objective of reunification with Daniel where DHHS did not provide any rehabilitative goals or tasks for Daniel. Accordingly, we reverse the order and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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ROBERT SCHNEIDER, APPELLEE, V. ALBERT LAMBERT, DOING BUSINESS AS LAMBERT INVESTMENTS, L.L.C., APPELLANT.

809 N.W.2d 515

Filed October 18, 2011. No. A-10-883.

1. **Justiciable Issues.** Justiciability issues that do not involve a factual dispute present 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. **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.
4. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
5. **Courts: Jurisdiction.** Although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power.
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. **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.

8. ____. 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.
9. **Collateral Estoppel.** Issues that were actually litigated and decided, but were not necessary to the final outcome of the case, are not subject to collateral estoppel in a future case.
10. **Collateral Estoppel: Res Judicata: Proof.** For application of the doctrines of collateral estoppel or res judicata, the party relying on either of those principles in a present proceeding has the burden to show that a particular issue was involved and necessarily determined in a prior proceeding.

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

Brian S. Kruse and Tara L. Tesmer, of Rembolt Ludtke, L.L.P., for appellant.

Bradley A. Sipp for appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

CASSEL, Judge.

## INTRODUCTION

After a bench trial, the district court entered judgment determining that a promissory note was Albert Lambert's personal obligation but dismissing the case because the note's holder failed to meet his burden of proof to show that there had not been an effective cure of the original notice of default. The sole issue raised on appeal is whether Lambert signed the promissory note in his personal capacity or merely as the representative of a limited liability company. Because we conclude that the court's determination regarding Lambert's liability was mere surplusage and that the case is moot, we dismiss the appeal.

## BACKGROUND

Robert Schneider made a loan evidenced by a promissory note. In the body of the note, the maker was stated as "**Lambert Investments**, Promisor," and at the bottom of the note and below the signature line appeared the typewritten words "Lambert Investments, Albert Lambert, Promisor."

Lambert's signature, without any other notation, appeared above the signature line.

Schneider subsequently filed a complaint against Lambert, doing business as Lambert Investments, L.L.C., alleging that Lambert had failed to make payments on the note despite Schneider's written notice of Lambert's default on the note and Lambert's failure to cure the default. Schneider prayed for judgment against Lambert of $60,000 with interest in accordance with the note. Lambert's amended answer denied the allegations of the complaint regarding the promissory note and specifically alleged that the note was between Schneider and Lambert Investments.

Following a bench trial, the district court entered a written decision making extensive findings and dismissing Schneider's complaint. In this decision, the court found that Schneider had failed to prove the existence of an uncured default on the note. As part of the same decision, the court also determined, based on extensive findings of fact and conclusions of law, that Lambert was personally liable on the note.

Lambert timely appeals.

## ASSIGNMENT OF ERROR

On appeal, Lambert assigns only that the district court erred in finding as a matter of law that Lambert was personally liable for the obligation under the note. Lambert makes no assignment of error regarding the court's finding concerning the failure of proof of an uncured default, and Schneider does not cross-appeal this finding.

## STANDARD OF REVIEW

[1,2] Justiciability issues that do not involve a factual dispute present a question of law. *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010). An appellate court resolves questions of law independently of the determination reached by the court below. *Id.*

## ANALYSIS

The district court's ultimate judgment presents a question of justiciability in that the district court's decision turned on whether an uncured default had been proved and not on

Lambert's personal liability on the instrument. The district court first determined that Lambert was personally liable on the promissory note after determining that his signature did not unambiguously show that it was made in a representative capacity. The court then stated, "Despite the findings and conclusions above, the case ultimately turns on one issue the court now addresses—whether the default was cured." Ultimately, the court dismissed the case after finding that Schneider failed to meet his burden of proof to show that there had not been an effective cure of the original notice of default. Neither party takes issue with this aspect of the court's decision.

[3-6] The circumstances of the court's actual judgment and the issue asserted on appeal require us to consider the legal principles applicable to justiciability. A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement. *Wetovick v. County of Nance, supra*. 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. *Id.* A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009). Although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power. *Id.* 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. *Id.*

[7,8] Because of these circumstances, we conclude that the instant appeal is moot. Schneider commenced suit on May 19, 2009, because Lambert purportedly had defaulted on the note and failed to cure the default after being sent a 30-day notice of default on April 6. 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. *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010). After giving notice of default, Schneider received additional payments through November 2009. Schneider did not send another default letter or a 90-day acceleration notice as provided in the note. 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. *Id.* In dismissing the case, the district court found that there was no uncured default—a finding that has not been appealed. Thus, we cannot provide the parties meaningful relief, particularly when the circumstance that led to the suit does not appear to exist.

In response to our preargument request for supplemental briefing on the question of mootness, Lambert filed a response arguing that the matter was not moot because of the potential that the district court's finding of Lambert's personal liability on the note would be given issue-preclusive effect in future litigation. Although Schneider did not file a supplemental brief, at oral arguments, counsel for both Schneider and Lambert essentially conceded that the district court's finding on liability was not necessary to the court's ultimate decision.

[9,10] A brief examination of the doctrine of collateral estoppel supports counsels' concessions. "[I]ssues that were actually litigated and decided, but were not necessary to the final outcome of the case, are not subject to collateral estoppel in a future case." 50 C.J.S. *Judgments* § 1079 at 446 (2009). Under the doctrine of collateral estoppel, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit. *Zwygart v. State*, 273 Neb. 406, 730 N.W.2d 103 (2007). Four conditions must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *Id.* This articulation of the elements of the

doctrine does not address the necessity of the determination of an issue. However, a slightly more recent Nebraska Supreme Court case refines the first condition by adding the concept of necessity. For application of the doctrines of collateral estoppel or res judicata, the party relying on either of those principles in a present proceeding has the burden to show that a particular issue was involved and necessarily determined in a prior proceeding. *Stevenson v. Wright*, 273 Neb. 789, 733 N.W.2d 559 (2007). The U.S. Supreme Court also recently stated that "[i]ssue preclusion bars successive litigation of 'an issue of fact or law' that 'is actually litigated and determined by a valid and final judgment, and . . . is essential to the judgment.'" *Bobby v. Bies*, 556 U.S. 825, 834, 129 S. Ct. 2145, 173 L. Ed. 2d 1173 (2009). "If a judgment does not depend on a given determination, relitigation of that determination is not precluded." *Id.*

We conclude, as counsel effectively conceded during oral arguments, that it was not necessary for the district court to make findings regarding Lambert's personal liability on the note, given its judgment dismissing the case upon the basis that any default was cured. The district court's finding with regard to Lambert's liability was mere surplusage and was not necessary in light of the court's ultimate conclusion that Schneider had not shown that the default had not been effectively cured.

## CONCLUSION

Because the district court dismissed the complaint upon the basis that there was no uncured default, its analysis and determination regarding Lambert's personal liability was unnecessary to its judgment and amounted to an advisory opinion. We conclude that the case is moot, and we dismiss the appeal.

APPEAL DISMISSED.

# STATE OF NEBRASKA, APPELLEE, V. HOWARD L. McBRIDE, APPELLANT.

804 N.W.2d 813

Filed October 25, 2011. No. A-10-1200.

1. **Lesser-Included Offenses.** Nebraska uses the statutory elements approach for determining what constitutes lesser-included offenses.
2. ____. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without at the same time having committed the lesser.
3. **Lesser-Included Offenses: Jury Instructions: Evidence.** Once it is determined that an offense is a lesser-included one, a court must examine the evidence to determine whether it justifies an instruction on the lesser-included offense by producing a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser offense.
4. ____: ____: ____. 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.
5. ____: ____: ____. Where the prosecution offers uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-included offense instruction.
6. **Motions for Mistrial: Motions to Strike: Proof: Appeal and Error.** Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.
7. **Criminal Law: Juries: Verdicts: Lesser-Included Offenses.** With respect to inconsistent jury verdicts in criminal matters, the most that can be said is that the verdict shows that either in the acquittal or in the conviction the jurors did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. The defendant may not upset such a verdict, even where the verdict acquits on a predicate offense while convicting on a compound offense.
8. **Criminal Law: Verdicts: Appeal and Error.** The fact that inconsistency may be the result of lenity, coupled with the State's inability to invoke review of the acquittal verdict, suggests that inconsistent verdicts should not be reviewable.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

DeAnn C. Stover for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Howard L. McBride appeals his conviction of second degree assault. On appeal, McBride challenges the failure of the district court for Lancaster County to give a lesser-included offense instruction, the effectiveness of his counsel for failing to request such an instruction, the district court's failure to declare a mistrial after a witness volunteered a statement about prior assaultive behavior, the sufficiency of the evidence to support the conviction, and the jury's inconsistent verdicts in convicting him of second degree assault but acquitting him of use of a weapon in the commission of a felony. We find no merit to any of these assertions, and we affirm.

## II. BACKGROUND

The events giving rise to this case occurred on or about November 6, 2009. On that date, there was an altercation between McBride and Eric Beckwith, during which Beckwith received injuries. Beckwith was treated at a hospital for a 4-inch laceration on his face and stab wounds to his legs. Medical evidence was adduced at trial indicating that the injuries were caused by a knife or similar sharp instrument. McBride was charged with second degree assault and use of a weapon in the commission of a felony.

At trial, Beckwith testified that he had been involved in a relationship with McBride's ex-wife, Merrie Whitaker, for more than 6 years. He testified that on November 6, 2009, he was in the process of getting a vehicle started to go to work when McBride approached him and started an altercation. Beckwith testified that McBride cut his face. Beckwith testified that McBride then chased him with a knife. Beckwith described the knife as having a black handle and a silver blade approximately 4 or 5 inches in length.

Beckwith testified that he fled from McBride and then began looking for a weapon to use so that he could "go and get this dude, you know." As he was running, he encountered Whitaker and got into her car. She began to take Beckwith to the hospital, but McBride approached the car at a stop sign. Beckwith testified that McBride approached the car, opened the passenger door with a knife in his hand, and began stabbing at Beckwith, striking him in both legs.

Whitaker testified generally in accord with Beckwith's testimony. She testified that she encountered Beckwith covered in blood, that Beckwith indicated that McBride had cut him, that she attempted to take Beckwith to the hospital, and that they encountered McBride. She testified that McBride ran up to the car, opened the door, and began stabbing Beckwith in the leg. She testified that she observed a knife in McBride's hand.

During Whitaker's testimony, she was asked when, before this event, had been the last time she had seen McBride. She responded, "Oh, I saw him when he got out of jail for that assault last summer." In a sidebar, McBride's counsel moved for a mistrial. The court, after noting that Whitaker appeared to have volunteered the information and that the State had not attempted to elicit it, denied the motion for mistrial, struck Whitaker's answer, and instructed the jury to disregard it.

McBride did not testify and presented no evidence. During opening statements, McBride's counsel suggested to the jury that there was no dispute that an altercation had occurred, but asserted that Beckwith might have been the aggressor and that McBride might have acted in self-defense. During closing arguments, McBride's counsel again argued that McBride had acted in self-defense.

The district court's instructions to the jury included instructions about the necessary elements of both second degree assault, requiring bodily injury caused by a dangerous instrument, and use of a weapon in the commission of a felony. No instruction was requested or given on any lesser-included offense of second degree assault, and no objections were tendered to the proposed instructions.

The jury returned a verdict of guilty on the second degree assault charge, but not guilty on the use of a weapon charge. The district court sentenced McBride to 4 to 6 years' imprisonment. This appeal followed.

## III. ASSIGNMENTS OF ERROR

On appeal, McBride has assigned errors challenging the district court's failure to give a lesser-included offense instruction and the effectiveness of his counsel for failing to request such an instruction, the district court's failure to declare a mistrial, the sufficiency of the evidence to support the conviction, and the jury's inconsistent verdicts in convicting him of second degree assault but acquitting him of use of a weapon in the commission of a felony.

## IV. ANALYSIS

### 1. Lesser-Included Offense Instruction

McBride first asserts that the jury should have been instructed on third degree assault as a lesser-included offense to the charge of second degree assault. He asserts that the district court erred in not so instructing the jury and that his counsel was ineffective for failing to request such an instruction. We find that the evidence adduced at trial did not provide a rational basis for a lesser-included offense instruction to be given, and we find no merit to McBride's assertions.

[1-4] Nebraska uses the statutory elements approach for determining what constitutes lesser-included offenses. *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without at the same time having committed the lesser. *Id.* Once it is determined that an offense is a lesser-included one, a court must examine the evidence to determine whether it justifies an instruction on the lesser-included offense by producing a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser offense. *Id.* Consequently, 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. *Id.*

Neb. Rev. Stat. § 28-309 (Supp. 2009) defines second degree assault and provides in pertinent part: "(1) A person commits the offense of assault in the second degree if he or she: (a) Intentionally or knowingly causes bodily injury to another person *with a dangerous instrument*." (Emphasis supplied.) Neb. Rev. Stat. § 28-310 (Reissue 2008) defines third degree assault and provides in pertinent part: "(1) A person commits the offense of assault in the third degree if he: (a) Intentionally, knowingly, or recklessly causes bodily injury to another person[.]"

In the present case, witnesses called by the State testified that McBride used a knife to inflict injuries to Beckwith. Beckwith testified that McBride slashed his face and stabbed his legs with a knife, and he described the knife. Whitaker testified that she observed a knife in McBride's hand and that McBride stabbed Beckwith in the leg. The emergency room physician who treated Beckwith's injuries testified that they were caused by a knife or similar sharp instrument. The State also provided photographs of the injuries. McBride presented no evidence at trial to dispute that a knife was used to inflict the injuries to Beckwith. Indeed, although he presented no evidence, McBride's argument to the jury was that Beckwith might have been the aggressor and McBride's actions might have been justified as self-defense.

[5] Where the prosecution offers uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-included offense instruction. See *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). *State v. Al-Zubaidy* is remarkably similar to the present case on this issue. In *State v. Al-Zubaidy*, the defendant was charged with and convicted of second degree assault arising from an incident wherein two victims were allegedly stabbed with a knife. The prosecution presented witnesses

who testified that a knife was used to inflict the injuries, and the defendant offered no evidence to dispute that a knife was used. Nonetheless, the defendant asserted in a postconviction proceeding that a lesser-included offense instruction should have been given and that his appellate counsel had been ineffective for not raising the issue on direct appeal. The Nebraska Supreme Court held that the defendant was not entitled to a lesser-included offense instruction, because all of the evidence adduced at trial indicated that a dangerous instrument, a knife, had been used to inflict the injuries. The court also held that counsel's failure to raise the issue did not amount to ineffective assistance of counsel.

In the present case, the State offered uncontroverted evidence that a dangerous instrument, a knife, was used to inflict the injuries suffered by Beckwith. McBride was not entitled to a lesser-included offense instruction on third degree assault, and his counsel was not ineffective for failing to request such an unwarranted instruction.

### 2. Motion for Mistrial

McBride next asserts that the district court erred in denying his motion for mistrial based on a statement volunteered by a witness during her testimony. The district court struck the statement, admonished the jury to disregard it, and denied the motion for mistrial. We find no abuse of discretion.

[6] The decision whether to grant a motion for mistrial is within the trial court's discretion and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. *Id.* The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice. *Id.*

In the present case, the State asked Whitaker when, before the date of the events in this case, she had last seen McBride. In response, she indicated that she had last seen McBride "when he got out of jail for that assault last summer." At a

sidebar, during which McBride's counsel moved for a mistrial, the court noted that the statement appeared to have been volunteered and not intentionally elicited by the State. McBride's counsel acknowledged, "I know." After the sidebar, the court ordered the answer stricken and admonished the jury to disregard it. The court denied the motion for mistrial. On the record presented, McBride has not demonstrated that this statement actually prejudiced him—rather than creating only the possibility of prejudice. We find no abuse of discretion and no merit to this assignment of error.

### 3. Sufficiency of Evidence

McBride next asserts that the evidence adduced at trial was insufficient to sustain his conviction for second degree assault. This assignment of error is meritless.

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. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011). 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.*

As noted above, a conviction for second degree assault can be sustained if the defendant intentionally or knowingly caused bodily injury to another person with a dangerous instrument. See § 28-309. Also as noted above, the State presented evidence, in this case about the injuries sustained by Beckwith, that McBride inflicted the injuries and that he did so with a knife. A rational trier of fact hearing the evidence presented by the State could have found that McBride attacked Beckwith with a knife and slashed his face and that McBride moments later again attacked Beckwith with a knife and stabbed his legs. The State adduced evidence that Beckwith required treatment at a hospital, including stitches and plastic surgery. McBride's assertion that this evidence was insufficient is meritless.

### 4. Inconsistent Verdicts

Finally, McBride challenges the inconsistent verdicts rendered by the jury in this case. The jury returned a verdict of guilty on the charge of second degree assault, which includes as an essential element the use of a dangerous instrument, but returned a verdict of not guilty on the charge of use of a deadly weapon in the commission of a felony. McBride asserts that the jury's not guilty verdict on the use charge demonstrates that the guilty verdict on the assault charge cannot be sustained. He also argues that the not guilty verdict on the use charge supports his argument, rejected above, that a lesser-included offense instruction was warranted. We disagree with these assertions.

McBride has cited us to no authority in Nebraska where either the Nebraska Supreme Court or this court has found an inconsistency between two verdicts in a criminal case, and we have found none. In the great majority of cases where an issue has been raised concerning allegedly inconsistent verdicts, the appellate court has concluded that the verdicts were actually not inconsistent and has explained why. Although a few decisions have included language which could be read to suggest that such a determination of inconsistency is possible, see, e.g., *State v. Tucker*, 278 Neb. 935, 774 N.W.2d 753 (2009), we have found no Nebraska opinion in which a judgment was reversed or a new trial ordered as a result of inconsistent verdicts. In one instance, the Nebraska Supreme Court could have found no inconsistency between the verdicts reached by a jury, but instead concluded that the evidence presented justified conviction under both counts of the information, that both offenses charged were clearly committed by the same person and at the same time, that it was unexplainable how the jury arrived at a verdict convicting on one count and acquitting on the other, that nonetheless the verdict was not void, and that the defendant could not base an assertion of reversible error on the acquittal of one offense because the jury's "error was in his favor." See *Weinecke v. State*, 34 Neb. 14, 24, 51 N.W. 307, 310 (1892).

[7,8] In *United States v. Powell*, 469 U.S. 57, 64-65, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984), quoting *Dunn v. United*

*States*, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356 (1932), the U.S. Supreme Court noted that, with respect to inconsistent jury verdicts in criminal matters, "'[t]he most that can be said . . . is that the verdict shows that either in the acquittal or [in] the conviction the jur[ors] did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.'" The defendant may not upset such a verdict, even where the verdict acquits on a predicate offense while convicting on a compound offense. See *United States v. Powell, supra*. The fact that inconsistency may be the result of lenity, coupled with the State's inability to invoke review of the acquittal verdict, suggests that inconsistent verdicts should not be reviewable. *Id.*

The Michigan Court of Appeals has recognized that juries may reach inconsistent verdicts as a result of mistake, compromise, or leniency. *People v Goss*, 446 Mich. 587, 521 N.W.2d 312 (1994). Juries are not held to rules of logic, nor are they required to explain their decisions. *People v Vaughn*, 409 Mich. 463, 295 N.W.2d 354 (1980). The ability to convict or acquit another individual is a grave responsibility and an awesome power, and an element of this power is the jury's capacity for leniency. *Id.* Thus, whenever a defendant is charged with different crimes that have identical elements, the jury must make an independent evaluation of each element of each charge and may reach different conclusions concerning an identical element of two different offenses. *People v Goss, supra*.

The evidence in this case was overwhelming and uncontradicted, demonstrating that McBride used a knife to inflict injuries upon Beckwith. It is apparent from reviewing the record made at trial that McBride's defense strategy, as indicated by his counsel during opening statements and argued during closing arguments, was that the jury should have considered his actions to be justified self-defense, not that there was no weapon used. Indeed, the jury was instructed on self-defense as a defense to the charges brought against McBride. That the jury inexplicably returned a not guilty verdict on the charge that McBride used a weapon in committing the felony the jury convicted him for, second degree assault, does not support a

finding either that there was insufficient evidence to support the assault conviction or that an otherwise unjustified lesser-included offense instruction should have been given. We find no merit to McBride's assertions to the contrary.

## V. CONCLUSION

We find no merit to McBride's assertions. The State adduced overwhelming and uncontroverted evidence that McBride assaulted Beckwith with a knife and inflicted bodily injuries. No lesser-included offense instruction was justified, counsel was not ineffective for failing to request an instruction, and the inconsistent jury verdicts do not demonstrate otherwise. The district court committed no abuse of discretion in denying McBride's motion for mistrial based on a statement volunteered by a witness, stricken from the record, and the subject of an admonishment to the jury. We affirm.

AFFIRMED.

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STEVE SICKLER ET AL., APPELLANTS, V. ROBERT KIRBY, INDIVIDUALLY, AND CROKER, HUCK, KASHER, DEWITT, ANDERSON & GONDERINGER, L.L.C., A NEBRASKA LIMITED PARTNERSHIP, APPELLEES.

805 N.W.2d 675

Filed November 8, 2011. No. A-10-965.

1. **Courts: Judgments: Judicial Notice.** Where cases are interwoven and interdependent, and the controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose 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.
3. **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.
4. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In a legal malpractice case, there are three basic components that compose the plaintiff's burden of proof: (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 to the client; these elements are the same general elements required in any other case based on negligence, i.e., duty, breach, proximate cause, and damages.

5. **Attorney and Client.** A lawyer's duty is to his or her client and does not extend to third parties absent some facts which establish a duty.
6. **Corporations.** The more closely held the corporation, the less separable the directors, officers, and owners are from the corporation.
7. **Attorney and Client: Corporations: Conflict of Interest.** A conflict of interest can be avoided if there is a clear understanding with the corporate owners that the attorney represents solely the corporation and not their individual interests.
8. **Malpractice: Attorney and Client.** Privity is not an absolute requirement for a legal malpractice claim.
9. **Attorney and Client.** 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.
10. **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.
11. **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.
12. **Negligence.** The determination of the existence of a duty and the identification of the applicable standard of care are questions of law, but whether there was a deviation from the standard of care, meaning that a party was negligent, is a question of fact.
13. **Negligence: Evidence.** In a negligence case, the fact finder must determine what conduct the standard of care requires under the circumstances as presented by the evidence, or as the fact finder determines the factual circumstances to be.
14. **Attorney and Client: Juries: Expert Witnesses.** To determine how an attorney should have acted in a given case, the jury will often need expert testimony describing what law was applicable to the client's situation.
15. ____: ____: ____. Expert testimony about the relevant law is often essential to assist the jury in determining what knowledge is commonly possessed by lawyers acting in similar circumstances and whether an attorney exercised common skill and diligence in ascertaining the legal options available to his or her client.
16. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Buffalo County: ALAN G. GLESS, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Richard J. Rensch and Sean P. Rensch, of Rensch & Rensch Law, for appellants.

William R. Johnson, of Lamson, Dugan & Murray, L.L.P., and Raymond E. Walden, of Walden Law Office, for appellees.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

## INTRODUCTION

This is a legal malpractice action in which the district court for Buffalo County granted summary judgment to the defendant law firm of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C. (Croker Huck), and its member attorney Robert Kirby (collectively the defendants). In addition to claims that there were genuine issues of material fact for trial, we address issues generated by the fact that the defendants were engaged to represent only a closely held corporation, Baristas & Friends, Inc. (B&F), while the Kearney, Nebraska, law firm of Jacobsen, Orr, Nelson, Wright and Lindstrom, P.C. (Jacobsen Orr), represented the individuals owning and operating B&F, Steve Sickler (Steve) and Cathy Mettenbrink (Cathy). The litigation has its origins in the fact that attorney Jeffrey Orr of Jacobsen Orr drafted franchise disclosure statements that did not comply with applicable franchising law for use in selling franchises. We find that the summary judgment entered against B&F was error. We further conclude that Steve and Cathy were "third parties" to whom the defendants owed a duty of reasonable care. Finally, we conclude that what the standard of care was, whether it was breached, and what damages, if any, resulted are all genuine issues of material fact for trial with respect to B&F as well as Steve and Cathy.

## FACTUAL AND PROCEDURAL BACKGROUND

In 2001, Steve and Cathy began operating a "European style" coffeehouse in Kearney named "Barista's Daily Grind." The success of the coffeehouse caused them in 2002 to explore the franchising of their specialty retail coffee

business, and they asked Orr to advise them on franchising laws and to prepare the necessary documents to sell franchises. Orr agreed to do so, although he had no expertise in, nor experience with, franchising that would qualify him to do this type of work.

B&F was formed to be the franchisor. Franchisees would do business under the name "Barista's Daily Grind Espresso to Go." Steve and Cathy formed W.E. Corporation to own the real estate and buildings used in Steve and Cathy's own retail coffee business and in their franchising business. They formed another corporation, Cup-O-Coa, Inc., to be the distribution arm for products used by the franchisees of B&F. All of the corporations formed by Steve and Cathy paid rent to W.E. Corporation for their buildings. In October 2002, Orr completed a draft of the franchise agreement, and in December, he drafted the disclosure statement—a crucial document, as will be explained below. From 2003 to 2006, B&F sold 22 franchises and collected over $800,000 from the sales.

The beginning of the events that ultimately led to the underlying lawsuit, in which the defendants are accused of legal malpractice, began unfolding in July 2004. At that time, a banker in Colorado requested from Steve B&F's "Uniform Franchise Offering Circular" (UFOC) on behalf of a prospective franchisee. Steve did not know what a UFOC was, and he referred the banker to Orr. Orr determined that the disclosure statement being used—the statement in its first version—was "'compliant and valid.'" *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 104, 759 N.W.2d 702, 705 (2009). Steve testified that Orr told him the UFOC was a requirement of federal law which B&F was "'probably going to have to get'" if it was "'going to be selling franchises out of state.'" *Id.*

[1] At this juncture, we note that a disciplinary proceeding was later instituted against Orr in which it was found that he had violated his oath of office and the attorney disciplinary rules requiring an attorney to competently represent a client. See *Orr, supra*. The Nebraska Supreme Court agreed with the referee's conclusion that Orr had negligently determined that he was competent to undertake this specialized franchising work for B&F and Steve and Cathy, and the court

imposed a public reprimand as a sanction. See *id*. Where cases are interwoven and interdependent, and the controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. *State ex rel. Pederson v. Howell*, 239 Neb. 51, 474 N.W.2d 22 (1991). Thus, some of our background derives from the Supreme Court's opinion in Orr's disciplinary proceeding.

In August 2004, Orr revised the franchise agreement and disclosure statement at Steve's request due to problems that B&F was having with a Des Moines, Iowa, franchisee whose attorney had sent a letter to Steve in February 2004 suggesting that B&F's disclosure statement delivered to the proposed Iowa franchisee did not comply with federal law. This resulted in Orr's production of the second disclosure statement—or "second edition," as it is referenced at times in the record. Dennis Turnbull in Colorado and Jeffrey Nesler in Iowa purchased franchises after receiving the second disclosure statement, as did others.

In October 2004, B&F filed suit with Jacobsen Orr as counsel in the district court for Buffalo County against its Colorado franchisee, Turnbull, seeking to rescind the franchise. Turnbull filed a counterclaim seeking damages and rescission due to the violations of the Federal Trade Commission (FTC) rules found at 16 C.F.R. § 436.3 et seq. (2001) dealing with the contents of franchise disclosure statements. Turnbull also claimed violations of Nebraska's Seller-Assisted Marketing Plan Act, Neb. Rev. Stat. §§ 59-1701 to 59-1762 (Reissue 2010). Although Orr remained primary counsel for B&F, he had the firm's associate, Bradley Holbrook, take over the handling of the Turnbull litigation. The ultimate outcome of that litigation was the entry of a judgment dated February 2, 2007, against B&F in the amount of $132,422.95, which included slightly over $49,000 in attorney fees awarded after the court found that the violations alleged in the counterclaim had occurred as a matter of law.

Returning to the Iowa problem, on April 25, 2005, franchisee Nesler's attorney sent a letter to Steve claiming Nesler's

entitlement to rescission, attorney fees, and other damages because of violations of the FTC rules and Iowa statutes relating to franchises, and warning that the owners of B&F, Steve and Cathy, could be personally liable for return of the franchise fee as well as other damages.

At this juncture, Steve, according to his affidavit, "demanded that Orr seek a second opinion regarding the legality of the franchising documents [he and Cathy] were using." Orr subsequently advised Steve and Cathy that his law firm, Jacobsen Orr, had contacted an Omaha, Nebraska, attorney for a second opinion about the documents in question—the second disclosure statement and the franchise agreement. The attorney that Orr contacted was Kirby of Croker Huck. Holbrook and Orr talked with Kirby, and then Holbrook wrote a confirming letter to Kirby about what he was to do—critique Orr's second-edition disclosure statement and the franchise agreement for compliance with Iowa and federal law. Holbrook provided copies of the documents to Kirby, along with a copy of the April 25, 2005, letter from Nesler's counsel setting forth the basis of his assertion that B&F's disclosure statement was insufficient and in violation of Iowa and federal law. Because of its importance to the instant lawsuit, we quote the following portions of the letter from Holbrook to Kirby:

> As mentioned, we would like your [sic] and your firm to do two things. First, we would like a legal opinion as to the compliance of the disclosure statement provided to . . . Nesler with the Iowa code as cited in [Nesler's attorney's] letter. Please also feel free to broaden the scope to any other area of the Iowa code you feel would be pertinent to the sale of this franchise and the procurement of the disclosure statement to . . . Nesler.
>
> Secondly, we would ask that you also review the disclosure statement for its compliance with the [FTC] rule 16 C.F.R. §436. In addition to that opinion, please feel free to include any failures to comply with the [FTC] rule and the level of material non-compliance. What we are interested in, in regards to the [FTC] rule, is if, in fact, the disclosure statement fails to meet the [FTC] rule, whether that would be deemed a material or non-material

> non-compliance and what the effect of the non-compliance would be on the transaction.
>
> As regards to [sic] the legal opinion on the [FTC] rule, I would ask that you keep that billing separate from the legal opinion on the disclosure statement and the Iowa code and related section[s] of the Iowa code that touch on the sale of franchises such as in the present case. Please send both billings directly to me at my office.

Moreover, Holbrook specified in his letter to Kirby that all communication regarding the review was to be via Jacobsen Orr. Although Steve had requested this review of Orr's documents, neither he nor Cathy selected Croker Huck and Kirby, and they never had any direct contact with Croker Huck or Kirby. And, while Holbrook maintains that he provided a copy of Kirby's critique of the documents to Steve, Steve's affidavit says that he did not ever see Kirby's opinion. Kirby and another lawyer at his firm completed the requested review and wrote to Holbrook on June 21, 2005, advising that B&F's franchise documents had numerous defects—and that even if not independently material, such taken together would be material violations. Kirby enclosed a 13-page memorandum from his associate detailing the defects. Moreover, Kirby pointed out that under Iowa law, a franchisor has the option of complying with the FTC rules for disclosure via a UFOC or an Iowa disclosure form provided for in the Iowa statutes, but that B&F's disclosure statement satisfied neither Iowa nor federal law. Kirby stated that under the FTC rules, there is no private right of action, as such is brought by the FTC, but there is a private right of action under the Iowa statutes. This opinion arrived about a week after Nesler filed suit against B&F, and Steve and Cathy personally, in the Polk County, Iowa, district court. Holbrook then engaged Kirby to defend only the corporation, B&F, and Holbrook assumed the responsibility for defending Steve and Cathy.

On August 10, 2005, Holbrook wrote a letter to Kirby containing the suggested strategy of delaying the litigation and working toward a settlement with Nesler whereby he would be replaced by another franchisee. Nonetheless, in the letter, Holbrook tells Kirby, "Frankly, feel free to handle it any way

you wish." While Holbrook testified that Steve told him he had someone lined up to step into the Nesler franchise, Steve says that he wanted to find someone to do that, but had not. Kirby testified that he did not ever know, discover, or make inquiry about who authored the documents that were being challenged in the lawsuit in which he was defending B&F "[b]ecause it wasn't important in connection with the defense of the Iowa litigation." Thus, Kirby did not ask Holbrook, or B&F's officers or directors, who had drafted the documents that he knew to be defective and which would subject his client, B&F, to a variety of adverse consequences. The evidence here, as well as the Supreme Court's opinion, makes it uncontroverted that Orr was the drafter of the first and second disclosure statements. See *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009). Additionally, the evidence is that Orr used Kirby's critique to attempt to draft a "third disclosure statement" that complied with applicable law—although Kirby was not told that this was being done. B&F sold seven more franchises using the third iteration of Orr's disclosure statement.

In November 2005, B&F was notified that it was under investigation by the FTC, at which point Holbrook contacted an attorney specializing in franchise law. That attorney reviewed the franchise documents, including the third disclosure statement, and found that even the third edition did not comply with FTC requirements, describing the deficiencies as "'major.'" *Orr*, 277 Neb. at 106, 759 N.W.2d at 706. It was not until after this occurrence that Orr's law firm withdrew from the representation of Steve and Cathy. By April 2006, the franchising of B&F had been shut down as the adverse consequences of the defective franchising documents continued to pile up. These consequences ultimately included an action against B&F by the U.S. Department of Justice on behalf of the FTC that resulted in injunctive relief plus a "suspended" civil penalty judgment of $242,000. An enforcement action by the Nebraska Department of Banking for failure to secure the required exemption provided for under the Seller-Assisted Marketing Plan Act, §§ 59-1701 to 59-1762, was also filed.

Returning to the Iowa lawsuit by Nesler, it was settled with the execution by Nesler of a settlement agreement and mutual release on December 21, 2005. This occurred after the execution by Steve and Cathy on December 13 of their personal confession of judgment in the amount of $45,000, which was not to be filed if paid with interest by February 24, 2006. Kirby's defense of B&F in the Nesler lawsuit turned out to be to simply follow Holbrook's instructions. Holbrook's affidavit recounts that he informed Kirby not to perform any discovery, to get an extension of time to answer the suit, and to negotiate a settlement. Holbrook further explained in his affidavit that only he communicated with Steve and Cathy about the Nesler litigation, including about Nesler's demand that any settlement include Steve and Cathy's personal confession of judgment. In fact, the evidence is that Kirby never communicated directly with Steve or Cathy about the Nesler litigation, and of course, the only way to communicate directly with the closely held corporate client, B&F, was via Steve and Cathy. The lawsuit in which Kirby was defending alleged that Steve and Cathy were "principal executive officers or directors" of B&F.

Holbrook testified via his affidavit that on June 28, 2005, he sent Steve a letter discussing a memorandum setting forth Kirby's opinions about the adequacy of the franchise disclosures that had been made to Nesler. Kirby's billings for the Croker Huck law firm reflected that the client was "Barista's and Friends, Inc.," but the bills were sent to Holbrook for the work done in reviewing the franchising documents as well as for the defense of the Nesler lawsuit, per Holbrook's instructions to Kirby.

On October 17, 2007, the U.S. Department of Justice filed suit against B&F as well as against Steve and Cathy, individually and as corporate officers, seeking "Civil Penalties, Permanent Injunction and other Equitable Relief" in the U.S. District Court for the District of Nebraska. Summarized, the suit alleged that the defendants had sold coffeeshop franchises since 2003 under the trade name "Barista's Daily Grind" in violation of the "Franchise Rule." The alleged violations were generally that such sales were made without the disclosures required prior to sale of a franchise by the UFOC,

which the FTC had authorized for franchisors to comply with the "Franchise Rule." This litigation was resolved by a "Stipulated Judgment and Order for Permanent Injunction" entered October 23, 2007, which, among many other conditions and prohibitions, included a suspended civil penalty judgment of $242,000.

The record before us contains evidence and testimony offered by the defendants from qualified experts asserting that the defendants' representation of B&F comported fully with the standard of care and, moreover, that the defendants owed no duty to Steve and Cathy. But, because the function of the trial court and, in turn, ours, on a motion for summary judgment, is not to decide the issue of fact, but, rather, to determine whether a genuine issue of material fact exists for trial, we do not detail the expert testimony that favors the defendants. Rather, we focus on the expert witness evidence offered by the plaintiffs in opposition to the defendants' motion for summary judgment and in support of the plaintiffs' own motion for summary judgment.

Gregory Garland, an Omaha trial attorney, provided expert testimony for the plaintiffs, although he conceded he was not an expert in the area of franchising. Thus, he did not offer any opinions as to the sufficiency of the franchise documents and disclosure statements. Garland set forth a virtual smorgasbord of negligence acts or omissions by Kirby with respect to Kirby's duties as the litigator for B&F. Garland's opinions are from the standpoint of an experienced litigator, and they incorporate a discussion of the relevant ethical and professional standards of conduct. Any analysis in this case must incorporate the backdrop that there obviously was negligence on the part of the drafter of the franchise documents which were given to Nesler by B&F and that Kirby, by virtue of his critique thereof, knew this core fact.

We have boiled down Garland's key opinions with respect to the ways in which Kirby was negligent to the following:

- In failing to advise the clients to seek the assistance of an experienced franchising attorney to rewrite the disclosure statement, and advise that a litigator with experience in franchising be secured to defend B&F in the Nesler litigation.

- In failing to advise the clients to immediately stop all franchising activity.
- In failing to determine who drafted the disclosure statement at issue in the Nesler litigation.
- In failing to advise the clients to seek the advice of an experienced legal malpractice attorney, given the conflict of interest the lawyers who drafted the document had in continuing to represent the clients—if Kirby had discovered, as he should have, that Orr was the drafter.
- In failing to advise the clients, if Kirby knew that Orr was the drafter of the documents, to bring Orr into the Nesler litigation as a third party; or, if he did not know that Orr was the drafter of the documents, in failing to discern who the drafter of the documents was and then advise the clients to bring that person or entity into the Nesler case as a third party.

Garland further opined that even if Kirby's only attorney-client relationship was with B&F, Kirby was nonetheless dutybound to communicate to Steve and Cathy, who were the officers and directors of his client, B&F, that their personal lawyers—if they were the drafters of the documents—had a conflict of interest that prevented them from advising Steve and Cathy about the Nesler litigation or otherwise being involved in that litigation.

## DISTRICT COURT DECISION

The decision of the district court on the motion of Croker Huck and Kirby is very brief. It finds that there are "no genuine issues as to any material fact or as to the ultimate inferences that may be drawn from those facts" and that "all legal questions presented, both as to duty and as to proximate cause, must be decided in favor of [the] defendants as a matter of law." No rationale whatsoever for these conclusions is provided. The district court simply sustained the defendants' motion for summary judgment and denied the plaintiffs' motion for summary judgment. The plaintiffs appeal this decision.

## ASSIGNMENTS OF ERROR

On appeal, the defendants set forth three assignments of error, which we restate: The district court erred in (1) granting

summary judgment and in deciding the issues of duty and proximate cause as a matter of law; (2) excluding from evidence exhibits 69, 70, 85 through 87, and 92; and (3) denying the defendants' motion seeking summary judgment that the defendants were negligent as a matter of law.

## STANDARD OF REVIEW

[2,3] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose 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. *Lynch v. State Farm Mut. Auto. Ins. Co.*, 275 Neb. 136, 745 N.W.2d 291 (2008). 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. *Id.*

## ANAYLSIS

[4] In a legal malpractice case, there are three basic components that compose the plaintiff's burden of proof: (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 to the client. See *Rodriguez v. Nielsen*, 264 Neb. 558, 650 N.W.2d 237 (2002). These elements are the same general elements required in any other case based on negligence, i.e., duty, breach, proximate cause, and damages. See *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987).

### *Did District Court Err in Granting Summary Judgment in Favor of the Defendants on Claims of B&F?*

Jacobsen Orr, the law firm that wrote the second disclosure statement that was provided to Nesler and others, engaged Kirby to perform an independent review of the disclosure statement and franchise agreement for compliance with Iowa law and with the relevant FTC rules. This occurred after Nesler's attorney wrote to Steve asserting that the disclosure statement did not comply with the applicable law. As a result, Steve

wrote an e-mail dated May 3, 2005, directing Orr to contact a lawyer to do an independent review of the documents. The defendants' critique of June 21 revealed that the disclosure statement was substantially deficient in numerous respects under both Iowa and federal law—just as Nesler, the Iowa franchisee, had claimed.

Nesler had filed suit against B&F, as well as against Steve and Cathy, approximately 1 week prior to the date of Kirby's critique of the franchise documents. Kirby's letter accompanying the critique noted the pendency of that action, as well as the fact that Iowa law allowed recovery of the franchise fee, damages, and attorney fees and costs for violation of Iowa's franchising statutes. Holbrook's affidavit in the summary judgment proceedings expressly states that he "requested that Kirby communicate with only Jacobsen Orr with respect to both the critique of the second Disclosure Statement and the representation of [B&F] in the Nesler litigation." Kirby followed that directive—a procedure that the plaintiffs' expert, Garland, opines did not meet the standard of care. The defendants concede that B&F was Kirby's client in the Nesler lawsuit and that "Croker Huck owed the full array of duties implied by the circumstances of defending a corporation against particular claims in a lawsuit." Brief for appellees at 20. Thus, the defendants were without question B&F's lawyers for the Iowa lawsuit.

Therefore, when viewing the evidence in the light most favorable to the plaintiffs, there was concededly an employment of the defendants to defend B&F. There is ample evidence in the record of the defendants' negligence in their representation of B&F, and there is evidence that such damaged B&F. What damages were proximately caused by the defendants' negligence, as distinguished from damages caused solely by the negligence of Jacobsen Orr, is a question of fact. Although we discuss damages in more detail later, suffice it to say that at this juncture, there is evidence that Kirby's negligence was part of the cascade of events that led to B&F's ceasing what had started out as a viable franchising business—at substantial personal financial damage to Steve and Cathy. Consequently, we find that there clearly are genuine

issues of material fact regarding damages caused by the defendants. Thus, summary judgment could not be granted against B&F.

For these reasons, we find that the district court's decision granting summary judgment on B&F's claim of legal malpractice against the defendants was error. As such, we reverse that portion of the district court's decision and remand B&F's cause against the defendants for further proceedings. We now turn to perhaps the more difficult aspect of the appeal: the summary judgment granted to the defendants on Steve and Cathy's claim.

*Did Trial Court Properly Grant Summary Judgment to the Defendants With Respect to Steve and Cathy's Personal Claims?*

After our review of the record and the parties' briefing, we believe there are two possible rationales that the district court might have used to conclude that, despite the evidence from the plaintiffs' expert detailing how the defendants breached the standard of care with respect to Steve and Cathy, the defendants were, nonetheless, entitled to summary judgment on such claims. The first is that the standard of care allowed Kirby to restrict his communication about his critique of the disclosure statements and the defense of the Nesler lawsuit to Jacobsen Orr. Put another way, the district court might have determined that the standard of care did not require Kirby to communicate with and advise Steve and Cathy about his critique and the defense of B&F in the Nesler lawsuit. Second, the court could have found that there was no evidence adduced that the defendants' negligence as outlined by Garland caused damage to any of the plaintiffs. We will analyze the merit of each of those rationales in turn.

*What Duty, if Any, Did the Defendants Owe to Steve and Cathy?*

Perhaps the central failure assigned to Kirby by Garland's testimony is that despite knowing that the B&F disclosure statement given to Nesler did not comply with the law and exposed B&F, as well as Steve and Cathy, to a number of adverse consequences, Kirby failed first to determine who

drafted the disclosure statement and then to advise B&F—which, as a practical matter, would mean advising Steve and Cathy, given the closely held corporation status of B&F—that the drafter was ultimately liable and should be made a third-party defendant in the Nesler lawsuit. Iowa has a third-party procedure much like Nebraska's, which allows a defendant to cross-petition into the case a nonparty who may be responsible for all or part of the plaintiff's damages. See Iowa Code Ann. § 1.246(1) (West 2002).

Also, Garland opines that because of Jacobsen Orr's production of the defective disclosure statements, that law firm had an obvious conflict of interest that prevented it from representing Steve and Cathy in the Nesler lawsuit. It also prohibited Jacobsen Orr from continuing to provide advice and counsel to Steve and Cathy with respect to the consequences of its own negligence. Kirby never advised B&F and Steve and Cathy of Jacobsen Orr's conflict of interest, which should have become obvious the minute Kirby rendered his unchallenged opinion that the franchising documents were defective and exposed the franchisor to claims for rescission, return of franchise fees, damages, and attorney fees. We note that there is no evidence that Jacobsen Orr advised Steve and Cathy that they could pursue a third-party claim against Jacobsen Orr.

In contrast to Garland's opinions, the defendants have produced evidence from experts that the failure to do these things was not any part of Kirby's duty to Steve and Cathy, as they were not his clients; only B&F was. However, because of the nature of summary judgment, we focus only on the evidence produced by the plaintiffs in resistance to the defendants' motion for summary judgment.

The plaintiffs' evidence of Kirby's negligence fundamentally involves Kirby's failure to respond to, and communicate about, the various implications of the undisputed fact that the disclosure statements were defective and exposed B&F to serious liabilities, which would negatively impact Steve and Cathy, given that B&F was their closely held corporation. The defendants' basic response arises from the fact that Jacobsen Orr, as opposed to Steve and Cathy, engaged Kirby and directed him to communicate only with Jacobsen Orr. Thus, the defendants

argue, "'[A]n attorney receiving a case from another attorney is entitled to place some reliance upon that attorney's investigation.'" Brief for appellees at 21, quoting *Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439 (5th Cir. 1992). This same proposition of law is also quoted from *Jeansonne v. Bosworth*, 601 So. 2d 739 (La. App. 1992), in the defendants' brief. The fundamental problem with this proposition is that Jacobsen Orr engaged Kirby on behalf of B&F to independently determine whether the disclosure statements complied with Iowa and federal law and to defend B&F in a lawsuit premised on the defective documents. Therefore, the express purpose of Kirby's document review was the exact opposite of "relying" on Jacobsen Orr's work.

As stated above, the defendants cite *Jeansonne, supra*, in their brief; however, they twist its proposition that "attorney B" brought into a case by "attorney A" can rely on attorney A's investigation. The Louisiana Court of Appeals made that statement in the context of an attorney's failure to assert a product liability cause of action where said attorney was brought into the case the last few days before the statute of limitations on that claim ran. Attorney A and his clients did not have the allegedly defective product—a broken piece of rope—and the court found that attorney B could rely on the fact that attorney A and his clients had searched for, but could not find, the rope. *Jeansonne*, if at all analogous to this case, is hardly helpful to the defendants, because here, there is evidence that if Kirby did not know that Jacobsen Orr was the drafter of the defective documents, he should have, and should have advised his clients about the implications of that fact, including bringing them into the Nesler suit as third parties. Kirby was bound generally to comply with the applicable standard of care, which, according to Garland, would be to identify the documents' drafter and then advise Steve and Cathy of their remedy to bring the drafter into the Nesler lawsuit as a third party.

The other case cited and relied upon by the defendants for their claim that Kirby did not have to "second guess" Jacobsen Orr is *Smith, supra*, but it is not on point. This case involved the attempted imposition of sanctions under Fed. R. Civ. P. 11,

which does not involve the attorney-client relationship or how an attorney's duty to the client is impacted by the fact attorney A procures the involvement of attorney B in the case. However, we cannot help but point out that after citing these cases, the defendants assert that such authority "supports [the defendants' expert's] opinions and repudiates . . . Garland's." Brief for appellees at 21. This is, at the very least, a tacit concession that an issue of fact regarding the standard of care exists because of differing expert opinions.

Next, the defendants cite to a series of cases, nine in number, which they assert address the applicable law regarding the duty of "secondary counsel." *Id.* at 22. Initially, we must take issue with the designation of the defendants as "secondary counsel," given that they indisputably were solely responsible for the defense of B&F in the Nesler case. Admittedly, Holbrook wanted to avoid having Kirby communicate with Steve and Cathy, the corporation's owners, officers, and directors—but that hardly makes them "secondary counsel." Rather, Holbrook's directions regarding communication that Kirby assiduously followed, when viewed in the light most favorable to the plaintiffs, lends support to Steve's claim advanced in his affidavit that Kirby acted in concert with Jacobsen Orr to "cover up" the latter's negligence.

Like the defendants' counsel, we do not dissect each of the nine cited cases, but we find it useful to discuss the first cited case, *Macawber Engineering, Inc. v. Robson & Miller*, 47 F.3d 253 (8th Cir. 1995), because it seems emblematic of what "secondary counsel" or "local counsel" really is and does. Macawber Engineering, Inc. (Macawber), appealed a district court order granting summary judgment in favor of Abdo & Abdo, P.A. (Abdo), and Steven R. Hedges, a member of that law firm. Macawber contended that Abdo and Hedges committed legal malpractice while acting as Macawber's local defense counsel because they failed to respond to certain requests for admissions which resulted in a $650,000 judgment against Macawber. The *Macawber Engineering, Inc.* court said that because there was no evidence that local counsel had a duty to respond to the requests for admissions, the summary judgment was affirmed.

The *Macawber Engineering, Inc.* court outlined the basic elements of proof in a legal malpractice claim, no different from those applicable here. Then the court turned to the matter of the attorney-client relationship and corresponding duties. The *Macawber Engineering, Inc.* court said:

> Where, as here, the alleged negligence or breach involves a failure to act, there can be no negligence or breach absent a duty to act. An attorney's duty to act arises from the attorney-client relationship. Therefore, the extent of this duty necessarily depends on the scope of the attorney-client relationship. *See* Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 8.2 (1989). In other words, an attorney's duty is defined and limited by the scope of the overall attorney-client relationship.

47 F.3d at 256. The *Macawber Engineering, Inc.* court then found that the terms of the representation agreement and the nature of the legal advice sought and received define the scope of the relationship. Using this basic rule, the Eighth Circuit reasoned:

> In this case, the undisputed evidence indicates that the scope of the attorney-client relationship between Macawber and Abdo was limited. Macawber's retention letter to Hedges provides, "[W]e confirm our appointment of your firm as our local counsel in support of litigating attorneys, Robson & Miller, in the above stated case." . . . In his deposition, Macawber's CEO testified that he relied on Robson & Miller to handle the Red Rock litigation and to direct the activities of local counsel. . . . By affidavit, Morton Robson and Kenneth Miller testified that Abdo's role was limited and that Abdo's attorneys did everything asked of them.

*Id.* at 256-57. The court then observed that it was undisputed that Macawber relied on the Robson & Miller law firm to direct Abdo's activities in the "Red Rock litigation." *Id.* at 256. The resulting attorney-client relationship between Macawber and Abdo was limited in scope and did not encompass a duty to monitor the discovery process and ensure responses to the requests for admissions. The unanswered requests for admissions were served on Robson & Miller, not Hedges, and the

evidence was that Hedges had no duty to either answer the requests or insure that Macawber's litigators did so in their limited capacity as local counsel. Thus, the summary judgment in favor of Abdo and Hedges was affirmed.

[5] Here, the question presented by Garland's opinions is whether Kirby was required by the standard of care to bypass the limited line of communication set forth by Jacobsen Orr's "terms of engagement" and contact Steve and Cathy directly. It is generally accepted that a lawyer who represents a business entity owes his or her allegiance to the entity, not to an individual shareholder. See, e.g., *Bauermeister v. McReynolds*, 253 Neb. 554, 571 N.W.2d 79 (1997), citing Canon 5, EC 5-18, of the Code of Professional Responsibility. A lawyer's duty is to his or her client and does not extend to third parties absent some facts which establish a duty. *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).

We can find only one Nebraska case discussing what we have here, a lawyer representing a very closely held corporation. In *Detter v. Schreiber*, 259 Neb. 381, 610 N.W.2d 13 (2000), it was held that an attorney who had done legal work for a closely held corporation regarding a lease and shareholder agreement had a conflict of interest which prevented him from representing a defendant-shareholder in an action against the other shareholder. Obviously, the facts of *Detter* are distinguishable from our situation, but the case is still instructive.

[6] The *Detter* opinion cites *In Re Brownstein*, 288 Or. 83, 87, 602 P.2d 655, 656 (1979), in which the Oregon court said that for purposes of potential conflicts of interest involving small, closely held corporations, the rights of the individual stockholders who controlled the corporation and those of the corporation itself were "virtually identical and inseparable." *In Re Brownstein*, at its core, is simply practical recognition of the fact that a corporation can act only through people—its directors, officers, and shareholders. In the instance of closely held corporations, it seems clear that the financial well-being of the directors, officers, and owners of the corporation is usually inseparable from the interests and fate of the corporation.

And, we suggest that the more closely held the corporation, the less separable the directors, officers, and owners are from the corporation. Here, there is substantial evidence that the interests and fates of Steve and Cathy are indistinguishable from those of B&F. This is of course the implicit, if not explicit, premise of Garland's opinions that Kirby was required by the standard of care to communicate what he knew, or should have known, to Steve and Cathy about the fact that Jacobsen Orr was the drafter of the defective documents and about the fact that Jacobsen Orr could be brought into the Nesler lawsuit as a responsible third party.

[7] The *In Re Brownstein* court reasoned that the conflict of interest could be avoided if there was "a clear understanding with the corporate owners that the attorney represent[ed] solely the corporation and not their individual interests." 288 Or. at 87, 602 P.2d at 657. The same would be true here, except that there is no evidence showing a clear understanding on the part of Steve and Cathy that Kirby's representation was solely of B&F to the exclusion of Steve and Cathy's personal interests as the directors, officers, and owners of B&F. In fact, the evidence is to the contrary. Steve asserts in his affidavit that he and Cathy "were never told of an agreement between Kirby and Holbrook that all communication had to go through Holbrook" and that he and Cathy "would not [have] agree[d] to that arrangement." He also asserts in his affidavit that he and Cathy never received Kirby's critique and were never told of the threat to their franchise business posed by the FTC for noncompliance with the disclosure statement requirements. Consequently, we return to the question of Kirby's duty to Steve and Cathy individually. In doing so, we assume the absence of an attorney-client relationship between Kirby as counsel and Steve and Cathy as individuals.

The Nebraska Supreme Court undertook an exhaustive analysis of when an attorney has a duty to third parties with whom there is no attorney-client relationship in *Perez v. Stern*, 279 Neb. 187, 777 N.W.2d 545 (2010). The factual background of *Perez* was that attorney Sandra Stern was negligent in letting the underlying wrongful death action be dismissed for failure of service, causing it to be time barred. Three years later, a

legal malpractice claim was filed against Stern on behalf of the decedent's children and their mother, but such was dismissed by the district court because it too was time barred by the statute of limitations. On appeal of that dismissal, the Supreme Court framed the issue as

> whether Stern owed an independent duty to the children, as [the decedent's] 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.

*Id.* at 188, 777 N.W.2d at 548.

[8-11] The *Perez* court set forth the children's burden of proof in a legal malpractice case, the elements of which are the same basic elements applicable in the present case: to prove (1) Stern's employment, (2) that Stern neglected a reasonable duty to the children, and (3) that such negligence was the proximate cause of damages. The court found that the first and third elements were present and thus focused on duty, even though there was no attorney-client relationship between the children and Stern. The court then said it has never been held that "privity" is an absolute requirement for a legal malpractice claim; rather, "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*." *Id.* at 192, 777 N.W.2d at 550 (emphasis in original). The court then for the first time in Nebraska case law set forth the specific standards to guide the determination of whether such a duty to a third party exists, and we quote:

> 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 profession. 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.

*Perez v. Stern*, 279 Neb. 187, 192-93, 777 N.W.2d 545, 550-51 (2010).

The *Perez* court explicitly adopted the foregoing as the appropriate analytical framework for determining whether counsel owes a duty to a third party. We note that this approach has been referenced as the "California formulation." See 1 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 7:8 at 792 (2011). Mallen and Smith further state, "The modern trend in the United States is to recognize the existence of a duty beyond the confines of those in privity to the attorney-client contract. Whatever the legal theory, however, there must be a duty of care owed by the attorney to the plaintiff." *Id.* at 791.

The *Perez* court wrapped up its discussion by noting that the principles we have detailed above provide guidance to determine whether the facts establish a duty to the third party and to evaluate the scope of that duty. The court then found that "the facts establish[ed] an independent legal duty from Stern to [the decedent's] statutory beneficiaries[, the third parties]." 279 Neb. at 192, 777 N.W.2d at 550. The *Perez* court reasoned:

> Under [Nebraska's wrongful death statutes], 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. The very nature of a wrongful 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.

279 Neb. at 197-98, 777 N.W.2d at 554.

[12-15] Furthermore, we recall that the determination of the existence of a duty and the identification of the applicable standard of care are questions of law, but whether there was a deviation from the standard of care, meaning that a party was negligent, is a question of fact. See *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009). The fact finder must determine what conduct the standard of care requires under the circumstances as presented by the evidence, or as the fact finder determines the factual circumstances to be. *Id*. How the fact finder determines whether the attorney's conduct met the standard of care was discussed in *Bellino v. McGrath North*, 274 Neb. 130, 147-48, 738 N.W.2d 434, 448 (2007) (citations omitted):

> To determine how the attorney should have acted in a given case, the jury will often need expert testimony describing what law was applicable to the client's situation. A "'"jury cannot rationally apply a general statement of the standard of care unless it is aware"' of what the common attorney would have done in similar circumstances." . . . Testimony about the relevant law is often essential to assist the jury in determining what knowledge is commonly possessed by lawyers acting in similar circumstances and whether the attorney exercised common skill and diligence in ascertaining the legal options available to his or her client. Attorneys represent their clients in legal matters; thus, in an action for professional negligence, the law is ingrained in the canvas upon which the picture of the attorney-client relationship is painted for the jury.

Applying the factors from *Perez v. Stern*, 279 Neb. 187, 777 N.W.2d 545 (2010), to the present case, we begin with the extent to which the transaction, i.e., the defense of B&F, was intended to affect the third parties. Obviously, in the case of this closely held corporation, whatever affected the corporation affected Steve and Cathy in a direct and substantial way. Second, the foreseeability of harm clearly weighs in favor of finding a duty to the third parties for the same reasons just articulated. Third, the degree of certainty that the third parties suffered injury likewise favors finding a duty to Steve and

Cathy, as the Nesler suit was the beginning of events which sounded the financial death knell for B&F and resulted in the destruction of Steve and Cathy's personal financial position given that other franchisees who also received the defective disclosure statements would be able to assert the same remedies as Nesler. The fourth consideration from *Perez*, the closeness of the connection between the attorney's conduct and the injury suffered, is apparent given Kirby's failure to advise B&F, which could be done only via Steve and Cathy, that they should not continue to be represented or advised by the lawyers who drafted the defective franchising documents because of those lawyers' obvious conflict of interest. Fifth, we assess the policy of preventing future harm. In this regard, finding that a duty existed as to the third parties may prevent future harm if extremely closely held corporations are viewed, from the corporation's counsel's standpoint, as inseparable from the small number of people who actually stand behind the corporation, because they are the people who stand to lose the most from negligent representation of the corporate entity. The sixth and final consideration under *Perez* is whether an undue burden is imposed on the profession. We find that it is not, because attorneys should have no trouble appreciating that (1) doing legal work for an extremely closely held corporation more than likely will substantially impact the few people behind the corporation and (2) generally, while people form such corporations for protection from personal liability, the fact of the matter is that their personal assets will typically be pledged and at risk—as is true here; lawyers can protect themselves and their clients' interests by express agreements as to the scope of the representation agreed to by the client.

Finally, we recall what the court in *Perez v. Stern*, 279 Neb. 187, 193, 777 N.W.2d 545, 551 (2010), recognized as the overarching consideration: "[T]he 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." In *Perez*, the court recognized that the purpose of bringing the wrongful death action was to benefit the decedent's statutory beneficiaries, and thus, even though

Stern's client was the personal representative, the decedent's children were found to be third parties to whom counsel owed a duty. Here, given the closely held nature of B&F, protection via legal representation of B&F is, for all intents and purposes, protection of Steve and Cathy; therefore, they would obviously be intended beneficiaries of Kirby's representation.

Therefore, in conclusion, while Steve and Cathy may not have a direct attorney-client relationship with the defendants, they were, as a matter of law, third parties to whom the defendants owed the duty of exercising such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances. See, *Perez, supra*; *Baker v. Fabian, Thielen & Thielen*, 254 Neb. 697, 578 N.W.2d 446 (1998). Although this general standard is established by law, the questions of what an attorney's specific conduct should be in a particular case and whether an attorney's conduct falls below that specific standard are questions of fact for the jury. See, *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009); *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991). The fact finder must determine what conduct the standard of care requires under the circumstances as presented by the evidence, or as the fact finder determines the factual circumstances to be. *Id*. How the fact finder determines whether the attorney's conduct met the standard of care was discussed in *Bellino v. McGrath North*, 274 Neb. 130, 147-48, 738 N.W.2d 434, 448 (2007) (citations omitted):

> To determine how the attorney should have acted in a given case, the jury will often need expert testimony describing what law was applicable to the client's situation. A "'"jury cannot rationally apply a general statement of the standard of care unless it is aware"' of what the common attorney would have done in similar circumstances." . . . Testimony about the relevant law is often essential to assist the jury in determining what knowledge is commonly possessed by lawyers acting in similar circumstances and whether the attorney exercised common skill and diligence in ascertaining the legal options available to his or her client. Attorneys represent their clients

> in legal matters; thus, in an action for professional negligence, the law is ingrained in the canvas upon which the picture of the attorney-client relationship is painted for the jury.

Thus, given the dispute in the evidence as to whether the representation the defendants provided to B&F—which directly impacted Steve and Cathy, the third parties—met the standard of care, there is clearly a genuine issue of material fact for trial. Therefore, the district court erred in granting summary judgment to the defendants on the claims of legal malpractice asserted personally by Steve and Cathy.

*Evidence of Damage From Negligence of the Defendants.*

Garland opined that based on the testimony of the franchise attorney contacted by Holbrook—which attorney, we note, ultimately replaced Jacobsen Orr and began representing B&F and Steve and Cathy—fines could be levied at $11,000 by the FTC per disclosure statement violation. Garland's deposition testimony was that he had counted 42 violations for a total of $462,000 in potential fines; he said that such fines would clearly not do anything "positive [for] the business" and that he thought that if Steve and Cathy faced such fines, they "would have seen [the business,] if not implode, be crippled to the point of maybe no return." As it turned out, both the FTC and the Nebraska Department of Banking took action against B&F because of the defective disclosure statements, which effectively meant the death of B&F.

The record, when viewed most favorably to B&F and Steve and Cathy, shows that a cascading series of events, all related to the defective franchising documents, combined to ruin what had started as a successful franchising business. These events conspired to expose B&F, as well as Steve and Cathy, to a variety of adverse legal actions, including repayment of franchise fees, attorney fees, and damages, as well as their own increased legal costs. Actions were instituted by Nesler, by Turnbull via the counterclaim, by the FTC, and by the Nebraska Department of Banking. These legal proceedings, including the fact that the Colorado franchisee, Turnbull, had

obtained a judgment in excess of $130,000 against B&F for franchise disclosure statement violations, would have to be part of any future compliant disclosure statement if B&F were to try to continue its franchising business. As Garland suggested, such could hardly have a positive effect on B&F's future prospects.

And, there is evidence in the record that at least some franchisees would have been willing to "exchange" their defective documents for compliant documents so that they could continue in business. Doing so would require compliant disclosure statements, which B&F never produced, at least while represented by Jacobsen Orr. Moreover, part of B&F's projected revenue stream would have come from the goods and services the franchisees would acquire from B&F, again providing some evidence of proximately caused damages. The defective documents exposed the plaintiffs to the requirement that they offer refunds of all franchise fees paid to B&F when each franchisee had been given the defective disclosure statements prior to the purchase of a franchise. Steve's affidavit recites that seven franchises were sold using the third-edition disclosure statement Orr drafted using Kirby's critique, but the evidence is that the third edition was not compliant with applicable law either. Additionally, there is evidence that the confession of judgment in the Nesler litigation destroyed Steve and Cathy's ability to secure additional bank financing because Nesler began attachment proceedings in April 2006, and such financing was needed to keep B&F operating.

In conclusion, there is evidence of a wide variety of damages sustained by B&F, as well as by Steve and Cathy personally. While some of the damages might be solely the consequence of Jacobsen Orr's negligence, there is evidence that some of those damages could have been avoided or mitigated by Kirby's adherence to the standard of care, as articulated by Garland. Although the defendants' experts express a differing view of the standard of care, that simply means that there were genuine issues of material fact that could not be resolved by summary judgment. Consequently, we find that the trial court erred in granting summary judgment to the defendants on Steve and Cathy's claims.

*Was Summary Judgment Properly Entered as to Other Named Plaintiffs?*

Barista's Company, Inc., a Nebraska corporation, was also named as a plaintiff, as were W.E. Corporation and Cup-O-Coa, whose functions we described earlier. There is no evidence that these three entities had any attorney-client relationship with the defendants or that they would be third parties under the authority we have earlier discussed in detail, at least on the record before us. Thus, the district court properly entered summary judgment in favor of the defendants as to these three plaintiffs, and to this extent, we affirm the decision of the district court.

*Did District Court Correctly Deny Plaintiffs' Motion for Summary Judgment?*

The plaintiffs assign error to the district court's decision denying their motion for summary judgment to be entered finding the defendants negligent as a matter of law. Obviously, the trial court did not err in this respect, for all of the reasons we have discussed above as to why summary judgment in the defendants' favor as to B&F and Steve and Cathy was not correct. Thus, this assignment of error is without merit.

*Did District Court Err in Ruling That Certain Exhibits Were Inadmissible at Hearing on Motions for Summary Judgment?*

[16] The plaintiffs assign error to the district court's decision excluding exhibits 69, 70, 85 through 87, and 92 from evidence at the summary judgment hearing. We have studied those exhibits, but have not used any of such in reaching our decision. Therefore, it is unnecessary for us to decide this assignment of error. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not necessary to adjudicate case and controversy before it).

## CONCLUSION

We conclude that under *Perez v. Stern*, 279 Neb. 187, 777 N.W.2d 545 (2010), Steve and Cathy were "third parties" to whom the defendants owed a duty of reasonable care. When we

view Garland's expert testimony in the light most favorable to Steve and Cathy, whether the defendants met that standard of care is a genuine issue of material fact for trial. Accordingly, the trial court erred in granting summary judgment to the defendants on Steve and Cathy's individual claims. Thus, we reverse the decision of the district court and remand such cause to the district court for further proceedings.

With respect to the plaintiff B&F, such corporation was indisputably a client of the defendants. There is evidence, when viewed most favorable to B&F, that the defendants breached the standard of care with respect to both the critique of the disclosure statement and the defense of B&F in the Nesler lawsuit. While the defendants offer opposing testimony from experts that there was no breach of the standard of care, resolution of that question is for the jury and is not to be decided on a motion for summary judgment. Accordingly, there is a genuine issue of material fact as to B&F's legal malpractice claims against the defendants. Thus, we reverse the grant of summary judgment to the defendants as to B&F's claims and remand the cause for further proceedings.

We find that there is no evidence that Barista's Company, W.E. Corporation, and Cup-O-Coa had an attorney-client relationship with the defendants; nor does the record before us contain evidence that these corporations would be third parties that were owed a duty of reasonable care by the defendants. Therefore, we affirm the grant of summary judgment in the defendants' favor as to these three plaintiffs.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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JAMES PETERSEN, APPELLANT, V.
NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., APPELLEES.
805 N.W.2d 667

Filed November 8, 2011. No. A-10-975.

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 may be reversed, vacated, or modified by an appellate court for errors appearing on the record.

2. ____: ____: ____. 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. **Judgments: Evidence: Words and Phrases: Appeal and Error.** An appellate court will not substitute its factual findings for those of the district court where competent evidence supports those findings. Competent evidence means evidence that tends to establish the fact in issue.
4. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
5. **Termination of Employment: Words and Phrases.** "Just cause" for dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice.
6. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

James L. Haszard, of McHenry, Haszard, Roth & Hupp, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and John L. Jelkin for appellees.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

INBODY, Chief Judge.

## INTRODUCTION

James Petersen appeals from the Lancaster County District Court's order affirming Petersen's termination from his employment with the Nebraska Department of Health and Human Services (DHHS). For the following reasons, we affirm.

## STATEMENT OF FACTS

*Background.*

Petersen had been employed with DHHS for approximately 28 years and was a member of the Nebraska Association of

Public Employees Local 61 of the American Federation of State, County and Municipal Employees (NAPE). Petersen worked at the Lincoln Regional Center (LRC) as a mental health security specialist II. Through his employment, Petersen was responsible for providing direct care to LRC patients in the forensics or security program, which included mental health board commitments with serious and persistent mental illnesses, court-ordered referrals, criminal defendants found not guilty by reason of insanity, and sexual offenders. On January 7, 2009, a tour of an LRC building was being given to a Nebraska State Patrol SWAT team. At approximately 2:30 p.m., one of the visiting SWAT team members stepped into the stairwell of the building to receive a cellular telephone call. Petersen, who had just arrived for work, passed the member in the stairwell, during which time the member detected the odor of burnt marijuana. LRC personnel were informed, and Petersen was assessed by the director of nursing and allowed to return to work. Shortly thereafter, Petersen was suspended, and on February 12, Petersen was terminated from his employment with DHHS.

The notice of termination indicated that Petersen had violated the NAPE labor contract by violating the "Code of Conduct for Nebraska Government," in addition to violating several subsections of article 10.2 of the labor contract, the DHHS drug testing policy, and the LRC facility/program work rules and standards.

*Procedural History.*

In accordance with the employee grievance procedure, Petersen immediately filed a grievance of his termination with the DHHS human resources manager. Petersen argued that said discipline was excessive and in violation of the labor contract. The manager determined that Petersen worked directly with patients in a locked unit for sex offenders at LRC and found that Petersen used marijuana prior to his shift, which increased the potential risk of harm to patients and coworkers in the unit. The manager recommended that Petersen's grievance be denied, which recommendation was adopted by the agency director.

Petersen then filed an appeal to the State Personnel Board. A "mini-hearing" was held with the administrator of the employee relations division, after which the administrator found that progressive discipline had not been employed and that the discipline of termination was more severe than the situation warranted. The administrator recommended that Petersen's grievance be sustained and that his discipline be modified to suspension without pay from the date of termination to July 1, 2009.

DHHS appealed the administrator's determination, and on September 2, 2009, a hearing was held. At the hearing, the compliance specialist at LRC testified that on January 7, 2009, he was giving a tour to members of the Nebraska State Patrol SWAT team when a member indicated to him that an individual, identified as Petersen, smelled of burnt marijuana as he passed him in the stairwell. The compliance specialist indicated that he wrote a report and submitted it to Scott Rasmussen, the LRC human resources manager.

Rasmussen testified that once he was made aware of the SWAT team member's observations, he contacted Debbie Roberts, the director of nursing, and instructed her to assess Petersen for anything unusual. After such assessment, Petersen and Roberts met with Rasmussen at around 4 p.m. that same day. Rasmussen testified that several individuals were involved in the meeting, during which he discussed with Petersen the SWAT team member's observations and further advised Petersen that he needed to submit to a drug test. Rasmussen testified that at the meeting, Petersen admitted to smoking marijuana at around noon and was again asked to submit to a drug test. Rasmussen testified that he asked Petersen to submit to a drug test approximately four times. Rasmussen indicated that Petersen refused each request, explaining that a test was not necessary because he had already admitted to smoking marijuana. Rasmussen directed another employee to drive Petersen home, which request was also denied by Petersen. Rasmussen explained that LRC's policy was to consider a refusal to submit to drug testing as a positive test and that Petersen was placed under investigatory suspension.

The administrative services major with the Nebraska State Patrol testified that through his employment, he had received significant training on drug evaluation and classification for purposes of determining whether or not an individual was impaired or under the influence. He testified that he had reviewed Petersen's file and that, in his opinion, at 2:30 or 2:45 p.m., when Petersen arrived for work, he still would have been under the influence of marijuana that had been smoked at noon that same day.

Roberts, the director of nursing, testified that because there are various types of patients residing at LRC, employees are required to be aware at all times. On one occasion several years prior, a physician was killed by a patient, and there are documented cases of other violent outbreaks by patients. Roberts testified that Petersen's main responsibility as a security specialist was to provide direct patient care: specifically, to maintain the psychiatric care for each patient in accordance with their individualized treatment plan.

Roberts testified that on January 7, 2009, Petersen worked "the 3:00 to 11:00" p.m. shift in the convicted sex offender program. Roberts became aware of some concerns regarding Petersen when it was reported to her by a compliance specialist that Petersen smelled of marijuana. Roberts testified that she did not have any specialized training in the detection of impairment but met with Petersen at around 3:30 p.m. to assess the situation. Roberts did not detect the smell of marijuana on Petersen and did not see any outward signs of impairment. Roberts directed Petersen to return to work and, at the request of Rasmussen, later brought Petersen to the administration building for further discussion. Roberts explained that Petersen was directed to take a drug test and refused.

Roberts explained that she had reviewed Petersen's evaluations dating back to 1989, which revealed generally good-quality evaluations. Roberts testified that Petersen used a significant amount of sick leave and leave without pay and that he needed improvement with attendance and punctuality. Generally, Petersen's evaluations encouraged him to become more involved in ward routines. In both 1997 and 1998,

Petersen utilized 280 hours of sick leave and was described as having difficulty adapting to change. Special evaluations were made in 2001 and 2007, for tardiness and increased use of sick leave. Roberts testified that there were also consistent indications in his evaluations that he had good working relationships with patients and documented his activities well. Roberts testified that during his 28 years of service, he had no formal disciplinary actions.

Roberts testified that although Petersen's employment had been terminated after further investigation, lesser discipline had been discussed as an option for Petersen. However, due to the strict guidelines requiring patient safety, it was imperative that employees be alert and under no impairment at all times. Roberts also testified that "role modeling" was a vital aspect of the employee's role at LRC and that if a "trooper" had smelled marijuana on Petersen, then there was also a possibility that some of the patients who were substance abusers could smell the odor as well. Roberts explained termination came down to the facts that the potential for harm was too great in this situation and that Petersen had been insubordinate, had admitted to smoking marijuana, and had failed to comply with requests for drug testing.

Petersen testified that in his many years of employment at LRC, he had not ever received any type of formal discipline. Petersen explained that he had utilized significant amounts of sick leave in the past in order to take care of family members or for his own health reasons, but had not been formally disciplined for those issues. Petersen testified that in the present situation, he believed disciplinary action was warranted for his actions, but not termination. Petersen explained that he was not impaired that afternoon because he had smoked the marijuana 2½ hours before work and had smoked only a small amount of marijuana. Petersen specifically testified that he had smoked only a quarter to a third of a single marijuana joint, which he explained was less than 1 gram, and, further, that the quality of the marijuana was only "medium." Petersen testified that he had been asked to submit to a drug test and admitted that he denied the requests. Petersen testified that he did not violate a "direct order" because he had not been ordered to take a drug

test, only requested to take a drug test. Petersen testified that he believed by admitting to having smoked marijuana, a drug test would not be necessary and would have saved the State the unnecessary expense of a drug test. Petersen felt that he was an asset to LRC, because he was helpful and had a unique ability to work with the patients in his unit. He also testified that if he was allowed to continue his employment with LRC, he would accept probation and would submit to a random drug-testing requirement.

A former coworker testified that he worked with Petersen in 1984 in the LRC security unit as a security specialist and that he tried to emulate Petersen because he possessed great leadership skills and respect for the patients.

An addiction therapist testified that he became acquainted with Petersen in 1992, when the therapist worked in the LRC security unit. He testified that he worked with Petersen until 1998, on a day-to-day basis, because the two worked the same shift in the same unit as security specialists. He testified that Petersen was very professional and that his actions with clients were above reproach. He testified that Petersen was a good employee and always completed his requirements.

On October 7, 2009, the hearing officer issued findings of fact, conclusions of law, and a recommendation regarding DHHS' appeal of Petersen's grievance. The hearing officer found that Petersen's violation of LRC policies by smoking marijuana and going to work under the influence disrupted the workplace, placed LRC in a bad light, and failed to set a good example for the patients. The officer determined that Petersen's actions had serious consequences, because he worked with individuals who had substance abuse problems. The officer found that not only had Petersen smoked marijuana shortly before work and then reported to work under the influence, but that he had also refused to take a drug test. The hearing officer found that Petersen had violated various policies and provisions of the labor contract and that, given the nature and severity of the infraction, there had been just cause to forgo progressive discipline and terminate Petersen's employment. On November 19, 2009, the State Personnel Board reviewed

the hearing officer's findings and voted unanimously to adopt the recommended decision.

Petersen then appealed to the Lancaster County District Court. A hearing was held during which evidence was submitted and arguments were made. The district court determined that DHHS had just cause to impose discipline upon Petersen and that, even in consideration of his work history at LRC, termination was appropriate. The district court affirmed the State Personnel Board's decision, and Petersen has now timely filed an appeal to this court.

## ASSIGNMENT OF ERROR

Petersen assigns, rephrased and consolidated, that the district court erred by affirming the termination of his employment.

## STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. 29, 767 N.W.2d 104 (2009); *Holmes v. State*, 275 Neb. 211, 745 N.W.2d 578 (2008). 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. *Ahmann v. Nebraska Dept. of Corr. Servs., supra*; *Holmes v. State, supra*.

[3] An appellate court will not substitute its factual findings for those of the district court where competent evidence supports those findings. Competent evidence means evidence that tends to establish the fact in issue. *Ahmann v. Nebraska Dept. of Corr. Servs., supra*.

[4] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Ahmann v. Nebraska Dept. of Corr. Servs., supra*; *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003).

## ANALYSIS

Petersen argues that the district court erred by affirming the termination of his employment with DHHS. Petersen argues that there was no just cause to terminate his employment; he should have been disciplined, not terminated; there was no evidence he was under the influence; and he was terminated for fear of his possible future actions.

*Just Cause for Termination.*

Petersen argues that there was no just cause to terminate his employment and, thus, that the decision to affirm the termination by the district court was arbitrary and capricious. Article 10.1 of the labor contract, which governs the discipline of NAPE employees such as Petersen, states in pertinent part:

> Discipline will be based upon just cause . . . . The Employer shall not discipline an employee without just cause, recognizing and employing progressive discipline. When imposing progressive discipline, the nature and severity of the infraction shall be considered along with the history of discipline and performance contained in the employee's personnel file.

[5] "Just cause" for dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice. *Ahmann v. Nebraska Dept. of Corr. Servs., supra*. See *Stejskal v. Department of Admin. Servs., supra*. The Nebraska Supreme Court has applied the same standard to findings regarding "good cause" for dismissal. See *Stejskal v. Department of Admin. Servs., supra*.

Article 10.2 of the labor contract indicates that there are several instances in which appropriate disciplinary action, subject to just cause, may be taken. Specifically, Petersen was found to have violated the following subsections of article 10.2 of the labor contract:

> b. Failure or refusal to comply with a lawful order or to accept a proper assignment from an authorized supervisor.

> c. Inefficiency, incompetence or gross negligence in the performance of duties.
>
> d. Unlawful manufacture, distribution, dispensation, possession or use of a controlled substance or alcoholic beverage in the workplace or reporting for duty under the influence of alcohol and/or unlawful drugs. Use of a controlled substance by the employee as prescribed by his/her physician and/or other licensed health practitioner shall not be a violation.
>
> . . . .
>
> j. Failure to maintain appropriate working relationships with the public, employees, supervisors, or managers while on the job or when performing job related functions.
>
> . . . .
>
> m. Acts or conduct which adversely affects the employee's performance and/or the employing agency's performance or function.

In support of his position, Petersen relies heavily on *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. 29, 767 N.W.2d 104 (2009). *Ahmann v. Nebraska Dept. of Corr. Servs.* involves an individual, John Ahmann, employed by the Nebraska Department of Correctional Services (DCS) as a receptionist. Ahmann's responsibilities included filing incident reports, filing inmate grievances, maintaining files, entering data into databases, preparing reports and correspondence, and other general secretarial duties. Ahmann's evaluations indicated that he exceeded performance level expectations and had not been disciplined or counseled for misconduct. However, in May 2006, Ahmann was subjected to a random urinalysis test and tested positive for marijuana. Ahmann was suspended without pay pending an investigation of violating article 10.2, subsections a, d, and m, of the labor contract. DCS terminated Ahmann's employment, and he appealed his termination in accordance with the employee grievance procedure. The hearing officer recommended that the grievance be sustained, in part, and that Ahmann's employment be reinstated but that he should be suspended for 20 days. The State Personnel Board voted to accept a portion of the hearing officer's recommendation, but nonetheless concluded that termination was justified.

Ahmann appealed to the district court, which concluded that while there was just cause to discipline Ahmann, there was not just cause for immediate termination. DCS then appealed to the Nebraska Supreme Court, which affirmed the decision of the district court, opining that DCS' treatment of other employees who tested positive for marijuana use indicated that DCS did not consider off-duty drug use a per se justification for immediate discharge. The Supreme Court found that Ahmann's use of marijuana did not occur on the job or otherwise "affect his job performance or in any way jeopardize the safety and security of DCS." *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. at 40, 767 N.W.2d at 112.

Petersen contends that his case is not materially different from Ahmann's case and that this court should find in accordance with that case. Petersen argues that there are two main differences from this case, which are essentially immaterial: first, that the smell of marijuana is not a material difference, and second, that the labor contract cannot be interpreted differently for different types of workers. We disagree. While some circumstances in both cases are similar, there are significant differences that distinguish the cases from one another.

As set forth above, article 10.1 of the labor contract requires that "[w]hen imposing progressive discipline, the nature and severity of the infraction shall be considered along with the history of discipline and performance contained in the employee's personnel file." In the case at hand, Petersen had been employed with DHHS for approximately 28 years and, throughout those years, had not received any formal discipline. There were several concerns addressed in his evaluations regarding sick time and tardiness, but again, no formal discipline had been taken. A Nebraska State Patrol SWAT team member observed Petersen reporting to work with the odor of burnt marijuana about his person. Petersen admitted to smoking marijuana shortly before reporting to work but refused numerous requests to take a drug test. Petersen argues that he did not refuse to take the test, because he was not ordered to take the test, only requested to; however, the DHHS drug policy clearly states, and Petersen testified that he understood, that a refusal was considered a failed test. Furthermore, Petersen himself

admitted that he worked in a highly volatile and potentially dangerous unit and that it was imperative that employees be fully aware of their surroundings due to the possibility of violence with the patients with whom he had direct contact each and every day.

Thus, while some of the facts in *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. 29, 767 N.W.2d 104 (2009), are similar to those in the present case, clearly, Ahmann, as a clerical worker, was not employed in the same position as Petersen, who was in direct contact with patients. Also, Ahmann did not smoke marijuana just prior to reporting to work and did not refuse to take a drug test.

We find Petersen's case more akin to several other cases in which the infraction of the individual in the course of his or her employment directly related to the safety and security of the individuals being monitored, other employees, and the public. See, *Nebraska Dept. of Correctional Servs. v. Hansen*, 238 Neb. 233, 470 N.W.2d 170 (1991) (correctional officer fell asleep while alone on duty at penitentiary; nature and severity of infraction is not measured by harm that resulted, but, rather, risk associated with it); *Percival v. Department of Correctional Servs.*, 233 Neb. 508, 446 N.W.2d 211 (1989) (actual harm not required to impose discipline; employee's violation of department rule, thereby compromising security, is sufficient for disciplinary action). See, also, *Nebraska Dept. of Health & Human Servs. v. Williams*, 16 Neb. App. 777, 752 N.W.2d 163 (2008) (good cause found when psychiatric technician's employment was terminated for failure to complete room checks, which aspect of job related directly to safety and security of patients in unit and public).

Given the nature and the severity of Petersen's infraction, and taking into account Petersen's history of discipline and performance, the district court was correct to conclude that a reasonable employer, acting in good faith, would regard the infraction as good and sufficient reason for immediate termination. Petersen worked in a potentially dangerous and violent unit where, the record indicates, a physician had been attacked and killed by a patient and, additionally, there had been other violent attacks upon employees by patients. It was of the

utmost importance, for his safety and the safety of others, that Petersen remain alert and unimpaired at work. Clearly, his use of marijuana prior to reporting to work had the potential to affect his job performance and jeopardize the safety and security of DHHS. These reasons, coupled with his admitted usage of marijuana and refusal to submit to a drug test after several requests, equate to just cause for termination of his employment, and we find that the district court's affirmation of Petersen's termination conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. This assignment of error is without merit.

*Remaining Assignments of Error.*

[6] Having determined that the district court did not err by affirming Petersen's termination of employment, we need not address Petersen's remaining arguments that there was no evidence he was under the influence of drugs and that he was terminated for fear of his possible future actions. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

## CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in affirming the termination of Petersen's employment with DHHS for admittedly smoking marijuana just prior to reporting for work and refusing to take a drug test. Therefore, we affirm.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
DAVID A. DERR, APPELLANT.
809 N.W.2d 520

Filed November 8, 2011. No. A-11-101.

1. **Effectiveness of Counsel: Records: Appeal and Error.** It is the responsibility of the appellate courts to determine whether the record presented on direct appeal

is sufficient to address the claims of ineffective assistance of trial counsel when appellate counsel is different from trial counsel.

2. **Effectiveness of Counsel: Proof.** In order to prevail on an ineffective assistance of counsel claim, a defendant must show that his or her counsel's performance was deficient and that he or she was prejudiced by that deficient performance.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

D. Brandon Brinegar, Deputy Buffalo County Public Defender, of Ross, Schroeder & George, L.L.C., for appellant.

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

IRWIN, MOORE, and CASSEL, Judges.

IRWIN, Judge.

## I. INTRODUCTION

This direct appeal involves issues of ineffective assistance of trial counsel. Appellate counsel is different from trial counsel. In the brief of David A. Derr, he asks that this court "find the record to be insufficient to allow [his] assigned errors to be addressed on direct appeal, and that [his] claims of ineffective assistance of counsel are preserved for postconviction review." Brief for appellant at 11. Derr's brief also states, "Essentially, [he] has no argument on direct appeal." *Id.* at 7.

[1] It is the responsibility of the appellate courts to determine whether the record presented on direct appeal is sufficient to address the claims of ineffective assistance of trial counsel when appellate counsel is different from trial counsel. Therefore, since Derr presumed the record was inadequate for review of these issues and failed to allege that any of counsel's actions prejudiced him or, stated another way, did not sufficiently allege his ineffective assistance of counsel claims, we are constrained to find that Derr's assertions of ineffective assistance of counsel are without merit.

## II. BACKGROUND

The underlying facts of this case are undisputed. In September 2009, Derr's 12-year-old daughter reported to police that Derr

had subjected her to sexual contact. Derr was subsequently arrested and charged with first degree sexual assault. Derr eventually pled no contest to an amended charge of attempted third degree sexual assault of a child. Derr was sentenced to a term of imprisonment of not less than 18 months or more than 5 years. Represented by appellate counsel different from his trial counsel, Derr timely appealed to this court. The case was submitted without oral argument pursuant to Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008).

## III. ASSIGNMENT OF ERROR

Derr asserts that he was denied effective assistance of trial counsel.

## IV. STANDARD OF REVIEW

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. *State v. McDaniel*, 17 Neb. App. 725, 771 N.W.2d 173 (2009). When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

## V. ANALYSIS

On appeal, Derr argues that he was denied his right to effective assistance of counsel because of his trial counsel's failure to (1) inform Derr that he could move to withdraw his no contest plea prior to the sentencing hearing, (2) adequately review the contents of the presentence report with Derr prior to the sentencing hearing, and (3) inform Derr that he could ask that the sentencing hearing be continued in order to obtain further evidence and/or expert witnesses. Derr acknowledges that his assertions are being raised for the first time on direct appeal and recognizes that the issues may not be ripe for resolution on appeal because of the lack of an evidentiary record.

Derr is also clearly aware of the rule that 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. See, e.g., *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009). In fact, in his appellate brief, Derr specifically asks that this court "find the record to be insufficient to allow [his] assigned errors to be addressed on direct appeal, and that [his] claims of ineffective assistance of counsel are preserved for postconviction review." Brief for appellant at 11. Derr does not provide any further argument concerning the merits of his ineffective assistance of counsel claims.

[2] The analysis section of Derr's brief is limited to his general argument that his trial counsel provided ineffective assistance and a brief recitation of how his counsel's performance was deficient. Derr does not allege how any of trial counsel's actions prejudiced him. In order to prevail on an ineffective assistance of counsel claim, a defendant must show that his or her counsel's performance was deficient and that he or she was prejudiced by that deficient performance. *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009). Because Derr did not allege both that his counsel's performance was deficient and that such deficient performance was prejudicial to him, resolution of his assertions of ineffective assistance of counsel hinges not on the adequacy of the record before us, but on his failure to provide this court with sufficient allegations of ineffective assistance of counsel.

### 1. Withdrawal of No Contest Plea

Derr alleges that his trial counsel was ineffective because counsel failed to inform him that he could withdraw his no contest plea prior to the sentencing hearing. Derr does not allege any possible grounds or reasons for the withdrawal of his plea. The right to withdraw a plea previously entered is not absolute. *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010). Because Derr does not allege the grounds for a withdrawal of his plea, he cannot demonstrate that a motion to withdraw the plea would have been successful. Thus, he cannot demonstrate that he was prejudiced by his counsel's failure to advise him that he could withdraw his plea. This assertion has no merit.

### 2. Review of Presentence Report

Derr alleges that his trial counsel was ineffective because counsel failed to adequately review the contents of the presentence report with Derr prior to the sentencing hearing. The record reveals that Derr's trial counsel did review the presentence report prior to the trial. In fact, at the sentencing hearing, counsel spoke at length about the information contained in the report. The record does not indicate whether Derr's trial counsel reviewed the report with Derr. However, even if his counsel did fail to review the report with him, Derr has not alleged how he was prejudiced by counsel's actions. Specifically, Derr has not alleged how the ultimate outcome of the sentencing hearing would have been different had he had the opportunity to review the report with counsel. This assertion has no merit.

### 3. Motion to Continue Sentencing Hearing

Derr alleges that his trial counsel was ineffective because he failed to inform Derr that he could ask that the sentencing hearing be continued in order to obtain further evidence and/or expert witnesses. Derr does not specify what other evidence or witnesses he could have called at the sentencing hearing if granted a continuance. Moreover, he does not allege what any additional evidence or testimony would have shown or whether it would have altered the outcome of the sentencing hearing. Because Derr does not specifically allege what other evidence or testimony he would have presented at the sentencing hearing, he cannot demonstrate that he was prejudiced by his counsel's failure to inform him that the sentencing hearing could be continued. This assertion has no merit.

## VI. CONCLUSION

Derr has not shown that he was prejudiced by his trial counsel's alleged deficient performance. As such, we reject his assigned error that his counsel was ineffective, and we affirm his conviction and sentence.

Affirmed.

# HONG'S, INC., DOING BUSINESS AS CHINA BUFFET, APPELLANT, v. GRAND CHINA BUFFET, INC., ET AL., APPELLEES.

805 N.W.2d 90

Filed November 8, 2011. No. A-11-165.

1. **Injunction: Damages: Appeal and Error.** In actions seeking both injunctive relief and damages, the standard of review applicable in reviewing questions of fact is de novo.
2. **Names: Proof.** In a case for trade name infringement, the plaintiff has the burden to prove by a preponderance of the evidence the existence of (1) a valid trade name entitled to protection and (2) a substantial similarity between the plaintiff's and the defendant's names, which would result in either actual or probable deception or confusion by ordinary persons dealing with ordinary caution.
3. ____: ____. If the similarity in trade names is such as to mislead purchasers or those doing business with a company, acting with ordinary and reasonable caution, or if the similarity is calculated to deceive the ordinary buyer in ordinary conditions, it is sufficient to entitle the one first adopting the name to relief.
4. **Names.** Competition between enterprises is thought to be a desirable objective; trade names allow the public to distinguish between the goods and services of merchants, and merchants may reap the benefits or suffer the consequences of their efforts. Thus, the evil sought to be eliminated by trade name protection is confusion.
5. ____. No precise rules can be laid down to determine whether trade name confusion exists or is likely to arise. Among the considerations are: (1) degree of similarity in the products offered for sale; (2) geographic separation of the two enterprises and the extent to which their trade areas overlap; (3) extent to which the stores are in actual competition; (4) duration of use without actual confusion; and (5) the actual similarity, visually and phonetically, between the two trade names.
6. **Names: Proof.** The likelihood of confusion in the use of trade names can be shown by presenting circumstances from which courts might conclude that persons are likely to transact business with one party under the belief they are dealing with another party.
7. **Names.** One trade name is not an infringement on another trade name if ordinary attention of persons would disclose the difference.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Jeffrey A. Silver for appellant.

Patrick M. Flood and Michael R. Peterson, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellees.

IRWIN, CASSEL, and PIRTLE, Judges.

PIRTLE, Judge.

## INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Hong's, Inc., doing business as China Buffet (Hong's), appeals from an order of the district court for Douglas County dismissing its claim for relief under Nebraska's Trademark Registration Act. Hong's challenges the court's finding that the name "China Buffet" was generic and descriptive, and therefore not entitled to protection under the Trademark Registration Act, as well as the finding that the name was not likely to cause confusion. Based on the reasons that follow, we affirm.

## BACKGROUND

On March 17, 2010, Hong's filed an application for a preliminary injunction enjoining Grand China Buffet, Inc.; Ying Chun Jiang; and Does 1 through 100 (collectively the defendants), from using the name "Grand China Buffet." A hearing regarding the application by Hong's for preliminary injunction was conducted in the district court on April 2. The court issued an order on April 5 denying the injunction.

On March 17, 2010, Hong's also filed a complaint for declaratory and injunctive relief pursuant to the Trademark Registration Act, Neb. Rev. Stat. § 87-126 et seq. (Reissue 2008), against the defendants. The matter was tried in the district court for Douglas County on October 29. At trial, the parties agreed to enter into a stipulation to submit a transcript of the proceedings from the April 2 hearing and reoffered the exhibits presented at that hearing.

The March 17, 2010, complaint filed by Hong's sought injunctive relief and damages for violation of the Trademark Registration Act, interference with a business relationship, and civil conspiracy. On March 18, Grand China Buffet's attorney filed an application for registration of trade name with the Nebraska Secretary of State.

The China Buffet restaurant, originally owned by China Buffet, Inc., opened in 1993 in a leased space located at 756 North 120th Street in Omaha, Nebraska. Hong Xeng, president

and part owner of China Buffet, testified that in 2000, he set up a corporation, "Hong's, Inc.," to purchase assets, including the trade name "China Buffet," from China Buffet, Inc. After the purchase, the China Buffet restaurant moved to 737 North 114th Street in Omaha, where it currently operates.

Hong's alleged that on March 25, 2004, it filed a registration of a service mark on "China Buffet" pursuant to the Trademark Registration Act, which registration was accepted for filing by the Secretary of State. Hong's further alleged that it spent close to $80,000 advertising the China Buffet name. Hong's alleged it had been vigilant in preserving and protecting the integrity of the service mark by issuing cease-and-desist letters to other operators of Chinese buffet restaurants attempting to use names similar to or the same as "China Buffet."

Grand China Buffet filed articles of incorporation with the Secretary of State on February 8, 2010. In February 2010, Hong's became aware of Grand China Buffet's intention to open a Chinese buffet restaurant under the name "Grand China Buffet" at 11226 Chicago Circle in Omaha. This location is within 1 mile of the China Buffet restaurant's 737 North 114th Street location. On February 3, Hong's sent Grand China Buffet a letter to inform the latter of the "China Buffet" service mark. This letter was returned not deliverable. On March 9, Hong's sent Grand China Buffet another letter via certified mail. On March 11, Grand China Buffet's attorney replied to the letter, stating his client was unwilling to abandon the use of the trade name, and the restaurant opened as planned. The evidence shows Hong's sent similar letters to other Nebraska businesses, including "Top of China Buffet" in Omaha, and "China Buffet" in Plattsmouth, Nebraska. Hong's did not send a letter to "Great China Buffet" operating in Lincoln, Nebraska, because it was open years before Hong's purchased China Buffet in 2000.

Xeng testified at the hearing on April 2, 2010, that the restaurant offers an all-you-can-eat buffet for a single price or customers may order off the menu. The buffet features Chinese food, an all-you-can-eat Mongolian grill, a salad bar, and a dessert bar. He stated concerns about confusion of his customers, the "illusion of mark," and his advertising costs. Hong testified

that a customer asked why the China Buffet restaurant moved to another location down the street.

Simon Dong is the manager and part owner of Grand China Buffet. Dong's real estate agent, Feng Ping Chen, recommended that Dong open a Chinese restaurant business in Omaha using the name "Grand China Buffet." Chen emphasized the word "grand" because it reflected the large size of the restaurant, the selection of food, and the seating capacity of 300 to 650 customers. Grand China Buffet is located in a former car dealership building, and the space is approximately 11,000 square feet. Like China Buffet, Grand China Buffet offers a buffet with a Mongolian grill. Grand China Buffet has a larger list of menu items available, and the offerings include daily seafood and sushi options.

Chen testified that nine of his clients have used the name "Grand China Buffet" across the United States. At the hearing, Chen said that he ate at China Buffet while in Omaha and that "[i]t was a very small restaurant, only have two buffet stand, very small buffet stand. And our concept of a super buffet is to provide a huge variety of selections." Chen noted Grand China Buffet has about four times more selections than the China Buffet location he visited.

The trial court considered the transcript of the April 2, 2010, hearing; the evidence offered at that hearing; the stipulation of the parties; and the parties' briefs. Ultimately, the court determined Hong's failed to carry the burden of proof showing that the use of "Grand China Buffet" was intended to cause confusion in the marketplace or usurp China Buffet's goodwill or that it did in fact cause confusion among customers or potential customers. The court also determined the "China Buffet" service mark was not protectable under the Trademark Registration Act, because it was generic and descriptive. The trial court's order, issued February 4, 2011, dismissed the complaint.

Hong's timely appealed.

## ASSIGNMENTS OF ERROR

Hong's alleges the court erred in finding the defendants did not violate the Trademark Registration Act and finding the

name "Grand China Buffet" is not likely to cause confusion with China Buffet.

## STANDARD OF REVIEW

[1] In actions seeking both injunctive relief and damages, the standard of review applicable in reviewing questions of fact is de novo. *ADT Security Servs. v. A/C Security Systems*, 15 Neb. App. 666, 736 N.W.2d 737 (2007).

## ANALYSIS

Hong's alleges the court erred in finding the defendants did not violate the Trademark Registration Act and finding the name "Grand China Buffet" is not likely to cause confusion with China Buffet.

[2] In a case for trade name infringement, the plaintiff has the burden to prove by a preponderance of the evidence the existence of (1) a valid trade name entitled to protection and (2) a substantial similarity between the plaintiff's and the defendant's names, which would result in either actual or probable deception or confusion by ordinary persons dealing with ordinary caution. *Nebraska Irrigation, Inc. v. Koch*, 246 Neb. 856, 523 N.W.2d 676 (1994).

We focus now on the question of whether there is substantial similarity resulting in actual or probable deception or confusion to determine whether Hong's is entitled to relief.

[3] If the similarity in trade names is such as to mislead purchasers or those doing business with a company, acting with ordinary and reasonable caution, or if the similarity is calculated to deceive the ordinary buyer in ordinary conditions, it is sufficient to entitle the one first adopting the name to relief. *Equitable Bldg. & Loan v. Equitable Mortgage*, 11 Neb. App. 850, 662 N.W.2d 205 (2003).

[4] As stated in *Dahms v. Jacobs*, 201 Neb. 745, 272 N.W.2d 43 (1978), competition between enterprises is thought to be a desirable objective; trade names allow the public to distinguish between the goods and services of merchants, and merchants may reap the benefits or suffer the consequences of their efforts. Thus, the evil sought to be eliminated by trade name protection is confusion. *Id.*

[5] No precise rules can be laid down to determine whether trade name confusion exists or is likely to arise. Among the considerations are: (1) degree of similarity in the products offered for sale; (2) geographic separation of the two enterprises and the extent to which their trade areas overlap; (3) extent to which the stores are in actual competition; (4) duration of use without actual confusion; and (5) the actual similarity, visually and phonetically, between the two trade names. *Dahms v. Jacobs, supra.*

We first turn to the degree of similarity between the products offered for sale by both parties. Both offer buffet-style Chinese food, a Mongolian grill, and the option to order off the menu. However, Grand China Buffet is a substantially larger restaurant, covering 11,000 square feet, while China Buffet is 6,000 square feet. In addition, Grand China Buffet has a larger menu and offers seafood and sushi options on a daily basis.

Next, we must consider the geographic separation. It is undisputed that the two restaurants are located in close proximity to one another and that the trade areas therefore overlap. This fact, on its own, is not sufficient to prove actual or probable confusion, but it is a factor which must be considered in the ultimate determination of this case.

The next factor, the extent to which the businesses are in actual competition, should be considered to determine how much weight should be given to the trade overlap. Hong's alleges that both restaurants share "virtually identical" services and concepts. Brief for appellant at 23. While it is true that both restaurants offer similar food, Grand China Buffet has made an attempt to add options such as seafood and sushi to set itself apart from China Buffet. Still, the two businesses offering a Chinese food menu and buffet options are likely to be in competition with one another. As previously noted, the *Dahms* court stated that competition is a desirable objective and ultimately benefits the customer and that thus, the evil sought to be eliminated is confusion.

We now consider the duration of the use of a name without actual confusion. In this situation, Hong's provided little to no evidence of actual confusion caused by the name "Grand China Buffet." The original complaint filed by Hong's alleged use of

the name "Grand China Buffet" caused and would continue to cause confusion among customers and potential customers, but Hong's failed to provide sufficient evidence of actual or even probable confusion. The only evidence provided by Hong's in the lower court was Xeng's testimony that customers had asked why the restaurant moved into a new location. The trial court's order following the motion by Hong's for preliminary injunction indicated there was "no substantiated evidence of confusion between the names of the parties." At trial, Hong's could have called customers to demonstrate their confusion regarding the relationship or lack thereof between the two businesses. Instead, Hong's offered the same exhibits and testimony that was previously ruled insufficient to demonstrate confusion.

[6] Hong's could also have demonstrated confusion not just of customers, but those likely to do business with China Buffet, including wholesalers, banks, utility providers, and so on. In *ADT Security Servs. v. A/C Security Systems*, 15 Neb. App. 666, 688, 736 N.W.2d 737, 760 (2007), the court stated: "'The likelihood of confusion in the use of trade names can be shown by presenting circumstances from which courts might conclude that persons are likely to transact business with one party under the belief they are dealing with another party.'" In *ADT Security Servs.*, the record showed vendors and customers sent invoices and checks intended for A/C Security Systems, Inc. (A/C), to ADT Security Services, Inc. (ADT). The administrative manager for ADT also testified that the Internal Revenue Service sent ADT materials intended for A/C and that customers telephoned ADT complaining of being double-billed by ADT and A/C. The court determined there was clear evidence of actual confusion in that case.

The court in *Personal Finance Co. v. Personal Loan Service*, 133 Neb. 373, 275 N.W. 324 (1937), indicated that either actual or probable deception, or confusion, could be shown to entitle a plaintiff to relief. However, Hong's failed to present sufficient evidence that its customers were likely to be misled. Absent a showing of fact, or the likelihood of confusion, we cannot conclude Grand China Buffet's name is likely to deceive actual or potential customers.

Finally, we must look at the actual similarity between the trade names. In previous cases, the Nebraska courts have determined business names were distinguishable where careful examination of the words would prevent the public from being deceived, although the two businesses were located in the same town and dealing in similar businesses.

[7] In *Nebraska Irrigation, Inc. v. Koch*, 246 Neb. 856, 523 N.W.2d 676 (1994), the court concluded that one trade name is not an infringement on another trade name if ordinary attention of persons would disclose the difference. This means, if the average customer could conclude upon reasonable examination of the name, size, location, and style of the two restaurants that they are distinguishable, then there is no infringement.

While the two names are similar, in the instant case, there are distinguishing features in both the names and business models that set the two apart. Grand China Buffet has an additional word in its title, and that word describes the size of the restaurant and the selection of food offered. In addition, the location of the two restaurants in a relatively close proximity would suggest to the average customer that the two businesses are not related. Finally, the outward appearance of the two buildings and signage are dissimilar enough that customers and potential customers acting with reasonable caution are unlikely to be misled.

## CONCLUSION

Hong's has failed to meet its burden to show, by a preponderance of the evidence, either actual or probable confusion in the use of the trade names "China Buffet" and "Grand China Buffet." We therefore affirm the judgment of the district court.

AFFIRMED.

# JEFFREY STERNER, APPELLEE, V. AMERICAN FAMILY INSURANCE COMPANY, APPELLANT.

805 N.W.2d 696

Filed November 15, 2011. No. A-10-1074.

1. **Workers' Compensation: Judgments: Appeal and Error.** Distribution of the proceeds of a judgment or settlement under Neb. Rev. Stat. § 48-118.04 (Reissue 2010) is left to the trial court's discretion and is reviewed by an appellate court for an abuse of that discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
3. **Workers' Compensation: Employer and Employee: Insurance.** Neb. Rev. Stat. § 48-118.04 (Reissue 2010) provides that third-party settlements are void unless agreed to in writing by the employee and employer, or its insurer.
4. **Workers' Compensation: Subrogation.** Using a "made whole" formulation or establishing a higher priority for a worker's recovery than for an employer's subrogation interest in a third-party claim is fundamentally flawed, and a division of the funds based thereupon would be untenable and an abuse of discretion.
5. **Workers' Compensation: Subrogation: Wages: Attorney Fees: Costs.** When an employer has a subrogation interest in the recovery in a worker's third-party claim, the party bringing the claim is entitled to deduct a reasonable sum for attorney fees and costs, but not for unreimbursed wages, from any amount recovered.
6. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Reversed and remanded for further proceedings.

Richard L. Walentine, Justin L. Griner, and Betty Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Terry M. Anderson and Melany S. O'Brien, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellee.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

Jeffrey Sterner was injured in the scope and course of his employment as a property loss adjuster for American Family Insurance Company (American Family) on February 6, 2008,

when he was attacked by a homeowner's pit bull dog. In his workers' compensation claim, he claimed injury to both his left and right shoulders, but was awarded benefits for the left shoulder only. Sterner pursued a third-party tort claim against the homeowner, which was ultimately settled for $80,000 with American Family's consent. Thereafter, this case was filed in the district court for Douglas County to determine the "fair and equitable" division of those settlement proceeds between Sterner and American Family's subrogation interest for workers' compensation benefits paid to Sterner. The district court found that American Family was entitled to an "equitable subrogation in the amount of $0.00." American Family has now appealed that decision to this court.

## FACTUAL AND PROCEDURAL BACKGROUND

Sterner was employed by American Family as a home property adjuster. On February 6, 2008, as Sterner was approaching the front door of a residence in the course of his job, a pit bull dog came around the front of the house, rushing at him and growling. Sterner partially blocked the dog's leap at him with a clipboard, but he slipped on the snow, fell, and landed on his left shoulder. The dog was at the "end of its chain" and therefore was not able to pursue Sterner, and he was not bitten. There is no dispute that Sterner sustained an injury to his left rotator cuff from the fall, which eventually resulted in surgical intervention and time off from work. Sterner's attending physician, Dr. Darren Keiser, assigned an 8-percent impairment of the left upper extremity. Sterner's weekly wage entitled him to the maximum allowable compensation benefit of $644 per week. All benefits for the left shoulder were voluntarily paid by American Family.

Because Sterner also claimed that his right shoulder was injured in this incident, he filed suit against American Family in the Nebraska Workers' Compensation Court. The matter was tried on November 20, 2009, and the workers' compensation trial judge rendered his decision on December 18. The trial judge found the left shoulder injury to be compensable, found that all allowable benefits had been paid, and then extensively

discussed the claim of injury sustained to the right shoulder. The judge found that the right shoulder condition did not arise out of and in the course of Sterner's employment and denied benefits. No appeal was filed from that decision.

The evidence shows that because of the left shoulder injury, Sterner missed 4½ weeks of work, and that he returned to limited duty work on July 23, 2008. His lifting was restricted, and he was not to climb ladders. With respect to the right shoulder, Sterner's claim was that he was required to work beyond the restrictions to his left arm, which led to an "'overuse'" injury to his right shoulder, culminating in a right rotator cuff tear and remedial surgery on January 2, 2009.

Sterner's orthopedic surgeon, Dr. Keiser, issued his opinion dated October 2, 2008, that because Sterner had no problems with his right shoulder since a prior injury and rotator cuff repair thereto in 1991, the right rotator cuff tear was a "direct result" of Sterner's overuse of that extremity because of his left shoulder injury. The evidence is that Sterner first reported right shoulder symptoms during the first week of August 2008. The compensation court trial judge said that he had searched Sterner's medical records but found no mention of his suffering pain or injury to his right arm while shutting his van door with his right hand or while reaching with his right arm to secure a laptop in his vehicle with a bungee cord. These were two incidents that Sterner eventually recounted and claimed were a cause of increased pain in the right shoulder in addition to his generalized overuse claim.

The trial judge also recounted that Sterner was examined for American Family by Dr. Dean Wampler, who issued a report dated February 4, 2009, that noted the history given by Sterner of noticing right shoulder pain shortly after returning to work on July 23, 2008. The trial judge quoted from Dr. Wampler's report, which stated as follows:

> The pathology in . . . Sterner's right shoulder is substantial. He has acromioclavicular joint arthritis, subacromial bursitis, a partial thickness tendon tear and a full-thickness tendon tear. All these findings can be explained by progression of degenerative joint disease. Many rotator cuff tears are the end effect of chronic subacromial

> impingement of the tendons between an arthritic AC joint . . . .

The Workers' Compensation Court trial judge also noted that Sterner's job did not involve the sort of intensive labor normally seen by the court in overuse injuries to an opposing member of the body. The court cited that Sterner was using a 2½-pound laptop, a light clipboard, and a tape measure as the tools of his trade. The court also noted that there was no evidence of the repetitive-type movements that are typically seen in instances of cumulative trauma.

In the end, the Workers' Compensation Court trial judge found in favor of American Family on the claim for an on-the-job injury to the right shoulder. The judge found the report of Dr. Wampler stating that Sterner's right rotator cuff injury was due to the effects of the natural progressive degenerative joint disease more persuasive than the overuse syndrome advocated by Dr. Keiser. Therefore, the compensation court denied any benefits for the right shoulder injury.

## DISTRICT COURT ACTION AND DECISION

Following the $80,000 settlement of Sterner's claim against the homeowner, an application for division of settlement proceeds was filed by American Family in the district court for Douglas County pursuant to Neb. Rev. Stat. § 48-118.04 (Reissue 2010). American Family alleged that it had paid to or on behalf of Sterner the sum of $35,313 as benefits under the Nebraska Workers' Compensation Act as a result of Sterner's accident of February 6, 2008; that Sterner's action against the homeowner had been settled for $80,000; that American Family had consented to said settlement; and that American Family claimed a subrogation interest and lien in the sum of $35,313 in the settlement proceeds. American Family alleged that it could not agree on a division of the settlement proceeds with Sterner and, therefore, requested that the court, pursuant to § 48-118.04, determine a fair and equitable division of such proceeds.

A hearing was held on July 16, 2010, in the district court. Ten exhibits were offered and received into evidence by

agreement of the parties, one of which was a joint stipulation setting forth a number of uncontroverted facts. The parties stipulated that Sterner's average weekly wage was $1,104.63; how the accident happened; and that American Family admitted liability for the injury to Sterner's left shoulder but denied that any injury to his right shoulder had occurred in the accident of February 6, 2008. The parties stipulated that as a result of the condition in Sterner's right shoulder, the sum of $43,438 in medical expenses was incurred as well as $16,132.32 in lost wages, for a total of $59,570. The parties agreed that $5,832.44 in gross lost wages was attributable to the left shoulder injury. With respect to the left shoulder, it was agreed that American Family had paid $21,145.10 in medical expenses, $2,576 in temporary total disability, and $11,592 for permanent partial impairment, for a total of $35,313.10. With respect to attorney fees, the parties stipulated that the sum of $22,802.66 was paid to Sterner's attorney for fees and that $1,395.92 was paid for costs.

The district court found that an attorney fee was due Sterner's counsel for representation in the tort case against the homeowner in the amount of $26,666.66 plus $1,395.92, for a total of $28,062.58 (although the court's total was $28,062.87, a math error of 29 cents), from which the court found that "American Family . . . is not entitled to any subrogation interest." The court also found that Sterner missed 19 weeks 4 days of work as a result of the February 6, 2008, incident and had total lost wages of $21,588.05. The court noted that he received temporary total disability payments totaling $2,576 from American Family. Thus, the court found that Sterner had unreimbursed wages of $19,012.05, "from which [American Family] is not entitled to subrogation." The court then concluded that

> [t]he remaining amount of approximately $32,900.00 is the sum from which [American Family] has a claim of subrogation and from which . . . Sterner must be compensated for the severe and permanent physical and emotional injuries that he suffered as a result of this injury, which sum is far less than the overall value of his claim.

No finding in dollars was made of such "overall value" by the court. The court then made a finding that Sterner's injuries

were "serious and permanent in nature from which he continues to have physical and emotional pain and suffering which . . . are likely to continue for the balance of his life expectancy." The court then stated that it was "persuaded by the opinions of [Sterner's] treating physicians and therapists." The district court's final conclusion was that American Family's "subrogation interest is outweighed by the severe and permanent injuries suffered by [Sterner]" and that American Family "is entitled to an equitable subrogation in the amount of $0.00." American Family now appeals.

## STANDARD OF REVIEW

[1,2] Distribution of the proceeds of a judgment or settlement under § 48-118.04 is left to the trial court's discretion and is reviewed by an appellate court for an abuse of that discretion. See *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id.*

## ASSIGNMENTS OF ERROR

American Family assigns three errors by the district court: The court erroneously applied a "made whole" analysis when it awarded no part of the tort settlement; the court erred in finding that Sterner had unreimbursed wages in the amount of $19,012.05, from which American Family was not entitled to any subrogation interest; and the court erred in finding that American Family was not entitled to any subrogation interest in the $28,062.58 paid to Sterner's counsel for fees and costs.

## ANALYSIS

The broad parameters of the applicable law in this appeal were set down by the Nebraska Supreme Court after taking into consideration the amendment to § 48-118.04 effective July 16, 1994. See 1994 Neb. Laws, L.B. 594. The fundamental change wrought by the amendment was that what had been a dollar-for-dollar subrogation right, see *Jackson v. Branick Indus.*, 254 Neb. 950, 581 N.W.2d 53 (1998), became a "fair and equitable" division of such third-party tort recovery proceeds.

[3] Section 48-118.04 provides that third-party settlements are void unless agreed to in writing by the employee and employer (or its insurer), which is true of the settlement involved here. See *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006). The Supreme Court in *Turco* held that the amended version of § 48-118.04(2) did not adopt any formula for making the "fair and equitable" division of a third-party settlement, and as a consequence, the *Turco* court held that the trial court erred when it concluded that the worker in that case had to be "made whole" before the subrogated compensation carrier was entitled to any portion of the settlement. The *Turco* court distinguished between statutory subrogation and equitable subrogation, holding that equitable principles apply in the absence of specific contractual or statutory provision, but that § 48-118.04 was such a statutory provision. The *Turco* court held that § 48-118.04 "requires a fair and equitable distribution to be determined by the trial court under the facts of each case." 271 Neb. at 776, 716 N.W.2d at 419.

In *Burns v. Nielsen*, 273 Neb. 724, 731, 732 N.W.2d 640, 648 (2007), the Supreme Court fleshed out its *Turco* decision, further holding:

> We conclude, based on our consideration of the statutory scheme, that the phrase "fair and equitable distribution," as used in § 48-118.04, was not intended to permit the subrogation interest of an employer or workers' compensation insurer to be subject to equitable defenses such as those relied upon by the district court.

The Supreme Court in *Burns v. Nielsen, supra*, therefore, reversed the trial court's judgment, which had used the equitable defenses of unclean hands and estoppel to bar the employer from recovering any of its subrogation interests. While *Turco v. Schuning*, 271 Neb. at 775, 716 N.W.2d at 419, cautions that there is no "exact formula" for a district court to make a "fair and equitable distribution" of a tort settlement between the injured employee and the employer, the court in *Burns v. Nielsen*, 273 Neb. at 735, 732 N.W.2d at 650, said that doing so "simply requires the [district] court to determine a reasonable division of the proceeds among the parties."

It is important to recount that in *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000), the Supreme Court reversed a district court's decision under § 48-118.04(2) that it would be inequitable to allow a workers' compensation insurer to recover its subrogation interest against the portion of a tort settlement representing recovery for pain and suffering and loss of consortium. The court in *Jameson* reasoned that "§ 48-118 does not distinguish between settlement proceeds paid for pain and suffering, medical benefits, or any other category of damages or injury in awarding an insurance company a subrogation interest in the settlement proceeds." 260 Neb. at 505, 618 N.W.2d at 649. With the basic applicable law in place, we now turn to the specific assignments of error.

*Did Trial Court Err in Employing "Made Whole" Analysis in Dividing Settlement?*

[4] American Family's core argument is that the trial court wrongfully analyzed whether the $80,000 settlement made Sterner whole contrary to *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006). The crux of this argument derives from the district court's statement in its order that

> $32,900.00 is the sum from which [American Family] has a claim of subrogation and from which . . . Sterner *must* be compensated for the severe and permanent physical and emotional injuries that he suffered as a result of this injury, which sum is far less than the overall value of his claim.

(Emphasis supplied.) The use of the word "must" certainly implies a finding that Sterner has to be fully compensated for his injuries before American Family can receive any of the settlement proceeds. After all, the primary definition of "must" is "to be bound or obliged to by an imperative requirement." Webster's Encyclopedic Unabridged Dictionary of the English Language 944 (1989). That the district court concluded that Sterner had to be first fully compensated seems even more compelling when the wording that Sterner "must be compensated" is juxtaposed with the court's description that American Family "has a claim" against the same amount. Thus, from the above-quoted language of the district court, the district court's

rationale apparently was that American Family merely had a claim, whereas Sterner had to be compensated in full for his injuries. In other words, whether we conclude that the district court used the now-discredited "made whole" formulation or established a higher "priority" for Sterner's recovery than for American Family's subrogation, the district court's rationale is fundamentally flawed, and a division of the funds based thereupon would be untenable and an abuse of discretion.

*Did Trial Court Err in Excluding Sum of $19,012.05 Representing Unreimbursed Lost Wages From Settlement Proceeds That Were Available for Satisfaction of American Family's Subrogation Interest?*

The exclusion of the amount of Sterner's lost wages, less what he received in temporary total disability payments, so as to reduce the available settlement proceeds from $80,000 to $60,987.95, was not supported by any citation of authority, and we know of none that would support that conclusion. Moreover, doing so clearly runs directly counter to the express holding of *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000), quoted earlier in our analysis. Accordingly, this assignment of error is well taken.

*Did Trial Court Err in Finding That American Family Was Not Entitled to Any Subrogation Interest in $28,062.58 That Court Found Was Paid to Sterner's Counsel for Fees and Costs?*

[5] American Family argues that the efforts of Sterner's attorney did not benefit it or its workers' compensation carrier, because "[a]ssuming that the parties were reasonable, settlement of [American Family's] subrogation claim and the injury to [Sterner's] left shoulder [claim] likely could have occurred without litigation." Brief for appellant at 17. This argument ignores Sterner's right to be represented and assumes, without any evidentiary support, that the homeowner's insurer would have paid $80,000 to Sterner if he were unrepresented—which is clearly a rather dubious proposition at best. Finally, it ignores Neb. Rev. Stat. § 48-118.02 (Reissue 2010), which

provides that when the employer has a subrogation interest in the recovery in a worker's third-party claim, "[t]he party bringing the claim or prosecuting the suit is entitled to deduct from any amount recovered the reasonable expenses of making such recovery, including a reasonable sum for attorney's fees." Accordingly, the implicit proposition advanced by American Family in this assignment of error that attorney fees and costs incurred by Sterner in gaining the settlement cannot be considered by the trial court in arriving at a fair and equitable division of the settlement is plainly wrong.

[6] That said, we note that the parties stipulated that Sterner's counsel had been paid $22,802.66 for attorney fees and $1,395.92 for costs out of the $80,000. However, the trial court, citing "the terms of a contingent fee agreement," used the sum of $26,666.66 plus costs of $1,395.92 to conclude that there was $28,062.58 from which American Family was not "entitled to any subrogation interest." The problem with this finding is that there is no contingent fee agreement in evidence; plus, the attorney fee subtracted from the gross settlement proceeds by the trial court is materially larger than that set forth in the parties' stipulation. However, American Family does not argue this evidentiary shortcoming as part of its claim that the trial court cannot deduct attorney fees and costs to arrive at a net amount of the settlement that is available for division. Nonetheless, we find that it was plain error for the trial court to exclude from the settlement proceeds available for division an amount for attorney fees that is different from and greater than what the parties stipulated had actually been paid, and it was plain error for the trial court to do so on the basis of a contingent fee agreement that is not in evidence. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004) (plain error is error plainly evident from record and of such nature that to leave it uncorrected would result in damage to integrity, reputation, or fairness of judicial process).

## RESOLUTION

All of American Family's assignments of error have merit. Our standard of review is clearly limited. Nonetheless, the district court's decision is flawed on several levels. First, the

court apparently used a "made whole" or "priority" concept as its starting point for making a division of the settlement proceeds. Second, the district court erred in two respects in its determination of the amount that was available for division under § 48-118.04(2): The amount actually available for distribution was $55,801.42 ($80,000 minus $22,802.66 for attorney fees and $1,395.92 for costs), rather than "approximately $32,900.00" as the district court found, because we also find that excluding unreimbursed lost wages is improper in addition to the error regarding attorney fees. Because the district court's finding of the amount available for a "fair and equitable" division of the settlement was substantially wrong, and the lesser amount clearly was a material finding and predicate in the trial court's ultimate decision that American Family would receive nothing from the settlement, we conclude that the district court did not make a "fair and equitable" division of the settlement. This would be true even if the district court did not intend to employ a "made whole" rationale in its distribution—despite the language clearly indicating such rationale. In short, for a number of reasons, the district court's division of the settlement was untenable and an abuse of discretion. Accordingly, we reverse, and remand for further proceedings on the record previously made.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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STATE OF NEBRASKA, APPELLEE, V.
JOSE L. ZAMARRON, APPELLANT.
806 N.W.2d 128

Filed November 15, 2011. No. A-11-378.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the court below.
2. **Sentences.** Whether a defendant is entitled to credit for time served is a question of law.
3. **Statutes: Legislature: Intent.** When construing a statute, courts look to give effect to the legislative intent of the enactment.
4. **Statutes.** Courts generally give words in a statute their ordinary meaning.

5. ____. It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
6. **Bail Bond.** A deposit of cash in lieu of or in support of bail under Neb. Rev. Stat. § 29-901 (Cum. Supp. 2010) is for the purpose only of ensuring the defendant's appearance in court when required; and upon full compliance with any such court orders and release of bail, the statutory refund must be made.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed as modified.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

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

IRWIN, CASSEL, and PIRTLE, Judges.

CASSEL, Judge.

## INTRODUCTION

In this appeal from the sentence imposed in a criminal case, Jose L. Zamarron challenges the district court's (1) application of his appearance bond to the costs and (2) refusal to apply "extra" good time credit to the costs. Because the only purpose of the bond was to ensure Zamarron's appearance and he appeared as ordered, the court erred in peremptorily applying Zamarron's bond to costs. Although our statutes allow for good time credit on presentence incarceration, they do not provide for extra time in custody to be applied to costs. Thus, the court did not err in refusing Zamarron's request to apply credit for time served against costs. Accordingly, we affirm the court's judgment as modified.

## BACKGROUND

Zamarron pled no contest to theft by unlawful taking in return for the State's agreement to recommend a sentence of time served. Zamarron requested that his good time credit be applied to any fine and costs. The court sentenced Zamarron to confinement in the county jail for 43 days, with credit given for 43 days of time served. The court ordered Zamarron to pay the costs of the action, ordered that Zamarron's bond be applied to court costs, and released any remaining bond.

Zamarron timely appeals. Pursuant to Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008), no oral argument was allowed.

## ASSIGNMENTS OF ERROR

Zamarron alleges that the district court erred in (1) applying bond proceeds to the costs of the action and (2) not allowing him credit against court costs for the time he already served in jail.

## STANDARD OF REVIEW

[1,2] Statutory interpretation is a question of law that an appellate court resolves independently of the court below. *State v. Becker*, 282 Neb. 449, 804 N.W.2d 27 (2011). Whether a defendant is entitled to credit for time served is a question of law. *Id.*

## ANALYSIS

*Statutory Interpretation.*

[3-5] Before addressing Zamarron's assignments of error, we recall basic precepts of statutory interpretation. When construing a statute, courts look to give effect to the legislative intent of the enactment. *State v. Becker, supra*. Courts generally give words in a statute their ordinary meaning. *Id.* It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

*Applying Bond to Costs.*

Zamarron first argues that the district court erred in applying his bond to costs. The record shows that Zamarron appeared in court on April 21, 2011, and acknowledged that he was indebted to the State in the amount of 10 percent of $10,000

> to be made and levied on [his] respective goods, chattels, lands and tenements; to be void, however, if [Zamarron] fails to appear before the [judge] on [a specified date] and as further instructed by the [c]ourt . . . until final judgment or as directed by said [c]ourt, until finally discharged, to answer the charges stated above.

Thus, this document constituted an appearance bond as provided for in Neb. Rev. Stat. § 29-901(3)(a) (Cum. Supp. 2010). That statute states, in part, that 90 percent of the cash deposit is to be returned to the defendant upon the performance of the appearance or appearances and 10 percent is to be retained by the clerk as appearance bond costs.

[6] An appearance bond must be refunded (less any applicable statutory fee) after full compliance with all court orders to appear. In *State v. McKichan*, 219 Neb. 560, 364 N.W.2d 47 (1985), the trial court ordered that a bail bond be released, but that the clerk of the court hold the proceeds to apply to the costs of the defendant's appeal to the Nebraska Supreme Court. The Supreme Court considered what authority the trial court had over a bail deposit under § 29-901(3)(a) and held that "the deposit of cash in lieu of or in support of bail under § 29-901 is for the purpose only of ensuring the defendant's appearance in court when required; and upon full compliance with any such court orders and release of bail, the statutory refund must be made." *State v. McKichan*, 219 Neb. at 563, 364 N.W.2d at 49. Thus, the Supreme Court modified the judgment to refund the statutory amount.

The same situation applies in the case before us. Just as in *McKichan*, the bond in this case was to secure Zamarron's appearance in court. Because Zamarron appeared as ordered and judgment had been entered against him, the remainder of his bond should have been released to him.

The State argues that the judgment for costs was a lien on Zamarron's property. Indeed, Neb. Rev. Stat. § 29-2407 (Reissue 2008) provides in part that "[j]udgments for fines and costs in criminal cases shall be a lien upon all the property of the defendant within the county from the time of docketing the case . . . ." The State contends that because Zamarron owed costs to the court and the court owed Zamarron the proceeds of his bond, there was a right of setoff.

However, the State's argument violates a basic rule of statutory construction. As we recognized above, it is not within the province of the courts to read a meaning into a statute that is not there. See *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). We see nothing in the statutes authorizing a setoff

under these circumstances. Accordingly, we conclude that the district court erred in applying the bond proceeds to the costs. We modify the judgment to refund to Zamarron the remaining 90 percent of the bond posted.

*Credit for Time Served Against Costs.*

Zamarron next argues that the court erred by not allowing good time credit for his time served to be applied against the court costs.

Under Neb. Rev. Stat. § 47-502 (Cum. Supp. 2010):

> Any person sentenced to a city or county jail shall, after the fifteenth day of his or her confinement, have his or her remaining term reduced one day for each day of his or her sentence during which he or she has not committed any breach of discipline or other violation of jail regulations.

Section 47-502 is applicable to time spent in the county jail awaiting sentencing. See *Williams v. Hjorth*, 230 Neb. 97, 430 N.W.2d 52 (1988). Under § 47-502, if no good time has been lost, a 43-day sentence would result in actual incarceration of 29 days. Thus, Zamarron contends that he served an extra 14 days because he already served the full 43 days. He requests that these extra 14 days of incarceration be applied to court costs.

We reject Zamarron's assertion that he is entitled to credit of $90 per day against costs, as it is contrary to the plain language of the statute. He relies upon Neb. Rev. Stat. § 29-2412(3) (Cum. Supp. 2010), which states:

> Any person *held in custody for nonpayment of a fine or costs* or for default on an installment shall be entitled to a credit on the fine, costs, or installment of ninety dollars for each day so held. In no case shall a person held in custody for nonpayment of a fine or costs be held in such custody for more days than the maximum number to which he or she could have been sentenced if the penalty set by law includes the possibility of confinement.

(Emphasis supplied.) As the emphasized language shows, the statute expressly limits the credit to the situation where the person is "held in custody for nonpayment." However,

Zamarron was not held in custody for nonpayment of costs. He was incarcerated prior to conviction based upon the theft charge. And Zamarron does not direct us to any law authorizing the conversion of extra days of incarceration to dollars that can then be credited against costs. "The Legislature has demonstrated that it can and will specify when credit should be given for similarly imposed restrictions—when it wishes to do so." *State v. Nelson*, 276 Neb. 997, 1003, 759 N.W.2d 260, 266 (2009). The plain language of § 29-2412 simply does not provide for a $90-per-day credit against costs for Zamarron's "extra" time incarcerated prior to sentencing. It is not within an appellate court's province to read a meaning into a statute that is not there. *State v. Nelson, supra*.

We note that the Nebraska Supreme Court has considered two cases in which a trial court ordered that credit for time served be applied to satisfy a fine, and in both instances, the Supreme Court determined that the trial court erred. In *State v. Holloway*, 212 Neb. 426, 322 N.W.2d 818 (1982), the defendant had been in jail for 393 days prior to sentencing. After the defendant pled no contest, the court imposed a sentence of 20 months' to 5 years' imprisonment and a $7,500 fine. The judgment provided that the defendant be given a credit of 93 days on the sentence and that the fine be satisfied by being given credit for 300 days of jail time. On appeal, the defendant sought to have all 393 days credited on his sentence of imprisonment. The Supreme Court stated that the statutes did not authorize a court to require a fine be satisfied by applying the jail time served without giving the defendant an opportunity to pay in the manner provided by statute. The Supreme Court modified that part of the judgment which required the fine to be satisfied by the credit for 300 days of jail time. In *State v. Brumfield*, 212 Neb. 605, 324 N.W.2d 407 (1982), the trial court gave the defendant credit for 182 days in custody prior to sentencing and applied the credit at a rate of $25 a day to the $5,000 fine. The defendant appealed. The Supreme Court concluded that the issue was controlled by *State v. Holloway, supra*, and that the defendant must be afforded an opportunity to pay the fine.

Although in these cases the Supreme Court did not specifically hold that credit for presentence incarceration can never be used to satisfy a fine, the court also did not mandate that such credit must be allowed. The court's determination that credit could not be given without giving the defendant an opportunity to pay does not necessarily mean that a trial court must apply presentence incarceration time toward court costs. Thus, these cases do not support Zamarron's argument in the instant appeal. Because we cannot read into a statute a meaning that is not there, see *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009), and because the plain language of § 29-2412 does not provide for credit against costs under the circumstances present here, we conclude that the district court did not err in refusing to apply any credit for time served against costs.

## CONCLUSION

We conclude that the district court erred in applying Zamarron's bond to costs, but that it did not err in refusing to apply credit for time served before sentencing against costs. Accordingly, we affirm the district court's judgment, but modify it to refund to Zamarron the remaining 90 percent of his bond rather than applying it to costs.

AFFIRMED AS MODIFIED.

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# IN RE ESTATE OF E. MAXINE ROSS, DECEASED. PORTER ROSS, APPELLANT, V. SCOTT HODSON AND CONNIE GROVE, APPELLEES.

810 N.W.2d 435

Filed November 22, 2011. No. A-11-210.

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 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.
3. **Decedents' Estates: Appeal and Error.** An appellate court, in reviewing a probate court judgment for errors appearing on the record, will not substitute its

factual findings for those of the probate court where competent evidence supports those findings.

4. **Evidence: Words and Phrases.** Competent evidence is evidence which is admissible and tends to establish a fact in issue.
5. **Decedents' Estates.** Pursuant to Neb. Rev. Stat. § 30-2314(a)(2)(ii) (Reissue 2008), the augmented estate includes any property owned by the surviving spouse at death of the decedent or previously transferred by the surviving spouse, except to the extent to which the surviving spouse establishes that such property was derived from any source other than the decedent.
6. **Witnesses: Testimony.** The credibility of a witness is a question for the trier of fact, and it is within its province to credit the whole of the witness' testimony, or any part of it, which seemed to it to be convincing, and reject so much of it as in its judgment is not entitled to credit.
7. **Decedents' Estates: Appeal and Error.** In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the 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.

Appeal from the County Court for Red Willow County: ANNE PAINE, Judge. Affirmed.

G. Peter Burger, of Burger & Bennett, P.C., for appellant.

Siegfried H. Brauer, of Brauer Law Office, for appellees.

IRWIN, MOORE, and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

Porter Ross challenges the county court's order including six jointly owned bank accounts in the augmented estate in calculating the amount of his elective share in the estate of E. Maxine Ross (Maxine). Our decision is driven by a deferential standard of review. Because there is some competent evidence to support the court's conclusion that Porter failed to prove the funds in the accounts at Maxine's death were not derived from Maxine, we affirm.

## BACKGROUND

Maxine passed away on October 29, 2006. She was survived by her husband, Porter, and several children by a previous marriage. Porter and Maxine had been married since 1990.

Maxine's nonprobate estate included joint interests in six accounts at a McCook bank. Five of these accounts were held by Maxine or Porter with right of survivorship. The sixth account was held by Maxine or Porter or Edward Troy Ross with right of survivorship. This appeal centers upon the source of funds in these accounts.

Porter filed a timely petition for elective share with the county court for Red Willow County, Nebraska. At a hearing, the parties presented evidence on the source of the accounts and of other assets in Maxine's estate. Only a relatively small portion of the evidence focused on the accounts at issue in this appeal. Specifically, Porter adduced evidence attempting to establish that the funds in the accounts at the McCook bank were derived from a source other than Maxine and, thus, were not to be included in the calculation of the elective share. We review the evidence as necessary in the analysis.

After the hearing, the court issued an order calculating the amount of elective share. The court found that Porter had failed to show that the accounts at the McCook bank were derived from a source other than Maxine and included the value of the accounts in the augmented estate. It found the value of the net augmented estate to be $280,086.71. Porter's elective share was valued at $140,043.36. Because the court found that Porter had $148,512.97 in charges against the elective share, it ordered that he should receive nothing further under the election.

Approximately 6 weeks after the court's initial decision, Porter filed a motion for new trial based on the existence of newly discovered evidence. The new evidence consisted of testimony from the vice president of the McCook bank, who further traced the history of the accounts and presented a report of ownership for the accounts of Porter and Maxine in October 1990. The court granted the motion for new trial and conducted two additional hearings in January 2011.

Despite the new evidence, the court was not persuaded to exclude the value of the accounts from the augmented estate. It made no changes to its calculation of the augmented estate or elective share—reaching the same amounts as before. Because Porter's charges against the elective share were greater than his

portion of the net augmented estate, the court again ruled that Porter would receive nothing further under the election.

Porter timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

## ASSIGNMENT OF ERROR

Porter alleges that the county court erred in finding that the McCook bank accounts were a part of the augmented estate chargeable against his claim for elective share despite the evidence that this property was derived from a source other than Maxine.

## STANDARD OF REVIEW

[1,2] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010). 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. *In re Estate of Craven*, 281 Neb. 122, 794 N.W.2d 406 (2011).

[3,4] An appellate court, in reviewing a probate court judgment for errors appearing on the record, will not substitute its factual findings for those of the probate court where competent evidence supports those findings. *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001). Competent evidence is evidence which is admissible and tends to establish a fact in issue. *In re Trust Created by Inman*, 269 Neb. 376, 693 N.W.2d 514 (2005).

## ANALYSIS

Before we address Porter's assignment that the county court erred in including the McCook bank accounts in the augmented estate, we first recall the process by which a surviving spouse's elective share is calculated. Under Neb. Rev. Stat. § 30-2313(a) (Reissue 2008), "the surviving spouse has a right of election to take an elective share in any fraction not in excess of one-half of the augmented estate." To calculate the augmented estate 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." *In re Estate of Fries*, 279 Neb. at 891, 782 N.W.2d at 601. Once the augmented estate is determined and the value of the surviving spouse's share is calculated, "property which is part of the augmented estate which passes or has passed to the surviving spouse by testate or intestate succession or other means and which has not been renounced . . . is applied first to satisfy the elective share." Neb. Rev. Stat. § 30-2319(a) (Reissue 2008).

[5] At issue in this appeal is whether the county court erred in determining that the accounts at the McCook bank should be included in Maxine's augmented estate. Pursuant to § 30-2314(a)(2)(ii), the augmented estate includes "[a]ny property owned by the surviving spouse at death of the decedent or previously transferred by the surviving spouse, except to the extent to which the surviving spouse establishes that such property was derived from any source other than the decedent." As such, any funds in the accounts that derived from Maxine should be included in the augmented estate. But any funds in the accounts that were derived from a source other than Maxine should not be included as part of the elective share calculation.

The burden was on Porter, as the surviving spouse, to establish that the accounts were derived from a source other than Maxine. See *id.* To meet this burden, Porter adduced evidence in the form of his own testimony and the testimony of Peter Graff, vice chairman of the McCook bank. When Porter was asked "whether those accounts at [the McCook bank], if the funds from those accounts . . . were all originally derived from your savings," he testified, "That's right." Similarly, when Graff was asked, "Now, with regard to the initial deposits for those accounts, do you know where the funds came from?" he testified, "Came from Porter Ross."

Based upon this testimony alone, the county court could have found, under the precedent of *In re Estate of Ziegenbein*, 2 Neb. App. 923, 519 N.W.2d 5 (1994), that Porter met his burden of proving that the source of the accounts was other than Maxine.

[6] However, the county court was not required so to find. The credibility of a witness is a question for the trier of fact, and it is within its province to credit the whole of the witness' testimony, or any part of it, which seemed to it to be convincing, and reject so much of it as in its judgment is not entitled to credit. *General Fiberglass Supply v. Roemer*, 256 Neb. 810, 594 N.W.2d 283 (1999). Our decision in the *Ziegenbein* appeal arose in a different context—there, the county court credited the surviving spouse's testimony and excluded the joint account from the augmented estate. The question on appeal was whether the surviving spouse's testimony alone was sufficient to support the judgment. We held that it was. In the case before us, however, the county court did not accept Porter's testimony and the question is whether there is competent evidence to support the court's decision.

[7] The county court specifically expressed doubt about the credibility of Porter's testimony regarding the source of the accounts:

> Porter['s] [testimony] that he supplied all of the funds for the bank accounts and simply put Maxine's name on the accounts to provide for her in the event of his death is somewhat supported by Exhibit 46, however there is contradictory evidence even in Porter's own testimony to show that Maxine had premarital assets which were combined with these accounts and that the accounts were used to deposit both parties' income and pay both parties' expenses.

In doubting the source of the accounts, the county court also implicitly questioned Graff's testimony about the source of the original deposits. In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the 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. *In re Trust of Hrnicek*, 280 Neb. 898, 792 N.W.2d 143 (2010). Thus, given the county court's rejection of the testimonies of Porter and Graff, we turn our attention to the other evidence in the record bearing on the source of the funds in these accounts.

Because of our standard of review, we focus upon whether competent evidence existed to support the county court's decision regarding these six accounts. In order to protect the privacy of the account numbers, we refer to the accounts by the "Item No." under which they are listed on "Schedule E" of the amended inventory filed with the court on October 30, 2008. Where more than one account is listed under an "Item No.," we refer to the first account listed as "a" and the second account listed as "b."

Other than the testimonies of Porter and Graff, Porter presented evidence provided by the McCook bank tracing the history of the six accounts as best as it could. The bank found no tracing history for account No. 3 (money market account) and traced accounts Nos. 4a and 4b (certificates of deposit) to unknown sources. The bank found that account No. 1a was a checking account originally held by Maxine individually. Finally, the bank produced records indicating that accounts Nos. 1b (checking account) and 2 (money market account) were Porter's individual accounts prior to his marriage to Maxine.

Because account No. 1a was linked to Maxine herself and accounts Nos. 3, 4a, and 4b came from unknown sources, the county court's decision to include these four accounts in the augmented estate was supported by competent evidence. The court did not err in holding that Porter failed to prove that these accounts were derived from a source other than Maxine.

As to the remaining two accounts, we concede that Porter adduced some evidence that accounts Nos. 1b and 2 were derived from a source other than Maxine. In addition to his own testimony, he produced evidence at rehearing (1) showing that he individually owned the two accounts in October 1990 and (2) showing the balances in the accounts both in October 1990 and at the time of Maxine's death. Account No. 1b contained $2,991.26 in October 1990 and $5,095.64 at Maxine's death. The respective amounts for account No. 2 were $14,085.16 and $18,730.40. Thus, the evidence clearly demonstrates that in October 1990, $2,991.26 in account No. 1b and $14,085.16 in account No. 2 were provided individually by Porter and not by Maxine.

We are faced with the question, however, of whether the evidence compels the conclusion that the balances in accounts Nos. 1b and 2 *existing at the date of Maxine's death* were derived from a source other than Maxine under § 30-2314(a)(2)(ii). It is important to note that Porter did not present a complete transactional history showing deposits and withdrawals, but merely presented evidence of the account balances in October 1990 and the date of death values. Cross-examination of the bank's vice president exposed this limitation. He testified:

> Q . . . With respect to the first account listed there on that first page, [account No. 1b], . . . do you have any records with you that track what money went into or out of that account between October 1st . . . of 1990 and the year 1994?
>
> A None with me. I could, as far as funds that went in and out, I can establish balances going forward as far as what the balances were. As far as the transactions, I don't believe I would be able to provide anything.
>
> Q All right. What about the second account listed there, [account No. 2], do you have anything?
>
> A It would be similar. I could establish balances[,] but I don't believe [I could establish] transactional history.
>
> . . . .
>
> Q And for all the accounts listed on Exhibit 46?
>
> A Yeah.

Although the parties have not cited, nor have we found, any case law specifically addressing the tracing of funds in the context of determining the source of funds for purposes of the augmented estate calculation, this court's decision in *In re Estate of Ziegenbein*, 2 Neb. App. 923, 519 N.W.2d 5 (1994), provides some guidance. In *In re Estate of Ziegenbein*, the court noted the rule in Neb. Rev. Stat. § 30-2703 (Reissue 1989), the statute then governing the ownership during lifetime of joint accounts, that a joint account balance belongs to the parties in proportion to the net contributions by each to the sums on deposit. The court implicitly used the lifetime-ownership methodology to determine the portion of the

account derived from the surviving spouse and not from the decedent for purposes of the augmented estate. In the *In re Estate of Ziegenbein* evidence, it was clear that all of the deposits to the account were made by the surviving spouse. Thus, it naturally followed that the entire account was derived from a source other than the decedent—i.e., provided solely by the surviving spouse.

Like the court in *In re Estate of Ziegenbein, supra*, we also choose to note the lifetime-ownership statute and draw upon its concepts to inform our interpretation of § 30-2314. *In re Estate of Ziegenbein, supra*, involved § 30-2703, which was repealed and replaced by Neb. Rev. Stat. § 30-2722 (Reissue 2008). A definition of "net contribution" was also added. Under § 30-2722(a), a party's net contribution includes

> the sum of all deposits to an account made by or for the party, less all payments from the account made to or for the party . . . and a proportionate share of any charges deducted from the account, plus a proportionate share of any interest or dividends earned, whether or not included in the current balance.

If the county court had accepted Porter's testimony that he provided the funds for all of the deposits, § 30-2722 would produce the same result as under the former statute. However, because the court did not accept Porter's testimony, the evidence necessary to reverse the court's judgment requires thorough account histories—including deposits, payments, charges, interest, and dividends. Thus, we look to the other evidence to see whether it compels a different conclusion.

For two reasons, we cannot find error in the county court's decision. First, the bank account evidence does not fill the obvious gap—there is no evidence to show that the amounts in the accounts in October 1990 were still there at the time of Maxine's death and had not been depleted and replaced by other money. We lack any evidence of the intervening deposits and withdrawals. Second, there was evidence that Maxine had some income and that she had other property, some of which was disposed and not traced to other accounts. Porter testified to Maxine's income in the form of Social Security and farm rent:

Q And so you each had Social Security?

A That's right.

Q But you weren't working?

A No, I've never worked since —

Q And you each had some rent from her farm and your farm.

A That's right.

He also testified that Maxine owned her own trailer home, which she sold after they got married:

Q [Porter], when you and Maxine were married, I believe there was some testimony about her owning a trailer house, is that correct?

A That's right.

. . . .

Q And some time after the two of you married, did she sell that and have it moved off of that place?

A She did.

He explained that when they got married, they lived on Maxine's land:

A Yeah, and when I got married I told her, I said let's put the trailer on your property.

Q Now, this is — when you got married now, this is Maxine?

A That's right.

. . . .

A . . . I told her, I said let's put this trailer up on your property . . . . And I says, I'm older. If something happens to me you'll be sitting on your own ground. You'll have your own home.

And he testified to three different vehicles that Maxine owned when they got married, all of which she later sold or traded:

Q . . . When Maxine and you married, she had some vehicles. She was driving one at that time, is that correct?

A Yes, she was driving one, yeah.

. . . .

Q . . . She had that car when the two of you got married?

A That's right.

Q And did she own an older pickup truck?
A That's right.
Q And did she own an older, I think it was a Buick Skylark or something similar to that?
A She did.
Q And were all three of those vehicles either sold or traded during the course of your marriage?
A She sold it.

Porter argues that the court's reliance on evidence of income from or proceeds of sale of Maxine's individual property amounted to mere speculation. This argument misses the mark. Porter had the burden of persuading the county court that the funds derived from a source other than Maxine—in this context, from Porter himself. Given that he failed to do so, our standard of review requires him to show that there is no evidence to support the court's decision. However, the county court confronted evidence of (1) bank account records failing to trace the October 1990 funds to the funds existing at the time of Maxine's death and (2) Maxine's other financial activity receiving income and sale proceeds. Viewed in the light most favorable to the appellees, we determine this constituted competent evidence sufficient to support the court's decision.

## CONCLUSION

Because the county court's decision that Porter failed to establish that the six jointly owned accounts were derived from a source other than Maxine was supported by competent evidence, we affirm the court's order including the accounts in the augmented estate.

AFFIRMED.

# McFadden Ranch, Inc., a Nebraska corporation, appellee, v. John "Jake" McFadden, appellant.

807 N.W.2d 785

Filed December 6, 2011. No. A-11-260.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
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.
3. **Negligence.** The elements of negligence constitute the elements of a breach of fiduciary duty cause of action.
4. **Fraud: Words and Phrases.** Constructive fraud is the breach of a duty arising out of a fiduciary or confidential relationship.
5. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
6. **Corporations.** An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders.
7. ____. The use of corporate property by a corporate director or officer to secure his or her personal debt constitutes a breach of fiduciary duty if the action was without corporate authority.
8. ____. Corporate officers and directors are required to discharge their duties with the care an ordinarily prudent person in a like position would exercise under similar circumstances.
9. **Corporations: Presumptions.** Generally, there is a presumption that the acts of corporate officers pertaining to ordinary business transactions are authorized by the corporation. This presumption does not apply when an officer diverts or pledges corporate property as security for a personal debt.
10. **Principal and Agent: Proof.** The burden of proof is upon a party holding a confidential or fiduciary relation to establish the fairness, adequacy, and equity of a transaction with the party with whom he or she holds such relation.

Appeal from the District Court for Keith County: John P. Murphy, Judge. Affirmed in part as modified, and in part reversed and remanded for further proceedings.

William J. Troshynski, of Brouillette Law Office, P.C., L.L.O., for appellant.

Terrance O. Waite and S. David Schreiber, of Waite, McWha & Schreiber, for appellee.

IRWIN, MOORE, and CASSEL, Judges.

CASSEL, Judge.

## I. INTRODUCTION

John "Jake" McFadden (Jake) appeals from the order of the district court entering summary judgment in favor of McFadden Ranch, Inc., on its breach of fiduciary duty, constructive fraud, and conversion causes of action. Because McFadden Ranch adduced sufficient evidence to establish that it was entitled to judgment as a matter of law for breach of fiduciary duty and fraud, but not for conversion, we adjust the damages award accordingly and affirm in part as modified, and in part reverse and remand for further proceedings consistent with this opinion.

## II. BACKGROUND

McFadden Ranch was a family-owned ranching corporation that was managed by Jake from approximately 2000 to 2008. Jake was also a shareholder, officer, and director of the company at that time.

During his time as manager, Jake and his wife, Cherri McFadden, took out several loans using McFadden Ranch's property as collateral.

In June 2005, American Mortgage Company (AMC) loaned McFadden Ranch $641,000, which was used to pay off four of Jake and Cherri's debts with the Bank of Paxton. Before AMC would approve this loan, it required Jake to provide a corporate resolution approving the use of McFadden Ranch's land as collateral. In response, Jake provided AMC with three purported corporate records, including a resolution allegedly passed on June 12 authorizing Jake "to mortgage, pledge, assign, and grant security interests in any assets of the Corporation including after acquired property as security for current and future

obligations." Jake secured the loan with a deed of trust for McFadden Ranch's land.

Approximately 2 years later, Jake and Cherri secured a second loan from the Bank of Paxton in the amount of $514,961.83. They used $383,933.98 to pay off their personal debts with the Bank of Paxton and deposited $100,000 into the bank account for "McFadden Cattle and Hay" (Jake and Cherri's farm account). They deposited the remaining $31,027.85 into McFadden Ranch's bank account. This loan was also secured by a deed of trust for McFadden Ranch's land.

Jake and Cherri subsequently defaulted on both the loan from AMC and the loan from the Bank of Paxton. Both lenders initiated foreclosure actions on the deeds of trust. Ultimately, McFadden Ranch sold a portion of its land by private sale and paid off the debts before foreclosure was complete.

Following the sale of some of McFadden Ranch's land, McFadden Ranch filed a complaint against Jake in the district court for Keith County, Nebraska, alleging that during his time as manager, he breached his fiduciary duty to the company and committed conversion and fraud. Jake denied the allegations in his answer.

McFadden Ranch filed a motion for summary judgment in November 2010. At a hearing in February 2011, the parties adduced evidence in the form of affidavits and the court took the matter under advisement. In a written order released on March 7, the court entered summary judgment for McFadden Ranch on all three causes of action and awarded it $1,247,167.79.

Jake timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

## III. ASSIGNMENTS OF ERROR

Jake alleges that the trial court erred (1) in finding that there was no material issue of fact to be decided by the trier of fact in regard to Jake's breaching his fiduciary duty and committing fraud against McFadden Ranch, (2) in implicitly ruling that Jake converted corporate property for his own

use and benefit, and (3) in granting judgment in the amount of $1,247,167.79.

## IV. STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011). 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. *Id.*

## V. ANALYSIS

### 1. Breach of Fiduciary Duty and Fraud

[3] The elements of a breach of fiduciary duty claim have not to date been clearly outlined in Nebraska case law. However, the breach of professional or fiduciary duties has been likened to professional malpractice. See *Community First State Bank v. Olsen*, 255 Neb. 617, 587 N.W.2d 364 (1998). Malpractice is itself "[a]n instance of negligence or incompetence on the part of a professional." Black's Law Dictionary 1044 (9th ed. 2009). Consequently, in the case of several professions, the Nebraska Supreme Court has identified the elements of malpractice as identical to the elements of negligence—duty, breach, causation, and damages. See, e.g., *Frank v. Lockwood*, 275 Neb. 735, 749 N.W.2d 443 (2008); *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987). Because breach of fiduciary duty is akin to malpractice under Nebraska law and because malpractice is a form of negligence, we hold that the elements of negligence constitute the elements of a breach of fiduciary duty cause of action. In doing so, we note that other states, including Iowa, Missouri, and Minnesota, have reached the same conclusion. See, e.g., *Union County, Iowa v. Piper Jaffray & Co., Inc.*, 788 F. Supp. 2d 902 (S.D. Iowa 2011); *Pool v. Farm Bureau Town & Country Ins.*, 311 S.W.3d 895

(Mo. App. 2010); *Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889 (Minn. App. 1989).

Thus, in order to prove that it was entitled to judgment on the breach of fiduciary duty issue, McFadden Ranch needed to adduce evidence (1) that Jake owed it a fiduciary duty, (2) that he breached the duty, (3) that his breach was the cause of the injury to the company, and (4) that the company was damaged.

[4] McFadden Ranch also alleged that Jake committed fraud by his actions. Constructive fraud is the breach of a duty arising out of a fiduciary or confidential relationship. *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009). Because constructive fraud is by definition the breach of a fiduciary duty, we engage in a single analysis.

[5] We review the evidence presented at the summary judgment hearing to determine whether McFadden Ranch adduced sufficient evidence to establish a prima facie case for summary judgment. A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006).

(a) Duty

[6] The fact that Jake owed McFadden Ranch fiduciary duties was clearly established by the evidence. Jake's siblings testified in their affidavits that Jake was an officer, director, and manager of McFadden Ranch from 2000 to 2008. An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders. *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009). Because Jake was an officer and director of McFadden Ranch, he owed fiduciary duties to the company in both capacities.

Jake offered no evidence that called into question the fact that he owed McFadden Ranch these fiduciary duties.

Therefore, he did not rebut the prima facie case for summary judgment on this element of the breach of fiduciary duty cause of action.

(b) Breach

In addition to establishing that Jake owed the company fiduciary duties, the evidence adduced by McFadden Ranch also showed that Jake breached these fiduciary duties through his use of company property to secure loans used to repay his personal debts.

[7,8] The use of corporate property by a corporate director or officer to secure his or her personal debt constitutes a breach of fiduciary duty if the action was without corporate authority. See *Fisher v. National Mtg. Loan Co.*, 132 Neb. 185, 271 N.W. 433 (1937), *modified on other grounds* 133 Neb. 280, 274 N.W. 568. Because it is not allowed by corporate law, an ordinarily prudent person in the position of officer or director would not use corporate property to secure his personal debt unless he had specific authority to do so. Under Neb. Rev. Stat. §§ 21-2099 and 21-2095 (Reissue 2007), corporate officers and directors, respectively, are required to discharge their duties with the care an ordinarily prudent person in a like position would exercise under similar circumstances. Therefore, in the absence of corporate authority, securing personal loans with corporate property constitutes a breach of fiduciary duty.

The evidence presented by McFadden Ranch showed that Jake used corporate property to secure two separate loans used to repay his personal debts. Jake took out the first of these loans from AMC in June 2005. The loan papers show that Jake secured this loan with a deed of trust for McFadden Ranch's land. But the president of AMC testified that Jake wanted the loan mainly to refinance Jake and Cherri's personal debt. Similarly, in July 2007, Jake took out a loan from the Bank of Paxton in order to pay off Jake and Cherri's personal debt and to fund their personal cattle and hay operation. Jake used $383,933.98 of the loan to pay off a loan in the name of "JOHN K MCFADDEN[,] CHERRI R MCFADDEN Dba McFadden Cattle & Hay." And he deposited $100,000 into Jake

and Cherri's "farm account." Jake deposited only $31,027.85 of the loan into a McFadden Ranch account. The bank records again show that Jake secured the loan with a deed of trust for McFadden Ranch's land.

[9] In order to establish that Jake breached his fiduciary duty by taking out these loans, McFadden Ranch needed to show that Jake acted in these transactions without corporate authority. Because of the self-dealing nature of these transactions, however, establishing this lack of authority did not necessarily require the production of actual evidence. Generally, there is a presumption that the acts of corporate officers pertaining to ordinary business transactions are authorized by the corporation. *Val-U Constr. Co. v. Contractors, Inc.*, 213 Neb. 291, 328 N.W.2d 774 (1983). However, this presumption does not apply when an officer diverts or pledges corporate property as security for a personal debt. *Id.* Therefore, by proving that Jake used corporate property to secure personal debts, McFadden Ranch also implicitly established that Jake acted without authority.

[10] Once McFadden Ranch established that Jake used corporate property as security for a personal debt and thus presumably acted without authority, the burden of proof shifted to Jake, as the fiduciary, to exculpate himself from these allegations of wrongdoing. The burden of proof is upon a party holding a confidential or fiduciary relation to establish the fairness, adequacy, and equity of a transaction with the party with whom he or she holds such relation. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001).

In order to show the fairness and adequacy of these two loan transactions, Jake needed to produce evidence that he acted with authority—which he failed to do. In the case of the loan from AMC, Jake did provide a corporate resolution allegedly granting him authority. But McFadden Ranch rebutted the validity of this resolution and thereby refuted Jake's showing of authority by presenting evidence that this resolution was false and that the board of directors never granted Jake authority. McFadden Ranch's board of directors supposedly granted Jake the authority to enter into the loan transaction with AMC

at a meeting on June 12, 2005. However, McFadden Ranch's corporate attorney testified that the official corporate records of the company do not include any records from a June 12 meeting. And four of the six individuals listed as attending the meeting—Jake's siblings—testified that they never knew about a June 12 meeting and never attended a meeting on that date. No evidence was presented regarding the purported attendance of Jake's mother at the meeting, and her testimony was not included in either party's evidence at the summary judgment hearing. Even Jake, who was supposedly the sixth individual at the June 12 meeting, did not admit to being there. Only one conclusion can be drawn from this evidence—that no meeting occurred during which the McFadden Ranch board of directors granted Jake the authority to enter into the loan agreement with AMC and that the resolution purporting to give him such authority is fake. Thus, the evidence shows that there is no *genuine* issue of material fact on the issue of corporate authorization of the AMC loan. In the case of the Bank of Paxton loan, Jake presented no evidence of authority. Therefore, because Jake did not produce evidence sufficient to raise a genuine issue of material fact that he acted with authority in these loan transactions, he did not meet his burden to present evidence to dispute McFadden Ranch's prima facie showing of the element of breach.

(c) Causation

McFadden Ranch presented evidence showing that Jake's breach of his fiduciary duty caused the company harm. The president of AMC, the vice president of the Bank of Paxton, and McFadden Ranch's accountant all testified that Jake breached his loan obligations to AMC and the Bank of Paxton and that company property was sold to satisfy these debts in the face of pending foreclosure actions. McFadden Ranch's accountant specifically explained:

> When the Bank of Paxton foreclosed these notes, the Company suffered the reported loss of the principal and interest on each loan because it was the Company's real property that secured the notes, which property was

eventually sold through a private sale to pay off the outstanding loans.

Jake does not deny that he defaulted on these loans or that McFadden Ranch land was sold to repay them. Therefore, there is no genuine issue of fact as to causation.

(d) Damages

Finally, McFadden Ranch adduced evidence establishing that the company was damaged by Jake's breach of fiduciary duty. The company's accountant calculated the loss to the company as $1,197,038—"the total of Jake's personal notes that were paid with the land sale proceeds, reduced by the total of the note that the corporation owed Jake." McFadden Ranch also presented evidence of the "'bad debt deduction'" that the company took on its September 30, 2009, tax return. To reach this deduction, the accountant explained that he "calculated that Jake's actions in defaulting the Company of its property[,] or more specifically by converting loan proceeds for his own use and pledging corporate property as security without Company approval, constituted a $1,197,037.79 . . . loss to the Company." Although Jake questioned the amount of damages, which we will discuss under his third assignment of error below, he did not contest that the company was harmed by his default on these loans. There is no issue of fact as to the existence of damages.

(e) Conclusion

Because McFadden Ranch adduced evidence to establish each element of the breach of fiduciary duty claim, it met its burden to show that it was entitled to judgment as a matter of law. By establishing that Jake breached his fiduciary duties, McFadden Ranch also presented a prima facie case for summary judgment for constructive fraud.

We have analyzed the evidence presented by Jake and find that he did not show the existence of a material issue of fact regarding any of the four elements of this cause of action. Consequently, the district court did not err in entering summary judgment for McFadden Ranch on either the claim for breach of fiduciary duty or the constructive fraud claim.

### 2. Conversion

McFadden Ranch alleged that Jake converted $50,130 of corporate assets through a series of unauthorized checks written on the company bank account. It presented evidence in the form of bank statements and canceled checks to show the unauthorized diversion of company funds.

However, the bank account on which these checks were written was owned by "RUTH I MCFADDEN OR JOHN K MCFADDEN" and not by the company. Thus, McFadden Ranch did not establish that it was entitled to judgment as a matter of law on the issue of conversion. McFadden Ranch concedes in its brief that "those suspicious withdrawals were not the proper subject of a motion for summary judgment. Accordingly, [McFadden Ranch] agrees that it would be appropriate to reverse . . . that portion of the judgment dealing with this account thereby reducing the judgment by $50,130.00." Brief for appellee at 14-15.

Because McFadden Ranch did not establish a prima facie case for summary judgment for conversion, the district court erred in granting summary judgment in its favor on this cause of action.

### 3. Amount of Damages

Finally, Jake alleges on appeal that the district court erred in its calculation of the amount of damages. He argues that there is a genuine issue of material fact as to the amount of damages for two reasons.

First, Jake argues that a previous stock pledge agreement between himself and McFadden Ranch "may serve to off-set any amount that may ultimately be owed [McFadden Ranch]." Brief for appellant at 18. Under this stock pledge agreement, Jake pledged his shares in McFadden Ranch in exchange for the use of company property to secure a $208,000 loan dated June 12, 2000. In the event that Jake defaulted on his loan payments, the pledged shares were to be sold to satisfy the debt. Jake argues that this agreement applies to the current situation. But there is no language in the agreement to indicate that it should be read to apply to other loan transactions in which Jake also used company property to secure his personal debts.

Indeed, because the stock pledge agreement is specific to a June 12 loan, we cannot expand it to later loan transactions. Therefore, Jake is not entitled to an offset for the amount of company stock he pledged under this agreement.

Second, Jake argues that there is a question of fact as to the amount of damages, because the company's accountant "attributes the entire amount to [Jake], despite the fact that in paragraph 3 of his affidavit he acknowledges that part of the debt that had been defaulted on was attributed to [McFadden Ranch] itself." Brief for appellant at 18. While it is technically true that the loan from AMC was made to McFadden Ranch and is therefore a debt of the company, McFadden Ranch did so only through Jake's own actions—he obtained the loan and directed that the funds be applied toward his personal debts. McFadden Ranch sold its property to repay the loan only because Jake defaulted on the payments. In these regards, the AMC loan, although in McFadden Ranch's name, was no different than the loan from the Bank of Paxton. Neither loan was incurred for corporate purposes, but only for Jake's benefit. Therefore, the damages to the company resulting from default on both loans were properly included in the overall damages calculation.

As we explained earlier, McFadden Ranch clearly established through its accountant the amount of damages caused by Jake's default on the AMC and Bank of Paxton loans. Jake did not present any evidence to refute these damage calculations other than the stock purchase agreement, which, as we explained above, was not applicable to the loans at issue here. Thus, there is no genuine issue of material fact as to the amount of damages to McFadden Ranch on the breach of fiduciary duty and fraud causes of action.

The district court's judgment lumped all of the damages into a single amount rather than following the customary procedure of setting out a specific amount for each cause of action. And as McFadden Ranch conceded on appeal, the court erred in granting summary judgment on the cause of action for conversion. Thus, to the extent that the district court's damage award of $1,247,167.79 included damages for conversion, it was in error. However, there is no dispute in the evidence of

the amount of damages respectively attributable to the separate causes of action. The evidence clearly established that McFadden Ranch was harmed in the amount of $1,197,037.79 as a result of Jake's breach of fiduciary duty and constructive fraud, while the remaining $50,130 of the original award was the result of the alleged conversion. Because the amount of damages attributable to the conversion cause of action is separate and distinct from the damages resulting from the breach of fiduciary duty and fraud, we are thus able to modify the district court's damage award to reflect the reversal on appeal of the judgment for conversion. We reduce the damage award by $50,130 to $1,197,037.79 and affirm as so modified.

## VI. CONCLUSION

Because McFadden Ranch adduced sufficient evidence to establish a prima facie case for breach of fiduciary duty and constructive fraud and Jake failed to present evidence raising a genuine issue of material fact, we affirm the district court's entry of summary judgment in McFadden Ranch's favor on those two causes of action. However, because the evidence did not show that the money Jake allegedly converted from McFadden Ranch came from an account owned by the company, we reverse the grant of summary judgment on the cause of action for conversion. Because we reverse on the conversion cause of action, we modify the district court's judgment to remove the amount attributable to the conversion claim. We therefore affirm in part as modified, and in part reverse and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART AS MODIFIED, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

# STATE OF NEBRASKA, APPELLEE, V. VICTOR VELA-MONTES, APPELLANT.

807 N.W.2d 544

Filed December 13, 2011. No. A-10-1043.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **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.
3. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for continuance will not be disturbed on appeal.
4. **Motions for Continuance.** Neb. Rev. Stat. § 29-1206 (Reissue 2008) states that applications for continuance shall be made in accordance with Neb. Rev. Stat. § 25-1148 (Reissue 2008) and that in criminal cases, the court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecution or defense, but also the public interest in prompt disposition of the case.
5. **Speedy Trial.** Neb. Rev. Stat. § 29-1208 (Reissue 2008) provides that a defendant who is not brought to trial before the running of the time for trial, as extended by excludable periods, shall be entitled to absolute discharge.
6. **Speedy Trial: Proof.** The burden of proof is upon the State to show that one or more of the excluded time periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 2008) are applicable when the defendant is not tried within 6 months.
7. ____: ____. To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence.
8. **Motions for Continuance: Appeal and Error.** Noncompliance with the mandates of Neb. Rev. Stat. § 25-1148 (Reissue 2008) is merely a factor to be considered in determining whether the trial court abused its discretion in ruling on a motion for continuance.
9. **Evidence: Waiver.** Oral statements of counsel should not be received as evidence, although objection to their reception may be waived.
10. **Motions for Continuance: Prosecuting Attorneys: Waiver: Appeal and Error.** It is not error for a trial court to grant a continuance when the factual basis for granting the motion is wholly or largely dependent upon the oral statements of the prosecutor and the defense does not object to the procedure.
11. **Motions for Continuance.** The plain requirements of Neb. Rev. Stat. § 25-1148 (Reissue 2008) are not difficult to comply with, especially when the defendant unequivocally objects to the State's failure to do so.
12. ____. The State's failure to comply with the dictates of Neb. Rev. Stat. § 25-1148 (Reissue 2008) deprives a defendant of a mere technical right.

13. **Judgments: Words and Phrases: Appeal and Error.** In the context of appealable orders, a substantial right is an essential legal right, not a mere technical right.
14. **Criminal Law: Judgments: Appeal and Error.** No judgment shall be set aside in any criminal case for error as to any matter of procedure if the appellate court, after an examination of the entire cause, considers that no substantial miscarriage of justice has actually occurred.
15. **Affidavits: Testimony.** The right to have a motion supported by affidavits or sworn testimony is a mere technical right, not an essential legal right.
16. **Motions for Continuance: Records: Appeal and Error.** In determining whether a trial court has abused its discretion in ruling on a continuance, it is proper for the reviewing court to look at the entire record in the case.
17. **Evidence: Motions to Dismiss: Appeal and Error.** In numerous instances, the Nebraska appellate courts have considered evidence relevant to earlier proceedings where such evidence was adduced at the time of a hearing on a motion for discharge.
18. **Motions for Continuance: Appeal and Error.** An appellant has suffered no loss of a substantial right by the grant of the State's motion for continuance when the State did not support the motion with an affidavit or sworn testimony.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed as modified.

Daniel R. Stockmann, of Dunn & Stockmann, L.L.O., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

PER CURIAM.

## INTRODUCTION

Victor Vela-Montes appeals from an order denying his motion for absolute discharge on speedy trial grounds. At the hearing on his motion for discharge, the district court received evidence precisely confirming the prosecutor's representations made at the time the State obtained a continuance. Vela-Montes argues that because the evidence was not produced at the earlier hearing in the form of an affidavit or live witness, the court erred in overruling his motion for discharge. We conclude that the receipt of this evidence did not affect a substantial right and that the court did not abuse its discretion in granting the motion to continue. Accordingly, the speedy trial clock had

not expired and the district court properly denied Vela-Montes' motion for discharge.

## BACKGROUND

On February 26, 2009, the State charged Vela-Montes with two counts of first degree sexual assault. On November 2, Vela-Montes filed a motion for continuance of the trial scheduled to begin on November 4. The court granted this motion and set trial for November 30.

On November 23, 2009, the State filed a motion to continue the trial. The State did not submit testimony, exhibits, or affidavits regarding the basis for the continuance, and Vela-Montes did not agree or stipulate to a continuance. The prosecutor made an unsworn statement to the court that one of the victims in the case was unavailable to testify on the date the case had been set for trial. The prosecutor stated:

> I am asking for a continuance of the trial date. One of the victims on the case . . . has contacted me since I gave her the date of November 30. She indicates to me that she's beginning classes full-time on November 30 and won't be available to testify that week. She has to take these classes as a requirement, a prerequisite, I guess, to get into what she wants to do as it pertains to the Army. And these classes run November 30 to February 25; however, she did indicate to me that she would be available in February and March to testify so that's the reason I'm asking for this continuance.

Defense counsel objected to the motion and argued that "the State is not even asking for a continuance in the proper manner. The statute for requesting a continuance requires an affidavit be submitted in support of the motion to continue." Defense counsel further argued to the court:

> I think the reason at least partially the statute requires an affidavit is that there needs to be some sort of evidence submitted, I think, by the State as to why [it] need[s] a continuance, not just an argument. [The State has not] submitted any evidence, affidavit or otherwise, as to why [it] need[s] the continuance or why there's been good cause shown to justify the continuance.

Over objection by Vela-Montes to both the method of the request and the continuance itself, the court sustained the motion and continued the trial to February 1, 2010.

On January 19, 2010, Vela-Montes filed a motion for discharge arguing that the 6-month statutory speedy trial time under Neb. Rev. Stat. §§ 29-1207 and 29-1208 (Reissue 2008) had expired and that his constitutional right to a speedy trial had been violated.

On January 25, 2010, the district court held a hearing on Vela-Montes' motion for discharge. The State presented testimony from the victim whose unavailability had prompted the State's November 2009 motion to continue. The victim testified that prior to the State's filing the motion to continue, she had informed the State that she would be unavailable to testify on the previously set trial date because of her class schedule and that she would not be available to testify until February 2010. Vela-Montes objected to the testimony of the victim, arguing that while such evidence may have been relevant in connection with the earlier hearing on the State's motion to continue, it was not relevant now in connection with the motion for discharge. The court overruled Vela-Montes' objection and denied his motion for discharge. On January 27, the court entered an order denying the motion for discharge.

Vela-Montes filed his first appeal, in case No. A-10-106, on January 27, 2010. We subsequently remanded the case back to the district court with directions that the court make specific findings of each period of delay excludable under § 29-1207(4)(a) to (f), which the court had failed to do in its prior order.

On October 13, 2010, the district court entered a supplemental order pursuant to this court's mandate. In this supplemental order, the district court found that the pretrial motions of Vela-Montes added a total of 132 days to his speedy trial clock and that the State's motion to continue trial for good cause to February 1, 2010, added an additional 63 days. Therefore, according to the district court, a total of 195 days were to be added to Vela-Montes' speedy trial clock.

For the sake of clarity, we note at this point that the district court improperly calculated the number of excludable days

on the prior remand, and the State agrees. It appears that the trial court did not recognize that an excludable period under § 29-1207 commences on the day immediately after the filing of a defendant's pretrial motion. See *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). The district court incorrectly included the day of the filing of each of the pretrial motions, thereby excluding 1 day too many for each time period. Those time periods dealt with discovery and continuance motions. Proceedings related to some of these motions have not been made a part of the record, but they are not the subject of any dispute.

Vela-Montes and the State agree that Vela-Montes' 6-month speedy trial clock within which to be brought to trial, exclusive of consideration of the time attributable to the State's continuance, expired on January 4, 2010. The only disputed issue is whether the time from December 1, 2009, to February 1, 2010, attributable to the State's continuance, was properly excluded from the speedy trial calculation.

## ASSIGNMENT OF ERROR

Vela-Montes assigns that the district court committed reversible error by overruling his motion for discharge when the State failed to bring his case to trial within the statutory 6-month period.

## STANDARD OF REVIEW

[1,2] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Tamayo*, 280 Neb. 836, 791 N.W.2d 152 (2010). But 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. *Id.*

[3] A motion for continuance is addressed to the discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for continuance will not be disturbed on appeal. *State v. Roundtree*, 11 Neb. App. 628, 658 N.W.2d 308 (2003).

## ANALYSIS

Vela-Montes constructs a technical argument. He asserts that the time attributable to the State's November 2009 motion to continue should not be excluded from the speedy trial calculation, because the State failed to properly seek the continuance and because he appropriately objected to the method used by the State and to the continuance itself. He argues that the later evidence bearing on the necessity of the continuance must be disregarded. Thus, the timing of the production of this evidence is critical to his argument.

[4] We begin by recalling the statutory provisions regarding continuances in the context of the statutory right to speedy trial. Neb. Rev. Stat. § 29-1206 (Reissue 2008) states that applications for continuance shall be made in accordance with Neb. Rev. Stat. § 25-1148 (Reissue 2008) and that in criminal cases, the court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecution or defense, but also the public interest in prompt disposition of the case. Section 25-1148 provides that an application for continuance shall state

> the grounds upon which the application is made, which motion shall be supported by the affidavit or affidavits of [a] person or persons competent to testify as witnesses under the laws of this state, in proof of and setting forth the facts upon which such continuance . . . is asked. After the filing of such application and the affidavits in support thereof, the adverse party shall have the right to file counter affidavits in the matter. Either party may, upon obtaining leave of the court, introduce oral testimony upon the hearing of such application. The court may, upon the hearing, in its discretion, grant or refuse such application, and no reversal of such cause or proceeding shall be had on account of the action of the court in granting or refusing such application except when there has been an abuse of a sound legal discretion by the court.

Although Vela-Montes presents a narrow attack focusing on the hearing on the State's motion for continuance, the

issue is presented to this court in the context of a speedy trial determination. As such, the relevant context for resolving the issue in this appeal is within the confines of Nebraska's statutory speedy trial guarantee.

[5-7] Section 29-1208 provides that a defendant who is not brought to trial before the running of the time for trial, as extended by excludable periods, shall be entitled to absolute discharge. The burden of proof is upon the State to show that one or more of the excluded time periods under § 29-1207(4) are applicable when the defendant is not tried within 6 months. *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence. *Id.*

There is no dispute about most of the relevant excludable time periods, and the only significant dispute is whether the time attributable to the State's November 2009 continuance should have been excluded. Vela-Montes argues that the time may not be excluded. If, however, as the State contends, that time is properly excluded, then the motion for discharge was properly denied.

Vela-Montes argues that the State's motion for continuance was wrongly granted by the court because the State failed to follow statutorily mandated procedures for requesting a continuance and because the motion for continuance was supported only by the unsworn representations of the prosecutor, over Vela-Montes' objection. We disagree.

[8] The Nebraska appellate courts have held that noncompliance with the mandates of § 25-1148 is merely a factor to be considered in determining whether the trial court abused its discretion in ruling on a motion for continuance. See, *State v. Santos*, 238 Neb. 25, 468 N.W.2d 613 (1991); *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987); *State v. Shipler*, 17 Neb. App. 66, 758 N.W.2d 41 (2008); *State v. Roundtree*, 11 Neb. App. 628, 658 N.W.2d 308 (2003); *State v. Matthews*, 8 Neb. App. 167, 590 N.W.2d 402 (1999).

[9,10] In *State v. Roundtree, supra*, the prosecutor orally moved for continuance before trial because of the alleged unavailability of witnesses. The State did not file a written

motion, did not file any affidavits, and did not present any sworn testimony in support of the motion. Rather, the prosecutor made several unsworn statements of fact during the hearing to justify a continuance. Defense counsel did not object to the State's failure to comply with § 25-1148, acknowledged having prior knowledge of the State's intent to seek the continuance, did not challenge the alleged unavailability of the witness, and objected to the granting of the continuance solely on the basis of constitutional speedy trial rights. On appeal, we recognized that § 25-1148 had not been complied with, but relied heavily on the fact that defense counsel did not object to the procedure employed by the State. We specifically recognized that oral or other informal statements are a poor procedure when speedy trial rights are involved. *State v. Roundtree, supra*. We also noted that oral statements of counsel should not be received as evidence, although objection to their reception may be waived. *Id.* We ultimately concluded that "it is not error for a trial court to grant a continuance when the factual basis for granting the motion is wholly or largely dependent upon the oral statements of the prosecutor and the defense does not object to the procedure." *Id.* at 640, 658 N.W.2d at 318. Thus, we specifically held that the defense's silence waived any requirement of compliance with § 25-1148.

Similarly, in *State v. Shipler, supra*, the State failed to comply with § 25-1148. Although the State filed a written motion, it failed to include affidavits to support the factual basis for the motion and, instead, relied on unsworn oral statements of the prosecutor at the hearing on the motion to demonstrate that the continuance was warranted. As in *State v. Roundtree*, this court found no abuse of discretion by the trial court in granting the motion, notwithstanding the State's failure to comply with § 25-1148. Again, we relied on the failure of the defendant to object to the State's failure to comply with § 25-1148 at the hearing on the motion to conclude that there was no abuse of discretion. See *State v. Shipler*, 17 Neb. App. 66, 758 N.W.2d 41 (2008).

[11] In contrast to *State v. Roundtree* and *State v. Shipler*, Vela-Montes specifically and vigorously objected to the State's

failure to comply with § 25-1148 and to the State's use of unsworn statements to support the motion to continue. We recognized in *State v. Roundtree* that when the facts or procedures being used by the State to seek a continuance are questioned, it is a simple matter to require the prosecutor to present evidence or sworn testimony to support the State's assertions. The plain requirements of § 25-1148, and our prior suggestions that they be followed, are not difficult to comply with, especially when the defendant unequivocally objects to the State's failure to do so.

[12-15] However, we assess the procedural defect in the broader context of Nebraska jurisprudence focusing on the parties' substantial rights, and thus, we concentrate on whether the continuance was justified in light of the evidence confirming the prosecutor's representations of cause. The State's failure to comply with the dictates of § 25-1148 deprived Vela-Montes of a mere technical right. In the context of appealable orders, we have said that a substantial right is an essential legal right, not a mere technical right. See, e.g., *In re Interest of T.T.*, 18 Neb. App. 176, 779 N.W.2d 602 (2009). And a fundamental principle of the review of judgments in criminal cases dictates that no judgment shall be set aside in any criminal case for error as to any matter of procedure if the appellate court, after an examination of the entire cause, considers that no substantial miscarriage of justice has actually occurred. See Neb. Rev. Stat. § 29-2308 (Reissue 2008). In a similar vein, the right to have a motion supported by affidavits or sworn testimony is a mere technical right, not an essential legal right. The substantial legal right was to have the continuance granted only where sufficient cause actually existed, which the evidence clearly established. Thus, Vela-Montes, though he objected to the State's method of requesting the continuance, did not lose a substantial right. And the fundamental principle of the review of judgments in criminal cases constrains us from reversing a ruling affecting a mere technical right.

We reject Vela-Montes' argument that he was deprived of a substantial right—the statutory right to speedy trial—as this merely attempts to bootstrap a substantial right to the

mere technical right actually affected. At oral argument, Vela-Montes' counsel forthrightly conceded that the evidence later presented, *if presented at the time of the hearing on the motion for continuance*, would have been sufficient to support the district court's order granting the continuance. Thus, it is not the character of the evidence presented, but merely the timing of the presentation, that constitutes the foundation of Vela-Montes' assigned error.

[16] During the hearing on Vela-Montes' motion for absolute discharge, the State presented sworn testimony to demonstrate that the factual basis for the prior continuance was justified. Vela-Montes objected, arguing that the evidence might have been relevant at the prior hearing on the State's motion to continue but could not be used later at the hearing on the motion for discharge to retroactively support an improperly awarded continuance. In determining whether a trial court has abused its discretion in ruling on a continuance, it is proper for the reviewing court to look at the entire record in the case. See *State v. Valdez*, 239 Neb. 453, 476 N.W.2d 814 (1991). We conclude that the court did not err in receiving such evidence at the motion for discharge for at least two reasons.

First, we emphasize that the evidence presented at the hearing on the motion for discharge did not vary in any material respect from what was adduced at the hearing on the State's motion to continue. As earlier set forth, during the hearing on the State's motion to continue, the prosecutor asserted that one of the victims would not be available to testify on the scheduled trial date due to prerequisite classes running from November 30, 2009, to February 25, 2010. The prosecutor represented that the bailiff informed her that the earliest date the court was available for trial was February 1. During the hearing on the motion for discharge, the victim who precipitated the State's November 2009 motion for continuance testified that when she was informed that the trial date was continued until November 30, she told the prosecutor that her college classes were beginning that day and that she would be unavailable to testify due to her school schedule. The State also called the bailiff to testify, and she testified that upon the State's November 2009 motion to continue, she

looked through the court's calendar and ascertained that the next available jury panel was February 1, 2010. This sworn testimony is materially the same as the prosecutor's unsworn statements made in support of the motion for continuance. Clearly, the precise conformity between the proffered justification and the later evidence drives our conclusion that Vela-Montes was not deprived of a substantial right—had there been any significant variance, we could not reach the same conclusion.

[17] Second, in numerous instances, the Nebraska appellate courts have considered evidence relevant to earlier proceedings where such evidence was adduced at the time of a hearing on a motion for discharge. For instance, in *State v. Dailey*, 10 Neb. App. 793, 639 N.W.2d 141 (2002), at the hearing on the defendant's motion for discharge, the State filed an affidavit of good cause which listed events that had occurred during the proceedings which the State asserted constituted good cause for the delay in bringing the defendant to trial. The trial court's decision noted some of the items contained in the State's affidavit. On appeal, we observed with respect to one time period at issue that "[t]he State's affidavit of good cause noted that [the defendant] requested this continuance in order to prepare for the State's newly filed motion for joint trial and to prepare a witness list." *Id.* at 798, 639 N.W.2d at 146. And in *State v. Beck*, 212 Neb. 701, 325 N.W.2d 148 (1982), an issue during the hearing on the motion for discharge was whether the defendant or his counsel was ever notified to appear for arraignment or trial. The trial court heard the testimony of the county judge who bound the defendant over for trial and the testimony of the defendant's former counsel. After the court found that the defendant left the jurisdiction and was unavailable for trial for over 8 months, the court denied the motion for discharge. In *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972), the State and the defendant presented evidence during the hearing on the motion for discharge related to the state of the court's docket and future business of the court, which evidence the Nebraska Supreme Court considered on appeal. Thus, we cannot conclude that the district court erred in receiving evidence during the hearing on the motion for discharge

which demonstrated that the earlier motion for continuance was for good cause.

[18] Under these particular circumstances, we conclude that the district court did not abuse its discretion in granting the State's motion for continuance. Vela-Montes suffered no loss of a substantial right by the grant of the State's motion when the State did not support the motion with an affidavit or sworn testimony.

Of course, the whole question could easily have been avoided had the prosecuting attorney simply complied with § 25-1148 when requesting the continuance. But because the district court did not abuse its discretion in granting the State's motion for continuance, the time attributable to the motion was properly excluded from the speedy trial clock. And because that time was properly excluded, Vela-Montes' speedy trial clock had not expired at the time he filed his motion for discharge. Accordingly, the district court did not err in denying his motion for absolute discharge.

## CONCLUSION

We conclude that the district court did not abuse its discretion in granting the State's motion to continue over Vela-Montes' objection. Although Vela-Montes had a technical right to have the State comply with the statutory requirement of § 25-1148 that the motion to continue be supported by an affidavit, the State's failure did not affect a substantial right of Vela-Montes, particularly when the oral representations by the State at the hearing on the motion to continue did not materially vary from the evidence adduced at the hearing on the motion for discharge. As such, we conclude that the speedy trial clock had not expired and that the court did not err in denying Vela-Montes' motion for absolute discharge. The last date for commencement of trial, disregarding periods of extension, would have been August 26, 2009. Extending the time by 191 days, the last day for commencement of trial was March 5, 2010. Vela-Montes' motion for discharge was filed on January 19. Thus, we modify the district court's order to correct the concededly incorrect calculation of the days remaining before expiration of the time to commence

trial—thereby determining that 45 days remain. Accordingly, we affirm as modified.

AFFIRMED AS MODIFIED.

IRWIN, Judge, dissenting.

I respectfully disagree with the conclusions of the majority that the motion to continue was properly granted without any supporting evidence, based solely on the prosecutor's unsworn assertions, over Vela-Montes' specific objection to the procedures being employed, and that it was acceptable for the State to wait until the later hearing on the motion to discharge to produce evidence in support of the motion to continue. When the period of time associated with this improperly granted motion to continue is considered in the speedy trial calculation, it is clear that Vela-Montes was not brought to trial within the statutorily allotted time and that his statutory right to a speedy trial was violated. As such, I would reverse, and remand with directions to grant the motion to discharge.

## I. INTRODUCTION

The majority specifically recognizes that the statutory provisions regarding continuances in the context of the statutory right to speedy trial include the requirement that the application for continuance "be supported by the affidavit or affidavits of [a] person or persons competent to testify as witnesses under the laws of this state, in proof of and setting forth the facts upon which such continuance . . . is asked." See § 25-1148. The majority then concludes that Vela-Montes' assertion that the State's failure to adduce any sworn testimony to support the prosecutor's unsworn assertions in support of the motion to continue was merely a "technical" attack and was an assertion of a "mere technical right" to have the State comply with the statutory directives and support its motion with evidence. I disagree.

The majority accurately notes that the Nebraska appellate courts have held that noncompliance with the mandates of § 25-1148 is merely a factor to be considered in determining whether the trial court abused its discretion in ruling on a motion to continue. See, *State v. Santos*, 238 Neb. 25, 468 N.W.2d 613 (1991); *State v. Carter*, 226 Neb. 636, 413 N.W.2d

901 (1987); *State v. Shipler*, 17 Neb. App. 66, 758 N.W.2d 41 (2008); *State v. Roundtree*, 11 Neb. App. 628, 658 N.W.2d 308 (2003); *State v. Matthews*, 8 Neb. App. 167, 590 N.W.2d 402 (1999). The majority also accurately recognizes that in prior cases concerning the State's noncompliance with the mandates of § 25-1148, a substantial factor considered by the appellate court was the defendant's failure to object to, or waive any challenge to, the noncompliance. See, *State v. Shipler, supra*; *State v. Roundtree, supra*. The majority then concludes that despite the statutory dictates that the State adduce evidence and not mere unsworn assertions in support of the motion to continue, despite Vela-Montes' specific and clear objections to the failure to comply with the statutory dictates, and despite the ease of compliance with the plain requirements of § 25-1148 and this court's prior suggestions to follow them, his right to have evidence adduced in support of a motion to continue that delayed his speedy trial was a "mere technical right" and not a legal right. The majority cites no authority for this conclusion.

## II. STATUTORY SPEEDY TRIAL GUARANTEE

Although the crux of the issue in this case is, as noted, whether the State's motion to continue was properly granted where the State failed to adhere to the statutory requirements of §§ 29-1206 and 25-1148 and where Vela-Montes specifically objected to the State's nonadherence, the issue is presented to this court in the context of a speedy trial determination. As such, the relevant context for resolving the issue in this appeal is within the confines of Nebraska's statutory speedy trial guarantee.

In 1971, the Nebraska Legislature enacted 1971 Neb. Laws, L.B. 436. See, Neb. Rev. Stat. §§ 29-1205 to 29-1209 (Reissue 2008 & Cum. Supp. 2010); *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972). These provisions were concerned with two things: (1) the right of the accused to a speedy trial and (2) the promotion of the interest of the public in the prompt disposition of criminal cases. See *State v. Alvarez, supra*. See, also, § 29-1206.

Section 29-1207 reads, in pertinent part, as follows:

> (1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.
>
> (2) Such six-month period shall commence to run from the date the indictment is returned or the information filed . . . .
>
> . . . .
>
> (4) The following periods shall be excluded in computing the time for trial:
>
> . . . .
>
> (c) The period of delay resulting from a continuance granted at the request of the prosecuting attorney, if:
>
> (i) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date[.]
>
> . . . .
>
> (f) Other periods of delay not specifically enumerated in this section, but only if the court finds that they are for good cause.

Section 29-1208 provides that if a defendant is not brought to trial before the running of the time for trial, as extended by excludable periods, he shall be entitled to absolute discharge.

The primary burden is upon the State, that is, the prosecutor and the court, to bring an accused to trial within the time provided by law. *State v. Alvarez, supra.* The State has the burden of proving that one or more of the excluded periods of time under § 29-1207(4) are applicable if the defendant is not tried within 6 months of the commencement of the criminal action. See *State v. Shipler*, 17 Neb. App. 66, 758 N.W.2d 41 (2008).

The Legislature recognized by the enactment of the speedy trial provisions the social desirability for a variety of reasons of bringing the accused to trial at an early date. *State v. Alvarez, supra*. The mandates of the statute must therefore be followed. *Id.*

In the present case, Vela-Montes fulfilled his responsibilities when he timely filed a motion for absolute discharge and asserted that he had not been brought to trial within the time period set forth in Nebraska's speedy trial statutes. At that point, the State was required to demonstrate that sufficient excludable time periods existed for the statutory speedy trial period not yet to have run. As noted above, there is no dispute about most of the relevant excludable time periods and the only significant dispute is whether the time attributable to the State's November 2009 continuance should have been excluded. If that time is properly excluded, then the motion for discharge was properly denied; if that time is not properly excluded, then the motion for discharge was not properly denied.

## III. EXCLUDABILITY OF STATE'S CONTINUANCE TIME

Both statute and case law provide guidance for trial courts when ruling on motions to continue. Section 25-1148 is the statutory polestar. Section 25-1148 provides that an application for continuance "*shall be* by written motion" and "*shall be* supported by the affidavit or affidavits of [a] person or persons competent to testify as witnesses under the laws of this state, in proof of and setting forth the facts" supporting the requested continuance. (Emphasis supplied.) Either party may introduce oral testimony upon the hearing of such application. *Id.* Section 29-1206 provides that applications for continuance in criminal cases are to be made in accordance with the statutory mandates of § 25-1148 and imposes an additional limitation that the trial court is to grant the continuance only upon a showing of good cause and only for so long as necessary, taking into account the request or consent of the parties and the public interest in prompt disposition of the case.

In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001); *State v. Donner*, 13 Neb. App. 85, 690 N.W.2d 181 (2004). A fundamental principle of

statutory construction is that penal statutes are to be strictly construed in favor of the defendant. See *id.* In this case, although § 25-1148 is not a penal statute, it is incorporated into penal proceedings through § 29-1206.

Although there is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions, as a general rule, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *State v. Donner, supra*. However, while the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done. *Id.*

In the present case, the use of "shall" in § 25-1148 would appear to render the requirement that the motion to continue be in writing and supported by sworn testimony in affidavits mandatory in character, unless the spirit and purpose of the legislation require that it be construed as permissive. In that regard, the speedy trial provisions in general, the heightened requirements of § 29-1206 requiring a court to additionally find good cause and consider the public interest in prompt disposition of the case, and the context of penal proceedings would seem to suggest that a permissive reading would be contrary to the spirit and purpose of speedy trial and penal provisions of statutory construction.

Nonetheless, Nebraska appellate courts have held, without further explanation, that noncompliance with the mandates of § 25-1148 is merely a factor to be considered in determining whether the trial court abused its discretion in ruling on a motion for continuance. See, *State v. Santos*, 238 Neb. 25, 468 N.W.2d 613 (1991); *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987); *State v. Shipler*, 17 Neb. App. 66, 758 N.W.2d 41 (2008); *State v. Roundtree*, 11 Neb. App. 628, 658 N.W.2d 308 (2003); *State v. Matthews*, 8 Neb. App. 167, 590 N.W.2d 402 (1999). This is in contrast to the Nebraska Supreme Court's holding in a 1989 civil case that "[b]ecause appellants' request for a continuance was oral and, therefore, failed to comply with § 25-1148, which prescribes a written application for a continuance and supporting affidavit, [the

court was] *precluded from considering* whether the district court committed reversible error in denying a continuance . . . ," even in a situation where the basis for seeking continuance related to permissible discovery on a jurisdictional issue. *Williams v. Gould, Inc.*, 232 Neb. 862, 884, 443 N.W.2d 577, 591 (1989) (emphasis supplied).

In cases where the criminal defendant has failed to comply with § 25-1148 and the trial court denied the requested continuance, the failure to comply with § 25-1148 has been used as a basis for finding that there was no abuse of discretion by the trial court in denying the motion. See, *State v. Carter, supra*; *State v. Matthews, supra.* In *State v. Santos, supra*, the Supreme Court reversed the trial court's denial of an oral motion for continuance made by the defendant where the circumstances forming the basis for the request arose from the court's action or inaction. In cases where the State has failed to comply with § 25-1148 and the trial court granted the requested continuance, however, the failure to comply with the statute was not sufficient to support a finding that the trial court abused its discretion in granting the motion. See, *State v. Shipler, supra*; *State v. Roundtree, supra*. However, the circumstances in which the State's failure to comply with § 25-1148 was presented in those cases differ significantly from the circumstances in the present case.

In *State v. Roundtree*, 11 Neb. App. 628, 658 N.W.d 308 (2003), the prosecutor orally moved for continuance before trial because of alleged unavailability of witnesses. The State did not file a written motion, did not file any affidavits, and did not present any sworn testimony in support of the motion. Rather, the prosecutor made several unsworn statements of fact during the hearing to justify a continuance. Defense counsel did not object to the State's failure to comply with § 25-1148, acknowledged having prior knowledge of the State's intent to seek the continuance, did not challenge the alleged unavailability of the witness, and objected to the grant of the continuance solely on the basis of constitutional speedy trial rights.

On appeal, this court recognized that § 25-1148 had not been complied with, but relied heavily on the fact that defense

counsel did not object to the procedure employed by the State. We specifically recognized that oral or other informal statements are a poor procedure when speedy trial rights are involved. *State v. Roundtree, supra*. We also specifically recognized that oral statements of counsel should not be received as evidence, although objection to their reception may be waived. *Id.* We ultimately concluded that it is not an abuse of discretion for a trial court to grant a continuance "when the factual basis for granting the motion is wholly or largely dependent upon the oral statements of the prosecutor *and the defense does not object to the procedure.*" *Id.* at 640, 658 N.W.2d at 318 (emphasis supplied). We specifically held that "by the defense's silence, it ha[d] waived any requirement that" § 25-1148 be complied with. *State v. Roundtree*, 11 Neb. App. at 640, 658 N.W.2d at 318.

In *State v. Roundtree*, we specifically iterated that, as other appellate courts that had considered the question had warned, where there is a possible speedy trial issue, it is wise to use a written affidavit. We found no abuse of discretion, however, because the defendant and his counsel had been present and had not objected on the record to the oral motion and showing. *Id.*

Similarly, in *State v. Shipler*, 17 Neb. App. 66, 758 N.W.2d 41 (2008), the State failed to comply with § 25-1148. In *State v. Shipler*, the State did file a written motion, but failed to include affidavits to support the factual basis for the motion and, instead, relied on unsworn oral statements of the prosecutor at the hearing on the motion to demonstrate that the continuance was warranted. As in *State v. Roundtree*, this court found no abuse of discretion by the trial court in granting the motion, notwithstanding the State's failure to comply with § 25-1148. As in *State v. Roundtree*, we relied on the failure of the defendant to object to the State's failure to comply with § 25-1148 at the hearing on the motion to conclude that there was no abuse of discretion. See *State v. Shipler, supra*.

The present case differs from these prior cases in Nebraska and appears to present a question of first impression, as Vela-Montes specifically and vigorously objected to the State's failure to comply with § 25-1148 and to the State's use of

unsworn statements to support the motion to continue. Where the defendants in *State v. Roundtree*, 11 Neb. App. 628, 658 N.W.2d 308 (2003), and *State v. Shipler, supra*, failed to object and were held to have waived the right to challenge the State's noncompliance with § 25-1148, Vela-Montes did not so fail.

At the hearing on the State's motion to continue, Vela-Montes specifically objected and argued to the trial court that the State was "not even asking for a continuance in the proper manner" and that "[t]he statute for requesting a continuance requires an affidavit be submitted in support of the motion to continue." Vela-Montes further argued that "there needs to be some sort of evidence submitted" by the State to support a request for continuance and urged the district court to overrule the motion because the State had not "submitted any evidence, affidavit or otherwise, as to why [it] need[s] the continuance or why there's been good cause shown to justify the continuance." Vela-Montes further objected when the State attempted to present such evidence at the hearing on his motion for discharge, arguing that the evidence might have been relevant at the prior hearing on the State's motion to continue but could not be used later at the hearing on the motion to discharge to retroactively support an improperly awarded continuance.

We recognized in *State v. Roundtree, supra*, that when the facts or procedures being used by the State to seek a continuance are questioned, it is a simple matter to require the prosecutor to present evidence or sworn testimony to support the State's assertions. The plain requirements of § 25-1148 and our prior suggestions that they be followed are not difficult to comply with, especially when the defendant unequivocally and persistently objects to the State's failure to do so. Although a defendant may be found to have waived the State's noncompliance with § 25-1148, Vela-Montes did not waive his objection thereto in this case. On the specific facts of this case, I would find that the district court abused its discretion in granting the State's motion to continue over Vela-Montes' objection that the State had failed to comply with the simple requirements of § 25-1148.

## IV. EVIDENCE AT DISCHARGE HEARING

As noted, although the State failed to adhere to the plain requirements of § 25-1148 at the hearing on the State's motion to continue, despite Vela-Montes' objections, the State did present sworn testimony at the hearing on Vela-Montes' motion for absolute discharge in an attempt to demonstrate that the factual basis for the prior continuance was justified. The State has provided no authority, I am aware of none, and the majority cites none, which would support the notion that the State can retroactively justify an otherwise improperly sustained motion for continuance. While the majority readily accepts this procedure to the detriment of the criminal defendant, I would hold that to endorse this procedure would place the court on the slippery slope of allowing any number of inadequate showings in support of motions to continue to be remedied at later times. I would decline to allow such a procedure in a case such as this, where a criminal defendant's right to speedy trial is at issue.

## V. RESOLUTION

As noted, there is no significant dispute in this case that Vela-Montes' speedy trial rights were violated if the time attributable to the State's motion to continue was not properly excludable from the speedy trial calculation. I would conclude that the time was not properly excludable, that the speedy trial clock expired, and that Vela-Montes' motion for absolute discharge under § 29-1208 should have been sustained.

# IN RE INTEREST OF DAVID M. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. HERENDIRA H., APPELLEE, MADISON COUNTY, NEBRASKA, INTERVENOR-APPELLANT, AND KATE M. JORGENSEN, INTERVENOR-APPELLEE.

808 N.W.2d 357

Filed December 20, 2011. No. A-10-968.

1. **Juvenile Courts: Guardians Ad Litem: Fees: Appeal and Error.** A juvenile court's decision concerning guardian ad litem fees is reviewed de novo on the record for an abuse of discretion.
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. **Juvenile Courts: Guardians Ad Litem: Fees: Standing: Appeal and Error.** A county has standing to appeal an order awarding guardian ad litem fees in a juvenile action because the county wherein the juvenile court proceedings were had must pay such fees, and thus, the county has an interest in the outcome of such a case.
4. **Juvenile Courts: Pleadings.** Neb. Rev. Stat. § 43-274 (Reissue 2008) grants county attorneys the ultimate discretion regarding whether to file a petition alleging that a child is within the meaning of Neb. Rev. Stat. § 43-247(1), (2), (3), or (4) (Reissue 2008).
5. **Juvenile Courts: Actions: Dismissal and Nonsuit.** An action in juvenile court may be dismissed by a county attorney at any time prior to trial without leave of court.
6. **Juvenile Courts: Pleadings.** Pursuant to Neb. Rev. Stat. § 43-274 (Reissue 2008), a guardian ad litem does not have the authority to initiate a juvenile court case by filing a petition alleging a child is within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008).

Appeal from the County Court for Madison County: DONNA F. TAYLOR, Judge. Reversed and remanded for further proceedings.

Joseph M. Smith, Madison County Attorney, and Gail E. Collins for intervenor-appellant.

Harry A. Moore for intervenor-appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

IRWIN, Judge.

## I. INTRODUCTION

This appeal concerns the determination of fees awarded to a guardian ad litem (GAL) for services rendered in a juvenile court action. Kate M. Jorgensen was appointed as GAL for David M., Miguel H., Edwin G., and Rogelio M. after the State filed a petition in the county court for Madison County, sitting as a juvenile court, alleging that the children were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Ultimately, the county court dismissed the juvenile court proceedings after the court found there was insufficient evidence to demonstrate that the children could not be returned to their mother.

At the conclusion of the juvenile court proceedings, Jorgensen sought fees for her services as GAL. Madison County opposed Jorgensen's request, arguing that certain actions taken by Jorgensen during the proceedings were not authorized or were completed for an improper purpose, and should not be reimbursed. After a hearing, the county court awarded Jorgensen the sum of $4,110.18 for her services as GAL. Madison County appeals from this award. For the reasons set forth below, we reverse the county court's award of fees to Jorgensen and remand the case for a new hearing concerning Jorgensen's fees.

## II. BACKGROUND

The issues raised in this appeal concern only the amount of fees awarded to Jorgensen for her services as GAL in the underlying juvenile court proceedings. However, in order to provide some context for the dispute concerning Jorgensen's fees, we briefly recount the factual and procedural background of the underlying juvenile case.

In May 2009, the State filed a petition in county court alleging that David, born in June 1997; Miguel, born in September 2001; Edwin, born in January 2005; and Rogelio, born in May 2006, were children within the meaning of § 43-247(3)(a) because there was no one available to care for them. Specifically, the petition alleged that the children's mother was currently in the Madison County jail and that their

fathers were residing in Mexico. At the same time the State filed the petition, it also filed a motion requesting that temporary custody of the children be granted to the Department of Health and Human Services (the Department). In support of that motion, the State submitted an affidavit which indicated that the children's mother, Herendira H., had been arrested and jailed for criminal impersonation after she admitted that she was in this country illegally and that she had been using someone else's identity in order to maintain employment. The county court granted the State's motion and awarded the Department temporary custody of the children. The court also appointed Jorgensen as the children's GAL.

Sometime after the State filed its petition, Herendira was deported to Mexico. She remained in Mexico during the pendency of these proceedings. Once in Mexico, Herendira contacted the Mexican consulate, which began to assist her in working toward reunification with her children. Herendira obtained appropriate housing in Mexico and completed a home study. In addition, she had regular and consistent telephone contact with the children.

In November and December 2009, the Department recommended that the children be reunited with Herendira in Mexico. The Department indicated that its investigation did not establish that Herendira had abused or neglected the children, but, rather, proved that Herendira had appropriately cared for the children, including providing for their medical and educational needs. In addition, the Department believed that any service that the family required could be provided in Mexico.

On December 10, 2009, the State filed a motion to dismiss its petition, based on the Department's investigation and recommendation. In that "Dismissal" motion, the State indicated it was requesting that the court "dismiss, without prejudice, the petition previously filed herein." The State also indicated that the dismissal was to be effective not immediately, but "at the point when the children are returned to Mexico to be with their mother." Jorgensen objected to the dismissal.

The next day, on December 11, 2009, the State filed an amended motion to dismiss. Under that "Amended

Dismissal" motion, the dismissal was intended to be effective immediately. After the State filed its amended motion to dismiss, Jorgensen filed a supplemental petition which alleged, among other things, that the children were within the meaning of § 43-247(3)(a) because they "have been emotionally, mentally and/or physically neglected by the mother and all of the juveniles suffer from severe developmental delays." The State filed a motion to quash the supplemental petition, arguing that a GAL does not have the authority to file such a petition. After a hearing, the county court found that Jorgensen, acting as the children's GAL, had the authority to file a supplemental petition. The court retained jurisdiction over the children and ordered that an adjudication hearing be held on the supplemental petition.

On February 17, 2010, a hearing was held. At the hearing, the county court addressed numerous motions filed by the parties, including a motion filed by Herendira asking the court to change the placement of the children pending the adjudication hearing. Herendira requested that the children be placed with her in Mexico. At the close of the hearing, the county court granted Herendira's request, finding that Jorgensen failed to demonstrate that placement of the children with Herendira would be contrary to their health, safety, and welfare. The court also found that there was not sufficient evidence to demonstrate that Herendira "did anything to cause the need for services, or that she did not seek out assistance to meet the special needs of her children." The county court recognized that by returning the children to Herendira in Mexico, the court would lose jurisdiction of the children; however, the court also recognized that the Mexican consulate had indicated its intent to provide the family with necessary services. The court's order effectively dismissed the case.

After the case was dismissed, Jorgensen sought attorney fees for her services as GAL. Madison County objected to Jorgensen's request. Specifically, the county objected to awarding fees to Jorgensen for any work she completed after the State filed its amended motion to dismiss on December 11, 2009. Madison County argued that after December 11, the county court no longer had the authority to continue

the proceedings, because the State dismissed the case and Jorgensen did not have the authority to file a supplemental petition to continue the court's jurisdiction. The county also alleged that the supplemental petition was "frivolous, contrary to law and wasteful."

In September 2010, the county court overruled all of the county's objections to Jorgensen's request for fees. The court approved fees of $4,110.18 to be paid to Jorgensen by Madison County. This amount includes reimbursement for work Jorgensen completed after December 11, 2009.

Madison County appeals from the county court's order awarding Jorgensen attorney fees in the amount of $4,110.18.

## III. ASSIGNMENTS OF ERROR

On appeal, Madison County argues that the county court erred in awarding Jorgensen fees for any actions taken after the State filed its amended motion to dismiss on December 11, 2009, because such dismissal terminated the juvenile court proceedings concerning the minor children. In addition, Madison County argues that the county court erred in failing to find that Jorgensen's actions after the December 11 dismissal were unwarranted, unnecessary, and frivolous.

## IV. ANALYSIS

### 1. Standard of Review

[1] A juvenile court's decision concerning GAL fees is reviewed de novo on the record for an abuse of discretion. See *In re Interest of Antone C. et al.*, 12 Neb. App. 466, 677 N.W.2d 190 (2004).

[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010); *Perez v. Stern*, 279 Neb. 187, 777 N.W.2d 545 (2010); *BSB Constr. v. Pinnacle Bank*, 278 Neb. 1027, 776 N.W.2d 188 (2009).

### 2. County's Standing to Appeal

After Madison County filed its appeal with this court, Jorgensen filed a motion to summarily dismiss the appeal. In

her memorandum brief in support of the motion, Jorgensen argued that the appeal had not been docketed properly and that there was a "defect of parties" because it appeared that the State, rather than Madison County, was appealing from the decision concerning the amount of fees awarded to her. Jorgensen further argued that the State does not have standing to appeal from the county court's order awarding her fees and asked that we dismiss the appeal.

We overruled Jorgensen's motion for summary dismissal and allowed the case to continue, but before we address Madison County's assigned errors, we briefly digress to discuss the manner in which this case was docketed on appeal.

This court has previously addressed the proper manner to appeal from an order granting or disallowing GAL fees in a juvenile court case, *In re Interest of Antone C. et al.*, 12 Neb. App. 152, 669 N.W.2d 69 (2003), in which the minor children's court-appointed GAL filed an appeal after the juvenile court disallowed reimbursement for certain actions taken during the juvenile court case. When the GAL filed her appeal with this court, she did so under the caption of the juvenile court case: "In re Interest of Antone C." As a result, there was some confusion about whether the GAL was appealing in her capacity as the children's GAL or as an individual. *Id.* After determining that the GAL was, in fact, appealing in her individual capacity, we indicated: "[F]or future cases when a [GAL] desires to contest a disallowance of a [GAL] fee, the [GAL] is the appellant as an intervenor." *Id.* at 158-59, 669 N.W.2d at 75. In addition, we found that Douglas County, which was appearing in this court on the issue of the GAL's fees, should be designated as the intervenor-appellee. *Id.*

[3] In this case, there is some confusion about whether it is the State or Madison County which is appealing from the county court's order awarding Jorgensen fees for her services as GAL. This confusion appears to have been caused by the parties' docketing the case under the juvenile court case caption, "In re Interest of David M. et al." From our review of the record, it is clear that it is Madison County which is appealing from the county court's order concerning Jorgensen's fees. Madison County has standing to appeal from such an order

because the county wherein the juvenile court proceedings were had must pay fees awarded to a GAL, and thus, the county has an interest in the outcome of such a case. See Neb. Rev. Stat. § 43-273 (Reissue 2008). However, as we indicated in *In re Interest of Antone C. et al.*, 12 Neb. App. 152, 669 N.W.2d 69 (2003), Madison County should have indicated in the case caption that it was the appellant as an intervenor and that Jorgensen was the intervenor-appellee.

Having concluded that Madison County is the proper intervenor-appellant in this action, we now address its specific assigned errors.

### 3. Effect of State's Amended Motion to Dismiss

On December 10, 2009, the State filed a motion to dismiss its petition which alleged that the minor children were within the meaning of § 43-247(3)(a). In that "Dismissal" motion, the State indicated it was requesting that the court "dismiss, without prejudice, the petition previously filed herein." The State also indicated that the dismissal was to be effective not immediately, but "at the point when the children are returned to Mexico to be with their mother." Presumably, this conditional dismissal was fashioned in an effort to provide the children with continuous care until such time as they were returned to Herendira. The next day, on December 11, the State filed an amended motion to dismiss. Under that "Amended Dismissal" motion, the dismissal was intended to be effective immediately.

On appeal, Madison County contends that the State's amended motion to dismiss filed on December 11, 2009, effectively terminated the juvenile court proceedings involving these minor children and that as a result, the county court no longer had the authority to continue such proceedings. The county further contends that because the court no longer had any authority to continue the proceedings, Jorgensen no longer had any authority as the court-appointed GAL. The county asserts that Jorgensen should not be awarded fees for any action taken after the filing of the amended motion to dismiss.

We agree with the county's assertion that the juvenile court proceedings involving the minor children were terminated at the time the State filed its amended motion to dismiss.

[4] The Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 through 43-2,129 (Reissue 2008 & Cum. Supp. 2010), does not specifically address whether a county attorney has the authority to unilaterally dismiss a juvenile court action. However, § 43-274 does grant county attorneys the ultimate discretion regarding whether to file a petition alleging that a child is within the meaning of § 43-247(1), (2), (3), or (4). In fact, § 43-274 provides only county attorneys with the authority to initiate a juvenile court action by filing such a petition. See § 43-274(1). By granting county attorneys such discretion, the Legislature clearly intended that they would play a pivotal role in the juvenile court proceedings.

[5] The Nebraska Supreme Court has held that an action in juvenile court may be dismissed by a county attorney at any time prior to trial without leave of court. See *In re Interest of Moore*, 186 Neb. 67, 180 N.W.2d 917 (1970). As such, when a county attorney files a dismissal in a juvenile court action, such dismissal occurs without any further action by the juvenile court; rather, such dismissal occurs by operation of law. We note that we cannot find any authority to suggest that the Supreme Court intended to place any qualifications or conditions on a county attorney's right to dismiss a juvenile court action prior to trial. See *id*. But see *Werner v. Werner*, 186 Neb. 558, 559-60, 184 N.W.2d 646, 647 (1971) ("[i]n an action for divorce, *until the trial court enters an order imposing some obligation*, the plaintiff has an unqualified right to dismiss his petition without leave of court, regardless of the nature of the pleadings on file" (emphasis supplied)).

In this case, the State filed its amended motion to dismiss on December 11, 2009, prior to the court's adjudicating the children to be within the meaning of § 43-247(3)(a) and prior to any trial. We conclude that the State had the unqualified authority to dismiss the proceedings at that stage of the case. As such, we conclude that the proceedings were dismissed by operation of law at the time the State filed the amended motion to dismiss.

Having found that the county court's jurisdiction in this case terminated on December 11, 2009, when the State filed its amended motion to dismiss, we next address whether Jorgensen, acting as the children's GAL, had the authority to reinstate the proceedings by filing a supplemental petition alleging that the children were within the meaning of § 43-247(3)(a).

### 4. GAL Had No Authority to File Supplemental Petition

Jorgensen filed her supplemental petition alleging that the children were within the meaning of § 43-247(3)(a) after the State filed its amended motion to dismiss. As such, as we discussed above, at the time Jorgensen filed the supplemental petition, there was no existing case concerning the minor children pending in the county court. In order to continue the proceedings concerning the minor children, a party, including a GAL, would have had to initiate a new, separate case. Thus, although Jorgensen entitled her filing as a "Supplemental Petition," in actuality, it was an original petition initiating a new action.

On appeal, Madison County alleges that Jorgensen, as the children's GAL, did not have the authority to initiate new, separate proceedings by filing a petition alleging that the children were within the meaning of § 43-247(3)(a). To the contrary, Jorgensen argues that she did have the authority to file such a petition pursuant to the language found in § 43-272.01(2)(h).

Two statutes provide authority for filing a petition in juvenile court. As we mentioned above, § 43-274(1) states:

> The county attorney, having knowledge of a juvenile in his or her county who appears to be a juvenile described in subdivision (1), (2), (3), or (4) of section 43-247, may file with the clerk of the court having jurisdiction in the matter a petition in writing specifying which subdivision of section 43-247 is alleged . . . .

Additionally, § 43-272.01(2)(h), which Jorgensen relies on, permits a GAL to "file a petition in the juvenile court on behalf of the juvenile."

This court has previously addressed the interplay between these two statutory provisions and whether pursuant to these statutes, a GAL has the authority to initiate a juvenile court case by filing a petition alleging that a child is within the meaning of § 43-247(3)(a). See *In re Interest of Valentin V.*, 12 Neb. App. 390, 674 N.W.2d 793 (2004). There, we stated:

> Although § 43-272.01 allows a GAL to file a petition in juvenile court, it does not address what type of petition, whereas § 43-274 expressly provides the specific method to be followed when filing a petition for adjudication under § 43-247(1) through (4). Clearly, at first blush, the statutes are in conflict. But, to the extent that there is a conflict between two statutes on the same subject, the specific statute prevails over the general statute. *Ways v. Shively*, 264 Neb. 250, 646 N.W.2d 621 (2002). Moreover, when general and special statutory provisions are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same. *Id.* Thus, in accordance with these principles, we find that the portion of § 43-272.01 which allows a GAL to file a petition in juvenile court is merely a general statute allowing a juvenile court-appointed GAL to "petition" the juvenile court for various matters of relief on behalf of the juvenile, typically during the course of an already initiated and ongoing juvenile case. Thus, the general statute, § 43-272.01, must yield to the specific statute for institution of an adjudication proceeding . . . .

*In re Interest of Valentin V.*, 12 Neb. App. at 393-94, 674 N.W.2d at 796.

[6] Section 43-274 allows only the county attorney to file a petition under specific circumstances, including those where the juvenile falls under the jurisdiction of the court based on § 43-247(3)(a), as Jorgensen alleged in her "Supplemental Petition." Pursuant to § 43-274, Jorgensen did not have the authority to initiate a juvenile court case by filing a petition alleging that the children were within the meaning of § 43-247(3)(a).

Because Jorgensen did not have the authority to initiate juvenile court proceedings with the filing of her "Supplemental

Petition," the proceedings involving the minor children ended when the State filed its amended motion to dismiss on December 11, 2009. After that time, the county court no longer had jurisdiction to conduct further proceedings concerning the minor children. See § 43-247. In addition, the county court no longer had the authority to continue Jorgensen's appointment as the children's GAL. See § 43-272.01. Accordingly, Jorgensen should not have been awarded any fees for actions taken after December 11.

The county court awarded Jorgensen $4,110.18 for her services as GAL in this case. Based on our review of the record, it is clear that a portion of these fees was for actions taken after December 11, 2009, and we conclude that the county court abused its discretion in awarding such fees to Jorgensen. We reverse the court's determination concerning Jorgensen's fees and remand the case back to the county court for a new hearing on the amount of fees due to Jorgensen.

### 5. Madison County's Other Assigned Errors

Because we have determined that the county court erred in its award of fees to Jorgensen for her work as the minor children's GAL after December 11, 2009, and have reversed its determination and remanded the case for a new hearing, we need not address Madison County's additional assigned errors, which assert that the county court erred in failing to find that Jorgensen's actions after the December 11 dismissal were unwarranted, unnecessary, and frivolous.

## V. CONCLUSION

Because the juvenile proceedings involving the minor children ended on December 11, 2009, when the State filed its amended motion to dismiss, the county court erred in awarding Jorgensen fees for any work she completed as the children's GAL after December 11. Accordingly, we reverse the county court's award of fees to Jorgensen and remand the case for a new hearing concerning the award of GAL fees.

Reversed and remanded for further proceedings.

STATE OF NEBRASKA, APPELLEE, V. RYAN KING, APPELLANT.
807 N.W.2d 192

Filed December 20, 2011. No. A-10-982.

1. **Sentences: Appeal and Error.** When a trial court's sentence is within the statutory parameters, even at the maximum of the parameters, the sentence will be disturbed by an appellate court only when an abuse of discretion is shown.
2. **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.
3. **Statutes: Sentences.** Neb. Rev. Stat. § 29-2260 (Reissue 2008) is a directive to the trial court as to the factors to be considered by the trial court in imposing a sentence, and it is clear that the statute is to serve as a guideline for the court but is not mandatory.
4. **Sentences: Appeal and Error.** While Neb. Rev. Stat. § 29-2260 (Reissue 2008) lists grounds to be considered by the sentencing court, it does not control its discretion. The failure of the trial court to make specific findings cannot be error or grounds for reversal.
5. ____: ____. Imposing a sentence within statutory limits is a matter entrusted to the discretion of the trial court.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Deborah D. Cunningham for appellant.

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

IRWIN, CASSEL, and PIRTLE, Judges.

PER CURIAM.

## I. INTRODUCTION

Ryan King appeals the sentence imposed upon his plea to a charge of criminal conspiracy to commit murder in relation to the April 2009 homicide of Brian Carson in Douglas County, Nebraska. King asserts on appeal that the sentence imposed was excessive. We affirm.

## II. BACKGROUND

The events giving rise to this case occurred in April 2009. At that time, Brian was killed by his son, Ryan Carson (Carson),

in Douglas County, Nebraska, by blunt force trauma to the head. As a result of the homicide and subsequent attempt to hide the crime, criminal charges were brought against a number of individuals, including Carson; Carson's mother, Teresa Carson; Carson's sister; Carson's girlfriend; Colton Novascone; King; and two other individuals. King ultimately entered a plea in this case.

In April 2009, Omaha Police Department officers received a call about a possible burglary at a residence in Douglas County. When they responded, they spoke with Teresa, who reported discovering a "red stain" on some carpet in the residence, various items removed or relocated in the residence, and a missing automobile. The automobile was discovered, and Brian's body was found in the trunk. An autopsy resulted in a conclusion that the cause of his death was blunt force trauma to the head.

The investigation into Brian's death included interviews of a number of suspects and potential witnesses. One of those interviews resulted in police being informed that Carson and two other individuals, eventually identified as King and Novascone, had traveled together to Omaha, Nebraska, from Mississippi immediately prior to the homicide of Brian.

An Omaha Police Department officer traveled to Lewisburg, Mississippi, where he interviewed King. King initially indicated that he, Novascone, and Carson traveled to Omaha; that he did not converse with the others during the trip; that upon arriving in Omaha, Carson provided them with money; and that he and Novascone immediately turned around and returned to Mississippi. Upon further questioning, King acknowledged that Carson had previously made threats and statements about wanting to kill his father, Brian, for sleeping with Carson's girlfriend and acknowledged going to Teresa's residence while in Omaha, but again maintained that he and Novascone immediately returned to Mississippi.

Upon further questioning, King gave a third statement to the officer. In his third statement during this single interview, King indicated that Carson had asked for King and Novascone to help "in killing [Carson's] dad." He indicated that the three drove from Mississippi to Omaha and that Carson spoke to his

mother, Teresa, on the telephone during the trip; King believed Teresa became aware that they were coming to Omaha to kill Brian. He indicated that they traveled to Teresa's residence, that they met Teresa and Carson's sister, and that Teresa left "because she didn't want to be there for the killing."

King indicated that they remained at Teresa's residence for a couple of hours and that at one point, Carson's sister called Brian to find out when he would be coming to the residence. A short time later, Brian arrived at the residence. King indicated that he and Novascone hid in the basement of the residence, while Carson hid in the garage. According to King, he was holding a "fireplace poker" at the time, Novascone was holding a steel pipe wrench, and Carson was holding "a shovel." King indicated that when Brian opened the door, Carson struck him and the two fell to the ground. Carson yelled to King and Novascone to assist him in striking Brian. King indicated that he observed Novascone strike Brian in the head with the pipe wrench at least twice, but that King did not strike Brian. King maintained that he heard Carson's sister upstairs in the residence crying, and he went upstairs to check on her. When he returned downstairs, he observed Carson and Novascone "putting Brian . . . into the garage."

King indicated to police that he then assisted Carson and Novascone in attempting to clean the house, using towels, bleach, and a steam cleaner. He indicated that after attempting to clean the house, he and Novascone were eventually given money and drove Carson's vehicle back to Mississippi. King informed police where the clothes he had been wearing on the night of the homicide were located, signed a permission form to search his belongings, signed a permission form to submit to DNA testing, and submitted to a buccal swab of his mouth.

On May 14, 2009, King was charged by information with criminal conspiracy and murder in the first degree. In the information, the State alleged that King had made plans to travel to Omaha with coconspirators, traveled to Omaha from Mississippi, went to a specified location for the purpose of killing Brian, and did kill Brian. The State also alleged that King

"purposely and with deliberate and premeditated malice" had killed Brian.

On November 20, 2009, King appeared before the district court and entered a plea of guilty to the charge of criminal conspiracy and, in exchange, the State dismissed the first degree murder charge. The court ordered preparation of a presentence report and set a date for sentencing.

On February 16, 2010, King returned to court for sentencing. At the sentencing hearing, King's counsel argued for a "midrange" sentence and pointed to King's lack of a prior criminal record. King's counsel argued that his research concerning prior conspiracy cases in Nebraska revealed a variety of adult defendants convicted of conspiracy and receiving sentences most often ranging up to 15 years' imprisonment. King's counsel noted that he had located only one conspiracy case since 1979 where a defendant was sentenced in excess of 20 years' imprisonment.

King's counsel also argued that the presentence report reflected that King was willing to cooperate with the State, was willing to give depositions or testify at trial if necessary, and did cooperate with the State from his initial contact with police. Counsel pointed to King's minimal involvement in the actual homicide, the fact that he never actually struck Brian during the homicide, the unusual nature of the crime and the involvement of a large number of other individuals charged with crimes related to the homicide, and the charges they were allowed to plead to. For example, counsel argued that Carson's mother, Teresa, was potentially more involved in the crime than King, left the scene knowing what was going to happen, was allowed to plead to being an accessory, and was sentenced to 18 to 20 years' imprisonment. He argued that Carson's sister's case was transferred to juvenile court, despite her having "lured her own father over to the house before this whole incident occurred."

The State acknowledged that King did cooperate and that he retreated when Brian arrived at Teresa's residence. The State argued that his cooperation was reflected in the State's reduction of the charges to only a conspiracy charge.

At sentencing, the court indicated that it had "considered the entire presentence investigation that was prepared," as well as the arguments of counsel. The court imposed a sentence of 40 to 45 years' imprisonment. This appeal followed.

## III. ASSIGNMENT OF ERROR

The only assignment of error is that the sentence imposed by the district court was excessive and did not reflect consideration of relevant mandatory sentencing factors.

## IV. ANALYSIS

King asserts on appeal only that the sentence imposed by the district court was excessive. He argues that consideration of relevant mandatory sentencing factors, such as his lack of prior criminal record, his age, his mentality, his education, and his role in the underlying criminal act, demonstrates that the sentence imposed was an abuse of discretion. We affirm the sentence imposed.

[1,2] Recently, the Nebraska Supreme Court again set forth the governing principles of law in this jurisdiction concerning excessive sentence appeals. See *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011). When a trial court's sentence is within the statutory parameters, even at the maximum of the parameters, the sentence will be disturbed by an appellate court only when an abuse of discretion is shown. *Id.* 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. *Id.*

King entered a plea to criminal conspiracy, a Class II felony offense. See Neb. Rev. Stat. § 28-202(4) (Reissue 2008). The statutory parameters provide that a Class II felony offense is punishable by 1 to 50 years' imprisonment. Neb. Rev. Stat. § 28-105(1) (Reissue 2008). As such, the sentence imposed upon King is within the statutory parameters.

King admitted to having used alcohol and marijuana and to having "experimented with mushrooms" on one or two

occasions and OxyContin on three to four occasions. These acts apparently never resulted in convictions. In addition, there is no dispute that the underlying offense leading to King's plea and conviction, the homicide of Brian, was a severe and violent offense. The district court indicated that it reviewed the entire presentence report before imposing sentence.

[3,4] The dissenting opinion correctly acknowledges that the district court was not required to pronounce specific findings. In *State v. Hunt*, 214 Neb. 214, 215, 333 N.W.2d 405, 406 (1983), the Nebraska Supreme Court emphatically rejected the argument that the "trial court was obligated to make specific findings before imposing the sentence," explaining that Neb. Rev. Stat. § 29-2260 (Reissue 2008) is "a directive to the trial court as to the factors to be considered by the trial court in imposing the sentence" and that "[i]t is clear that the statute is to serve as a guideline for the court but is not mandatory." These rules, the *Hunt* court further explained, derived from the court's earlier interpretation in *State v. Machmuller*, 196 Neb. 734, 246 N.W.2d 69 (1976), that while § 29-2260 lists grounds to be considered by the sentencing court, "it does not control its discretion." 196 Neb. at 738, 246 N.W.2d at 72. It naturally follows that the failure of the trial court to make specific findings cannot be error or grounds for reversal. This rule has been consistently followed. See, *State v. Ayres*, 236 Neb. 824, 464 N.W.2d 316 (1991); *State v. Jallen*, 218 Neb. 882, 359 N.W.2d 816 (1984).

[5] Nonetheless, the dissenting opinion would effectively reweigh the sentencing factors and come to a different subjective result—a function allocated to the district court under our statutes and case law. Imposing a sentence within statutory limits is a matter entrusted to the discretion of the trial court. *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011). This allocation of responsibility dictated that the district court exercise its responsibility to weigh the sentencing factors applicable to King. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. 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. *Id.* Thus, the exercise of this subjective judgment is the proper function of the district court. This court's function, on the other hand, is to determine whether the district court's sentence constituted an abuse of its discretion.

The State correctly argued that the presentence report assessed King as a high risk to reoffend. According to the presentence report summary, the results of the "Substance Abuse Questionnaire" scored King in the "maximum risk range for [a]ggressiveness and in the problem risk area for [a]lcohol, [d]rugs, [v]iolence, [a]ntisocial, and [s]tress [c]oping." The presentence report also includes the results of the "Level of Service/Case Management Inventory (LS/CMI)," a "validated risk/need assessment tool that is designated specifically to determine the degree of risk that the offender presents to the community and the risk to recidivate." As the presentence report summarizes:

> The LS/CMI scored in the very high risk range for [a]lcohol/[d]rug [p]roblems. The LS/CMI scored in the high risk range for [e]ducation/[e]mployment. [King] scored in the medium risk range on the LS/CMI for [l]eisure/[r]ecreation, [c]ompanions, [p]rocriminal [a]ttitude/[o]rientation[,] and [a]ntisocial [p]attern. Overall, . . . King scored a 22 on the LS/CMI[,] which places him in the high risk category (a score of 20 to 29 is considered a high risk).

The district court appropriately imposed a sentence, the State contends, sufficient to enable the Department of Correctional Services to ensure that the aggressiveness and alcohol and drug problems are addressed.

The State also persuasively argued that King participated in a murder. At oral argument, the State summarized that King "agree[d], with several others, to spend a couple of days on the road and joined in the planning and killing of another human being." He helped cover up the crime, helped "stuff" the victim's body in the car, and helped facilitate the disposal of the body by parking the car. Thus, we conclude that King was not a mere bystander who happened to be present at the commission of a violent crime.

We find justification in the record for the sentence imposed. We conclude that there was no abuse of discretion. As such, we affirm the sentence.

## V. CONCLUSION

We find no abuse of discretion in the sentence imposed, which is within statutory limits. We affirm the sentence.

AFFIRMED.

IRWIN, Judge, dissenting.

## I. INTRODUCTION

Ryan King was 17 years of age at the time of the underlying crime in this case, and 18 years of age at the time of sentencing. He was sentenced to very nearly the maximum allowable sentence when the lower court sentenced him to 40 to 45 years' imprisonment, despite a complete lack of any prior criminal record, his age, and a lack of indication in the record that he was actively involved in the planning or carrying out of the underlying homicide. The record suggests that King was physically present in the residence, but retreated when the crime occurred, and that he assisted in cleaning up after the homicide.

The following table contains the sentences of the most relevant involved parties:

| **Name** | **Convicted of/Pled to** | **Sentence Received** |
|---|---|---|
| Ryan Carson | Second degree murder | 60 to 80 years |
| Colton Novascone | Conspiracy | 45 to 50 years |
| | Second degree assault | 3 to 5 years |
| Ryan King | Conspiracy | 40 to 45 years |
| Teresa Carson | Accessory | 18 to 20 years |
| Ryan Carson's sister | Transferred to juvenile court | |

I write separately because I find the sentence imposed on King to be particularly harsh in light of the entire record and the circumstances in this case. I find the sentence especially severe in light of the myriad factors the Nebraska Supreme Court has iterated to guide the lower court's sentencing decision. I believe that the district court's sentence, which I conclude to be significantly more severe than warranted by the record and the circumstances of King's background and involvement in the underlying homicide, is an abuse of discretion. Therefore, the

sentence should be reversed and the matter remanded for a new sentencing hearing before a different district court judge.

## II. BACKGROUND

As the majority notes, the investigation into Brian Carson's death included interviews of a number of suspects and potential witnesses. Those interviews resulted in police being informed that Ryan Carson (Carson) and two other individuals, eventually identified as King and Colton Novascone, had traveled together to Omaha from Mississippi immediately prior to the homicide of Brian.

Because King ultimately entered a plea in this case, the record presented on appeal is primarily composed of the presentence report, which is 14 volumes in length and in excess of 1,300 pages. The vast majority of the presentence report concerns the police investigation into the homicide of Brian and includes numerous interviews with a variety of other suspects and potential witnesses, but is largely unconcerned with King himself. Indeed, there are entire volumes of the presentence report where King is barely or never mentioned. The entire presentence report contains a single recorded interview of King, and my review of the presentence report suggests that this is most likely because King was cooperative and his account of his involvement was not contradicted by any other suspects or witnesses.

The entire interview of King is approximately seven pages in length. During that interview, King acknowledged traveling to Omaha with Carson and Novascone, acknowledged being physically present in the residence when Carson killed Brian, acknowledged witnessing Novascone strike Brian at least once, but did not indicate any participation in the planning or actual carrying-out of the homicide. He did acknowledge helping Carson and Novascone attempt to clean after the homicide. This interview is the only interview of King in the entirety of the 14-volume presentence report in his case. A review of the multiple interviews of other suspects and potential witnesses reveals no contradiction to King's statements about his level of involvement in the homicide or the events that occurred; in his interviews, Novascone repeatedly denied

any involvement or knowledge of what happened, but never implicated King to any greater extent than King's own statement to police.

At King's sentencing, his counsel argued that research concerning prior conspiracy cases in Nebraska revealed a variety of adult defendants convicted of conspiracy and receiving sentences most often ranging up to 15 years' imprisonment. King's counsel cited one case involving an adult gang member with a criminal record convicted of conspiracy in a homicide case where the defendant, similarly to King, had not committed the actual murder and where the defendant received a sentence of 7 to 10 years' imprisonment on the conspiracy conviction. King's counsel noted that he had located only one conspiracy case since 1979 where a defendant, despite age and criminal records, was sentenced in excess of 20 years' imprisonment.

King's counsel also argued that the presentence report reflected that King was willing to cooperate with the State, was willing to give depositions or testify at trial if necessary, and did cooperate with the State from his initial contact with police. Counsel pointed to King's minimal involvement in the actual homicide, the fact that he never actually struck Brian during the homicide, the unusual nature of the crime and the involvement of a large number of other individuals charged with crimes related to the homicide, and the charges they were allowed to plead to. For example, counsel argued that Carson's mother, Teresa Carson, was potentially more involved in the crime than King, left the scene knowing what was going to happen, was allowed to plead to being an accessory, and was sentenced to 18 to 20 years' imprisonment. He argued that Carson's sister's case was transferred to juvenile court, despite her having "lured her own father over to the house before this whole incident occurred."

The State acknowledged that King did cooperate and that he retreated when Brian arrived at Teresa's residence. The State did not assert that King had been any more involved than suggested. The State argued that his cooperation was reflected in the State's reduction of the charges to only a conspiracy charge.

Although the court indicated that it had "considered the entire presentence investigation that was prepared," as well as the arguments of counsel, the court did not indicate what in the presentence report justified a near-maximum sentence of 40 to 45 years' imprisonment, when the maximum that could have been imposed was 50 years. In fact, the record contains no specific written or oral statements by the court explaining why the court was imposing this particular sentence on King. While I understand such remarks are not required by Nebraska statute or jurisprudence, some explanation of King's sentence may have aided in review of this sentence on appeal.

## III. ANALYSIS

King asserts on appeal only that the sentence imposed by the district court was excessive. He argues that consideration of relevant mandatory sentencing factors, such as his lack of prior criminal record, his age, his mentality, his education, and his role in the underlying criminal act, demonstrates that the sentence imposed was an abuse of discretion. I agree.

In the present case, the sentence imposed is within the statutory limits, albeit near the maximum end of the limits. King entered a plea to criminal conspiracy, a Class II felony offense. See Neb. Rev. Stat. § 28-202(4) (Reissue 2008). The statutory limits provide that a Class II felony offense is punishable by 1 to 50 years' imprisonment. Neb. Rev. Stat. § 28-105(1) (Reissue 2008). As such, the sentence imposed upon King, 40 to 45 years' imprisonment, is within the statutory limits and can be disturbed only upon a finding that the trial court abused its discretion.

The Nebraska Supreme Court has iterated a number of factors that the lower court is to consider when imposing a sentence. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011). 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. *Id.*

In this case, most of the factors to be considered by the trial court in imposing a sentence mitigate in favor of a sentence not approaching the maximum allowable sentence. King was only 17 years of age at the time of the offense, was still a student in school and had not yet graduated, and had not had an opportunity to gain any meaningful work experience. King had been held back at least 1 year in school and was still in 10th grade. King told the probation officer who prepared the presentence report that some of his friends had gang affiliations, but King denied personally having any such affiliations and indicated that these acquaintances did not get into trouble—and there is nothing in the record to suggest otherwise.

It is true that King admitted to having used alcohol and marijuana and to having experimented with other substances on three or four occasions. However, despite these instances of experimentation, King had never had any prior encounter with law enforcement. He had no prior record whatsoever. Moreover, although the substance abuse questionnaire resulted in a finding that King was in the "maximum risk" category for aggressiveness, his complete lack of a prior criminal record, the lack of any indication in the presentence report about prior disciplinary problems at school, and the fact that the record unequivocally demonstrates that in the present case, he retreated from, rather than participated in, the violent homicide of Brian belie the notion that a sentence this severe was necessary to ensure that his aggressiveness and alcohol and drug problems are addressed.

There is no dispute that the underlying offense leading to King's plea and conviction, the homicide of Brian, was a violent offense. However, the record establishes without contradiction that King did not personally take part in the attack of Brian, did not strike Brian, and actually retreated from the scene when Brian was attacked by Carson and Novascone. While the underlying offense involved violence, it did not involve violence on the part of King. King told the probation officer preparing his presentence report that he did not really believe that they were going to kill Brian when he accompanied Carson and Novascone from Mississippi. Despite the State's characterization at oral argument, quoted

by the majority, that King "agree[d], with several others, to spend a couple of days on the road and joined in the planning and killing of another human being," there is no indication in the record that King had any knowledge of Carson's plan to kill Brian until the parties were somewhere between Mississippi and Nebraska late at night. There is no indication that King played an active role in any planning of the crime, and although he assisted Carson and Novascone with attempting to clean up the scene afterward, he did not "join in the . . . killing" and his involvement in the underlying offense was largely a matter of being present when it happened.

In addition to all of the factors set forth by the Supreme Court, the record in this case demonstrates that King was generally cooperative with law enforcement. His presentence report includes only one interview of King, and although he was hesitant to admit his involvement, during the course of that single interview, he cooperated and acknowledged his involvement. There is nothing in the interviews of other suspects or potential witnesses to suggest that King was less than truthful in the statement he ultimately gave to police during that interview, and the vast majority of the more than 1,300 pages of presentence report in this case do not even concern King.

The district court indicated that it reviewed the entire presentence report before imposing sentence, but the court gave no insight or indication of anything contained in the report that would suggest the need for King to be subject to a near-maximum period of imprisonment, beyond the underlying offense that King was present for the commission of. Nonetheless, the court sentenced King to 40 to 45 years' imprisonment.

As noted, there were a number of other individuals who were charged with various offenses related to the homicide of Brian. Novascone entered pleas to charges of criminal conspiracy and second degree assault for his role in accompanying Carson and King from Mississippi and actually striking Brian in the head multiple times with a pipe wrench; he was sentenced to 45 to 50 years' imprisonment on the conspiracy conviction and 3 to 5 years' imprisonment on the assault conviction, and his

appeal challenging those sentences is dealt with by this court in a memorandum opinion filed today, *State v. Novascone*, No. A-10-472. Carson's mother, Teresa, entered a plea to a charge of being an accessory to a felony and was sentenced to 18 to 20 years' imprisonment. Carson's sister had her case transferred to juvenile court on the State's motion and entered admissions to charges of criminal conspiracy and being an accessory to a felony. Carson ultimately entered a plea to a charge of second degree murder and was sentenced to 60 to 80 years' imprisonment. He appealed in case No. A-10-473, which we summarily affirmed.

I conclude that King's lack of any prior criminal record, his age and mentality, his cooperation with law enforcement, and his minimal involvement in the underlying homicide all weigh heavily in favor of a sentence more lenient than that imposed by the district court. While I do not suggest to minimize the circumstances underlying this offense or suggest that a significant sentence would be inappropriate, I cannot find justification in the record for the severity of the sentence imposed.

I recognize that attempts to reverse or modify sentences as excessive have not been favorably received in Nebraska appellate jurisprudence. In *State v. Reynolds*, No. A-91-403, 1992 WL 215386 (Neb. App. Sept. 8, 1992) (not designated for permanent publication), this court reviewed sentences imposed on a 34-year-old woman who had completed only the fourth grade, was disabled and unemployed, was in poor health, and had a history of drug and alcohol abuse. We concluded that the sentences imposed, which were very near the maximum allowable sentences, were excessive and contrary to the well-established sentencing goals of deterring others from criminal acts, rehabilitating the defendant, and providing protection for society. The State successfully sought further review, and the Nebraska Supreme Court reversed our finding. See *State v. Reynolds*, 242 Neb. 874, 496 N.W.2d 872 (1993). The Supreme Court held that this court had failed to articulate sufficient reasons why a severe sentence constituted an abuse of discretion, recognized that sentencing limitations are matters for the Legislature, and iterated that imposing a sentence within those limits is within the discretion of the trial court.

In *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000), this court reversed a district court's finding that a sentence imposed by a county court was excessive. In so doing, we recognized that appellate courts have extremely limited review of sentences and that sentences within statutory limits are uniformly and routinely affirmed despite the appellate court's opinion of their severity. We noted that a sentence being within statutory limits nearly universally means that there has been no abuse of discretion. The dissenting opinion in *State v. Ruisi, supra*, recognized that, in the then 8 years of existence of this court, not a single criminal sentence had met the definition of abuse of discretion set forth in excessive sentence precedence, but concluded that the Nebraska Supreme Court had left the door ajar, however slightly, to finding such an abuse of discretion. The Nebraska Supreme Court, in *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001), disapproved of the majority's suggestion in *State v. Ruisi, supra*, that sentences within statutory limits can never be an abuse of discretion. Nonetheless, I have found only one Nebraska appellate case, decided in the decade since, finding that a sentence lawfully imposed within statutory limits constitutes an abuse of discretion and is excessive. See *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006). But see, *State v. Moore*, 274 Neb. 790, 743 N.W.2d 375 (2008); *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005); *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004); *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001); *State v. Hatt*, 16 Neb. App. 397, 744 N.W.2d 493 (2008); *State v. Brown*, No. A-05-1417, 2006 WL 2669410 (Neb. App. Sept. 19, 2006) (not designated for permanent publication), *petition for further review overruled* 272 Neb. xxxi (Nov. 15, 2006); *State v. Prater*, No. A-05-1544, 2006 WL 1889169 (Neb. App. July 11, 2006) (not designated for permanent publication), *petition for further review overruled* 272 Neb. xxxi (Aug. 30, 2006); *State v. Charles*, 13 Neb. App. 305, 691 N.W.2d 567 (2005); *State v. Chrisman*, No. A-03-1271, 2004 WL 2032767 (Neb. App. Sept. 14, 2004) (not designated for permanent publication), *petition for further review overruled* 268 Neb. xxxiv (Nov.

10, 2004) (all finding sentence imposed by lower court to be excessively *lenient*).

In *State v. Iromuanya*, the Nebraska Supreme Court noted that the sentence imposed "should fit the offender and not merely the crime." 272 Neb. at 216, 719 N.W.2d at 295. The Supreme Court reduced the minimum portion of a sentence imposed upon an individual convicted of committing second degree murder, based largely on the defendant's lack of criminal history. In so doing, the Supreme Court noted that the trial court "could not have imposed a more severe minimum term . . . on a hardened criminal with a lengthy history of violent felony convictions." *Id.* The current case is similar in that respect; the trial court here could scarcely have imposed a more severe sentence on a hardened criminal with a lengthy history of violent felony convictions.

Contrary to the characterization of the majority opinion, I would not advocate reaching a subjective result of what sentence is appropriate. While the majority rightly notes that the exercise of judgment in imposing a sentence is properly the function of the district court, and the exercise of judgment in reviewing a sentence for an abuse of discretion is properly the function of this court, my conclusion that the district court did abuse its discretion does not infringe on the proper allocation of responsibilities between the district court and this court any more than this court's finding that a district court abused its discretion in imposing an excessively lenient sentence does. The functions of the district court and this court are precisely the same whether it is a defendant alleging the sentence to be excessively severe or whether it is the State alleging the sentence to be excessively lenient, and in both cases, our responsibility is to review the same sentencing considerations the district court is supposed to consider, as set out and discussed above. See *State v. Charles, supra* (reviewing same sentencing considerations to conclude sentence was excessively lenient). My conclusion that the sentence here was objectively excessive is no more violative of the allocation of responsibilities than in any of the cited cases where the appellate courts have concluded that sentences imposed were excessively lenient, despite

being within statutory limits and having been an exercise of the district court's subjective discretion. As in those cases, I would simply find that the court abused its discretion in this case. See *id.*

Despite the unfavorable reaction to prior attempts by this court to recognize the constraints of the standard of review in considering sentences, I find that the district court's sentence was significantly more severe than warranted by the record and the circumstances of King's background and involvement in the underlying homicide and that it was an abuse of discretion. Therefore, the sentence should be reversed and the matter remanded for a new sentencing hearing before a different district court judge.

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## In re Interest of Marcos S.A. and Andres S., children under 18 years of age. State of Nebraska, appellee, v. Marcos A., appellant.

807 N.W.2d 794

Filed December 20, 2011. No. A-11-335.

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. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
3. **Parent and Child: Due Process.** The parent-child relationship is afforded due process protection.
4. **Due Process.** Parties whose rights are to be affected are entitled to be heard.
5. **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.
6. **Due Process: Notice.** To satisfy procedural due process requirements, notice must be reasonably calculated to inform the person concerning the subject and issues involved in the proceeding.

7. **Courts: Jurisdiction: Notice.** A court has no authority or jurisdiction to act on its own motion without notice to the parties and an opportunity to be heard.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH, Judge. Reversed and remanded for further proceedings.

Rex J. Moats, of Moats Law Firm, P.C., L.L.O., and Douglas D. Dexter for appellant.

Donald W. Kleine, Douglas County Attorney, and Jordan Boler for appellee.

INBODY, Chief Judge, and SIEVERS and PIRTLE, Judges.

PIRTLE, Judge.

## INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Marcos A. appeals from an order of the separate juvenile court of Douglas County determining permanent custody of Marcos S.A. (Marcos Jr.) and Andres S., terminating the jurisdiction of the juvenile court, and terminating the responsibility of the Nebraska Department of Health and Human Services (DHHS).

## BACKGROUND

Marcos and Jennifer S. are the unmarried parents of the minor children Marcos Jr., born in December 2006, and Andres, born in August 2009. Marcos was arrested in February 2009 for robbery. He is currently serving an 8- to 10-year sentence and will be eligible for parole on February 14, 2013. Upon his release, he will be deported to Mexico. The record indicates that Marcos and Jennifer lived together on and off until Marcos' arrest and that Marcos Jr. remained in Jennifer's care until she was arrested on March 27, 2009. That same day, the Douglas County Attorney's office filed a petition in the juvenile court alleging that Marcos Jr. was without proper parental care by the fault or habits of his parents, due to their incarceration, and that thus, he was a child within the juvenile

court's jurisdiction pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008).

On May 6, 2009, Marcos Jr. was adjudicated as a minor child within this statute. During the hearing, Jennifer admitted to several counts included in the petition, including that Marcos Jr. was a child under 18 years of age living in Douglas County; that she was incarcerated, making her unable to provide proper care for him; that she failed to provide him with safe, stable, and appropriate housing; and that as a result, Marcos Jr. was a child at risk for harm. Marcos admitted that Marcos Jr. was a child under 18 years of age living in Douglas County; that Marcos was currently incarcerated, making him unable to provide proper care for Marcos Jr.; and that as a result, Marcos Jr. was a child at risk for harm. The court found that based on the admission pleas entered by both parents, Marcos Jr. should remain in the temporary custody of DHHS.

Jennifer was released from custody prior to June 5, 2009. DHHS' court report bearing that date referred to Jennifer's having visitation with Marcos Jr. at "a neutral location" and stated that Marcos Jr. is not currently visiting with Marcos due to his incarceration.

When Andres was born in August 2009, the Douglas County Attorney's office filed a supplemental petition alleging that Andres was "at risk for harm" because Jennifer "has failed to provide proper parental care, support and/or supervision" for him. Prior to the December 2 review and permanency planning hearing, the supplemental petition was dismissed and Andres remained in Jennifer's care. At the December 2 hearing, a court report prepared by a DHHS caseworker, Mark Wolford, was presented. This report indicated that Jennifer was having visits with Marcos Jr. four times a week and had completed or was in the process of completing the following court-ordered recommendations: attending a domestic violence class, continuing participation in individual therapy and semisupervised visitations, submitting to three urinalysis tests per week, and attending a parenting class. Jennifer's counsel added that she made incredible progress in following the court's recommendations.

On January 25, 2010, Jennifer asked her cousin to care for Andres while she attended a district court sentencing for previous criminal infractions. Jennifer was not prepared to be away from Andres for longer than a few hours. At that hearing, Jennifer was sentenced to 9 months' incarceration and was taken into custody immediately. At this time, Marcos was still incarcerated. Andres was placed in the same agency-based foster home as Marcos Jr. on January 25. On January 27, DHHS filed an affidavit and filed a supplemental petition, alleging that Andres lacked proper parental care by Jennifer's fault or habits in that she was incarcerated. The juvenile court took jurisdiction over Andres under § 43-247(3)(a) on March 3.

On March 8, 2010, Marcos' counsel filed a motion to review the placement from the children's foster home to a "relative foster placement." On April 8, a review and permanency planning hearing was held and the motion was denied by the court. The State offered several exhibits, including a court report written by Wolford, the caseworker for this matter, noting that until Jennifer's incarceration, she cared for Andres and was having semisupervised visits with Marcos Jr. four times a week. During that time, Jennifer worked with a family support worker, learning new parenting styles and learning to take a more active role in parenting.

The hearing proceeded to an adjudication, during which Marcos admitted to three counts included in the second supplemental petition: that Andres was a child under 18 years of age, that he was living in Douglas County, and that due to the fact that Marcos was currently incarcerated, Andres was at risk for harm. Based on these admissions, the court found Andres came within the meaning of § 43-247(3)(a) by a preponderance of the evidence insofar as Marcos was concerned.

The court's August 30, 2010, order scheduled a review and permanency hearing for December 8. Meanwhile, in October, the children began the transition to living with Jennifer upon the recommendation of DHHS. The court's November 22 order continued the December 8 hearing to January 7, 2011. On November 24, 2010, the children were placed in the home with Jennifer while legal custody remained with DHHS.

The case plan presented by DHHS at the January 7, 2011, hearing recommended that the children remain in the temporary custody of DHHS for appropriate care and placement to exclude the home of Marcos and include the home of Jennifer. The document, written by Wolford on January 4, 2011, indicated that Jennifer is happy to have her children home and that DHHS reports no safety concerns regarding her ability to care for them. However, he recommended that DHHS maintain legal custody. The guardian ad litem agreed with DHHS' recommendation, including that the permanency plan of reunification be achieved by April 22 due to Jennifer's positive parenting practices during visits.

DHHS' report noted that Marcos was currently incarcerated. Further, Marcos' attorney stated in June 2010 that Marcos was allowed visits with his children in jail, but his visitation status had been restricted due to his behavior. These restrictions limited visitation hours to only 2 days a week and required Marcos to be in full restraints, including shackles, during all visits. Both the State and the case manager stated concerns in approving visits at the jail due to the negative effect it could have on the children. The court ordered that no visitations between Marcos and the children would take place.

Jennifer's counsel indicated at the review and permanency planning hearing that she intended to file for custody on Jennifer's behalf in the district court. She did not make an oral motion for a custody determination at the hearing that day. The juvenile court judge indicated that she would be willing to have the matter transferred to her court "if that is what the parties choose to do." The judge stated, "I would think, given the circumstances of [Marcos], that that would not be a challenging issue, addressing custody." The county attorney agreed that placing the children in the custody of Jennifer should be secured before closing the case. The guardian ad litem agreed that Jennifer was making progress and encouraged her to keep working with Marcos Jr.'s daycare to improve his behavior. At this point, the juvenile court judge stated that, but for custody, there would be no reason to continue jurisdiction in this matter, and Wolford agreed. Jennifer's counsel stated, "Your Honor, we would love to have the children placed with Jennifer . . . .

We feel that she has done a great job and she'll continue to be a good parent."

The court did not receive any motion from the county attorney, DHHS, or the children's guardian ad litem regarding a custody determination on January 7, 2011. The court determined that based upon the evidence provided, the fact that Marcos is currently incarcerated, and the expectation that upon completion of his incarceration, Marcos will be deported, it was appropriate to place the children in the legal custody of Jennifer. Despite objections from Marcos' counsel, the court relieved DHHS of its legal duty at that time and terminated the jurisdiction of the juvenile court.

## ASSIGNMENTS OF ERROR

Marcos alleges that (1) the juvenile court lacked jurisdiction to issue an order determining permanent custody of Marcos Jr. and Andres because procedures for determining permanent child custody under Neb. Rev. Stat. § 42-364 (Cum. Supp. 2010) were not followed and (2) the juvenile court violated Marcos' right to due process of law under the U.S. and Nebraska Constitutions in issuing an order determining permanent custody of Marcos Jr. and Andres in the absence of notice to Marcos that the juvenile court might take such action.

## 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. *In re Interest of Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008). Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. See *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002).

## ANALYSIS

[3,4] This court recognizes that the parent-child relationship is afforded due process protection. *In re Interest of Antonio O. & Gisela O.*, 18 Neb. App. 449, 784 N.W.2d 457 (2010). "'"For more than a century the central meaning of procedural

due process has been clear: 'Parties whose rights are to be affected are entitled to be heard. . . .' . . .'" *Id.* at 458, 784 N.W.2d at 465. See, also, *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556 (1972).

[5,6] When a person has a right to be heard,

> "'[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). To satisfy procedural due process requirements, notice must be reasonably calculated to inform the person concerning the subject and issues involved in the proceeding. See *In re Interest of Antonio O. & Gisela O., supra*.

Marcos' appeal is primarily predicated upon the notice, or lack thereof, that a custody decision was to be made at a review and permanency hearing in the juvenile court of Douglas County. This case was originally brought by the State under § 43-247(3)(a) on March 27, 2009. Between June 2009 and January 2011, Marcos, Jennifer, the Douglas County Attorney's office, the children's guardian ad litem, and DHHS participated in seven review and permanency planning hearings. At each of these hearings, the court heard about the progress of the case and noted the reunification dates suggested by DHHS. DHHS case plans included recommendations for reunification by September 2010, November 2010, and April 2011. At no point was Marcos notified of a potential reunification date in January 2011 or that the issue of custody was to be heard at the January 7, 2011, review and permanency planning hearing.

Jennifer's counsel indicated at the January 7, 2011, review and permanency planning hearing that she intended to file for custody on Jennifer's behalf in the district court. The juvenile

court judge stated that she would be willing to have the custody matter transferred to her court "if that is what the parties choose to do." The judge stated, "I would think, given the circumstances of [Marcos], that that would not be a challenging issue, addressing custody." The county attorney agreed that placing the children in the custody of Jennifer should be secured before closing the case. The guardian ad litem agreed that Jennifer was making progress and encouraged her to keep working with Marcos Jr.'s daycare to improve his behavior.

At that time, the juvenile court asked Wolford to confirm that, but for the issue of custody, there was no reason to continue the jurisdiction of the juvenile court. Upon his confirmation, the judge stated, "This [c]ourt can place custody with an individual." Jennifer's counsel added, "Your Honor, we would love to have the children placed with Jennifer . . . . We feel that she has done a great job and she'll continue to be a good parent." The court immediately stated the determination that the children would be placed in the legal custody of Jennifer and relieved DHHS of its responsibility.

In 2008, the Legislature modified the jurisdiction of juvenile courts and county courts sitting as juvenile courts so that these courts could exercise jurisdiction over custody matters when the court already had jurisdiction over the juvenile for another purpose. See *In re Interest of Ethan M.*, 18 Neb. App. 63, 774 N.W.2d 766 (2009). Because the juvenile court had jurisdiction in this case pursuant to § 43-247(3)(a), the juvenile court could exercise jurisdiction over custody matters in this case. However, the issue in this case is not whether the court had jurisdiction, but, rather, the notice and the opportunity to be heard on the issue of custody.

[7] The State alleges that the statement in court was considered a motion for a custody determination during the proceedings and that therefore, the court was correct in finding that permanent custody be with Jennifer. The State also alleges, in the alternative, that if the statement was not a valid motion for custody, "the court can make a custody determination on its own accord." Brief for appellee at 15. Following Marcos' due process objection, the juvenile court judge stated that her

decision was based on the evidence heard at the proceedings from spring 2009 through that hearing on that day. However, the Nebraska Supreme Court has consistently held that the court has no authority or jurisdiction to act on its own motion without notice to the parties and an opportunity to be heard. *Francis v. Francis*, 195 Neb. 417, 238 N.W.2d 468 (1976).

In the instant case, the parties were certainly on notice that custody would become an issue at the close of the case in juvenile court, as is the nature of such a case. However, the parties were given no indication that the juvenile court would take up the issue of legal custody, which could lead to the end of its jurisdiction, at the review and permanency planning hearing on January 7, 2011.

Procedural due process includes notice to the person whose right is affected by the proceeding and a reasonable opportunity to confront or cross-examine adverse witnesses and present evidence. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). Marcos' rights as a father were certainly affected by the decision to award custody to Jennifer. He was not on notice that the custody determination would be made at that particular hearing, nor did the juvenile court provide him the opportunity to be heard on the issue once it was raised. While we recognize that Marcos is not in a position to maintain custody at this time, he still has the right, as the father of Marcos Jr. and Andres, to present evidence and arguments on the question of his children's custody, including the fitness of Jennifer, as well as to establish his right to parenting time and his role as a parent.

The record shows that the guardian ad litem, the Douglas County Attorney's office, and DHHS were all prepared to continue the case as scheduled with a goal of reunification in April 2011, and Jennifer's counsel indicated she intended to file for custody on Jennifer's behalf in the district court. If the court had not immediately ruled on its own motion and allowed Jennifer to move for custody as planned, Marcos would have been given notice and an opportunity to be heard on the subject of custody and parenting time at a hearing on that motion. Though Marcos' parental rights were not officially terminated, there was no plan in place for visitation, parenting time, or

a procedure for determining what time Marcos will be able to spend with his children when his circumstances inevitably change. Because the judge ordered earlier in the same hearing that Marcos receive no visitation with his children, the order granting custody to Jennifer essentially deprived Marcos of all parental rights without notice or the opportunity to be heard on that issue. This was an unacceptable violation of Marcos' right to procedural due process and an abuse of discretion by the juvenile court.

## CONCLUSION

We find it was an abuse of discretion for the court to award legal custody to Jennifer, relieve DHHS of its legal duty, and terminate the jurisdiction of the juvenile court without providing Marcos notice and the opportunity to be heard on a motion for custody. The decision of the juvenile court is reversed, and the cause is remanded for further proceedings in accordance with this decision.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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RONALD D. SHERMAN, APPELLANT, V. BEVERLY NETH, DIRECTOR, NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

808 N.W.2d 365

Filed December 27, 2011. No. A-10-945.

1. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Jurisdiction.** Neb. Rev. Stat. § 60-498.01 (Reissue 2010) provides that the Department of Motor Vehicles acquires jurisdiction to administratively revoke the driving privileges of a motorist arrested as described in Neb. Rev. Stat. § 60-6,197(2) (Reissue 2010) upon receipt of a proper sworn report of the arresting officer.
2. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Proof.** The Department of Motor Vehicles makes a prima facie case for license revocation once it establishes that the officer provided a sworn report containing the statutorily required recitations.
3. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Evidence.** In an administrative license revocation proceeding, if the sworn report

does not include information required by statute, the report may not be supplemented by evidence offered at a subsequent hearing.

4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Appeal and Error.** An appellate court reaches an independent conclusion whether the sworn report provided the required statutory information to confer authority to the Department of Motor Vehicles to revoke an operator's license.
5. **Rules of the Road.** Neb. Rev. Stat. § 60-6,197 (Reissue 2010) is located in the Nebraska Rules of the Road.
6. **Drunk Driving: Proof: Convictions.** A conviction pursuant to Neb. Rev. Stat. § 60-6,197 (Reissue 2010) can be secured based only upon a motorist's operating a motor vehicle while intoxicated on a public road or on private property open to public access, and the location of the offense being somewhere to which the Nebraska Rules of the Road are applicable is a necessary element of the underlying offense.
7. ____: ____: ____. Being on a public road or private property open to public access is a necessary element which must be proven by the State to support a conviction under Neb. Rev. Stat. § 60-6,197 (Reissue 2010).
8. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Jurisdiction: Proof.** For the sworn report to confer jurisdiction for an administrative license revocation proceeding and to prove the State's prima facie case that a valid arrest pursuant to Neb. Rev. Stat. § 60-6,197 (Reissue 2010) occurred, the sworn report must contain sufficient assertions to allow an inference that the motorist was on a public road or private property open to public access.

Appeal from the District Court for Cheyenne County: DEREK C. WEIMER, Judge. Reversed and remanded with directions.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Gregory J. Walklin for appellee.

IRWIN, MOORE, and CASSEL, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Ronald D. Sherman appeals an order of the district court for Cheyenne County, Nebraska, upholding the Department of Motor Vehicles' administrative revocation of Sherman's operator's license for refusal to submit to a chemical test. On appeal, Sherman asserts that the sworn report submitted at the administrative license revocation hearing was insufficient to establish a prima facie case and confer jurisdiction on the Department

of Motor Vehicles (hereinafter the Department). Specifically, Sherman contends the refusal statutes, like the driving under the influence statutes, require that the sworn report sufficiently establish he was on a public road or private property open to public access at the time of his arrest. We agree and conclude that the sworn report was insufficient, and we reverse, and remand with directions.

## II. BACKGROUND

On April 10, 2010, at approximately 9:30 p.m., an officer with the Sidney Police Department was on patrol when he observed a vehicle parked in a nonresidential area of the town. According to the officer's testimony, the vehicle was parked on a "driveway entering [a] recycling place directly parallel with East Elm Street" in Sidney, on private property. Upon stopping and investigating, the officer discovered Sherman sleeping in the driver's seat of the vehicle, with an open beer can between his legs and "an open 30-pack" of beer on the passenger-side floorboard; Sherman was the only occupant of the vehicle. The officer observed that Sherman had "glossy" eyes and that there was a strong smell of alcohol, and Sherman acknowledged having consumed approximately six beers. The officer testified that he had driven past the location approximately 30 minutes before and had not observed the vehicle.

The officer had Sherman exit the vehicle, and the officer requested that Sherman perform field sobriety tests. Sherman refused, contending that he had not been driving. Sherman also refused to submit to a preliminary breath test, again contending that he had not been driving. The officer then placed Sherman under arrest for refusal of the preliminary breath test and driving under the influence.

Sherman was transported to the police department for administration of a chemical test. Sherman refused to submit to a chemical test, once again contending that he had not been driving. The officer then completed the "Notice/Sworn Report/Temporary License" form and provided Sherman a copy. Sherman timely filed a petition for a hearing. On May 11, 2010, the Department entered an administrative order revoking Sherman's operator's license.

Sherman appealed to the district court. On September 3, 2010, the district court entered an order affirming the administrative license revocation order. The court rejected Sherman's assertion that the Department had lacked jurisdiction for insufficiency of the sworn report to sufficiently establish a prima facie case and confer jurisdiction. This appeal followed.

## III. ASSIGNMENT OF ERROR

On appeal, Sherman asserts that the district court erred in finding that the Department had jurisdiction based on the sufficiency of the sworn report.

## IV. ANALYSIS

Sherman asserts on appeal that the sworn report in this case was insufficient to satisfy the statutory prerequisites for conferring jurisdiction upon the Department and for establishing the Department's prima facie case for administrative license revocation. Specifically, Sherman asserts that the assertions on the sworn report concerning the reasons for his arrest fail to sufficiently establish that he was on a public road or private property open to public access at the time of his arrest. We agree.

[1-4] Neb. Rev. Stat. § 60-498.01 (Reissue 2010) provides that the Department acquires jurisdiction to administratively revoke the driving privileges of a motorist arrested as described in Neb. Rev. Stat. § 60-6,197(2) (Reissue 2010) upon receipt of a proper sworn report of the arresting officer. The Department makes a prima facie case for license revocation once it establishes that the officer provided a sworn report containing the statutorily required recitations. *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). If the sworn report does not include information required by statute, the report may not be supplemented by evidence offered at a subsequent hearing. *Id.* An appellate court reaches an independent conclusion whether the sworn report provided the required statutory information to confer authority to revoke an operator's license. See *id.*

Section 60-498.01(2) requires the sworn report to state "(a) that the person was arrested as described in subsection (2) of

section 60-6,197 and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person refused to submit to the required test." The appellate courts in Nebraska have previously addressed the necessary assertions required to sufficiently demonstrate the reasons for arrest in a variety of situations. See, *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d 731 (2007); *Betterman v. Department of Motor Vehicles, supra*; *Barnett v. Department of Motor Vehicles*, 17 Neb. App. 795, 770 N.W.2d 672 (2009); *Yenney v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 446, 729 N.W.2d 95 (2007).

In *Betterman v. Department of Motor Vehicles*, 273 Neb. at 186, 728 N.W.2d at 581, the Nebraska Supreme Court noted that an arrest described in § 60-6,197(2) is an arrest "'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.'" In the cases cited above, and in others addressing the sufficiency of the sworn report, the appellate courts of this state have primarily addressed what assertions are necessary to establish that the motorist was intoxicated or operating a motor vehicle; none of the cases address a question concerning the location of the motorist at the time of contact with law enforcement.

[5,6] Section 60-6,197 is located in the Nebraska Rules of the Road. See Neb. Rev. Stat. §§ 60-601 to 60-6,380 (Reissue 2010, Cum. Supp. 2010 & Supp. 2011) (known as the Nebraska Rules of the Road). Section 60-6,108 specifically provides that § 60-6,197 "shall apply upon highways and anywhere throughout the state except private property which is not open to public access." As such, a conviction pursuant to § 60-6,197 can be secured based only upon a motorist's operating a motor vehicle while intoxicated on a public road or on private property open to public access, and the location of the offense being somewhere to which the Nebraska Rules of the Road are applicable is a necessary element of the underlying offense.

In *Betterman v. Department of Motor Vehicles, supra*, the Nebraska Supreme Court found sufficient a sworn report that

indicated the motorist had been driving recklessly, displayed signs of alcohol intoxication, and refused field sobriety tests and a breath test. An assertion that the motorist was "driving recklessly" is sufficient to allow an inference that he was on a public road when stopped by the officer. In *Snyder v. Department of Motor Vehicles*, 274 Neb. at 169, 736 N.W.2d at 733, the Nebraska Supreme Court found insufficient a sworn report that indicated that the motorist had been arrested for "'Speeding (20 OVER)/D.U.I.,'" or driving under the influence, because the assertion of "'D.U.I.'" was insufficient to establish the reasons for suspecting the motorist of being intoxicated. The assertion that the motorist was stopped for speeding would have been sufficient to allow an inference that he was on a public road when stopped. In *Yenney v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. at 451, 729 N.W.2d at 99, this court found insufficient a sworn report that indicated that the motorist had been "passed out in front of [the gas] Station, near front doors" with "Signs of alcohol intoxication," because the assertions were not sufficient to demonstrate that the motorist had actually been driving or in control of the vehicle. The assertions in that case that the motorist was in front of a gas station would have been sufficient to allow an inference that he was on private property open to public access. See, also, *State v. Prater*, 268 Neb. 655, 686 N.W.2d 896 (2004) (parking lot for apartment complex was open to public access).

[7,8] Nebraska appellate courts have not previously specified that the reasons for the arrest recited on the sworn report must allow an inference that the motorist was on a public road or on private property open to public access. Nonetheless, it is axiomatic that being on a public road or private property open to public access is a necessary element which must be proven by the State to support a conviction under § 60-6,197. As such, inasmuch as the sworn report confers jurisdiction for administrative license revocation and proves the State's prima facie case that a valid arrest pursuant to § 60-6,197 occurred, the sworn report must contain sufficient assertions to allow an inference that the motorist was on a public road or private property open to public access.

In the present case, the sworn report includes the following handwritten reasons for Sherman's arrest: "[A]sleep behind wheel with keys in ignition [and] vehicle off, with open beer between legs. Subject pulled parrallel [sic] with east elm street. Subject smelled strongly of alcoholic beverage, glossy eyes[,] trouble walking. Made contact reference suspicious vehicle." While these assertions would be sufficient to establish that Sherman was driving or in physical control of the vehicle and that he was intoxicated, the assertions are not sufficient to allow an inference that Sherman was on a public road or private property open to public access. Unlike the assertions in the cases discussed above, the assertions in the sworn report in this case do not indicate that the location "parrallel [sic]" to a public street was either a public road or private property open to public access. As such, we conclude that the sworn report in this case was insufficient to confer jurisdiction on the Department, and the district court erred in upholding the administrative license revocation.

## V. CONCLUSION

The sworn report in the present case was insufficient to confer jurisdiction on the Department. The district court erred in rejecting Sherman's challenge to the sufficiency of the report and in upholding the administrative license revocation. We reverse, and remand with directions to reverse the revocation.

REVERSED AND REMANDED WITH DIRECTIONS.

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# MIDWEST RENEWABLE ENERGY, LLC, APPELLANT, V. LINCOLN COUNTY BOARD OF EQUALIZATION, APPELLEE.

807 N.W.2d 558

Filed December 27, 2011. No. A-10-1106.

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. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
5. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.
6. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
7. **Taxation: Jurisdiction: Appeal and Error.** If the board which made a decision, order, or determination that is appealed to the Tax Equalization and Review Commission lacked subject matter jurisdiction, then the commission cannot acquire subject matter jurisdiction.
8. **Jurisdiction: Appeal and Error.** If the tribunal from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
9. **Jurisdiction: Waiver.** Litigants cannot confer subject matter jurisdiction upon a tribunal by acquiescence or consent.
10. **Records: Words and Phrases.** A document is filed with an officer when it is placed in his custody and deposited by him in the place where his official records and papers are usually kept.
11. **Taxation: Stipulations.** Pursuant to 442 Neb. Admin. Code, ch. 4, § 005 (2009), the Tax Equalization and Review Commission is not bound by a stipulation made by the parties.
12. **Taxation: Property: Time.** Under Neb. Rev. Stat. § 77-1229(1) (Reissue 2009), a tax return listing tangible personal property must be filed on or before May 1 of each year.
13. **Taxation: Presumptions.** Under certain circumstances, Neb. Rev. Stat. § 49-1201 (Reissue 2010) requires that a tax return be treated as made and received when it was mailed.
14. **Trial: Notice: Proof.** Absent direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository, proof of a course of individual or office practice that letters which are properly addressed and stamped are placed in a certain receptacle from which an authorized individual invariably collects and places all outgoing mail in a regular U.S. mail depository and that such procedure was actually followed on the date of the alleged mailing creates an inference that a letter properly addressed with sufficient postage attached and deposited in such receptacle was regularly transmitted and presents a question for the trier of fact to decide.

Appeal from the Tax Equalization and Review Commission. Affirmed.

Jerrold L. Strasheim for appellant.

Rebecca Harling, Lincoln County Attorney, and Joe W. Wright for appellee.

IRWIN, MOORE, and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

Midwest Renewable Energy, LLC (MRE), appeals from an order of the Tax Equalization and Review Commission (TERC). TERC affirmed a penalty imposed on MRE for the late filing of a tax return. Because MRE's evidence did not establish that the tax return was placed in an official U.S. Postal Service depository or that the custom of a postal carrier's retrieving the mail from MRE's mailbox actually occurred on the purported date of mailing, we affirm TERC's order.

## BACKGROUND

The Lincoln County assessor imposed on MRE a penalty of 25 percent of MRE's tax due on the value of its personal property as authorized under Neb. Rev. Stat. § 77-1233.04(4) (Reissue 2009). Penny S. Thelen, the controller for MRE, was responsible for preparing and filing MRE's Nebraska personal property tax returns. She prepared MRE's 2009 return based on a depreciation schedule printed on the evening of April 22, 2009. That night, Thelen signed the return as its preparer and the chairperson of MRE's board of managers signed it as the taxpayer. Thelen placed the return in an envelope, and there is no dispute that she correctly addressed the envelope to the Lincoln County assessor. She applied to the envelope a return address sticker and sufficient first-class postage and placed the envelope in the office's outgoing mailbox. The chairperson, who was a certified public accountant, kept a list of all personal property tax returns for all clients required to file such returns in order to ensure that the returns were timely filed. His list included MRE's return and showed that it was mailed on April 23.

MRE's outgoing mailbox was an uncovered "sturdy box" located behind the secretary's workspace. It was inaccessible to anyone other than the office's secretary and accountants, and it was designated solely for the picking up of mail by a

U.S. postal carrier. Each Monday through Saturday morning, a postal carrier came to the office to deliver incoming mail and retrieve outgoing mail.

Mary Ann Long, the Lincoln County assessor, stated that there was no record in the assessor's office that it received a personal property tax return for 2009 from MRE prior to August 1. Amy McFarland, a certified public accountant employed by MRE, stated in an affidavit that she spoke with Long on the telephone prior to September 1 and that Long asked her to mail a copy of MRE's 2009 personal property tax return to the assessor's office. McFarland's understanding of that conversation was that an employee in the assessor's office had inadvertently removed from the assessor's electronic records all of MRE's personal property and that thus, Long requested MRE to mail a duplicate 2009 personal property tax return. On September 1, MRE sent a copy of the 2009 personal property tax return pursuant to a request by the assessor's office.

On August 27, 2009, the assessor sent MRE a notice of failure to file a personal property tax return, which notice showed that the 25-percent statutory penalty had been applied. On September 24, Thelen sent a letter to the Lincoln County assessor's office, requesting that the penalty be removed. The letter stated, "It is our understanding from conversations with your office that . . . the [a]ssessor inadvertently removed the property that is owned by [MRE]." On September 28, the Lincoln County Board of Equalization (Board), through the deputy county clerk, sent a letter to Thelen setting a time and date to consider the penalty protest.

The Board held a hearing on the protest on November 2, 2009. Several unsworn statements were made during the hearing. Thelen stated that there was a typographical error in her affidavit, in that she prepared the return on April 21 rather than April 22, but that it went out of the office on April 23 as averred. McFarland stated that when she spoke with Long on the telephone in late August, Long "did not indicate that the return had not been received." One of the Board members stated during the hearing that he was "not for one second suggesting that anybody with [MRE] was anything other than one

hundred percent honest in their affidavits and their testimony [that day]." He further stated that he did not question whether MRE mailed the return, but that he was questioning whether it was ever "in the hands of the [a]ssessor." The Board ultimately determined that a penalty of $58,400.44 should be applied to MRE's 2009 personal property tax return.

The parties filed a joint motion for TERC to decide the case upon a stipulation of facts by affidavits and upon the transcripts of the hearing and decision of the Board with accompanying exhibits. TERC granted the joint motion, and on October 13, 2010, TERC affirmed the Board's decision, with one commissioner dissenting. The TERC majority concluded that MRE had not adduced sufficient clear and convincing evidence that the Board's decision was unreasonable or arbitrary. TERC's decision stated that it gave the affidavits greater weight than the unsworn statements made to the Board. TERC recognized that there was "no direct proof that the envelope was mailed using the United States Postal Service." Thus, TERC reasoned that the lacking element did not give rise to a presumption of receipt by the assessor.

MRE timely appeals.

## ASSIGNMENTS OF ERROR

MRE assigns eight errors. MRE alleges, consolidated, restated, and reordered, that TERC erred in (1) affirming the Board's decision imposing the penalty when there was insufficient competent evidence to support the decision, (2) failing to accept the stipulated facts and give them proper weight, and (3) failing to hold that MRE's 2009 tax return was deemed to have been filed and received when mailed as provided by Neb. Rev. Stat. § 49-1201 (Reissue 2010) and finding that there was insufficient competent evidence that the tax return was mailed on April 23, 2009.

## STANDARD OF REVIEW

[1-3] Appellate courts review decisions rendered by TERC for errors appearing on the record. *Vandenberg v. Butler County Bd. of Equal.*, 281 Neb. 437, 796 N.W.2d 580 (2011). 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. *Id.* Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *Id.*

## ANALYSIS

*Jurisdiction.*

[4-6] The Board asserts in its brief that it never had subject matter jurisdiction to hear the case. Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *In re Interest of Devin W. et al.*, 270 Neb. 640, 707 N.W.2d 758 (2005). Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction. *Cargill Meat Solutions v. Colfax Cty. Bd. of Equal.*, 281 Neb. 93, 798 N.W.2d 823 (2011). Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *Davis v. Choctaw Constr.*, 280 Neb. 714, 789 N.W.2d 698 (2010).

[7-9] If the board which made a decision, order, or determination that is appealed to TERC lacked subject matter jurisdiction, then TERC cannot acquire subject matter jurisdiction. See 442 Neb. Admin. Code, ch. 5, § 016.03 (2009). And if the tribunal from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. See *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009). Litigants cannot confer subject matter jurisdiction upon a tribunal by acquiescence or consent. *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008).

The Board argues that it lacked jurisdiction because MRE failed to properly file a written appeal with the county clerk. Under Neb. Rev. Stat. § 77-1233.06(2) (Reissue 2009), a taxpayer can appeal a penalty imposed by the county assessor "by filing a written appeal with the county clerk in the same manner as prescribed for protests in section 77-1502." Neb. Rev. Stat. § 77-1502(2) (Supp. 2009) states that a protest "shall be signed and filed with the county clerk" and that it "shall

contain or have attached a statement of the reason or reasons why the requested change should be made and a description of the property to which the protest applies." Here, MRE wrote a letter to the county assessor on September 24, 2009, asking that the penalty be removed because "the original 2009 personal property tax return for [MRE] was mailed on or before April 30, 2009." The only apparent deficiency is that the protest was mailed to the county assessor rather than the county clerk. But on September 28, the Board, through a deputy county clerk, sent MRE a letter notifying it of the time and date of a hearing on the protest.

MRE responds that § 77-1233.06(2) merely imposed a condition precedent to the right of a taxpayer to litigate a penalty and that as such, the presentation of the protest to the county clerk could be, and was, waived. MRE relies upon cases such as *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990), addressing the claim required by statute before a suit may be commenced against a political subdivision under the Political Subdivisions Tort Claims Act.

Even if we assume that the requirement of § 77-1233.06(2) is controlled by the mandatory requirement of § 77-1502(2) that the protest shall be "filed with the county clerk of the county where the property is assessed," the record shows that the protest was received by the county clerk on or before the last day for appeal. The Board relies on cases such as *JEMCO, Inc. v. Board of Equal. of Box Butte Cty.*, 242 Neb. 361, 495 N.W.2d 44 (1993). In that pre-TERC case, the Nebraska Supreme Court held that the taxpayer's failure to present the question of the property's valuation to the county board of equalization precluded an appeal to the district court. In that case, it was "clear from the record" that the taxpayer never filed a protest with the county board of equalization. *Id.* at 363, 495 N.W.2d at 46. In the case before us, the situation is materially different. Here, MRE's letter of protest, dated September 24, 2009, appears in the record and the transcription of the hearing before the Board clearly shows that it was provided to the Board. While the record does not contain a copy showing any file stamp affixed by the county clerk, the record also contains the September 28 letter from a deputy county clerk to MRE notifying it that

the Board would "meet to consider the protest of penalty" and that the Board would "consider the protest [MRE] filed on the penalty that was assessed on [its] personal property tax schedule for late filing." Thus, the record is clear that by September 28, the protest had come into the possession of, i.e., had been received by, the county clerk. Because the assessor notified MRE of the penalty on August 27, the 30-day period for appeal would have expired on September 26. But because that date fell on a Saturday, MRE had until Monday, September 28, to accomplish the filing. See Neb. Rev. Stat. § 49-1203 (Reissue 2010). The record shows that by such date, the county clerk had received MRE's protest.

[10] The county clerk's receipt of the document constituted the "filing" required by § 77-1233.06(2). A document is filed with an officer when it is placed in his custody and deposited by him in the place where his official records and papers are usually kept. *Prucka v. Eastern Sarpy Drainage Dist.*, 157 Neb. 284, 59 N.W.2d 761 (1953). Because the county clerk had clearly received MRE's protest, the Board had the power and duty to correct a penalty which was wrongly imposed or incorrectly calculated. See § 77-1233.06(3). We find no merit to the Board's argument that it lacked subject matter jurisdiction of MRE's appeal. It naturally follows that TERC also had jurisdiction of the appeal taken to it and that we have jurisdiction of the instant appeal.

*Stipulated Facts and Weight Given.*

[11] MRE argues that TERC erred in giving affidavits greater weight than unsworn statements because the parties stipulated to the facts. There is no doubt that parties to a proceeding before TERC may agree upon facts by written stipulation. See 442 Neb. Admin. Code, ch. 4, § 005 (2009). However, "[TERC] is not bound by a stipulation." *Id.* Further, it appears from the transcript that the stipulation of facts was "by affidavits." Thus, we find no error by TERC in according the affidavits greater weight.

*Propriety of Penalty.*

[12] The crux of MRE's appeal is that TERC erred in upholding the penalty imposed for the late filing of a tax

return. Under Neb. Rev. Stat. § 77-1229(1) (Reissue 2009), a tax return listing tangible personal property must be filed on or before May 1 of each year. MRE asserts that it mailed its 2009 return before May 1, but the assessor claims not to have received it until after September 1.

During the hearing before the Board, the deputy county attorney stated that the assessor had to actually receive the tax return in order for MRE to have filed it. MRE argues that such advice does not conform to the law because the return did not have to be actually received in order to be filed. Of course, this court reviews questions of law de novo. See *Vandenberg v. Butler County Bd. of Equal.*, 281 Neb. 437, 796 N.W.2d 580 (2011).

[13] We agree with MRE that § 49-1201 applies and, under certain circumstances, requires that a tax return be treated as made and received when it was mailed. Section 49-1201 states in pertinent part:

> Any . . . tax return . . . which is: (1) Transmitted through the United States mail; (2) mailed but not received by the state or political subdivision; or (3) received and the cancellation mark is illegible, erroneous, or omitted shall be deemed filed or made and received on the date it was mailed if the sender establishes by competent evidence that the . . . tax return . . . was deposited in the United States mail on or before the date for filing or paying.

MRE focuses on that part of § 49-1201 which says that the return "shall be deemed filed . . . and received on the date it was mailed." But, first, that statute requires the sender to establish that the return was "deposited in the United States mail."

MRE's evidence established that Thelen placed the envelope containing the tax return in MRE's outgoing mailbox. But there was no evidence that this uncovered "sturdy box" kept behind MRE's secretary's workspace was a regular U.S. Postal Service depository.

This evidence failed to trigger a receipt-of-mail presumption. In *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992), an insured testified that she dropped

an envelope into a mail chute in the hallway of her employer's building, which chute goes to the basement, where the mailroom is located. The Nebraska Supreme Court stated, "As a matter of law, [the insured's] evidence did not entitle her to the receipt-of-mail presumption, nor was the evidence sufficient to submit the issue of payment to the jury." *Id.* at 18, 480 N.W.2d at 196. The Supreme Court reasoned that the insured failed to show that her mailing was properly mailed for two reasons: First, "[t]here is no evidence that the mailroom was operated under the auspices of the U.S. Postal Service or that it was a U.S. Postal Service depository." *Id.* at 18, 480 N.W.2d at 197. Similarly, MRE did not establish that its mailbox was an official U.S. Postal Service depository or otherwise operated in connection with the postal service. Second, the Supreme Court stated that there was no evidence "showing that an authorized individual invariably collected and placed all outgoing mail collected from the mailroom in a regular U.S. mail depository or that such a procedure was actually followed on [the purported date of mailing]." *Id.* According to MRE's evidence, each Monday through Saturday, a U.S. postal carrier came to the office to deliver MRE's mail and retrieve outgoing mail. Thelen recalled only one occasion in the past 16 years in which the postal carrier did not pick up mail. But MRE did not establish that a U.S. postal carrier picked up the mail on April 23, 2009, and placed it in a regular U.S. mail depository.

[14] While MRE's evidence did create an inference of regular transmission, it presented a question of fact for TERC's resolution, and TERC was not required to accept the inference.

> [A]bsent direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository, . . . proof of a course of individual or office practice that letters which are properly addressed and stamped are placed in a certain receptacle from which an authorized individual invariably collects and places all outgoing mail in a regular U.S. mail depository and that such procedure was actually followed on the date of the alleged mailing creates an inference that a letter properly addressed

> with sufficient postage attached and deposited in such receptacle was regularly transmitted and presents a question for the trier of fact to decide.

*Houska v. City of Wahoo*, 235 Neb. 635, 641, 456 N.W.2d 750, 754 (1990). MRE's evidence concerning its mailing procedure created only an inference that its tax return was "regularly transmitted." See *id.* TERC rejected this inference. Accordingly, because the assessor otherwise did not receive the tax return until after September 1, 2009, the penalty was properly imposed.

## CONCLUSION

Although MRE mailed its protest of the penalty to the county assessor rather than the county clerk, the county clerk had clearly received, i.e., filed, the protest prior to the deadline for filing of the appeal. Thus, the Board timely had notice of the protest and was not deprived of subject matter jurisdiction. TERC also had jurisdiction to consider MRE's appeal from the Board's decision, and we have jurisdiction of the appeal from TERC's decision. Because we conclude that TERC's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable, we affirm its order.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
FRANCIS M. ZIMMERMAN, APPELLANT.
810 N.W.2d 167

Filed January 10, 2012. No. A-10-922.

1. **Convictions: Evidence: Appeal and Error.** 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. **Courts: Time: Appeal and Error.** Where no timely statement of errors is filed in an appeal from a county court to a district court, appellate review is limited to plain error.

3. **Rules of the Supreme Court: Courts: Appeal and Error.** The purpose of Neb. Ct. R. § 6-1452(A)(7) (rev. 2011) is to specifically direct the attention of the reviewing court to precisely what error was allegedly committed by the lower court and to advise the nonappealing party of what is specifically at issue in the appeal.
4. ____: ____: ____. When an appellant fails to file a statement of errors in the district court, an appellate court may at its discretion consider errors assigned in the appellate court, provided that the record shows that those errors were also assigned in the district court.
5. **Criminal Law: Motor Vehicles.** Knowledge that an accident has happened and that an injury has been inflicted is an essential element of the crime of leaving the scene of a personal injury accident.
6. ____: ____. A driver is not criminally liable when he does not know that an accident has happened, an injury has been inflicted, or a death has occurred. Lack of such knowledge constitutes a proper defense. It is a question of fact and not of law.
7. ____: ____. Knowledge of the occurrence of an accident is an essential element of the crime of leaving the scene of a property damage accident.
8. **Criminal Law: Motor Vehicles: Proof.** Knowledge that an accident occurred may be proved by circumstantial evidence, and the fact finder may consider all of the facts and circumstances which are indicative of knowledge.

Appeal from the District Court for Saunders County, MARY C. GILBRIDE, Judge, on appeal thereto from the County Court for Saunders County, MARVIN V. MILLER, Judge. Judgment of District Court affirmed.

Thomas J. Klein, Saunders County Public Defender, of Haessler, Sullivan & Klein, Ltd., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, MOORE, and CASSEL, Judges.

MOORE, Judge.

## INTRODUCTION

Francis M. Zimmerman was convicted in the county court for Saunders County of leaving the scene of a property damage accident and failure to appear. The district court for Saunders County upheld his conviction. On appeal to this court, Zimmerman argues that the State failed to prove he had knowledge an accident occurred and that therefore, the evidence was insufficient to convict him of leaving the scene.

Although we hold that knowledge is an essential element of the crime of leaving the scene of a property damage accident, we find there was sufficient evidence to show that Zimmerman had knowledge of the occurrence of the accident. Therefore, we affirm.

## BACKGROUND

On September 19, 2009, Cynthia Tylski parked her red car in a grocery store's parking lot in Ashland, Nebraska, between 6 and 6:30 p.m. While Tylski was in the grocery store, she learned that her car had been hit in the parking lot. Tylski observed that the right rear bumper had "popped" off and was hanging from the car and that there was plastic on the ground. There was no note or contact information left at her car explaining how the damage was done or whom she could contact.

Kristen Cooper witnessed the accident as she was walking up to the grocery store. Cooper was walking through the store's parking lot when she first heard a loud sound of "scraping metal." She looked up and saw a white pickup backing out of a parking stall and saw the bumper coming off of the car parked next to the driver's side of the pickup. Then, the pickup pulled back into the parking stall so the vehicles were parked next to each other. Cooper saw the driver of the pickup get out of his driver's-side door. Cooper next saw the driver talk to Chad Johnson and then walk into the store. While in the store, Cooper saw the driver exit the store. Cooper testified that she saw the driver of the pickup drive away from the store without leaving a note on the damaged car.

Johnson, an acquaintance of the driver, testified that as he was leaving the store, Zimmerman was entering the store. They had a brief conversation, but Zimmerman did not mention an accident.

At approximately 6:45 p.m., Officer Daniel Ottis was dispatched to the parking lot. Ottis observed that the "skirting" of the passenger-side rear bumper of Tylski's car was torn and hanging. Cooper was able to identify the driver of the pickup from the security footage provided by the store. Ottis recognized the driver as Zimmerman from previous contacts.

On September 21, 2009, Ottis made contact with Zimmerman. Zimmerman told Ottis he was not involved in any accidents on September 19. Although Zimmerman admitted being at the grocery store that day, he denied speaking with anyone while inside the store. Ottis inspected Zimmerman's pickup and observed red paint on the driver's-side front bumper. Ottis described it as a "pencil sized" paint transfer on the bumper. The total damage to Tylski's car was $978.98.

Zimmerman testified at trial that he did not know that he was in an accident at the time it occurred. Zimmerman said he was not aware of the accident until he was contacted by Ottis. He testified that he did not notice the damage to his pickup until he looked at it with Ottis. Zimmerman stated that his radio is always on when he is in his pickup, but he thought he would have heard the metal sound described by Cooper if it were that loud. Zimmerman testified that he pulled back into the parking stall because he wanted to get a drink, that he then saw Johnson, and that he wanted to talk to him. Zimmerman testified that he did not get out of his driver's-side door because it does not work. A few days after the accident, Zimmerman called Tylski's home to apologize, although he told Tylski that he did not remember hitting her car.

The State filed a complaint in the county court for Saunders County charging Zimmerman with one count of leaving the scene of a property damage accident under Neb. Rev. Stat. § 60-696(2) (Cum. Supp. 2008). A charge of failure to appear was added to the State's amended complaint when Zimmerman was not present at a hearing on January 4, 2010. A bench trial was held before the court on April 22, and Zimmerman was found guilty of both counts. On June 17, Zimmerman was sentenced to a fine and court costs. Additionally, Zimmerman's license was subject to a mandatory revocation for a period of 1 year according to § 60-696(3). Zimmerman appealed to the district court, which affirmed his conviction and sentence. Zimmerman timely appealed to this court.

## ASSIGNMENT OF ERROR

On appeal, Zimmerman's assertion of error challenges the sufficiency of the evidence adduced by the State at trial

to prove beyond a reasonable doubt that he had violated the statutory provision for which he was cited, § 60-696(2). Specifically, he alleges the State failed to demonstrate that he had knowledge an accident occurred and that such knowledge is an essential element of the crime of leaving the scene of an accident.

## STANDARD OF REVIEW

[1] 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. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

## ANALYSIS

[2-4] We first address the State's argument that because Zimmerman failed to file a statement of errors in his appeal to the district court, we are limited to a plain error review. The record before this court does not contain a statement of errors when Zimmerman appealed the judgment of the county court to the district court, as required by Neb. Ct. R. § 6-1452(A)(7) (rev. 2011). Where no timely statement of errors is filed in an appeal from a county court to a district court, appellate review is limited to plain error. *State v. Harper, ante* p. 93, 800 N.W.2d 683 (2011). The purpose of the rule is to specifically direct the attention of the reviewing court to precisely what error was allegedly committed by the lower court and to advise the nonappealing party of what is specifically at issue in the appeal. *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005). When an appellant fails to file a statement of errors in the district court, an appellate court may at its discretion consider errors assigned in the appellate court, provided that the record shows that those errors were also assigned in the district court. *State v. Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 508 N.W.2d 820 (1993). See, also, *First Nat. Bank of Omaha v. Eldridge*, 17 Neb. App. 12, 756 N.W.2d 167 (2008) (despite

failure to file statement of errors in district court, higher appellate court may still consider errors actually considered by district court).

A review of the record and the order issued by the district court in this case clearly indicates that the issue of insufficiency of the evidence was considered by the district court. For these reasons, we elect to consider Zimmerman's assigned error.

The citation issued to Zimmerman specifically charged him with a violation of § 60-696(2), which provides as follows:

> The driver of any vehicle involved in an accident upon a public highway, private road, or private drive, resulting in damage to an unattended vehicle or property, shall immediately stop such vehicle and leave in a conspicuous place in or on the unattended vehicle or property a written notice containing [his or her name, address, telephone number, and operator's license number]. In addition, such driver shall, without unnecessary delay, report the collision, by telephone or otherwise, to an appropriate peace officer.

[5] Zimmerman argues that the evidence was insufficient to convict him of leaving the scene, because the State failed to meet its burden of proving that he had any knowledge that an accident occurred. Knowledge is not an explicit element of § 60-696(2), nor has the question of whether knowledge of the occurrence of a property damage accident is a necessary element of the crime been previously addressed in appellate case law. However, the Nebraska Supreme Court has determined that knowledge that an accident has happened and that an injury has been inflicted is an essential element of the crime of leaving the scene of a *personal injury accident*, which is now codified under Neb. Rev. Stat. § 60-697 (Reissue 2010). See, *State v. Snell*, 177 Neb. 396, 128 N.W.2d 823 (1964); *Behrens v. State*, 140 Neb. 671, 1 N.W.2d 289 (1941).

The language of § 60-697(1), leaving the scene of a personal injury accident, is nearly identical to that of § 60-696(2), leaving the scene of a property damage accident. Both statutes require that the driver involved in an accident immediately stop his or her vehicle and give or leave his or her personal

information, including the driver's name, address, and vehicle and driver's license information.

[6] In *Behrens v. State, supra*, the Nebraska Supreme Court reversed the conviction of a driver for failure to stop at an accident which resulted in a death. The primary reason for the reversal was the failure of the State to establish that the deceased was struck or injured by the defendant's vehicle. The Supreme Court went on to note that the question of lack of knowledge of the driver that an injury or death had occurred was also raised. The Supreme Court held that a driver is not criminally liable "when he does not know that an accident has happened, an injury has been inflicted, or a death has occurred." 140 Neb. at 678, 1 N.W.2d at 293. "Further, lack of such knowledge constitutes a proper defense. . . . It is a question of fact and not of law." *Id.* The Supreme Court noted the conflicting evidence regarding the defendant's knowledge and found that the trial court's refusal to submit to the jury the defendant's "theory of [the] transaction" by a proper instruction constituted error. *Id.* at 679, 1 N.W.2d at 293. We note that the statute in question at the time of this decision contained both the offense of failure to stop at the scene of an accident resulting in injury or death and the failure to stop at the scene of an accident resulting in damage to property. In *State v. Snell, supra*, the Supreme Court, in applying the *Behrens* case, held that knowledge that an accident has happened and that an injury has been inflicted is an essential element of the crime of leaving the scene of a personal injury accident. Because the jury had been improperly instructed that it could find the defendant guilty even if it found that the defendant did not know that he had been involved in an accident in which a person had been injured, but should have known, the Supreme Court reversed the conviction and remanded the cause for a new trial.

[7] We find that the same rationale should apply in the case of leaving the scene of a property damage accident under § 60-696. Therefore, we hold that knowledge of the occurrence of an accident is an essential element of the crime of leaving the scene of a property damage accident. In the present case, the question of Zimmerman's knowledge was presented to the

trial court as well as to the district court. Because this was a bench trial, however, we do not have the issue of jury instructions before us as was present in the cases noted above.

[8] Based upon our review of the record, we find that the evidence in this case was sufficient to sustain a finding of knowledge of an accident on the part of Zimmerman. Knowledge that an accident occurred may be proved by circumstantial evidence, and the fact finder may consider all of the facts and circumstances which are indicative of knowledge. See *State v. Snell*, 177 Neb. 396, 128 N.W.2d 823 (1964). While Zimmerman insisted that he did not know an accident had occurred, Cooper testified that the sound of scraping metal was loud and caused her to stop and look in the direction of the vehicles. Further, Cooper testified that Zimmerman exited his pickup on the driver's side after the accident, which would have allowed him to observe the significant damage to Tylski's car. Viewing and construing the evidence most favorably to the State, we find that the evidence was sufficient to support a finding that Zimmerman was aware of the occurrence of the accident and was guilty of leaving the scene of a property damage accident.

## CONCLUSION

We conclude that knowledge of the occurrence of an accident is an essential element of leaving the scene of a property damage accident. We find that the evidence was sufficient to establish that Zimmerman had knowledge of the occurrence of the accident and was guilty of leaving the scene of a property damage accident.

AFFIRMED.

# HARRIETTE JANE UNGER, APPELLEE AND CROSS-APPELLANT, V. OLSEN'S AGRICULTURAL LABORATORY, INC., APPELLANT AND CROSS-APPELLEE.

809 N.W.2d 813

Filed January 10, 2012. No. A-11-205.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the finding of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.
3. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Final Orders: Appeal and Error.** A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.
6. **Workers' Compensation: Notice.** If the employee fails to give notice as soon as practicable, the employee may be barred from asserting his or her claim.
7. ____: ____. When the parties do not dispute the facts concerning reporting and notice, whether such facts constitute sufficient notice to the employer under Neb. Rev. Stat. § 48-133 (Reissue 2010) presents a question of law.
8. **Workers' Compensation: Notice: Appeal and Error.** Where the underlying facts are undisputed, or if disputed, the factual finding of the trial court was not clearly erroneous, the question of whether Neb. Rev. Stat. § 48-133 (Reissue 2010) bars the claim is a question of law upon which the appellate court must make a determination independent of that of the trial court.

Appeal from the Workers' Compensation Court. Affirmed.

Patrick R. Guinan, Tiernan T. Siems, and Sara A. Lamme, of Erickson & Sederstrom, P.C., for appellant.

P. Stephen Potter for appellee.

IRWIN, MOORE, and CASSEL, Judges.

MOORE, Judge.

## INTRODUCTION

This appeal involves Harriette Jane Unger's claim in the Workers' Compensation Court for benefits from her employer, Olsen's Agricultural Laboratory, Inc. (Olsen's). A single judge of the compensation court entered an award in Unger's favor for permanent total disability benefits, medical expenses, and future medical care. The judge also found that Olsen's failed to affirmatively plead that Unger did not give adequate notice of her injury under the Nebraska Workers' Compensation Act and declined to consider the lack-of-notice defense alleged by Olsen's. Olsen's appealed to a review panel of the compensation court, and the review panel remanded the matter to the trial judge for a determination of the viability of the lack-of-notice defense. Olsen's then appealed to this court. We find that the review panel's order was a final, appealable order, and we affirm the review panel's remand of the matter for a determination of the viability of the lack-of-notice defense. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

## BACKGROUND

Unger filed the initial petition in this case on May 12, 2003, and the operative fourth amended petition on December 9. In the operative petition, Unger alleged that she was employed by Olsen's from October 4, 1999, through May 23, 2001, where she worked as a laborer testing soil samples. Unger claimed that she contracted a lung condition known as aspergillosis from exposure to substances in her work that resulted in substantial disability, medical treatment, and ultimately surgery, including the removal of a portion of her lung. Unger alleged that the matters in dispute included past and future medical expenses, temporary and permanent disability, loss of earning capacity, and vocational rehabilitation.

In its answer, Olsen's alleged, among other things, that there were additional matters in dispute, including whether the statute of limitations barred Unger's claim, whether any injury Unger might have sustained was due to a work-related injury

or exposure, and whether Unger provided sufficient notice of injury to Olsen's.

Trial was held before a single judge of the compensation court on January 28, 2010. For purposes of this appeal, we need not detail the evidence presented. During trial, there was some discussion between the judge and counsel for Olsen's about the alleged delay by Unger in giving notice of her injury. The judge asked counsel for Olsen's whether it was standing on its lack-of-notice defense, which counsel answered in the affirmative.

The single judge entered an award on August 31, 2010, finding that Unger was injured as a result of an occupational disease, finding that she was permanently and totally disabled, and awarding benefits. Of particular relevance to this appeal is the trial judge's finding that Olsen's failed to affirmatively plead that Unger did not give adequate notice of her injury under the Nebraska Workers' Compensation Act and that the court would not consider this argument.

Olsen's appealed to a review panel of the compensation court, assigning 18 errors in its application for review. The review panel entered an order of remand on review on February 23, 2011. The panel, without deciding whether lack of notice is an affirmative defense, found that such defense was in fact alleged by Olsen's in paragraph 17 of its answer to Unger's fourth amended petition. It also found that the trial judge was aware of the lack-of-notice defense and the unwillingness of Olsen's to waive that argument because of the affirmative response of Olsen's to the trial judge's inquiry during trial as to whether Olsen's was standing on the lack-of-notice defense. The review panel ordered that the award be remanded to the trial court for "a proper determination of the viability of the lack of notice defense" asserted by Olsen's. The review panel did not consider the other assigned errors of Olsen's.

Olsen's subsequently perfected its appeal to this court.

## ASSIGNMENTS OF ERROR

Olsen's asserts, consolidated and restated, that the review panel erred in (1) failing to find that Unger did not give notice of her injury as soon as practicable as required by statute and

remanding the matter back to the trial court, (2) not considering the other assigned errors of Olsen's concerning not vacating the part of the award finding that Unger suffered a compensable injury and not vacating the single judge's finding that aspergillosis is an occupational disease, (3) failing to find that Unger's claim was barred by the statute of limitations, (4) failing to vacate the award of a 100-percent loss of earning capacity and permanent disability, and (5) failing to vacate the award finding past and future medical expenses are compensable for any work-related accident Unger suffered or for any disease she allegedly contracted while employed.

On cross-appeal, Unger asserts that the review panel erred in holding that Olsen's properly asserted lack of notice in its answer.

## STANDARD OF REVIEW

[1-3] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Pearson v. Archer-Daniels-Midland Milling Co.*, 282 Neb. 400, 803 N.W.2d 489 (2011). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the finding of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong. *Id.* With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Id.*

## ANALYSIS

*Jurisdiction.*

[4] We first consider whether the review panel's February 23, 2011, order is a final, appealable order. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter

before it. *Darnall Ranch v. Banner Cty. Bd. of Equal.*, 280 Neb. 655, 789 N.W.2d 26 (2010).

The only assignment of error considered by the review panel was the assertion of Olsen's that the single judge erred in finding that Olsen's failed to affirmatively plead as a defense that Unger failed to give sufficient notice of her injury under the Nebraska Workers' Compensation Act. The panel concluded that the lack-of-notice defense was properly before the trial court and should have been addressed and ordered that the award be remanded to the trial court for a determination of the viability of the lack-of-notice defense. The question that we must answer is whether this order of remand qualified as a final, appealable order.

We find some guidance in the case of *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 787 (1995). In that workers' compensation case, a dispute existed between Aetna Insurance Company and Continental Western Insurance Company over which had coverage. The trial judge applied the last injurious exposure rule and found Aetna Insurance Company to be the sole liable defendant. The three-judge review panel disagreed with the trial judge's use of the last injurious exposure rule, held that the date of injury determines liability when there is one employer and several insurers, vacated the award, and remanded the matter for a determination of the date of the worker's injury. On appeal to this court, the majority concluded that there was no final, appealable order and, in the process, distinguished *Hull* from our opinion in *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994) (holding that review panel order vacating trial judge's dismissal of petition for failure to prove work-related injury and remanding matter for trial was final, appealable order, finding that substantial right had been affected because review panel's order destroyed dismissal obtained by employer from trial court).

[5] On further review, the Nebraska Supreme Court in *Hull* reversed, finding that the review panel order was a final, appealable order. The court in *Hull* cited to the well-known holding of *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993), that "a substantial right is affected if the order affects the subject

matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing." 247 Neb. at 718, 529 N.W.2d at 788. The court in *Hull* found that the order of the review panel affected substantial rights of the worker and Continental Western Insurance Company because the worker "was deprived of an award in his favor and Continental [Western Insurance Company] was deprived of a finding of no liability on its part." 247 Neb. at 719, 529 N.W.2d at 788.

[6] In the case before us, Unger received a very substantial award of benefits, and the single judge found that Olsen's was precluded from asserting its lack-of-notice defense. Neb. Rev. Stat. § 48-133 (Reissue 2010) requires that an employee give notice of an injury to the employer "as soon as practicable" after the injury. If the employee fails to give notice as soon as practicable, the employee may be barred from asserting his or her claim. See *Williamson v. Werner Enters.*, 12 Neb. App. 642, 682 N.W.2d 723 (2004). As a result of the order of remand in this case, Unger is now facing a defense which was earlier resolved in her favor—not on the merits, but on an obviously erroneous procedural basis by the trial judge. Thus, should the remand in this matter result in a finding that Unger failed to give the required notice, she could be deprived of a substantial award. Because there now exists the potential deprivation of Unger's award, we conclude that the review panel order of remand affects a substantial right and therefore constitutes a final, appealable order.

*Notice.*

We next consider the first assignment of error asserted by Olsen's, which is dispositive of this appeal. As mentioned above, § 48-133 requires that an employee give the employer notice of an injury as soon as practicable after the happening thereof. Olsen's clearly raised the issue of Unger's alleged lack of notice in its operative answer, whether it was necessary to do so or not. And, the trial judge was aware of the lack-of-notice issue and the unwillingness of Olsen's to waive that argument based on the discussion during trial between the judge and counsel for Olsen's on that issue. We conclude, as

did the review panel, that the trial judge was clearly wrong in failing to address the notice issue.

In its brief on appeal, Olsen's argues that it was error for the review panel to fail to find that Unger did not give notice of her injury as soon as practicable as required by statute. Olsen's asserts that it was error to remand the matter back to the trial court for this determination because there was no factual dispute and that therefore, it is a question of law.

[7,8] Olsen's relies upon the proposition that when the parties do not dispute the facts concerning reporting and notice, whether such facts constitute sufficient notice to the employer under § 48-133 presents a question of law. See *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009), citing *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995). This court has also recognized that where the underlying facts are undisputed, or if disputed, the factual finding of the trial court was not clearly erroneous, the question of whether § 48-133 bars the claim is a question of law upon which the appellate court must make a determination independent of that of the trial court. See, *Snowden v. Helget Gas Products*, 15 Neb. App. 33, 721 N.W.2d 362 (2006); *Williamson v. Werner Enters., supra*. In all of these cases, unlike the case at hand, the appellate court was called upon to review a determination previously made by the trial court, and reviewed by the three-judge panel, regarding the notice issue. In this case, no such determination has been made for either the review panel or us to review.

We also note that the argument of Olsen's that the facts are undisputed focuses on Unger's delay in giving notice as soon as practicable. In *Williamson v. Werner Enters.*, 12 Neb. App. 642, 682 N.W.2d 723 (2004), we found that the meaning of the phrase "as soon as practicable" depended on the particular facts and circumstances. Clearly, in the present case, this is a question that should be determined by the trial court based upon the particular facts and circumstances.

Furthermore, there is another, perhaps more important, question in this case, relating to an exception to the notice requirement in § 48-133. The statute goes on to state that "[w]ant of such written notice shall not be a bar to proceedings under the

Nebraska Workers' Compensation Act, if it be shown that the employer had notice or knowledge of the injury." Unger argues that Olsen's had notice or knowledge of her injury prior to her giving written notice. Again, this question should be addressed by the trial court as it involves analysis of what information Olsen's had concerning Unger's lung condition and her exposure to substances in connection with her job requirements. See, *Risor v. Nebraska Boiler, supra*; *Snowden v. Helget Gas Products, supra*.

In conclusion, we affirm the order of the review panel remanding the matter to the single judge for a determination of the viability of the lack-of-notice defense. We note that the review panel did not expressly vacate the award of the trial judge, and we accordingly conclude that the remand is solely for a determination, on the existing evidentiary record, of whether the defense of lack of timely notice of injury is viable.

## CONCLUSION

We affirm the order of the Workers' Compensation Court review panel remanding this matter for a determination of the viability of the lack-of-notice defense asserted by Olsen's.

AFFIRMED.

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[By order of the court, *State v. Nadeem*, 19 Neb. App. 466, 808 N.W.2d 95 (2012), withdrawn. See *State v. Nadeem*, 19 Neb. App. 565, 809 N.W.2d 825 (2012). (Pages 467-73 omitted.)]

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# KERRY L. TEETOR, APPELLANT, V. DAWSON PUBLIC POWER DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, AND ROBERT A. HEINZ, APPELLEES.

808 N.W.2d 86

Filed January 17, 2012. No. A-11-170.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment 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. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the court granted the judgment and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
4. **Employer and Employee: Public Policy: Damages.** Under the public policy exception to the at-will employment doctrine, an employee can claim damages for wrongful discharge when the motivation for the firing contravenes public policy.
5. **Termination of Employment: Summary Judgment: Discrimination: Presumptions: Proof.** When considering the propriety of a grant of summary judgment in a wrongful termination of at-will employment case, Nebraska employs the burden-shifting analysis for considering claims of employment discrimination that originated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973): First, the plaintiff has the burden of proving a prima facie case of discrimination. Second, if the plaintiff succeeds in proving that prima facie case, the burden of production shifts to the defendant-employer to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection or discharge from employment. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted and drops from the case. Third, assuming the employer establishes an

articulated nondiscriminatory reason for disparate treatment of an employee, the employee maintains the burden of proving that the stated reason was pretextual and not the true reason for the employer's decision.

6. **Employer and Employee: Time: Proof.** Proximity in time between an employee's actions allegedly being retaliated against and discharge is a typical beginning point for proof of a causal connection, and a plaintiff supports an assertion of retaliatory motive by demonstrating such proximity along with evidence of satisfactory work performance and evaluations.

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

Daniel M. Placzek, of Leininger, Smith, Johnson, Baack, Placzek & Allen, for appellant.

Gail S. Perry and Jarrod S. Boitnott, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellees.

IRWIN, MOORE, and CASSEL, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Kerry L. Teetor appeals an order of the district court for Dawson County, Nebraska, granting summary judgment in favor of the Dawson Public Power District (the District) and Robert A. Heinz (collectively Appellees) in this action for wrongful termination of employment. On appeal, Teetor has assigned numerous errors challenging the court's grant of summary judgment and its finding that there was no genuine issue of material fact concerning Teetor's employment status and concerning there being sufficient grounds for terminating his employment. We find no merit, and we affirm.

## II. BACKGROUND

Teetor was employed by the District from April 1978 to May 2008. Teetor was the operations manager for the District. At all relevant times, Heinz was the general manager of the District. Heinz conducted regular evaluations of Teetor's performance, and Teetor generally received all positive performance reviews from Heinz.

In April 2008, the District's employees expressed interest in forming a labor union. The District conducted a meeting with

the employees on April 10. During that meeting, the employees expressed to the District's management that Teetor's management style was "threaten[ing]" and having a negative effect on morale. The District informed the employees that the proper procedure if they were unhappy with Teetor's management was to follow the District's grievance procedure. Subsequently, a number of grievances were filed, involving approximately 20 employees.

On April 10, 2008, the same day as the District's meeting with employees about their desire to form a labor union, a storm moved into the District's service territory and began to cause power outages. The District's repair employees were called in to respond to the outages. One of the employees indicated that he had consumed two beers. At the time, the District had a policy that employees could not return to work after consuming alcohol. Heinz advised the employee that he could work, but Teetor advised him not to drive. Apparently, the employee actually did drive; Heinz was ultimately disciplined for allowing the employee to return to work after consuming alcohol.

In late April 2008, Heinz met with Teetor and advised him that employees had filed grievances about his management. During that meeting, Teetor indicated that "everybody was nothing but a bunch of bitches and whiners and that they — everybody just wanted to get rid of him." Teetor also informed Heinz that he was going to "take action" concerning Heinz' allowing the employee to work after consuming alcohol.

Heinz testified that he initially did not intend to terminate Teetor's employment and that, instead, he attempted to find alternative solutions that would be acceptable to the employees of the District. In late April 2008, Heinz met with Teetor and offered, as a potential solution, that Teetor needed to apologize to the employees for his prior intimidating and threatening behavior and assure them that it would not happen again. Teetor's response was that "none of it was true" and that "[e]veryone was out to get him." Heinz testified that he never heard any apology or assurance that Teetor would not retaliate against the employees for filing grievances against him.

On April 29, 2008, the District's personnel committee met. At that meeting, the committee discussed both the many grievances filed against Teetor and Heinz' investigation of the grievances. The committee concluded that the grievances filed by the employees were valid and highlighted a pattern of abusive behavior by Teetor. Heinz then determined that termination of Teetor's employment was necessary because of Teetor's unwillingness to attempt to repair the situation by apologizing and assuring the employees that he would not retaliate.

Also in late April 2008, and prior to his termination of employment, Teetor began the process of filing a workers' compensation claim based on mental anxiety. On May 1, Teetor filed a grievance with the District concerning Heinz' decision to allow an employee to return to work after consuming alcohol. On May 2, Heinz met with Teetor and advised him that his employment was terminated.

Teetor filed an unsuccessful claim with the Nebraska Employment Opportunity Commission; he served notice of claims pursuant to Nebraska's Political Subdivisions Tort Claims Act, and his tort claims were ultimately denied. Teetor then filed an action in the district court alleging multiple causes of action for wrongful termination and interference with a business relationship. The action was removed to federal court, where Teetor's causes of action were dismissed based on violation of federal law and the matter was remanded to the district court. Appellees moved for summary judgment.

On February 2, 2011, the district court entered a memorandum and order concerning the motion for summary judgment. The district court provided over 20 pages of analysis of Teetor's claims. The court recognized that Teetor's wrongful termination claims included assertions that he was terminated from employment in contravention of public policy for filing a grievance about his superior's authorization of an employee's working after consuming alcohol, in retaliation for filing a workers' compensation claim, in exchange for the District employees' not forming a labor union, in contravention of an employee manual, and in bad faith. The court analyzed each claim under the summary judgment standard and concluded Teetor had failed to adduce sufficient evidence to establish

that he was anything other than an at-will employee and that termination of his employment was in contravention of public policy or law. The court granted summary judgment in favor of Appellees, and this appeal followed.

## III. ASSIGNMENTS OF ERROR

Teetor has assigned numerous errors on appeal. At their core, his assertions all challenge the district court's grant of summary judgment.

## IV. ANALYSIS

In his amended complaint, Teetor asserted 10 causes of action to support his claim that his employment was wrongfully terminated. Two of the causes of action were based on his assertion that his employment was terminated in retaliation for his filing a grievance against Heinz related to Heinz' decision to allow an employee to work after consuming alcohol. One of the causes of action was based on his assertion that his employment was terminated in retaliation for his filing a workers' compensation claim. One of the causes of action was based on his assertion that his employment was terminated in exchange for the District employees' not forming a labor union. One of the causes of action was based on his assertion that his employment was terminated in contravention of the terms of an employee manual. One of the causes of action was based on his assertion that his employment was terminated in contravention of a requirement of good faith and fair dealing. Three of the causes of action were based on assertions of interference with a business relationship. One of the causes of action was based on his assertion that termination of his employment was in violation of federal law. We find no merit to his claims on appeal that the district court erred in granting summary judgment on these claims.

[1,2] An appellate court will affirm a lower court's grant of summary judgment 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. *Howsden v. Roper's Real Estate*

*Co.*, 282 Neb. 666, 805 N.W.2d 640 (2011). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the court granted the judgment and gives such party the benefit of all reasonable inferences deducible from the evidence. *Federated Serv. Ins. Co. v. Alliance Constr.*, 282 Neb. 638, 805 N.W.2d 468 (2011).

[3,4] Teetor has not asserted or adduced any evidence to suggest that he was hired on anything other than an at-will basis. The general rule in Nebraska is that unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason. *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006). Under the public policy exception, however, an employee can claim damages for wrongful discharge when the motivation for the firing contravenes public policy. *Id.*

[5] In *Riesen v. Irwin Indus. Tool Co., supra*, the Nebraska Supreme Court, in considering the propriety of a grant of summary judgment in a wrongful termination of at-will employment case, employed the burden-shifting analysis for considering claims of employment discrimination that originated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The district court in the present case employed the same reasoning. In *Riesen v. Irwin Indus. Tool Co.*, the Nebraska Supreme Court noted that the following procedure is utilized under the three-tiered allocation of proof standard: First, the plaintiff has the burden of proving a prima facie case of discrimination. Second, if the plaintiff succeeds in proving that prima facie case, the burden of production shifts to the defendant-employer to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection or discharge from employment. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted and drops from the case. Third, assuming the employer establishes an articulated nondiscriminatory reason for disparate treatment of an employee, the employee maintains the burden of proving that the stated reason was pretextual and not the true reason for the employer's decision.

1. GRIEVANCE

Teetor first asserted that his employment was terminated in retaliation for his filing a grievance against Heinz related to Heinz' decision to allow an employee to work after consuming alcohol. Although Teetor demonstrated a proximity in time between the grievance and the discharge, the district court concluded that he failed to demonstrate any additional evidence which would support a finding that the termination was in retaliation for the grievance. We agree.

Teetor asserted that termination of his employment in retaliation for his filing a grievance was in contravention of public policy. Specifically, he argued that Neb. Rev. Stat. § 60-4,163 (Reissue 2010) prohibits operation of a motor vehicle after consuming alcohol and that the District's policy actually prohibits returning to employment after consumption of alcohol. Teetor asserts that his grievance against Heinz for allowing the employee to return to work provided a retaliatory motive for termination of Teetor's employment.

[6] In *Riesen v. Irwin Indus. Tool Co., supra*, the Nebraska Supreme Court noted that proximity in time between an employee's actions allegedly being retaliated against and discharge is a typical beginning point for proof of a causal connection and that a plaintiff supports an assertion of retaliatory motive by demonstrating such proximity along with evidence of satisfactory work performance and evaluations. In the present case, Teetor established that his termination from employment was close in time to his filing of a grievance against Heinz and that he had a history of satisfactory work performance and evaluations.

The district court acknowledged that Teetor had adduced sufficient evidence to make his prima facie case of retaliatory discharge. In addition, the court acknowledged that it is the public policy of the State of Nebraska to promote safe roads and that the statutory and the District's prohibitions noted above would be part of such a policy. The district court then found that Appellees met their burden of production with respect to providing a justification for the discharge by providing evidence of Teetor's demoralizing management style,

allegations of his bullying and harassment of employees, and complaints about his ineffectiveness as a leader.

To defeat summary judgment concerning Teetor's claims that he was improperly discharged in retaliation for filing a grievance against Heinz, Teetor then needed to present evidence establishing a genuine issue of material fact regarding whether Appellees' proffered explanation for firing him was merely pretextual. The district court found that Teetor did not, and we agree.

Teetor adduced no evidence to establish that Appellees' reasons for terminating his employment were merely pretextual. Indeed, Teetor himself testified that he received a telephone call from Heinz on April 29, 2009, and that his interpretation of the telephone call was that he "was going to be fired" on May 2, and that "[s]o, on May 1st, I decided that I'm going to be fired, so I might as well file a grievance" against Heinz. Thus, although there was temporal proximity, Teetor's own testimony demonstrates that there was no genuine issue of material fact suggesting that he was fired in retaliation for filing a grievance against Heinz or that Appellees' proffered reasons for the termination were pretextual. We affirm the summary judgment on these claims.

### 2. Workers' Compensation

Teetor next asserted that his employment was terminated in retaliation for his filing a workers' compensation claim. Termination of employment in retaliation for filing a workers' compensation claim is contrary to public policy and supports a wrongful termination action. See *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003). Like Teetor's claims asserting that the termination was in retaliation for his filing a grievance against Heinz, this claim relied primarily on the temporal proximity between Teetor's filing of a workers' compensation claim and the termination of his employment. Like it did concerning the assertions based on Teetor's grievance against Heinz, the district court found that Teetor had satisfied his burden to establish a prima facie case because of the temporal proximity and his history of satisfactory performance and evaluations and that Appellees satisfied

their burden of production by establishing that Teetor was terminated from employment because of his management style and employee complaints.

Again, the issue concerning summary judgment is whether Teetor satisfied his burden of establishing pretext. We agree with the district court that he did not. Teetor has not pointed us to any evidence in the record suggesting any causal connection between his filing of a workers' compensation claim and Appellees' decision to terminate his employment. The only evidence adduced by Teetor was that his firing was close in time to his filing of a workers' compensation claim, but the evidence establishes without contradiction that the investigation into his management behaviors and employee complaints had already begun and was nearing an end when he filed his workers' compensation claim and that his claim was actually based on emotional conditions that arose as a result of that investigation. There was no evidence to establish a genuine issue of fact on this point, and we affirm the summary judgment granted on this claim.

### 3. Union Activity

Teetor next asserted that his employment was terminated as a means of discouraging union activity and that his termination was done to encourage employees to vote against forming a union. As with the above claims, the only evidence adduced in support of Teetor's claim is that the termination was close in time to the employee vote rejecting the creation of a union. As with the above claims, Teetor adduced no evidence to establish any factual question that his employment was terminated in exchange for the employees' voting against forming a union. Teetor adduced no evidence to suggest anyone associated with Appellees made any suggestion to any of the employees that Teetor would be fired in exchange for their voting against creation of a union. We affirm the summary judgment granted on this claim.

### 4. Employee Manual

Next, Teetor asserted that Appellees failed to follow procedures set forth in an employee manual including a progressive

discipline provision. The district court found that there was no genuine issue of material fact that the employee manual reserved the right of Appellees to terminate employment at any time. We agree.

Teetor acknowledged in his testimony that the employee manual provided that "[w]hile not required to do so, the District may, in its sole discretion, follow progressive discipline to correct problems," and that the employee manual provided that "[t]he District retain[ed], in its sole discretion, the right to modify or bypass any steps . . . including the right to immediately terminate an employee if management decide[d] such action [was] appropriate." The employee manual also specifically provided that the progressive discipline rules were "not intended to form any contract between the District and its employees as to the procedures to be followed concerning any rule violation." There is no evidence in the record creating any genuine issue of fact concerning whether the employee manual somehow altered Teetor's employment status or obligated Appellees to impose progressive discipline prior to termination. We affirm the summary judgment granted on this claim.

### 5. Good Faith and Fair Dealing

Teetor next asserted that termination of his employment was in contravention of implied covenants of good faith and fair dealing contained in the employment agreement created by the employee manual. As discussed above, the employee manual specifically did not create an employment contract that altered Teetor's at-will employment status, and there is no evidence that any portion of the manual created a covenant of good faith and fair dealing. Such a covenant is not implied in Nebraska relating to the termination of at-will employees. See *Renner v. Wurdeman*, 231 Neb. 8, 434 N.W.2d 536 (1989). We affirm the summary judgment granted on this claim.

### 6. Interference With Business Relationship

Teetor next asserted that termination of his employment constituted an impermissible interference with the valid business relationship between Teetor and the District. The district court

properly characterized Teetor's assertions concerning alleged interference with a business relationship as being based upon assertions of tortious conduct.

Neb. Rev. Stat. § 13-902 (Reissue 2007) provides that no political subdivision shall be liable for torts of its officers, agents, or employees and that no suit shall be maintained against such political subdivision or its officers, agents, or employees on any tort claim except to the extent the political subdivision has waived its immunity in the Political Subdivisions Tort Claims Act.

Neb. Rev. Stat. § 13-910(7) (Reissue 2007) specifically provides that no waiver of immunity exists with regard to allegations of interference with contract rights. In the present case, Teetor brought his suit against the District and against Heinz in his official capacity only and has not created any genuine issue of material fact concerning the ability to bring suit against Appellees for alleged interference with contractual rights. We affirm the summary judgment granted on this claim.

### 7. Federal Law

Finally, Teetor asserted that termination of his employment was in contravention of federal law. Specifically, Teetor alleged a violation of the Employee Retirement Income Security Act of 1974. This action was removed to federal court, and the federal court found the claim of such a violation to be without factual or legal basis and dismissed it. The district court agreed with the federal court and granted summary judgment in district court on this claim as well. Teetor has not challenged this grant of summary judgment on appeal.

## V. CONCLUSION

We find no merit to Teetor's assertions of error on appeal. The most that can be said about Teetor's claims in the district court is that he demonstrated that his termination of employment was close in time to his filing of a grievance, his filing of a workers' compensation claim, and an employee vote concerning formation of a union. He failed, however, to establish any genuine issue of material fact to suggest that the legitimate grounds for termination of his at-will employment asserted by

Appellees were pretextual or that his at-will employment status was altered by any provisions of the employee manual. As such, we affirm the grant of summary judgment.

AFFIRMED.

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TURBINES LTD., APPELLEE, V. TRANSUPPORT, INCORPORATED, APPELLANT.

808 N.W.2d 643

Filed January 24, 2012. No. A-11-042.

1. **Motions for New Trial: Appeal and Error.** Decisions regarding motions for new trial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
2. **Motions to Vacate: Appeal and Error.** An appellate court reviews a ruling on a motion to vacate for abuse of discretion.
3. **Actions: Rescission: Equity: Appeal and Error.** An action for rescission sounds in equity, and it is subject to de novo review upon appeal.
4. **Attorney and Client.** No person shall represent another through the practice of law unless he or she has been previously admitted to the bar by order of the Supreme Court.
5. **Attorney and Client: Corporations.** A corporation cannot appear in its own person. It must appear by a member of the bar.
6. **Appeal and Error.** To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
7. **Motions to Vacate: Default Judgments.** A default judgment will not ordinarily be set aside on the application of a party who, by his own fault, negligence, or want of diligence, has failed to protect his own interests. Such a party will not be permitted to ignore the process of the court and thereby impede the termination of litigation.
8. **Motions for New Trial: Statutes.** A motion for new trial is a statutory remedy, and it can be granted by the court only upon the grounds specified by statute.
9. **Actions: Equity: Contracts: Rescission.** An action to rescind a written instrument is an equity action.
10. **Contracts: Rescission.** Grounds for cancellation or rescission of a contract include, inter alia, fraud, duress, unilateral or mutual mistake, and inadequacy of consideration, which may arise from nonperformance of the agreement.
11. **Breach of Contract: Rescission.** Rescission is a proper remedy when the breach of contract is so substantial and fundamental as to defeat the object of the parties in making the agreement.
12. **Contracts.** Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the

nonoccurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

13. **Contracts: Rescission.** The essential conditions to relief from a unilateral mistake by rescission are: The mistake must be of so fundamental a nature that it can be said that the minds of the parties never met and that the enforcement of the contract as made would be unconscionable. The matter as to which the mistake was made must relate to the material feature of the contract.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Reversed and remanded with directions.

Thomas B. Donner for appellant.

Clarence E. Mock, of Johnson & Mock, for appellee.

INBODY, Chief Judge, and SIEVERS and PIRTLE, Judges.

SIEVERS, Judge.

Turbines Ltd. (Turbines) sought an order for rescission of a contract with Transupport, Incorporated. The district court for Cuming County entered judgment in favor of Turbines and against Transupport for rescission of the contract. The district court subsequently overruled Transupport's motion to vacate judgment and overruled Transupport's motion for new trial. Transupport appeals. We conclude that the evidence was insufficient to prove that Turbines was entitled to rescission.

## BACKGROUND

Turbines is a Nebraska corporation that sells and maintains helicopters. Turbines also has an office in Singapore. Marvin Kottman owns Turbines. Transupport is a New Hampshire corporation that sells spare parts for turbine engines. William Foote is the vice president of Transupport. Turbines and Transupport have had a business relationship since the 1980's.

In December 2006 or January 2007, Brian Woodford of Monarch Aviation (Monarch), a Singapore aircraft parts company, contacted Turbines' Singapore office, looking for a "First Stage" turbine nozzle. Turbines did not have the nozzle, which was considered obsolete, in its inventory. To satisfy Monarch's purchase request, Turbines' Nebraska office

contacted Transupport to see if it had the nozzle in its inventory, which Transupport did. Although Monarch was initially interested in purchasing eight nozzles, Monarch ultimately elected to purchase only one nozzle due to concerns about quality.

On January 29, 2007, Turbines sent a purchase order for the turbine nozzle to Transupport, stating that the price was $30,000. Transupport sent the nozzle to Turbines in February 2007. After receiving the nozzle from Transupport, Turbines followed Monarch's instructions and attempted to send the nozzle directly to Monarch's client in Malaysia.

However, in February 2007, the nozzle was seized by the U.S. Customs and Border Protection (Customs) because the nozzle was on the "United States Munitions List." Customs asserted that because the nozzle was on the munitions list, it could not be exported without a Directorate of Defense Trade Controls license endorsement. Kottman disagreed with Customs' conclusion and asserted that the nozzle was classified as a "Dual-Use" item that did not require a license for export. After several futile attempts to resolve the issue with Customs, Kottman contacted the U.S. Department of State (State Department). In November 2008, the State Department sent a letter to Kottman stating that the nozzle did not require a State Department license. However, Customs would not release the nozzle until Turbines met certain requirements, including payment of holding or storage fees. Turbines did not feel that it should have to pay the holding or storage fees because the nozzle had been illegally seized, and ultimately, on January 21, 2009, Customs decided to remit the nozzle to Turbines without payment of the fees.

Shortly after Customs seized the nozzle and before the State Department ruled the nozzle did not require a license for export, officers from U.S. Immigration and Customs Enforcement (ICE) contacted Kottman. ICE informed Kottman that it possessed information that Woodford, of Monarch, was redirecting munitions list goods from permitted destinations, such as Malaysia, to Iran, a prohibited destination. Under federal Iranian Transactions Regulations, 31 C.F.R. Part 560, a person is prohibited from exporting goods, technology, or

services if that person "know[s] or [has] reason to know" that such items are intended to be redirected to Iran. See 31 C.F.R. § 560.205(a)(1) (2011).

In August 2007, Kottman learned that Woodford's wife was arrested on a previously sealed federal indictment. The indictment alleged conspiracy to defraud the United States, attempted exportation of arms and munitions, laundering of monetary instruments, and money laundering.

Due to the information provided by ICE and the indictment of Woodford's wife, Turbines could not export the nozzle to Monarch without exposing Kottman and Turbines to criminal prosecution. Thus, when Customs released the nozzle to Turbines in January 2009, Turbines returned the nozzle to Transupport. Transupport refused to refund the purchase price to Turbines but returned the nozzle to Turbines after Turbines filed this lawsuit, and as we understand the record, Turbines or its counsel has the nozzle.

On March 10, 2010, Turbines filed its suit against Transupport, seeking rescission of the contract. In its complaint, Turbines alleged that it agreed to purchase a turbine nozzle from Transupport for $30,000; that the parties' purchase agreement was subject to "'inspection, and acceptance[,] by [the] end user," which, according to Turbines' allegations, was Monarch, a Singapore company; that Turbines subsequently learned the real end user was probably located in Iran; and that Turbines could not legally export the nozzle under these circumstances. Turbines asked the court for a rescission of the contract between Turbines and Transupport and asked the court to order Transupport to return the $30,000 purchase price. On May 4, Turbines filed a motion for default judgment alleging that Transupport failed to timely answer the complaint. Foote, as registered agent for Transupport, wrote a letter to the clerk of the district court "[i]n response to the complaint." The letter was filed on June 2.

In a pretrial order filed on August 5, 2010, the district court noted that "[Transupport] waived [its] appearance" at the pretrial conference held that same day. In its order, the district court extended the discovery deadline to November 1 and set trial for November 29.

On November 22, 2010, Turbines filed a "Motion to Strike Answer, Motion for Default Judgment, and Notice of Hearing." Turbines asked the court to strike the "purported Answer" of Transupport because it was not drafted and filed by an attorney licensed or permitted to practice law within Nebraska.

Trial was held on November 29, 2010. Turbines was represented by counsel, but no representative of Transupport appeared. Turbines adduced evidence, and the matter was submitted to the court. Turbines argued alternative grounds for judgment: (1) Transupport did not obey the notice to appear, and the evidence shows that Turbines is entitled to a rescission, or (2) since no formal or proper answer was filed, Turbines is entitled to a default judgment. The court said that it thought the motion to strike Transupport's answer should be sustained and that the case could proceed as a motion for default judgment. However, the court also said it wanted to go "beyond that" and rule on the merits of the complaint based on the evidence presented. The court's expressed rationale was that whether it treated the matter as a motion for default judgment or as a trial on the merits would make no difference, because the evidence would only be in support of the complaint because Transupport chose not to appear. After evidence was adduced, the court then stated, "[T]he evidence is pretty clear today that the parties understood and believed that the customer was somebody other than either of the two parties in this case, and it was ultimately the customer of [Turbines] to whom the nozzle would be provided." Finally, the court stated that the elements of the transaction could not be completed and that equitable jurisdiction of the court could be used to allow rescission of the contract.

In its "Judgment" filed on December 7, 2010, the district court found that Turbines was entitled to rescission of its agreement with Transupport, although the oral rationale recounted above was not part of the judgment. Accordingly, the district court granted judgment in favor of Turbines and against Transupport for rescission of the contract between them. The district court specifically ordered Turbines, who had possession of the nozzle, to return it to Transupport, and Transupport was ordered to pay $30,000 to Turbines.

On December 15, 2010, counsel for Transupport filed his appearance. That same day, Transupport also filed the following: a motion for new trial, a motion to vacate judgment, a motion for leave to file an answer out of time, a motion for additional time to complete discovery, and the affidavit of Transupport's counsel alleging that Transupport had a meritorious defense warranting a vacation of the judgment. We note that the motion for new trial would toll the time to perfect an appeal.

A hearing on the motions was held on December 21, 2010. In its order filed on January 5, 2011, the district court considered the motion for new trial and the motion to vacate judgment separately. The district court denied Transupport's motion for new trial because Transupport had alleged the statutory grounds for vacating or modifying judgment (Neb. Rev. Stat. § 25-2001 (Reissue 2008)), rather than the grounds for a new trial (Neb. Rev. Stat. § 25-1142 (Reissue 2008)).

The district court also denied Transupport's motion to vacate judgment. The district court found that the evidence adduced by Transupport did "not satisfy any of the asserted seven statutory grounds described in § 25-2001." The district court also refused to use its inherent powers to vacate the judgment, finding that Transupport inexplicably failed to participate in the proceedings for several months and therefore must live with the consequences of its inaction. Transupport filed this timely appeal.

## ASSIGNMENTS OF ERROR

Transupport assigns that the district court erred in (1) striking the answer filed by Transupport, (2) overruling Transupport's motion to vacate, (3) denying Transupport's motion for new trial, and (4) determining that Turbines was entitled to rescission.

## STANDARD OF REVIEW

[1] Decisions regarding motions for new trial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

[2] An appellate court reviews a ruling on a motion to vacate for abuse of discretion. *Obad v. State*, 277 Neb. 866, 766 N.W.2d 89 (2009).

[3] An action for rescission sounds in equity, and it is subject to de novo review upon appeal. *Ord, Inc. v. AmFirst Bank*, 276 Neb. 781, 758 N.W.2d 29 (2008).

## ANALYSIS

*Transupport's Answer.*

Transupport assigns as error that the district court struck Transupport's "answer." What the court struck was a letter to the court written by Foote, Transupport's registered agent, and filed on June 2, 2010, in response to Turbines' complaint. At the hearing on November 29, which Transupport did not attend or participate in, the district court sustained Turbines' motion to strike Transupport's "answer" because the letter or answer was not filed by an attorney licensed in Nebraska.

[4] As a general rule, no person shall represent another through the practice of law unless he or she has been previously admitted to the bar by order of the Supreme Court. *Back Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 443 N.W.2d 604 (1989). Neb. Rev. Stat. § 7-101 (Reissue 2007) provides:

> Except as provided in section 7-101.01, no person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state. No such paper shall be received or filed in any action or proceeding unless the same bears the endorsement of some admitted attorney, or is drawn, signed, and presented by a party to the action or proceeding. It is hereby made the duty of the judges of such courts to enforce this prohibition. Any person who shall violate any of the provisions of this section shall be guilty of a Class III misdemeanor, but this section shall

not apply to persons admitted to the bar under preexisting laws.

[5] The facts in the present case are similar to those in *Galaxy Telecom v. SRS, Inc.*, 13 Neb. App. 178, 689 N.W.2d 866 (2004), wherein a registered agent for the defendant wrote a letter in response to the plaintiff's petition. The defendant failed to attend several hearings, and the plaintiff was eventually awarded default judgment. On appeal, this court held that the responsive letter filed by the registered agent on behalf of the defendant was a nullity and did not constitute an answer. We reasoned as follows:

> The Nebraska Supreme Court has held that proceedings in a suit by a person not entitled to practice law are a nullity, and the suit may be dismissed. *Anderzhon/Architects v. 57 Oxbow II Partnership*, 250 Neb. 768, 553 N.W.2d 157 (1996). Accord *Waite v. Carpenter*, 1 Neb. App. 321, 496 N.W.2d 1 (1992). "It is axiomatic that a corporation cannot appear in its own person. It must appear by a member of the bar." *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 849, 83 N.W.2d 904, 910 (1957). The truth of this statement by the Nebraska Supreme Court becomes apparent upon reviewing § 7-101 set forth above. [The registered agent] is not a party to the lawsuit, nor is he a member of the Nebraska bar. [He] was not authorized to defend the present action by using or subscribing his own name, or by drawing pleadings or other papers to be signed and filed by a party. Accordingly, we do not give any effect to the papers signed and filed by [him] on behalf of [the defendant].

*Galaxy Telecom*, 13 Neb. App. at 185, 689 N.W.2d at 872-73. The same reasoning applies in the present case. Foote is not a party to the lawsuit, nor is he a member of the Nebraska bar. Foote was not authorized to defend Transupport in the present action by using or subscribing his own name, or by drawing pleadings or other papers to be signed and filed by a party. The responsive letter filed by Foote on behalf of Transupport was a nullity and did not constitute an answer. The district court did not err in striking Transupport's letter or answer.

[6] Transupport argues, but does not specifically assign as error, that the district court should have allowed it additional time to timely file an amended answer. To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Gengenbach v. Hawkins Mfg.*, 18 Neb. App. 488, 785 N.W.2d 853 (2010). Thus, we do not address this claim.

*Motion to Vacate Judgment.*

Transupport argues that the district court erred in overruling its motion to vacate. The district court overruled Transupport's motion to vacate because Transupport failed to appear at court proceedings until after the trial.

The record shows that Transupport was served on March 16, 2010. After Transupport failed to answer, Turbines moved for default judgment on May 4, setting a hearing on the motion for June 3. On June 2, the clerk of the Cuming County District Court received a letter from Foote, as Transupport's registered agent, "[i]n response to the complaint." On June 3, the district court entered a pretrial progression order setting a pretrial conference for August 5. The court gave notice to Transupport, which was not yet represented by counsel. The district court held a pretrial conference on August 5, at which no one appeared for Transupport. In its pretrial order, the district court noted that "[Transupport] waived [its] appearance." Trial was set for 9 a.m. on November 29, and notice was sent to Transupport. On November 22, Turbines moved to strike Transupport's answer and moved for default judgment, setting the hearing on such motion for the same date as the trial. Notice of the motion and hearing thereupon was mailed to Foote at Transupport on November 22. Transupport did not appear at the November 29 proceeding. In a "Judgment" filed on December 7, the district court found in favor of Turbines for rescission of the contract and ordered Transupport to pay Turbines $30,000. It was not until December 15 that counsel for Transupport entered an appearance and filed various motions.

[7] The Nebraska Supreme Court has held:

> "'A default judgment will not ordinarily be set aside on the application of a party who, by his own fault, negligence, or want of diligence, has failed to protect his own interests. Such a party will not be permitted to ignore the process of the court and thereby impede the termination of litigation.'"

*First Fed. Sav. & Loan Assn. v. Wyant*, 238 Neb. 741, 747, 472 N.W.2d 386, 391 (1991), quoting *Fredericks v. Western Livestock Auction Co.*, 225 Neb. 211, 403 N.W.2d 377 (1987). Transupport relies upon the proposition found in *Beliveau v. Goodrich*, 185 Neb. 98, 100, 173 N.W.2d 877, 879 (1970): "It is the policy of the law to give a litigant full opportunity to present his contention in court and for this purpose to give full relief against slight and technical omissions." See, also, *Lee Sapp Leasing v. Ciao Caffe & Espresso Inc.*, 10 Neb. App. 948, 640 N.W.2d 677 (2002). In *Lee Sapp Leasing, supra*, there was a failure to timely answer interrogatories in garnishment, and default judgment resulted. We found that the district court abused its discretion in failing to sustain the motion to vacate. We found first of all that the notice given to the garnishee before judgment was entered was "very poor." *Id.* at 958, 640 N.W.2d at 686. And we cited the fact that in the garnishee's showing of a meritorious defense, there was an affidavit contrary to the garnishment affidavit, asserting that the garnishee was holding no assets of the judgment debtor, and the fact that supporting documentary evidence was attached thereto. As a consequence, we said:

> To allow a final judgment for more than $85,000 upon the basis of this record would clearly be a great injustice. The question is whether such an injustice should be perpetrated in the interest of judicial efficiency. We believe the cases we have cited, discussed, and quoted from above clearly hold such an injustice is not necessary in the interest of judicial efficiency.

10 Neb. App. at 960-61, 640 N.W.2d at 687.

This case is different and distinguishable from *Lee Sapp Leasing* in a number of ways. First, the three-page, single-spaced letter of May 28, 2010, by Foote to the clerk of the

district court leaves no doubt that Foote was in possession of the complaint, as he attempted a detailed refutation, paragraph by paragraph, of the complaint. Foote ended the letter by stating that "Transupport requests simple dismissal of this case on the side of [Transupport]." No dismissal occurred, but, rather, on June 3, the court entered and sent to Transupport a "Pretrial Progression Order Civil Docket." Importantly, in addition to explicitly setting a pretrial conference for 1 p.m. on August 5 at the Cuming County courthouse, the order said, "The pretrial conference shall be attended by the attorney that will act as lead counsel at the time of trial." Thus, Transupport was effectively told by the court, "Get a lawyer to appear for you!" Additionally, the ultimate issue in this case was whether Transupport was going to end up with the $30,000 or the nozzle (which it could return to inventory and sell again, as it had not been used)—a very different outcome from that which occurred with respect to the garnishee in *Lee Sapp Leasing.* In addition to ignoring the court's order setting the pretrial conference for August 5, Transupport ignored Turbines' motion to compel discovery, which was noticed for hearing at the time of the pretrial conference. Then Transupport ignored the court's order of August 5 setting the trial for November 29, which order was sent to Transupport given that counsel had not shown up to represent it at the pretrial conference as the court had directed. Finally, the court on November 29 remarked that while it could enter default, it wanted evidence on the merits. So, as opposed to the judgment in *Lee Sapp Leasing*, this was not a default, but a judgment on the merits after a trial. Given the above-recited course of events, the entry of this judgment is hardly the sort of "injustice" we found and reversed in *Lee Sapp Leasing*, 10 Neb. App. at 960, 640 N.W.2d at 687. The record is clear that Transupport failed to participate in court proceedings for several months. Despite having notice of hearings and trial, Transupport ignored the court's orders, failed to appear for trial, and cannot realistically claim that an injustice has occurred. Because Transupport, through its own fault and want of diligence, failed to protect its own interests, the district court did not abuse its discretion in overruling Transupport's motion to vacate.

*Motion for New Trial.*

[8] Transupport argues that the district court erred in denying its motion for new trial. However, in its argument, Transupport essentially repeats its argument regarding the motion to vacate judgment. A motion for new trial is a statutory remedy, and it can be granted by the court only upon the grounds specified by statute. *Cotton v. Gering Pub. Sch.*, 1 Neb. App. 1036, 511 N.W.2d 549 (1993). In its motion for new trial, Transupport set forth seven "reasons" for a new trial, which consisted of almost verbatim language from § 25-2001(4)—the statute giving the district court the power to vacate or modify its judgment or orders. The statute setting forth grounds for a new trial is § 25-1142. Transupport has neither identified nor argued any statutory basis under § 25-1142 that would justify a new trial. Therefore, under such circumstances, we could hardly conclude that the district court abused its discretion in denying Transupport's motion for new trial when no statutory ground for granting a new trial was identified and argued.

*Rescission.*

[9-11] Transupport argues that the district court erred in determining that Turbines was entitled to rescission. An action to rescind a written instrument is an equity action. *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990); *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985). Our review is de novo review upon appeal. See *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998). "Grounds for cancellation or rescission of a contract include, inter alia, fraud, duress, unilateral or mutual mistake, and inadequacy of consideration, which may arise from nonperformance of the agreement." *Eliker v. Chief Indus.*, 243 Neb. 275, 278, 498 N.W.2d 564, 566 (1993), citing 13 Am. Jur. 2d *Cancellation of Instruments* § 23 (1964). *Eliker, supra*, also holds that rescission is a proper remedy when the breach of contract is so substantial and fundamental as to defeat the object of the parties in making the agreement. *Eliker* involved a contract for construction of a house, but the nonperformance was such that the house that had been bargained for was uninhabitable for all practical purposes. In *Gallner v. Sweep Left, Inc.*, 203 Neb. 169, 277 N.W.2d 689 (1979), the

court said that where contractual promises are mutual and dependent, the failure of one party to perform authorizes the other to rescind the contract.

As is evident from the recitation of the chain of events between Transupport and Turbines, the core agreement between the parties was really quite simple: Transupport would deliver a specific nozzle and Turbines would pay $30,000 for it. There is no dispute that both parties performed their obligations under the contract—Turbines paid the agreed-upon price, and Transupport provided the specified nozzle. With this important premise in place, which plainly distinguishes *Eliker* from the instant case, we turn to the decision of the district court.

The district court's judgment of December 7, 2010, recites that evidence was adduced and that the court finds that "[Turbines] is entitled to rescission of its agreement with [Transupport]." The court did not articulate its grounds for granting rescission in its order, but did discuss its reasoning on the record at the close of the November 29 hearing. The court said that the contract underlying this action was "pretty much an oral contract with terms set forth as offered and accepted during the course of the correspondence, and [that] there may be some confusion in the minds of the parties as to what is meant by customer," but the court found that the evidence was pretty clear that the parties understood that the customer was somebody other than the two parties. The court then found that there was probably disagreement as to "the complete elements of the transaction which was never completed, and . . . that when [the parties] cannot do that," the equitable jurisdiction of the court can be used to allow rescission to return the parties to their former position. The former position of the parties is that Transupport would get back its nozzle and Turbines would have its $30,000 returned. The implicit, if not explicit, underpinning of the district court's decision is that part and parcel of the contract was that Turbines would be successful in exporting the nozzle to its customer.

We quote the heart of Turbines' argument that we should uphold the district court's decision granting rescission:

> [T]he record establishes all three requirements of U.C.C. § 2-615 and common law contractual principles related

> to supervening impracticability. The contract between Turbines and Transupport was "subject to inspection and acceptance" by Turbines' customer, Monarch; the supervening indictment of [Woodford and his wife] created the real possibility continued attempts to export the nozzle would subject Turbines to federal criminal liability; and the inability to export the nozzle to the intended customer through Turbines was an event both Turbines and Transupport assumed would not occur.

Brief for appellee at 20.

Initially, we note that comment 2 to Neb. U.C.C. § 2-615 (Reissue 2001) states, "This section excuses a seller from timely delivery of goods contracted for, where his or her performance has become commercially impracticable because of unforeseen supervening circumstances . . . ." While § 2-615 might excuse Turbines from delivery of the nozzle to Monarch, there is no failure of the seller, Transupport, to deliver, and as such, § 2-615 is not applicable to this case.

The second difficulty with Turbines' argument is that in the documents which arguably form the contract, there is no mention of Monarch or either of its indicted principals, Woodford and his wife. Thus, the premise of the argument that the nozzle was subject to inspection by Monarch is not borne out by the record. Rather, an e-mail from Kottman to Foote indicates that Kottman wrote, "The customer has requested the markings on the nozzle" and that Kottman apparently cut and pasted into his e-mail portions of an e-mail from the unidentified customer in response to pictures he had been sent of the nozzles—pictures we infer Turbines got from Transupport—which said, "[W]e would like to know exactly what is inscribed on each Nozzle, as this does not show up on the pix." Thus, on January 19, 2007, Foote e-mailed Kottman with data that he said represent "the extent of any/all text on the nozzles," which data we need not repeat. Foote closed simply with "Does that help?" and signed the e-mail as "Will." Then there is an e-mail correspondence of January 25 involving only Kottman, Woodford, and Tham Wei Min—who apparently was Turbines' contact or employee in Malaysia—wherein Woodford confirmed payment of $35,850 and provided specifics for shipment. The

correspondence ended with a transmittal from Tham Wei Min to Kottman stating, "Seemed that they are ready to move. Pls check remittance. Also note shipping instruction provided by Monarch." Neither Transupport nor Foote was involved in this latter correspondence.

This was followed by what appears to be a "Purchase Order" on a Turbines company form dated January 29, 2007, directed to Transupport, for the nozzle at a price of $30,000 and its shipment to Turbines via "UPS 2nd Day." Under the heading "Remarks," the document provides, "Company C of C" (certificate of conformance) and "Subject to Inspection and acceptance by customer." There is nothing in the purchase order or in the subsequent "Invoice," both of which are discussed in detail below, that says that the "customer" is Monarch rather than Turbines. Kottman testified that the phrase "Subject to Inspection and acceptance by customer" was placed on the purchase order as a result of discussions he had with Transupport, stating, "I had no use for the nozzle, I needed to send it to my customer so that he would accept it, and if for some reason it was unacceptable to the customer it would be returned to [Transupport]." But, there is no evidence that the nozzle was unacceptable either to Turbines or to Monarch. Rather, Turbines was informed by ICE that Woodford was involved in moving embargoed goods to Iran, which meant that Kottman, being informed of such activity, could be in violation of the sanctions imposed on Iran by the U.S. government. Kottman testified that Transupport knew that Turbines planned to export the nozzle to its customer in Asia, but he admitted that Transupport was never told the name of Turbines' customer; nor did Turbines introduce any other evidence that Transupport otherwise knew that Turbines intended to sell the nozzle to Monarch. Further, there is no evidence that Transupport knew, or had reason to know, that exportation by Turbines to Monarch or to Woodford and his wife was illegal, and such an eventuality was not part of the discussion that Kottman testified he had with Transupport about reasons for a potential rejection of the nozzle by the "customer" (irrespective of who that customer was).

However, the purchase order discussed above was not produced by Turbines from its records, but, rather, it

came "[t]hrough discovery from Transupport," according to Kottman. Kottman testified that additional language on the purchase order was not on the document when it was sent to Transupport—implying that such was added for purposes of this litigation sometime after the original was sent by Turbines. This typewritten addition to the purchase order, in what is clearly a different typeface, states, "Turbines . . . is Transupport's customer, acceptance/rejection is always at customer. This way if part is damaged or customer rejects it [sic] can be returned." However, this language is not determinative given that there is no evidence that Turbines' ability to export the nozzle to Monarch was part of the contract between the parties to this suit.

Transupport's invoice for the nozzle, mentioned above, is addressed to Turbines and dated February 2, 2007. It shows a "prepaid" amount of $30,000 and indicates "UPS-BLUE-INS" as, apparently, the shipping method. It also says, "Transupport is not the USPPI for this item." The evidence is that this is a Customs term for "[U.S.] principal party of interest" and that ICE requires every export of goods to have a "USPPI" designation. A certificate of conformance, or "C of C," signed by Foote provides, "No returns with out [sic] prior authorization. No returns after 90 days. Any authorized returns must be in original packaging as supplied by Transupport." The nozzle was not returned to Transupport within 90 days, but because the nozzle was under seizure by Customs, we do not believe that Turbines' failure to return it within such timeframe is determinative. All but one of the remaining exhibits from the November 29, 2010, trial deal with Customs' and the State Department's handling of the export problems that we have already detailed. The final exhibit is the "Criminal Docket for Case #: 1:03-cr-00070-SJ-2," which details the criminal prosecution of Woodford's wife. The exhibit shows that on January 15, 2003, a sealed indictment of her and Woodford was filed in the U.S. District Court for the Eastern District of New York and that such indictment was ordered unsealed on August 24, 2007, which was some 6 months after Turbines and Transupport made their deal and while the nozzle was tied up by Customs.

[12] Of the grounds for rescission outlined in *Eliker v. Chief Indus.*, 243 Neb. 275, 498 N.W.2d 564 (1993), Turbines makes no claim of fraud, duress, or inadequacy of consideration. Thus, we turn to Turbines' claim of supervening impracticability or "supervening frustration" from the Restatement (Second) of Contracts § 265 (1981):

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which *was a basic assumption on which the contract was made*, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

(Emphasis supplied.) In the Restatement's comment *a.* to § 265, the "rationale" is explained as "[t]his section deals with the problem that arises when a change in circumstances makes one party's performance virtually worthless to the other . . . ." Accordingly, Turbines argues that because it could not export the nozzle to Monarch, it was worthless to Turbines and the contract with Transupport for its purchase should be rescinded. However, it is apparent that whether § 265 is applicable to this case is dependent on whether the "basic assumption" on which the parties' contract was made included the fact that Turbines would be able to successfully export the nozzle to its customer in Asia, generally, or in particular, to export it to Monarch. Given Kottman's admission that he never advised Transupport that the ultimate purchaser was Monarch, it is impossible to say that a "basic assumption" of the contract was Turbines' ability to export the nozzle to Monarch. There was no evidence that Turbines could not export it to Malaysia—in fact, Turbines' evidence establishes that the nozzle was a "dual use" item which could be exported to Malaysia—just not to Monarch or to Woodford and his wife.

Thus, the question becomes whether Transupport's generalized knowledge that Turbines intended to resell the nozzle to a customer in Asia is sufficient to find supervening frustration under § 265 of the Restatement. We find that the answer is in the negative. Transupport's generalized knowledge of Turbines' intent to export the nozzle to someone in Asia is patently

insufficient given that the evidence adduced by Turbines shows that the nozzle, as a "dual use" item, is in fact exportable—just not to Monarch. But that was because of ICE's belief that Woodford and his wife were moving embargoed goods to Iran, an eventuality not covered by the contract documents.

Moreover, when we bear in mind that rescission is an equitable doctrine, we find that the equities here cut against allowing rescission. First, the evidence shows that while Transupport required prepayment from Turbines, Turbines did the same as to Monarch—and at a $5,850 markup. The evidence is that while the nozzle is considered "obsolete," there is a market as well as buyers for it in the worldwide market in which Turbines operates. In the final analysis, the equities do not favor rescission.

[13] *Eliker v. Chief Indus.*, 243 Neb. 275, 498 N.W.2d 564 (1993), suggests that a unilateral mistake can be a basis for rescission and, by inference, that Turbines made a unilateral mistake in believing it could export the nozzle to Monarch. If there was any mistake, it was Turbines' mistaken belief that it could export the nozzle to Monarch. And, such mistake would be unilateral because Transupport never knew who Turbines' Asian purchaser was. However, even if Turbines made a unilateral mistake, relief by way of rescission is still not warranted:

> The essential conditions to relief from a unilateral mistake by rescission are: The mistake must be of so fundamental a nature that it can be said that the minds of the parties never met *and that the enforcement of the contract as made would be unconscionable*. The matter as to which the mistake was made must relate to the material feature of the contract. The mistake must have occurred notwithstanding the exercise of reasonable care by the party making it. Relief by way of rescission must be without undue prejudice to the other party, except for the loss of his bargain.

*School District v. Olson Construction Co.*, 153 Neb. 451, 459-60, 45 N.W.2d 164, 168 (1950) (emphasis supplied). Here, we cannot say that enforcement of the contract would be unconscionable. During the trial, Kottman testified as follows:

THE COURT: You indicated initially that at one time you had nozzles like this in your warehouse?
THE WITNESS: Yes.
THE COURT: And you disposed of them?
THE WITNESS: Yes.
THE COURT: Because they were obsolete?
THE WITNESS: Yes. Big mistake.
THE COURT: Didn't know that there was a market for them out there, huh?
THE WITNESS: No, I didn't.

Earlier in his testimony, Kottman was speaking about obsolete warehouse inventory and said that "sometimes there's just a remote operator in some part of the world that might have an engine that's just an old obsolete engine" so "once in a while [one] just find[s] an opportunity to sell to a customer [to whom one] otherwise just would never sell." Therefore, even if Turbines could not export the nozzle to Monarch, it is clear from Kottman's testimony that the nozzle is potentially marketable to others, even if that market is limited. Kottman testified that based on "experience," he knew that this particular nozzle was a dual use item and would not ultimately require an export license. In short, according to Kottman, it was a mistake not to have the nozzle in his inventory, there are potential customers for the nozzle, and it is exportable because it is a dual use item. And, under *School District, supra*, the mistake that was made must relate to the material feature of the contract. Turbines' ability to export the nozzle to Monarch or to Woodford and his wife was simply not a "material feature" of the contract between Turbines and Transupport. Thus, we cannot say that enforcement of the contract would be unconscionable.

## CONCLUSION

After our de novo review of the record, we find that the evidence and the applicable law do not support the district court's decision granting Turbines rescission of its contract with Transupport. Therefore, the decision of the district court is reversed, and the cause is remanded to the district court with directions to dismiss the complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

# DANIEL T. MEIS, APPELLANT, V. ROBERT HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEE.

808 N.W.2d 897

Filed January 31, 2012. No. A-11-386.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo. It accepts all the factual allegations in the complaint as true and draws all reasonable inferences for the nonmoving party.
2. **Constitutional Law: Property.** To establish a takings claim under either the U.S. or Nebraska Constitution, it is axiomatic that the claimant must have been deprived of some property right.
3. **Constitutional Law: Prisoners.** While prisoners do not shed all constitutional rights at the prison gate, lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights.
4. **Prisoners: Property.** A state has a compelling interest in maintaining security and order in its prisons and, to the extent that it furthers this interest in reasonable and nonarbitrary ways, property claims by inmates must give way.
5. ____: ____. A prisoner does not enjoy the unqualified right to possess property while in prison.
6. ____: ____. An inmate is not deprived of ownership of property when forced to send property out of prison so long as he or she retains the ability to exercise some degree of choice as to its destination.
7. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.
8. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of the 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.
9. **Mandamus.** A court issues a writ of mandamus only when (1) the relator has a clear right to the relief sought, (2) a corresponding clear duty exists for the respondent to perform the act, and (3) no other plain and adequate remedy is available in the ordinary course of law.
10. **Jurisdiction: Appeal and Error.** If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
11. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed in part, and in part vacated and dismissed.

Daniel T. Meis, pro se.

Jon Bruning, Attorney General, and Linda L. Willard for appellee.

INBODY, Chief Judge, and CASSEL and PIRTLE, Judges.

CASSEL, Judge.

## INTRODUCTION

Daniel T. Meis, an inmate at the Nebraska State Penitentiary, appeals from the order of the district court dismissing his complaint against Robert Houston, the director of the Nebraska Department of Correctional Services (the Department), in which Meis challenged a new limitation on the amount of property that an inmate can possess. Because Meis does not enjoy a right to the possession of property while in prison, the district court did not err in failing to grant declaratory judgment or in finding that there was no taking. We similarly find no error in the court's decision not to grant mandamus. However, to the extent the district court considered the decision of the Department of Correctional Services Appeals Board (Appeals Board), which appeal was not timely filed, we vacate the district court's order for lack of jurisdiction. Accordingly, we affirm in part, and in part vacate and dismiss.

## BACKGROUND

The facts of this case are not in dispute.

On September 24 and November 1, 2009, the Department revised administrative regulation No. 204.01(III)(A)(13) and operational memorandum No. 204.001.110(V)(D)(9), respectively, to limit the amount of personal property that can be possessed by an inmate to 4 cubic feet. Neither the revisions nor the original rules were promulgated pursuant to the Administrative Procedure Act. Under the revised rules, an inmate is given the choice to dispose of any excess property by shipping it to a location designated by the inmate or by having it picked up by an approved visitor. For inmates at the state penitentiary, excess property that is not removed within 30 days will be destroyed or donated to charity. Inmates in Meis' housing unit at the state penitentiary were notified on June 9, 2010, that this new property limitation would take effect on July 12.

On July 13, 2010, a case manager at the state penitentiary approached Meis and ordered him to place his personal property into a plastic tub to determine if it was less than 4 cubic feet. Meis refused. The case manager filed a misconduct report. The disciplinary committee found Meis guilty of disobeying an order and sentenced him to "7 days [of] bunk restriction." This misconduct was later dismissed and expunged from his record.

On July 14, 2010, the case manager again approached Meis and ordered him to place his personal property into a plastic tub. Meis again refused. The case manager filed a second misconduct report, in response to which the disciplinary committee again held a hearing, found Meis guilty of disobeying an order, and sentenced him to 7 days of segregation. Meis appealed this disciplinary committee decision to the Appeals Board, which upheld his punishment for disobeying an order.

While Meis was serving his time in segregation, his property was sent to storage. Upon release, Meis retrieved his property and found several items to be missing. He was presented with a "Notice of Excess Property" informing him that these items were either not allowed or in excess of the new property limit. This form, dated July 26, 2010, also notified Meis that he had 30 days to remove the property from the state penitentiary before it would be "destroyed or donated to charity." Meis refused to sign the "Notice of Excess Property" to acknowledge its receipt. On July 26, Meis also received a "Property Release Form" giving him the opportunity to designate an individual to whom the excess or contraband property could be released. Meis refused to designate an individual to receive his property. When Meis filed a grievance in early September requesting that his property be returned, he was informed that it had been held for 30 days and then destroyed when he failed to exercise his option to have the property sent out of the facility.

Meis subsequently filed a complaint with the district court for Lancaster County, Nebraska, asking for a declaratory judgment declaring the property limitation to be invalid, for a writ of mandamus ordering the Department to promulgate the property limitation under the Administrative Procedure Act, for a reversal of the Appeals Board decision, and for damages. In

response, Houston filed a motion to dismiss, arguing that the complaint failed to state a cause of action upon which relief could be granted. After a hearing at which briefs were submitted, the district court found that the property limitation was not required to be promulgated pursuant to the Administrative Procedure Act, because it fell within the internal management exception of Neb. Rev. Stat. § 84-901(2) (Reissue 2008), and that the limitation did not constitute an illegal taking. It ruled that Meis' complaint did not state a cause of action for declaratory relief, mandamus, or damages and that his complaint did not support a reversal of the decision of the Appeals Board. Consequently, the district court sustained the motion to dismiss.

Meis timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

## ASSIGNMENTS OF ERROR

Meis alleges, restated and reordered, that the trial court erred (1) in ruling that there was no taking that required just compensation, (2) in finding that Meis was not entitled to declaratory judgment under Neb. Rev. Stat. § 84-911 (Reissue 2008), (3) in finding that Meis had no right to mandamus, and (4) in sustaining the decision of the Appeals Board. Meis also alleges that Neb. Rev. Stat. § 83-4,111 (Reissue 2008) and 68 Neb. Admin. Code, ch. 7, § 008 (2008), are unconstitutional.

## STANDARD OF REVIEW

[1] An appellate court reviews a district court's order granting a motion to dismiss de novo. It accepts all the factual allegations in the complaint as true and draws all reasonable inferences for the nonmoving party. *Roos v. KFS BD, Inc.*, 280 Neb. 930, 799 N.W.2d 43 (2010).

## ANALYSIS

*Whether Property Limitation Is Taking.*

Meis alleges that the district court erred in ruling that the property limitation did not affect a taking under the U.S. or Nebraska Constitution. The Fifth Amendment to the U.S. Constitution provides that private property will not be taken

for public use without just compensation. Neb. Const. art. I, § 21, is slightly broader in its protection and states that "[t]he property of no person shall be taken or damaged for public use without just compensation therefor." The district court ruled that the property limitation did not result in a taking under either provision. We agree.

We note at the outset that Meis' argument does not turn upon—indeed, does not even mention—the fact that his excess property was ultimately destroyed pursuant to the property limitation rule. He argues instead that merely denying him the use of his excess property was a taking. As such, we do not address whether the property limitation rule affects a taking to the extent that it results in the destruction of property, but limit our analysis to the provisions of the property limitation rule that require inmates to send excess property out of the prison.

[2] To establish a takings claim under either the U.S. or Nebraska Constitution, it is axiomatic that the claimant must have been deprived of some property right. *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009). Meis argues that he was deprived of the ownership, possession, and use of his property. However, because Meis does not have a protected property interest in the possession or use of property while in prison and because he was not deprived of ownership of the excess property, his claim under the Takings Clause is without merit.

[3] "While prisoners do not shed all constitutional rights at the prison gate, '"'[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights.'"'" *Martin v. Curry*, 13 Neb. App. 171, 176, 690 N.W.2d 186, 192 (2004) (quoting *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995)).

[4] One of the rights limited upon incarceration is the right to property. The U.S. Supreme Court has held that a prisoner's right against the deprivation of property without due process of law is "not absolute." *Bell v. Wolfish*, 441 U.S. 520, 554, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). Rather, this property right is "subject to reasonable limitation or retraction in light of the legitimate security concerns of the institution." *Id.* Indeed,

a state has a compelling interest in maintaining security and order in its prisons and, to the extent that it furthers this interest in reasonable and nonarbitrary ways, property claims by inmates must give way. *Sullivan v. Ford*, 609 F.2d 197 (5th Cir. 1980).

[5] In limiting prisoners' property rights, the 10th Circuit has drawn a distinction between the right to own property and the right to possess property while in prison—a prisoner's right to *own* property is protected; the right to *possess* property while in prison is not. See, *Searcy v. Simmons*, 299 F.3d 1220 (10th Cir. 2002); *Hatten v. White*, 275 F.3d 1208 (10th Cir. 2002). Even though these cases arose in the due process context, we believe that the same distinction between ownership and possession applies in the context of takings. If penological interests justify the limitation of due process property rights, those same penological interests will justify a limitation of the property rights guaranteed by the Takings Clause. Therefore, we now adopt this distinction and hold that a prisoner does not enjoy the unqualified right to possess property while in prison.

If a prisoner is not guaranteed the right to possess property while in prison, it follows that he will not enjoy the right to use property either, which right necessarily depends upon the ability to possess property. The cases to which Meis cites for the proposition that denying use of property is a taking both pertain to regulatory takings and involve real property, and we consequently find them to be inapplicable in the context of the taking of a prisoner's personal property. Additionally, we have found no cases that recognize a prisoner's right to the use of personal property. As such, we are not persuaded by Meis' argument that he has a right to the use of his property while in prison.

[6] Having established that a prisoner's right to the possession and use of property while in prison is limited, we turn to the property right that inmates do retain—the right to own property. In determining whether the property limitation interferes with the right of ownership, we again find the 10th Circuit's due process property rights jurisprudence to be instructive and applicable. In *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991),

the 10th Circuit held that requiring an inmate to send property out of prison to a place he could designate did not "deprive" the inmate of the property because he retained control over it. Similarly, in *Hatten v. White, supra*, the 10th Circuit held that an inmate was not deprived of his property because he was allowed to send it to a place of his choosing. From these cases, we conclude that an inmate is not deprived of ownership of property when forced to send property out of prison so long as he or she retains the ability to exercise some degree of choice as to its destination. We note that this approach has also been adopted by the Supreme Court of Appeals of West Virginia and the U.S. District Court for the District of Minnesota. See, *Pyron v. Ludeman*, Nos. 10-3759, 10-4236, 2011 WL 3293523 (D. Minn. June 6, 2011); *State ex rel. Anstey v. Davis*, 203 W. Va. 538, 509 S.E.2d 579 (1998).

As was the case in *Williams v. Meese, supra*, and *Hatten v. White, supra*, Meis was given choices under the property limitation rule. He was given the option of sending his property to a designated address or having someone pick it up. Because it gave him these options, the property limitation rule did not deprive Meis of ownership of the excess property, but merely its possession and use, to which we have already determined he has no right.

Because Meis' right to possess and use property was limited upon his incarceration and because the property limitation does not affect property ownership, he has not established that the property limitation deprived him of a protected property interest. Therefore, his takings claim must fail.

*Declaratory Judgment.*

Under § 84-911, the validity of any rule or regulation may be determined upon a petition for a declaratory judgment thereon addressed to the district court for Lancaster County if it appears that the rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner. We need not reach the validity of the property limitation, however, because Meis is not entitled to declaratory judgment by virtue of the fact that the property limitation does

not interfere with or impair any legally recognized rights or privileges of Meis.

Meis argues that the property limitation affects his right to possess, use, and own property, but we are not convinced by his arguments. First, as we held above, Meis does not have a legal right to the possession of property while in prison. Because he has already forfeited his right to the possession of property as an inmate, the property limitation cannot be said to interfere with or impair that right. Second, if Meis has forfeited his right to possess property, he has also given up his right to use property while in prison, a right which cannot be exercised without possession. Finally, we have already determined that the property limitation does not interfere with Meis' right to own property.

[7] Because the property limitation does not interfere with or impair Meis' rights to the possession, use, or ownership of property, he is not entitled to declaratory judgment under § 84-911. We need not address whether the property limitation falls within the internal management exception of § 84-901(2). An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Jackson v. Brotherhood's Relief & Comp. Fund*, 273 Neb. 1013, 734 N.W.2d 739 (2007).

[8] Upon our de novo review of this assignment of error, we reach the same conclusion as the district court, but for a different reason. Where the record adequately demonstrates that the decision of the 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. *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009). Therefore, we affirm.

*Right to Mandamus.*

[9] Meis next alleges that the district court erred in finding that he had no right to mandamus. A court issues a writ of mandamus only when (1) the relator has a clear right to the relief sought, (2) a corresponding clear duty exists for the respondent to perform the act, and (3) no other plain and adequate remedy is available in the ordinary course of law.

*Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 794 N.W.2d 685 (2011).

Meis contends that § 83-4,111 gives him a right "to a determination of which rights he lost and retained as a result of his felony conviction but also to the promulgation of that determination (upon his commitment)." Brief for appellant at 16. Section 83-4,111(1) demands that the Department "adopt and promulgate rules and regulations to establish criteria for justifiably and reasonably determining which rights and privileges an inmate forfeits upon commitment and which rights and privileges an inmate retains." We do not read this language as establishing a right in inmates to a determination of which rights they retain upon commitment.

Meis further argues that § 83-4,111 creates a duty on the part of Houston to promulgate "rules and regulations regarding inmate rights." Brief for appellant at 16. We agree with Meis to the extent that § 83-4,111 requires the Department to promulgate rules and regulations that establish criteria for determining which rights and privileges an inmate forfeits upon commitment. However, the Department has already promulgated the rules required by this statute—68 Neb. Admin. Code, chs. 1 through 9 (2008). Therefore, the Department's duty under § 83-4,111 has been fulfilled.

Because Meis has no clear right under § 83-4,111 and because the Department has already fulfilled its duty to promulgate rules pursuant to § 83-4,111, he has no right to mandamus. The district court properly ruled that Meis' complaint did not state a cause of action for mandamus.

*Decision of Appeals Board.*

Meis also alleges that the district court erred in sustaining the decision of the Appeals Board upholding his punishment for disobeying a direct order. However, the district court did not actually sustain the Appeals Board decision. It simply declared that Meis' complaint did not "support reversal of the decision of the [Appeals] Board." We therefore take Meis' assignment of error as challenging this decision of the district court.

[10] Because Meis' petition to review the Appeals Board decision was not timely filed, the district court had no

jurisdiction to review the Appeals Board decision. Pursuant to Neb. Rev. Stat. § 84-917(2)(a)(i) (Cum. Supp. 2010), Meis could institute proceedings for review of the Appeals Board decision "by filing a petition in the district court . . . within [30] days after the service of the final decision by the agency." The Appeals Board decision was sent to Meis on September 3, 2010, but his complaint was not filed with the district court until October 26, more than 30 days after the decision was sent to him. Therefore, because Meis' petition for review was not timely filed, the district court lacked jurisdiction to review the Appeals Board decision. Consequently, we also lack jurisdiction to review this assignment of error. If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008). We vacate the district court's order to the extent it considered the decision of the Appeals Board.

*Constitutional Challenge to § 83-4,111 and 68 Neb. Admin. Code, ch. 7, § 008.*

[11] Finally, Meis alleges that § 83-4,111 and 68 Neb. Admin. Code, ch. 7, § 008, are unconstitutional delegations of the State Legislature's authority. We refuse to address this assignment of error on appeal, however, because Meis did not raise this issue before the district court. Neither did the district court rule upon the constitutionality of § 83-4,111 and 68 Neb. Admin. Code, ch. 7, § 008. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *Robinson v. Dustrol, Inc.*, 281 Neb. 45, 793 N.W.2d 338 (2011). Because the district court did not rule on these matters, Meis cannot assert them for the first time in this appeal.

## CONCLUSION

Because Meis had no right to possession of property while in prison and because the property limitation preserved his right to ownership by giving him the choice of where to send his excess property, we affirm the decisions of the district court that there was no taking and that Meis was not entitled to declaratory judgment. Because Meis has no clear right under

§ 83-4,111, we also affirm the district court's decision that he was not entitled to mandamus. However, because Meis' request for review was not timely filed with the district court under the Administrative Procedure Act, we lack jurisdiction to review the Appeals Board decision and vacate the district court's order to the extent it reviewed this decision. Finally, because Meis did not raise the issue of constitutionality before the district court, we do not consider his challenge to § 83-4,111 and 68 Neb. Admin. Code, ch. 7, § 008.

AFFIRMED IN PART, AND IN PART VACATED AND DISMISSED.

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DONNA BENELL, GUARDIAN AND CONSERVATOR OF LESTER MCMURRY, AN INCAPACITATED PERSON, APPELLEE, V. MARY ROSS, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHERI KOINZAN, DECEASED, APPELLANT.

808 N.W.2d 657

Filed February 7, 2012. No. A-11-279.

1. **Deeds: Equity.** An action to set aside a deed sounds in equity.
2. **Deeds: Mental Competency: Proof.** To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he could not understand and comprehend the purport and effect of what he was then doing.
3. **Deeds: Contracts: Mental Competency.** In determining the mental capacity of the grantor to execute an instrument, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of the property dealt with and what he proposed to do with it, and had the capacity to decide intelligently whether or not he intended to make the conveyance, it cannot be found that the grantor was incompetent to execute the instrument.
4. ____: ____: ____. The test for capacity to execute a deed is not whether the grantor understood all the legal phraseology of a contract.

Appeal from the District Court for Custer County: KARIN L. NOAKES, Judge. Reversed.

Tim W. Thompson and Angela R. Shute, of Kelley, Scritsmier & Byrne, P.C., for appellant.

Julianna S. Jenkins, of Sennett, Duncan & Jenkins, P.C., L.L.O., for appellee.

IRWIN, MOORE, and CASSEL, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Donna Benell (Donna), the guardian and conservator of Lester McMurry (Lester), brought an action to set aside a 2005 deed of a farm located in Logan County, Nebraska. In the deed, Lester reserved a life estate in the farm for himself and gave the farm to his longtime friend, Cheri Koinzan (Cheri), upon his death. Donna alleged, among other things, that Lester lacked the mental capacity to execute such a deed. After a trial, the district court entered an order finding that Lester "lacked the requisite mental capacity to execute" this particular deed. The court granted Donna's motion and set aside the deed. A few weeks after the trial, Cheri died. The personal representative of Cheri's estate, Mary Ross, appealed from the district court's order.

Upon a de novo review, we conclude that although there was conflicting evidence presented concerning Lester's capacity to execute the deed, the district court found that he was capable of understanding "the concept of giving property away" and the effect of a simple deed of conveyance. Such a finding is sufficient to establish that Lester had the capacity to execute the deed. As such, we reverse the district court's order setting aside the deed.

## II. BACKGROUND

Lester has been diagnosed with moderate mental retardation. He is able to live on his own and is capable of carrying out various farming work. However, as a result of his mental status, he does require assistance with such things as managing his finances, dealing with certain health issues, and making plans for the future.

Lester's longtime friend, Cheri, assisted him for many years. She handled his financial affairs, helped him deal with his diabetes, and assisted him with furnishing and decorating his home. She also assisted him with his estate planning. In 2005,

Cheri took Lester to a lawyer to discuss Lester's executing a will and other estate planning documents. As a result of his meeting with the lawyer, on April 21, 2005, Lester executed a deed giving Cheri his farmland in Logan County, subject to a life estate he reserved for himself.

A few years after Lester executed this deed, Cheri became very ill and was unable to continue to assist him on a regular basis. As a result of Cheri's illness, Donna, Lester's niece, began to assist him with his affairs and was eventually appointed as his guardian and conservator. Donna learned about the deed Lester executed in April 2005 "[t]hrough the grapevine" and filed an action to set aside the deed on the grounds that Lester was not mentally competent to execute such a document, that Cheri exercised undue influence over Lester, and that Cheri induced Lester to execute the deed through fraudulent misrepresentation.

In February 2011, a trial was held concerning Donna's allegations about the deed to the farm. At the trial, both Donna and Cheri presented a great deal of evidence which focused primarily on whether Lester had the mental capacity to execute a deed in April 2005. We have reviewed the evidence presented by the parties in its entirety. However, because all of the parties are familiar with the facts of the case, we decline to provide a detailed recitation of that evidence here. Instead, we will refer to the evidence as necessary in our analysis below.

The district court entered an order in this matter on March 17, 2011. In the order, the court concluded that Lester lacked the capacity to execute the April 21, 2005, deed. The pertinent language of the trial court's order reads as follows:

> This court believes [Lester] is legally capable of understanding the nature and effect of a simple deed of conveyance. Despite the legalese often contained in transfer documents, the concept of giving property away would not have been too difficult for [Lester] to understand.
>
> However, the deed at issue was a little more complicated. This was a nonrevocable deed that reserved a life estate in [Lester]. It is certainly clear to this court that [Lester] wanted [Cheri] to have his land when he died. However, this court does not believe [Lester]

> could comprehend what would happen to his land if [Cheri] predeceased him. The evidence clearly shows that [Lester] has limited mental abilities. [Lester has been diagnosed] with mental retardation and [there was evidence presented] that persons with moderate mental retardation function at the level of a 2nd grader. [Lester] might understand simple concepts like giving away property but it is doubtful [he] had a full comprehension of the effect of his signing this particular deed. Therefore, the court finds that [Lester] lacked the requisite mental capacity to execute this deed.

The court granted Donna's request to set aside the April 21, 2005, deed.

A few weeks after the trial, Cheri died. The personal representative of Cheri's estate, Ross, filed this appeal from the district court's order setting aside the April 21, 2005, deed. In order to eliminate any confusion, however, we will continue to refer to Cheri as the party who is opposing the motion to set aside the deed.

## III. ASSIGNMENT OF ERROR

We consolidate and restate Cheri's three assignments of error into one. Cheri contends that the district court erred when it ruled that because this particular deed, executed by Lester, contained a life estate reserved for him, he lacked the requisite mental capacity to execute the deed.

## IV. STANDARD OF REVIEW

[1] An action to set aside a deed sounds in equity. *Schmidt v. Feikert*, 10 Neb. App. 362, 631 N.W.2d 537 (2001). In an appeal of an equitable 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, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

## V. ANALYSIS

On appeal, Cheri argues that the district court erred in finding that Lester lacked the requisite mental capacity to execute the April 21, 2005, deed and in granting Donna's motion to set aside that deed. Specifically, Cheri asserts that Donna did not present sufficient evidence to demonstrate that Lester lacked the mental capacity to execute the deed because there was overwhelming evidence presented to the contrary. Cheri also asserts that the district court erred in determining that this deed, in particular, was too difficult for Lester to adequately understand.

Upon our de novo review of the record, we conclude that Cheri's assertions have merit. Although there was conflicting evidence presented concerning Lester's capacity to execute the deed, the district court found that Lester was capable of understanding "the concept of giving property away" and the effect of a simple deed of conveyance. Such a finding is sufficient to establish that he had the capacity to execute the April 21, 2005, deed. As such, we reverse the district court's order setting aside that deed.

[2,3] The Nebraska Supreme Court has held that in order to set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he could not understand and comprehend the purport and effect of what he was then doing. *Marston v. Drobny*, 166 Neb. 747, 90 N.W.2d 408 (1958). The court has further explained that in determining the mental capacity of the grantor to execute an instrument, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of the property dealt with and what he proposed to do with it, and had the capacity to decide intelligently whether or not he intended to make the conveyance, it cannot be found that the grantor was incompetent to execute the instrument. *Id.*

The parties presented conflicting evidence concerning Lester's capacity to execute the April 21, 2005, deed. Cheri presented evidence which demonstrated that Lester understood

the nature and extent of the farm at issue, that he wanted to give his farm to Cheri after his death, and that he understood what he was doing when he signed the deed. At the trial, Jon Schroeder, the attorney who assisted Lester with the execution of the deed, testified that he went to great lengths to ensure that Lester understood what he was doing when he signed the deed. Schroeder indicated that he spent a great deal of time with Lester and explained the various options for the farm after Lester's death. Schroeder testified that Lester understood these options and chose to keep a life estate and grant the farm to Cheri upon his death. Schroeder also testified that when Lester returned to his office a second time to sign all of the documents, Schroeder again explained to Lester in great detail the effect of the deed and all of his other options. In addition to Schroeder's testimony, various members of Lester's community, including Cheri, testified that Lester often talked about wanting to ensure that Cheri received the farm upon his death. A psychologist who examined Lester indicated that he is capable of understanding the concept of giving something away.

To the contrary, Donna presented evidence that Lester did not understand or appreciate the effect of signing the April 21, 2005, deed. Donna presented evidence to establish that Lester could not understand the intricacies of signing the deed no matter how much explanation was provided to him. In addition, there was evidence that Lester did not even remember signing the deed. At trial, Lester seemed unsure about whether he wanted to give the farm to Cheri and could not provide a clear answer about his understanding of the deed. In addition, there was evidence that Lester was easily manipulated and would often agree to do things simply to please others.

As we explained above, where credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Schmidt v. Feikert*, 10 Neb. App. 362, 631 N.W.2d 537 (2001). Here, after considering the conflicting evidence presented by the parties, the district court found that Lester is "legally capable of understanding

the nature and effect of a simple deed of conveyance" and that "the concept of giving property away would not have been too difficult for [Lester] to understand." The court also found that it is clear that Lester wanted Cheri to have the farm when he died. There is sufficient evidence in the record to support these findings.

Despite the district court's findings that Lester was capable of understanding and comprehending the purport and effect of giving away property and that he knew what he was doing when he gave the farm to Cheri, the trial court determined that Lester did not have the capacity to execute the April 21, 2005, deed because that deed was more complicated than a simple deed of conveyance and Lester is not capable of understanding "what would happen to his land if [Cheri] predeceased him." Essentially, the district court concluded that even though Lester had the capacity to execute a deed giving his farm to Cheri, he did not have the capacity to execute this particular deed because it involved Lester's retaining a life estate in the farm prior to giving it away to Cheri upon his death.

[4] We conclude that the district court erred in determining that although Lester had the mental capacity to execute a deed, he did not have the capacity to execute this deed. It appears that in making its determination, the district court applied a more stringent test for capacity than is warranted by the case law discussed thoroughly above. We note that the parties do not point us to any authority to support the district court's conclusion that Lester must understand every possible future circumstance concerning the farm's disposition in order to have the capacity to execute the deed. In addition, the Illinois Supreme Court in *Bordner v. Kelso*, 293 Ill. 175, 186-87, 127 N.E. 337, 341 (1920), put it accurately and succinctly when it held that the test for capacity to execute a deed is not whether the grantor understood all the "legal phraseology of a contract." Whether a grantor appreciates the meaning of "legal phraseology is a matter of education rather than mental competency." *Id.* at 187, 127 N.E. at 341. We are convinced Lester knew what his rights were in executing the April 21, 2005, deed and that the farm would pass to Cheri upon his death, even though

he may not have been able to provide the legal definition of the terms "life estate" or "remainder."

Upon our de novo review, we conclude there is sufficient evidence in the record to establish that Lester understood that by signing the April 21, 2005, deed, he was giving his farm away upon his death, and that he wanted to give the farm to Cheri. In addition, there was ample testimony to demonstrate that Lester understands what it means to give something away. The fact that he executed a more "complicated" deed in order to retain possession of the farm until his death does not, by itself, demonstrate that he lacked the mental capacity to appreciate what he was doing when he signed the deed.

In light of the district court's factual findings, we conclude that the district court erred in finding that Lester lacked the mental capacity to execute the April 21, 2005, deed and, as a result, erred in setting aside that deed.

## VI. CONCLUSION

Upon our de novo review of the record, we conclude that although there was conflicting evidence presented concerning Lester's capacity to execute the April 21, 2005, deed, the district court found that Lester was capable of understanding "the concept of giving property away" and the effect of a simple deed of conveyance. Such a finding is sufficient to establish that Lester had the capacity to execute the deed. As such, we reverse the district court's order setting aside the deed.

REVERSED.

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STATE OF NEBRASKA, APPELLEE, V.
PAUL W. MICK, APPELLANT.
808 N.W.2d 663

Filed February 14, 2012. Nos. A-11-235, A-11-236.

1. **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.

2. ____: ____. If it is more appropriate to dispose of an ineffectiveness claim because of the lack of sufficient prejudice, that course should be followed.
3. **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.
4. **Sentences.** In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
5. ____. 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.
6. ____. In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
7. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
8. **Criminal Law: Restitution: Damages.** Neb. Rev. Stat. § 29-2280 et seq. (Reissue 2008) vests trial courts with the authority to order restitution for actual damages sustained by the victim of a crime for which the defendant is convicted.
9. ____: ____: ____. Pursuant to Neb. Rev. Stat. § 29-2281 (Reissue 2008), before restitution can be properly ordered, the trial court must consider: (1) whether restitution should be ordered, (2) the amount of actual damages sustained by the victim of a crime, and (3) the amount of restitution a criminal defendant is capable of paying.
10. **Criminal Law: Restitution: Damages: Proof.** The language of Neb. Rev. Stat. § 29-2281 (Reissue 2008) and the case law require appropriate sworn documentation to support both the actual damages sustained by the victim and the defendant's ability to pay restitution.
11. **Restitution: Appeal and Error.** On appeal, an appellate court does not endeavor to reform the trial court's order. Rather, the appellate court reviews the record made in the trial court for compliance with the statutory factors which control restitution orders.

Appeals from the District Court for Gage County: PAUL W. KORSLUND, Judge. Affirmed in part, sentence of restitution vacated, and cause remanded with directions.

Franklin E. Miner for appellant.

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

INBODY, Chief Judge, and SIEVERS and PIRTLE, Judges.

INBODY, Chief Judge.

## INTRODUCTION

Paul W. Mick appeals his plea-based convictions and sentences in Gage County District Court in two separate criminal cases, which have been consolidated for review on appeal. Pursuant to Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008), this case was submitted without oral argument.

## STATEMENT OF FACTS

In the first case, on October 1, 2010, at approximately 1:30 a.m., Beatrice police officers were dispatched to a business in response to a report of a broken-out garage door. Upon arrival at the scene, officers observed a shattered overhead door and a license plate in the driveway near the door. A restored 1968 Ford Fairlane 500 was determined to be missing from the business. An hour later, a deputy with the Gage County sheriff's office observed the vehicle and attempted to initiate a traffic stop of the vehicle, but was unsuccessful, and a pursuit of the vehicle ensued. Beatrice police officers deployed mechanical tire deflators, which the vehicle ran over and continued. When the vehicle came to a stop shortly thereafter, the driver exited the vehicle and took off running on foot. The deputy chased and eventually stopped the driver, later identified as Mick. Officers observed alcohol containers in the vehicle, and during an interview with the deputy, Mick admitted to driving under the influence.

In the second case, the Beatrice Police Department was dispatched to a convenience store regarding possible fraud involving Mick's attempt to cash a check for $635 on another individual's checking account, which check was later discovered missing. The individual believed that Mick was the only individual who had access to her checkbook. During an interview with police, Mick admitted that he stole the check, filled it out for $635, and attempted to cash it at the convenience store.

As a result of these incidents, Mick was charged with eight counts in the first criminal case and one count in the second case. Those counts included the following: burglary, theft by receiving stolen property, operating a motor vehicle to avoid

arrest, willful reckless driving, obstructing a peace officer, driving under the influence, refusal to submit to a preliminary breath test, refusal to submit to a chemical test, and second degree forgery (more than $300 but less than $1,000).

Pursuant to a plea agreement with the State, Mick pled no contest to burglary, operating a motor vehicle to avoid arrest, driving under the influence, and second degree forgery. The State moved to dismiss the remaining charges, Mick agreed to a civil judgment of restitution in the amount of $12,469.74, and the parties agreed that they would jointly recommend a sentence of 14 to 15 years' imprisonment for the burglary charge. The district court accepted Mick's pleas, and Mick then moved to waive the presentence investigation, which motion was overruled. At sentencing, Mick was sentenced to 14 to 15 years' imprisonment with 146 days' credit for time served for the burglary conviction; 20 to 60 months' imprisonment for the operating a motor vehicle to avoid arrest conviction; 60 days' confinement, a $400 fine, and a 6-month license revocation for the driving under the influence conviction; and 20 to 60 months' imprisonment for the second degree forgery conviction. The district court ordered the sentences to run consecutively, and Mick was ordered to pay a civil judgment of $12,469.74 as restitution pursuant to the parties' plea agreement. Mick has timely appealed to this court.

## ASSIGNMENTS OF ERROR

Mick assigns that he received ineffective assistance of trial counsel and that the district court abused its discretion by imposing excessive sentences.

## ANALYSIS

*Ineffective Assistance of Counsel.*

Mick contends that he received ineffective assistance of counsel because trial counsel did not properly research his right to waive the presentence investigation report and did not object to the short amount of time given to complete the presentence investigation report.

[1-3] 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. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010). If it is more appropriate to dispose of an ineffectiveness claim because of the lack of sufficient prejudice, that course should be followed. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004). 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. *Id.*

The record indicates that at trial, Mick's counsel made the following request to waive the presentence investigation:

> Mick has asked me to request that he be allowed to waive the presentence investigation. I was not aware of the ability to do so in a felony matter. However, . . . Mick did have a printout. It's part of a case. It's not the entire case, but it does appear that [§] 29-2261(1) may allow that to be done in a felony proceeding. And again, he provided this to me this morning so I didn't have a chance to look it up. But he would like to go forward with sentencing and waive the right to a presentence.

The court indicated that it was aware the presentence investigation could be waived, but that it was not typically done, and overruled the motion, ordering the presentence investigation to proceed. Specifically, the district court determined, "I agree that the presentence investigation can be waived under certain circumstances, but it's not something that is typically done. I would prefer to have a presentence investigation before proceeding . . . ."

Neb. Rev. Stat. § 29-2261(1) (Reissue 2008) requires that a presentence investigation be completed in felony matters. However, the Nebraska Supreme Court has construed this statute as a mandate imposed for the benefit of the defendant and gives the defendant a statutory right to a presentence investigation. See *State v. Tolbert*, 223 Neb. 794, 394 N.W.2d 288 (1986). However, the court further found that the right to have a presentence investigation completed prior to sentencing may be waived. *Id.*

While Mick's counsel may have indicated to the trial court that she was unfamiliar with the ability to waive the presentence investigation in a felony matter, she maintained to the district court, as requested by Mick, Mick's request to waive the presentence investigation. The district court considered Mick's request to waive the presentence investigation and denied his request. There is nothing in the record to indicate that counsel's failure to research waiver of a presentence investigation in a felony matter prejudiced him in any way.

Mick further argues that counsel failed to object to the short amount of time given to complete the presentence investigation. Mick was adjudged guilty on February 2, 2011, and was sentenced on February 23. Specifically, Mick argues that his statement is missing from the report as a result of the short turnaround between his plea and his sentencing. The presentence investigation does not include a statement by Mick, but indicates that Mick's counsel was to provide his statement to the probation office and had not done so. However, the record indicates that while there is no defendant's statement contained in the presentence investigation report, at sentencing, Mick was given the opportunity to give a statement and declined. Thus, any possibility of prejudice was cured when Mick was given an opportunity to give a statement in court at the time of his sentencing. Accordingly, we need not determine whether counsel was ineffective in failing to provide her client's statement for the presentence investigation. See *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000) (if it is easier to dispose of ineffectiveness claim on ground of lack of sufficient prejudice, that course should be followed). This assignment of error is without merit.

*Excessive Sentences—Imprisonment.*

Mick argues that the district court abused its discretion by imposing excessive sentences.

[4-6] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009). 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. *Id.* In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009).

[7] A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

The presentence investigation report indicated that Mick was 36 years old, had a ninth-grade education, and had a lengthy criminal history, beginning in 1989, when Mick was a juvenile. Many of his convictions are for incidents similar to the present case and involve numerous prison sentences.

We have carefully reviewed the record and the sentences imposed for each of Mick's convictions. All of the sentences are within the statutory limits. Furthermore, at the sentencing hearing, in addition to other factors, the district court specifically indicated that it had taken into consideration the plea agreement and that Mick had saved the State the time and expense of the trial. Therefore, we cannot say that the district court abused its discretion by imposing sentences within the statutory limits.

*Excessive Sentences—Restitution.*

Mick also argues that the district court abused its discretion at sentencing by ordering restitution, based upon grounds that the district court did not take into consideration his ability to pay.

[8] Neb. Rev. Stat. § 29-2280 et seq. (Reissue 2008) vest trial courts with the authority to order restitution for actual damages sustained by the victim of a crime for which the defendant is convicted. *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000). In imposing restitution, § 29-2281 provides, in part, the following parameters:

> To determine the amount of restitution, the court may hold a hearing at the time of sentencing. The amount of restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record. The court shall consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations and shall balance such considerations against the obligation to the victim.

[9,10] Pursuant to § 29-2281, before restitution can be properly ordered, the trial court must consider: (1) whether restitution should be ordered, (2) the amount of actual damages sustained by the victim of a crime, and (3) the amount of restitution a criminal defendant is capable of paying. *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999). The language of § 29-2281 and the case law require appropriate sworn documentation to support both the actual damages sustained by the victim and the defendant's ability to pay restitution. *State v. Wells, supra*.

The record indicates that, as part of the plea agreement, Mick agreed to $12,469.74 of restitution as part of a civil judgment. At the plea hearing, Mick indicated to the district court that he understood the terms of the plea agreement and had not been threatened or promised anything to enter into the agreement. The district court found that Mick understood his rights; was acting freely and voluntarily; understood the nature of the charges, the possible penalties, and the effect of the pleas; and had entered his pleas voluntarily, knowingly, and intelligently. At the sentencing hearing, Mick's counsel specifically stated that Mick "would also ask the Court to enter a civil judgment in the amount of $12,469.74."

However, the record is devoid of any evidence of the trial court's meaningful consideration of Mick's ability to pay the restitution ordered. We are mindful that, pursuant to the plea agreement, Mick agreed to pay restitution to the victim in this case. Nonetheless, despite the plea agreement, the court must still give meaningful consideration to Mick's ability to

pay restitution, and the record does not establish that the court did so.

[11] On appeal, we do not endeavor to reform the trial court's order. Rather, we review the record made in the trial court for compliance with the statutory factors which control restitution orders. *State v. Wells, supra*. Having reviewed the record in this case, we find that the record does not indicate that the trial court meaningfully considered the factors mandated by § 29-2281 with respect to Mick's ability to pay $12,469.74 in restitution. Therefore, the district court erred in the restitution order, and as such, we vacate the trial court's order regarding restitution and remand this matter to the trial court for such proceedings as are consistent with this opinion and the statutory factors set forth in § 29-2281.

## CONCLUSION

In conclusion, we find no merit to Mick's claims that his trial counsel was ineffective or that the district court abused its discretion by imposing sentences which are within the statutory ranges; thus, we affirm that portion of the district court's order imposing said sentences. The portion of the sentences regarding restitution is vacated, and the cause is remanded for proceedings consistent with this opinion.

AFFIRMED IN PART, SENTENCE OF RESTITUTION VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

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JAMES SPENCER COLLINS, APPELLEE, V. LEE MARIE COLLINS, APPELLANT, AND STATE OF NEBRASKA ON BEHALF OF MATTHEW COLLINS AND CODY COLLINS, INTERVENOR-APPELLEE.

808 N.W.2d 905

Filed February 14, 2012. No. A-11-251.

1. **Modification of Decree: Child Support: Appeal and Error.** An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.

2. **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.
3. **Rules of the Supreme Court: Child Support.** Under the Nebraska Child Support Guidelines, if applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities.
4. **Child Support: Evidence.** In the initial determination of child support, earning capacity may be used where evidence is presented that the parent is capable of realizing such capacity through reasonable effort.
5. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.
6. **Modification of Decree: Child Support: Rules of the Supreme Court: Presumptions: Time.** A rebuttable presumption establishing a material change of circumstances occurs when application of the Nebraska Child Support Guidelines results in a variation by 10 percent or more, but not less than $25, upward or downward, of the current child support obligation due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months.
7. **Modification of Decree: Child Support: Proof.** The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification.
8. **Modification of Decree: Child Support.** For a court to modify child support, the material change of circumstances must exist at the time of the modification trial.
9. **Child Support: Evidence.** In child support cases, the court must determine the parent's current monthly income from the most reliable evidence presented.
10. **Modification of Decree: Child Support.** Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.
11. **Modification of Decree.** Temporary unemployment is not a material change of circumstances.

Appeal from the District Court for Cheyenne County: DEREK C. WEIMER, Judge. Reversed.

Liam E. Gallagher for appellant.

Charlotte L. Hood-Wright, Deputy Cheyenne County Attorney, for intervenor-appellee.

No appearance for appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

PER CURIAM.

## INTRODUCTION

In March 2010, the district court for Cheyenne County, Nebraska, dissolved the marriage of Lee Marie Collins and James Spencer Collins and ordered Lee to pay no child support.

In December 2010, pleadings were filed seeking to modify the divorce decree to increase the amount of Lee's child support.

After a trial, the district court found that Lee had diligently but unsuccessfully sought employment. Then the district court ordered Lee's child support obligation increased from zero to an amount calculated by imputing the minimum wage as her earning capacity. The district court stated, "I am satisfied that at the time that the modification action in this case was filed . . . there was a change in the circumstances that [Lee] was facing, in that she was working at that time." Lee was not working at the time of trial.

We find the court abused its discretion both in imputing minimum wage to Lee and in finding a material change in circumstances that warranted modification of her child support obligation.

## BACKGROUND

In March 2010, the district court for Cheyenne County dissolved the marriage of Lee and James and gave James residential custody of their two minor children, Matthew Collins and Cody Collins. Citing a cut in Lee's working hours to fewer than 25 per week, the district court initially ordered Lee to pay no child support.

On September 20, 2010, Lee started working at "Advanced Services Incorporated" (ASI), where she earned $10.50 per hour and worked approximately 60 hours per week.

On December 28, 2010, the State filed a motion for leave to intervene and a complaint to modify the divorce decree to increase the amount of Lee's child support. The district court issued an order allowing the State to intervene, and the motion to modify was set for trial on March 17, 2011.

By the time of trial, Lee was no longer receiving work assignments from ASI. Although ASI never officially terminated her employment, it had not given Lee a work assignment since February 12, 2011. Given this lack of work assignments, Lee sought other employment, applying for jobs in nursing, legal assistance, patient accounts, office management, data entry, food service, and housecleaning. At the time of trial, Lee had not found other employment.

At trial, the State offered two calculations for child support under the child support guidelines, the first based upon Lee's employment at ASI and the second based upon minimum-wage employment. The State argued that under either calculation, there had been a material change in circumstances such that it was appropriate to modify the award of child support. The district court agreed, stating, "I am satisfied that at the time that the modification action in this case was filed . . . there was a change in the circumstances that [Lee] was facing, in that she was working at that time." Even though Lee was not working at the time of trial, the district court imputed minimum-wage earning capacity to Lee and ordered her to pay child support in the amount of $168.29 for two children and $168.29 for one child beginning on March 1, 2011. The court declined to make the increase retroactive.

Lee timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

## ASSIGNMENTS OF ERROR

Lee alleges, reordered and restated, that the district court abused its discretion by (1) imputing minimum-wage earning capacity to her when she had made reasonable efforts but had failed to find a minimum-wage job and (2) finding that there had been a material change in circumstances.

## STANDARD OF REVIEW

[1,2] An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion. *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922

(2009). 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. *Id.*

## ANALYSIS

*Imputing Minimum Wage.*

Lee argues that the district court abused its discretion in imputing minimum-wage earning capacity to Lee when she had made reasonable efforts but had not yet succeeded in obtaining employment to replace her work for ASI. We agree with Lee that the district court abused its discretion by imputing and using Lee's earning capacity to modify the original support order. We say this because Lee presented evidence that she could not find minimum-wage employment through reasonable efforts and because the court found that the evidence showed that Lee had diligently but unsuccessfully sought employment.

[3,4] Reviewing the child support guidelines applicable to the instant case, we recall that a court is permitted to consider a parent's earning capacity when determining the amount of child support obligation. Under the child support guidelines, if applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. Neb. Ct. R. § 4-204. In the initial determination of child support, earning capacity may be used "where evidence is presented that the parent is capable of realizing such capacity through reasonable effort." *Bandy v. Bandy*, 17 Neb. App. 97, 108, 756 N.W.2d 751, 759 (2008). Although the case before us involves the modification of child support and not the initial determination, the same principle applies—earning capacity should be used only if there is evidence that the parent can realize that capacity through reasonable efforts.

The evidence showed that Lee was unable to reach minimum-wage earning capacity by reasonable efforts. As soon as her work assignments from ASI ceased, Lee began looking for other employment, applying for at least 10 jobs per week. She applied for jobs in nursing, legal assistance,

patient accounts, office assistance, office management, data entry, housecleaning, waitressing, and food service. She looked for jobs in both Nebraska and Indiana. All in all, Lee testified at trial that she had applied for over 32 jobs between February 12, 2011, and early March 2011 and sent out 41 e-mails relating to jobs. Despite these reasonable efforts at gaining employment of any kind, Lee was unsuccessful at finding even minimum-wage employment and remained unemployed at the time of trial.

The district court acknowledged the evidence that Lee was making reasonable efforts to find employment. It admitted that she was diligent in her job search, stating, "I don't think there's any way anyone can reasonably argue to me today, based on the evidence I've received[,] that she's not diligently looking for work . . . ." Nonetheless, the district court chose to impute a minimum-wage earning capacity to her in the face of continued unemployment. Because the evidence demonstrated that Lee was unable to reach minimum-wage earning capacity by reasonable efforts, it was clearly untenable for the district court to attribute such earning capacity to her.

*Material Change of Circumstances.*

[5] A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered. *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009).

[6] The Nebraska Child Support Guidelines include a provision that attempts to provide more predictability in determining the existence of a material change in circumstances. A rebuttable presumption establishing a material change of circumstances occurs when application of the child support guidelines results in a variation by 10 percent or more, but not less than $25, upward or downward, of the current child support obligation due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months. *Grahovac v. Grahovac*, 12 Neb. App. 585, 680 N.W.2d

616 (2004) (relying on child support guideline now codified as Neb. Ct. R. § 4-217).

[7] The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification. *Incontro v. Jacobs, supra*.

[8] The parties ask us to decide whether the material change of circumstances must exist at the time of filing of the complaint to modify or at the time of the modification trial. We hold that the change in circumstances must exist at the time of the modification trial for two reasons. First, because the court's decision to modify child support must be based upon the evidence presented in support of the complaint to modify. Second, because the change in circumstances cannot be temporary.

[9] The change in circumstances must exist at the time of trial because the decision to modify child support must be based upon the evidence presented by the parties. The Iowa Supreme Court has specifically stated that in child support cases, "[t]he court must determine the parent's current monthly income from the most reliable evidence presented." *In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991). Because evidence is presented at a date after the filing of the complaint to modify and because the court must look at the parent's current income, it would be improper for the court to focus on anything but the most recent circumstances ascertainable from the evidence. The circumstances at the time of the complaint to modify would be less recent than the circumstances at the time of the subsequent order. Therefore, the change in circumstances justifying a modification of child support must exist at the time of trial.

[10,11] Furthermore, the change of circumstances must exist at the time of trial because such change must be more than temporary. Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary

or permanent. *Incontro v. Jacobs, supra*. Furthermore, the Nebraska Supreme Court has specifically held that "temporary unemployment is not a material change of circumstances." *Graber v. Graber*, 220 Neb. 816, 821, 374 N.W.2d 8, 11 (1985), *disapproved on other grounds, Wagner v. Wagner*, 224 Neb. 155, 396 N.W.2d 282 (1986). Given this focus on the permanent nature of the change of circumstances, such change of circumstances should exist at the time of trial and not merely at the time of the complaint to modify.

Applying this rule to the evidence in the case before us and considering the evidence of Lee's income at the time of trial, we find that the State was unable to produce sufficient proof of a material change of circumstances. Although Lee's employment by ASI lasted for more than 3 months, given that it had effectively terminated, it could not be reasonably expected to last for an additional 6 months. Thus, the State's evidence failed to trigger the rebuttable presumption of a change of circumstances under § 4-217. Using Lee's hourly wage at ASI, her child support obligation would increase from zero to $503.80 for two children and to $344.95 for one child. But even if the rebuttable presumption had been triggered, by the time the complaint to modify was considered by the district court, Lee was able to present evidence to rebut the State's proof of her employment. Although her employment had not been terminated, Lee's testimony revealed that she was not receiving any work assignments from ASI. Furthermore, Lee was unable to find other employment despite a diligent job search. Thus, the evidence showed that Lee's current income at the time of the modification trial was zero.

When compared to Lee's original circumstances at the time of the divorce decree, her employment situation at the time of trial had not improved—it had worsened. At the time of the original divorce decree establishing child support, Lee was ordered to pay no child support because the hours at her job had been cut back to fewer than 25 per week. Therefore, the State did not establish a material change in circumstances because it could not prove that Lee was working more than 25 hours per week at the time of the modification trial. For the

district court to find a material change of circumstances despite this lack of evidence was clearly untenable.

Because we have already decided that it was an abuse of discretion for the district court to impute a minimum-wage earning capacity to Lee, it would also be an abuse of discretion for the district court to decide that there was a material change in circumstances based upon such imputation.

We further note that this is not a case in which earning capacity could be used to increase Lee's child support when circumstances otherwise would not demand such increase. Earning capacity has been used to maintain a certain level of child support when a change in circumstances would otherwise justify a downward modification. We have used earning capacity in this way when the change in circumstances was due to the parent's fault or voluntary decision to move to lower-paying employment. See, e.g., *Murphy v. Murphy*, 17 Neb. App. 279, 759 N.W.2d 710 (2008); *State on behalf of Longnecker v. Longnecker*, 11 Neb. App. 773, 660 N.W.2d 554 (2003), *superseded by statute on other grounds as stated in Hopkins v. Stauffer*, 18 Neb. App. 116, 775 N.W.2d 462 (2009). The Nebraska Supreme Court has similarly refused to modify a parent's child support obligation when "[the parent's] income decreased due to his own personal wishes, and not as a result of unfavorable or adverse conditions in the economy, his health, or other circumstances that would affect [the parent's] earning capacity." *Incontro v. Jacobs*, 277 Neb. 275, 285, 761 N.W.2d 551, 559-60 (2009). While the case before us includes a request for an upward modification instead of a downward modification, the State is in effect asking us to use earning capacity in a similar manner—to order Lee to pay more child support than her circumstances would otherwise demand. The case before us does not present facts that justify such use of earning capacity. Lee's decrease in income since the initial complaint to modify was not due to her fault or voluntary choice. On the contrary, Lee has remained unemployed despite numerous efforts on her part to find employment. Therefore, it was an abuse of discretion for the district court to decide that there was a material change in circumstances based upon earning capacity.

## CONCLUSION

Because the evidence demonstrated that Lee could not attain a minimum-wage earning capacity by reasonable efforts, the district court abused its discretion in imputing such earning capacity to her. And because the State did not present sufficient evidence of a material change in circumstances since the original divorce decree, the district court also abused its discretion in finding a material change in circumstances that warranted modification of Lee's child support obligation. We reverse.

REVERSED.

CASSEL, Judge, dissenting.

I respectfully disagree with the majority opinion. The majority opinion correctly recites our standard of review of de novo on the record for abuse of discretion. But I find no abuse of discretion in either the district court's imputation of minimum-wage earning capacity to Lee or the court's determination that there had been a material change in circumstances.

*Imputation of Minimum Wage.*

The evidence provides overwhelming support for a determination that Lee had an earning capacity at least equal to the minimum wage over a 40-hour week—indeed, she admitted as much. Lee has consistently earned at least minimum wage in her previous jobs and often earned more than minimum wage. She earned $10.50 per hour at ASI, where she worked 60 hours per week. She began her employment at ASI in September 2010, and it continued after the State commenced this modification proceeding until at least February 12, 2011. At ASI, Lee also earned overtime pay for the hours she worked in excess of 40 hours per week. Lee earned $10 per hour at "Country Printer" as a printer's assistant starting in March 2010. And during her marriage to James, Lee held steady employment in the nursing industry. Lee testified that nursing positions paid even more than what she earned at ASI. James also testified that Lee maintained employment of at least minimum wage throughout their marriage.

Even though Lee was unemployed at the time of the order of modification, the evidence of her occupational skills indicated that she remained qualified to obtain employment paying at least minimum wage. At the time of trial, Lee held a valid nursing license in Indiana and could reinstate her licenses in Nebraska and South Dakota by paying certain fees and taking a continuing education course. Lee testified that she was qualified for and was applying for jobs above minimum-wage level, including positions such as legal assistant, patient account coordinator, office assistant, office manager, and a data entry position. One of these positions paid as much as $15 to $18 per hour.

Lee admitted that she was "likely qualified to obtain at least minimum wage employment." She admitted that she was capable of working at least 40 hours per week. Although she testified that she had gone to "rehab" in May 2010, she also stated that she had maintained her sobriety since April. At the conclusion of her testimony, she was asked if "it would be reasonable to expect that [she] could hold minimum wage employment," to which she responded, "I'm trying to."

Based on this evidence, the district court found, "There is no question that [Lee] is capable of minimum wage employment. . . . She doesn't deny that and I wouldn't expect her to. She's clearly making efforts to gain employment . . . ." I entirely agree with this assessment of the evidence.

The Nebraska Child Support Guidelines clearly permit a trial court to consider a parent's earning capacity when determining the amount of child support obligation. If applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. Neb. Ct. R. § 4-204. While the courts have mainly used earning capacity when a parent suffers a reduction in income due to his or her own fault or choice, the child support guidelines do not dictate that earning capacity be used only in such situations. The need to examine a party's earning capacity is especially true when it appears that the parent is capable of earning more income than

is presently being earned. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

Lee's earning capacity was not diminished by the fact that she had been unable to find replacement employment at the time of trial. In *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985), *disapproved on other grounds, Wagner v. Wagner*, 224 Neb. 155, 396 N.W.2d 282 (1986), a few months before the modification hearing, the parent obligated to pay child support suffered an illness that prevented her from working. In light of evidence that her disability would probably not last longer than a few months and because of her qualifications, the Nebraska Supreme Court held that her unemployment was temporary and was not reason to reduce her child support obligation. See *id*. I would similarly find that the facts surrounding Lee's unemployment indicate that it was merely temporary. Indeed, at the time of trial, Lee had only been without work for 1 month, was diligently applying for jobs, and even had a job interview that same day. There was no evidence to indicate that Lee was unable to hold full-time employment. Her unemployment was not due to illness, and she had no disabilities that would prevent her from working. On the contrary, Lee admitted that she was capable of working at least 40 hours per week and that she had in fact held steady employment throughout her marriage to James. I also note that Lee maintained her nursing license and was qualified for nursing positions. Given her work history, her nursing license, and the short length of her unemployment at the time of trial, I would find that Lee's unemployment at the time of trial was temporary and therefore was not reason to reduce her earning capacity.

Because Lee previously held and was qualified to hold positions that pay minimum wage or above and because her unemployment at the time of trial was temporary, the district court did not abuse its discretion in considering earning capacity instead of Lee's actual salary or in finding that Lee's earning capacity was at least minimum wage. Had the district court used Lee's earnings from her ASI employment to increase child support, it might have been an abuse of discretion in light of her temporary unemployment at the time of trial and her diligent and continuing efforts at obtaining new employment.

But I find no abuse of discretion in imputing earning capacity at only a minimum-wage level.

*Material Change of Circumstances.*

I similarly find no abuse of discretion in the district court's finding that there was a material change in circumstances that merited a modification of Lee's child support obligation. The Nebraska Supreme Court has held that a material change in circumstances is a concept which eludes precise, concrete definition. See *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987). The Supreme Court has identified certain factors which a district court may consider in determining whether a material change has occurred or not. Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent. *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009).

The Nebraska Child Support Guidelines include a provision that attempts to provide more predictability in determining the existence of a material change in circumstances. A rebuttable presumption establishing a material change of circumstances occurs when application of the child support guidelines results in a variation by 10 percent or more, but not less than $25, upward or downward, of the current child support obligation due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months. *Grahovac v. Grahovac*, 12 Neb. App. 585, 680 N.W.2d 616 (2004) (relying on child support guideline now codified as Neb. Ct. R. § 4-217).

It is unnecessary to decide whether the material change of circumstances must exist at the time of filing of the complaint for modification or at the time of the subsequent order because, in the case before us, a material change of circumstances existed at both points in time. Lee argues that there was not a material change in circumstances because she had "lost her job at the time of the modification order and was making no

money[—]the same amount she was making at the time of the first order." Brief for appellant at 7. However, this argument ignores Lee's earning capacity.

Both at the time of the complaint to modify and at the time of the trial and court order, Lee's earning capacity was at least at a minimum-wage level. At either time, the court could properly impute this earning capacity to her in calculating her child support obligation. Using minimum wage to calculate Lee's child support obligation, the resulting monthly child support payment is $168.29 for two children and $168.29 for one child, an amount already reduced by the guidelines' basic subsistence limitation. Thus, under § 4-217, one compares $168.29 to zero, and $168.29 represents an increase of more than 10 percent and an amount greater than $25. And this earning capacity had obviously existed for more than 3 months—given her employment by ASI for a longer period—and was expected to continue indefinitely. Thus, a material change of circumstances is presumed under § 4-217.

The district court implicitly found that Lee did not rebut the presumption merely by establishing that she had not yet obtained replacement employment. I agree. The court did not apply the change retroactively to the time of the State's complaint to modify, but, instead, implemented the change only prospectively. I conclude that the court did not abuse its discretion in modifying the child support order to require Lee to pay support on the imputed earning capacity.

Because I find no abuse of discretion by the district court in imputing to Lee an earning capacity based on the minimum wage or in finding that there had been a material change in circumstances, I would affirm the court's order.

# IN RE INTEREST OF DAVONEST D. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. TRAVIS B., APPELLANT.

809 N.W.2d 819

Filed February 21, 2012. No. A-11-380.

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. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Juvenile Courts: Parental Rights: Appeal and Error.** In reviewing questions of law, an appellate court in termination of parental rights proceedings reaches a conclusion independent of the lower court's ruling.
4. **Parent and Child: Due Process.** The parent-child relationship is afforded due process protection.
5. **Parties: Due Process: Words and Phrases.** The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard.
6. **Due Process.** When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against a 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 constitution or statute; and a hearing before an impartial decisionmaker.
7. **Parental Rights: Due Process.** Parental physical presence is unnecessary for a hearing to terminate parental rights, provided that the parent has been afforded procedural due process for the hearing to terminate parental rights.
8. **Parental Rights: Due Process: Appeal and Error.** If a parent has been afforded procedural due process for a hearing to terminate parental rights, allowing a parent who is incarcerated or otherwise confined in custody of a government to attend the termination hearing is within the discretion of the trial court, whose decision on appeal will be upheld in the absence of an abuse of discretion.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Judgment vacated, and cause remanded with directions.

Stacy A. Witt and Keith S. Filewicz for appellant.

Donald W. Kleine, Douglas County Attorney, Amy Schuchman, and Kailee Smith, Senior Certified Law Student, for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

## INTRODUCTION

Travis B. appeals from the orders of the separate juvenile court of Douglas County which terminated his parental rights to his child, Da Shawn B. Upon our de novo review of the record, we conclude that Travis' due process rights were violated by virtue of his absence, and the absence of his attorney, from the termination hearing. We therefore vacate the juvenile court's orders, and remand with directions for a new adjudication and termination hearing.

## BACKGROUND

On November 26, 2008, the Douglas County Attorney's office filed a petition in the juvenile court alleging that Davonest D., Daviarra B., and Da Shawn B. were without proper parental care by the faults or habits of their biological mother and that thus, they were children within the juvenile court's jurisdiction pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Da Shawn was placed in the temporary custody of the Nebraska Department of Health and Human Services (DHHS) on the same day. Travis is the biological father of Da Shawn, and this appeal involves Da Shawn only. Da Shawn's mother is not a party to this appeal, and her involvement in the juvenile court proceedings will not be discussed further.

The record shows that Travis was convicted in federal court on drug charges and sentenced to 151 months' incarceration on June 15, 2004. His projected release date is in September 2018.

According to DHHS, a certified "alleged father letter" was sent to Travis on October 20, 2009, at the federal prison in El Reno, Oklahoma. The "alleged father letter" was documented as received on October 22, 2010, and Travis never responded to it.

On March 1, 2011, a second supplemental petition was filed, alleging that Da Shawn lacked proper parental care by reason of the faults or habits of Travis. The petition also included a motion to terminate Travis' parental rights based upon Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2010), on the ground of Da Shawn's having been abandoned by Travis for 6 months or more immediately prior to the filing of the petition; § 43-292(2), because Travis had substantially and continuously or repeatedly neglected and refused to give Da Shawn necessary parental care and protection; § 43-292(7), because Da Shawn had been in an out-of-home placement for 15 or more months of the most recent 22 months; and § 43-292(9), because Travis had subjected Da Shawn to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse. Further, the petition alleged that terminating Travis' parental rights was in Da Shawn's best interests. Finally, the petition alleged that reasonable efforts under Neb. Rev. Stat. § 43-283.01 (Cum. Supp. 2010) were not required because Travis subjected Da Shawn to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse. A motion for temporary custody was also filed on March 1. At the time the second supplemental petition was filed, Travis was being housed at the Saunders County jail.

On March 1, 2011, the juvenile court entered an order for immediate custody of Da Shawn with DHHS to exclude placement with Travis. The order set a hearing for March 7 to determine whether the immediate custody order should continue. A notice of hearing was filed showing hearings on the second supplemental petition set for March 7 and April 8. The juvenile court also issued a summons for Travis at the Saunders County jail which ordered Travis to be personally served with the second supplemental petition, motion for temporary custody, and order for immediate custody and to appear in court on April 8.

On March 2, 2011, the juvenile court issued a transport order directing the sheriff of Douglas County to escort Travis from the Saunders County jail to the Douglas County Separate Juvenile Court for the hearing to be had on March 7. A notice

from the sheriff's office indicated that it received the March 2 transport order; that it was executed on March 4 by taking Travis into custody and delivering him to the Douglas County Department of Corrections; and that thereafter, Travis was returned to the Saunders County jail on March 7. This notice was not received by the juvenile court until March 10.

The juvenile court appointed an attorney to represent Travis on March 2, 2011. This order also listed the date of the protective custody hearing as March 7.

On March 4, 2011, not March 7 as stated in the transport order, a protective custody hearing regarding the second supplemental petition was held with the following people present: the mother's attorney, the guardian ad litem, the deputy county attorney, and Travis' attorney. The juvenile court found that Travis had not been served with the second supplemental petition and that there were no objections to continuing the protective custody hearing. The juvenile court set the hearing on protective custody and adjudication on the second supplemental petition for April 8 and directed Travis' attorney to notify Travis of the scheduled hearing date and time. The record contains a "Service Return" dated March 4, 2011, which indicates that Travis was personally served at "Saunders County Corrections" on March 3.

On March 9, 2011, the juvenile court issued another transport order, directing the sheriff of Douglas County to escort Travis from the Saunders County jail to the Douglas County Separate Juvenile Court to appear at a hearing on April 8. A summons was also filed on March 9, directing Travis to appear for the hearing on April 8. On March 10, the juvenile court received a notice from the sheriff's office indicating that it received the transport order dated March 9, 2011, but that because Travis was a federal inmate being housed at the Saunders County jail, a writ of habeas corpus was required in order to transport him. The record does not contain any evidence that a writ was executed.

On April 8, 2011, a hearing was held on the second supplemental petition. Neither Travis nor his attorney was present. Despite their absence, the juvenile court proceeded to hear testimony and receive evidence regarding the adjudication of

Da Shawn and the motion for termination of Travis' parental rights. Testimony was presented by a foster care specialist that she was not aware of any contact between Travis and Da Shawn since she had been involved in the case, that Da Shawn did not have a relationship with Travis, that Travis had not performed any parental action or indicated any interest in parenting Da Shawn, and that in the specialist's opinion, Travis' parental rights should be terminated. The guardian ad litem for Da Shawn cross-examined the specialist very briefly, through which it was established that Travis had some contact with Da Shawn prior to Da Shawn's removal from his mother's custody, that Travis was notified of the removal, and that Travis had not been involved in the proceedings since the notification.

On April 8, 2011, the juvenile court entered an order finding the State's evidence to be "credible, reliable and probative" and that all counts in the second supplemental petition were true by clear and convincing evidence. The juvenile court further found that Da Shawn was a child within the meaning of § 43-247(3)(a) insofar as Travis was concerned; that Da Shawn was within the meaning of § 43-292(1), (2), (7), and (9); and that it was in Da Shawn's best interests that the parental rights of Travis be terminated. The juvenile court filed an amended order on April 18 correcting some clerical errors in its previous order. Travis filed this timely appeal.

## ASSIGNMENTS OF ERROR

Travis assigns, consolidated and restated, (1) that the juvenile court violated his constitutional right of due process by terminating his parental rights without his or his attorney's presence at the termination proceedings, (2) that the juvenile court erred in finding that his parental rights should be terminated under § 43-292, and (3) that the juvenile court erred in finding it was in the best interests of Da Shawn to have Travis' parental rights terminated.

## STANDARD OF REVIEW

[1] 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 Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

[2,3] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Scott v. County of Richardson*, 280 Neb. 694, 789 N.W.2d 44 (2010). In reviewing questions of law, an appellate court in termination of parental rights proceedings reaches a conclusion independent of the lower court's ruling. See *In re Interest of Kayle C. & Kylee C.*, 253 Neb. 685, 574 N.W.2d 473 (1998).

## ANALYSIS

[4-6] This court recognizes that the parent-child relationship is afforded due process protection. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). "'For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard . . . ."'" *Id.* at 413, 482 N.W.2d at 257. See, also, *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

> When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by . . . the proceeding; . . . reasonable opportunity to refute or defend against a 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 constitution or statute; and a hearing before an impartial decisionmaker.

*In re Interest of L.V.*, 240 Neb. at 413-14, 482 N.W.2d at 257. See, also, *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

[7,8] Travis' appeal is primarily predicated upon the juvenile court's proceeding with the adjudication and termination hearing without either Travis or his attorney present. The Nebraska Supreme Court has held that parental physical presence is unnecessary for a hearing to terminate parental rights, provided that the parent has been afforded procedural due process for the hearing to terminate parental rights. *In re Interest of Mainor T.*

*& Estela T., supra* (extended to include parent who cannot appear at adjudication hearing because of incarceration or confinement). Accord *In re Interest of L.V., supra.* However,

> "[i]f a parent has been afforded procedural due process for a hearing to terminate parental rights, allowing a parent who is incarcerated or otherwise confined in custody of a government to attend the termination hearing is within the discretion of the trial court, whose decision on appeal will be upheld in the absence of an abuse of discretion. . . ."

*In re Interest of Mainor T. & Estela T.*, 267 Neb. at 248, 674 N.W.2d at 458, quoting *In re Interest of L.V., supra.* Thus, the issue becomes whether Travis' due process rights were otherwise protected in his physical absence.

This case is not one where Travis was affirmatively disallowed from attending the hearing. In fact, it seems the juvenile court made specific and direct efforts to enable him to attend by issuing transport orders and summons. However, not only did the juvenile court take no further action upon receipt of the sheriff's request for a writ of habeas corpus rather than a transport order, but it also proceeded with the hearing without comment on the record as to either Travis' or his attorney's absence.

We determine from our de novo review of the record that despite Travis' statutory right to counsel, neither was he represented by counsel at the adjudication and termination hearing nor had he waived this right. See, Neb. Rev. Stat. § 43-279.01 (Reissue 2008); *In re Interest of Mainor T. & Estela T., supra*. We further determine that the juvenile court otherwise failed to afford Travis due process in that (1) no procedure was utilized by the court to provide Travis with any opportunity to refute or defend against the allegations of the petition and (2) no procedures were implemented to afford Travis an opportunity to participate in the hearing, to confront or cross-examine adverse witnesses, or to present evidence in his behalf. See, *In re Interest of Mainor T. & Estela T., supra*; *In re Interest of L.V., supra*.

We conclude that such lack of procedures denied Travis due process. Having so determined, we need not reach the issue of

whether the juvenile court erred in terminating Travis' parental rights or in finding that such termination was in Da Shawn's best interests.

## CONCLUSION

Our de novo review of the record demonstrates that during these proceedings, Travis was denied due process. We therefore vacate the juvenile court's adjudication and termination orders and remand the matter to the juvenile court with directions to conduct a new adjudication hearing and to provide Travis due process in the proceedings consistent with this opinion.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

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## DOWD GRAIN CO., INC., ET AL., APPELLANTS, V. COUNTY OF SARPY, A CORPORATE BODY POLITIC, ET AL., APPELLEES.

810 N.W.2d 182

Filed February 28, 2012. No. A-10-1238.

1. **Appeal and Error.** In order to be considered by an appellate court, alleged errors must be both specifically assigned and specifically argued in the brief of the party asserting the error.
2. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
3. **Judgments: Collateral Estoppel: Res Judicata.** The applicability of the doctrines of res judicata and collateral estoppel is a question of law.
4. **Moot Question: Jurisdiction: Appeal and Error.** Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions.
5. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
6. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment 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.

7. **Summary Judgment: Affidavits.** Affidavits received on a motion for summary judgment shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.
8. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of the litigant complaining about evidence admitted or excluded.
9. **Trial: Presumptions: Evidence.** In a bench trial, there is a presumption that the finder of fact disregards inadmissible evidence.
10. **Actions: Judicial Notice.** A court may judicially notice adjudicative facts, which are not subject to reasonable dispute, at any stage of the proceeding.
11. **Actions: Judicial Notice: Appeal and Error.** In interwoven and interdependent cases, an appellate court may examine its own records and take judicial notice of the proceedings and judgment in a former action involving one of the parties.
12. **Zoning: Ordinances: Time.** The time of decision rule generally requires that the zoning ordinance and regulations in effect at the time of a court's decision control its outcome.
13. **Statutes: Legislature: Intent: Time.** Generally, an appellate court will apply the statute in effect at the time of its decision, at least when the legislature intended that its modification be retroactive to pending cases.
14. ____: ____: ____: ____. The purpose of the principle of an appellate court's applying the statute in effect at the time of its decision is to effectuate the current policy declared by the legislative body.
15. **Zoning: Licenses and Permits.** Under Neb. Rev. Stat. § 23-114.04(1) (Reissue 2007), a county board enforces the zoning regulations within its county by requiring the issuance of permits prior to the construction of any nonfarm building or structure within a zoned area.
16. ____: ____. Under Neb. Rev. Stat. § 23-114.04(1) (Reissue 2007), a county board may provide for the withholding of any permit if the purpose for which it is sought would conflict with zoning regulations.
17. **Evidence: Appeal and Error.** An appellate court cannot consider as evidence statements made by the parties at oral argument or in briefs, as these are matters outside the record.
18. **Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.
19. ____. An exception to the law-of-the-case doctrine applies if a party shows a material and substantial difference in the facts on a matter previously addressed by an appellate court.
20. **Collateral Estoppel: Res Judicata: Proof.** For application of the doctrines of collateral estoppel or res judicata, the party relying on either of those principles in a present proceeding has the burden to show that a particular issue was involved and necessarily determined in a prior proceeding.
21. **Res Judicata.** Res judicata does not apply when there has been an intervening change in facts or circumstances.
22. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally

cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.

23. **Moot Question.** 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.
24. **Moot Question: Appeal and Error.** Under the public interest exception, an appellate court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.
25. ____: ____. When determining whether a case involves a matter of public interest, an appellate court considers (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed.

Terry J. Grennan, of Cassem, Tierney, Adams, Gotch & Douglas, and Duane J. Dowd for appellants.

Kim K. Sturzenegger and Richard L. Boucher, of Boucher Law Firm, for appellees County of Sarpy, Richard Houck, and Sarpy County Department of Planning and Building.

Joseph E. Jones and Timothy J. Thalken, of Fraser Stryker, P.C., L.L.O., for appellee OSI Properties Limited Partnership.

INBODY, Chief Judge, and CASSEL and PIRTLE, Judges.

CASSEL, Judge.

## INTRODUCTION

In a prior appeal, we reversed the district court's judgment of dismissal on the pleadings, where the complaint alleged noncompliance with design aspects of a 2004 zoning ordinance. In 2007, the County of Sarpy enacted a revised zoning regulation which, appellees argue, had the effect of excepting the property at issue from the design requirements. Upon remand, the district court entered summary judgments, determining that the 2007 revised regulation rendered the complaint moot. We conclude that the time of decision rule requires us to

apply the regulations now in effect, that the revised regulation excepts the property at issue, and that the issues raised by the complaint are moot. Accordingly, we affirm the summary judgments entered in favor of appellees.

## BACKGROUND

This litigation is before us for a second time. We begin by summarizing the proceedings leading to the first appeal.

Dowd Grain Co., Inc.; Duane J. Dowd, trustee; Grand Prix, Inc.; Duane J. Dowd; and Lawrence Dowd (collectively Dowd) filed an action in December 2005 in the Sarpy County District Court against appellees—the County of Sarpy, Richard Houck, and the Sarpy County Department of Planning and Building (collectively the Sarpy County defendants) and OSI Properties Limited Partnership (OSI). The complaint sought relief such as declaratory judgment, temporary and permanent injunctions, the abatement of a nuisance, and damages based on an alleged improper issuance of building permits and zoning violations. The complaint alleged that the building OSI intended to construct, if completed as designed, would violate certain provisions of an overlay district zoning ordinance which was adopted on March 9, 2004. In particular, OSI's building would use metal panels on areas visible to the public, would have flat facades which were not articulated every 50 feet, and would have loading docks facing public streets, all of which would violate the ordinance.

OSI filed a motion for judgment on the pleadings, and the Sarpy County defendants joined in the motion. The district court sustained the motions and dismissed Dowd's complaint.

Dowd appealed to this court, which appeal was docketed as case No. A-06-682. On appeal, we reversed the judgment and remanded the cause for further proceedings in a memorandum opinion. See *Dowd Grain Co. v. County of Sarpy*, No. A-06-682, 2008 WL 2511147 (Neb. App. June 24, 2008) (selected for posting to court Web site). We determined that some of the issues raised by the complaint were properly before the district court under Neb. Rev. Stat. § 23-114.05 (Reissue 2007), even though Dowd was also pursuing an appeal of the issuance of the building permits to the county board of adjustment.

On that same day, we released a memorandum opinion in a related case, *Dowd Grain Co. v. County of Sarpy Bd. of Adj.*, No. A-06-681, 2008 WL 2511150 (Neb. App. June 24, 2008) (selected for posting to court Web site), but we expressed no opinion on whether our resolution in that case would affect the proceedings in case No. A-06-682 on remand. The Nebraska Supreme Court subsequently denied appellees' respective petitions for further review.

After briefing on the appeal in case No. A-06-682 had been completed, the Sarpy County Board of Commissioners enacted a revised zoning regulation governing the highway corridor overlay district. As amended and adopted in 2010, section 32.3, "Project Application and Exceptions," states that the zoning regulations apply, in part, to the following:

> Any new development requiring a building permit built on land within the boundaries of the HC Highway Corridor Overlay District after the effective date of this Regulation, except any land that was platted prior to March 9, 2004; provided however, that land within the boundaries of the HC Highway Corridor Overlay District that was zoned other than agricultural prior to March 9, 2004, that was part of a Phased Development shall also be excepted.
>
> Replats, lot line adjustments, and lot consolidations of such platted properties shall remain excepted.
>
> Phased Developments shall mean property that was, at a minimum, preliminary platted and at least a part of the property within the preliminary plat was final platted.

Our opinion in case No. A-06-682 did not address or consider any changes made in the zoning regulation after the docketing of that appeal. With the issuance of our mandate in that case, the matter returned to the district court.

Upon receipt of our mandate, the district court entered an order setting the case for a docket call and later addressed Dowd's application for an order to show cause and other motions filed by the parties after our remand on the first appeal.

First, Dowd filed two motions, including a motion for summary judgment. Dowd's motion for summary judgment against the Sarpy County defendants asserted that Dowd was entitled

to relief under § 23-114.05 because OSI had no valid building permits. The other motion was styled as a "motion and application for order requiring [the Sarpy County defendants] to perform their required duties and comply with court orders." In this motion, Dowd alleged that OSI did not have valid building permits for the property and building at issue, that § 23-114.05 required the Sarpy County defendants to perform their duties regarding building permits, and that appellees had no valid reason to negate the requirement of performance of such duties.

Appellees then filed motions for summary judgment. The Sarpy County defendants' motion asserted that Dowd's complaint was based upon the 2004 ordinance, the ordinance at issue was revised in 2007, and Dowd's lawsuit was moot. On the same date, OSI filed a motion for summary judgment. It alleged that the court lacked subject matter jurisdiction due to mootness because Sarpy County amended its zoning regulations after Dowd filed their lawsuit, that OSI's building complied with the current zoning regulations, that OSI's actions and omissions were not a public or private nuisance, and that abatement was not an available remedy. In a "response," Dowd asserted that appellees' motions for summary judgment were barred by the law-of-the-case, res judicata, and collateral estoppel doctrines.

The district court held a hearing on the motions. The court received two affidavits of Rebecca Horner, the planning director of Sarpy County, over Dowd's objections that Horner did not qualify as an expert, that she could not give opinions with regard to the law, and that her affidavits were not relevant or material. Horner stated in an affidavit that under the revised regulation, property platted before March 9, 2004, was excepted from the design requirements applicable to buildings built within the overlay district. Horner further stated that OSI's building would be excepted from the building design requirements if a building permit were submitted because the property on which OSI's building is situated was platted before March 9. According to Horner, "the property described as Lot 1 Commerce Business Centre Replat 5 was originally part of the Commerce Business Centre subdivision. The Commerce

Business Centre Plat was filed on October 24, 2001. Part of that subdivision was replatted as Commerce Business Centre Replat 5 on September 28, 2005."

The district court later entered its order granting appellees' motions for summary judgment. It observed that the narrow issue previously before us was whether Dowd could pursue an action under § 23-114.05 while also appealing the issuance of building permits to the county board of adjustment and that we merely concluded Dowd could proceed under that statute. The district court phrased the primary issue then before it as whether it was proper to consider the revised version of the highway corridor overlay district. The district court reasoned that the 2007 revised regulation was not before the appellate courts in the prior appeal, that the revised regulation effectively repealed the 2004 ordinance, and that Dowd's 2005 complaint was moot because it did not address the legislation currently in existence. The court found that there was no genuine issue as to any material fact regarding whether OSI's building must comply with the overlay district zoning ordinance in light of the 2007 amendment, that the evidence established OSI's property was not subject to the 2004 ordinance because of the exception passed in 2007, and that there was no evidence to support Dowd's claim that OSI's property was a nuisance. The court also denied both of Dowd's motions.

Dowd then filed a motion to alter or amend the judgment, which the district court overruled. This timely appeal followed.

## ASSIGNMENTS OF ERROR

[1] Dowd assigns 10 errors. In order to be considered by an appellate court, alleged errors must be both specifically assigned and specifically argued in the brief of the party asserting the error. See *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011). Dowd argues, consolidated, restated, and reordered, that the district court erred in (1) admitting Horner's affidavits into evidence; (2) failing to apply the law-of-the-case, res judicata, or collateral estoppel doctrines; and (3) granting appellees' motions for summary judgment rather than the motions of Dowd for summary judgment and for

an order requiring the Sarpy County defendants to perform their duties.

## STANDARD OF REVIEW

[2] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

[3] The applicability of the doctrines of res judicata and collateral estoppel is a question of law. *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

[4,5] Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions. *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009). When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts. *Id.*

[6] An appellate court will affirm a lower court's granting of summary judgment 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. *Howsden v. Roper's Real Estate Co.*, 282 Neb. 666, 805 N.W.2d 640 (2011).

## ANALYSIS

*Admission of Horner's Affidavits.*

Dowd argues that the district court committed reversible error by admitting Horner's affidavits. The district court's order quoted a portion of the revised regulation, which was attached to Horner's affidavits, and noted that Horner stated OSI's building would be excepted from the building design requirements under the revised regulation and that OSI's building was compliant with the current zoning regulations. We conclude that any error in admission of the exhibits was harmless.

[7] Horner's affidavits were relevant and material. Affidavits received on a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Neb. Rev. Stat. § 25-1334 (Reissue 2008). Horner is the planning director of Sarpy County. As such, she is required to be familiar with the Sarpy County zoning regulations and to prepare any amendments to the zoning regulations. See, also, Neb. Rev. Stat. §§ 23-174.06 and 23-174.08 (Reissue 2007) (planning director is responsible for preparation of comprehensive plan of county and amendments and extensions thereto, for zoning resolution, and for submitting such items to county planning commission). Appellees' motions for summary judgment relied upon the 2007 revised regulation, and Horner attached the pertinent portion of the regulation to her affidavits.

[8-11] Even if Horner's interpretation of the regulation and its applicability to OSI's building was inadmissible, the admission of that portion of her affidavit does not require reversal. To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of the litigant complaining about evidence admitted or excluded. *Nickell v. Russell*, 260 Neb. 1, 614 N.W.2d 349 (2000). Dowd cannot establish prejudice, because similar content was established by other means. Because the pertinent portion of the 2007 revised regulation was attached to Horner's affidavits, the district court did not need to rely on Horner's interpretation of it. And in a bench trial, there is a presumption that the finder of fact disregards inadmissible evidence. *In re Interest of Christopher T.*, 281 Neb. 1008, 801 N.W.2d 243 (2011). Further, the record and our opinion in case No. A-06-681 established the October 2001 platting of the Commerce Business Centre and the September 2005 replatting of some of that same property upon OSI's purchase of it. A court may judicially notice adjudicative facts, which are not subject to reasonable dispute, at any stage of the proceeding. *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008). In interwoven and interdependent cases, an appellate court may examine its own records and take judicial notice of

the proceedings and judgment in a former action involving one of the parties. *Id.* Dowd has not established that admission of Horner's affidavits constituted reversible error.

*Applicability of 2007 Revised Regulation.*

Before considering the effect of the 2007 revised regulation, we must first determine whether it is applicable in this appeal. Dowd's position is that we must decide this appeal under the 2004 overlay district ordinance because it was the ordinance in effect when OSI applied for its building permits. OSI, on the other hand, contends that the district court correctly held that the time of decision rule required application of the 2007 regulation. We agree with OSI.

[12] We hold that the time of decision rule generally requires that the zoning ordinance and regulations in effect at the time of a court's decision control its outcome. In reaching this conclusion, we first consider analogous reasoning of the Nebraska Supreme Court in cases not directly focused on the issue. We then examine the decisions of other states that have decided this precise issue. Finally, we observe that recognized exceptions to the doctrine do not apply in the situation before us.

The Nebraska Supreme Court has applied a similar concept to the time of decision rule. Although not as succinctly stated, it appears that similar reasoning was employed in *Whitehead Oil Co. v. City of Lincoln*, 234 Neb. 527, 451 N.W.2d 702 (1990). In that case, Whitehead Oil Company filed its land-use permit application before the city adopted a change of zone; thus, it argued that it acquired a vested right to use the property at issue in a manner consistent with the zoning in effect at the time of filing its permit application. The Supreme Court reasoned that a landowner had no vested right in the continuity of zoning in a particular area so as to preclude subsequent amendment, and a zoning regulation may be retroactively applied to deny an application for a building permit even though the permit could lawfully have issued at the time of application. *Id.*

[13,14] We next observe that in most jurisdictions, the reviewing court will apply the law as it exists at the moment

of decision in the reviewing court. See 4 Kenneth H. Young, Anderson's American Law of Zoning § 27.38 (4th ed. 1997). See, also, *U.S. Cellular v. Board of Ad. of Des Moines*, 589 N.W.2d 712 (Iowa 1999); *MacDonald Advertising Co. v. McIntyre*, 211 Mich. App. 406, 536 N.W.2d 249 (1995); *City and County of Honolulu v. Midkiff*, 616 P.2d 213 (Haw. 1980). Generally, an appellate court will apply the statute in effect at the time of its decision, at least when the legislature intended that its modification be retroactive to pending cases. *CBS Outdoor v. Lebanon Plan. Bd.*, 414 N.J. Super. 563, 999 A.2d 1151 (2010). The purpose of the principle is to effectuate the current policy declared by the legislative body. *Id.*

Although there are exceptions to the time of decision rule, we do not find any applicable exception under the circumstances presented by this appeal. In *Hanchera v. Board of Adjustment*, 269 Neb. 623, 694 N.W.2d 641 (2005), the Nebraska Supreme Court stated that a new zoning ordinance will not have retroactive effect where a landowner, in good faith reliance on existing zoning, has substantially changed position either by causing substantial construction to be made or by incurring substantial expenses related to construction, or both. And in *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 660, 515 N.W.2d 390 (1994), the Supreme Court stated that a new regulation may not be applied retroactively where a zoning authority is guilty of misconduct or bad faith in its dealings with an applicant for a use permit in accordance with the then-existing zoning regulation, or if it arbitrarily and unreasonably adopts a new regulation in order to frustrate an applicant's plans for development rather than to promote general welfare. We find none of the exceptions to be applicable under the circumstances of this case. Thus, we will follow the general rule and apply the current zoning regulations, which include the substance of the 2007 revised regulation.

We reject Dowd's argument that the 2007 revised regulation, even if applicable, does not except OSI's property. Dowd asserts that we determined in case No. A-06-681 that OSI's property was platted on September 28, 2005, and thus, the language from the new ordinance excepting any land platted prior to March 9, 2004, does not apply. What we actually stated in

case No. A-06-681, however, is that OSI's property was *replatted* on September 28, 2005. We recognized that the property was originally platted in 2001 and then replatted in 2005. And the 2007 regulation specifically states that replats of property platted before March 9, 2004, "shall remain excepted." Therefore, we reject Dowd's argument that the language of the 2007 regulation does not except OSI's property.

[15,16] We also find no merit to Dowd's argument that OSI does not have a valid building permit. Under Neb. Rev. Stat. § 23-114.04(1) (Reissue 2007), a county board enforces the zoning regulations within its county by "requiring the issuance of permits prior to the . . . construction . . . of any nonfarm building or structure within a zoned area" and the board "may provide for the withholding of any permit if the purpose for which it is sought would conflict with zoning regulations." Thus, the purpose of the building permit is to ensure compliance with the zoning regulations and the statute emphasizes the importance of obtaining such compliance *before* the construction of a building or structure. Here, OSI sought building permits prior to the erection of its building and its building has been fully constructed. The Sarpy County defendants have no quarrel with OSI's application, payment of fees, filing of plans, performance of construction, or compliance with all applicable zoning regulations. The revised zoning ordinance adopted after construction of OSI's building excepts the building from the design requirements which previously applied to it. The primary purpose of § 23-114.04(1) is to ensure compliance with the zoning regulations, and that purpose has been accomplished—the building complies with the zoning regulations that now apply to it. Under the circumstances before us, that purpose would not be enhanced or furthered by requiring OSI to obtain a new permit for the building that has already been built and that complies with the applicable zoning regulations.

*Law-of-the-Case, Res Judicata, and Collateral Estoppel Doctrines.*

Dowd argues that the law-of-the-case, res judicata, and collateral estoppel doctrines render the new overlay district

ordinance immaterial and irrelevant. We reject Dowd's argument for a number of reasons.

[17] First, the revised ordinance was not before the appellate courts in the prior appeal in case No. A-06-682. Dowd contends that appellees "presented the 'change in the ordinance' at oral argument in the Court of Appeals, [and] they also made the change in the [o]rdinance part of their [p]etitions for [f]urther [r]eview." Brief for appellants at 21. Dowd then equates the Supreme Court's denial of the petitions for further review with a rejection of the argument that the change in the ordinance made the case moot. However, an appellate court cannot consider as evidence statements made by the parties at oral argument or in briefs, as these are matters outside the record. *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011). The revised regulation—which was enacted after the bill of exceptions was prepared—was not a part of the record in the prior appeal, and we did not consider it.

[18,19] Second, Dowd's argument focuses on the prior appeal in a different case, case No. A-06-681. The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011). Thus, if the law-of-the-case doctrine had any applicability, it would be with regard to our holdings in case No. A-06-682, not those in case No. A-06-681. And an exception to the law-of-the-case doctrine applies if a party shows a material and substantial difference in the facts on a matter previously addressed by an appellate court. *County of Sarpy v. City of Gretna*, 276 Neb. 520, 755 N.W.2d 376 (2008). The enactment of the 2007 revised regulation, which excludes OSI's building from certain requirements which precipitated Dowd's complaint, constitutes a material and substantial difference in the facts. Accordingly, the law-of-the-case doctrine does not apply.

[20,21] Third, collateral estoppel and res judicata do not bar our consideration of the new ordinance. For application of the doctrines of collateral estoppel or res judicata, the party relying on either of those principles in a present proceeding has the burden to show that a particular issue was involved and necessarily determined in a prior proceeding. *Stevenson v.*

*Wright*, 273 Neb. 789, 733 N.W.2d 559 (2007). Res judicata does not apply when there has been an intervening change in facts or circumstances. *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007). As discussed above, the applicability of the 2007 revised regulation to OSI's property was not considered or at issue in either case No. A-06-681 or case No. A-06-682, and it presents a change in circumstances.

*Mootness.*

Appellees contend, and the district court found, that the revised regulation makes the issues raised by Dowd's complaint moot. We agree.

[22,23] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009). 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. *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010). Because Dowd's complaint is based on OSI's building's noncompliance with design aspects of the 2004 ordinance and the 2007 revised regulation excepts OSI's building from those requirements, the district court correctly determined that the issues raised by Dowd's complaint were moot.

[24,25] We conclude that no exception to the mootness doctrine applies, and Dowd does not assert otherwise. Under the public interest exception, an appellate court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. *City of Omaha v. Tract No. 1*, 18 Neb. App. 247, 778 N.W.2d 122 (2010). When determining whether a case involves a matter of public interest, an appellate court considers (1) the public or private nature of the question presented,

(2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem. *Id.* While the first factor may weigh in favor of finding the public interest exception applies, we think that a similar problem is not likely to recur and that this court's resolution is not likely to offer much guidance in light of our discussion of the time of decision rule. We conclude that this case does not fall within the public interest exception to the mootness doctrine.

Because the issues raised by Dowd's complaint are moot and an exception to the mootness doctrine is not applicable, the district court properly entered summary judgment in favor of appellees and denied Dowd's motion for summary judgment.

## CONCLUSION

We conclude that any error in admitting Horner's affidavits was harmless and not reversible error. Under the time of decision rule, we apply the zoning regulations currently in effect, which include the 2007 revised regulation. Because the revised regulation was not considered or at issue in the prior appeals in cases Nos. A-06-681 and A-06-682 and it constitutes a material change in facts, the law-of-the-case, res judicata, and collateral estoppel doctrines do not apply. Finally, we conclude that the issues raised by Dowd's complaint—premised upon violations of the 2004 ordinance from which OSI's building is excepted under the 2007 revised regulation—are moot and that the public interest exception to the mootness doctrine does not apply. Accordingly, we affirm the district court's entry of summary judgments in favor of appellees.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. MOHAMMED NADEEM, APPELLANT.

809 N.W.2d 825

Filed March 6, 2012. No. A-10-981.

1. **Trial: Juries: Appeal and Error.** A district court's decision regarding impaneling an anonymous jury is reviewed under the deferential abuse-of-discretion standard.
2. **Juries: Words and Phrases.** Generally, an "anonymous jury" describes a situation where juror identification information is withheld from the public and the parties themselves.
3. **Trial: Juries: Presumptions.** Juror anonymity is most disadvantageous to the defendant during jury selection and with regard to the defendant's presumption of innocence.
4. **Juries.** A court should not impanel an anonymous jury unless it (1) concludes that there is a strong reason to believe the jury needs protection and (2) takes reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his or her fundamental rights are protected.
5. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
6. **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.
7. ____. An appellate court may consider an issue not raised to the trial court if such issue amounts to plain error.
8. ____. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
9. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Motion for rehearing sustained. See 19 Neb. App. 466, 808 N.W.2d 95 (2012), for original opinion. Original opinion withdrawn. Reversed and remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, and Elizabeth D. Elliott for appellant.

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

INBODY, Chief Judge, and SIEVERS and PIRTLE, Judges.

SIEVERS, Judge.

## INTRODUCTION

Mohammed Nadeem appealed his convictions and sentences in the district court for Lancaster County for attempted first degree sexual assault and attempted third degree sexual assault of a child. In our opinion released January 17, 2012, *State v. Nadeem, ante* p. 466, 808 N.W.2d 95 (2012), we concluded that the trial court abused its discretion in impaneling an anonymous jury, and we reversed the convictions and remanded the cause for a new trial. The State has filed a motion for rehearing, contending that our decision was incorrect in its reasoning and that as a consequence, our result was incorrect. We hereby grant the motion for rehearing, but we limit the rehearing relief to withdrawing our previous opinion in its entirety, and we replace it with the instant opinion. We reach the same result, but upon somewhat different reasoning.

## BACKGROUND

On August 6, 2009, H.K., the victim in this case, was with a friend at a public library in Lincoln, Nebraska. H.K. was 14 years old at the time. While H.K. was sitting at a table in a reading room of the library using her laptop computer, she noticed Nadeem standing within a couple feet of her looking at a newspaper and glancing over at her. Shortly thereafter, Nadeem began talking to H.K. and asking her questions, including how old she was. Nadeem asked H.K. for her telephone number, and when she would not give it to him, he gave H.K. his telephone number and told her he hoped to hear from her.

When H.K.'s mother later picked up H.K. and her friend from the library, H.K. told her mother about her encounter with Nadeem. H.K. and her mother reported the incident to the library and then called the police. The next day, the police asked H.K. to make a controlled call to Nadeem from the police station, which she agreed to do. H.K. spoke with Nadeem and asked him why he wanted her to call. Nadeem indicated that he wanted to talk to her more and to see her. The conversation continued, and they began discussing what they would

do together, which led to Nadeem's indicating that he wanted to touch her and that he had a "grand collection of ideas" in regard to what type of touching. H.K. told Nadeem she was a virgin, and at that point, Nadeem asked H.K. if she wanted to lose her virginity and when she wanted to lose it. He suggested "sexual stimulation" such as "licking," "kissing," and "fingering" when H.K. told him that she did not know how to lose her virginity. When H.K. stated that she did not know what "fingering" meant, Nadeem volunteered to do it to her. Nadeem later explained that putting his penis into H.K.'s vagina would also be "stimulation." By the end of the conversation, Nadeem and H.K. agreed to meet at the library about 30 minutes later. Nadeem was arrested when he arrived at the library. Nadeem was 22 years old at the time.

Nadeem was charged by information with attempted first degree sexual assault and attempted third degree sexual assault of a child. A jury found him guilty on both counts. The trial court sentenced him to 3 to 6 years' imprisonment on the attempted first degree sexual assault conviction and not less than nor more than 1 year's imprisonment on the attempted third degree sexual assault of a child conviction.

## ASSIGNMENTS OF ERROR

Nadeem assigns that the trial court erred in (1) impaneling an anonymous jury, (2) finding that there was sufficient evidence to support convictions for attempted first degree sexual assault and attempted third degree sexual assault of a child, (3) admitting testimony by library staff of prior "unusual behavior" exhibited by Nadeem in the library, (4) failing to give an entrapment instruction on the attempted first degree sexual assault charge, and (5) imposing excessive sentences. Nadeem also alleges that he received ineffective assistance of counsel. Because of the result we reach, we only discuss the first assignment of error.

## STANDARD OF REVIEW

[1] A district court's decision regarding impaneling an anonymous jury is reviewed under the deferential abuse-of-discretion standard. *State v. Sandoval*, 280 Neb. 309, 788

N.W.2d 172 (2010), citing *U.S. v. Darden*, 70 F.3d 1507 (8th Cir. 1995).

## ANALYSIS

Before voir dire began, each prospective juror had apparently been assigned a number. Throughout voir dire—including questioning by the court, the prosecutor, and defense counsel—each juror was referred to by his or her assigned number rather than his or her name. Our record concerning jury selection begins with remarks by the judge to all of the potential jurors, followed by the calling of each prospective juror into the jury box by his or her number. After counsel had made their peremptory strikes, the numbers of the jurors who would sit on the case were called.

At the outset, we emphasize that our record contains absolutely nothing about how a "numbers" jury or an "anonymous" jury came to be used in this case, including at whose instance or why. We can discern from the voir dire that juror questionnaires were used, but none of such are in our record, and thus, we are uncertain about exactly what sort of information was revealed on the questionnaires. However, a hearing on Nadeem's postverdict motion entitled "Motion to Release Jurors Information" suggests that the names of the jurors were withheld from defense counsel. At the September 3, 2010, hearing on this motion, defense counsel told the court:

> The second motion [is] to release juror information. My client and his family have some concerns as to whether or not the jurors were influenced by either his religion or national origin and wanted an opportunity to talk with the jurors and to interview the jurors.
>
> And if I understand Nebraska law correctly, in order to release the names of the jurors that we have to get court permission to do that. That's all that we're asking. So we can interview the jurors and find out what their reasoning was behind their verdict.

The trial court denied the motion without explanation.

[2] The term "anonymous jury" encompasses the withholding of a broad spectrum of information. *State v. Sandoval, supra.* Generally, an "anonymous jury" describes a situation

where juror identification information is withheld from the public and the parties themselves. *Id.* The least secretive form of an anonymous jury is where only the jurors' names are withheld from the parties. *Id.* At other times, names and other identification information are withheld, but limited biographical information is made available. See *id.* In the instant case, the above record concerning Nadeem's posttrial motion supports the conclusion that this was likely an "anonymous jury," rather than a "numbers jury," in that the identity of the jurors was withheld from Nadeem and his counsel. However, while this is the most secretive jury, in the end that difference does not affect our ultimate result. But hereafter, we will use the term "anonymous jury" in our discussion. Generally, impaneling an anonymous jury is a drastic measure that should only be undertaken in limited circumstances, and there is a danger that the practice could prejudice jurors against the defendants. *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

[3] Juror anonymity is most disadvantageous to the defendant during jury selection and with regard to the defendant's presumption of innocence. *State v. Sandoval, supra.* Also, during jury selection, a lack of information could prevent the defense from making intelligent decisions regarding peremptory strikes. *Id.* And, there is a risk that potential jurors will interpret the anonymity as an indication that the court believes the defendant is dangerous. *Id.*

*State v. Sandoval, supra*, is the first time either of the two Nebraska appellate courts has addressed the propriety of withholding personal information or names of potential jurors from the defendant. In *Sandoval*, the trial court announced in a preliminary hearing that it intended to identify jurors by number rather than by name. The court ordered defense counsel not to disclose the names of the potential jurors to anyone, including the defendant. As each juror entered the courtroom for voir dire, the court informed the juror that the court and attorneys would be referring to the juror by his or her juror number. No other acknowledgment or explanation of the action was given.

[4] Although *Sandoval* was the first time the issue of numbers or anonymous juries was addressed by a Nebraska

appellate court, the Supreme Court in that opinion cited 13 different state and federal appellate decisions that dealt with the issue dating back to 1991. From that authority, the *Sandoval* court adopted the two basic prerequisites, or a two-pronged test, for the use of such juries, saying that a court should not impanel an anonymous jury unless it (1) concludes that there is a strong reason to believe the jury needs protection and (2) takes reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his or her fundamental rights are protected. *Id.*

Our Supreme Court followed the lead of the other decisions it had cited with respect to the part of its discussion captioned as "Compelling Reason to Believe Jury Needs Protection." *Id.* at 328, 788 N.W.2d at 196. The factors to consider were held to be (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment. The *Sandoval* court concluded that the trial court did not abuse its discretion in impaneling an anonymous jury under the circumstances of the case. In regard to the first part of the test, the court decided that there was a combination of factors to support the conclusion that the jury needed protection. Specifically, the court noted that the defendant was a member of a gang and had commanded a riot while in prison and preyed on other inmates. The court also noted that the murders with which he was charged generated significant media attention in Nebraska and that, if convicted, he faced life imprisonment or the death penalty. In the instant case, there is nothing in the record to even hint at a need for protection of the jury.

Although *Sandoval* articulated a second prerequisite to the use of numbers or anonymous juries—that precautions are taken by the trial court to prevent prejudice to the defendant—the record here reveals nothing on that subject. In any event, given the fact that the first prerequisite was obviously

not satisfied in the instant case, there is no need to discuss the second prerequisite for the use of such a jury any further.

In our view, the *Sandoval* court's adoption of the two-part test, or prerequisites as we have termed such, for the use of numbers or anonymous juries is the substantive law of that decision. However, the court also laid down what we consider to be a procedural directive when it said, "Henceforth, if the court decides to impanel an anonymous or numbers jury, we direct the court to follow the two-part test set forth herein and to articulate its specific findings of fact in support of such decision." *State v. Sandoval*, 280 Neb. 309, 328, 788 N.W.2d 172, 196 (2010). The significance of both the substantive and the procedural holdings of *Sandoval* for the present case is that this case was tried before the *Sandoval* decision was rendered. In short, the "henceforth" part of the decision was not applicable in Nadeem's case, and the trial judge did not need to make the specific findings required "henceforth" by *Sandoval*. Thus, we emphasize that our reversal does not flow from the fact that there were not specific findings by the trial judge. Rather, it flows directly from the complete and total absence of anything substantive in the record to justify what the *Sandoval* court called "a drastic measure that should only be undertaken in limited circumstances." 280 Neb. at 326-27, 788 N.W.2d at 195. Such circumstances are, of course, the two prerequisites discussed above. In other words, even though the trial judge, at the time of this trial, was not required to make specific findings on why such a jury was justified and on the precautions taken, the record still must contain those substantive elements that would justify taking such an unusual and drastic step. And this record simply contains nothing of the sort.

[5,6] However, we now turn to the State's arguments that Nadeem did not object to the use of an anonymous jury and raises the issue on appeal for the first time, but that any error is waived. The State reminds us of the firmly established proposition that failure to make a timely objection waives the right to assert prejudicial error on appeal. See *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011). The rationale is that 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. *Id.* Additionally, one may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *Id.* The *Collins* court set forth numerous examples of the application of this rule, but none involved numbers or anonymous juries, as this case and *Sandoval* are the only cases in which such a jury was involved.

[7,8] In our original opinion in this case, we may have made an implicit suggestion that trial counsel did not have an opportunity to object. However, even though there is no record of how this anonymous jury came about, the entire jury selection process is on the record, and at the beginning of that process, trial counsel could have easily approached the bench and made a record of any objection out of the venire's hearing. Thus, counsel clearly had an opportunity to object. That said, we turn to the well-established exception to the waiver rule, which exception is that an appellate court may consider an issue not raised to the trial court if such issue amounts to plain error. See *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008).

We do note that in *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), the defendant claimed ineffective assistance of counsel because of his trial counsel's failure to object to the use of the anonymous jury and because counsel did not request a curative instruction. The Supreme Court quickly disposed of this claim by simply saying that the record showed the use of the anonymous jury was justified and appropriate precautions were taken and that therefore, counsel was not ineffective.

But this case is substantially different from *Sandoval* because here, there is absolutely nothing in the record that establishes either the existence of a compelling need to protect the jury or that precautions were taken to prevent prejudice to Nadeem. In short, there is a complete absence

of evidence that establishes the substantive prerequisites for the use of an anonymous jury. Therefore, the ultimate issue devolves to the question: Under such circumstances, was it plain error to use an anonymous jury? Given the high substantive requirements for the use of such a jury, coupled with the definition of plain error, we can only answer the determinative question posed above in the affirmative. We recall that an anonymous jury's use carries an obvious risk of disadvantaging the defendant in the jury selection process, as well as having a potentially adverse impact on the presumption of innocence. Thus, we must conclude that plain error exists. The record fails to show both a need to protect the jury and how Nadeem was protected from the potential prejudice to him from the use of this unusual procedure. Failure to correct this error would damage the integrity, reputation, and fairness of the judicial process. Thus, the use of this anonymous jury in Nadeem's trial, although unobjected to, constitutes reversible plain error, and it naturally follows that doing so was an abuse of discretion.

[9] Having found reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Nadeem's convictions. See *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009). If it was not, then double jeopardy principles would not allow a remand for a new trial. See *id.* The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *Id.* Bearing in mind our recitation of the factual evidence at the outset of our opinion, we find that the sum of all the evidence was sufficient to sustain the verdicts. We therefore reverse the convictions and remand the cause for a new trial.

Given our determinations that the trial court abused its discretion in impaneling an anonymous jury and that such was plain error, we need not address Nadeem's remaining assignments of error. See *State v. Passerini*, 18 Neb. App. 552, 789 N.W.2d 60 (2010) (appellate court is not obligated to engage in analysis which is not needed to adjudicate controversy before it).

## CONCLUSION

For the foregoing reasons, we conclude that the trial court abused its discretion in impaneling an anonymous jury. Because the evidence presented by the State was sufficient to sustain Nadeem's convictions, we reverse the convictions and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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## STEPHEN M. SAWTELL, JR., AND JULIA A. SAWTELL, HUSBAND AND WIFE, APPELLEES, V. BEL FURY INVESTMENTS GROUP, L.L.C., APPELLANT.

810 N.W.2d 320

Filed March 6, 2012. No. A-11-150.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. 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.
3. **Equity: Quiet Title.** A quiet title action sounds in equity.
4. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.
5. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
6. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which 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.
7. **Adverse Possession: Boundaries.** Proof of the adverse nature of the possession of the land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description.
8. ____: ____. The burden to prove an exact and definite description of land adversely possessed is not met where the metes and bounds of the area claimed would rest on speculation and conjecture.

9. **Summary Judgment.** The denial of summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation.
10. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded for further proceedings.

Brian J. Muench for appellant.

Matthew S. McKeever, of Copple, Rockey, McKeever & Schlecht, P.C., L.L.O., for appellees.

INBODY, Chief Judge, and CASSEL and PIRTLE, Judges.

CASSEL, Judge.

## INTRODUCTION

Bel Fury Investments Group, L.L.C. (Bel Fury), challenges the district court's decree granting summary judgment in favor of Stephen M. Sawtell, Jr., and Julia A. Sawtell on their claim of adverse possession to a tract of land of which Bel Fury is the record owner. We note plain error. Because the district court entered a decree setting out a legal description of real property that is fundamentally incomplete and ambiguous, we reverse, and remand for further proceedings.

## BACKGROUND

The Sawtells reside at 9228 Timberline Drive, Omaha, Nebraska. They are the record owners of that property, which is legally described as "Lot 52, Block 2, Raven Oaks, an Addition to the City of Omaha, as surveyed, platted and recorded in Douglas County, Nebraska." The Sawtells purchased this property in July 2006.

The Sawtells' property is adjacent to property owned by Bel Fury. Bel Fury's property is legally described as follows:

> The South Half (1/2) of the South Half (1/2) of the Southwest Quarter (1/4) of the Northwest Quarter (1/4) of Section Nineteen (19), Township Sixteen (16) North, Range Thirteen (13), East of the 6th P.M., in Douglas County, Nebraska; Except that part Deeded to Omaha Public Power District, specifically[:]

> The South Two Hundred Eighty (280′) Feet of the East Five Hundred Sixty Seven (567′) Feet of the West Six Hundred (600′) Feet of the South One Half of the South One Half of the Southwest Quarter of the Northwest Quarter (S ½ S ½ SW ¼ NW ¼) of Section Nineteen (19), Township Sixteen (16) North, Range Thirteen (13) East of the 6th P.M., Douglas County, Nebraska.

Bel Fury acquired this land by a tax foreclosure sale in February 2002.

At dispute is a tract of land approximately 100 feet by 10 feet located along the property line between the Sawtells' residence and Bel Fury's property (hereinafter referred to as the "disputed land"). The disputed land has been fenced in as part of the backyard of 9228 Timberline Drive since 1994. However, Bel Fury is the record owner.

In April 2010, the Sawtells filed a complaint against Bel Fury in the district court for Douglas County, Nebraska, alleging that they had acquired title to the disputed land by adverse possession. They subsequently filed a motion for summary judgment. A hearing was held, and evidence was adduced by both parties. One of the affidavits presented by the Sawtells was that of a registered land surveyor. In this affidavit, the surveyor explained that based on his survey of the disputed land, "[t]he fence extended 8.9′ and extended South 1.0′ from the Northwest corner of the subject property, and then extended South to a point 18′ North and 4′ West of the Southwest corner of the Lot line of the subject property." He also recommended a legal description for the Sawtell property that would include all of the land enclosed by the fence:

> Lot 52, Block 2, Raven Oaks, a Subdivision, as surveyed, platted and recorded in Douglas County, Nebraska, including a point extending 8.9′ West and 1.0′ South of the Northwest corner of Lot 52, Block 2 extending southerly to a point 18′ North and 4.8′ West of the Southwest corner of Lot 52, Block 2 to a point extending 4.8′ East to a point on the lot line of Lot 52, Block 2.

At the hearing, the district court verbally sustained the motion for summary judgment. It filed a written decree to that

effect on January 24, 2011, quieting title to the disputed land in the Sawtells. The decree set out the legal description of the disputed land as follows:

> A point extending 8.9′ West and 1.0′ South of the Northwest corner of Lot 52, Block 2 extending southerly to a point 18′ North and 4.8′ West of the Southwest corner of Lot 52, Block 2 to a point extending 4.8′ East to a point on the lot line of Lot 52, Block 2.

In its decree, the district court also amended the legal descriptions of the property owned by the Sawtells and Bel Fury to include and exclude, respectively, the adversely possessed tract of land. In the case of the Sawtell property, this combined description reads:

> Lot 52, Block 2, Raven Oaks, a Subdivision, as surveyed, platted and recorded in Douglas County, Nebraska, including a point extending 8.9′ West and 1.0′ South of the Northwest corner of Lot 52, Block 2 extending southerly to a point 18′ North and 4.8′ West of the Southwest corner of Lot 52, Block 2 to a point extending 4.8′ East to a point on the lot line of Lot 52, Block 2.

The district court amended the legal description of Bel Fury's property by adding the following qualification to the existing description:

> and except that part described as follows:
>
> A point extending 8.9′ West and 1.0′ South of the Northwest corner of Lot 52, Block 2 extending southerly to a point 18′ North and 4.8′ West of the Southwest corner of Lot 52, Block 2 to a point extending 4.8′ East to a point on the lot line of Lot 52, Block 2.

Bel Fury timely appeals.

## ASSIGNMENTS OF ERROR

Bel Fury alleges that the district court erred in (1) granting the Sawtells' motion for summary judgment, specifically finding that their claim met the requirements for adverse possession; (2) finding that the intervening foreclosure action on this specific real property did not toll the time required for adverse possession; and (3) finding that the Sawtells were entitled to actual notice of the intervening foreclosure action.

Prior to oral argument, we notified the parties to be prepared to address whether there was plain error in the district court's legal description of the disputed land.

## STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011). 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. *Radiology Servs. v. Hall*, 279 Neb. 553, 780 N.W.2d 17 (2010).

[3,4] A quiet title action sounds in equity. *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007). On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations. *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 759 N.W.2d 464 (2009).

## ANALYSIS

[5,6] We do not reach the assigned errors in this case because we note plain error in the legal description of the disputed land set forth in the district court's decree. Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011). Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which 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. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). In the instant case, the district court plainly erred in using a legal description that is incomplete and ambiguous.

[7,8] Our case law in the area of adverse possession has evolved to place a high burden on the party claiming title by adverse possession to provide a description of the land to which he or she is claiming title. Proof of the adverse nature of the possession of the land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description. *Matzke v. Hackbart*, 224 Neb. 535, 399 N.W.2d 786 (1987). Over the years, the Nebraska Supreme Court has explained that the land must be "sufficiently described to found a verdict upon the description," *Steinfeldt v. Klusmire*, 218 Neb. 736, 739, 359 N.W.2d 81, 83 (1984), and that the description "must also be 'exact' and 'definite,'" *Petsch v. Widger*, 214 Neb. 390, 397, 335 N.W.2d 254, 259 (1983). This burden is not met where the metes and bounds of the area claimed would rest on speculation and conjecture. *Inserra v. Violi*, 267 Neb. 991, 679 N.W.2d 230 (2004). The Nebraska Supreme Court has not hesitated to reject adverse possession claims when the burden to provide a specific description is not met. See, e.g., *id*. at 996, 679 N.W.2d at 235 (describing evidence as providing "at best an approximate location of the claimed boundary"); *Matzke v. Hackbart*, 224 Neb. at 541, 399 N.W.2d at 791 (describing description provided as "an admitted estimation, with no factual basis expressed in the record"); *Steinfeldt v. Klusmire*, 218 Neb. at 739, 359 N.W.2d at 83 (noting that claimant's "evidence failed to establish any specific boundaries").

While our case law does not directly place a burden on the trial courts to provide precise descriptions when quieting title to property through adverse possession, we have begun to hold these courts accountable in addition to the parties for providing adequate property descriptions. In a 2004 Nebraska Supreme Court case, the court reversed a district court's allowance of an adverse possession claim based on a description that referred to "'the real property running from "pole to pole" on center on Lot 56 immediately adjacent to Lot 55.'" *Inserra v. Violi*, 267 Neb. at 993, 679 N.W.2d at 233. The court elaborated: "The issue is not . . . whether a surveyor could at some future date establish a boundary and legal description

using the landmarks identified in their testimony. Rather, their adverse possession claim must fail because they did not produce such evidence at trial, as our case law requires." *Id.* at 996, 679 N.W.2d at 235. We have interpreted *Inserra v. Violi* to require a court "to include a precise legal description of property rather than general descriptions based on landmarks." *Campagna v. Higday*, 14 Neb. App. 749, 761, 714 N.W.2d 770, 779 (2006).

The instant case does not include a property description that relies on landmarks or approximations, but it does present errors in description that will cause significant problems in future transactions involving the disputed land. First, the legal description of the disputed land does not describe a closed parcel of land. Such a description would not be sufficient to convey title if provided on a deed. See *Sober v. Craig*, No. A-94-513, 1996 WL 4310 (Neb. App. Jan. 2, 1996) (not designated for permanent publication). Neither would it serve as an adequate mortgage description. See *First Fed. Sav. & Loan Assn. v. Thomas*, 230 Neb. 465, 432 N.W.2d 222 (1988).

Second, the amended legal description of the Sawtell property erroneously states that the Sawtell land "includ[es]" the disputed land. The disputed land is not "includ[ed]" in the Sawtells' lot "as surveyed, platted and recorded." The disputed land lies *outside* of the platted lot. Thus, rather than the platted lot "including" the disputed land, the disputed land would be "together with" or "in addition to" the platted lot.

Finally, the legal description provided by the district court is ambiguous. One alternative is that the tract begins at the northwest corner of the platted lot and proceeds 8.9 feet west and then 1 foot south to a point; in other words, containing a right angle from west to south in the midst of the distance between the northwest corner of Lot 52 and the "point," where the total distance covered is 9.9 feet. Another alternative is that the surveyor meant to say, "beginning at the northwest corner of Lot 52, then proceeding in a straight line to a point located 8.9′ west and 1.0′ south of said northwest corner of Lot 52." In this interpretation, the line would be straight but of unstated length between the two points—point 1 being the northwest corner of Lot 52 and point 2 being the point 8.9 feet west and

1 foot south of the northwest corner of Lot 52. While we might guess that the surveyor meant the latter, the description does not require this interpretation. There are similar ambiguities in the balance of the description. As we have already stated, the burden of describing property in adverse possession cases "is not met where the metes and bounds of the area claimed would rest on speculation and conjecture." *Inserra v. Violi*, 267 Neb. 991, 995, 679 N.W.2d 230, 234 (2004).

[9] Because we interpret the adverse possession case law as placing a burden on the courts, as well as the parties, to provide precise legal descriptions of the land under adverse possession, we find the district court's legal description in this case to be plain error. Thus, the court's decree granting summary judgment cannot stand and must be reversed. But Bel Fury did not move for summary judgment. So our reversal merely reverses the district court's ruling on summary judgment from one granting the motion to a denial of the motion. And, of course, the denial of summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation. See *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004). Thus, our decision effectively returns the case to its posture before the Sawtells filed their motion for summary judgment.

[10] Because our finding of plain error necessitates a reversal and remand, we do not consider the errors assigned by the Sawtells and we express no opinion regarding the merits of the Sawtells' claim founded on adverse possession. An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it. *Fokken v. Steichen*, 274 Neb. 743, 744 N.W.2d 34 (2008).

## CONCLUSION

We find plain error in the issuance of a decree using an incomplete and ambiguous legal description to quiet title to real property. Accordingly, we reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ALEXANDER ZOUBENKO, APPELLANT, V.
VALENTINA ZOUBENKO, APPELLEE.
813 N.W.2d 506

Filed March 13, 2012. No. A-11-340.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; those determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
3. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
4. ____. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate.
5. ____. Factors which should be considered by a court in determining alimony include: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
6. ____. The primary purpose of alimony is to assist an ex-spouse for a period of time necessary for that individual to secure his or her own means of support, and the duration of an alimony award must be reasonable in light of this purpose.
7. ____. In awarding alimony, the income and earning capacity of each party as well as the general equities of each situation must be considered.
8. ____. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed as modified.

Terrance A. Poppe and Heidi M. Hayes, of Morrow, Poppe, Watermeier & Lonowski, P.C., L.L.O., for appellant.

F. Matthew Aerni, of Berry Law Firm, for appellee.

INBODY, Chief Judge, and CASSEL and PIRTLE, Judges.

PIRTLE, Judge.

## INTRODUCTION

Alexander Zoubenko appeals from an order of the district court for Lancaster County ordering Alexander to pay alimony to Valentina Zoubenko in the sum of $1,500 per month. This order states that the obligation shall terminate upon Valentina's remarriage or the death of either party.

## BACKGROUND

Alexander and Valentina came to the United States from Ukraine in 1992. They were married in New York, New York, on March 23, 1992. This was Alexander's second marriage and Valentina's first, and the parties have no children, separately or jointly. Both parties studied engineering and earned bachelor's degrees in Ukraine prior to moving to the United States. At the time of trial, Alexander was 44 years old and Valentina was 58 years old. Both parties are healthy and stated no health concerns.

When the couple came to the United States, they initially worked as housecleaners. After approximately 11 months, Alexander got a job with Boiler Management in New Jersey, where he was employed until October 1994. Alexander received a job offer from Foster Wheeler Power Corporation in 1994, and he worked for the company in New Jersey and San Diego, California, until 1997. In 1997, Alexander gained employment with Alston Power in Windsor, Connecticut, and the couple moved from San Diego to Holyoke, Massachusetts, for this job opportunity. Alexander held this position until he received a job offer to work for Siemens Power Corporation in Orlando, Florida, in 2004. In 2006, Alexander received an offer for his current position in Lincoln, Nebraska. Alexander currently works for Cleaver-Brooks as a project engineer and earns approximately $79,000 per year.

Valentina secured employment as a "cleaning person" within about 3 months after moving to the United States. She cleaned apartments and offices for about 4 years, earning approximately $10 per hour. After this period, Valentina did not work outside of the home during the marriage. During the marriage,

Valentina was responsible for household duties, including doing the laundry and balancing the checkbook. Alexander helped with part of the cooking, and the two grocery shopped together. Valentina testified that Alexander asked her to stay at home and "live like old style family; he will work and I will stay at home and take care of him." Valentina began working again in September 2010, and she currently works as a sales associate in Connecticut, where she earns $8.45 per hour. Valentina worked for 20 years in Ukraine. Valentina testified that computers were not part of the engineering field when she worked there and that she has no computer skills. She also testified that she does not have a sufficient command of the English language or the technical language used in the engineering field. She requested alimony because she has difficulty finding jobs due to her language limitations as well as her lack of recent work experience and computer skills.

On April 1, 2011, the district court for Lancaster County ordered Alexander to pay alimony to Valentina in the amount of $1,500, continuing in a like amount on the first day of each month until Valentina remarries or either party dies. Alexander timely appealed the decree by filing a notice of appeal and a cash deposit in lieu of a bond and docket fee with the district court on April 25.

## ASSIGNMENT OF ERROR

Alexander assigns that the district court erred in granting Valentina alimony for life because this was unreasonable and an abuse of discretion.

## STANDARD OF REVIEW

[1] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; those determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion. *Thompson v. Thompson*, 18 Neb. App. 363, 782 N.W.2d 607 (2011).

[2] A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving

a litigant of a substantial right and a just result. *Dormann v. Dormann*, 8 Neb. App. 1049, 606 N.W.2d 837 (2000).

## ANALYSIS

[3,4] This court has previously stated that "[i]n determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness." *Hill v. Hill*, 10 Neb. App. 570, 573, 634 N.W.2d 811, 814 (2001). The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. *Id.* See *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000).

In this case, Alexander does not dispute that alimony should be awarded due to the 18-year duration of the parties' marriage and the current employment circumstances of the parties. We will address Alexander's sole assignment of error—that the duration of alimony, until the death of either party, is an unreasonable period of time.

[5] Factors which should be considered by a court in determining alimony include: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Kalkowski v. Kalkowski, supra*. See Neb. Rev. Stat. § 42-365 (Reissue 2008).

At the time of trial, Alexander was 44 years old and Valentina was 58 years old, and both stated they were healthy. Alexander is currently employed with Cleaver-Brooks in Lincoln, earning approximately $79,000 per year. Valentina is currently employed part time as a sales associate, earning $8.45 per hour. She lives with a cousin in Connecticut. The parties have no children, so we need not consider any ongoing expenses associated with custody, care, or education of children. Nor do we need to consider any interference with the interests of minor children associated with Valentina's return to work.

Valentina testified the marriage caused an interruption of her career, because she did not work outside of the home for the majority of the couple's marriage at the request of Alexander. Her "contributions to the marriage were almost entirely domestic"—keeping the books, doing most of the cooking, and doing the laundry. Brief for appellee at 4. Valentina argues that her career effectively ended upon her marriage to Alexander and that her ability to advance in her career would have been hindered by the numerous times the parties moved to accommodate Alexander's career.

Further, Valentina argues that although she is employable, she is "no where [sic] near employable in her field of training." *Id*. at 7. Yet, Valentina was not employed in her field of training either prior to or during the parties' marriage. During their first 4 years in the United States, and prior to Alexander's request that Valentina not work outside of the home, Valentina was continuously employed, but she made no effort to learn computer and language skills or advance her career as an engineer. It is true that Valentina's employment was interrupted when Alexander transferred from New Jersey to California. However, it seems the greater interruption in her career was the move to the United States, which occurred prior to the parties' marriage. This is not to suggest that Valentina does not deserve consideration for her contributions to the home or that her employment history was not impacted by Alexander's frequent job transfers. It simply indicates that Valentina's marriage to Alexander was not the only hindrance to her career.

[6] The Nebraska Supreme Court stated in *Gress v. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007), that the primary purpose of alimony is to assist an ex-spouse for a period of time necessary for that individual to secure his or her own means of support, and the duration of an alimony award must be reasonable in light of this purpose. In *Simon v. Simon*, 17 Neb. App. 834, 770 N.W.2d 683 (2009), the wife was rendered nearly blind by a genetic condition and was no longer able to work in her chosen field of nursing. This court awarded alimony for 120 months on appeal in light of her clear employment limitations and the nearly 30-year duration of the marriage.

In comparison, the simple fact that Valentina is nearing a traditional retirement age and is unlikely to find work in her chosen field is not enough to justify an award of lifetime alimony. The trial court's award gives no incentive for Valentina to remarry or become self-sufficient. Valentina states in her brief that she is employable but that it is unreasonable to expect her to pick up where she left her career in Ukraine approximately 18 years ago. However, that is not what is suggested in *Gress v. Gress, supra*. Even if Valentina does not return to a job within the engineering field, participation in some training courses would likely increase her ability to find full-time employment and to earn income in excess of her current part-time wage of $8.45 per hour. To supplement this training, Valentina should be given support for a reasonable amount of time to acquire the skills she needs to support herself.

[7,8] The criteria listed in § 42-365 are not an exhaustive list, and the "income and earning capacity of each party as well as the general equities of each situation" must also be considered. *Kelly v. Kelly*, 246 Neb. 55, 64, 516 N.W.2d 612, 617-18 (1994). However, alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000).

In *Kramer v. Kramer*, 1 Neb. App. 641, 510 N.W.2d 351 (1993), this court considered the reasonableness of an award of lifetime alimony where the parties were married 25 years, the wife did not work outside of the home for an extended period of time, and the parties had disparate earning capacities. This court concluded that an award of lifetime alimony would likely exceed the number of years the parties were married, and a reasonable time period under the circumstances should not extend into the husband's retirement. Given the modern life expectancies, the husband would potentially be responsible for the alimony well into his sixties and beyond, should the wife choose not to remarry. Therefore, we concluded that alimony should terminate after 15 years, when both parties would reach 62 years of age. The decision against lifetime alimony on appeal was supported by the fact that the wife was not incapacitated in any way, she went back to school to receive

training for a second career, and the parties had no minor children to care for.

In this situation, the circumstances are obviously different, given the disparate ages of the parties, but the facts are still similar. In this case, the decree took into consideration additional "complications" justifying the award of lifetime alimony, without which the court stated alimony would have been awarded for no more than 10 years. The complications included Valentina's ability or potential lack thereof to collect a livable wage from Social Security due to her limited history of employment in the United States. The court also noted that Valentina received about $132,000 in deferred compensation through the property settlement agreement, which included access to a portion of Alexander's retirement accounts. This amount would not likely provide her with enough to replace the minimum monthly wage she now earns once she stops working.

However, a de novo review of the evidence reveals that a lifetime award of alimony unfairly burdens Alexander and gives Valentina no incentive to remarry or motivation to improve her situation and become self-supporting. The court noted the evidence of Valentina's expenses was lacking, and Valentina is currently living, rent free, with a family member. She is employed part time, and there is nothing to prevent her from participating in courses to strengthen her job skills and language skills in order to secure more lucrative employment. Valentina and Alexander have no children, so there is no continuing obligation for care or education of minor children. Valentina is a healthy, educated woman with the potential to support herself in the near future.

At trial, Valentina requested $1,500 per month "for a period of 20 years, because that is how long it will be until [Alexander] is 65." The trial court's order stated that without consideration of Social Security ramifications, it would have awarded alimony for no longer than 10 years, but that in light of the circumstances, it chose to award lifetime alimony instead. It is unusual that the trial court awarded alimony in excess of what Valentina requested, but this conclusion is especially unusual given that she provided no evidence regarding her expected

Social Security entitlement. The determination that the factors noted above, taken as a whole, justify an award of lifetime alimony simply is not supported by the record and amounts to a judicial abuse of discretion.

An award of $1,500 per month for a fixed duration of 240 months would amount to a maximum payment of $360,000, a generous stipend for Valentina as she works toward becoming self-sufficient and as a supplement to her income if she encounters complications when applying for Social Security. In addition, Alexander is required under the decree to maintain a life insurance policy with Valentina as the beneficiary to cover the balance of his alimony obligation in the event he predeceases Valentina. This arrangement would release Alexander from his alimony obligation at approximately age 65, a time traditionally associated with retirement. Under these conditions, Valentina is guaranteed 20 years of supplementary income, after which point she is responsible for herself.

## CONCLUSION

Under the facts of this case, we find an abuse of discretion by the district court in awarding lifetime alimony to Valentina when she herself did not request it. The monthly amount of alimony was not in dispute, and as a result, we conclude that an award of alimony of $1,500 per month, for a period of 240 months, is reasonable under the circumstances. This award commenced on April 1, 2011, and is payable on the first day of each month thereafter, terminable upon the death of either party or the remarriage of Valentina. We modify the district court's award of alimony accordingly, and as so modified, we affirm the decree.

AFFIRMED AS MODIFIED.

# STATE OF NEBRASKA, APPELLEE, V. SEAN MORRISSEY, APPELLANT.

810 N.W.2d 195

Filed March 13, 2012. No. A-11-625.

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. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
3. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion.
4. **Highways.** Under Neb. Rev. Stat. § 39-1801 (Reissue 2008), when a county road is unusually dangerous to travel, it may be temporarily closed by erecting suitable barricades and posting signs warning the public that the road is closed by authority of law.
5. **Rules of the Road: Words and Phrases.** A road closed sign is a traffic control device under Neb. Rev. Stat. § 60-670 (Reissue 2010).
6. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
7. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** If an officer has probable cause to stop a violator, the stop is objectively reasonable, and any ulterior motive on the officer's part is irrelevant.
8. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop.
9. **Constitutional Law: Search and Seizure: Motor Vehicles.** In determining whether the government's intrusion into a motorist's Fourth Amendment interests was reasonable, the question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved the violation.
10. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** An officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred.

Appeal from the District Court for Saunders County, MARY C. GILBRIDE, Judge, on appeal thereto from the County Court for Saunders County, MARVIN V. MILLER, Judge. Judgment of District Court affirmed.

W. Randall Paragas, of Paragas Law Offices, for appellant.

Jon Bruning, Attorney General, and Carrie A. Thober for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

Sean Morrissey appeals his conviction for first-offense driving under the influence. He contends that the county court erred in overruling his motion to suppress and that the district court erred in affirming that decision. Because Morrissey committed violations of law by failing to obey a barricade and sign marked "Road Closed" and traveling upon a closed road, the arresting officer had probable cause to stop the vehicle. We affirm.

## BACKGROUND

On November 28, 2010, at approximately 1:15 a.m., a deputy sheriff stopped the vehicle Morrissey was driving because it was on County Road X, in Saunders County, Nebraska, which road had been closed due to weather and muddy road conditions. The deputy subsequently arrested Morrissey for driving under the influence of alcohol. The State filed a complaint charging Morrissey with first-offense driving under the influence.

Morrissey moved to suppress evidence obtained as a result of the traffic stop. Evidence adduced during the hearing established that County Road X was a minimum maintenance road and that on November 28, 2010, the intersection was marked with a large road closed barricade across the middle of the roadway and a road closed sign was posted in the ditch. There is no dispute that the road was not under construction at the time of the stop. The deputy testified that there was a posted detour, but Morrissey denied seeing any detour signs for County Road X. When the deputy stopped the vehicle and spoke with Morrissey, he noticed that Morrissey's eyes were glassy and bloodshot and detected the odor of an alcoholic beverage

coming from Morrissey. The deputy testified that Morrissey admitted to consuming alcohol prior to the stop. The deputy testified that he told Morrissey the stop was due to his being on a closed road and that Morrissey acknowledged seeing the road closed signs. The deputy ascertained that Morrissey lived in Omaha, Nebraska, and thus, that he did not live along the closed road. Morrissey testified that he was driving his passengers to their home in "Woodcliff," which was "on the other side of the road," and that County Road X was the shortest, most convenient route there.

The county court overruled the motion to suppress, finding that the deputy had probable cause to stop Morrissey based upon an observed violation of law: Morrissey was driving on a closed road which was clearly marked with a barricade. After a stipulated bench trial, the county court found Morrissey guilty. Morrissey appealed to the district court, which affirmed the conviction.

Morrissey timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

## ASSIGNMENT OF ERROR

Morrissey assigns only that the county court erred in overruling his motion to suppress, but claims that the court erred for two reasons. First, Morrissey claims that his conduct fell within the exception of Neb. Rev. Stat. § 60-6,115 (Reissue 2010). Second, he argues that the arresting officer was unaware that the exception did not apply.

## 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, 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. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

[2,3] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. See *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010). In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *Id.*

## ANALYSIS

Morrissey argues that the county court erred in overruling his motion to suppress. Specifically, he contends that the deputy did not have an articulable suspicion to make the traffic stop because the deputy could not have had an objective belief that Morrissey had committed a crime, was committing a crime, or was about to commit a crime. Morrissey emphasizes that he "did not commit a traffic offense and was exercising great care in his driving." Brief for appellant at 6. He relies upon our decision in *State v. Carnicle*, 18 Neb. App. 761, 792 N.W.2d 893 (2010), and contends that the deputy's observation of Morrissey's driving on the closed road should not have created an objective belief that Morrissey was committing a traffic violation. We disagree.

[4] Morrissey committed a misdemeanor by traveling on the closed road. Under Neb. Rev. Stat. § 39-1801 (Reissue 2008), when a county road is unusually dangerous to travel, it may be temporarily closed by erecting suitable barricades and posting signs warning the public that the road is closed by authority of law. A person violating § 39-1801 commits a Class V misdemeanor. See *id.* Because the road had been temporarily closed and suitable barricades and signs had been posted, Morrissey violated § 39-1801 by proceeding down the closed road.

[5] The State correctly points out that by failing to obey the road closed barricade and sign, Morrissey also violated the statute requiring drivers to obey traffic signs. A road closed sign is a "[t]raffic control device" under Neb. Rev. Stat. § 60-670 (Reissue 2010). Section 60-670 defines a "traffic control device" as "any sign, signal, marking, or other device not inconsistent with the Nebraska Rules of the Road placed

or erected by authority of a public body or official having jurisdiction for the purpose of regulating, warning, or guiding traffic." Neb. Rev. Stat. § 60-6,119(1) (Reissue 2010) requires drivers to "obey the instructions of any traffic control device applicable thereto placed in accordance with the Nebraska Rules of the Road." And Neb. Rev. Stat. § 60-682 (Reissue 2010) declares that unless otherwise specified, "a violation of any provision of the rules shall constitute a traffic infraction." Thus, in addition to the violation of § 39-1801, Morrissey's violation of the road closed barricade and sign constituted a traffic infraction.

[6,7] Morrissey's failure to heed the road closed barricade and sign provided the deputy with probable cause to stop the vehicle. A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). If an officer has probable cause to stop a violator, the stop is objectively reasonable, and any ulterior motive on the officer's part is irrelevant. *Id.* Thus, the deputy had probable cause to stop Morrissey for both traveling upon the closed road and failing to obey traffic control devices.

[8] Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). Thus, once stopped, the deputy was free to inquire of Morrissey about his residence and reason for travel on the road. And during this inquiry, the deputy detected an odor of alcohol coming from Morrissey and noticed that Morrissey's eyes were glassy and bloodshot. These circumstances provided the deputy with a reasonable, articulable suspicion that Morrissey was driving under the influence.

*State v. Childs*, 242 Neb. 426, 495 N.W.2d 475 (1993), to which Morrissey cites, is inapposite. In that case, a police officer stopped a vehicle solely because of the in-transit stickers displayed. Significantly, the officer saw no deficiency in the

vehicle and nothing unlawful about the driver's operation of it. The in-transit tags were valid, but when the officer asked the driver for a bill of sale and motor vehicle registration, the officer noticed that the driver appeared intoxicated. In *Childs*, the officer lacked an objectively reasonable basis to stop the vehicle. In contrast, in the instant case, the deputy observed a traffic violation, which provided probable cause to stop the vehicle.

Morrissey's reliance on § 60-6,115 is misplaced. That statute states:

> Notwithstanding the provisions of subsection (1) of section 60-6,119, when the Department of Roads, any local authority, or its authorized representative or permittee has closed, in whole or in part, by barricade or otherwise, *during repair or construction*, any portion of any highway, the restrictions upon the use of such highway *shall not apply to persons living along such closed highway or to persons who would need to travel such highway during the normal course of their operations if no other route of travel is available to such person*, but extreme care shall be exercised by such persons on such highway.

(Emphasis supplied.)

Under the plain language of § 60-6,115, Morrissey fails in numerous ways to qualify for the exception. First, there is no dispute that County Road X was closed due to weather and road conditions and that it was not under construction or repair. Second, Morrissey did not live along County Road X. Third, he was in the act of driving passengers to their home (which was *not* along the road) and did not need to travel it in "the normal course of [his] operations." And fourth, another route of travel was available to reach Woodcliff. Thus, § 60-6,115 did not authorize Morrissey to use the closed road.

[9,10] Moreover, even if it could be maintained that Morrissey fell within the exception of § 60-6,115, the stop would still have been reasonable. In *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996), the Nebraska Supreme Court reasoned that there may be some circumstances in which wholly lawful conduct might justify the suspicion that criminal activity is afoot; the purpose of an investigative stop is to clarify

ambiguous situations, and even if it is equally probable that the vehicle or its occupants are innocent of any wrongdoing, police must be permitted to act *before* their reasonable belief is verified by escape or fruition of the harm it is their duty to prevent. In determining whether the government's intrusion into a motorist's Fourth Amendment interests was reasonable, the question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved the violation. *State v. Prescott*, 280 Neb. 96, 784 N.W.2d 873 (2010). Rather, an officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred. *Id.* Because the deputy observed an apparent traffic violation when Morrissey was driving on a road which was clearly marked as being closed, the deputy had probable cause to believe that a violation had occurred and his stop of the vehicle was objectively reasonable.

## CONCLUSION

We conclude that Morrissey committed a misdemeanor and a traffic violation by driving on a road which was clearly marked with a road closed barricade and sign. Because the deputy observed this violation, his stop of the vehicle was objectively reasonable. We affirm the district court's order which affirmed the county court's denial of Morrissey's motion to suppress and the conviction and sentence.

AFFIRMED.

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# NEBRASKA PUBLIC ADVOCATE, APPELLANT, V. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, BLACK HILLS/NEBRASKA GAS UTILITY COMPANY, LLC, DOING BUSINESS AS BLACK HILLS ENERGY, APPELLEE, AND CONSTELLATION NEW ENERGY—GAS DIV., LLC, ET AL., INTERVENORS-APPELLEES.

815 N.W.2d 192

Filed March 20, 2012. No. A-11-341.

1. **Appeal and Error.** In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

2. **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.
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 not arbitrary, capricious, or unreasonable.
4. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
5. **Courts: Appeal and Error.** Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to the higher court. In the absence of plain error, where an issue is raised for the first time in the higher appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition.
6. **Public Utilities: Rates.** In determining whether expenses are prudently incurred, the test is whether they are costs which a reasonable utility or jurisdictional entity would have made in good faith under the same circumstances at the relevant point in time.
7. **Administrative Law: Judgments: Appeal and Error.** An appellate court, in reviewing a district court judgment for errors appearing on the record, under the Administrative Procedure Act, will not substitute its factual findings for those of the district court when competent evidence supports those findings.
8. **Evidence: Words and Phrases.** Competent evidence means evidence that tends to establish the fact in issue.
9. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did based on the testimony and exhibits contained in the record before it.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Roger P. Cox and Jack L. Schultz, of Harding & Schultz, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellee Nebraska Public Service Commission.

Trenten P. Bausch and Megan S. Wright, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and Douglas J. Law, of Black Hills Energy, for appellee Black Hills/Nebraska Gas Utility Company, LLC.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

The Nebraska Public Service Commission (Commission) granted in part an application filed by Black Hills/Nebraska Gas Utility Company, LLC, doing business as Black Hills Energy (Black Hills Energy), for a natural gas general rate increase, a large amount of which was attributable to transactions between Black Hills Energy and its affiliates. The district court affirmed. The Nebraska Public Advocate (Public Advocate) appeals, arguing that Black Hills Energy did not meet its burden to show that each payment to an affiliate was prudently incurred and that the costs charged by affiliates reasonably approximated the market value. Because we find no errors appearing on the record, we affirm.

## BACKGROUND

In 2007, Black Hills Corporation (BHC) entered into an agreement to acquire the regulated gas utilities of Aquila, Inc., in several states, including Nebraska. Aquila, BHC, and Black Hills Energy submitted to the Commission application No. NG-0044, which sought approval of the proposed transfer of Aquila's Nebraska certificate of public convenience and the changed control of Aquila's Nebraska jurisdictional utility assets. The Commission entered an order approving the transfer, and the acquisition was completed in July 2008.

BHC established Black Hills Energy as a separate legal entity for the natural gas assets formerly of Aquila which were located in Nebraska. Black Hills Utility Holdings, Inc., is a subsidiary of BHC which was formed to hold and separate the regulated utility holdings that BHC acquired from Aquila from the nonregulated holdings of BHC. Black Hills Energy obtains services from Black Hills Utility Holdings which are primarily related to customer service, billing, and information technology. Black Hills Service Company, LLC, is a subsidiary of BHC which provides administrative and management services—including functions such as payroll, administering benefits, risk management, and executive management—to all of BHC's subsidiaries.

On December 1, 2009, Black Hills Energy filed an application with the Commission for a general rate increase. The Public Advocate, along with several other entities, filed petitions for formal intervention, which were granted.

The Commission received extensive live, prefiled, and rebuttal testimony and exhibits regarding the rate application. Because the issue on appeal is narrow, we omit discussion of the evidence not pertinent to this appeal. In particular, affiliate costs are at issue. Michael Arndt, a public utility rate consultant, testified that an affiliate transaction is one for goods or services between two companies which share common ownership through a holding company structure. According to Arndt, 57.04 percent of Black Hills Energy's test year operation and maintenance expenses related to charges from affiliate companies. He cautioned that because affiliated companies share common ownership, the transactions between them lack arm's-length bargaining.

Black Hills Energy obtains support services from Black Hills Service Company and from Black Hills Utility Holdings through written service agreements. According to BHC's executive vice president and chief financial officer, doing so avoids the duplication of these business functions by each of the regulated and nonregulated business units of BHC and creates efficiencies by having the support services provided on a centralized basis. Jeffrey Thomas, a senior regulatory analyst for Black Hills Utility Holdings, similarly testified that having centralized department functions necessary for operations through Black Hills Service Company and Black Hills Utility Holdings helps reduce costs. He explained that costs would increase if each state was required to have its own accounting departments and computer systems, because there would be an increase in the number of employees and systems due to the duplication of many functions that are shared by the affiliates. Both Black Hills Service Company and Black Hills Utility Holdings have a cost allocation manual (CAM), and both companies provide their services at cost to Black Hills Energy and other BHC affiliates through direct and indirect charges. The service agreements specifically state that Black Hills Service

Company and Black Hills Utility Holdings will provide Black Hills Energy with

> various services as provided herein at cost, and pursuant to [the respective company's CAM], with cost determined in accordance with applicable rules and regulations under the [Energy Policy Act of 2005], which require [the company] to fairly and equitably allocate costs among all associate companies to which it renders services.

A return is not built into the costs charged by the parent or service company or other affiliate; the allocations are based on actual costs. In response to Commission staff questions, Black Hills Energy stated that it evaluates whether a cost from an affiliate is less than or equal to the cost of obtaining a good or service from an unregulated third party.

Thomas explained the allocation of common expenses. He testified that BHC had taken measures to segregate the costs of its regulated affiliates, such as Black Hills Energy; its nonregulated affiliates, such as Enserco Energy Inc.; and its regulated utility affiliates, such as Black Hills Energy and Cheyenne Light, Fuel & Power. It then applies cost allocation methods to those common costs. BHC also accounts for regulated and nonregulated private enterprise activity conducted within its regulated utilities by using Commission-approved cost allocation methodologies. Thomas stated that the majority of expense allocations in the rate application consisted of "either costs directly assigned or prudently incurred common expenses derived by dividing up the common functional support costs that are centralized. Those costs include information technology, billing, collection, accounting, treasury, human resources, and other corporate functions." According to Thomas, BHC directly assigns a cost to a business unit when those costs can be identified; when a cost cannot be directly assigned, BHC determines "the cost 'drivers'" and adopts a reasonable allocation method to divide those common expenses. If a cost driver is not readily apparent, then a general allocation methodology is used. Thomas explained that in allocating costs to Black Hills Energy, BHC used the cost allocation methods under the CAM that BHC filed with its application for approval to

transfer Aquila's assets to BHC, as directed to do so by the Commission. With regard to nonregulated activity conducted within the regulated utility, Thomas stated that the change from Aquila to Black Hills Energy provided for the same type of allocation methods used by Aquila and approved by the Commission for Aquila. Thomas stated that in Aquila's last rate case, the Public Advocate did not challenge the allocations under that CAM and the Commission accepted the allocation methodologies. According to Thomas, there were no significant differences in the cost assignment methodology between the Aquila and BHC CAM's. Thomas explained that there was a similarity in business support structures between Aquila and BHC, that both companies adopted and applied the same cost allocation methodology, that BHC segregates its nonregulated and sister utility affiliates from cost allocations in the Nebraska affiliate, and that BHC has adopted an allocation methodology and organization structure from Aquila that had been approved by several commissions in order for Black Hills Energy to comply with and conform to the cost allocation methodologies. Thomas prepared a summary of affiliate charges to the Nebraska gas operations for three time periods ("Black Hills base year costs," 2007 calendar year cost under Aquila, and Aquila's base year cost), and the summary "show[ed] a consistency in the make-up of costs charged to the Black Hills gas operations."

Richard Petersen, the director of gas regulatory accounting, opined that the affiliate transaction costs were reasonable. He noted that BHC operates in a number of states, that it has to ensure that costs as assigned between states are reasonable, that BHC is "privy to a lot of other company data where you compare costs from your company to their company," and that the costs "seem reasonable based on those comparisons." But Petersen agreed that none of that information had been provided to the Commission in this case.

Laura Patterson is the director of compensation, benefits, and human resources information systems for BHC. She testified that pay ranges within the pay grades are competitive with what is paid by other companies for similar positions. She explained that where data exists, all jobs are compared to

the market and placed in the grade where the midpoint of the range is closest to the average market rate for that job. She further testified, "Towers Watson conducted a market review of the [Black Hills Energy] positions in early 2009 and benchmarked each position to a BHC salary grade based midpoints [sic], which were designed to closely reflect the market median values." She further testified that market rates are determined by using data from compensation surveys where companies report actual compensation paid to employees by position. She testified that the BHC compensation department annually reviews the pay structure to see how it and pay practices reflect the market. According to Patterson, "As of May 1, 2010, the average base pay for employees in Nebraska was 98% of the market median, indicating BHC employees' base pay rates were slightly below but within acceptable range of the market median."

According to Arndt, Black Hills Energy had not supported its affiliate charges in its prefiled direct testimony; however, Arndt was not recommending any adjustments to disallow Black Hills Energy's affiliate charges for ratemaking purposes. He iterated that affiliate charges must be justified by Black Hills Energy before it would be appropriately allowed in the cost of service in this case. He further iterated his position that affiliate charges "are naturally suspect, since the goal of corporations is profit maximization." He cautioned that regulated companies could subsidize nonregulated companies through affiliated transactions "by overallocating costs to regulated utility companies through common allocators such as the general allocator in this case, which uses factors such as net plant, payroll and gross margins."

The Commission entered a lengthy final order granting the application in part. The Commission observed that Black Hills Energy had the burden of proof to demonstrate the proposed rates were just and reasonable and that "[m]ere conclusory statements are insufficient." The Commission found that Black Hills Energy was entitled to a base rate jurisdictional revenue requirement of $193,031,728, which amounted to a rate increase but was less than the increase sought by Black Hills Energy.

The Public Advocate subsequently filed a "Motion for Clarification and/or Reconsideration and Request for Oral Argument." Following a hearing, the Commission entered an order granting the motion in part with respect to the allowance of rate case expenses. It denied all other aspects of the motion, including that regarding affiliate transactions.

The Public Advocate then filed in the district court a petition for review of the administrative decision. The Public Advocate claimed that the evidence presented at the hearing showed Black Hills Energy did not comply with or meet the burden of proof imposed by 291 Neb. Admin. Code, ch. 9, § 005.07 (2009), and that the inclusion of affiliate transaction costs in rates charged to jurisdictional ratepayers was contrary to § 005.07.

The district court entered a comprehensive and well-reasoned order. In conducting its de novo review, it attached a rebuttable presumption of validity to the actions of the Commission and stated that the burden of proof rested with the Public Advocate as the party challenging the Commission's action. The court rejected the Public Advocate's claim that affiliate transaction costs should have been disallowed because Black Hills Energy failed to present sufficient evidence to demonstrate the prudence and value of those costs as required by § 005.07. The court reasoned that the Public Advocate's claim failed to acknowledge that Black Hills Energy's allocations of costs from affiliated service companies were made pursuant to a cost allocation methodology required by the Commission and failed to recognize the substantial evidence presented by Black Hills Energy which supported the reasonableness and value of the cost allocations from the affiliated service companies to Black Hills Energy. The district court found that the Commission properly allowed Black Hills Energy's affiliate costs.

The Public Advocate timely appeals.

## ASSIGNMENTS OF ERROR

The Public Advocate assigns, restated and reordered, that the district court and the Commission erred in (1) considering the testimony and evidence of Thomas and (2) determining that the challenged affiliate transaction costs could be included

in rates to be charged to jurisdictional ratepayers, when Black Hills Energy did not satisfy the burden of proof imposed upon utilities by § 005.07.

[1] The Public Advocate also assigns that the district court erred in determining that a rebuttable presumption of validity applied to the actions of the Commission and in holding that the burden of proof with respect to affiliate transaction costs rested with the Public Advocate. However, we decline to consider this assignment of error because it is not argued in the Public Advocate's brief. See *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011) (in order to be considered by appellate court, alleged error must be both specifically assigned and specifically argued in brief of party asserting error).

## STANDARD OF REVIEW

[2,3] 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. *Tymar v. Two Men and a Truck*, 282 Neb. 692, 805 N.W.2d 648 (2011). 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 not arbitrary, capricious, or unreasonable. *Liddell-Toney v. Department of Health & Human Servs.*, 281 Neb. 532, 797 N.W.2d 28 (2011).

[4] An appellate court reviews questions of law independently of the lower court's conclusion. *Tymar v. Two Men and a Truck, supra*.

## ANALYSIS

*Thomas' Evidence.*

[5] The Public Advocate assigns that the court and the Commission erred in considering the testimony and evidence of Thomas, a witness for Black Hills Energy. Although the Public Advocate objected to Thomas' evidence before the Commission, the Public Advocate did not raise or discuss the issue in its petition for review filed with the district court. See

Neb. Rev. Stat. § 84-917(2)(b)(vi) (Cum. Supp. 2010) (petition for review shall set forth petitioner's reasons for believing that relief should be granted). Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to the higher court. In the absence of plain error, where an issue is raised for the first time in the higher appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition. *In re Petition of Navrkal*, 270 Neb. 391, 703 N.W.2d 247 (2005). Because the issue was not presented to or passed upon by the district court and because we find no plain error, we decline to further address this assignment of error.

*Burden of Proof.*

The crux of the Public Advocate's appeal is that Black Hills Energy did not meet its burden of proof with respect to affiliate transactions and that such transactions should not be included in the rates charged to jurisdictional ratepayers. Thus, the Public Advocate argues that "the $7,443,996 of affiliate costs that constitute direct charges and the $19,609,402 of affiliate costs that constitute allocated charges cannot be included in rates and such amounts must not be included in [Black Hills Energy's] annual revenue requirement." Brief for appellant at 19. Black Hills Energy argues that the costs the Public Advocate complains about are technically from an affiliate but would be intercorporate common expenses. Thus, Black Hills Energy asserts that it is a cost allocation issue rather than an affiliate transaction.

[6] The Public Advocate argues that Black Hills Energy did not satisfy the burden of proof imposed by § 005.07. Section 005.07, concerning payments to affiliates, states:

> The jurisdictional utility has the burden to demonstrate that any cost[s] paid to an affiliate for any goods or services are prudent. The jurisdictional utility has the burden to demonstrate all of the following before any amount paid to an affiliate either, as a capital cost or an expense, is included in rates . . . :

> 005.07A Each payment is prudently incurred for each item or class of items at the time incurred.
>
> 005.07B The costs charged by an affiliate reasonably approximate the market value of service to it.

In determining whether expenses are prudently incurred, the test is whether they are costs which a reasonable utility or jurisdictional entity would have made in good faith under the same circumstances at the relevant point in time. See *K N Energy v. Cities of Alliance & Oshkosh*, 266 Neb. 882, 670 N.W.2d 319 (2003).

[7-9] Our inquiry under the operative standard of review is whether competent evidence supports the district court's decision. An appellate court, in reviewing a district court judgment for errors appearing on the record, under the Administrative Procedure Act, will not substitute its factual findings for those of the district court when competent evidence supports those findings. *Intralot, Inc. v. Nebraska Dept. of Rev.*, 276 Neb. 708, 757 N.W.2d 182 (2008). Competent evidence means evidence that tends to establish the fact in issue. *Shepherd v. Chambers*, 281 Neb. 57, 794 N.W.2d 678 (2011). The Public Advocate asserted during oral argument that whether Black Hills Energy's evidence met the burden of proof under § 005.07 presented a question of law, which we would review de novo. But the evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did based on the testimony and exhibits contained in the record before it. *Banks v. Housing Auth. of City of Omaha*, 281 Neb. 67, 795 N.W.2d 632 (2011).

Black Hills Energy's evidence, taken as a whole, sufficiently showed that payments made to affiliates were prudently incurred and that the costs charged by affiliates reasonably approximated the market value. The evidence established that when the Commission approved the transfer of Aquila's assets to Black Hills Energy, it directed BHC to keep Black Hills Energy as a separate subsidiary. Because Black Hills Energy is a separate entity, Black Hills Service Company and Black Hills Utility Holdings are its affiliates. These companies provide support services to Black Hills Energy and other affiliates, and

the centralization of such support services saves money and avoids duplication of employees and systems.

The Commission directed Black Hills Service Company and Black Hills Utility Holdings to allocate costs to Black Hills Energy in accordance with the CAM's on file. And the allocation of costs under Aquila's corporate structure—which had been approved by the Commission—was similar to the allocation of costs to Black Hills Energy. The service agreements that Black Hills Energy had with Black Hills Service Company and Black Hills Utility Holdings require that the support services be provided to Black Hills Energy "at cost." Black Hills Energy's evidence established that a return is not built into the costs charged, that the allocations are based on actual costs, and that Black Hills Energy evaluates whether costs from an affiliate are less than or equal to the costs of obtaining goods or services from an unregulated third party. Further, there was a consistency in costs charged under both Aquila and Black Hills Energy. In addition, Petersen provided general testimony that the costs incurred from affiliate transactions seemed reasonable based on comparisons to data of other companies. And Patterson testified that BHC conducts compensation surveys and market reviews to try to approximate the average market rate for jobs. We find that the record contains substantial evidence to support the decision of the district court.

## CONCLUSION

We conclude that the district court's order conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. In other words, we find no error appearing on the record. Accordingly, we affirm.

AFFIRMED.

# IN RE INTEREST OF EMERALD C. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. RICHARD D., APPELLANT, AND JEFFREY A. WAGNER, APPELLEE AND CROSS-APPELLANT.

810 N.W.2d 750

Filed March 20, 2012. No. A-11-383.

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. **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: Proof.** 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 Neb. Rev. Stat. § 43-292 (Cum. Supp. 2010) exists and that termination is in the children's best interests.
4. ____: ____. Generally, when termination is sought under subsections of Neb. Rev. Stat. § 43-292 (Cum. Supp. 2010) other than subsection (7), the evidence adduced to prove the statutory grounds for termination will also be highly relevant to the best interests of the juvenile.
5. **Parental Rights.** When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the child's best interests require termination of parental rights.
6. ____. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.
7. **Parental Rights: Attorney and Client: Guardians Ad Litem.** While the Nebraska Rules of Professional Conduct require a parent's attorney to zealously represent the wishes of the parent in a proceeding to terminate parental rights, a parent's guardian ad litem is to determine the best interests of the parent without reference to the parent's wishes.
8. **Parental Rights: Guardians Ad Litem.** A guardian ad litem appointed for a parent pursuant to Neb. Rev. Stat. § 43-292(5) (Cum. Supp. 2010) is entitled to participate fully in the proceeding to terminate parental rights.

Appeal from the Separate Juvenile Court of Douglas County: CHRISTOPHER KELLY, Judge. Affirmed.

Matthew R. Kahler, of Finley & Kahler Law Firm, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, Amy Schuchman, and Sara VanBrandwijk, Senior Certified Law Student, for appellee State of Nebraska.

Jeffrey A. Wagner, of Schirber & Wagner, L.L.P., guardian ad litem for Richard D.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

## INTRODUCTION

Richard D. appeals from the order of the separate juvenile court of Douglas County which terminated his parental rights to his minor children. Richard's guardian ad litem (GAL), Jeffrey A. Wagner, has cross-appealed. Our de novo review finds that there was sufficient evidence to support the juvenile court's finding that grounds existed to terminate Richard's parental rights and that such was in the children's best interests. Further, Richard's GAL has not shown how Richard was prejudiced by the decision of the juvenile court to deny Richard's GAL the opportunity to participate at the termination hearing. Accordingly, we affirm the decision of the juvenile court.

## BACKGROUND

Richard is the biological father of Danielle D. (born in August 1995), Richard D. II (Richard Jr.) (born in August 1996), Phyllip D. (born in February 1999), Timothy D. (born in April 2006), Elizabeth D. (born in March 2007), and Michael D. (born in July 2008), and he is the stepparent of Emerald C. (born in August 2002). All references in this case to "the children" or "Richard's children" apply only to Richard's biological children, unless otherwise specified.

The State filed a juvenile court petition on August 15, 2008, seeking to adjudicate Richard's children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Specifically, the State alleged that Richard had failed to provide the children with safe, stable, and/or appropriate housing; that on or about August 12, a protection and safety worker observed the home of the children to be in a filthy, unwholesome condition; that Richard had failed to provide the children with appropriate care, support, and/or supervision; that notwithstanding services offered to the parents on a voluntary basis by the Nebraska Department of Health and Human Services (the

Department), Richard had failed to follow through with services designed to prevent the removal of the children from the parental home; and that due to these allegations, the children were at risk for harm. The children were removed from Richard's home on the same day that the petition was filed. Following a first appearance and a detention and protective custody hearing, the juvenile court ordered that the children were to remain in the temporary care and custody of the Department to exclude Richard's home.

An adjudication hearing was held on November 18, 2008, and Richard entered an admission to a portion of the petition. Pursuant to the State's motion, the juvenile court dismissed the allegations that a protection and safety worker had observed the home in a filthy and unwholesome condition and that Richard had failed to follow through with services designed to prevent the removal of the children from the home. The court found the other allegations of the petition against Richard to be true based on the plea and adjudicated all of the children, including Emerald, as being within the meaning of § 43-247(3)(a). The court ordered that the children remain in the custody of the Department for appropriate care and placement.

A dispositional hearing was held on January 20, 2009, which hearing was continued to January 27. Following the continued hearing, the juvenile court, among other things, ordered Richard to participate in individual therapy, cooperate with family support worker services and other case professionals, and be allowed reasonable rights of semisupervised visitation.

On February 19, 2009, following another dispositional hearing, the juvenile court ordered Richard to attend individual and family therapy, cooperate with family support and other workers, complete a parenting course, and keep his home open to visits by the Department and all case professionals involved in the case. The court also ordered that on February 27, placement for Danielle, Richard Jr., Phyllip, and Emerald could include Richard's home with a written safety plan in place. The court also ordered that Elizabeth, Timothy, and Michael could transition back to Richard's home on March 28, when approved in writing by the case manager, the children's GAL,

and individual and family therapists. Danielle, Richard Jr., Phyllip, and Emerald returned to the family home on February 27. The transition of the other children to Richard's home did not occur. On April 28, the State filed a motion for temporary custody, asking the juvenile court to again remove Danielle, Richard Jr., Phyllip, and Emerald from Richard's home, which motion was granted by the court.

Following a dispositional hearing on August 24, 2009, the juvenile court ordered Richard to participate in individual therapy, complete a domestic violence program, cooperate with family support worker services, maintain safe and adequate housing for himself and his children, participate in marital counseling, and be allowed reasonable rights of supervised visitation. A similar order was entered following a review and permanency planning hearing on January 19, 2010, except Richard was also ordered to submit to random drug and alcohol testing. Richard and his wife separated at some point, and therefore marital counseling did not occur.

On May 27, 2010, the State filed a third motion for termination of parental rights with respect to Richard and his children. The State sought termination of Richard's parental rights under Neb. Rev. Stat. § 43-292(2), (6), and (7) (Cum. Supp. 2010) and alleged that termination of Richard's parental rights was in his children's best interests.

A termination hearing was held before the juvenile court on November 5 and 18, 2010, and January 27, 2011. The court heard closing arguments from the parties on April 7.

At the start of the November 5, 2010, hearing, while clarifying other preliminary matters, the court stated, "Just so we're clear, [Richard's GAL], you will not be participating in examination of the witnesses as [the GAL] for the father." Richard's GAL objected for the record, and the court overruled the objection.

Testimony was received from a family therapist, a family support worker, a "family partner," a visitation worker, a visitation supervisor, the foster parents for two of the children, and the Department's caseworker. The children initially came into the Department's care in August 2008 because of allegations of a dirty home, improper supervision, and parental drug abuse.

The Department provided Richard with family therapy, family support services, visitation supervision and transportation of the children for visitation, and assistance with cleaning and maintaining his home. At the time of the termination hearing in January 2011, Danielle and Phyllip had been placed with their mother; Richard Jr. was at a youth center; and Elizabeth, Michael, and Timothy were in foster care.

Initially, Richard had supervised visits with all of the children four times a week. After the older children were returned to his home in February 2009, he was provided with 24-hour, in-home supervision for the older children, and he continued to have visitation with the younger children four times a week. The older children were again removed from the home in April, because of an altercation between Richard and his wife that took place when the younger children were present for a semisupervised visit. Thereafter, Richard continued to have visits four times a week until January 2010, when the visitations were reduced to three per week for the older children and two per week for the younger children due to the children's basic needs not being met at visits. In April 2010, Richard's visits with all of the children were reduced to one per week due to excessive cancellations by Richard.

The testimony revealed that Richard is a loving father, that there is a bond between Richard and all of the children, and that the children are happy to visit with Richard. Richard's interaction with the children is limited somewhat by certain health issues that make it difficult for Richard to physically care for the children. Richard occasionally had difficulty staying awake during visitations. In 2010, Richard experienced multiple hospitalizations, including surgery, for his medical issues. Richard is not able to supervise all six children at once, and he frequently relies upon the older children to help care for the younger children during visits. The youngest child, Michael, is autistic, has fetal alcohol syndrome, and has "a cyst on both sides of his brain." Richard has difficulty at times following Michael's dietary restrictions and interacting with Michael. Richard Jr. has a number of behavioral issues and has been diagnosed with oppositional defiant disorder, which is characterized by acting out feelings and not responding to

directions and rules. Richard's attendance at visitation was mostly consistent; however, he did cancel visits due to work, illness, or hospitalization. On some occasions, visits were canceled by Richard without a reason given. On one occasion, visitation was ended early and the police were called as a result of a verbal altercation between Richard and a visitation worker. Richard also ended visits early on occasion due to his work schedule and health concerns. The foster parents of Elizabeth and Michael testified to behavioral issues after the children visited Richard; however, they also testified to observing a bond between the children and Richard.

Family therapy was provided to Richard and three of the children—Danielle, Richard Jr., and Phyllip—beginning in December 2008. The goals for the family were to rebuild family relationships, increase communication, and help the children maintain good behaviors in their respective placements. Richard was an active participant in family therapy and displayed an affectionate bond with the children. The therapist testified that the three children made progress individually while in therapy, that they loved Richard and valued the time with him, but that they became discouraged, frustrated, angry, and sad over the course of therapy and the prospect of not being reunified in the same household. The last family therapy for Richard and the three children was in July 2010, and the sessions were not resumed after Richard failed to indicate that he would attend a session in August. The therapist was not concerned about the effect that termination of Richard's parental rights may have on Danielle and Phyllip, since they were placed with their mother, and the therapist believed that these children would continue to have a relationship with Richard.

Assistance was provided to Richard by the Department to improve the condition of his home, which was a concern when the children were initially removed from the home. A primary goal established for Richard was to make sure that his home was in a sanitary condition so that it was safe for the children. A family support worker checked the condition of Richard's home on a weekly basis, physically helped him to clean, assisted with a garage sale, and suggested methods to keep

the house more orderly. Richard's home was cluttered, and the Department helped Richard in this regard by providing several Dumpsters to clear items out of the house. According to the family support worker, Richard was inconsistent in maintaining a sanitary and safe home. Richard reported that he was having trouble paying his bills, that he was not able to use the air conditioner, that his home was in "bad shape," that "meat had gone bad" in the refrigerator, and that he was embarrassed about the home's condition. At one point during the case, Richard was not living in the house. Richard also indicated that his house was in foreclosure. The family support worker eventually stopped working with Richard due to his lack of consistency in attending their meetings and his issues in maintaining the condition of his home.

The Department caseworker for Richard's family testified at length about the history of the case, the Department's efforts to assist Richard, and the continuing concerns about his ability to parent the children. The caseworker acknowledged that Richard did participate in individual therapy, visited with the children, and completed a domestic violence program. The caseworker testified, however, that Richard had not made a lot of progress throughout the case. With respect to visitation, Richard was not placing the children's needs above his own and was still utilizing the older children to look after the younger ones. Richard still was unable to provide a stable home and environment. The caseworker noted that Richard's girlfriend had been living in the home and that there were reports they were physically fighting with relatives who also lived in the home. The home remained cluttered. Additional concerns included drug distribution charges against Richard, for which he spent some time incarcerated prior to January 2010. After this time, Richard was ordered to undergo urinalysis testing. Richard tested positive for morphine on several occasions, and the caseworker had not seen a prescription for morphine. Richard was also inconsistent in submitting to urinalysis testing. At the time of the termination hearing in January 2011, Richard was in jail for distribution of drugs and had been ordered to complete a 90-day evaluation. Richard was not having visits with his children or receiving family

support services at this time due to his incarceration. The caseworker was concerned about the amount of time Richard's children had been out of his care and testified, over objection, to her opinion that termination of Richard's parental rights was in the children's best interests.

The juvenile court entered an order on April 8, 2011, finding that there were sufficient grounds to terminate Richard's parental rights to his children under § 43-292(2), (6), and (7) and that termination of those rights was in the children's best interests. Richard subsequently perfected his appeal to this court.

## ASSIGNMENTS OF ERROR

Richard asserts that the juvenile court erred in (1) finding that his parental rights should be terminated under § 43-292(2), (6), and (7); and (2) finding that termination of his parental rights was in his children's best interests.

On cross-appeal, Richard's GAL asserts that the juvenile court erred by denying him the right to participate in the termination hearing.

## 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. *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011). 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. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

## ANALYSIS

*Statutory Grounds for Termination.*

[3] 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. See *In re Interest of Sir Messiah T. et al., supra*. In this case, the juvenile court found that the State proved grounds for termination under § 43-292(2), (6), and (7).

Under § 43-292(7), the State must show that the children have been in an out-of-home placement for 15 or more of the most recent 22 months. The record shows that the children were removed from Richard's home in August 2008. Although Danielle, Richard Jr., and Phyllip were placed in Richard's home in February or March 2009, they were again removed from Richard's home in April 2009 and have not returned to his care. The State proved the ground enumerated in § 43-292(7) by clear and convincing evidence.

[4] Because the State need prove only one ground for termination, we decline to address Richard's arguments relevant to the court's determination that the State proved the grounds enumerated in § 43-292(2) and (6) except as those arguments relate to the issue of best interests. Generally, when termination is sought under subsections of § 43-292 other than subsection (7), the evidence adduced to prove the statutory grounds for termination will also be highly relevant to the best interests of the juvenile. See *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). Accordingly, we will consider evidence relevant to the other grounds in our analysis of the children's best interests.

*Best Interests.*

Richard asserts that the juvenile court erred in finding that termination of his parental rights was in the children's best interests.

In addition to finding termination appropriate under § 43-292(7), the juvenile court found grounds for termination under § 43-292(2) and (6). Subsection (2) concerns "parents [that] have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection," while subsection (6) concerns the failure of reasonable efforts on the part of the State to correct the conditions leading to the juvenile's adjudication. Under Neb. Rev. Stat. § 43-283.01 (Cum. Supp. 2010), the State is required, except in circumstances not present in this case, to make reasonable efforts to preserve and reunify families. Richard argues that the State did not provide reasonable efforts in this case.

A review of the record in this case shows that Richard was provided with numerous services but failed to fully utilize the services provided. He was provided with cleaning assistance and Dumpsters to clean his cluttered home. The support worker advised Richard regularly on issues related to his home, including ways to make it sanitary and safe for the children. The support worker stopped working with Richard due to his problems with consistency in attending their meetings and his issues in maintaining the condition of his home. The testimony of various witnesses shows that Richard's failure in this area was not due to the number of Dumpsters provided to him, as he asserts, but because of his inconsistent work with service providers. Richard did not achieve the goal of making sure his house was safe and sanitary for the children.

Richard did actively participate in therapy, at least through July 2010. According to the therapist, however, at the time of the last therapy session with the family, Richard was not in a position to parent his children. Richard eventually completed the domestic violence program as ordered. However, law enforcement officers were called to Richard's home because of a domestic situation after Richard had completed the program. Richard was ordered to submit to random drug and alcohol testing. Richard was inconsistent in submitting to testing, and some of his tests were positive for morphine.

Richard asserts that his hospitalizations should have been given greater consideration with respect to a determination of whether he consistently visited his children. The record shows that Richard canceled some visits due to medical issues or work, but other cancellations were not explained. Further, the record shows that Richard missed visits both before and after his hospitalizations. Richard has shown an inability to fully engage with or care for all of his children at the same time as evidenced by his reliance on the older children to provide care for the younger children. This problem is exacerbated by the special needs of Richard Jr. and Michael.

[5,6] While the record shows that Richard loves his children and they love him, the record also reflects that some of the children have become very frustrated with the length of time they have spent in foster care. When a parent is

unable or unwilling to rehabilitate himself or herself within a reasonable time, the child's best interests require termination of parental rights. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.* Upon our de novo review, we find that termination of Richard's parental rights was in the children's best interests.

*Participation of Richard's GAL.*

[7,8] Richard's GAL asserts that the juvenile court erred by denying him the right to participate in the termination hearing. The GAL argues that Richard's due process rights were violated and relies on *In re Interest of D.S. and T.S.*, 236 Neb. 413, 461 N.W.2d 415 (1990). In that case, the GAL for the mother had to pose objections through the mother's attorney, was limited in his questioning at trial, and was not allowed to ask questions at the deposition of a psychologist. The Nebraska Supreme Court observed that an attorney acting as an advocate fulfills a different role than one acting as a GAL. The court further observed that while Canon 7 of the Code of Professional Responsibility, now found under the Nebraska Rules of Professional Conduct, requires a parent's attorney to zealously represent the wishes of the parent in a proceeding to terminate parental rights, a parent's GAL is to determine the best interests of the parent without reference to the parent's wishes. See *In re Interest of D.S. and T.S., supra*. The court noted, accordingly, that a parent's GAL might seek the admission or exclusion of different evidence than would a parent's attorney. The court concluded that a GAL appointed for a parent pursuant to § 43-292(5) (parent unable to discharge responsibilities due to mental illness or deficiency) is entitled to participate fully in the proceeding to terminate parental rights and found that it was error for the lower court to have prevented the parent's GAL from fully participating in the termination proceedings. However, the court found no prejudice from the error because no showing had been made as to what would have been admitted or kept out of evidence had the parent's GAL been allowed to participate more fully.

In the case at hand, the record is unclear why Richard was appointed a GAL, as there was no allegation that Richard was unable to discharge parental responsibilities due to a mental illness or deficiency under § 43-292(5). We note that under Neb. Rev. Stat. § 43-292.01 (Reissue 2008), the juvenile court may appoint a GAL for any party as deemed necessary or desirable in cases other than those where termination is sought under § 43-292(5). For purposes of our analysis, we will assume that the instruction from the Supreme Court in *In re Interest of D.S. and T.S, supra*, concerning the GAL's participation applies in this case such that it was error to preclude the GAL's participation at the termination hearing. As in *In re Interest of D.S. and T.S.*, the question before us is whether Richard was prejudiced by the denial of that right. Richard's GAL argues that he would have called the oldest child to testify, that he would have sought the admission or exclusion of evidence in advocating for Richard's best interests, and that his participation may have brought forth persuasive evidence that termination of Richard's parental rights was not in the children's best interests. However, the GAL has not shown specifically what evidence would have been brought forth or excluded through his participation.

Based on our de novo review of the entire record, we conclude that Richard was not prejudiced by the denial of his GAL's participation at the termination hearing. The record reveals a variety of impediments of significant duration that prevent Richard from being able to properly parent his children. The evidence that termination of Richard's parental rights was in the children's best interests was, in fact, rather overwhelming. Because Richard's GAL has not shown that Richard was prejudiced by the juvenile court's denial of his GAL's participation at the termination hearing, we find this assignment of error to be without merit.

## CONCLUSION

The juvenile court did not err in terminating Richard's parental rights.

Because Richard was not prejudiced by the juvenile court's failure to allow Richard's GAL to participate at the termination

hearing, the GAL's assignment of error on cross-appeal is without merit.

AFFIRMED.

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KENNETH NORDHUES, APPELLANT, V. STEVE MAULSBY, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE AND CROSS-APPELLANT, B & W, INC., THIRD-PARTY DEFENDANT AND FOURTH-PARTY PLAINTIFF, APPELLEE, CROSS-APPELLEE, AND CROSS-APPELLANT, AND MAX HARGROVE, FOURTH-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLEE.

815 N.W.2d 175

Filed March 20, 2012. No. A-11-420.

1. **Contracts.** The determination of rights under a contract is a law action.
2. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
3. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
4. **Witnesses: Evidence: Appeal and Error.** An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.
5. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.
6. ____: ____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the 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.
7. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.
8. **Res Judicata.** Res judicata is an affirmative defense which must ordinarily be pleaded to be available; and while an appellate court may raise the issue of res judicata sua sponte, it is infrequently done.
9. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
10. ____. Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.

11. ____. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
12. **Jurisdiction: States.** The first step in a conflict-of-law analysis is to determine whether there is an actual conflict between the legal rules of different states.
13. ____: ____. An actual conflict exists when a legal issue is resolved differently under the law of two states.
14. **Uniform Commercial Code: Contracts: Sales.** The Uniform Commercial Code applies when the principal purpose of a transaction is the sale of goods, but does not apply when the contract is principally for services.
15. **Uniform Commercial Code: Words and Phrases.** Merchant means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill.
16. ____: ____. Entrusting includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.
17. **Jurisdiction: States.** When there is an actual conflict between the laws of different states, the rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties.
18. **Jurisdiction: States: Presumptions.** In the absence of pleading and proof to the contrary, Nebraska courts presume that the law of the foreign jurisdiction which should be applied is the same as the Nebraska law, as to Constitution, statutes, and case law.
19. **Uniform Commercial Code: Words and Phrases.** A buyer in the ordinary course of business is a person that buys goods in good faith and without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind.
20. ____: ____. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices.
21. ____: ____. Good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
22. **Vendor and Vendee: Consideration: Notice: Words and Phrases.** A bona fide purchaser is one who pays a valuable consideration, has no notice of outstanding rights of others, and acts in good faith.
23. **Vendor and Vendee: Notice: Title.** Necessary notice may be imparted to a prospective purchaser by actual or constructive notice of facts which would place a reasonably prudent person upon inquiry as to the title he or she is about to purchase.

Appeal from the District Court for Blaine County: MARK D. KOZISEK, Judge. Affirmed.

Rodney J. Palmer, of Palmer & Flynn, P.C., L.L.O., for appellant.

Barry D. Geweke, of Stowell, Kruml & Geweke, P.C., L.L.O., for appellee Steve Maulsby.

John A. Selzer, of Simmons Olsen Law Firm, P.C., for appellee B & W, Inc.

Bradley D. Holbrook and Justin R. Herrmann, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., for appellee Max Hargrove.

IRWIN, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

## I. INTRODUCTION

Kenneth Nordhues appeals from the decision of the district court for Blaine County which dismissed his claim for damages regarding cattle that were previously taken from him in a replevin action.

## II. OVERVIEW

James Norwood bought 190 heifers in Valentine, Nebraska, and then delivered them to Kevin Asbury in Missouri to care for them. While in Asbury's care, 150 of the heifers were sold/given to Max Hargrove. Hargrove in turn sold the heifers to B & W, Inc. B & W sold 115 of the heifers to Steve Maulsby, who in turn sold the heifers to Nordhues. The chain of sales from Asbury to Nordhues occurred within a span of approximately 2 weeks.

This matter arises out of a companion case, *Norwood v. Nordhue*, No. A-09-1025, 2010 WL 2902345 (Neb. App. July 13, 2010) (selected for posting to court Web site). In the companion case, Norwood, the first owner in the chain, sought to replevin 115 heifers from Nordhues, the last "owner" in the chain. Using Nebraska law, we determined that Nordhues did not acquire any title or right to the heifers, and thus, Nordhues

was ordered to deliver the heifers to Norwood. This case was then filed, in which Nordhues sued Maulsby for the amount he had paid for the cattle, alleging that Maulsby did not have good title to the heifers in order to sell them to him. In turn, each previous seller in this chain was brought into the case as a party defendant with the exception of Asbury, who has taken bankruptcy. Thus, all those through whose hands passed the cattle purchased by Norwood at Valentine are parties to the suit, except Asbury.

## III. FACTUAL BACKGROUND

Norwood, who resides in Weston, Missouri, purchased 190 heifers at the Valentine livestock auction on March 27, 2008. Norwood shipped the heifers to Asbury in Armstrong, Missouri, on March 28. According to Norwood, the initial agreement was that he was to provide bulls to breed the heifers, pay half of the mineral costs, pay all veterinarian bills for the heifers, and pay half of the veterinarian expenses for the resulting calves. Asbury was to provide feed and care for the heifers and calves. The calves would then be sold at weaning time, with Norwood and Asbury dividing the proceeds equally. At some point, Norwood and Asbury discussed breeding the heifers by means of artificial insemination. According to Norwood, Asbury was to bear the costs related to the artificial insemination of the heifers. After the insemination process was completed, the heifers were placed in pastures with bulls provided by Asbury. At some point, Asbury informed Norwood that he did not have room to pasture all of the heifers until calving time and that Norwood would have to sell about half of them as bred heifers. According to Norwood, he and Asbury did not discuss or have any agreement about when or where that half of the heifers would be marketed.

Norwood learned the heifers were no longer in Missouri in October 2008, when law enforcement personnel informed him that Asbury had been foreclosed on by the bank and that there were not "very many cattle left there." According to Norwood, he confronted Asbury, who informed him that because of the foreclosure, he had moved the heifers "to a

safe place." Asbury would not tell Norwood where the heifers were located.

According to Asbury, when the heifers left his property, they were delivered to Hargrove, but Asbury confirmed that Norwood did not agree to this. Specifically, Asbury testified that he did not have any directive from Norwood that the heifers leave his place. When asked whether Norwood and Hargrove had any agreement about the heifers being taken from Asbury's place, Asbury replied, "It was a favor for me." Asbury indicated that Hargrove was going to take care of the heifers for Asbury. According to Asbury, there was no understanding that Norwood would pay Hargrove for keeping Norwood's heifers, and Asbury was unsure as to whether Hargrove knew that the heifers were Norwood's. Asbury agreed that he received some money from Hargrove, but he testified that this money was not for Norwood's heifers. Asbury thought that all 190 head of Norwood's heifers went to Hargrove on the same date. Asbury testified that when the heifers left his farm and went into Hargrove's custody, he was not in any way trying to sell the heifers and that he did not have any authorization or intent to sell them. As far as Asbury was concerned, the heifers remained Norwood's property at that point.

On the other hand, according to Hargrove, he purchased 140 head of bred heifers from Asbury (and received an additional 10 head at no charge). Hargrove testified that Asbury represented that he owned these heifers. Hargrove denied that Asbury sent the heifers to him to take care of them for him, and Hargrove testified that he did not have any relationship with Norwood. According to Hargrove, the 140 heifers he purchased from Asbury (plus the additional 10 head) were sorted from approximately 190 head of heifers at Asbury's place. Hargrove did not know what happened to the 40 remaining heifers.

Hargrove then sold 140 of the Norwood heifers to B & W—Hargrove also gave B & W, at no charge, the extra 10 head that he had received from Asbury. B & W then sold 115 of the Norwood heifers to Maulsby, who, in turn, sold the 115 heifers to Nordhues.

## IV. PROCEDURAL BACKGROUND

### 1. Companion Case—Replevin

Norwood filed a petition in replevin in the district court for Blaine County, Nebraska, on November 12, 2008. Norwood alleged that he was the owner of 190 heifers, which he purchased at the Valentine livestock auction on March 27, 2008, and that some of these heifers were currently in Nordhues' possession in Blaine County. Norwood alleged that he was entitled to immediate possession of the heifers and that Nordhues had wrongfully detained and refused to deliver them to Norwood or to allow Norwood to take possession of them. Norwood sought judgment against Nordhues for return of the heifers, or for their value if not returned, and for his damages and costs.

Norwood filed a motion for summary judgment on March 31, 2009, which was heard by the district court on April 21. The court received exhibits into evidence, including the depositions of Norwood, Asbury, an employee of Asbury, Hargrove, a representative of B & W, a person affiliated with B & W, and Maulsby. The information contained in these depositions is summarized above. The district court entered an order on August 5, granting Norwood's motion for summary judgment. Applying Nebraska law, the district court concluded that either Asbury or Hargrove was a thief who stole Norwood's heifers and that any title Hargrove received from Asbury was void. The court further concluded that because neither Asbury nor Hargrove had the ability to convey any title or rights to the heifers, neither B & W, Maulsby, nor Nordhues acquired any title to or ownership rights in the heifers. The court ordered Nordhues to deliver possession of the 113 heifers to Norwood. (At the time of the replevin proceedings, Nordhues had only 113 of the 115 Norwood heifers he purchased from Maulsby in his possession. The other two apparently either died or were lost.) Nordhues appealed to this court, and we affirmed the district court's decision. See *Norwood v. Nordhue*, No. A-09-1025, 2010 WL 2902345 (Neb. App. July 13, 2010) (selected for posting to court Web site).

### 2. Current Proceedings

On October 1, 2009, Nordhues filed a complaint against Maulsby and Midwestern Cattle Marketing, LLC (Midwestern Cattle), seeking damages in the amount of $117,300 for Maulsby and Midwestern Cattle's failure to convey clear title to 115 head of bred heifers.

Maulsby filed an answer and third-party complaint on November 16, 2009. In his third-party complaint, Maulsby alleged the following: He purchased 115 bred heifers from B & W, which he resold to Nordhues; B & W breached its contract with Maulsby to deliver clean title to the 115 bred heifers; and B & W should be required to pay any judgment entered against Maulsby or Midwestern Cattle in Nordhues' action against them. Maulsby asked that the district court award him judgment against B & W for damages "in an amount to be proven at trial including but not limited to the amount of any judgment and costs awarded against Maulsby for Plaintiff, . . . Nordhues, in this litigation."

B & W filed an answer and third-party complaint on January 1, 2010. In its third-party complaint, B & W alleged the following: B & W purchased 140 heifers from Hargrove, and it resold 115 of the bred heifers to Maulsby; B & W purchased the bred heifers from Hargrove in good faith and for value; and B & W is a "buyer in the ordinary course of business" with regard to the bred heifers as that term is defined in the applicable Uniform Commercial Code (U.C.C.). However, B & W also alleged that if it is determined that B & W is liable to Maulsby on the basis of Maulsby's third-party complaint, then Hargrove breached the provisions of his agreement with B & W which required Hargrove to deliver clear title to the bred heifers to B & W and Hargrove should be held liable to B & W for any damages sustained by B & W because of the breach, including any amount that B & W is held to be liable to Maulsby for. In its answer and third-party complaint, B & W alleged that Missouri law should determine the outcome of the proceedings.

In his answer filed on February 12, 2010, Hargrove denied breaching the provisions of his agreement with B & W which

required Hargrove to deliver clear title to the bred heifers to B & W.

In an order filed on February 18, 2010, the district court dismissed Nordhues' complaint against Midwestern Cattle after finding that it was Maulsby, not Midwestern Cattle, who was involved in the livestock transactions. The district court found that, according to the evidence, Maulsby, who was employed by Midwestern Cattle, had mistakenly used a Midwestern Cattle receipt for what was his personal livestock transaction. Midwestern Cattle had no further involvement in this case.

Apparently, all parties filed motions for summary judgment and a hearing on such motions was held on June 8, 2010 (neither the motions nor the proceedings thereupon are in our record). On September 10, the district court filed its order denying the motions for summary judgment. The district court found that Norwood, Asbury, Hargrove, and B & W are all merchants regarding cattle. The district court then conducted a "[c]hoice of laws" analysis, ultimately finding that Missouri law should be applied to the transactions between Norwood/Asbury, Asbury/Hargrove, and Hargrove/B & W. The district court then found that, under Missouri law, Norwood gave Asbury the power to transfer all of Norwood's rights (the rights of an owner) in the heifers to a buyer in the ordinary course of business. The district court then found that Asbury's rights could be transferred only to a buyer in the ordinary course of business, as defined by Missouri law. Because the district court found that the circumstances of the case created a question of fact as to whether Hargrove was a buyer in the ordinary course of business and a good faith purchaser, the district court denied all parties' motions for summary judgment.

A pretrial conference was held on October 19, 2010. As a result of discussion had at the pretrial conference, the parties filed a stipulation on December 15. Nordhues, Maulsby, B & W, and Hargrove stipulated as follows:

> 1. In August 2008, Nordhues, purchased 115 head of heifers (the "Heifers") from Maulsby for $117,300.00.

2. Maulsby had purchased the Heifers from B&W for $110,400.00.

3. B&W had purchased the Heifers from Hargrove.

4. All evidence presented to the court at the hearing on the Motion for Summary Judgment held on June 8, 2010 may be submitted as evidence in the trial of this action without objection.

5. If the court determines that Hargrove did not convey good title to the Heifers to B&W, then the court may enter judgment in favor of the parties as follows:

A. Nordhues shall be entitled to a judgment against Maulsby in the sum of $117,300.00 plus Nordhues' costs.

B. Maulsby shall be awarded judgment against B&W for the amount of the judgment awarded to Nordhues against Maulsby plus Maulsby's costs.

C. B&W shall be awarded judgment against Hargrove for the amount of the judgment awarded to Maulsby against B&W plus B&W's costs.

In its pretrial order filed on December 17, the district court stated: "After discussion between the court and counsel, the sole issue to be determined by the court is whether Harg[ro]ve was a buyer in the ordinary course of business and a good faith purchaser." This would be the only issue left for resolution as a result of the parties' stipulation.

A bench trial was held on January 5, 2011. The district court filed its judgment of dismissal on April 21. In its judgment, the district court said, "In the Order Denying Motions for Summary Judgment . . . the court made certain findings which are confirmed and recited again herein." Then the district court recited, nearly verbatim, its "choice of laws" analysis from its September 10, 2010, order denying the motions for summary judgment, which found that Missouri law should be applied to the transactions between Norwood/Asbury, Asbury/Hargrove, and Hargrove/B & W. The district court then addressed the Asbury/Hargrove transaction to determine whether Hargrove was a buyer in the ordinary course of business and a good faith purchaser. The district court determined that he was.

The district court found that Hargrove bought the heifers from Asbury without actual knowledge that the heifers were

owned by someone other than Asbury. The district court also found that Hargrove was a good faith purchaser for value, despite receiving an additional 10 heifers from Asbury free of charge. The district court noted that there were any number of reasons for the free extra 10 head: The heifers were not as represented and had lost weight; some heifers were "open" (i.e., not bred); Asbury knew he was short on the cow-calf pairs and bred heifers he was to have delivered—as part of other transactions between Asbury/Hargrove, Asbury/B & W, and Hargrove/B & W which occurred at the same time Asbury sold the Norwood heifers to Hargrove; and Asbury was to haul one load of heifers which he did not haul. The district court also found that Hargrove's purchase price was not an indication that Hargrove did not pay fair market value. The district court found that Hargrove made "no more than each subsequent seller" and that the transactions seem to "reflect capitalism at its best" because each party was able to make a profit. The district court concluded that the price at which Hargrove purchased the heifers "would not put one on inquiry as to the title he was about to purchase."

The district court acknowledged the discrepancy between its decision and the decision in the companion replevin case which we decided on appeal and which we earlier referenced. The district court stated:

> The court is acutely aware of the seemingly inconsistent results between the two cases. The court decides the cases upon the issues raised by the pleadings and the evidence adduced. The evidence adduced herein leads the court to conclude that Hargrove was a buyer in the ordinary course of business. The facts available to Hargrove were not such that they would have put a reasonably prudent person upon inquiry as to the title he is about to purchase.

The district court dismissed Nordhues' complaint with prejudice. Nordhues now appeals.

## V. ASSIGNMENTS OF ERROR

Nordhues assigns that the district court erred by (1) dismissing Nordhues' complaint with prejudice; (2) finding that

Hargrove was a buyer in the ordinary course of business, contrary to its prior finding; (3) finding that Hargrove was a good faith purchaser, contrary to its prior finding; (4) failing to follow the pretrial order and limit the issues; and (5) failing to find that Nordhues was a bona fide purchaser for value without notice and a buyer in the ordinary course of business.

On cross-appeal, Maulsby assigns that (1) in the event it is determined that the trial court erred in dismissing Nordhues' complaint, then the trial court also erred in denying Maulsby's third-party complaint against B & W, and (2) in the event it is determined that the trial court erred by not entering judgment for Nordhues against Maulsby, then the trial court also erred by not entering judgment for Maulsby against B & W in a like amount.

On cross-appeal, B & W assigns that (1) in the event it is determined that the trial court erred in dismissing Nordhues' complaint against Maulsby and in denying Maulsby's third-party complaint against B & W, then the trial court also erred in denying B & W's third-party complaint against Hargrove, and (2) in the event it is determined that the trial court erred by not entering judgment for Nordhues against Maulsby and by not entering judgment for Maulsby against B & W, then the trial court also erred by not entering judgment for B & W against Hargrove pursuant to the stipulation of the parties. In short, the appeal and cross-appeals determine who will end up holding "an empty bag" after the various transactions involving the heifers that Norwood bought at the Valentine auction.

## VI. STANDARD OF REVIEW

[1] The determination of rights under a contract is a law action. *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

[2] A suit for damages arising from breach of a contract presents an action at law. *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (2010).

[3-6] In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Hooper v. Freedom Fin. Group*, 280 Neb. 111, 784 N.W.2d 437 (2010). An appellate court will not

reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error. *Id*. Similarly, the trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Id*. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the 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. *Id.*

## VII. ANALYSIS

### 1. Res Judicata

Nordhues assigns that the district court erred in finding Hargrove was a buyer in the ordinary course of business and a good faith purchaser, contrary to the prior findings in the replevin case, and that these two issues are res judicata. Insofar as our record reveals, Nordhues raised the issue of res judicata for the first time at the appellate level, unless it was raised during summary judgment. But we do not have the motions for summary judgment, nor do we have the bill of exceptions of the summary judgment hearing—neither of which did Nordhues request be made part of our record. Even though Nordhues' argument is so sketchy that it is questionable that he has complied with our requirement that an error be assigned and argued, we briefly address the issue.

[7,8] It is well known that an issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *Robinson v. Dustrol, Inc.*, 281 Neb. 45, 793 N.W.2d 338 (2011). See, also, *Ballard v. Union Pacific RR. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010) (res judicata is affirmative defense which must ordinarily be pleaded to be available; and while appellate court may raise issue of res judicata sua sponte, it is infrequently done). We decline to consider the res judicata issues in the present appeal.

### 2. Expansion of Issues From Pretrial Order

[9] Nordhues assigns, but does not specifically argue, that the trial court erred by failing to follow the pretrial order which

identified only two issues: whether Nordhues was (1) a buyer in the ordinary course of business and (2) a good faith buyer. He further assigns, but does not specifically argue, that the trial court

> erroneously injected additional issues of: A) whether Missouri law should be applied; B) whether the parties were merchants regarding the buying and selling of cattle; C) whether there is a conflict in the laws of Missouri and Nebraska; D) whether this action is one of tort or contract; and E) whether the Restatement Second Conflict of Laws should be applied to resolve conflict rather than the two limited issues which were agreed upon by the parties and which were contained in the Pretrial Order.

An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010). Moreover, we note that the district court did not "inject additional issues" at trial; rather, it merely reiterated, nearly verbatim, its findings and holdings from its order denying summary judgment.

### 3. Conflict of Law

The district court in the instant case applied Missouri law, whereas in the companion replevin case, the district court applied Nebraska law. Given that Nordhues does not specifically argue his claim that the trial court wrongfully injected the issue of whether Missouri law should apply, we could consider the issue only under the plain error doctrine.

[10,11] Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Deterding v. Deterding*, 18 Neb. App. 922, 797 N.W.2d 33 (2011). See, also, *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Deterding v. Deterding, supra*.

It is clear that Nordhues can recover damages only if he did not receive "good title" to the livestock from Maulsby. The

question of "good title" to the heifers begins with Asbury and Hargrove and whether each had the power to transfer title to the livestock—Asbury by entrustment and Hargrove as a good faith buyer in the ordinary course of business. All parties agree that if Hargrove had good title, then all subsequent purchasers, including Nordhues, also had good title.

Both Nebraska and Missouri have ties to this case. The cattle were purchased in Nebraska by Norwood, a Missouri resident. The cattle were delivered to Asbury's ranch in Missouri for care, and Asbury is a Missouri resident. Asbury sold the cattle to Hargrove, also a Missouri resident. Hargrove then sold the cattle to B & W, a Nebraska corporation. B & W had the cattle moved to Nebraska. The cattle were subsequently sold to Maulsby and then to Nordhues, both Nebraska residents. Thus, the question becomes: Does Nebraska or Missouri law apply? Accordingly, a conflict-of-law analysis must be performed.

(a) Is There Actual Conflict in Law?

[12,13] The first step in a conflict-of-law analysis is to determine whether there is an actual conflict between the legal rules of different states. *Christian v. Smith*, 276 Neb. 867, 759 N.W.2d 447 (2008). An actual conflict exists when a legal issue is resolved differently under the law of two states. *Heinze v. Heinze*, 274 Neb. 595, 742 N.W.2d 465 (2007).

[14] The beginning point is Asbury and whether he had the power to transfer good title to Hargrove. This case is controlled by the U.C.C. The U.C.C. applies when the principal purpose of a transaction is the sale of goods, but does not apply when the contract is principally for services. *MBH, Inc. v. John Otte Oil & Propane*, 15 Neb. App. 341, 727 N.W.2d 238 (2007). Animals are goods under the U.C.C. See Neb. U.C.C. § 2-105(1) (Reissue 2001) ("goods" means all things which are movable at time of identification to contract for sale and also includes unborn young of animals). Accord Mo. Ann. Stat. § 400.2-105(1) (West 1994).

[15] Both Nebraska and Missouri have statutes regarding the entrustment of goods to a merchant. Initially, we note that there is no question that all persons involved in these livestock

transactions—from Norwood to Nordhues—were merchants under Nebraska and Missouri law. The term "merchant" is defined basically the same by both states. Merchant means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill. Neb. U.C.C. § 2-104(1) (Cum. Supp. 2010). Accord Mo. Ann. Stat. § 400.2-104(1) (West 1994). All persons involved in these livestock transactions were merchants because all are in the business of buying and selling cattle.

[16] The evidence is that Norwood entrusted 190 heifers to Asbury for care. Both Nebraska and Missouri use the same definition of entrusting:

> "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

Neb. U.C.C. § 2-403(3) (Reissue 2001). Accord Mo. Ann. Stat. § 400.2-403(3) (West 1994). Regarding entrustment of goods to a merchant, Nebraska provides: "Any entrusting of possession of goods to a merchant *for purposes of sale* who deals in goods of that kind gives him or her power to transfer all rights of the entruster to a buyer in ordinary course of business." Neb. U.C.C. § 2-403(2) (emphasis supplied). Missouri provides: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." Mo. Ann. Stat. § 400.2-403(2).

Clearly, there is an actual conflict between the legal rules of Nebraska and Missouri. Nebraska's statute limits the circumstances in which an entrustee merchant has the power to transfer rights to a buyer in the ordinary course of business,

and Missouri's statute does not have the same limitations. In Nebraska, the entrustee merchant has the power to transfer rights only if the goods were delivered to the entrustee merchant "for purposes of sale." It is undisputed that Norwood did not entrust the livestock to Asbury "for purposes of sale." Therefore, the legal issue involved herein—whether Asbury could transfer good title to the heifers—would be resolved differently depending upon which state's law is applied. Under Nebraska law, Asbury could not transfer good title to the heifers, but under Missouri law, he could.

(b) Should Nebraska or Missouri Law Control?

[17] Nebraska has adopted the Restatement (Second) of Conflict of Laws § 188 (1971). *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001). The Restatement, *supra* at 575, provides, in relevant part:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the [general choice-of-law] principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties . . . the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicil[e], residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

And the Restatement, *supra*, § 6 at 10, referenced in § 188 above, pertains to choice-of-law principles and provides:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

We now consider the contacts in the instant case. Although Norwood purchased the cattle in Nebraska, they were delivered to Asbury's ranch in Missouri for care. Asbury subsequently sold Norwood's cattle to Hargrove, who in turn sold them to B & W—the transfers of cattle between Asbury/Hargrove and Hargrove/B & W were virtually simultaneous. It is undisputed that the place of contracting between Norwood/Asbury, Asbury/Hargrove, and Hargrove/B & W was in Missouri. At the time of these transactions, the cattle were in Missouri, and thus, these contracts were all performed in Missouri. Furthermore, Norwood, Asbury, and Hargrove were all residents of Missouri. Thus, Missouri had the most significant relationship to the transactions and the parties mentioned above. And there is nothing in the general principles of the Restatement's § 6 that indicates Nebraska law should be applied to the Missouri transactions. Accordingly, the district court did not commit plain error in determining that Missouri has the most significant relationship to the transactions and the parties mentioned above and that Missouri law should be applied to those transactions. We recognize that B & W was a Nebraska corporation and that Maulsby and Nordhues were Nebraska residents, and the cattle eventually were returned to Nebraska. Nonetheless, it is the first two transactions, Norwood/Asbury and then Asbury/Hargrove, which are determinative for our conflict-of-law analysis.

[18] We recognize that applying Missouri law to the instant case is seemingly inconsistent with what occurred in the companion replevin case. In that case, the district court applied Nebraska law and concluded that because neither Asbury nor Hargrove acquired valid title to the heifers, neither one had power to transfer valid title to the subsequent purchasers, including Nordhues. On appeal to this court, Nordhues argued that Missouri law should have controlled. In our memorandum opinion deciding that appeal, we noted that the conflict-of-law issue was not raised to the district court, either in pleadings or in arguments at hearings. In fact, our memorandum opinion recites that

> the arguments at the hearings on the summary judgment and motion to alter or amend the summary judgment did not raise the issue of the applicability of Missouri law; rather, the arguments clearly referred to the Nebraska version of [U.C.C] § 2-403 and whether the cattle were delivered "for purposes of sale."

*Norwood v. Nordhue*, No. A-09-1025, 2010 WL 2902345 at *5 (Neb. App. July 13, 2010) (selected for posting to court Web site). That fact is significant because "[t]he rule is that, in the absence of pleading and proof to the contrary, Nebraska courts presume that the law of the foreign jurisdiction which should be applied is the same as the Nebraska law, as to Constitution, statutes, and case law." *Forshay v. Johnston*, 144 Neb. 525, 13 N.W.2d 873 (1944) (syllabus of the court). We further noted that in his appellate brief, Nordhues did not specifically assign error to any alleged failure by the district court to apply Missouri law, and we declined to apply the plain error doctrine to the conflict-of-law issue.

In the instant case, however, the conflict-of-law issue was pled and subsequently addressed by the district court. Nordhues did not properly assign and argue the conflict-of-law issue in his brief to this court. Nonetheless, in the instant case, the district court was asked to apply Missouri law and did so, and as explained above, Missouri law was the applicable law. The appeal in *Norwood v. Nordhue, supra*, was decided on the issues properly presented for appellate review. In the present case, no party has properly assigned and argued error to

the application of Missouri law, which, in any event, was the applicable law.

(c) Application of Missouri Law

*(i) Norwood/Asbury Transaction*

The district court found that Norwood delivered his heifers to Asbury for him to care for them. The evidence in the record supports this finding. See *In re Guardianship of Elizabeth H.*, 17 Neb. App. 752, 771 N.W.2d 185 (2009) (appellate court, in reviewing judgment for errors appearing on record, will not substitute its factual findings for those of lower court where competent evidence supports those findings). It is undisputed that Norwood and Asbury were merchants with regard to cattle. Under Missouri law, by entrusting the heifers to Asbury, Norwood gave Asbury the power to transfer all of Norwood's rights in the heifers to a buyer in the ordinary course of business. See Mo. Ann. Stat. § 400.2-403(2) (any entrusting of possession of goods to merchant who deals in goods of that kind gives him power to transfer all rights of entruster to buyer in ordinary course of business).

*(ii) Asbury/Hargrove Transaction*

[19-21] Therefore, we now turn to whether Hargrove was a buyer in the ordinary course of business. Missouri defines a "buyer in the ordinary course of business" as

> a person that buys goods in good faith and without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices.

Mo. Ann. Stat. § 400.1-201(9) (West Cum. Supp. 2012). Incidentally, we note that Nebraska law is in accord. See Neb. U.C.C. § 1-201(9) (Cum. Supp. 2010). "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing

in the trade. Mo. Ann. Stat. § 400.2-103(1)(b) (West Cum. Supp. 2012). Accord Neb. U.C.C. § 2-103(1)(b) (Cum. Supp. 2010).

[22,23] "[A] bona fide purchaser [is] one who pays a valuable consideration, has no notice of outstanding rights of others and who acts in good faith." *J.C. Equipment, Inc. v. Sky Aviation, Inc.*, 498 S.W.2d 73, 76 (Mo. App. 1973). "The necessary notice referred to may be imparted to a prospective purchaser by actual or constructive notice of facts which would place a reasonably prudent person upon inquiry as to the title he is about to purchase." *Id.* See, also, Mo. Ann. Stat. § 400.1-201(25) (person has "notice" of fact when person has actual knowledge of it or from all facts and circumstances known to him or her at time in question he or she has reason to know that it exists).

Hargrove gave a deposition in the replevin case that we have mentioned, and that deposition was also received into evidence in the instant case. In his deposition, Hargrove testified that Asbury "represented" that he owned the heifers. And in an affidavit prepared in the instant case, which was also received into evidence, Hargrove stated that he believed Asbury owned the heifers. Furthermore, Hargrove testified that he had known Asbury for 20 years and had done cattle transactions with him on previous occasions. Hargrove testified that he never had a title issue in any of his prior cattle transactions with Asbury. Thus, we find no error in the district court's finding that Hargrove bought the heifers from Asbury without actual knowledge that the heifers were owned by someone other than Asbury. See *In re Guardianship of Elizabeth H.*, 17 Neb. App. 752, 771 N.W.2d 185 (2009) (appellate court, in reviewing judgment for errors appearing on record, will not substitute its factual findings for those of lower court where competent evidence supports those findings). However, we must also look at whether Hargrove had constructive notice, meaning from all the facts and circumstances known to him at the time in question, he had reason to know that there was a problem with Asbury's title to the heifers.

a. Hargrove's Purchase Price

Asbury initially wanted to sell Hargrove 140 head of bred heifers for $900 per head. However, Hargrove ultimately purchased the heifers for $842.85 per head. The district court found that according to the evidence, the final contract entered into was the result of negotiations between the parties. The district court also said: "The evidence does not persuade the court that Hargrove should have been put on notice regarding the title he received because he was able to dicker and buy the heifers at a lower price than first offered by Asbury." We agree.

Testimony from Hargrove disclosed two different reasons for the reduction in price: Asbury's need for money and the condition of the heifers' eyes. In his deposition in the companion replevin case, Hargrove testified that Asbury lowered the price in order to get his money "right now." At trial, Hargrove testified that Asbury needed the money for a separate cattle deal in Iowa. And the evidence discloses that Asbury received payment 2 weeks prior to delivery of the heifers—supporting the notion that Asbury needed money "right now." Additionally, at trial in the instant case, Hargrove testified that when he first looked at the cattle in mid-July, he mentioned to Asbury that he was concerned because some of the heifers had "blue eyes"—Hargrove testified that if left untreated, the heifer can lose one or both of its eyes, which would make the heifer harder to sell or lower its value. Hargrove testified that Asbury assured him that the eyes were being treated. Hargrove testified that he did not have an agreement to purchase the livestock when he left Asbury in mid-July. Hargrove testified that Asbury called him "a few days, maybe a week" later and said he would take less for the heifers. Hargrove testified that based on the quality and condition of the livestock he bought, $842.85 per head was in the "fair market value range." Based on our review of the record, the evidence was insufficient to show that Hargrove should have been put on notice regarding the title to the cattle because the price of the heifers was lowered. We find no error in the district court's determination that the final contract entered into was the result of negotiations between the parties.

b. Extra 10 Head of Heifers

Hargrove contracted to buy 140 bred heifers, each weighing 875 to 900 pounds, from Asbury for $842.85 per head. The evidence shows that at the time the heifers were sorted and loaded, Asbury allowed Hargrove to take another 10 head for no additional charge. We point out the evidence shows that the B & W representative was present and participated in the sorting and loading and that B & W essentially took possession of the heifers, including the extra 10 head, from Hargrove at the same moment that Hargrove took possession of the heifers from Asbury. These facts alone might give rise to a question of good faith concerning the Asbury/Hargrove transaction. However, there were other cattle transactions between Asbury/Hargrove, Asbury/B & W, and Hargrove/B & W all occurring at the same time. We summarize the transactions as follows:

- Asbury/Hargrove: Asbury contracted to sell Hargrove 140 heifers for $842.85 each, for a total of $118,000.
- Hargrove/B & W: Hargrove contracted to sell B & W those same 140 heifers for $900 each, for a total of $126,000.
- Asbury/Hargrove: Asbury contracted to sell Hargrove 70 Angus cow-calf pairs for $1,000 each, for a total of $70,000.
- Hargrove/B & W: Hargrove contracted to sell B & W the same 70 Angus cow-calf pairs for $1,000 each, for a total of $70,000.
- Asbury/B & W: Asbury contracted to sell B & W $75,000 worth of bred heifers at $800 each.

Clearly, these folks were "cattle dealers." The total payments to Asbury were $263,000. All payments were made to Asbury before anyone took possession of any of the cattle. The district court found: "Asbury had to have known he was short on the number of cattle he had contracted to sell and for which he had already received payment on the date of the delivery of the heifers." On August 14, 2008, Asbury delivered 150 heifers. The next day, he delivered 26 cow-calf pairs and 52 dry cows. The total value of the livestock delivered was $179,000. The district court found that Hargrove and B & W were short $84,000 worth of livestock, after including the extra 10 heifers. On September 2, Asbury wrote Hargrove a

check for $84,000, but the check was returned for insufficient funds. Subsequently, on October 2, Asbury gave Hargrove a check for $35,000. Thus, Hargrove and B & W were still short $49,000.

The district court found that there were a number of reasons for the extra 10 head of heifers Hargrove received from Asbury for no charge. In examining the evidence, it reveals that in addition to the fact that Asbury was short on the number of cattle he had contracted to sell, there was evidence that the 140 heifers were not as represented. The heifers had lost weight and therefore were "light," and some of the heifers were "open." Asbury was also not required to haul one load of heifers which he had agreed to haul. Thus, the district court implicitly held that the additional 10 heifers would not have put Hargrove on notice that something was wrong with Asbury's title to the heifers, because there were multiple reasons for Asbury to add an additional 10 head in his deal with Hargrove. Upon our review of the record, the trial court was not clearly wrong in its finding that Hargrove did not have constructive notice of any problem with Asbury's title to the heifers.

c. Resolution

We find no error in the district court's conclusion that Hargrove was a buyer in the ordinary course of business and a good faith purchaser. Thus, the Asbury/Hargrove transaction resulted in Hargrove's receiving Norwood's rights—the rights of an owner—to the heifers. And as owner, Hargrove would have good title to the heifers. See Mo. Ann. Stat. § 400.2-403(2). And as stated previously, all parties agree that if Hargrove had good title, then all subsequent purchasers, including Nordhues, also had good title. Nordhues' complaint against Maulsby sought damages in the amount of $117,300 for Maulsby's failure to convey clear title to 115 head of bred heifers. Because Nordhues received good title to the heifers from Maulsby, his claim for damages is without merit. Accordingly, the district court did not err when it dismissed Nordhues' complaint with prejudice.

## VIII. CONCLUSION

Because we find no error with the district court's judgment of dismissal, we need not address the cross-appeals of Maulsby or B & W.

AFFIRMED.

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CENTURION STONE OF NEBRASKA, APPELLANT, V.
TONY TROMBINO AND LORI TROMBINO, APPELLEES.
812 N.W.2d 303

Filed March 27, 2012. No. A-11-139.

1. **Courts: Appeal and Error.** The district court and higher appellate courts generally review appeals from the county court for error appearing on the record.
2. **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.
3. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
4. **Motions for Mistrial: Jury Misconduct: Appeal and Error.** Trial counsel's failure to move for a mistrial based on alleged juror misconduct during deliberations precludes counsel from raising the issue on appeal.
5. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position that the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.
6. **Contracts: Substantial Performance: Damages.** If a construction contract has been substantially performed but there are defects or omissions in the work which are remediable at reasonable expense without taking down and reconstructing any substantial portion of the building or structure, it is generally held that the contractor is entitled to the contract price after deducting therefrom the expense of making the work conform to the contract requirements.
7. **Contracts: Damages.** Where defects cannot be remedied without reconstruction of or material injury to a substantial portion of a building, the measure of damages is the difference between the value as constructed and the value if built according to the contract.
8. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.
9. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which 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.

10. **Jury Instructions: Pleadings: Evidence.** A trial court, whether requested to do so or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence.
11. **Jury Instructions: Appeal and Error.** If all the jury instructions read together correctly state the law, are not misleading, and adequately cover issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
12. **Contracts: Substantial Performance.** Substantial performance must be shown before an action on a contract can be brought.
13. ____: ____. There is substantial performance of a building contract where all essential elements necessary to full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete strict performance that the owner obtains substantially what is called for by the contract.

Appeal from the District Court for Otoe County, DANIEL E. BRYAN, JR., Judge, on appeal thereto from the County Court for Otoe County, JEFFREY J. FUNKE, Judge. Judgment of District Court reversed and cause remanded with directions.

Karl Von Oldenburg and Sara E. Miller, of Brumbaugh & Quandahl, P.C., for appellant.

Angelo M. Ligouri, of Ligouri Law Office, for appellees.

IRWIN, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

Centurion Stone of Nebraska (Centurion) sued Tony Trombino and Lori Trombino in the county court for Otoe County to recover $10,135.61 allegedly owing on a contract to install stucco and stone to the exterior of the Trombinos' new home. The Trombinos, who have paid Centurion a total of $55,590, counterclaimed, asserting that Centurion billed them for work in excess of their $61,000 contract and failed to perform in a workmanlike manner, causing damages. After a jury found against Centurion and in favor of the Trombinos in the amount of $16,000, judgment was entered accordingly and Centurion's claim was dismissed. Centurion appealed to the Otoe County District Court, and the judgment was affirmed. Centurion now appeals to this court. We conclude that plain

error in the jury instructions requires that we reverse, and remand the cause for a new trial.

## BACKGROUND

In October 2007, the Trombinos contracted with Centurion to do stucco and stone work on the exterior of their new home. There are two itemized estimates from Centurion in evidence, one for stucco work and one for stone work, that total $61,000. Each estimate recites that the job has already been "field measured" and that all applicable sales tax is included in the total. After various delays, the project was completed in January 2008. It is undisputed that the Trombinos have already paid Centurion $55,590 on the contract.

In its complaint, Centurion claimed that the Trombinos still owe $10,135.61. According to Centurion, the amount over the original $61,000 contract price ($4,725.61) was for propane to provide heat for the mortar when stones were set in cold weather and other additions to the contract. In the Trombinos' answer and counterclaim, they characterize the additional $4,725.61 charge as unreasonable and excessive and deny agreeing to it. They further allege that Centurion's faulty workmanship caused damage to their residence. Specifically, they claim that Centurion left dried mortar on the stucco and the stone, used the wrong pattern of stone, used broken and defaced stones that should have been discarded, allowed the mortar to freeze, applied the wrong color of mortar, and used poor craftsmanship in applying the stone. The Trombinos asked for judgment in excess of $7,000, "the exact amount to be proven at trial," on their counterclaim.

At trial, Robert Gress, a 64-year-old retired concrete, brick, and stone mason from Otoe County, testified about the quality of the work performed by Centurion. Gress went to the Trombinos' home on two occasions prior to trial to inspect Centurion's work. He did not take measurements; he merely observed. He described the job as "sloppy" and exhibiting "[p]oor workmanship." Specifically, he noticed discolored mortar (which he believed was due to the mortar freezing), mortar with holes in it, stones with mortar smeared on them, stones cut improperly, stones used that he would have discarded, and

uneven levels of stone along the windowsills. Supporting photographs were received in evidence. Because we remand for a new trial, we need not detail Gress' evidence about remediation of the problems with Centurion's work that he observed or his estimates of the cost of remediation.

The order and judgment of the jury was filed on May 10, 2010. The order recites that the jury found against Centurion and in favor of the Trombinos in the amount of $16,000. On May 18, Centurion filed a motion for a new trial and a motion for judgment notwithstanding the verdict. In both motions, Centurion asserted generally that the jury's verdict and award did not conform to the evidence presented at trial. After a hearing on the motions in the county court for Otoe County, the county court judge overruled both of Centurion's motions. With respect to each motion, the court specifically found in its order that the jury verdict was sustained by sufficient evidence. Centurion appealed to the district court for Otoe County. After its review, the district court found no error in the jury's verdict and affirmed. Centurion now timely appeals to this court.

## ASSIGNMENTS OF ERROR

Centurion's assigned errors are as follows: (1) There was insufficient evidence of damages to support the jury's verdict, (2) the verdict was the result of misconduct by opposing counsel and the jury, and (3) Centurion substantially performed and is thus entitled to the balance due on the contract.

## STANDARD OF REVIEW

[1-3] The district court and higher appellate courts generally review appeals from the county court for error appearing on the record. *Stover v. County of Lancaster*, 271 Neb. 107, 710 N.W.2d 84 (2006). 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. *Id.* However, in instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *Id.*

## ANALYSIS

*Was Evidence Insufficient to Support Jury's Award of Damages?*

Having thoroughly reviewed the record with regard to this assignment of error, and recognizing that the Trombinos' evidence of damages was largely admitted without objection, we would typically answer this question in the affirmative, given our standard of review. However, we do not detail the damages evidence and why it would be sufficient to sustain a verdict for $16,000, because we find that the jury instructions were fundamentally flawed to the point that a reversal of the award and a remand for a new trial are required.

*Was Jury's Verdict Result of Misconduct?*

Centurion next contends that the jury's damages award was derived from improper "testimony" by the Trombinos' counsel during closing arguments. Brief for appellant at 12. Because we reverse the verdict, which fact would obviously be inadmissible in a new trial, we need not address this assignment of error.

Centurion further claims as part of this assignment of error that the jury's verdict was based on juror misconduct, which it alleges is evident from three questions the jury asked the court during deliberations. The jury's questions were:

- Can or should attorney fees and court costs be considered in damage costs or value?
- Can emotional damage be a consideration? Are there any guidelines on this subject?
- If we find for the plaintiff, the defendant must pay the $10,135.61? If we find for the defendant, is the balance of $10,135.61 null and void?

With respect to each of these questions, the record reflects that the court returned an answer stating that it was unable to answer the question and that the jury should refer to the jury instructions as well as the verdict forms. With regard to the third question, the judge directed the jury to specific instructions on the claims of the parties, the measure of damages, and the submission of the matter to the jury.

[4] We do not understand the assertion that the questions show jury misconduct. In any event, Centurion did not object to the way the trial court handled the questions from the jury, nor did it seek a mistrial based on the alleged misconduct; thus, Centurion waived its right to assert this error. See *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

*Did Centurion Substantially Perform Contract, and Is It Thus Entitled to Balance Due on Contract?*

Finally, Centurion argues that it performed as promised under the contract and is therefore entitled to the amount the Trombinos still owe, which Centurion claims is $10,135.61. The Trombinos respond in their brief:

> There is no evidence supporting a judgment of $10,135.61. The original contract was for $61,000.00, of that [the Trombinos] tendered payment of $55,590.00. . . . [Centurion's] failure to perform pursuant to agreement created substantial repair and finishing work for the [Trombinos]. Further, the terms of the parties' agreement were 50% down and 50% upon completion[.] [Centurion] never completed [its] contracted obligation to the [Trombinos].

Brief for appellees at 11.

[5-7] In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position that the injured party would have occupied if the contract had been performed, that is, to make the injured party whole. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998); *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994). If a construction contract has been substantially performed but there are defects or omissions in the work which are remediable at reasonable expense without taking down and reconstructing any substantial portion of the building or structure, it is generally held that the contractor is entitled to the contract price after deducting therefrom the expense of making the work conform to the contract requirements. See *Stillinger & Napier v. Central States Grain Co., Inc.*, 164 Neb. 458, 82 N.W.2d 637 (1957). However, where

defects cannot be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between the value as constructed and the value if built according to the contract. *A R L Corp. v. Hroch*, 201 Neb. 422, 268 N.W.2d 101 (1978).

[8-11] Centurion did not object to the jury instructions at the time of trial, nor does it assign error to such in the present appeal. Accordingly, our review of the jury instructions is limited to plain error. Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which 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. *Id.* The trial court, whether requested to do so or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence. See *Sand Livestock Sys. v. Svoboda*, 17 Neb. App. 28, 756 N.W.2d 299 (2008), citing *Nguyen v. Rezac*, 256 Neb. 458, 590 N.W.2d 375 (1999). In our review, we must read all the jury instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. See *Nguyen v. Rezac, supra*.

The jury instruction regarding damages, No. 18, is set forth below in its entirety. We have added letters to the individual paragraphs for ease of reference in the subsequent discussion.

> [A.] If you find in favor of [Centurion] on its claim of breach of contract claim [sic] then you must determine the amount of [Centurion's] damages.
>
> [B.] In this matter, [Centurion] is entitled to recover the contract price minus the reasonable cost of making the work conform to the requirements of the contract, minus any payments already received on the contract.

> [C.] If you find in favor of [Centurion], but do not find any actual damages, then you may award [Centurion] no more than a nominal sum.
>
> [D.] If you find in favor of the [Trombinos], on their counterclaim of breach of contract claim [sic] then you must determine the amount of the [Trombinos'] damages.
>
> [E.] In this matter, [the Trombinos] are entitled to recover the reasonable cost of making the work conform to the requirements of the contract.
>
> [F.] If you find in favor of the [Trombinos] on their counterclaim, but do not find any actual damages, then you may award the [Trombinos] no more than a nominal sum.

[12,13] At the outset, we note that the trial court took paragraph B directly from NJI2d Civ. 4.44(A) and paragraph E directly from NJI2d Civ. 4.45(B), both of which assume substantial performance on the part of the contractor. Thus, it appears that the trial court implicitly found that Centurion substantially performed as a matter of law. Substantial performance must be shown before an action on the contract can be brought. *Lange Bldg. & Farm Supply v. Open Circle "R"*, 216 Neb. 1, 342 N.W.2d 360 (1983). There is substantial performance of a building contract where all essential elements necessary to full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete strict performance that the owner obtains substantially what is called for by the contract. *Id*. No error is assigned to this implicit finding on the part of the trial court, and we cannot say that such a conclusion, assuming such to have been the trial court's intention, was plain error.

This takes us to what we believe is a substantial problem with the instructions, particularly No. 18, because although the Trombinos admitted that the contract was for $61,000 and conceded that they had paid only $55,590, the jury did not award Centurion any damages whatsoever—or at least none that we can discern under the instructions. But, when we accept for analytical purposes the trial court's implicit finding

of substantial performance, Centurion would be entitled to at least $5,410 in damages—the unpaid portion of the agreed-upon contract price—and then the jury would have to decide the merits of Centurion's claim that there was an additional $4,725.61 due for propane and other additions to the contract. Thus, the jury's finding of no damages for Centurion is clearly wrong, because such could not be a correct result under the trial court's implicit finding that Centurion had substantially performed.

Nebraska law is that if a construction contract has been substantially performed but there are defects or omissions in the work which are remediable at reasonable expense without taking down and reconstructing any substantial portion of the building or structure, the contractor is generally entitled to the contract price after deducting therefrom the expense of making the work conform to the contract requirements. See *Stillinger & Napier v. Central States Grain Co., Inc.*, 164 Neb. 458, 82 N.W.2d 637 (1957).

In jury instruction No. 2, the court presented Centurion's claim that the Trombinos had breached the contract by failing to pay for the goods and services. The instruction does not list an amount owing on the contract, and paragraph B in jury instruction No. 18 clearly left that issue up to the jury to decide. The court instructed that if Centurion proved the elements of its claim, "then your verdict must be for [Centurion]." Also in instruction No. 2, the court presented the Trombinos' "claims," which in shortened form were that Centurion did not do what it agreed to do, did poor work, and caused damage to the Trombinos' home. After setting forth the elements the Trombinos had to prove, the court instructed that if the Trombinos had met their burden of proof, "then your verdict must be for the [Trombinos]." The instruction does not tell the jury what to do in the event both parties proved their claims—which is clearly a possible conclusion from the evidence.

We previously found no merit to Centurion's argument that the jury questions submitted to the trial judge are evidence of juror misconduct; however, we do think the jury's third question, in particular, shows that the jury was confused by the

instructions, because it did not know what to do if it found merit to Centurion's claim for additional payment on the contract. In short, how was the jury to reconcile the claim and the counterclaim? Under the pleadings and evidence, it is clear that the jury could find that Centurion was still owed money on the contract and that the Trombinos were entitled to damages for remediation of substandard work. In other words, a finding for Centurion on its claim would not necessarily prevent a corresponding finding for the Trombinos on their counterclaim, and vice versa. But, not only was the jury not expressly told this was permissible, it was not told via the instructions what to do in the event such was its conclusion, in order to reconcile its findings and return a single verdict for one party or the other. In the jury's third question, the jury asked: "If we find for the plaintiff, the defendant must pay the $10,135.61? If we find for the defendant, is the balance of $10,135.61 null and void?" These questions strongly suggest that the jury was confused about how to "balance the books" and what it should do if it found that each party had proved the elements of its claim.

Jury instruction No. 18 puts the jury in the position of having to reach an "all or nothing" decision for one party or the other. In order words, if the jury found that Centurion proved the elements of its claim, then the jury was told to use paragraph A, B, or C. Alternatively, if the jury found that the Trombinos proved the elements of their claim, then the jury was told to use paragraph D, E, or F.

To avoid the above problems, the jury should have been asked to determine what amount, if any, was unpaid to Centurion on the contract, which Centurion claimed was $10,135.61, remembering that the Trombinos conceded that the original contract price was $61,000, leaving $5,410 thereof admittedly unpaid because the Trombinos had paid $55,590. Then, the court should have instructed the jury to determine the Trombinos' counterclaim by determining whether there was defective or nonconforming performance of Centurion's contract and, if so, the fair, reasonable, and necessary cost of remediation of such defects. Then, figuring the ultimate jury award becomes a matter of simple math. An appropriate damages instruction that

is tailored to the factual scenario of this case would have read along the following lines:

> A. If you find in favor of Centurion on its breach of contract claim, then you must determine the amount of money that Centurion is still owed on the contract, and that amount shall be entered as your verdict for Centurion, unless you have also found for the Trombinos on their counterclaim, in which case your final verdict will be determined by the instructions that follow.
>
> B. Even if you find in favor of Centurion on its claim, you can find for the Trombinos on their counterclaim for breach of contract if they have proved the elements thereof, and then you must determine the amount of the Trombinos' damages, as set forth below.
>
> C. The Trombinos are entitled to recover the reasonable cost of making the work conform to the requirements of the contract, and that amount shall be entered as your verdict in favor of the Trombinos, unless you have also found for Centurion on its claim, in which case your verdict will be determined by the instructions that follow.
>
> D. If you have determined that both Centurion and the Trombinos have proved their claims and that both parties are therefore entitled to recover, then your final verdict shall be determined as follows: If the amount of Centurion's recovery on the contract is greater than the amount of damages you have found that the Trombinos sustained, the difference shall be the amount that you shall award to Centurion. If, on the other hand, the damages you have found the Trombinos sustained are greater than the amount that is owed to Centurion on the contract, the difference shall be the amount that you shall award to the Trombinos.
>
> E. If you have found in favor of both Centurion and the Trombinos, then you shall also complete the special interrogatory form by filling in the amount owed to Centurion on the contract as well as the amount of damages that you found the Trombinos to have sustained.

Quite plainly, the evidence presented in this case does not support the jury's finding that Centurion was owed nothing

on its breach of contract claim, assuming that there was substantial performance of the contract, as the trial court implicitly concluded. As explained above, the Trombinos admit that they paid only $55,590 on the $61,000 contract. Thus, given the implicit trial court finding that there was substantial performance, Centurion sustained damage of at least $5,410. But, there is no way under the jury's instructions and verdict forms to know that the jury included in its calculation of the Trombinos' award of damages any consideration of any amounts owing to Centurion on the contract, because the jury was not instructed to do so. That said, the clear inference from the jury's third question is that it was confused about this issue and did not know how to handle it.

Thus, the jury's award of $16,000 to the Trombinos for "the reasonable cost of making the work conform to the requirements of the contract" potentially gives the Trombinos a windfall and is not in accord with established Nebraska law with respect to calculating damages for breach of a construction contract when there has been substantial performance. See, *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998); *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994) (in breach of contract action, ultimate objective of damages award is to put injured party in same position that injured party would have occupied if contract had been performed, that is, to make injured party whole). The basic calculation here is to determine the amount owing Centurion on the contract, if any, then to determine if the Trombinos were damaged and the cost of remediation, after which it is a simple mathematical calculation to determine who owes whom how much. Due to the trial court's implicit determination that Centurion substantially performed as a matter of law, Centurion was entitled to the contract price after deducting therefrom the expense of making the work conform to the contract requirements. See *Stillinger & Napier v. Central States Grain Co., Inc.*, 164 Neb. 458, 82 N.W.2d 637 (1957). But, the trial court's jury instructions do not incorporate this basic and well-established concept in a clear, understandable, and usable way.

We find, after our plain error review, that the failure of the trial court to correctly instruct the jury on the calculation of

damages, given the competing claims of the parties, leaves us with no confidence that the jury actually reached a fair and just result. We bear in mind that the jury's questions suggest that the jury felt Centurion's claim had some validity but that it did not know what to do, given its obvious conclusion that the Trombinos' claim also had validity. The error in the jury instructions prejudicially affects Centurion's substantial right 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. See, e.g., *Sand Livestock Sys. v. Svoboda*, 17 Neb. App. 28, 756 N.W.2d 299 (2008) (trial court committed plain error by instructing jury to determine question of law).

## CONCLUSION

We cannot determine how the jury arrived at its verdict of $16,000 for the Trombinos, given that the instructions were drafted so as to force a verdict for one party or the other without any balancing of the competing claims. The nature of the case is that the jury needed to determine the merits of each party's claim, the damages on such, and then "do the math" to arrive at a final verdict for one party or the other. Because the court failed to clearly instruct the jury on how to "balance the books" in the event that it found merit and damages on each party's claim, we must reverse the verdict and remand the cause for a new trial under proper instructions. By including a special interrogatory on the amount of damages on each party's claim, if any, the court can then determine how the verdict was determined. Our assumption that the court found that there had been substantial performance is only an assumption for discussion purposes, and such is not binding upon retrial. Therefore, we reverse, and remand to the district court with directions to reverse, and remand to the county court for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN F. BECKMAN AND FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, APPELLANTS, V. FEDERATED MUTUAL INSURANCE COMPANY, ALSO KNOWN AS AND DOING BUSINESS AS FEDERATED INSURANCE, ET AL., APPELLEES.

814 N.W.2d 763

Filed March 27, 2012. No. A-11-307.

1. **Judgments: Appeal and Error.** The interpretation of a statute is a question of law, and when reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Insurance: Declaratory Judgments: Attorney Fees.** Attorney fees under Neb. Rev. Stat. § 44-359 (Reissue 2010) are available for an insured who wins a declaratory judgment action against an insurer.
3. **Insurance: Contracts: Liability.** An adjustment of liability priorities between two insurers is not an action upon the insurance policy.

Appeal from the District Court for Washington County: JOHN E. SAMSON, Judge. Affirmed.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellants.

Michael G. Mullin and Amy L. Van Horne, of Kutak Rock, L.L.P., for appellees Federated Mutual Insurance Company and Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc.

IRWIN, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

This is the second appearance of this matter in this court. We now address whether under the factual pattern and decision outlined in *Beckman v. Federated Mut. Ins. Co.*, 18 Neb. App. 513, 788 N.W.2d 806 (2010) (*Beckman I*), attorney fees are allowable under Neb. Rev. Stat. § 44-359 (Reissue 2010). We agree with the trial court's decision to deny the requested fees.

## FACTUAL BACKGROUND

It is most efficient to simply repeat the key facts of the case as we related such in *Beckman I*. Thus, we quote from our earlier opinion:

> On July 31, 2006, John F. Beckman took his stepdaughter's vehicle to Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc.[,] . . . to have repairs performed on the vehicle. Sid Dillon provided Beckman with a substitute vehicle, a 2005 Chevrolet Malibu owned by Sid Dillon, and gave him permission to operate the vehicle. On that same day, Beckman was involved in an accident with a bicyclist, Clinton R. Sedivy, while operating the Malibu.
>
> At the time of the accident, Beckman was insured by Farmers Mutual Insurance Company of Nebraska . . . . At that time, Sid Dillon and the Malibu were insured by Federated Mutual Insurance Company . . . .

*Beckman I*, 18 Neb. App. at 514-15, 788 N.W.2d at 808.

In *Beckman I*, we set forth various provisions of the Farmers Mutual Insurance Company of Nebraska (Farmers Mutual) and Federated Mutual Insurance Company (Federated) insurance policies, which we need not repeat in this opinion. In *Beckman I*, we described that appeal as "an insurance coverage dispute arising out of an accident in which the driver was operating a temporary substitute vehicle provided by a car dealership." 18 Neb. App. at 514, 788 N.W.2d at 808. We further said that "[t]he question before this court is whether the Farmers Mutual insurance policy or the Federated insurance policy provided primary coverage." *Id.* at 517, 788 N.W.2d at 810. Our conclusion in *Beckman I* was that the Farmers Mutual policy and the Federated policy contained mutually repugnant language and that Nebraska law requires that in such circumstance, the insurer for the vehicle's owner, in this case Federated on behalf of Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. (Sid Dillon), had the primary coverage for the claims of the bicyclist with whom Beckman collided while driving Sid Dillon's car. Therefore, we held that Federated provided primary coverage and that the Farmers Mutual policy which provided personal insurance for the driver, Beckman, was excess coverage. Consequently, we reversed the district court's grant of summary judgment to Federated and remanded the matter with directions to enter summary judgment in favor of Beckman and Farmers Mutual consistent with our decision

that the Farmers Mutual policy was only excess to the primary coverage of Federated.

Thereafter, Beckman and Farmers Mutual filed a motion for taxation of attorney fees in the district court for Washington County, Nebraska, seeking an award for the attorney fees incurred by Farmers Mutual in defending the underlying case filed by the bicyclist against Beckman and Sid Dillon. Additionally, Beckman and Farmers Mutual sought an award of attorney fees for pursuing the case we have described as *Beckman I* and summarized herein. The district court entered its order on March 29, 2011, granting attorney fees to Farmers Mutual for the defense of the underlying personal injury lawsuit, as Federated conceded its responsibility for such fees. The district court, citing *Dairyland Ins. Co. v. Kammerer*, 213 Neb. 108, 327 N.W.2d 618 (1982), found that *Beckman I* "involved an adjustment of liability priorities between two insurance companies [and] the attorney's fees incurred by [Beckman and Farmers Mutual] in regard to the primary coverage issue, are not authorized under [§] 44-359."

Beckman and Farmers Mutual have appealed the denial of their requests for fees incurred in the pursuit of the declaratory judgment action, including fees and costs in their successful appeal to this court in *Beckman I*.

## ASSIGNMENT OF ERROR

The single assignment of error is simply that the trial court erred in denying attorney fees for the costs incurred in pursuing the declaratory judgment action, *Beckman I*.

## STANDARD OF REVIEW

[1] The parties are in agreement on the correct standard of review for this court. The standard is that the interpretation of a statute is a question of law, and when reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998).

## ANALYSIS

Section 44-359 provides, in part:

> In all cases when the beneficiary or other person entitled thereto brings an action upon any type of insurance

> policy except workers' compensation insurance, or upon any certificate issued by a fraternal benefit society, against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his or her recovery, to be taxed as part of the costs.

This statute also provides that in the event of an appeal, the appellate court shall likewise allow reasonable attorney fees.

Beckman and Farmers Mutual argue:

> This was not a situation in which two insurance companies disputed who was primary and who was excess; rather, Federated took the position that Beckman was not an insured under the policy. This declaratory action was, therefore, "an action upon" the policy to prove that Beckman met the definition of an insured.

Brief for appellants at 7.

Beckman and Farmers Mutual argue that the fact that costs were incurred to establish Federated's liability does not allow Federated to avoid its obligation for the costs of such determination under § 44-359. On the other hand, Federated adopted the district court's position. Citing *Dairyland Ins. Co. v. Kammerer*, 213 Neb. 108, 327 N.W.2d 618 (1982), Federated and Sid Dillon argue that attorney fees are not recoverable when the action involves merely an adjustment of liability priorities between insurers rather than an action upon the policy.

We turn our attention to *Dairyland Ins. Co. v. Kammerer, supra*, where the court held that attorney fees are not recoverable by one insurer from another insurer in an action to adjust the priorities of liability between the insurers. In *Beckman I*, it seems clear that the adjustment of priorities of liability between Farmers Mutual and Federated was the core issue and, in fact, we stated in our opinion that such was the nature of the case. Our decision in *Beckman I* did not relieve either insurance company of liability, but established priority by its holding that the Federated policy for the vehicle's owner provided "primary" coverage while the driver's personal policy through

Farmers Mutual was merely "excess." 18 Neb. App. at 514, 788 N.W.2d at 808.

In *Dairyland Ins. Co. v. Kammerer, supra*, the suit was instituted by Dairyland Insurance Company (Dairyland) seeking a declaration that a policy issued by Auto-Owners Insurance Company (Auto-Owners) provided primary coverage for an automobile accident on March 27, 1980. The evidence was that on March 5, Auto-Owners issued a binder to Judith C. Popish covering a 1974 MGB convertible which she owned. On March 27, Richard A. Wrich, with Popish's permission, was operating her insured MGB and was involved in an accident with another automobile, allegedly injuring Diana K. Kammerer. On April 10, Auto-Owners sent Popish a notice of cancellation, advising her that the Auto-Owners policy would be canceled effective April 22, which would have been nearly a month after the accident. The reason stated for the cancellation was that Popish had not disclosed that Wrich was a member of her household at the time of the issuance of the Auto-Owners policy. Auto-Owners returned only the portion of the premium paid by Popish attributable to the timeframe after the date of the cancellation. While the court's opinion does not articulate whom Dairyland insured, we believe it is a safe assumption that Dairyland was Wrich's personal auto insurer. The court found that on the date of the accident, Wrich operated Popish's motor vehicle with her permission, that Wrich was an insured under the Auto-Owners policy, and that the policy provided coverage for both Popish and Wrich (unless on March 27 the policy was not in effect at all). The court explained that upon learning of the alleged fraud at the time of the issuance of its policy, Auto-Owners had two choices: (1) it could cancel the policy from its inception and return the entire premium on the theory that the policy never came into existence or (2) it could waive the alleged fraud, keep the premium earned to the date of cancellation, and accept responsibility under the policy. Since Auto-Owners canceled the policy effective a month after the accident, the Auto-Owners policy was in effect at the time of the accident and provided coverage for Wrich.

[2] The secondary question in *Dairyland Ins. Co. v. Kammerer*, 213 Neb. 108, 327 N.W.2d 618 (1982), dealt with the fact that

the appellants had jointly requested an award of attorney fees under the version of § 44-359 then in effect. After citing the provisions of the statute, the court said that the appellants included the beneficiaries of the policy, Popish and Wrich, and that the provisions of § 44-359 should be applied. The court held that "[a]ttorney fees under [this] statute are available for an insured who wins a declaratory judgment action against the insurer." *Id.* at 112, 327 N.W.2d at 621, citing *Herrera v. American Standard Ins. Co.*, 203 Neb. 477, 279 N.W.2d 140 (1979). But, the Supreme Court said that Dairyland "stands on different ground." *Id.* The court continued:

> Dairyland may be entitled to bring or join this declaratory judgment action because of the effect a judgment may have on its own liability to Wrich on a separate policy. But as between Dairyland and Auto-Owners, this suit is merely an adjustment of liability priorities and it cannot be seen as "an action upon" the policy issued by Auto-Owners to Popish. The appellants . . . Wrich and . . . Popish are therefore given 10 days from the date of the issuance of this opinion in which to make a showing to this court of whether they have incurred any expenses by way of attorney fees in connection with either the trial of this case in the District Court or its appeal in this court. . . . The appellees are given 5 days thereafter to make any countershowing. Upon the filing of such showings, the court will give further consideration to the request for attorney fees.

*Dairyland Ins. Co. v. Kammerer*, 213 Neb. at 112-13, 327 N.W.2d at 621.

As in *Dairyland Ins. Co. v. Kammerer, supra*, in the instant action, Beckman and Farmers Mutual brought the lawsuit tried in *Beckman I*, the resulting appeal, and then this appeal from the denial of a request for attorney fees. It is argued that Beckman was a beneficiary of the Federated policy "as an insured and Farmers Mutual was both a beneficiary and a person interested in the policy whose rights and obligations were dependent upon that policy." Brief for appellants at 8-9. It is then asserted that "the trial court was required to allow a reasonable sum as an attorney's fee to Beckman and Farmers Mutual." Brief for

appellants at 9. Federated asserts that the *Dairyland Ins. Co.* case was not an action on the policy, but, rather, involved a question of law regarding the effect of Auto-Owners' actions in attempting to void the policy. This is a misstatement in that Auto-Owners did not attempt to void the policy, but actually simply canceled it a month after the accident, and thus, the policy had been in effect and provided coverage to Popish, the owner of the involved vehicle, as well as to Wrich, the driver of Popish's vehicle.

Accordingly, following the lead of the Nebraska Supreme Court in *Dairyland Ins. Co. v. Kammerer, supra*, we find that as between Farmers Mutual and Federated, there can be no award of fees because Farmers Mutual is neither the policyholder nor an insured under the Federated policy. Admittedly, in *Beckman I*, we determined that Beckman was a beneficiary of the Federated policy because of the doctrine of mutual repugnancy, which meant that the insurance policy of the vehicle's owner, Sid Dillon, provided the primary coverage and Beckman's personal insurance was only excess. So, all that is left is the question of whether Beckman, personally, is entitled to an award of fees under the statute.

In the case before us, there is a stipulation regarding attorney fees to which an exhibit is attached and incorporated. The attached exhibit is entitled "Coverage Action Attorney Fees and Costs," which the stipulation says "reflects attorney fees, paralegal fees, and out-of-pocket expenses charged by Gross & Welch to Farmers Mutual." The stipulation further provides that such fees and costs were paid by Farmers Mutual to pursue and finalize the coverage action. Therefore, given the stipulation, the billing to Farmers Mutual, and the stipulation that Farmers Mutual has paid such fees, we need not take the step taken by the Nebraska Supreme Court in *Dairyland Ins. Co. v. Kammerer*, 213 Neb. 108, 327 N.W.2d 618 (1982), to give Beckman an opportunity to make a showing that he personally paid attorney fees in order to establish that he was a beneficiary under the Federated policy who is entitled to recover costs and fees under § 44-359. But, under *Dairyland Ins. Co. v. Kammerer, supra*, Farmers Mutual is not entitled to recover the

fees and costs it paid to adjust the liability coverage priorities between Farmers Mutual and Federated.

## CONCLUSION

[3] Accordingly, as the district court found, the declaratory judgment action, *Beckman I*, was an adjustment of liability priorities between two insurers, Farmers Mutual and Federated, the former being found to have primary coverage and the latter only excess coverage. The express holding of *Dairyland Ins. Co. v. Kammerer, supra*, was that the dispute between Dairyland and Auto-Owners was "merely an adjustment of liability priorities and cannot be seen as 'an action upon' the policy issued by Auto-Owners to Popish." *Id.* at 113, 327 N.W.2d at 621. The same is true here as between Farmers Mutual and Federated. For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

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# STATE OF NEBRASKA, APPELLEE, V. MARK A. HENSHAW, APPELLANT.

812 N.W.2d 913

Filed March 27, 2012. No. A-11-567.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Speedy Trial.** To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Cum. Supp. 2010) to determine the last day the defendant can be tried.
3. ____. Under Neb. Rev. Stat. § 29-1208 (Cum. Supp. 2010), if a defendant is not brought to trial before the running of the time for trial, as extended by excludable periods, he or she shall be entitled to his or her absolute discharge.
4. **Speedy Trial: Pretrial Procedure.** The plain terms of Neb. Rev. Stat. § 29-1207(4)(a) (Cum. Supp. 2010) exclude all time between the filing of a defendant's pretrial motions and their disposition, regardless of the promptness or reasonableness of the delay. The excludable period commences on the day immediately after the filing of a defendant's pretrial motion. Final disposition under § 29-1207(4)(a) occurs on the date the motion is granted or denied.

5. **Speedy Trial: Plea in Abatement.** It is irrelevant for speedy trial purposes whether a plea in abatement is properly filed or has the necessary requirements; there are no such requirements under Neb. Rev. Stat. § 29-1207(4)(a) (Cum. Supp. 2010) in order for a plea in abatement to toll the speedy trial clock.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Leslie E. Cavanaugh for appellant.

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

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

PIRTLE, Judge.

## INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Mark A. Henshaw appeals from an order of the district court for Douglas County which denied his motion for discharge on speedy trial grounds. We conclude that the district court correctly found that the time between the filing of Henshaw's pro se plea in abatement and the district court's ruling thereon was an excludable period of time under the speedy trial statutes. Accordingly, we affirm the district court's decision to deny Henshaw's motion for discharge.

## BACKGROUND

On September 3, 2010, the State filed an information charging Henshaw with two counts of burglary. On September 7, he filed a motion for discovery which was granted on October 4. On November 30, Henshaw filed a pro se plea in abatement. On February 23, 2011, the State filed an amended information charging Henshaw with the same two counts of burglary and adding a habitual criminal allegation. Also on February 23, Henshaw, through trial counsel, filed another plea in abatement. Following a hearing on May 18, the district court entered an order on May 19 overruling Henshaw's plea in abatement. A jury trial was set for June 6.

On June 6, 2011, Henshaw filed a motion for discharge alleging that his statutory right to a speedy trial had been violated. At the hearing on the motion to discharge, Henshaw argued that his pro se plea in abatement filed on November 30, 2010, did not toll the speedy trial clock because it was not filed with a hearing date and because he did not file a request for a transcript of the preliminary hearing. He further admitted that an excludable period started when trial counsel filed the plea in abatement on February 23, 2011.

Following the hearing on Henshaw's motion for discharge, the district court overruled the motion, finding that the time period from the filing of Henshaw's pro se plea in abatement on November 30, 2010, until the court's ruling on the plea in abatement on May 18, 2011, which was entered May 19, was an excludable period of time for speedy trial purposes. It found that, without addressing any other excludable time periods, there were at least 170 excludable days and that the State had a minimum of 73 days left to bring Henshaw to trial. This appeal followed.

## ASSIGNMENT OF ERROR

Henshaw assigns that the trial court erred in finding that the time period from the filing of his pro se plea in abatement on November 30, 2010, until the court's "hearing and ruling on May 18, 2011," was an excludable period of time under the speedy trial statutes.

## STANDARD OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009).

## ANALYSIS

Henshaw assigns that the trial court erred in finding that the period of time from "November 30, 2010[, to] May 18, 2011," attributable to his plea in abatement, was an excludable period of time under the speedy trial statutes.

[2,3] Neb. Rev. Stat. § 29-1207(1) (Cum. Supp. 2010) provides that "[e]very person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section." To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4) to determine the last day the defendant can be tried. *State v. Williams, supra*. Under Neb. Rev. Stat. § 29-1208 (Cum. Supp. 2010), if a defendant is not brought to trial before the running of the time for trial, as extended by excludable periods, he or she shall be entitled to his or her absolute discharge. *State v. Williams, supra*.

[4] The rules concerning the effect of a defendant's motions are well settled. The plain terms of § 29-1207(4)(a) exclude all time between the filing of a defendant's pretrial motions and their disposition, regardless of the promptness or reasonableness of the delay. *State v. Williams, supra.* Section 29-1207(4)(a) specifically includes pleas in abatement as pretrial motions by a defendant. The excludable period commences on the day immediately after the filing of a defendant's pretrial motion. *State v. Williams, supra.* Final disposition under § 29-1207(4)(a) occurs on the date the motion is granted or denied. *State v. Williams, supra*.

Henshaw argues on appeal that neither his pro se plea in abatement nor the plea in abatement filed by counsel tolled the speedy trial clock because neither conformed to the statutory requirements of Neb. Rev. Stat. § 29-1818 (Reissue 2008). Section 29-1818 provides that "[n]o plea in bar or abatement shall be received by the court unless it be in writing, signed by the accused, and sworn to before some competent officer." Henshaw did not make an argument based on § 29-1818 at the hearing on the motion for discharge. Rather, he argued that the pro se plea in abatement did not toll the speedy trial clock because it was not filed with a hearing date and because he did not file a request for a transcript of the preliminary hearing. However, regardless of which argument is made, the outcome is the same—the filing of the pro se plea in abatement tolled the speedy trial clock.

[5] It is irrelevant for speedy trial purposes whether the plea in abatement was properly filed or had the necessary requirements. There are no such requirements under § 29-1207(4)(a) in order for a plea in abatement to toll the speedy trial clock. Based on the plain language of § 29-1207(4)(a), Henshaw's pro se plea in abatement was a pretrial motion filed by the defendant. Once Henshaw's pro se plea in abatement was filed by the clerk of the district court for Douglas County on November 30, 2010, the speedy trial clock stopped until the trial court disposed of the pretrial motion. Had the trial court found that the pro se filing did not comply with § 29-1818 or was defective in some other way, as Henshaw contends, the speedy trial clock would still have stopped from the period when the pro se plea in abatement was filed until the court made such ruling disposing of the pretrial motion.

We conclude that the filing of Henshaw's pro se plea in abatement on November 30, 2010, tolled the speedy trial clock and the excludable period continued until the court ruled on the plea in abatement on May 19, 2011. Therefore, when counsel filed the plea in abatement on February 23, the clock was already stopped and such filing had no effect on the speedy trial calculation. Accordingly, the trial court did not err in excluding the time between Henshaw's pro se plea in abatement filing and the court's ruling thereon from the speedy trial calculation.

We further determine that the speedy trial clock had not expired at the time Henshaw filed his motion for discharge. The information was filed on September 3, 2010, which would have made the last day to bring Henshaw to trial, absent any excludable periods, March 3, 2011. Henshaw filed his pro se plea in abatement on November 30, 2010, and it was overruled in an order filed May 19, 2011, resulting in 170 excludable days. Henshaw admits that there are 27 excludable days attributable to his motion for discovery filed on September 7, 2010, and granted on October 4. Adding the 197 days of excludable time, the last date on which the State could bring Henshaw to trial was extended to September 16, 2011. At the time Henshaw filed his motion for discharge on June 6, 2011, the speedy trial clock had not expired, as there were 102 days

still remaining to bring Henshaw to trial. The trial court did not err in overruling Henshaw's motion to discharge based on speedy trial grounds.

## CONCLUSION

We conclude that the district court did not err in finding that the time period from the filing of Henshaw's pro se plea in abatement on November 30, 2010, until the court's ruling on the plea in abatement filed on May 19, 2011, was an excludable period of time under the speedy trial statutes. Accordingly, the district court did not err in denying Henshaw's motion for discharge and its judgment is affirmed.

AFFIRMED.

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# JAMES HENDERSON AND JAMIE HENDERSON, HUSBAND AND WIFE, APPELLANTS, V. CITY OF COLUMBUS, A MUNICIPAL CORPORATION, APPELLEE.

811 N.W.2d 699

Filed April 3, 2012. No. A-11-060.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, 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 reasonably be deduced from the evidence.
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. **Negligence: Words and Phrases.** Ordinary negligence is defined as doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances.
4. **Political Subdivisions Tort Claims Act: Negligence.** A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against an individual.
5. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty.

6. **Negligence.** In a negligence case, a defendant's conduct should be examined not in terms of whether there is a duty to perform a specific act, but, rather, whether the conduct satisfied the duty placed upon individuals to exercise such degree of care as would be exercised by a reasonable person under the circumstances.
7. ____. Foreseeable risk is an element in the determination of negligence, not legal duty.
8. ____. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence.
9. **Governmental Subdivisions: Property: Words and Phrases.** Inverse condemnation is shorthand for a governmental taking of or damage to a landowner's property without the benefit of condemnation proceedings.
10. **Constitutional Law: Actions: Governmental Subdivisions: Property: Damages.** The right of a landowner to seek damages from the government in the form of an inverse condemnation claim derives from article I, § 21, of the Nebraska Constitution, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor."
11. **Constitutional Law: Eminent Domain.** Nebraska's constitutional right to just compensation includes compensation for damages occasioned in the exercise of eminent domain and, therefore, is broader than the federal right, which is limited only to compensation for a taking.
12. **Constitutional Law: Eminent Domain: Damages: Words and Phrases.** The words "or damaged" in Neb. Const. art. I, § 21, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property.
13. **Governmental Subdivisions: Property: Proximate Cause: Words and Phrases.** In an inverse condemnation action, the proximate cause of an injury is that which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury, and without which the injury would not have occurred.
14. **Proximate Cause: Proof.** When multiple causes act to produce a single injury, any one of those acts can still qualify as a proximate cause of that harm so long as it was a substantial factor in bringing about the injury.
15. **Constitutional Law: Actions: Governmental Subdivisions: Property: Proof.** In an action based on the constitutional provision that no person's property shall be taken or damaged for public use without just compensation, proof of negligence or commission of a wrongful act is not necessary to recovery by a plaintiff.
16. **Governmental Subdivisions: Property: Negligence.** Negligence is not part of the analytical calculus in an inverse condemnation claim.
17. **Appeal and Error.** A case is not authority for any point not necessary to be passed on to decide it or not specifically raised as an issue addressed by the court.
18. **Governmental Subdivisions: Property: Proximate Cause: Proof.** The element of proximate causation for inverse condemnation is established if the plaintiff can prove a substantial cause-and-effect relationship excluding the probability that other forces alone produced the injury.
19. **Governmental Subdivisions: Property: Proximate Cause.** In an inverse condemnation case, even where an independent force contributes to the injury, a

public improvement remains a substantial concurrent cause if the injury occurred in substantial part because the improvement failed to function as it was intended.

20. **Constitutional Law: Governmental Subdivisions: Property.** The aim of the Takings Clause of the Fifth Amendment to the U.S. Constitution is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

George H. Moyer, of Moyer & Moyer, for appellants.

Erik C. Klutman and Mark Sipple, of Sipple, Hansen, Emerson, Schumacher & Klutman, for appellee.

Renee Eveland, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for amici curiae Marlin G. Delimont et al.

IRWIN, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

## INTRODUCTION

This appeal stems from an action for property damage which occurred on July 9, 2004, due to raw sewage flooding the home of James Henderson and Jamie Henderson and the homes of 15 other Columbus property owners who assigned to the Hendersons their rights to sue for damages. The Hendersons sued the City of Columbus, claiming that the flooding and consequent damage were caused by the malfunction of the city-run sanitary sewage disposal system. In their complaint, the Hendersons asserted as theories of recovery negligence, inverse condemnation, nuisance, and trespass. After a bifurcated bench trial in the district court for Platte County on the sole issue of liability, the court found in favor of the City of Columbus and dismissed the Hendersons' complaint with prejudice. On appeal, the Hendersons allege that the district court's judgment is contrary to the law and the evidence.

## FACTUAL BACKGROUND

Because this dispute deals with the alleged breakdown of the sanitary sewer system for the City of Columbus (hereinafter

the City), a basic understanding of that system is helpful at the outset. The City's sanitary sewer system utilizes a gravity flow system whereby sewage is projected underground toward its ultimate destination, the City's wastewater treatment facility, through angled pipelines via the force of gravity. There are 19 "lift stations" positioned throughout the City which sewage flows into via the pipelines. When sewage rises to a certain predetermined level within a lift station, a switch is automatically tripped to start an electronic pump that moves the sewage to a higher elevation through a "force main," which is essentially a pipe under pressure. The sewage is then discharged back into the gravity flow system, where the cycle is repeated as the sewage makes its way to the wastewater treatment facility. This gravity flow and lift station system is necessitated by the fact that terrain where Columbus is located is essentially flat.

The City's lift stations typically have two pumps that are automatically alternated in order to equalize wear. Normally only one pump, the "lead pump," is activated at a time. However, in the event the volume of sewage within the lift station rises to a second predetermined point, the second, "lag," pump is automatically activated in order to manage the greater volume of sewage. With both pumps running, a total of 250 gallons of sewage per minute are pumped downstream, compared to 175 gallons per minute with only one pump running.

By way of directional orientation, the Hendersons' residence is located just off the corner of 26th Street and 26th Avenue in Columbus. Twenty-Sixth Street runs east to west, and 26th Avenue stretches north to south. Approximately three blocks north of the Hendersons' home, via 26th Avenue, is the 26th Avenue lift station, which is approximately 20 feet deep and 8 feet in diameter. The wastewater systems of the houses in the vicinity of the 26th Avenue lift station all feed into one main, called the 26th Avenue trunkline. With the exception of the homes of assignors Harvey and Shirdelle Mueller, Allen and Christie Stubbert, and Bill and Heather Elton, the homes of all of the assignors in this case are connected to the 26th Avenue trunkline.

Sewage enters the 26th Avenue lift station from a 12-inch-diameter gravity flow pipeline from the north. Within the lift station, sewage is then pumped to a higher elevation and pushed south through a 6-inch-diameter force main. After traveling a half block, sewage is forced into manhole 7, which is located at the intersection of 30th Street and 26th Avenue. Sewage also entered manhole 7 from the west through the residential gravity flow system. Manhole 7 is about 3.75 feet deep and 3 feet in diameter. Sewage is then forced out of manhole 7 to the south through a 6-inch-diameter force main. Although the system was modified in 2005, in 2004, at the corner of 28th Street and 26th Avenue, the 6-inch force main connected to an 8-inch-diameter pipeline and continued to flow to the south through the City's gravity flow system.

We note that in addition to the sanitary sewer system, the City maintains and operates a storm sewer system. These two systems are entirely separate. Nevertheless, the testimony was that it is impossible to avoid inflow of surface water or infiltration of ground water into the sanitary sewer system during and after a rainstorm. Inflow of surface water occurs immediately during a storm, and once the storm is over, it quickly dissipates. Infiltration is typically due to ground water's seeping into the pipes over a longer period of time after a major rainfall event. There was testimony that it is possible for ground water to enter the sanitary sewer system through pipe joints, in places where roots have forced their way into the pipes, through cracks in the pipes, or through leaking manholes.

A heavy rainstorm hit Columbus on the morning of July 9, 2004. The record reveals that the downpour began at approximately 2 a.m., with the rainfall at its heaviest between 2 and 3 a.m. The storm ceased altogether by 4:30 or 5 a.m. There was competing evidence offered on the total amount of precipitation from the storm. The Loup River Public Power District reported 2.5 inches, the Columbus Municipal Airport reported 3.09 inches, and the Columbus sanitary sewer system headquarters reported 4.17 inches.

At 6:15 a.m. on July 9, 2004, James Henderson went to his basement before work and noticed water "with mixtures of actual waste" flooding several inches above the floor and

an "overwhelming" smell of raw sewage. His testimony was that the sewage appeared to be coming out of his basement floor drain, which was connected to a residential lateral that hooked into the City's sanitary sewer system. The Hendersons' home is located three blocks downstream from the 26th Avenue lift station.

## PROCEDURAL HISTORY

The Hendersons filed an amended complaint against the City on August 13, 2008. In their first cause of action, they claim that on July 9, 2004, the City's sanitary sewer system malfunctioned, causing raw, untreated sewage to back up into the pipes and conduits that were carrying sewage away from their home into the City's sanitary sewage system, resulting in flooding of their home and damages. The Hendersons assert negligence, nuisance, trespass, and inverse condemnation theories of recovery. In their 2d through 16th causes of action, the Hendersons allege that a total of 15 other households suffered similar property damage on July 9, 2004, and that all of the other property owners properly assigned their rights to sue the City for damages to the Hendersons. At trial, the parties stipulated that the Hendersons and the 15 assignors duly complied with the provisions of Nebraska's Political Subdivisions Tort Claims Act by previously filing claims for damages and costs with the City, which claims were denied or not acted upon by the City within 6 months after they were filed.

In its answer, the City denies all of the material allegations in the Hendersons' complaint and sets forth several affirmative defenses. The City alleges that the Hendersons failed to state a claim upon which relief can be granted; that the Hendersons were negligent, or comparatively negligent, to a degree sufficient to bar or reduce their recovery; and that the City is not liable for damages pursuant to Neb. Rev. Stat. § 13-910 (Reissue 2007).

At the bifurcated bench trial on the issue of liability, Charles Sliva was called by both parties to testify. Sliva was the City's utility supervisor, and in that position, he oversaw the operation of the sanitary sewer system. In the early morning of July 9, 2004, Sliva was telephoned by Herman Janssen, a City water

utilities employee since 1991, to respond to a "high alarm" at the 26th Avenue lift station (hereinafter also referenced as "lift 20"). High alarm occurs when the sewage in the lift station exceeds a certain predetermined level, alerting the City that action is needed in order to avoid an overflow.

Sliva testified that he had a service vehicle at his home, so he drove directly to lift 20 after receiving the call from Janssen. He testified that he was unable to take his normal route north up 26th Avenue due to water flooding the road, so he took 23d Avenue instead. He testified that water was curb deep by the time he got to the intersection of 17th Street and 23d Avenue. When he eventually rounded the corner onto 26th Avenue, water was up to the rocker panels on his four-wheel-drive pickup truck. At that point, Sliva was three blocks south of the Hendersons' home.

When Sliva arrived at lift 20, the alarm was sounding, the emergency light was on, and the circuit breakers were "kicked out in the off position." Sliva testified that he reset the circuit breakers, got both pumps going to handle the high volume of sewage in the lift station, tested the "amp loads" to make sure the pumps were properly pumping, and made sure there was no debris in the pumps. At that point, both pumps together were forcing 250 gallons of sewage per minute down the 6-inch force main to the south. The sewage discharged into a manhole one-half block south of lift 20, after which it continued south through the force main. Sliva's testimony was that once he reactivated the power, the pumps at the lift station were working properly and the amp loads were correct. Sliva testified that he checked the manholes upstream from lift 20 to see if there were any backup issues and that he did not find any. Sliva testified that he did not check to see if the manholes downstream from lift 20 were backed up because he feared removing the lids from the manholes would cause floodwater from the rainstorm to invade the sanitary sewer system.

Sliva testified that a computer records activity, such as when a lift system fails, "lock[s]" that data in a "control printout." The court received into evidence, at trial, a control printout covering July 8 through 10, 2004. The control printout shows that lift 20 was on high alarm at 4:05 a.m. on July 9, 2004. At

4:05 a.m., 4:17 a.m., and 4:22 a.m., also on July 9, the control printout reads "POWER.FAIL" for lift 20. The control printout reflects that the power came back on at lift 20 at 5:11 a.m., at which time it was still on high alarm.

It is not completely clear what caused the power outage at lift 20 in the early morning of July 9, 2004, but the testimony was that lightning from the heavy rainstorm was likely the cause. Sliva testified that severe lightning is bad for lift station pumps because it causes power interruptions where the power flashes on and off. He testified that lightning will cause a circuit breaker switch to "throw" in order to prevent damage to the electric motor or to the other electric components in the lift station.

The next day, July 10, 2004, Sliva was called out at 3 a.m. for another power outage at the 26th Avenue lift station. Apparently, the power went out because the pumps' impellers were clogged with large rags, which caused the circuit breakers to switch off. Sliva activated both pumps when he turned the power back on, and again, the sewerline was overloaded, i.e., more water was forced through the sewerline than the system could handle. As a result, two homeowners who reported backups the day before called in and complained of backups again.

Thereafter, Sliva conducted an investigation into the potential causes of the flooding that occurred on July 9 and 10, 2004, using smoke testing. Smoke testing is an operation where smoke is forced into the sewer system by a high-flow fan. Smoke rises to the surface in the event cracks or breaks are present in the pipeline. The "work area" identified in the list of Sliva's findings received by the trial court is from 33d Avenue to 26th Avenue and from 23d Street to 38th Street. Sliva found a cracked pipeline on 30th Street west of 26th Avenue, a manhole "leaking under sidewalk" at an unidentified location, a manhole "seeping" at 35th Street and 26th Avenue, five other manholes leaking at their rings, and a cleanout cap left off by a City contractor, all of which were the City's responsibility according to the testimony of Sliva's supervisor, Charles Thomerson. Sliva also discovered an apartment complex's surface water drains hooked directly

to the sanitary sewer system, one sump pump illegally hooked to a resident's sewer near 30th Street and 31st Avenue, and one instance of a broken or missing residential cleanout cap in the work area. The testimony was that the City would not have been responsible for those latter three items. In any event, Sliva testified that none of the problems identified in his investigation would have caused the sewage backups currently at issue.

Sliva also testified regarding the City's routine system of sewer cleaning and maintenance. He testified that the City's goal is to clean and inspect the entire sanitary sewer system once every 2 years. The City uses a high-velocity sewer jet and a closed-circuit television inspection camera, which is pulled through the sewerlines to check for any deficiencies in the pipes, such as cracks or breaks. The City began its routine maintenance of the area surrounding the 26th Avenue lift station on January 1, 2003, and such was completed by July 1.

The Hendersons' expert, Richard Walsh, is a retired professional engineer with a master's degree in sanitary engineering. He was a general civil engineer with a private firm in Columbus for about 10 years, after which he started his own firm. Walsh consulted for the City in the past with respect to the sanitary sewer system. In doing so, he visited all of the City's water and wastewater facilities and all of the lift stations. He installed the first automatic alarm system on the sewage lift stations and did a hydraulic analysis for the installation of a replacement sewer system for the City. Thereafter, he consulted for more than 10 years at another private firm that develops power plants.

Walsh testified that in formulating his opinion, he reviewed a number of depositions that are not in the record, as well as a computer-generated 76-page document prepared by the City's expert, James Condon, called a HYDRA study. A HYDRA study is a commercially available computer program that does hydraulic modeling, in this case of the City's sanitary sewer system, in order to mathematically determine what happens under a specific set of circumstances. The data entered into the HYDRA study includes the condition of the sewerline, the sewer size, the elevations, and also the number of

contributing households. The results of this study will be discussed momentarily.

Walsh opined that to a reasonable degree of scientific certainty, the sewage backups could have been avoided if Sliva had checked downstream to see the condition of the manholes before activating both pumps at the 26th Avenue lift station. Walsh testified that the effect of turning on those two high-volume pumps was to "surcharge," or overload, the sanitary sewer system, forcing raw sewage into the basements of residents' homes. He explained that the gravity flow sewer system was put under pressure by the high volume of water that was being pushed down the pipeline. He testified, "The pressure rose above the capacity of the gravity sewer system and it became, in essence, a force main that [sic] water sought the lowest point it could to escape the system, which, unfortunately, was . . . several basements." Walsh testified that he did not have any complaints with the City's cleaning and maintenance program for the sanitary sewer system, with the City's warning system to advise when lift stations are about to overflow, or with the manner in which the City maintains the sanitary sewer system.

Walsh testified that the sewage backups could have been prevented if Sliva had not activated both pumps simultaneously at the lift station. Walsh testified, "Probably if [Sliva] had only turned on one pump the backup would not have occurred." He testified that, alternatively, the City could have pumped sewage into an auxiliary tank truck or into the storm sewer system. His testimony was that none of the avenues for surface water invasion of the sanitary sewer system discovered by Sliva and identified in the list of his findings, even in the aggregate, would have been significant enough to fill the sanitary sewer with the high volume of rainwater that likely invaded the system on July 9, 2004.

The Hendersons' counsel stipulated to the expert designation of the City's engineering expert, Condon. Condon testified that in forming his opinion, he relied on personal field observations, flow rates, pipe sizes, elevations, pump lengths, pump capacities, weather data, and some affidavits not in evidence. He also relied on the results of his HYDRA study, which was marked

as an exhibit and offered into evidence at trial. The HYDRA study was not received into evidence, however, due to the great deal of information contained in the study but not testified to by Condon. The district judge stated, "I won't receive the report, but I have heard the testimony. It is in the record and I can consider and weigh it as I see accordingly."

With respect to the HYDRA study, Condon testified that the computer program is unable to factor in what happened outside the sewer system. For instance, it does not show the impact of any rainwater that may have invaded the sanitary sewer system. Condon testified that the HYDRA study essentially just shows whether there is adequate capacity in the pipeline to handle the sewage flow under given circumstances. He testified that the HYDRA model is very conservative. It uses "worst case diurnal flow patterns"—i.e., peak flow periods of sewer usage such as early morning and late afternoon, as well as conservative numbers in terms of normal household contributions—to predict flow patterns. The result of the HYRDA study was that there was inadequate capacity at manhole 7 to carry away what was being pumped into it from lift 20 and what was entering that manhole from connecting mains to the west. This result was without consideration of the rainwater from the storm of July 9, 2004. The result of the HYDRA study was also that the capacity of the sanitary sewer system from manhole 7 to manhole 16 was exceeded. Manhole 16 is located at the corner of 26th Street and 26th Avenue, one block north of the Hendersons' residence. Condon testified that such could have been a factor contributing to the backups.

Condon testified that the HYRDA modeling is unable to determine additional contributing factors with respect to the backups. However, he offered his opinion regarding such. He testified:

> [I]f you had storm water enter a house and it went into a floor drain, any kind of flooding on a lawn or something that would get into a lateral line that would be broke[n] and separated, any kind of potential entry to the sanitary system through manholes, through cleanouts, through additional sumps. Some of the information that

> was identified in the subsequent investigations. All of those contribute. Certainly, you know, manholes being flooded is a major potential contributor.

When asked for his opinion as to the cause of the sewage backups on July 9, 2004, Condon testified:

> My opinion is that excess water may have gotten into the system because of the flooding and that [the activation of] those [two] pumps [at the 26th Avenue lift station was] not a primary cause of any major backups. It was clear from the data and information that I got that those pumps work routinely together, pumping two at a time, and do not cause backups. [They h]ave — had a history of a — multiyear history, even decades of history, where they had not caused those kinds of problems.
>
> So, you know, my feeling is that the events of that night, that rainstorm, caused problems either through entering the sanitary sewer system or entering private storm water — entering private homes through possibly broken laterals or things like that.

Condon's further testimony was that the activation of both pumps was "[a]bsolutely not" the sole cause of the sewage backups because "they have shown, over a long period of time, that they function quite well without ever causing backups so there ha[ve] to be external circumstances beyond the[ir] pumping that would cause that to happen."

With respect to the power outage at lift 20, which, as stated above, was likely due to lightning, Condon testified that the City did not have lightning protection. Specifically, there was no lightning arrestor system on the lift station. Condon testified that a lightning arrestor system is similar to a lightning rod that directs lightning to the ground to prevent it from striking wires and causing an electrical problem. Condon testified that in addition to a lightning arrestor, the City also could have used an alternate power source, meaning a second available power feed from a different supplier. Condon further testified that the City had a backup generator it could have utilized in order to avoid a power outage.

Thomerson, the City's public works environmental services director and Sliva's supervisor, was called as a witness for the

City. He was asked on direct examination about the procedure for checking manholes downstream in the event of a rainstorm where water is running all over the street. He testified, "[I]f there is water and the manhole's underwater, you don't want to check it at that time, because you'll be opening up a 24-inch hole for more water [to enter the sewage system]." Thomerson testified that in a high alarm situation at a lift station, both pumps must be activated because otherwise, the upstream gravity flow system would become surcharged. Stated slightly differently, according to Thomerson, had Sliva utilized only one pump at the 26th Avenue lift station as opposed to two, it is likely there would have been flooding to the north of that lift station. His testimony was that lift station high alarms occur "a couple times a year" and that no downstream backup problems had ever occurred due to both pumps' being activated. Thomerson testified that pumping sewage into the storm sewer system, as Walsh suggested as a viable alternative to activating both pumps, had never been done during a storm because, if the storm system were full, sewage would end up on the streets and sidewalks and that would be a public health concern.

Conversely, Janssen testified that if water or sewage was too high in the lift station to handle, the City usually put a gas-powered pump in the lift station and pumped it into the storm sewer system. His testimony was that the City would not do so, however, if the storm sewer system were already full of storm water. Janssen testified that on July 9, 2004, after he attended to the first lift station high alarm in the City, he met up with Sliva at lift 20. He testified that at such time, the storm sewer system north of lift 20 did not appear to be full, though south of lift 20, it did appear to be full.

Merlin Lindahl, who was retired at the time of trial, had been the City's engineer in July 2004. He was responsible for supervising the storm sewer system. Lindahl, who was called as a witness for the Hendersons, testified that in 2005, he was asked by the City to design some changes to the sanitary sewer system. The City's counsel objected on the ground of remedial measures, and the Hendersons' counsel replied that the Hendersons would limit the offer of Lindahl's testimony

exclusively to showing feasibility and proximate cause. The Hendersons' counsel called the court's attention to a statement that the City's counsel made in his opening statement that the backups were caused by an act of God, namely the heavy rainstorm on the morning of July 9, 2004, and that such causation is shown by the fact that similar backups have not happened before or after that event. The court overruled the City's objection, and Lindahl's examination in this regard continued. We note that the admission of this testimony is not an assigned error.

Lindahl testified that he was asked to extend the force main connected to the 26th Avenue lift station for an additional block so that it would discharge into a 12-inch-diameter pipeline, as opposed to the 8-inch-diameter pipeline to which it was connected on July 9, 2004. He testified that the project was large enough that it was bid out to a private contractor, and that it was completed sometime in 2005. There was testimony from Lindahl and Sliva that extending the force main south of the 26th Avenue lift station was due to residential growth. Sliva was asked during redirect examination why the City would eliminate two lift stations if there was a growing population in the area surrounding those lift stations; counsel for the Hendersons stated that such seemed counterintuitive. Sliva's response was that the 26th Avenue lift station was designed with the ability to handle a much greater capacity. Sliva testified, "With the growth potential in that area, it made [us] able to take those [two] lift stations [upstream] offline to gravity flow them to [the] 26th [Avenue lift station]."

On the other hand, Lindahl testified that the reason the City gave him for wanting to move the force main was that a house had been affected by a sewer backup which the City thought perhaps had been caused by the existing force main's dumping into an 8-inch line, so the City wanted to connect it to a 12-inch line instead. When Lindahl was asked on cross-examination whether he remembered whether any similar major backups of sewage had occurred prior to July 9, 2004, he stated that he recalled one in 1983. The Hendersons' counsel objected to further testimony from Lindahl with respect to

this 1983 event on the ground of remoteness, and the City's counsel withdrew further questioning.

After the close of evidence, the trial court set up a briefing schedule and the matter was taken under advisement. In accordance with the briefing schedule, all briefs were received by October 7, 2010. On October 14, the case came on for further hearing on the Hendersons' motion for leave to withdraw rest filed September 13. The purpose of that motion was to offer an additional exhibit into the record. Although the court ultimately received the exhibit, it does not appear in the appellate record presently before us.

On November 10, 2010, the district court entered its memorandum opinion and order. The court rejected all theories of recovery set forth by the Hendersons and found for the City. The court dismissed the Hendersons' operative complaint with prejudice and taxed the costs of the litigation, $208.82, to the Hendersons. The court's specific findings will be discussed as needed in the context of the analysis section below.

## ASSIGNMENTS OF ERROR

The essence of the Hendersons' seven assignments of error can be boiled down to two: that the trial court erred in finding for the City with respect to the claims of (1) negligence and (2) inverse condemnation.

## STANDARD OF REVIEW

[1] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. *Desel v. City of Wood River*, 259 Neb. 1040, 614 N.W.2d 313 (2000). Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Id.*

[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of

the conclusion reached by the trial court. *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010).

## ANALYSIS

### NEGLIGENCE

[3-5] The Hendersons allege that the trial court's decision that the City was not negligent in its maintenance and operation of the sanitary sewer system on July 9, 2004, was erroneous. Ordinary negligence is defined as doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances. *Desel, supra*. A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against an individual. *Id*. In order to prevail in a negligence action, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty. *Id*.

[6-8] In a negligence case, a defendant's conduct should be examined not in terms of whether there is a duty to perform a specific act, but, rather, whether the conduct satisfied the duty placed upon individuals to exercise such degree of care as would be exercised by a reasonable person under the circumstances. See *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010). Foreseeable risk is an element in the determination of negligence, not legal duty. *Id*. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. *Id*. Courts should leave determinations of the extent of foreseeable risk to the trier of fact unless no reasonable person could differ on the matter. *Id*.

In the instant case, the City had a duty to maintain and operate its sanitary sewage collection and disposal system in a reasonable manner, i.e., without negligence. The issue, with respect to the Hendersons' theory of negligence, was whether the City breached that duty on the morning of July 9, 2004, by

failing to exercise the appropriate degree of care in light of the foreseeable risk then existing.

In its order, the district court found that the City did not breach its duty to the Hendersons and their assignors on July 9, 2004, because downstream flooding was not a foreseeable risk when Sliva activated both pumps at the 26th Avenue lift station. Relying on the testimony of Thomerson and Janssen, the court found that lift station high alarms had never caused the City concern for downstream backups, only upstream backups. It found that Sliva did not check the downstream manholes due to the potential for surface rainwater's invading the sanitary sewer system if he were to open the manholes' lids to check their levels. It also found that Sliva's 29 years of experience dictated that he needed to react quickly and restart both pumps in order to eliminate the potential for upstream backups, when peak sewage usage, given the time of day, was about to begin.

Accordingly, the district court found that Sliva exercised such degree of care as would be exercised by a reasonable person under the circumstances then existing when he responded to the high alarm at the 26th Avenue lift station. And, as stated above, because the district court found that downstream flooding was not a foreseeable risk, it determined that the City did not breach its duty to the Hendersons and their assignors with respect to the design, construction, maintenance, and operation of its sewage collection and disposal system and that the City was thus not negligent.

On appeal, the Hendersons argue that the district court improperly focused its negligence analysis on the knowledge of individuals such as Sliva, when it should have focused on what the City knew or should have known, namely, that manholes 7 through 16 did not have the capacity to handle the sewage being forced into them from the 26th Avenue lift station. The evidence was that this particular lift station was 20 feet deep and 8 feet in diameter, while manhole 7, into which the 26th Avenue lift station discharged through a 6-inch force main, was 3.75 feet deep and 3 feet in diameter. Thus, the 26th Avenue lift station holds 1,004.8 cubic feet of water, whereas

manhole 7 holds only 26.49 cubic feet of water—a cubic foot of water equals 7.48 gallons of water. When both lift station pumps are turned on, they are pushing 250 gallons of water per minute into manhole 7, meaning that 250 gallons of water are being pushed through a 6-inch force main per minute into a vessel that holds less than 199 gallons.

Condon's HYDRA study, which provided data suggesting the inadequate capacity of the sewage system in the area involved, attempted to replicate the conditions in the sanitary sewer system on the morning of July 9, 2004. However, Condon was unable to determine how much rainwater had entered the sewage system. So, he entered data representing normal household flows of sewage at peak usage time—though his testimony was that the July 9 backups actually occurred prior to peak usage time—so as to best simulate what happened on that morning. Condon's HYDRA study showed that the sanitary sewage system south of the 26th Avenue lift station, specifically from manholes 7 through 16, was incapable of handling the volume of sewage, thus causing sewage to be forced outside the pipelines. He testified that this did not necessarily translate into sewage backing up into residents' basements. And, neither Walsh nor Condon testified that the inadequate capacity of the manholes and pipes south of the 26th Avenue lift station, as revealed by the HYDRA study, was the cause of the backups at issue.

After weighing the evidence in the light most favorable to the City, as our standard of review dictates, we cannot say that the district court's factual findings with regard to the City's alleged negligence are clearly erroneous. Both experts testified that it was probable that rainwater invaded the sanitary sewer system downstream of the 26th Avenue lift station. The trial court accepted this testimony and found in its order that "[w]hen . . . Sliva activated both lift station pumps, it caused the already overcharged downstream system to backup and enter the laterals and basements of some homes connected to the City's sewer system." The inadequate capacity issue uncovered by the HYRDA study did not take into consideration the entry of rainwater into the system and, in any event,

according to the evidence, was at most a factor contributing, to an unknown and unspecific degree, to the residential backups. Thus, after application of our standard of review to the trial court's factual findings, we must affirm the trial court's finding of no merit to the Hendersons' theory of recovery based on negligence.

## Inverse Condemnation

[9-12] Additionally, the Hendersons allege that the trial court departed from the law in its analysis of proximate causation in the context of their inverse condemnation claim. Inverse condemnation is shorthand for a governmental taking of or damage to a landowner's property without the benefit of condemnation proceedings. See *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998). The right of a landowner to seek damages from the government in the form of an inverse condemnation claim derives from article I, § 21, of the Nebraska Constitution, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." Nebraska's constitutional right to just compensation includes compensation for damages occasioned in the exercise of eminent domain and, therefore, is broader than the federal right, which is limited only to compensation for a taking. *Strom, supra*. The words "or damaged" in Neb. Const. art. I, § 21, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. *Strom, supra*.

The trial court decided the Hendersons' inverse condemnation claim against them on the ground that they failed to meet their burden to prove that the "City's actions or inactions were the proximate cause of their damages." Specifically, the court found that the Hendersons failed to prove what caused the sanitary sewer system to be overloaded with floodwaters. On appeal, the Hendersons allege that the trial court's application of the law was incorrect with respect to proximate causation. According to our standard of review, we evaluate matters of law independently of the trial court while giving the prevailing party, in this case the City, the benefit of every reasonable

inference deducible from the evidence with respect to the trial court's factual findings.

[13,14] In an inverse condemnation action, the proximate cause of an injury is that which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury, and without which the injury would not have occurred. *Steuben v. City of Lincoln*, 249 Neb. 270, 543 N.W.2d 161 (1996). When multiple causes act to produce a single injury, any one of those acts can still qualify as a proximate cause of that harm so long as it was a substantial factor in bringing about the injury. *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008).

Because we think the exact wording of the trial court's order is essential in analyzing this assignment of error, we quote somewhat extensively from that section of the order:

> As noted in the discussion [of negligence] above, both the [Hendersons'] and the City's respective experts testified it was probable that rainwater from the intense storm somehow invaded the sanitary sewer system and overloaded it downstream of the 26th Avenue lift station. *When both pumps at the 26th Avenue lift station were reactivated to address the high alarm, it caused the already overloaded downstream system to back up.* Again, although evidence was offered as to possible causes for surface floodwaters entering the sanitary sewer system downstream, no definitive cause was discovered. There is no evidence to support a finding that the City was responsible through its actions or inactions for the entry of floodwaters into the sanitary sewer system. And there further exists no evidence showing that the [Hendersons] or any of their assignors have suffered property damage as a result of reoccurring, permanent, or chronic sewer backups, or that the damage suffered was intentionally caused by the City.
>
> Given the entirety of the record and the circumstances surrounding this case, the Court cannot conclude the [Hendersons] have met their burden to prove the City's actions or inactions were the proximate cause of their

> damages. That said, the Court finds for the City and against the [Hendersons] with respect to the [Hendersons'] inverse condemnation theory of recovery.

(Emphasis supplied.)

In the above-quoted portion of the trial court's order, the court clearly made a factual finding that Sliva's activation of the two pumps after the high alarms and subsequent power outage in the early morning of July 9, 2004, "caused the already overloaded downstream system to back up" into homeowners' basements. We agree with that finding, which the Hendersons urge is dispositive of the issue of causation on their theory of inverse condemnation. The trial court also found, however, that the evidence was inconclusive as to what caused the rainwater to invade the sanitary sewer system in the first place. And on that ground, the court found that there was a failure of proof of proximate causation regarding inverse condemnation. The Hendersons contend that, on these facts, the cause of the storm waters' invading the downstream sanitary sewer system should have no bearing on proximate causation in the context of inverse condemnation.

In the inverse condemnation section of its order, the trial court cited only to *Steuben v. City of Lincoln*, 249 Neb. 270, 543 N.W.2d 161 (1996). That case involved a "2-year rainfall," which the court described as a rainstorm where there is a 50-percent chance the volume of rain that fell will either occur or be exceeded every year. *Id.* at 272, 543 N.W.2d at 163. The court's opinion does not specify the amount of rainfall involved in a 2-year rainfall. However, logic dictates that a 2-year rainfall would involve considerably less rainfall than would occur, for example, in a 100-year storm. In any event, in *Steuben*, during a 2-year storm in the city of Lincoln, surface water draining behind the property of Charles and Rebecca Steuben backed up against an adjacent railroad fill, reaching a depth of almost 8 feet. The water flowed onto the Steubens' property, eventually reaching a depth of approximately 6 feet against their house. The water pressure shattered the basement windows and door of their home, and water entered the basement, causing damages in excess of $30,000. On the date of

the flood, it was discovered that one of the culverts through the railroad bed fill was clogged with debris.

The Steubens alleged that the city of Lincoln's actions and inactions constituted a taking of their property under article I, § 21, of the Nebraska Constitution. Specifically, the Steubens argued that the damage to their property was the result of the city's increasing surface water drainage and runoff, by developing residential areas and irrigating a golf course, which was adjacent to the Steubens' property, without modifying the existing storm water drainage systems to handle the increased drainage. The trial court found in favor of the city of Lincoln, and the Steubens appealed.

On appeal, the Nebraska Supreme Court found that the high water level on the Steubens' property was indeed caused by the lack of capacity in the culverts under the railroad fill. However, the court found that the culverts at issue were not owned, installed, or maintained by the city and were not within Lincoln's city limits. The opinion recites that as a result, in order to make their inverse condemnation claim actionable, the Steubens had the burden of proving that the city's approval, development, and maintenance of the plats, park, and golf course, all of which surrounded their property, were the proximate cause of their damages. The opinion recites:

> In the instant case, no evidence was adduced that the City changed or altered a natural waterway, constructed a dam or embankment, or intentionally directed water onto the Steubens' property. While the development of the plats and irrigation of the golf course may have increased surface water drainage, the Steubens did not offer any proof of what impact this increased surface water drainage had on the July 25, 1990, flood. There is no evidence to establish the origin of the surface water or to assume the City was the only property owner in the watershed dispelling surface water during the flood. Thus, we hold that the Steubens have failed to prove that the City's actions and inactions were the proximate cause of their damages. As a result, we conclude that the Steubens' property has not been taken by the City for a public purpose.

*Steuben v. City of Lincoln*, 249 Neb. 270, 273-74, 543 N.W.2d 161, 163-64 (1996).

During oral arguments for the immediate case, counsel for the City asserted that *Steuben* establishes that inverse condemnation requires a wrongful act on the part of the government in order to be actionable—thus necessitating, essentially, a negligence analysis. Counsel asserted that we would be effectively overruling *Steuben* if we were to find otherwise with regard to this case. Counsel pointed to the following dicta from *Steuben* in support of this argument: "In the instant case, no evidence was adduced that the City changed or altered a natural waterway, constructed a dam or embankment, or intentionally directed water onto the Steubens' property." 249 Neb. at 273-74, 543 N.W.2d at 163.

However, a careful reading of *Steuben* reveals that the Supreme Court engaged in the analysis emphasized by counsel only because the culverts that caused flooding on the Steubens' property were not owned by the city. Thus, the court implicitly found that the only way for the city to have been the proximate cause of the flooding was if its approval, development, and maintenance of the city-approved plats and the city-owned park and golf course immediately surrounding the Steubens' property proximately caused surface water to drain onto their land. The court found that the Steubens were unable to attribute drainage of surface water to the city of Lincoln, and thus, it affirmed the trial court's ruling.

The present case is clearly distinguishable from *Steuben*. There is no question that the sanitary sewer system in Columbus is owned, installed, and maintained by the City, whereas the clogged culvert in *Steuben* was owned by the railroad, not the city of Lincoln. Moreover, the sewage backups in this case, according to the trial court's factual findings, were caused when a City employee turned on both pumps at the 26th Avenue lift station on the morning of July 9, 2004, at a time when the system was already overloaded with sewage and rainwater.

[15-17] The Supreme Court has explicitly stated that in an action based on the constitutional provision that no person's property shall be taken or damaged for public use without just

compensation, proof of negligence or commission of a wrongful act is not necessary to recovery by a plaintiff. See *Quest v. East Omaha Drainage Dist.*, 155 Neb. 538, 52 N.W.2d 417 (1952), citing *Wagner v. Loup River Public Power District*, 150 Neb. 7, 33 N.W.2d 300 (1948). See, also, *Baum v. County of Scotts Bluff*, 169 Neb. 816, 822, 101 N.W.2d 455, 461 (1960) ("[n]egligence is not a necessary element to be proved in maintaining an action for [damages for inverse condemnation]"). We further emphasize that even if the dicta in *Steuben v. City of Lincoln*, 249 Neb. 270, 543 N.W.2d 161 (1996), can be read to suggest otherwise, such is not determinative in this case, in the face of the express holding in *Quest, supra.* There, the court clearly held that negligence is not part of the analytical calculus in an inverse condemnation claim. See *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004) (case is not authority for any point not necessary to be passed on to decide it or not specifically raised as issue addressed by court).

The parties do not direct us to a Nebraska inverse condemnation case where sewage backed up into a resident's home, and our research has not uncovered such a case. However, in the amicus brief filed in this case, on behalf of clients whose interest in this case is not disclosed, we have been directed to the factually analogous case *CSAA v. City of Palo Alto*, 138 Cal. App. 4th 474, 41 Cal. Rptr. 3d 503 (2006).

In *City of Palo Alto*, the homeowners' insurer, California State Automobile Association Inter-Insurance Bureau (CSAA), filed an inverse condemnation action as subrogee against the city of Palo Alto, California, for property damage that homeowners David and Suzanne McKenna suffered as a result of a backup of raw sewage into their home. The constitutional provision under which CSAA sued the city of Palo Alto is similar to Neb. Const. art. I, § 21, and provides in pertinent part: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." See Cal. Const. art. I, § 19.

The first backup of raw sewage into the McKennas' home occurred on November 6, 2001. A video inspection on that

same day determined that the cause of the backup was tree root intrusion in the sewer laterals located on the McKennas' property. CSAA authorized the replacement of the existing lateral from the McKennas' home to the sidewalk (which was owned by the McKennas) and from the sidewalk to the main sewerline under the street (which was owned by the city). The replacement of the city's portion of the lateral was completed on November 20.

On December 4, 2001, the McKennas' home was again flooded with raw sewage. A video inspection conducted the next day showed that the lateral pipe replaced by CSAA was clear of debris and in "perfect" condition, but that there were tree roots intruding into the city's joint connecting the McKennas' lateral to the city's main. The video inspection also revealed that there was toilet paper clogging the city's main, that the main was half filled with standing water, and that tree roots were penetrating every 8-foot joint within the main.

Following payment of the McKennas' claims for property damage resulting from the second sewage backup, CSAA filed suit against the city of Palo Alto under theories of inverse condemnation, trespass, nuisance, and negligence. CSAA did not request reimbursement for the payments it made in regard to the November 2001 backup—its claim was only for the December 2001 backup. Both sides waived trial by jury, and the matter was tried to the court.

CSAA provided evidence of three potential causes of sewage backup: (1) tree roots invading the pipes, (2) insufficient slope in the main to carry away the sewage, and (3) the existence of standing water filling one-half of the main, as observed by video inspection the day after the December 2001 backup. The city presented evidence that its maintenance program was to "hydroflush" the sewer main once every 2 years. *CSAA v. City of Palo Alto*, 138 Cal. App. 4th 474, 478, 41 Cal. Rptr. 3d 503, 505 (2006). The sewer main at issue had been flushed 1½ years prior to the November 2001 backup and had been regularly flushed once every 2 years since 1983. The evidence was that the McKennas' home was the only home on their street that experienced sewage overflow in November and

December 2001. There was no evidence of any prior or subsequent sewer backups in the immediate area.

At the conclusion of the trial, the trial court ruled in favor of the city of Palo Alto. In its order, the California trial court found that although the sewage backup was caused by a blockage in the city's sewer main, CSAA failed to prove how or why the blockage in the city's main occurred. CSAA timely appealed, asserting on appeal that the trial court erred in its analysis of inverse condemnation, specifically by requiring it to prove fault.

[18,19] On appeal, the California Court of Appeal for the Sixth District reversed the decision of the trial court and found in favor of CSAA on its claim for damages for inverse condemnation. The court found that the only issue in dispute was proximate causation in the context of inverse condemnation. Citing to *Belair v. Riverside Cty. Flood Cont. Dist.*, 47 Cal. 3d 550, 253 Cal. Rptr. 693, 764 P.2d 1070 (1988), the court stated that the element of proximate causation for inverse condemnation is established if the plaintiff can prove a substantial cause-and-effect relationship excluding the probability that other forces alone produced the injury, and that even where an independent force contributes to the injury, the public improvement remains a substantial concurrent cause if the injury occurred in substantial part because the improvement failed to function as it was intended. The opinion recites:

> While the trial court found that neither tree roots nor inadequate slope caused the sewage backup into the McKennas' home, and that the City had a regular program of maintenance for the sewer, it also specifically found that the blockage occurred in the main owned and operated by the City. How or why the blockage occurred is irrelevant. The purpose of the sanitary sewer is to carry wastewater away from the residence. The City's sanitary sewer failed to carry wastewater away from the McKennas' residence because of a blockage in the City's main, and therefore, failed to function as intended.

*CSAA v. City of Palo Alto*, 138 Cal. App. 4th at 483, 41 Cal. Rptr. 3d at 509 (emphasis omitted).

In the case before us, the trial court found that the Hendersons failed to prove proximate causation in their inverse condemnation claim because there was inadequate proof of precisely how rainwater invaded the sanitary sewer system south of the 26th Avenue lift station. The main evidence on that point was the testimony of Sliva and Condon. Sliva's postflood investigation uncovered only three issues potentially contributing to the backups which were not the City's responsibility: an apartment complex's surface water drains hooked directly to the sanitary sewer system, one sump pump illegally hooked to a resident's sewer near 30th Street and 31st Avenue, and one instance of a broken or missing residential cleanout cap in the work area. The evidence was that none of these things, even combined, would have caused the system overload.

Additionally, there was testimony from the City's own expert, Condon, that flooded manholes were a "major" potential contributor. Sliva's investigation found leaks at a total of seven manholes in the designated work area around the 26th Avenue lift station. Sliva also discovered a cracked sewage pipeline and a cleanout cap left off by a City contractor. The testimony was that each of those issues was the responsibility of the City. Further, though Condon speculated that additional sump pumps (which are the responsibility of the residents, not the City) hooked directly into the City's sewer main likely contributed to the overload, Sliva's smoke testing located only one such sump pump in the area around lift 20. Condon also testified that the inadequate capacity of manholes 7 through 16, as modeled in his HYDRA study, could have contributed to the surcharge of the sewage system.

In this case, the trial court's finding that the evidence was inconclusive as to the exact cause of the overcharging of the downstream sanitary sewer system prior to the activation of the two pumps at lift 20 was not clearly erroneous. However, on these facts and under the applicable law, we find that how the overload of water and sewage in the sanitary sewer system occurred prior to Sliva's response to the high alarm at lift 20 is not the decisive factor in determining proximate cause in the context of this inverse condemnation claim. Importantly, the trial court's factual finding was that the backup occurred when

Sliva activated both pumps at lift 20, which caused the backup into the homes of the Hendersons and the affected assignors. This factual finding is well supported by the record. Using the California Court of Appeal's language: "The purpose of the sanitary sewer is to carry wastewater away from the residence. The City's sanitary sewer failed to carry wastewater away from the [Hendersons' and their assignors'] residence[s] because of a blockage in the City's main, and therefore, failed to function as intended." See *CSAA v. City of Palo Alto*, 138 Cal. App. 4th 474, 483, 41 Cal. Rptr. 3d 503, 509 (2006) (emphasis omitted). Here, under the trial court's factual finding, once Sliva turned on both pumps, sewage and water were forced into the downstream homes, and thus, the action of the City, through Sliva, has the requisite cause-and-effect relationship as articulated by the California court in *City of Palo Alto, supra.*

We do not intend to suggest that inverse condemnation is effectively a matter of strict liability, and we follow the lead of the California appellate court which made it clear that inverse condemnation is not strict liability. See *id*. Here, there was no indication that the Hendersons or the assignors were the cause of the backups, but the trial court did make a factual finding that satisfies the proper test for causation—"a substantial cause-and-effect relationship," which we adopt from *City of Palo Alto*. That cause-and-effect factual finding was that the backups were caused when both pumps at the 26th Avenue lift station were activated when the system was already full of water and sewage. The trial court's only error is one of law by applying a negligence-based view of causation to its finding of cause-in-fact: Sliva's activation of both pumps.

[20] In these circumstances, it is unfair that the Hendersons and the assignors alone bear this public burden of a malfunction in the City's sanitary sewage system. It is through inverse condemnation that the financial burden of the sewer backups is spread to the public as a whole, i.e., the citizens of Columbus. See, U.S. Const. amend. V; *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998) (aim of Takings Clause is to prevent government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by public as whole).

## CONCLUSION

For the foregoing reasons, we reverse the portion of the trial court's order dealing with inverse condemnation as it pertains to the Hendersons and to the assignors with residences downstream of the 26th Avenue lift station who suffered sewage backups and flooding. However, the trial court found that the homes of two families among the homeowners, the Muellers and the Eltons, were not connected to the 26th Avenue lift station, and the Hendersons concede that two homeowner families, the Muellers and the Stubberts, are not properly in the lawsuit. After our review of the record and the briefing, it is unclear exactly which of these three homeowner families should be excluded from the damage aspect of the suit. Therefore, upon remand, the trial court should clarify this aspect of the case. We remand the cause for the appropriate proceedings on the damage aspect of all of the proper claims.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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# IN RE TRUST OF O'DONNELL.
# JUNE O. BEACHLER, APPELLANT, V. DEBORAH A. SANWICK, APPELLEE.

815 N.W.2d 640

Filed April 3, 2012. No. A-11-069.

1. **Trusts: Equity: Appeal and Error.** Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record.
2. **Equity: Reformation.** A proceeding to reform a written instrument is an equity action.
3. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue.
4. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
5. **Evidence: Proof.** Evidence may be clear and convincing despite the fact that other evidence may contradict it.

6. **Trusts.** A document by which a settlor purports to revoke a revocable trust is a term of that trust within the meaning of Neb. Rev. Stat. § 30-3841 (Reissue 2008).
7. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.

Appeal from the County Court for Douglas County: THOMAS G. MCQUADE, Judge. Affirmed.

Robert C. McGowan, Jr., of McGowan & McGowan, for appellant.

Deborah A. Sanwick, pro se.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

## INTRODUCTION

June O. Beachler appeals from an order of the county court for Douglas County, which determined that Deborah A. Sanwick was entitled to the remaining funds in two testamentary trusts set up by Eileen S. O'Donnell, deceased, as opposed to Beachler, the purported residuary beneficiary of O'Donnell's estate. On our de novo review, we find that the county court did not err in reforming the trust provisions of O'Donnell's will and we affirm the decision of the county court.

## BACKGROUND

Sanwick and her brother, John M. Morrissey (John), were O'Donnell's first cousins once removed on their father's side. Their father and O'Donnell were the only children of two sisters who had a close relationship, and they grew up together in the same neighborhood. John and Sanwick's mother was Ruby Morrissey (Ruby). Sanwick's family stayed in contact with O'Donnell throughout her life, although Sanwick did not spend a lot of time around O'Donnell other than at various family functions. Beachler was not a relative, but was a close, personal friend of O'Donnell.

O'Donnell died on October 9, 2004, at the age of 84. She wrote her own will, which is a one-page, typed document dated July 25, 2001. O'Donnell possessed no legal training or expertise. All evidence shows that she was competent, knew

what her assets were, and wanted to dispose of them pursuant to a will.

O'Donnell's will states, in relevant part:

> 1. To John . . . fifty thousand dollars to be put in a trust fund, administered by Great Western Bank, to be disbursed at no more than four hundred dollars per month. In the event of his predeceasing me, to his sister [Sanwick].
>
> 2. To Ruby . . . fifty thousand dollars to be put in a trust fund, administered by Great Western Bank, to be dis[bu]rsed at no more than four hundred dollars per month. In the event of her predeceasing me, to her daughter [Sanwick].
>
> . . . .
>
> 6. To . . . Sanwick fifty thousand dollars. In the event of her predeceasing me, to her daughter . . . .
>
> . . . .
>
> 9. To . . . Beachler all remaining monies. In the event of her predeceasing me, to her children . . . equally.

O'Donnell's will also made a number of other monetary bequests to individuals not relevant to this case, with the provision that if these individuals predeceased O'Donnell, then the money went to O'Donnell's estate. Finally, the will distributed certain personal property and nominated Beachler as personal representative of the estate.

O'Donnell's will was admitted to formal probate in Douglas County in December 2004. The short-form inventory filed by Beachler, in her capacity as personal representative of the estate, indicates that O'Donnell's estate was worth $967,811.58 and consisted of a large amount of financial assets and about $3,000 in other personal property. The estate was closed informally by Beachler in December 2005. Both John and Ruby died after the will was probated, leaving money in the trusts totaling approximately $49,000.

John died on August 14, 2008. Sanwick filed a petition for a trust administration proceeding, relative to John's trust, seeking to have the county court determine the distribution of funds remaining in John's trust. In her operative responsive pleading, Beachler agreed that the court should determine the distribution rights to the remaining funds in John's trust and

she asserted that she was entitled to the funds as the residuary devisee under O'Donnell's will. The parties' pleadings contained additional allegations regarding the existence of a residuary clause or residuary devisee in O'Donnell's will, which we need not discuss further.

Ruby died on June 1, 2009. Thereafter, Beachler filed a petition under another docket number, seeking a declaratory judgment regarding entitlement to the funds remaining in Ruby's trust. Beachler asserted that O'Donnell's will did not specify how the trust corpus was to pass in the event Ruby died before exhaustion of the trust corpus and that the fact there was money remaining in the trust at the time of Ruby's death resulted in a failure of trust. Beachler asserted that a resulting trust arose in favor of O'Donnell and that because Beachler was the sole residuary devisee of the estate, she was entitled to the funds remaining in Ruby's trust. Sanwick filed an answer and a cross-petition for a trust administration proceeding relative to Ruby's trust, setting forth allegations in her cross-petition similar to those she alleged in connection with John's trust.

The two cases were consolidated at the request of Sanwick, and a trial was held before the county court on October 6, 2010. The court received various documentary exhibits into evidence and heard testimony from a representative of Great Western Bank, Beachler, an attorney who created a draft of a will for O'Donnell, and Sanwick.

Sanwick is an attorney admitted to practice in Nebraska and is a cousin of O'Donnell. Sanwick testified that O'Donnell contacted her sometime in 1999 about preparing her will. Sanwick told O'Donnell that she would be uncomfortable drafting the will if she were to receive any bequests and suggested finding another attorney to prepare O'Donnell's will. Sanwick approached Chris Arps, who had his office in the same building as Sanwick at that time, and Arps agreed to prepare a will for O'Donnell. According to Sanwick, she and Arps met with O'Donnell at an extended care facility for that purpose. Sanwick stated that she remained in the room during the meeting while O'Donnell told Arps what she owned and how she wanted her property disposed of in her will. Sanwick

recalled that O'Donnell wanted to leave $50,000 each to John, Ruby, and Sanwick. Sanwick stated that she suggested to O'Donnell the testamentary trusts for John and Ruby because of John's irresponsible nature and his ability to manipulate Ruby. According to Sanwick, Arps asked O'Donnell what she wanted to happen to the money in the trusts if either John or Ruby died before the money was paid out, and O'Donnell replied that the money should go to Sanwick.

Arps confirmed that Sanwick approached him sometime in 1999 about preparing a will for O'Donnell. Although he did not specifically recall the meeting with O'Donnell, Arps prepared a draft of a will for O'Donnell, based on information from either O'Donnell or Sanwick. Arps' records show that the draft will was prepared on or about January 27, 1999, but do not indicate whether he sent a copy of the draft to O'Donnell. Arps did not set up a specific file for O'Donnell or send her a bill. Rather, the draft will was contained in a miscellaneous file maintained by Arps for people who contacted him but did not return.

The Arps draft contains provisions for a trust for Ruby and a trust for John, although Arps mistakenly used the name "Jack," which was a nickname for "John." Specifically, the draft will prepared by Arps for O'Donnell stated in article XI, "I give, devise and bequeath the sum of $50,000.00 in Trust, to my Trustee hereinafter named, said Trust to be known as 'RUBY MORISSEY TRUST.'" The draft provided for $500 per month to be paid to Ruby and directed the trustee to distribute the remaining principal and income of the trust to Sanwick upon Ruby's death. Article XIII of the draft contains an identical provision setting up a trust for John and, again, providing that the remaining principal and income be distributed to Sanwick upon John's death. The draft also contained a bequest of $50,000 to Sanwick and a number of other specific monetary bequests, some of which are similar if not identical to the monetary bequests found in the will written by O'Donnell; named Beachler as trustee of the two trusts and as personal representative of the estate; stated that certain items of personal property might be distributed by a separate writing; and devised the remainder of her property to Beachler.

Sanwick testified that the Arps draft accurately reflected what O'Donnell told Arps when they met. Sanwick recalled a subsequent conversation with Arps in which he informed Sanwick that O'Donnell had not contacted him and needed to do so. Sanwick called and left a telephone message at some point reminding O'Donnell to contact Arps and also letting her know that if she did not want to retain Arps, Sanwick could recommend another attorney. According to Sanwick, O'Donnell did not return that specific telephone call, and although they spoke a few more times before O'Donnell's death, they never again discussed her will. Sanwick was not aware that O'Donnell had a will until after O'Donnell's death.

Beachler testified that O'Donnell called her sometime in 2001 to ask whether she would be O'Donnell's personal representative. According to Beachler, O'Donnell said that she was going to prepare her own will and that she would send Beachler a copy in the mail. According to Beachler, O'Donnell had a computer and told Beachler she was going to use the Internet to make her will. Beachler recalled that approximately 2½ years earlier, after O'Donnell returned home from a stay in the hospital, O'Donnell told Beachler that she had contacted Sanwick to prepare her will. O'Donnell told Beachler that Sanwick and "some other gentleman" visited her when she was in the hospital to prepare her will and that "they were supposed to come to her apartment and finish it and no one showed up." Beachler did not ever have any specific discussions with O'Donnell regarding the provisions of O'Donnell's will, how O'Donnell wanted to dispose of her estate, or the extent or nature of O'Donnell's assets. Beachler did receive the 2001 will from O'Donnell and held it until her death.

On December 28, 2010, the county court entered an order ruling on the consolidated cases. The court did not find any ambiguity in the terms of the two trusts but noted that the will did not address disposition of any money that might remain in the trusts if one or more of the beneficiaries died after O'Donnell did. In addressing O'Donnell's intent regarding disposition of the money remaining in the trusts, the court referred to Neb. Rev. Stat. § 30-3841 (Reissue 2008), which allows a court to reform the terms of a trust, even if unambiguous, to

conform to the settlor's intent. In examining what the evidence showed of O'Donnell's intent, the court found that paragraphs 1 and 2 of the will clearly showed that O'Donnell intended for Sanwick to have the money if either John or Ruby died before O'Donnell did, which the court took as an indication that O'Donnell intended for Sanwick to receive the money, and not the will's residuary beneficiary. The court reviewed the evidence presented at trial and concluded that the evidence clearly and convincingly showed O'Donnell intended for the remaining moneys in the two trusts to be disbursed to Sanwick upon the death of John and Ruby and that all other issues were moot. Beachler subsequently perfected her appeal to this court.

## ASSIGNMENTS OF ERROR

Beachler asserts that the county court erred in (1) reforming the two testamentary trusts at issue, determining that O'Donnell's intent and the terms of the trusts were affected by a mistake of fact or law, whether in expression or inducement, and that clear and convincing evidence existed to support this determination and (2) not determining that a failure of trust occurred and not declaring that a resulting trust arose in favor of the estate and Beachler in her capacity as sole residuary beneficiary of O'Donnell's will.

## STANDARD OF REVIEW

[1-3] Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record. *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011). A proceeding to reform a written instrument is an equity action. *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007). In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue. *In re Margaret Mastny Revocable Trust, supra*.

## ANALYSIS

The county court found the terms of the two trusts unambiguous but found clear and convincing evidence that O'Donnell

intended for money remaining in the trusts upon John's and Ruby's deaths to pass to Sanwick and reformed the trusts accordingly.

[4,5] The statute at issue in this appeal is § 30-3841, which provides:

> The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *R & B Farms v. Cedar Valley Acres*, 281 Neb. 706, 798 N.W.2d 121 (2011). Evidence may be clear and convincing despite the fact that other evidence may contradict it. *In re Trust Created by Isvik, supra*.

The Nebraska Supreme Court interpreted § 30-3841 in *In re Trust Created by Isvik, supra*, where the court considered whether the trial court erred in reforming a particular term of trust to conform to what it perceived as the intent of the settlor, LaVohn Isvik. Isvik had created a trust and appointed a bank as trustee. At the time of the events in question, Isvik was dissatisfied with the performance of the bank serving as trustee. Isvik and her daughter met with representatives of the bank, and after the meeting, the daughter understood that Isvik wanted to revoke her trust, while the bank representatives were left with the impression that Isvik wished only to remove the bank as trustee. The month after the meeting, Isvik prepared a letter to the bank which stated that she was revoking her trust. Isvik's daughter testified about a telephone conversation in which Isvik told her that she had sent a letter to the bank revoking her trust. A representative of the bank called Isvik to clarify her intent, and understood after their conversation that Isvik simply wanted to act as her own trustee. Isvik's attorney spoke with Isvik about the letter after receiving a copy. The attorney initially thought that Isvik wanted to revoke the trust, but, after further discussion, concluded that Isvik wanted only

to remove the bank as trustee, and he agreed to prepare the necessary legal documents to name new trustees. Isvik died approximately 1½ weeks after sending the letter to the bank and before she had a chance to review or sign the documents drafted by the attorney naming new trustees.

After Isvik's death, the bank filed a petition for trust administration and sought an order from the county court declaring whether the trust had been revoked or whether the letter should be reformed to effect only a change in trustee. The county court conducted an evidentiary hearing, received the unsigned documents prepared by Isvik's attorney into evidence, and found clear and convincing evidence that Isvik's use of the term "revoke" in the letter was a mistake and was only an attempt to change the trustee. The court further concluded that because the letter did not revoke the trust and no formal change of trustee occurred before Isvik's death, the bank remained the trustee.

[6] On appeal, the Nebraska Supreme Court first considered whether Isvik's letter was a "term of trust" subject to reformation under § 30-3841. Based on its review of the Nebraska Uniform Trust Code and the language of Isvik's trust, the court concluded that a document by which a settlor purports to revoke a revocable trust is a term of that trust within the meaning of § 30-3841. *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007).

The Nebraska Supreme Court next considered whether extrinsic evidence of Isvik's intent could be considered in determining whether terms of the trust were affected by mistake of fact or law and thus subject to reformation under § 30-3841. The court noted that § 30-3841 is taken directly from § 415 of the Uniform Trust Code and relied upon the following comment section to § 415 regarding reformation:

> "Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent. Because reformation may involve the addition of language to the instrument,

> or the deletion of language that may appear clear on its face, *reliance on extrinsic evidence is essential*. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required."

*In re Trust Created by Isvik*, 274 Neb. at 534, 741 N.W.2d at 646, quoting Unif. Trust Code § 415, 7C U.L.A. 514, comment (2006) (emphasis supplied). Based on the comment to § 415 and the court's prior holdings concerning the receipt of extrinsic evidence in equitable actions to reform written instruments, the court concluded that the lower court properly received extrinsic evidence of Isvik's intent.

Finally, the Nebraska Supreme Court considered whether there was clear and convincing evidence that Isvik's true intent at the time she sent the letter was to maintain the trust but to discharge the bank as trustee. The court noted the conflicting evidence of Isvik's intent at the time she sent the letter, which supported both the inference that Isvik intended to revoke the trust and the inference that she, instead, intended to maintain the trust and discharge the bank as trustee. In its de novo review, the court found that the evidence of Isvik's intent at the time she sent the letter was evenly balanced, and the court was unable to reach a firm belief or conviction that Isvik mistakenly expressed her true intent in the letter. Accordingly, the court concluded that the lower court erred in reforming the letter and that thus, the trust was revoked and ceased to exist prior to Isvik's death.

In the present case, we are called upon to determine whether reformation of the trust provisions in O'Donnell's will is necessary to conform the terms of the trust to her intention. In making this decision, we must decide whether there is clear and convincing evidence that O'Donnell's intent and the terms of the trust were affected by a mistake of fact or law. The evidence shows that O'Donnell was competent, knew what her assets were, and wanted to dispose of them through a will. There is no dispute that O'Donnell contacted Sanwick about creating a will; that Sanwick involved Arps in the drafting of a will for O'Donnell; that O'Donnell wanted to leave money to John, Ruby, and Sanwick; and that Sanwick suggested

creation of the trusts for John and Ruby. The evidence also supports the inference that O'Donnell expressed her intent that if John or Ruby died before exhausting the funds in the trusts, she wanted any remaining money to go to Sanwick. Such terms are reflected in the draft prepared by Arps, which Sanwick testified accurately reflected what O'Donnell told Arps during the meeting. Although O'Donnell did not execute the Arps will, 2 years later O'Donnell drafted her own will, which contained many of the same provisions as the Arps draft. As in the Arps draft, the will created by O'Donnell left $50,000 directly to Sanwick and set up trusts for John and Ruby. While O'Donnell's will states that the money intended for John and Ruby should go to Sanwick if John or Ruby died before O'Donnell, the will does not address what was to happen if John or Ruby died after O'Donnell without exhausting the funds in the trusts. In our de novo review, we conclude that such failure is a mistake of fact or law, particularly given the fact that O'Donnell, who had no legal training or expertise, drafted the will herself.

When examining O'Donnell's will as a whole, it is apparent that she intended for some of her bequests to remain in particular families if the beneficiaries predeceased her, while other bequests appear to have been specific to that beneficiary only. For example, O'Donnell wrote in her will that if John or Ruby predeceased her, the money intended for them should go to Sanwick, and that if Sanwick predeceased her, the money intended for Sanwick should go to Sanwick's daughter. O'Donnell also wrote that if Beachler predeceased her, the money intended for Beachler, her longtime friend, should go to Beachler's children. In contrast, O'Donnell provided that money intended for other individuals should go to her estate if those individuals predeceased her. O'Donnell clearly intended that money bequeathed to the family of her cousin, who was Ruby's husband and John and Sanwick's father, should remain in the family if any of those individuals predeceased her. And, the extrinsic evidence supports the conclusion that it was O'Donnell's intent that should trust proceeds remain at the time of John's and Ruby's deaths, such proceeds should go to Sanwick.

Beachler argues that because the meeting between Arps, Sanwick, and O'Donnell occurred and the Arps draft was created 2 years prior to the time O'Donnell drafted her own will, this evidence is not indicative of O'Donnell's intent at the time she drafted her will. However, Beachler has not presented any conflicting evidence concerning O'Donnell's intention. No evidence was adduced to support an inference that O'Donnell's intent was for any remaining funds in the trusts to go to her estate, or to Beachler as the purported residuary beneficiary. In fact, Beachler admitted that she did not have any discussions with O'Donnell regarding the provisions in her will, how she wanted to dispose of her estate, or the nature and extent of her assets.

[7] After our de novo review of the record, we are left with a firm belief or conviction that O'Donnell mistakenly expressed her true intent in the trust provisions of the will. Accordingly, upon our de novo review, we conclude that the county court did not err in reforming the unambiguous trust provisions of O'Donnell's will. We note that we have been called upon to consider only whether the county court erred in reforming paragraphs 1 and 2 of the will, which created the trusts for John and Ruby, respectively, and need not consider any further issues raised by the parties in their briefs. In fact, the county court, after deciding the reformation issue, stated that all other issues were moot. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *Robinson v. Dustrol, Inc.*, 281 Neb. 45, 793 N.W.2d 338 (2011).

## CONCLUSION

The county court did not err in reforming the trust provisions of O'Donnell's will.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. WILLIAM E. SMITH, APPELLANT.

811 N.W.2d 720

Filed April 10, 2012. No. A-10-442.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
3. **Effectiveness of Counsel: Records: 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.
4. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
5. **Motions to Suppress: Appeal and Error.** When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue for review on appeal.
6. **Trial: Evidence: Waiver: Appeal and Error.** If a party fails to make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence received without objection.
7. **Constitutional Law: Identification Procedures: Due Process.** An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law.
8. **Identification Procedures.** Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures. The factors to be considered include (1) the opportunity of the witness to view the alleged criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his or her prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation.
9. **Trial: Identification Procedures.** An in-court identification may properly be received in evidence when it is independent of and untainted by illegal pretrial identification procedures.
10. **Jury Instructions: Pleadings: Evidence.** Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence.
11. **Lesser-Included Offenses: Jury Instructions: Notice.** A trial court is not required to sua sponte instruct on lesser-included offenses, but the trial court may do so if the evidence adduced at trial would warrant conviction of the

lesser charge and the defendant has been afforded a fair notice of those lesser-included offenses.

12. **Homicide: Intent.** The distinguishing factor between sudden quarrel manslaughter and second degree murder is that in sudden quarrel manslaughter, the killing, even if intentional, was the result of a legally recognized provocation, i.e., the sudden quarrel.
13. ____: ____. An intentional killing committed without malice upon a sudden quarrel constitutes the offense of manslaughter.
14. ____: ____. An intentional killing can be manslaughter, if it results from a sudden quarrel. Thus, attempted sudden quarrel manslaughter can be considered a crime.
15. **Lesser-Included Offenses.** The determination whether an offense is a lesser-included offense employs a statutory elements approach in which a court looks only to the elements of two criminal offenses to determine whether one cannot commit one of the offenses, the greater offense, without simultaneously committing the other offense, the lesser offense.
16. **Homicide: Lesser-Included Offenses.** Second degree murder and manslaughter are lesser-included offenses of first degree murder.
17. **Lesser-Included Offenses: Jury Instructions: Evidence.** The court should give a lesser-included offense instruction when the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
18. **Homicide: Intent.** A sudden quarrel requires provocation which causes a reasonable person to lose normal self-control.
19. **Homicide: Intent: Time.** If one had enough time between the provocation and the killing, or the attempt, to reflect on one's intended course of action, then the mere presence of passion does not reduce the crime below murder.
20. ____: ____: ____. In determining whether a killing constitutes murder or manslaughter, the question is whether, under all the facts and circumstances, a reasonable time had elapsed from the time of the provocation to the instant of the killing for the passion to subside and for reason to resume control of the mind.
21. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of jury instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
22. **Homicide: Jury Instructions: Evidence.** A trial court is required to give an instruction where there is any evidence which could be believed by the trier of fact that the defendant committed manslaughter and not murder.
23. **Constitutional Law: Double Jeopardy: Evidence: 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.
24. **Effectiveness of Counsel.** The failure to anticipate a change in the existing law does not amount to ineffective assistance of counsel.
25. **Criminal Law: Weapons: Words and Phrases.** Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.

26. **Self-Defense.** To successfully assert the claim of self-defense, one must have a reasonable and good faith belief in the necessity of using such force.
27. ____. The force used in self-defense must be immediately necessary and must be justified under the circumstances.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Peter K. Blakeslee for appellant.

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

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

## I. INTRODUCTION

William E. Smith appeals from the decision of the district court for Lancaster County that, after a jury trial, convicted him of attempted second degree murder, first degree assault, and use of a weapon to commit a felony. Smith challenges the in-court identifications of him as the shooter by four witnesses, the jury instructions, and the effectiveness of his trial counsel. Because we find that the jury should have been instructed on attempted sudden quarrel manslaughter in addition to attempted second degree murder, we reverse, and remand for a new trial on that count of the information.

## II. BACKGROUND

LeMarcus Gaskins (Marcus) was shot shortly after midnight on November 13, 2008, outside the Save-Mart grocery store in Lincoln, Nebraska. Immediately before the shooting, Marcus had been in a fistfight with Smith, their second fistfight within an hour. At trial, several witnesses made in-court identifications of Smith as the shooter of Marcus.

We briefly detail the events leading up to the shooting. On November 12, 2008, a surprise 21st birthday party was thrown for Lorenzo Gaskins. The large group of 15 to 20 people—including Tyrone Gaskins, Matthew Weston, Winston Sanniola, Lorenzo, and Marcus—took a limousine

to a "gentlemen's club," then to the Spigot bar in downtown Lincoln. At the Spigot bar, some of the individuals went inside. While inside the Spigot bar, Tyrone exchanged words with Stacey Gant. Smith, an acquaintance of Gant, later approached Tyrone and told him: "'You don't . . . disrespect women like that.'" Tyrone exited the bar, as did Smith and Gant. Outside of the bar, Tyrone got into an altercation with Smith. Marcus stepped in and punched Smith in the mouth. The birthday group retreated to the limousine and left. Smith left with his friend Carlos Helmstadter in Helmstadter's Cadillac Escalade.

The Escalade followed the limousine from the Spigot bar, located at approximately 17th and O Streets, to Save-Mart, located near North 11th Street and Cornhusker Highway—which according to one witness was a 5- to 10-minute drive. At Save-Mart, Smith got out of the passenger side of the Escalade and started yelling. The birthday group ignored Smith, and some of the individuals, including Marcus, went inside the store. When Marcus learned that Smith wanted to fight him, he went outside to engage in a fight. Some of Marcus' group joined in the fight, at which point Smith was outnumbered. The fight ended when Helmstadter fired two or three gunshots into the air. Smith then took Helmstadter's gun and began firing. One of Smith's shots hit Marcus. Helmstadter and Smith fled the scene. Marcus suffered life-threatening injuries, including a rib fracture, a punctured lung, a small kidney laceration, and a grade V liver laceration—the most serious survivable liver laceration, which Marcus did survive.

Witnesses identified Jemaine Sidney as the shooter in the original photographic lineup just hours after the shooting. However, Sidney had an alibi for the time of the shooting and was eliminated as a suspect. Smith was eventually developed as a suspect and identified by several witnesses during a second photographic lineup that took place within 4 days of the shooting.

The State charged Smith with one count of attempted second degree murder, a Class II felony; one count of first degree assault, a Class III felony; and one count of use of a weapon to commit a felony, a Class III felony.

In his amended motion to suppress, Smith sought an order suppressing any evidence or testimony regarding out-of-court or in-court identifications of himself as the "shooter" by Weston, Sanniola, Lorenzo, and Tyrone. Smith alleged that the witnesses were shown two photographic lineups. During the first lineup, all four of the witnesses identified Sidney as the "shooter." Smith further alleged that it was only after an "unduly suggestive" second lineup that three of the witnesses, all but Tyrone, identified Smith as the "shooter."

At the suppression hearing, the evidence revealed that the witnesses were shown the first photographic lineup shortly after the shooting. The first lineup, in which Smith's photograph did not appear, contained photographs of six men, four with some form of "braided" hair, a descriptive factor that the witnesses to the shooting had noted. All four witnesses identified Sidney as the "shooter." Because Sidney had an alibi for the time of the shooting, the investigation continued and Smith was developed as a suspect. Within 4 days of the shooting, the same four witnesses were shown a second photographic lineup, which included a picture of Smith. The second lineup contained photographs of Sidney, Smith, and four other individuals. None of the individuals in the second lineup had braids or "corn rows," except for Sidney and Smith. Looking at the second lineup, Sanniola described the lineup as "a lot tougher" and stated that all of the individuals "look[ed] alike." And while looking at the photographs of Sidney and Smith, Tyrone said, "'[A]ren't they the same guy[?]'" During the second lineup, Weston, Sanniola, and Lorenzo identified Smith as the shooter. However, Tyrone still identified Sidney as the shooter.

In its order on the amended motion to suppress, the district court found that the second photographic lineup, in which Weston and Sanniola identified Smith as the shooter, was unduly suggestive because Sidney and Smith were the only men in the lineup with braids or "corn rows." However, based on the testimony, the district court found that on the night of the shooting,

> Weston had an opportunity to view the person identified as the shooter on the following occasions: Outside the Spigot bar; when the Escalade stopped in the Save-Mart

> parking lot; when the shooter exited the Escalade; when Marcus and the shooter got into a fight in the Save-Mart parking lot; when the shooter secured the handgun; when the shooter began randomly shooting; and when the shooter began shooting specifically at Marcus. During the majority of those observations, the shooter was in a fairly well lit location and Weston was paying close attention to what was going on between Marcus and the shooter. While not identical, Weston's basic descriptions of the shooter were pretty consistent. Although Weston, after viewing the first six-photo lineup shortly after the shooting was 99% sure Sidney was the shooter, within less than two days after the shooting, when he viewed the second six-photo lineup, he was initially 85% and then 100% sure that [Smith] was the shooter.
>
> Sanniola had an opportunity to view the person identified as the shooter on the following occasions: When the man got out of the Escalade in the Save-Mart parking lot; when the shooter was randomly shooting the handgun; and when the shooter was specifically shooting at Marcus. While the shooter was shooting, Sanniola was basically lying prone in fro[nt] of the shooter, watching him shoot. The shooting took place in a fairly well lit parking lot and Sanniola was paying close attention to what was going on. He was even able to identify the shooter as firing a semi-automatic handgun. Although Sanniola, after viewing the first six-photo lineup shortly after the shooting, was 95% sure that Sidney was the shooter, within less than two days after the shooting, when he viewed the second six-photo lineup, he was "positive" that [Smith] was the shooter.

The district court found that based on the totality of the circumstances, the suggestive identification was nonetheless reliable. The district court noted that during the hearing on the amended motion to suppress, Weston and Sanniola each identified Smith as being the shooter, and that "[t]he evidence does not even hint that the in-court identifications made by Weston and Sanniola were in any way tainted by the suggestive nature of the second six-photo lineup." The district court

held that insofar as it related to Weston and Sanniola, Smith's amended motion to suppress was denied. The motion remained "open" with respect to Lorenzo because he was unavailable for the suppression hearing. The district court found that because Tyrone identified Sidney as the shooter in both lineups, the amended motion to suppress was not applicable to him.

At trial, Weston, Sanniola, Lorenzo, and Helmstadter identified Smith as the person who shot Marcus, and we note that Helmstadter was not involved in viewing the two photographic lineups. The jury found Smith guilty of attempted second degree murder, first degree assault, and use of a weapon to commit a felony. Smith was sentenced to 25 to 35 years' imprisonment for attempted second degree murder, 15 to 20 years' imprisonment for first degree assault, and 15 to 20 years' imprisonment for use of a weapon to commit a felony. The sentence for first degree assault was to run concurrently with the sentence for attempted second degree murder. However, the sentence for use of a weapon to commit a felony was to run consecutively to the other sentences. Smith now appeals.

## III. ASSIGNMENTS OF ERROR

Smith assigns as error, summarized, that (1) the district court erred in allowing Weston, Sanniola, Lorenzo, and Tyrone to testify as to their in-court identifications of Smith as the "shooter" after they had identified another person as being responsible and were exposed to an unduly suggestive photographic lineup; (2) his trial counsel was ineffective with regard to the eyewitness identifications; (3) the district court erred in failing to instruct the jury on the negative element of "sudden quarrel" in the attempted second degree murder instruction or on the offense of attempted "sudden quarrel" manslaughter as a lesser-included offense of attempted second degree murder; and (4) his trial counsel was ineffective with regard to challenging and requesting jury instructions.

## IV. STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. See *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

[2] Whether jury instructions are correct is a question of law, which we resolve independently of the lower court's decision. *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

[3,4] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). The determining factor is whether the record is sufficient to adequately review the question. *Id.* 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. *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

## V. ANALYSIS

### 1. Witness Identifications of Smith

#### (a) Admissibility of In-Court Identifications

Smith argues that the district court erred in allowing Weston, Sanniola, Lorenzo, and Tyrone to testify as to their in-court identifications of Smith as the "shooter" after they had identified another person as being responsible in the first photographic lineup, and then were exposed to an unduly suggestive second photographic lineup. Initially, we note that Tyrone did not identify Smith as the shooter in either lineup, nor did he identify Smith as the shooter during his trial testimony. Thus, we consider Smith's assignment of error and argument as applicable only to the identifications made by Weston, Sanniola, and Lorenzo, given that Tyrone's testimony would generally be favorable to Smith.

##### *(i) Weston and Sanniola*

[5,6] Weston and Sanniola made in-court identifications of Smith as the shooter without objection by Smith. Smith objected to Weston's testimony that Smith told Helmstadter to "[g]ive me the gun," but did not object when Weston and Sanniola identified Smith as the person who shot Marcus. When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to

preserve the issue for review on appeal. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). If a party fails to make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence received without objection. *State v. Sanders*, 15 Neb. App. 554, 733 N.W.2d 197 (2007). Thus, Smith waived his right to assert error regarding Weston's and Sanniola's in-court identifications of Smith as the person who shot Marcus.

*(ii) Lorenzo*

Smith did object to Lorenzo's testimony that Smith was the person who shot Marcus. Because Lorenzo was unavailable at the suppression hearing, the district court addressed Smith's motion to suppress Lorenzo's out-of-court and in-court identifications of Smith as the shooter during the trial. As it did with respect to Weston and Sanniola, the district court found that the second photographic lineup was unduly suggestive, but the district court allowed the in-court identification. Thus, we must now determine whether allowing Lorenzo's in-court identification was error.

[7,8] An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law. *State v. Smith, supra*. Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures. *Id*. The factors to be considered include (1) the opportunity of the witness to view the alleged criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his or her prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005). Against these factors is to be weighed the corrupting influence of the suggestive identification itself. *Id*.

[9] In-court identifications may be admissible even if there was an illegal pretrial identification procedure.

> "An in-court identification may properly be received in evidence when it is independent of and untainted by illegal pretrial identification procedures. . . . A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant in circumstances free from taint."

*State v. Smith*, 269 Neb. at 785-86, 696 N.W.2d at 883 (quoting *State v. Auger & Uitts*, 200 Neb. 53, 262 N.W.2d 187 (1978)).

Assuming that the trial court was correct in finding the identification procedure used in this case, i.e., the second photographic lineup, was unduly suggestive, application of the foregoing factors from *State v. Faust, supra*, to the facts in this case demonstrates that Lorenzo's in-court identification was sufficiently reliable to avoid suppression, and therefore such was properly admitted for the jury's consideration. The evidence adduced at trial clearly indicates that Lorenzo's testimony was based upon his observations of November 13, 2008. On the night of the shooting, Lorenzo had an opportunity to view the shooter when the shooter began firing shots toward Marcus in the Save-Mart parking lot. At that time, Lorenzo was approximately 30 feet away from the shooter. Lorenzo was standing in the entryway of Save-Mart (between the two sets of sliding doors), and the sliding doors to the outside were open, giving him a clear view to the outside. Lorenzo testified that he could see "[p]retty good," because the parking lot was "pretty lit up with the lights from the building, streets [sic] lights out there in the parking lot." The shooter was in a fairly well-lit location, and Lorenzo was paying "[v]ery close" attention to what was going on. At trial, Lorenzo described the shooter as a "[b]igger gentleman, six foot, heavier set, African American, with braids." Although Lorenzo, after viewing the first six-photograph lineup shortly after the shooting, was 80- to 90-percent sure that Sidney was the shooter, 4 days after the shooting, when he viewed the second six-photograph lineup, he positively identified Smith as the shooter. We note that our record contains the photographic lineups, and clearly,

Smith's and Sidney's physical appearances in the photographs are similar. At trial, Lorenzo identified Smith with 100-percent certainty as the person who shot Marcus. Lorenzo's in-court identification of Smith as the shooter was independent of the unduly suggestive pretrial identification and thus was properly received into evidence.

(b) Ineffective Assistance of Counsel

Smith argues that his trial counsel was ineffective because (1) in his amended motion to suppress, counsel failed to challenge Weston's and Tyrone's identifications of Smith at the Spigot bar prior to the shooting; (2) at trial, counsel withdrew his objection to Weston's identification of Smith as the person involved in an altercation at the Spigot bar, thereby failing to preserve the issue for appellate review; and (3) counsel failed to object to Weston's, Sanniola's, and Tyrone's identifications of Smith during the trial, thereby failing to preserve the issue for appellate review.

In *State v. Williams*, 269 Neb. 917, 924, 697 N.W.2d 273, 279 (2005), the Nebraska Supreme Court said:

> To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first 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. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.

To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). Where a defendant is unable to demonstrate sufficient prejudice, no examination of whether counsel's performance was deficient is necessary. *Id.*

We need not address whether trial counsel was ineffective for the reasons set forth above, because even if trial counsel was ineffective, Smith cannot show prejudice. Smith argues that counsel was ineffective regarding witness identifications

of Smith as the person involved in the altercation at the Spigot bar and as the person involved in the fight at Save-Mart before the shooting started. However, Smith's ineffective assistance claims are limited to witnesses Weston, Sanniola, and Tyrone. Smith overlooks, or perhaps hopes that we overlook, the fact that there were other witness identifications to which he does not assign error, and which involve people who were not shown the photographic lineups. Gant, an acquaintance of Smith, testified that Smith was involved in the altercation at the Spigot bar and that Smith was hit in the mouth during the altercation. And Helmstadter, who testified that Smith was "[l]ike a brother," testified that he saw Smith at the Spigot bar and that Smith said he got hit in the mouth by a "guy . . . in the limo." Furthermore, Helmstadter testified that he and Smith followed the limousine to Save-Mart, where, after Smith got into a fight, Smith grabbed Helmstadter's gun and started shooting. As stated previously, Smith assigns no error regarding the testimony given by Gant and Helmstadter. Thus, there is unchallenged and highly incriminating evidence that Smith had a motive to "get back" at Marcus because Smith was on the "short end" of the fight at the Spigot bar, that he followed Marcus to Save-Mart, and that he fired shots at Marcus at that location—after getting Helmstadter's gun from him. Such other evidence means that Smith cannot demonstrate sufficient prejudice, and therefore, an examination of whether counsel's performance was deficient is not necessary. See *State v. Smith, supra*. Put another way, when the evidence arrayed against a defendant is "overwhelming," prejudice from counsel's alleged errors becomes difficult to prove. See *State v. Lyman*, 241 Neb. 911, 917, 492 N.W.2d 16, 21 (1992) (postconviction relief denied when trial evidence was so "overwhelming," there was no need to consider alleged deficiencies by counsel for alleged failure to investigate and failure to move to suppress confession, because defendant could not show prejudice), *disapproved on other grounds, State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005). The evidence against Smith, if not overwhelming, is very close to being so, given the testimony of Helmstadter—Smith's companion throughout the evening.

### 2. Jury Instructions

#### (a) "Sudden Quarrel"

Smith argues that his trial counsel was ineffective for failing to request that the district court instruct the jury on the law applicable to the case, including (1) an instruction on the "absence of a sudden quarrel" as an element of attempted second degree murder that must be proved by the State and/or (2) an instruction that the offense of attempted "sudden quarrel" manslaughter is a lesser-included offense of attempted second degree murder. Although trial counsel initially sought a preliminary instruction for attempted second degree murder setting forth the absence of a sudden quarrel as a "negative element," counsel withdrew his request at the final instruction conference. A party who does not request a desired jury instruction cannot complain on appeal about incomplete instructions. *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

[10,11] Smith also argues that the district court erred in failing to give the "sudden quarrel" instructions sua sponte. Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence. *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). A trial court is not required to sua sponte instruct on lesser-included offenses, but the trial court may do so if the evidence adduced at trial would warrant conviction of the lesser charge and the defendant has been afforded a fair notice of those lesser-included offenses. *State v. James*, 265 Neb. 243, 655 N.W.2d 891 (2003).

In their briefs, both parties note that the issue of the "absence of a sudden quarrel" as an element of attempted second degree murder was pending before the Nebraska Supreme Court in an unrelated case—*State v. Smith*, case No. S-09-1107—involving different parties. We have waited for that opinion before deciding the present case. The Nebraska Supreme Court released its opinion in that case on November 18, 2011. See *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011). In that case, Ronald G. Smith (Ronald) lived with Terri Harris. Ronald had been drinking and using methamphetamines when he got into an argument with Harris about Ronald's drinking and drug use, money,

and the fact that they both had been recently laid off from their jobs. At some point during the argument, Ronald pushed Harris from her bed. Harris hit the floor hard and lay there motionless with her face up. Ronald took a pillow from the bed and held it over Harris' face for 1 to 2 minutes. Harris did not resist. Ronald took Harris' severance check, cashed it, and left the state. Ronald was charged with and convicted of second degree murder, second degree forgery, and theft by taking. All three charges related to the death of Harris.

The district court gave a pattern second degree murder instruction to the jury. The jury was instructed that to convict Ronald of second degree murder, the State had to prove beyond a reasonable doubt that Ronald killed Harris intentionally but without premeditation. The jury was then instructed that if it found the State had proved each element beyond a reasonable doubt, it was its "'duty to find [Ronald] guilty of the crime of murder in the second degree.'" *Id*. at 723-24, 806 N.W.2d at 387. The jury was instructed that it could proceed to consider whether Ronald committed manslaughter if it found that the State had failed to prove any one or more of the material elements of second degree murder beyond a reasonable doubt. On appeal, Ronald argued that the district court failed to instruct the jury that the distinction between second degree murder and manslaughter is based on whether the specific intent to kill was or was not the result of a "sudden quarrel."

[12,13] In its analysis of Ronald's appeal, the Nebraska Supreme Court focused on one type of manslaughter as defined by Neb. Rev. Stat. § 28-305(1) (Reissue 2008), which the court referred to as "sudden quarrel manslaughter" or "voluntary manslaughter." We will use the term "sudden quarrel manslaughter" in our discussion. After a lengthy and indepth analysis of Nebraska case law and the language that the Legislature used to define manslaughter, the Nebraska Supreme Court stated that the distinguishing factor between sudden quarrel manslaughter and second degree murder is that in sudden quarrel manslaughter, "the killing, even if intentional, was the result of a legally recognized provocation, i.e., the sudden quarrel, as that term has been defined by our jurisprudence." *State v. Smith*,

282 Neb. at 732, 806 N.W.2d at 393. The Nebraska Supreme court further stated: "The holding of [*State v.*] *Jones*[, 245 Neb. 821, 515 N.W.2d 654 (1994),] that an intentional killing cannot constitute sudden quarrel manslaughter is inconsistent not only with the language of § 28-305(1), but also with its common-law roots." *State v. Smith*, 282 Neb. at 732, 806 N.W.2d at 393. The court held:

> [W]e conclude that the analysis and holding of [*State v.*] *Pettit*[, 233 Neb. 436, 445 N.W.2d 890 (1989),] was correct and that the holding of [*State v.*] *Jones*[, 245 Neb. 821, 515 N.W.2d 654 (1994),] that "[t]he distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill" was error. We therefore overrule this holding in *Jones* and reaffirm the holdings of *Pettit* and *Boche* [*v. State*, 84 Neb. 845, 122 N.W. 72 (1909),] that an intentional killing committed without malice upon a "sudden quarrel," as that term is defined by our jurisprudence, constitutes the offense of manslaughter.

*State v. Smith*, 282 Neb. 720, 734, 806 N.W.2d 383, 394 (2011). The Nebraska Supreme Court found that the jury in Ronald's case should have been given a step instruction requiring the jury to convict on second degree murder if it found that Ronald killed Harris intentionally, without premeditation, but that if the jury acquitted him of that charge, it could consider the alternative possibility that the killing was intentional but provoked by a sudden quarrel, and therefore constituted manslaughter.

[14,15] Although not discussed by the Nebraska Supreme Court in *State v. Smith, supra*, we have held that the crime of attempted voluntary manslaughter (even upon a sudden quarrel) does not exist in Nebraska. See *State v. Smith*, 3 Neb. App. 564, 529 N.W.2d 116 (1995). See, also, e.g., *State v. Al-Zubaidy*, 5 Neb. App. 327, 559 N.W.2d 774 (1997), *reversed on other grounds* 253 Neb. 357, 570 N.W.2d 713; *State v. George*, 3 Neb. App. 354, 527 N.W.2d 638 (1995). Recognizing that the key element of all attempt crimes under Neb. Rev. Stat. § 28-201 (Reissue 2008) is the taking of a

substantial step toward the crime's commission, which may generally be said to be, by definition, an intentional act, we said that a person cannot perform the same act both intentionally and unintentionally. Though not specifically mentioning or overruling the above cases, we conclude that the Supreme Court's decision in *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011), has implicitly overruled these cases by virtue of its holding that an intentional killing can, in fact, be manslaughter, if it results from a sudden quarrel. Thus, attempted sudden quarrel manslaughter can now be considered a crime and the jury should have been so instructed if attempted sudden quarrel manslaughter is a lesser-included offense of attempted second degree murder. To determine lesser-included offenses, Nebraska uses the elements test:

> [T]he rule we have adopted for determining whether an offense is a lesser-included offense employs a statutory elements approach in which we look only to the elements of two criminal offenses to determine whether one cannot commit one of the offenses, the "greater offense," without simultaneously committing the other offense, the "lesser offense." Under this approach, the "lesser offense" is the one for which fewer—or in the lesser-included vernacular "less"—elements are required to be proved. The approach focuses on the elements of the offenses, and comparison of the penalties associated with the offenses is not a factor.

*State v. Gresham*, 276 Neb. 187, 193, 752 N.W.2d 571, 577 (2008).

[16,17] It is clear that second degree murder and manslaughter are lesser-included offenses of first degree murder. See *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011). And the court should give a lesser-included offense instruction when the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Sinica*, 277 Neb. 629, 764 N.W.2d 111 (2009). We note that while such cases speak of "acquitting" of the greater offense before considering

the lesser offenses, the Nebraska Supreme Court in *State v. Goodwin*, 278 Neb. 945, 967, 774 N.W.2d 733, 749 (2009), "encourage[d]" trial courts to use NJI2d Crim. 3.1 because it "provides a clearer and more concise explanation of the process by which the jury is to consider lesser-included offenses" when a step instruction on lesser-included offenses is warranted. This pattern instruction does not direct that the jury must "acquit" of the greater offense before considering the lesser offense. Rather, the instruction informs the jury that if the State did not prove beyond a reasonable doubt "each element" of the greater, then it is to consider the lesser offenses. NJI2d Crim. 3.1.

Therefore, we are at the point of determining whether the evidence provides a rational basis for finding that the State did not prove all of the elements of attempted second degree murder, but did prove the elements of attempted sudden quarrel manslaughter. Clearly, we are dealing only with attempt crimes, because the victim had the good fortune to survive what well could have been a fatal gunshot wound. Because there is no dispute that Smith was the one firing the gun, the proof obviously establishes the substantial step portion of attempt—for second degree murder or for sudden quarrel manslaughter.

[18-20] A sudden quarrel requires provocation which causes a reasonable person to lose normal self-control. *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008). If one had enough time between the provocation and the killing, or the attempt in the present case, to reflect on one's intended course of action, then the mere presence of passion does not reduce the crime below murder. See *State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994).

> "The true inquiry appears to be whether the suspension of reason, if shown to exist, arising from sudden passion, continued from the time of provocation till the very instant of the act producing death [or which was an attempt to produce death] took place, and if, from any circumstances whatever shown in evidence, it appears that the party reflected and deliberated, or if in legal presumption there was time or opportunity for cooling, the

> provocation can not be considered by the jury in arriving at their verdict."

*Id*. at 360, 513 N.W.2d at 300 (quoting *Savary v. State*, 62 Neb. 166, 87 N.W. 34 (1901)). Or, put another way, the question is whether, under all the facts and circumstances, a reasonable time had elapsed from the time of the provocation to the instant of the killing for the passion to subside and for reason to resume control of the mind. *State v. Lyle, supra.* "Common examples of this type of manslaughter include [an attempted] killing provoked during a physical altercation in which the participants voluntarily engaged." *State v. Smith*, 282 Neb. 720, 733, 806 N.W.2d 383, 394 (2011).

In the present case, Smith argues:

> [Marcus] committed an unprovoked attack on [Smith] when he punched him in the face at the Spigot Bar. [Marcus] then voluntarily left the Save-Mart grocery store and joined with several others in physically assaulting [Smith] in the Save-Mart parking lot. The evidence was there from which a jury could conclude that [Smith], in response to such treatment, had sufficient provocation that would cause him to lose self-control, cloud his reason, and prevent rational action. The evidence was there from which a jury could conclude that the quarrel was "sudden"—i.e. that there was no reasonable time lapse between the quarrel and the shooting of [Marcus] for [Smith] to regain his reason and self-control.

Brief for appellant at 40. We agree.

Marcus punched Smith in the face at the Spigot bar. Marcus and his friends left the Spigot bar in a limousine. Smith asked Helmstadter whether he had a gun, to which Helmstadter responded that he had a gun in his Escalade. Smith and Helmstadter then got into Helmstadter's Escalade and followed Marcus' limousine to Save-Mart. Outside of Save-Mart, Smith yelled at Marcus to fight. Marcus came out of the Save-Mart and engaged in a fight with Smith. At least two witnesses testified that at least three or four of Marcus' friends joined Marcus in his fight with Smith. Helmstadter testified that after he fired his gun two or three times into the air, Marcus and his friends "backed up, everybody dispersed." After Marcus and his

friends backed away from Smith, Smith grabbed the gun from Helmstadter, fired several shots in the direction of Marcus' friends near the Save-Mart entrance, and fired at Marcus, who was running away from him. Thus, there is "some evidence" of a sudden quarrel, and evidence that the events in the Save-Mart parking lot could inflame Smith's passions and provoke him to the point of losing self-control, particularly when only minutes earlier he was unexpectedly punched in the mouth by Marcus at the Spigot bar. And Smith found himself being "jumped" by Marcus' friends minutes later as Smith apparently sought to "even the score" with Marcus, but instead got involved in a "lopsided" fight with Marcus and three or four of his friends. Whether these facts equate to a sudden quarrel so as to constitute attempted sudden quarrel manslaughter is for the jury's determination—but there is certainly evidence upon which they could so find. Accordingly, the district court erred in failing to instruct the jury on attempted sudden quarrel manslaughter as a lesser offense.

[21] Having identified trial error, we must now consider whether it was prejudicial or harmless. "Before an error in the giving of jury instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant." *State v. Smith*, 282 Neb. 720, 734-35, 806 N.W.2d 383, 394 (2011). "The appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant." *Id.* at 735, 806 N.W.2d at 394.

[22] "A trial court is required to give an instruction where there is any evidence which could be believed by the trier of fact that the defendant committed manslaughter and not murder." *Id*. In this case, it would be that Smith committed attempted sudden quarrel manslaughter rather than attempted second degree murder. In the context of this case, Smith was prejudiced by the district court's failure to give an instruction on attempted sudden quarrel manslaughter, because the jury could reasonably have concluded his intent to kill was the result of a sudden quarrel, and thereby convicted him of the lesser offense. Being deprived of that option is clearly prejudicial to Smith.

In *State v. Smith, supra*, the Nebraska Supreme Court said that the jury could reasonably infer that Ronald and Harris had been arguing and that Ronald had been angry. But there was no evidence explaining how or by whom the argument was started, its duration, or any specific words spoken or actions which were taken before Ronald pushed Harris to the floor. There was no evidence that Harris said or did anything which would have provoked a reasonable person in Ronald's position to push Harris from the bed and smother her with a pillow. The court also said, "Nor does evidence of a string of prior arguments and a continuing dispute without any indication of some sort of instant incitement constitute a sufficient showing to warrant a voluntary manslaughter instruction." *Id*. at 735, 806 N.W.2d at 395. The Nebraska Supreme Court found that Ronald was not prejudiced by the jury instructions, because there was no evidence in that record upon which the jury could have concluded that Ronald committed sudden quarrel manslaughter instead of second degree murder.

Unlike in *State v. Smith, supra*, the jury in this case could have determined that there was a dispute between Marcus and Smith which suddenly ignited at the Spigot bar when Marcus punched Smith in the mouth, and which consequentially produced another incident of violence at Save-Mart. It is not insignificant that the two locations are in close proximity to one another and only minutes apart. Furthermore, from the evidence at trial, the jury could have determined that when Marcus' friends joined in the fight at Save-Mart, there was an "instant incitement." Accordingly, there was a sufficient showing to warrant an attempted sudden quarrel manslaughter instruction. And the district court's failure to give such an instruction was prejudicial error.

[23] Having found reversible error, we must consider whether Smith can be subjected to a retrial. 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. *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011). We conclude that with regard to

the charges of which Smith was convicted—attempted second degree murder, first degree assault, and use of a weapon to commit a felony—the evidence introduced at the trial, whether erroneously or not, was quite clearly sufficient to sustain the guilty verdicts, and that therefore, Smith can be retried on such charges. We note that Smith does not assign error to the convictions for first degree assault and use of a weapon to commit a felony. Thus, those convictions stand affirmed and the retrial shall encompass only the attempted second degree murder charge.

[24] Given the result we reach concerning attempted sudden quarrel manslaughter and the instructions to the jury, we need only briefly address Smith's claims of ineffectiveness of trial counsel concerning the way the jury was instructed. As stated previously in this opinion, until the recent case of *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011), the crime of attempted voluntary manslaughter (including upon a sudden quarrel) did not exist in Nebraska. Given the lack of authority on such point, we cannot say that trial counsel was ineffective for not anticipating how the courts would rule. See *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002) (failure to anticipate change in existing law does not amount to ineffective assistance of counsel).

(b) Self-Defense

Smith argues that his trial counsel was ineffective because trial counsel did not request a self-defense instruction for all three counts. Smith also argues that the district court erred in failing to give a self-defense instruction sua sponte.

[25-27] Neb. Rev. Stat. § 28-1409 (Reissue 2008) states in relevant part:

> (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 [or] serious bodily harm, . . . nor is it justifiable if:
>
> (a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or
>
> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take . . . .

Deadly force shall mean force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Neb. Rev. Stat. § 28-1406(3) (Reissue 2008). Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. *Id.* To successfully assert the claim of self-defense, one must have a reasonable and good faith belief in the necessity of using such force. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006). In addition, the force used in self-defense must be immediately necessary and must be justified under the circumstances. *Id.*

There is no evidence that Smith had a reasonable and good faith belief that he needed to protect himself against death or serious bodily harm, which would justify his use of deadly force. According to the evidence, Smith followed Marcus to the Save-Mart parking lot. Smith then initiated a fight with Marcus at Save-Mart. Apparently, some of Marcus' friends joined the fray and Smith was outnumbered. Helmstadter fired shots into the air, and the fight broke up. Smith then grabbed Helmstadter's gun and fired at Marcus, who was running away from him. There is no evidence that anyone else had a weapon. Smith had two opportunities to retreat: (1) He could have not followed Marcus from the Spigot bar to Save-Mart, and (2) after Helmstadter fired shots into the air and the fight ended, Smith could have gotten into the Escalade and left Save-Mart, or simply not grabbed Helmstadter's gun and begun firing at Marcus. Clearly, Smith's use of deadly

force was not justifiable and a self-defense instruction was not warranted by the evidence. Accordingly, Smith's trial counsel was not ineffective for not requesting a self-defense instruction, and the trial court did not err in failing to give such an instruction.

## VI. CONCLUSION

Because we find that the jury should have been instructed on both attempted second degree murder and the lesser-included offense of attempted sudden quarrel manslaughter, we reverse, and remand this cause for a new trial on the charge of attempted second degree murder. Smith's convictions for first degree assault and use of a weapon to commit a felony are affirmed because no error was assigned to such. We find no merit to any of Smith's remaining assignments of error.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

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## ABANTE, LLC, DOING BUSINESS AS ABANTE MARKETING AND ABANTE HOLDINGS, LLC, APPELLANT, V. PREMIER FIGHTER, L.L.C., ET AL., APPELLEES.

814 N.W.2d 109

Filed April 10, 2012. No. A-11-202.

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. ____: ____. 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. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
5. **Summary Judgment: Final Orders.** The granting of a summary judgment is a final order where it concludes all issues between the two parties on either side of the motion.

6. **Final Orders: Appeal and Error.** An appellate court's role is not to find a determination under Neb. Rev. Stat. § 25-1315 (Reissue 2008) by implication; rather, an appellate court's review is limited to an analysis of the express determination made by the trial court.
7. **Final Orders: Jurisdiction: Appeal and Error.** Without an express determination that there is no reason for delay and an express direction for the entry of final judgment from the trial court, an appellate court is without jurisdiction to hear an appeal from an order that does not dispose of all of the claims against all of the parties.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Appeal dismissed.

John C. Fowles, of Fowles Law Office, P.C., L.L.O., for appellant.

Steven M. Delaney, of Reagan, Melton & Delaney, L.L.P., for appellee MMAStop, Inc.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

## INTRODUCTION

Abante, LLC, doing business as Abante Marketing and Abante Holdings, LLC, appeals from an order of the district court for Sarpy County, Nebraska, that entered summary judgment in favor of MMAStop, Inc., one of the appellees. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Because the order appealed from fails to dispose of the claims against the remaining appellees, two of whom are the subject of a bankruptcy stay, and fails to make findings necessary for certification under Neb. Rev. Stat. § 25-1315 (Reissue 2008), we dismiss the appeal for lack of jurisdiction.

## BACKGROUND

In its operative complaint, Abante alleged that Matthew H. Anselmo induced Abante to finance a merchandise order from a retailer for Premier Fighter, L.L.C.; that Abante agreed to finance approximately $240,000 of the order; and that pursuant to instructions from Anselmo, Abante sent approximately $120,000 to MMAStop by wire transfer to begin the

production of merchandise, with the remainder sent directly to Premier Fighter. Abante further alleged that Anselmo, acting as an employee and agent of Premier Fighter, executed a promissory note to Abante in the amount of $240,000, due on or before October 12, 2008, with interest to accrue at 100 percent. Abante alleged that only one payment of $3,500 has been made on the note, which payment was received from M & M Marketing, L.L.C. Abante alleged that the money it wired to MMAStop was not used for the production of merchandise, but was instead used to offset indebtedness of Anselmo to MMAStop. Abante sought recovery against Premier Fighter on the promissory note in the total sum of $476,500, representing principal and interest remaining due. Abante sought recovery against Anselmo and M & M Marketing for the same amount, alleging that they were jointly and severally liable for the obligation of Premier Fighter by virtue of Anselmo's having disregarded the corporate identities of Premier Fighter and M & M Marketing. Abante sought recovery against Anselmo in the sum of $236,500 on the basis of fraud, asserting that Anselmo fraudulently induced Abante to make a loan. Finally, Abante sought recovery against MMAStop for return of the wired money in the sum of $120,000.

During the pendency of the proceedings, a suggestion in bankruptcy was filed showing that Premier Fighter and M & M Marketing had filed involuntary chapter 7 bankruptcy petitions. The district court entered an order for bankruptcy stay, staying all future proceedings in the case. Thereafter, Abante filed a motion seeking approval to proceed against MMAStop only, which motion was granted by the district court in an order which further indicated that the bankruptcy stay remained in place as to all other defendants. The record shows that Anselmo was the sole owner of M & M Marketing, which in turn owned Premier Fighter. At the time of the summary judgment hearing, Anselmo was incarcerated in a federal prison as a result of a fraud conviction.

MMAStop moved for summary judgment, and a hearing was held at which numerous depositions and exhibits were received in evidence. On February 24, 2011, the district court entered an order granting summary judgment in favor of MMAStop,

finding that Abante's cause of action for money had and received against MMAStop was without merit. The order did not address the remaining defendants, did not dismiss the action, and did not make any findings under § 25-1315. Abante filed this timely appeal.

## ASSIGNMENT OF ERROR

Abante assigns, summarized and restated, that the district court erred in granting summary judgment in favor of MMAStop.

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

## ANALYSIS

[2-4] The dispositive issue in this appeal is whether the district court's order granting summary judgment in favor of MMAStop is a final, appealable order. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Id*. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. *Wright v. Omaha Pub. Sch. Dist.*, 280 Neb. 941, 791 N.W.2d 760 (2010). Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Id*. Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009).

[5] It has been recognized that the granting of a summary judgment is a final order where it concludes all issues between the two parties on either side of the motion. See *Blue Cross*

*and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004). However, where multiple parties are involved in the case, § 25-1315(1) is implicated. This section 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 the present case, there are several claims for relief against multiple parties and the summary judgment order did not dispose of the remaining claims or parties. Nor did the district court expressly direct the entry of a final judgment or make an express determination that there is no just reason for delay, as required by § 25-1315(1). This same situation was presented to the Nebraska Supreme Court in *Kilgore v. Nebraska Dept. of Health & Human Servs., supra*. In that case, summary judgment was granted in favor of only two of multiple defendants. On appeal, the Supreme Court concluded that while the summary judgment order affected a substantial right and satisfied the requirements of § 25-1902(1), it did not satisfy the requirements of § 25-1315. See, also, *Ferer v. Aaron Ferer & Sons Co.*, 16 Neb. App. 866, 755 N.W.2d 415 (2008) (summary judgment order which disposed of some but not all of appellant's claims and which did not make determination pursuant to § 25-1315 was not final, appealable order).

[6] Both parties in this appeal urge the conclusion that there is a final order, despite acknowledging that the order does not

make the express findings required by § 25-1315. The parties suggest that the § 25-1315 determination was implied by the district court's decision to allow Abante to proceed against MMAStop but leaving the bankruptcy stay in place as to the remaining defendants. The parties also argue that there is no active case with respect to the three other defendants and that the cause of action brought against MMAStop does not interrelate with the claims relevant to the other defendants. The Supreme Court has made it abundantly clear that an appellate court's role is not to find a § 25-1315 determination by implication; rather, our review is limited to an analysis of the express determination made by the trial court. See *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007). See, also, *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005) (rather than leave assessment of status of trial proceedings to appellate conjecture, § 25-1315(1) requires express determination that there is no just reason for delay of appeal of order disposing of less than all claims or parties and express direction for entry of judgment as to those adjudicated claims or parties). Further, even if the order allowing the case to proceed as to MMAStop only can somehow be viewed as invoking § 25-1315, a proposition that we do not accept, the order did not provide the required explanation supporting certification. See *Murphy v. Brown*, 15 Neb. App. 914, 738 N.W.2d 466 (2007).

[7] This case presents a somewhat different factual situation due to the bankruptcy stay in place for Premier Fighter and M & M Marketing. Neither party has presented us with any authority, nor are we aware of any, that the bankruptcy stay excuses or alters the requirement for an express determination and direction by the trial court under § 25-1315. While this may be relevant to the trial court's determination when presented with a request for certification of a final order, it does not change the conclusion that without an express determination that there is no reason for delay and an express direction for the entry of final judgment from the trial court, an appellate court is without jurisdiction to hear an appeal from an order that does not dispose of all of the claims against all of the parties. See *Cerny v. Todco Barricade Co., supra.*

Because the order granting summary judgment to MMAStop does not dispose of all of the claims against all of the parties, and does not make an express determination and direction under § 25-1315, this appeal must be dismissed for lack of jurisdiction.

## CONCLUSION

The order granting summary judgment in favor of MMAStop is not a final, appealable order.

APPEAL DISMISSED.

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JASON M. CITTA, APPELLANT, V.
TRICIA J. FACKA, APPELLEE.
812 N.W.2d 917

Filed April 10, 2012. No. A-11-549.

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. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Actions: Paternity: Child Support: Equity.** While a paternity action is one at law, the award of child support in such an action is equitable in nature.
4. **Paternity: Child Support: Appeal and Error.** A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
5. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
6. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
7. **Child Custody.** 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.
8. **Rules of the Supreme Court: Pretrial Procedure: Evidence.** Under Neb. Ct. R. Disc. § 6-336(a), matters are deemed admitted unless, within 30 days after

service of the request, the party to whom the request is directed serves a written answer or objection.

9. **Rules of the Supreme Court: Pretrial Procedure.** Under Neb. Ct. R. Disc. § 6-336, if the request for admission seeks information that is permissible under Neb. Ct. R. Disc. § 6-326, the request can ask a party to admit facts in dispute, the ultimate facts in a case, or facts as they relate to the law applicable to the case.
10. ____: ____. Neb. Ct. R. Disc. § 6-336 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a request for admission.
11. **Rules of the Supreme Court: Pretrial Procedure: Evidence: Proof.** A party that seeks to claim another party's admission, as a result of that party's failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must also offer the request for admission as evidence.
12. **Rules of the Supreme Court: Pretrial Procedure.** If the necessary foundational requirements are met and no motion is sustained to withdraw an admission, a trial court is obligated to give effect to the provisions of Neb. Ct. R. Disc. § 6-336 which require that the matter be deemed admitted.
13. **Rules of the Supreme Court: Pretrial Procedure: Proof.** Admitted facts under Neb. Ct. R. Disc. § 6-336 serve to limit the proof at trial.
14. **Child Custody.** Child custody is a judicial determination and is never to be regarded as a merely evidentiary matter.
15. ____. The technical rules of civil procedure cannot apply with equal force in a child custody case as in other civil cases, because the sole determining factor in a child custody case must be the best interests of the child.
16. **Child Custody: Courts.** A trial court has an independent responsibility to determine questions of custody of minor children according to their best interests, which responsibility cannot be controlled by an agreement or stipulation of the parties.
17. ____: ____. Admissions made by a party's failure to answer requests for admissions, like agreements made by a party, cannot circumvent the court's duty to independently assess a child's best interests in determining the child's custodial arrangement.
18. **Child Custody.** While an unwed mother is initially entitled to automatic custody of the child, the issue must ultimately be resolved on the basis of the fitness of the parents and the best interests of the child.
19. **Divorce: Child Custody: Public Policy.** It is sound public policy to keep siblings together when a marriage is dissolved, but the ultimate test remains the best interests of the children.
20. **Child Custody.** When deciding custody issues, the court's paramount concern is the child's best interests.
21. **Rules of the Supreme Court: Child Support.** In general, child support payments should be set according to the Nebraska Child Support Guidelines.
22. ____: ____. The Nebraska Child Support Guidelines provide that in calculating child support, a court must consider the total monthly income of both parties.

23. **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.
24. **Paternity: Child Support: Attorney Fees: Costs.** Attorney fees and costs are statutorily allowed in paternity and child support cases.
25. **Attorney Fees.** The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Terrance O. Waite and Patrick M. Heng, of Waite, McWha & Heng, for appellant.

Kim M. Seacrest, of Seacrest Law Office, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

Jason M. Citta appeals from the order awarding Tricia J. Facka custody of the parties' child. Although we conclude that the court erred in not deeming as admitted Citta's requests for admission upon Facka's failure to respond, the issue of child custody cannot be controlled by unanswered requests for admission. We find no abuse of discretion by the court in its award of custody or its calculation of child support. Accordingly, we affirm.

## BACKGROUND

The parties, who never married, are the biological parents of a son, born in January 2009. On January 27, Citta filed a complaint to establish paternity, visitation, and child support. Citta alleged that he was a fit and proper person to be awarded permanent custody of the child.

On March 11, 2011, Citta mailed to Facka's counsel requests for admission, interrogatories, and requests for production of

documents. On May 2, Citta filed a motion to deem Facka's requests for admission as admitted pursuant to Neb. Ct. R. Disc. § 6-336 (Rule 36) because Facka had failed to respond to the requests within 30 days. On that same date, Citta filed a motion to compel Facka to fully and completely answer the interrogatories and requests for production of documents. On May 16, the court held a hearing and addressed various motions. The following colloquy ensued:

> [Citta's counsel]: Also pending is a motion to compel and deem requests for admissions admitted.
>
> [Facka's counsel]: And I can have those to [Citta's counsel] by the end of the day.
>
> [Citta's counsel]: That doesn't take care of the request for admissions. I do have affidavits showing that we've served those, there's been no response, no reason to even know what the controversy is despite letters from me saying good faith efforts to resolve this short of a motion to compel.
>
> THE COURT: On the motion for requests for admissions, as long as the party comes forward eventually and says we'll answer them, that's good enough; and they are deemed admitted, so answer them.
>
> [Facka's counsel]: Your Honor, actually I can have them to him by the end of the day.
>
> THE COURT: That would be just great.

The court received an affidavit of Citta's counsel in support of the motion to deem requests for admission as admitted. The attorney stated that the requests were mailed to Facka's counsel on March 11, that Citta's counsel sent an April 26 letter to Facka's counsel inquiring about the status of answers, and that Citta's counsel had received no response as of May 12. Citta's counsel attached to his affidavit the requests for admission—which showed a March 11 certificate of service on Facka's counsel at the correct address—and the April 26 letter to Facka's counsel which stated in part that "[w]e need to have your client's response within the next week in order to avoid the necessity of filing a [m]otion to [c]ompel." The requests for admission asked Facka to admit, among other things, that Citta was a fit and proper parent to the child, that Citta was more

than capable of taking care of the child, and that it was in the best interests of the child for physical custody to be granted to Citta. The record does not contain any written ruling by the court on the motions.

The district court conducted a trial on May 25, 2011. It received Facka's responses to Citta's requests for admission, interrogatories, and requests for production. Facka's responses were signed May 12, but they apparently were not produced to Citta until May 16.

Citta lives in North Platte, Nebraska. Facka moved out of Citta's home in late August or early September 2008. She has lived in Sutherland, Nebraska, since November 2009. Citta testified that he was not consulted prior to Facka's move and that Facka told him that where she was going to be living was none of his business.

Each party had concerns about the other. One of the reasons that Facka believed Citta should not have custody was his past alcohol problem. The evidence established that Citta voluntarily underwent treatment for his alcohol problem 3 years before, and Facka admitted that she had no evidence of any alcohol consumption by Citta since that time. Citta testified that he participates in Alcoholics Anonymous. Facka testified that when she lived with Citta, she experienced other issues of Citta, such as verbal abuse, anger management, and a gambling addiction. She testified, "I would notice when I walk in the office in the middle of the night and he'd be playing poker and drinking . . . ." Citta testified that he had visited a casino twice in the past 3 years and had not played online poker during that time. Facka also testified about her concern that Citta, who is a physician, had given the child a double dose of decongestant. Citta, on the other hand, testified that as a physician, he believed he gave the child an appropriate amount. Citta had concern about Facka's obstructing Citta's relationship with the child. He testified that she told him on several occasions that she wants total control of the decisions in the child's life. Citta also had health concerns about the child. He testified that the child has bronchial spasms, that the child is on daily allergy medicine, that the child may be developing asthma, and that the child may have an allergy to

cats, particularly because Citta is allergic to cats and cats are "one of the most common allergants [sic] to induce bronchial spasm." However, Facka refused to "get rid of" her cat. Citta felt that the child was safe with Facka and that she provided a stable home "until recently."

Citta testified that he accommodated Facka's requests to alter the visitation schedule 99 percent of the time, but that she accommodated his requests about half of the time. Facka testified that she refused Citta's request for an extra day with the child over Father's Day weekend because "he was going to be fishing on a boat all day long with a five-month-old baby." She felt it was in the child's best interests to refuse the request. But Citta testified that he was not going to have the child on the boat with him. Citta testified that he wanted the child to have pictures taken with Citta's newly born child in December 2010, but Facka informed him that she had taken the child to "Urgent Care" and that he would be unavailable. Citta testified that Facka had never before gone to Urgent Care, that Citta's medical clinic was open, and that the child's care is free at the clinic.

A clinical psychologist observed Citta with the parties' child and conducted a psychological evaluation of Citta. The psychologist "did not see any reason that [Citta] was not a competent and caring father who would look out for [the child's] best interest[s]." The psychologist further reported that there was no evidence to suggest that Citta had any significant psychological, behavioral, or parenting difficulties.

The district court entered its order on June 2, 2011. The court awarded Facka custody of the child. It observed that the child had lived with Facka for almost 2½ years without any complaints by Citta regarding Facka's parenting ability. The court stated, "The fact that [Citta] had two minor children out of wedlock does not redound to his benefit in determining where the custody of the minor child in this case should be placed." The court ordered Citta to pay child support of $2,617 per month.

Citta timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

## ASSIGNMENTS OF ERROR

Citta alleges, consolidated and reordered, that the district court erred in (1) failing to deem admitted the requests for admission based on Facka's failure to timely respond, (2) granting Facka sole physical and legal custody of the child, and (3) determining the amount of child support owed by Facka when there was a lack of evidence offered by Facka.

## 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. *In re Adoption of Amea R.*, 282 Neb. 751, 807 N.W.2d 736 (2011).

[2] In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011).

[3,4] While a paternity action is one at law, the award of child support in such an action is equitable in nature. *State on behalf of Kayla T. v. Risinger*, 273 Neb. 694, 731 N.W.2d 892 (2007). A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *Id.*

## ANALYSIS

*Jurisdiction.*

[5,6] We address two jurisdictional issues before considering the merits of the appeal. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Adoption of Amea R., supra*. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua

sponte. *Crawford v. Crawford*, 18 Neb. App. 890, 794 N.W.2d 198 (2011).

First, Facka asserts in her brief on appeal that this court lacks jurisdiction due to the lack of a final order because the district court did not dispose of Citta's motions to compel and to deem Facka's requests for admission as admitted. Indeed, we find no explicit ruling in the record. However, the district court did not enter any sanctions and, by conducting a full trial on all the issues, the district court implicitly denied the motions.

[7] Second, we notice a potential issue under the Parenting Act. Because the action was filed after January 1, 2008, and because parenting functions for a child are at issue, the Parenting Act applies. See Neb. Rev. Stat. § 43-2924(1)(b) (Reissue 2008). From the record before us, we see no parenting plan submitted by the parties. Neb. Rev. Stat. § 43-2929(1) (Reissue 2008) states in part that "[w]hen 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." See, also, *State ex rel. Amanda M. v. Justin T.*, 279 Neb. 273, 777 N.W.2d 565 (2010). And we determined in *Bhuller v. Bhuller*, 17 Neb. App. 607, 767 N.W.2d 813 (2009), that a decree which did not resolve visitation issues as required under § 43-2929 was not a final, appealable order.

Here, the court's order did not attach a parenting plan, but it did award custody to Facka and provide Citta with reasonable visitation comporting with *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987), in addition to a telephone call each Wednesday not to exceed 1 hour. *Wilson* visitation is visitation every other weekend and certain holidays. Although the court's order left unaddressed several of the determinations that under § 43-2929(1)(b) should be included in the parenting plan, it did address custody, the day of telephone visitation, and alternating weekend and holiday visitation. We conclude that the court's failure to address all the various items that should be included in a parenting plan would be error, but that such error does not deprive us of jurisdiction and neither party assigns any error in this regard.

*Motion to Deem Requests Admitted.*

[8] Citta argues that the district court erred by not deeming his requests for admission as admitted. He correctly points out that under Rule 36(a), matters are deemed admitted unless, within 30 days after service of the request, the party to whom the request is directed serves a written answer or objection. In analyzing this assignment of error, we rely upon a recent decision of the Nebraska Supreme Court and look to case law from other states considering unanswered requests for admission in the context of child custody proceedings.

[9-13] *Tymar v. Two Men and a Truck*, 282 Neb. 692, 805 N.W.2d 648 (2011), is instructive with regard to ignored requests for admission. Under Rule 36, if the request for admission seeks information that is permissible under Neb. Ct. R. Disc. § 6-326, the request can ask a party to admit facts in dispute, the ultimate facts in a case, or facts as they relate to the law applicable to the case. *Tymar v. Two Men and a Truck, supra*. Rule 36 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a request for admission. *Tymar v. Two Men and a Truck, supra*. However, Rule 36 is not self-executing. Thus, a party that seeks to claim another party's admission, as a result of that party's failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must also offer the request for admission as evidence. *Tymar v. Two Men and a Truck, supra*. If the necessary foundational requirements are met and no motion is sustained to withdraw an admission, a trial court is obligated to give effect to the provisions of Rule 36 which require that the matter be deemed admitted. *Tymar v. Two Men and a Truck, supra*. Such admitted facts serve to limit the proof at trial. *Id.* During the May 16, 2011, hearing on the motion, the court received an exhibit which contained the requests for admission, established that the requests were served on Facka's counsel on March 11, and established that Facka had not answered the requests or objected to them. Thus, the district court should have deemed the matters admitted. Upon their being deemed

admitted, Facka would have the opportunity to move to have the admissions withdrawn.

[14,15] Courts in other states have determined that child custody determinations should not be made solely on the basis of unanswered requests for admission that would otherwise be deemed admitted. In *Gilcrease v. Gilcrease*, 918 So. 2d 854 (Miss. App. 2005), the mother failed to respond to requests for admission, including one that asked her to admit that the best interests of her son would be served by placement in the father's custody. The appellate court reasoned that while the trial court committed a procedural error by ignoring what had been deemed admitted, "the mistake was made with the proper result in mind" because "[c]hild custody is a judicial determination, and is never to be regarded as a merely evidentiary matter." *Id.* at 859. Thus, the court determined that basing a determination of child custody solely on a Rule 36 admission is improper. Similarly, a Massachusetts court stated:

> "The purpose of [Rule 36] is to assist 'the parties in their preparation for trial by facilitating proof with respect to issues that cannot be eliminated from the case, and by narrowing the issues by eliminating those that can be.'" . . . It is a procedural rule. Child custody, on the other hand, holds a peculiar place in our jurisprudence and implicates a "societal interest." . . . Awards of custody are made upon a determination of the best interests of the child.

*Houston v. Houston*, 64 Mass. App. 529, 534-35, 834 N.E.2d 297, 301-02 (2005). In *In re Marriage of Zimmerman*, 29 S.W.3d 863 (Mo. App. 2000), the mother failed to respond to requests for admission asking her to admit, among other things, that it was in the children's best interests to be placed in the primary physical custody of the father. The appellate court rejected the father's contention that the children's best interests were not at issue and removed from the trial court's discretion, noting that child custody "is a matter uniquely reserved for the discretion of the trial court." *Id.* at 868. The court reasoned that an admission as to best interests of a child does not "reliev[e] the trial court of its responsibility to make that

determination itself consistent with the statutory mandate" and that it was "well settled in this state that agreements between parents about the custody of children are not binding on the trial court, and are merely advisory." *Id.* The *Zimmerman* court further stated:

> We do not dispute that Mother's failure to respond to the request for admissions was a binding admission on her. We do not believe, however, that the conclusion of the *parties*, whether by agreement or as the result of discovery procedures, alters the duty of the trial court to make the determination as to the best interests of the children in custody matters.

*Id.* (emphasis in original). "[I]n a custody case the real party at interest is the child rather than the named parties." *Erwin v. Erwin*, 505 S.W.2d 370, 372 (Tex. App. 1974). "The technical rules of civil procedure cannot apply with equal force in a child custody case as in other civil cases, because the sole determining factor in a child custody case must be the best interests of the child." *Id.*

[16] Nebraska statutory and case law already explicitly applies the same principle to parties' agreements addressing child custody. It is well established in Nebraska that a trial court has an independent responsibility to determine questions of custody of minor children according to their best interests, which responsibility cannot be controlled by an agreement or stipulation of the parties. See, e.g., *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007); *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000); *Lautenschlager v. Lautenschlager*, 201 Neb. 741, 272 N.W.2d 40 (1978); *Deterding v. Deterding*, 18 Neb. App. 922, 797 N.W.2d 33 (2011); *Walters v. Walters*, 12 Neb. App. 340, 673 N.W.2d 585 (2004); *Zerr v. Zerr*, 7 Neb. App. 885, 586 N.W.2d 465 (1998). This public policy is embodied in Neb. Rev. Stat. § 42-366(2) (Reissue 2008), which specifically excepts agreements as to custody of minor children from being binding upon the court.

It would be inconsistent with this underlying policy to allow a party, by simply failing to answer discovery requests, to accomplish the very result that the party cannot obtain by express agreement. Accordingly, we agree with the courts of

other states that the failure to respond to requests for admission regarding child custody does not control the issue. Just as parties in a proceeding to dissolve a marriage cannot control the disposition of matters pertaining to minor children by agreement, *Deterding v. Deterding, supra*, the operation of Rule 36 cannot take the issue of custody away from the trial court's responsibility to independently determine what is in the best interests of the children.

[17] Accordingly, we hold that admissions made by a party's failure to answer requests for admissions, like agreements made by a party, cannot circumvent the court's duty to independently assess a child's best interests in determining the child's custodial arrangement. While the district court erred in not deeming as admitted Citta's requests for admission upon Facka's failure to timely answer or object to them, the court was not bound by the resulting admissions in deciding the child's custody based upon its assessment of the child's best interests.

*Custody.*

[18] Citta's chief complaint on appeal is that the court erred in failing to award him custody of the child. While an unwed mother is initially entitled to automatic custody of the child, the issue must ultimately be resolved on the basis of the fitness of the parents and the best interests of the child. *Spence v. Bush*, 13 Neb. App. 890, 703 N.W.2d 606 (2005). Upon our review of the record, we find both parents to be fit.

[19] Citta also argues that it is in the child's best interests to be domiciled with his sibling. It is sound public policy to keep siblings together when a marriage is dissolved, but the ultimate test remains the best interests of the children. *Kay v. Ludwig*, 12 Neb. App. 868, 686 N.W.2d 619 (2004). The child is alleged to be a half sibling of Citta's other child. We note that Facka has raised doubts about whether Citta is really the other child's father because the mother of that child was still married at the time she became pregnant. At the time of trial, the mother had sued Citta for paternity and child support and Citta testified that he had "not heard anything on [the status of the lawsuit] recently."

[20] When deciding custody issues, the court's paramount concern is the child's best interests. See *Mann v. Rich*, 18 Neb. App. 849, 794 N.W.2d 183 (2011). Neb. Rev. Stat. § 43-2923(6) (Cum. Supp. 2010) states:

> In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of the foregoing factors and:
>
> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning;
>
> (c) The general health, welfare, and social behavior of the minor child;
>
> (d) Credible evidence of abuse inflicted on any family or household member[;] and
>
> (e) Credible evidence of child abuse or neglect or domestic intimate partner abuse.

The parties were not living together at the time of the child's birth, and the child has remained in Facka's care since birth. But there is no dispute that Citta has taken an active role in the child's life since the child's birth. Both parties care for the child and have a good relationship with the child, and the child has done well in Facka's custody. It appears that either party would be a suitable custodial parent. We cannot say that the court abused its discretion in awarding custody to Facka.

*Child Support.*

Citta assigns two errors with respect to child support: (1) that the evidence was insufficient to support the award and (2) that the court erred in failing to take into consideration Facka's current income.

At the time of trial, Facka was working in an office of a powerplant in Sutherland. She worked 40 hours a week, earning $18 an hour, but she had no benefits. She had just begun the job on May 16, 2011, and testified that it was a "contract

work" position for 90 days, after which time she would be reevaluated and could apply for the job. If she got the job, the starting pay would be $14 an hour. From October 2009 to May 2010, she earned $12.74 an hour as a surgical assistant. She testified that while at the surgery center, she earned less in 2010 and in 2011 than she did in 2009. The child support calculation that she offered was based on her 2009 income. Citta is a physician, and his 2009 income tax return showed that his adjusted gross income was $335,825. He testified that he had received an extension for the filing of his 2010 tax return and did not have the return prepared at the time of trial.

[21,22] In general, child support payments should be set according to the Nebraska Child Support Guidelines. *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009). The guidelines provide that in calculating child support, a court must consider the total monthly income of both parties. See Neb. Ct. R. § 4-204. Citta complains that Facka offered only her 2009 tax return. He points out that § 4-204 states in part that "[c]opies of at least 2 years' tax returns, financial statements, and current wage stubs should be furnished . . . ." Here, we have only the 2009 tax return of each party. Although more information about income from each party would have been desirable, the court did not abuse its discretion in calculating child support upon the only tax returns offered into evidence. We also conclude that the court did not abuse its discretion in calculating child support using Facka's 2009 earnings. At the time of the 2011 trial, Facka had been in the position which paid her $18 an hour for 9 days and the position was for 90 days. Further, she testified that her 2010 and 2011 earnings were less than what she earned in 2009. Under these circumstances, we find no abuse of discretion by the district court in its calculation of child support.

*Attorney Fees.*

Facka filed a motion with this court seeking an award of attorney fees on appeal. According to the affidavit of her counsel, Facka had incurred attorney fees of $4,752.57 since Citta's filing of the notice of appeal.

[23,24] 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. *Eikmeier v. City of Omaha*, 280 Neb. 173, 783 N.W.2d 795 (2010). Attorney fees and costs are statutorily allowed in paternity and child support cases. See, Neb. Rev. Stat. § 43-1412(3) (Reissue 2008); *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999); *Coleman v. Kahler*, 17 Neb. App. 518, 766 N.W.2d 142 (2009). Customarily, attorney fees and costs are awarded only to the prevailing party or assessed against those who file frivolous suits. *Coleman v. Kahler, supra*. Facka was the prevailing party in this appeal.

[25] The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case. *Id.* We award Facka attorney fees of $2,500 for the services of her attorney on appeal.

## CONCLUSION

We conclude that the district court erred in not deeming as admitted Citta's requests for admission upon Facka's failure to timely answer or object to them. However, we hold that a court is not bound by such admissions as to child custody or best interests. Upon our de novo review of the record, we find no abuse of discretion by the district court in its award of custody to Facka or in its calculation of child support. We award Facka attorney fees of $2,500 for her attorney's services on appeal.

AFFIRMED.

# MARTIN E. TITUS, APPELLANT, V. PHYLLIS A. TITUS, APPELLEE.

811 N.W.2d 318

Filed April 17, 2012. No. A-11-222.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.
2. **Divorce: Property Division: Alimony.** In addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2008), in dividing property and considering alimony upon a dissolution of marriage, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation.
3. **Alimony.** Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.
4. ____. Disparity in income or potential income may partially justify an award of alimony.
5. ____. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
6. **Alimony: Appeal and Error.** An appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
7. **Divorce: Property Division: Equity.** The purpose of assigning a date of valuation in a decree is to ensure that the marital estate is equitably divided.
8. **Divorce: Property Division: Appeal and Error.** As a general principle, the date upon which a marital estate is valued should be rationally related to the property composing the marital estate, and the date of valuation is reviewed for an abuse of the trial court's discretion.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Elizabeth Stuht Borchers and Steven J. Riekes, of Marks, Clare & Richards, L.L.C., and J. Schaad Titus, of Titus, Hillis, Reynolds, Love, Dickman & McCalmon, for appellant.

John S. Slowiaczek, Virginia A. Albers, and Jesse S. Krause, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

## INTRODUCTION

Martin E. Titus appeals from an order of the district court for Douglas County, which dissolved his marriage to Phyllis A. Titus. On appeal, Martin challenges the amount and duration of the court's award of alimony to Phyllis and the date the court used for valuation of certain marital property. Because we find no abuse of discretion in either regard, we affirm.

## BACKGROUND

The parties were married in Texas in March 1986 and lived in Omaha, Nebraska, at the time of trial. Two children were born to the parties, with only the youngest child, born in 1992, still a minor at the time of trial. At the time of trial, the parties' oldest child was a senior in college but still resided at home with Phyllis. The youngest child was living at home, was being home-schooled by Phyllis, but was also attending community college classes and had plans to attend college full time in the fall.

The parties separated in July 2009 but continued to operate the finances of their respective homes out of joint checking accounts into which Martin continued to deposit his paychecks and bonuses during the pendency of these proceedings. Martin filed a complaint for dissolution of marriage in the district court on March 15, 2010, and Phyllis answered and filed a counterclaim on April 7.

The parties entered into a property settlement agreement, which contained provisions for the division of real and personal property, the payment of debts, custody, child support, health insurance, and attorney fees and costs. We note that Martin's child support obligation for the youngest child terminated in June 2011, although Martin agreed to continue to provide health insurance and pay any unreimbursed expenses for both children as long as they were students and eligible under the coverage terms of his insurance plan.

The parties' property settlement agreement provided for an equal division of the marital estate. Under the settlement agreement, Phyllis received a debt-free house valued at $415,000. Martin received a debt-free house valued at

$221,556, a time-share valued at $20,000, and a certificate of deposit valued at $54,354. The parties each received a debt-free 2009 vehicle. Business interests, investment accounts, and a joint checking account were divided equally between the parties based on their values as of December 31, 2010, although exact values were not specified in the settlement agreement. Phyllis agreed to make an equalizing payment to Martin of $59,545, resulting in a net award of the specifically valued assets of $355,455 to each party. At trial, Martin was asked approximately how much value Phyllis would be receiving under the terms of the parties' agreement, and he testified that in addition to the debt-free house and vehicle, Phyllis would be receiving at least $1.3 million in cash; retirement funds of at least $200,000; and business interests valued between $700,000 and $1 million. Martin was to receive similar assets of equal value.

The parties were unable to agree on the issues of alimony and the valuation date for retirement accounts, and trial was held on these issues on January 13, 2011.

At the time of the marriage, Martin, a college graduate, was working in the energy industry in Texas earning $24,891 per year. Over the course of the marriage, Martin changed jobs several times, requiring relocation to Missouri, Colorado, and finally Nebraska. In 1995, Martin began working in Omaha for Tenaska Marketing Ventures (Tenaska), a company which is in the business of trading and marketing natural gas. Martin was a senior vice president at the time of trial.

Martin's Social Security statement, which was admitted into evidence, reflects a steady and gradual increase in his taxed Medicare earnings through 2000, when his earnings were $208,862. From 2001 through 2004, his taxed Medicare earnings fluctuated below and above $500,000, and in 2005, they were $728,191. In 2006, Martin entered into a 5-year employment contract with Tenaska, causing his income to increase to over $1 million a year. Martin testified that Tenaska pays a base salary and that successful employees can earn significant bonuses. Martin's annual base salary under the contract was approximately $187,000 with minimal cost-of-living increases. The record shows that Martin has earned significant bonuses

while employed with Tenaska. The parties' joint tax returns show that Martin's adjusted gross income was $1,127,605 in 2006; $2,189,505 in 2007; $1,762,051 in 2008; and $1,508,291 in 2009. Martin's 2010 earnings statement from Tenaska showed earnings of $1,083,721.48. Martin described his compensation under the 5-year contract as "[e]xtraordinary" and testified that he anticipates changes in his income once the contract ends due to various developments in the natural gas industry. Martin expected that his income for 2011 would be "give or take some $500,000" and that in 2012, it would be half of that amount. However, Martin admitted that he could not state with certainty what would happen with regard to the natural gas market in 2011 and beyond and that such predictions were somewhat speculative. Martin also agreed that his future income was "totally unknown." Martin testified that when the 5-year contract ends, he assumes that a new agreement of some type will be reached, which will include a base salary, bonuses, and some type of incentive payment. Martin testified that he would like to work until about age 60.

Martin testified that his monthly expenses were approximately $6,155, and an exhibit reflecting these expenses was received in evidence.

Phyllis did not graduate from college but took courses over a 4- to 5-year period, first in education and then in English and journalism. Phyllis' work experience after high school was mostly administrative and clerical. Phyllis earned $6,018 in taxed Medicare earnings in 1986, the year the parties were married, and her highest yearly income during the marriage was $15,190 in 1989. The last time she had any earned income was in 1990, when she earned $1,227. The parties agreed that Phyllis would not return to work after the birth of their first child and that she would homeschool their children. At the time of trial, Phyllis' duties in regard to home-schooling the parties' youngest child had greatly diminished. Phyllis has been involved in various volunteer activities related to home-schooling and has served on the board of the Home Educators Network, serving as president for 4 years. At the time of trial, Phyllis did not have any specific plans for further education for herself, but she testified that it was something

she would consider after the parties' youngest child finished high school.

Phyllis offered an exhibit estimating her monthly expenses at $6,813. In preparing the exhibit, Phyllis utilized checking account statements and credit card receipts for the previous 3 years. The exhibit identifies the monthly amount for Phyllis' health insurance as "unknown" because at the time Phyllis created the document, Martin was still paying her health insurance. Phyllis estimated that health insurance would cost her $450 to $500 per month once she was no longer covered under Martin's policy. Phyllis also testified that since she prepared the exhibit, her real estate taxes have gone up slightly.

In her testimony, Phyllis requested alimony in the amount of $15,000 per month, although the proposed findings she submitted to the court requested alimony of $18,000 per month until the death of either party or Phyllis' remarriage. Phyllis testified that after paying state and federal taxes on $15,000 in alimony, she would be left with just over $10,000. In addition to covering her monthly expenses, Phyllis hoped to place 10 percent of the alimony payments in savings. During the marriage, the parties contributed 10 percent of their income to their church, and both parties hoped to continue this practice following the divorce.

Phyllis acknowledged that she would be able to earn interest income if she invested the cash she was to receive from the division of the marital estate. Phyllis recalled seeing a spreadsheet prepared by Martin on which he estimated that she should be able to earn around $46,000 a year in interest if she "managed those finances." Phyllis testified that she hoped she would not have to take income from any such investments and that they could be allowed to grow for her retirement.

Martin agreed that an award of alimony was appropriate and testified that he would be willing to pay $10,000 a month in alimony for 5 years.

The district court entered a decree of dissolution on March 9, 2011. The court approved the parties' settlement agreement and incorporated it into the decree. The court found that the retirement accounts should be valued and divided as of December 31, 2010, and that each party's share of the accounts

should be adjusted for investment gain or loss from the date of valuation until the time the accounts were divided. With respect to alimony, the court stated that it had considered the criteria set forth in Neb. Rev. Stat. § 42-365 (Reissue 2008); specifically, the relative economic circumstances of the parties, the history of the contributions to the marriage of both parties, and Phyllis' interruption of her career for the care and education of the parties' children. The court ordered Martin to pay alimony to Phyllis at the rate of $15,000 a month for a term of 120 months, after which time Martin's obligation would be reduced to $7,500 for a term of 24 months.

## ASSIGNMENTS OF ERROR

Martin asserts, consolidated and restated, that the district court abused its discretion in (1) entering an alimony award of $15,000 per month for 10 years followed by $7,500 per month for an additional 2 years and (2) valuing the retirement accounts on December 31, 2010, rather than the date of separation or the date the complaint was filed.

## STANDARD OF REVIEW

[1] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion. *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009).

## ANALYSIS

*Alimony.*

Martin asserts that the district court abused its discretion in entering an alimony award of $15,000 per month for 10 years followed by $7,500 per month for an additional 2 years.

[2] Section 42-365 provides, in part:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the

> marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

In addition to the specific criteria listed in § 42-365, in dividing property and considering alimony upon a dissolution of marriage, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

[3-5] Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). However, disparity in income or potential income may partially justify an award of alimony. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004). In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

Martin does not dispute that an award of alimony was proper, but he asserts that the court erred in the amount and length of the alimony award and argues that the award is excessive based on Phyllis' needs. Martin also argues that Phyllis' monthly expenses are overstated, that the award creates an unjust result because Phyllis will have no incentive to seek employment or further education, and that the award of $15,000 per month represents nearly 100 percent of his monthly base salary, requiring him to invade the corpus of his share of the property division.

The parties were married for 25 years. At the time of trial, Phyllis was 52 years old and in good health. While she attended college and took courses over a period of years, she does not have a college degree. Phyllis was employed in a secretarial capacity early in the marriage, but she has not worked since 1990, when the parties agreed that she would stop working outside the home in order to care for and homeschool the parties' children. The parties' children have both reached the

age of majority, so their care will not be a factor in Phyllis' postdivorce efforts to provide for herself, although it does not appear that Phyllis has any concrete plans to pursue either further education or employment. Phyllis' earnings prior to 1990 were nominal when compared to those of Martin, who was earning over $1 million at the time of trial. Martin's average gross monthly income, including the base salary and bonuses, for 2006 through 2010 was $124,000 per month, although the annual amount had declined from over $2 million in 2007 to just over $1 million in 2010. Martin was almost 50 at the time of trial and anticipated working for another 10 years. He also anticipated that his income would be decreasing after the end of the 5-year contract due to changes in the natural gas industry; however, he admitted that his future income was speculative. Both parties have relatively similar monthly expenses, both parties reside in debt-free homes, and each party received assets valued at approximately $355,455, as well as equal shares of cash, investments, and business interests—which combined are of significant value, and from which the parties may earn additional income.

There is little guidance in Nebraska jurisprudence relating to alimony awards in high-income cases, and the usual statutory factors and precedential case law do not specifically address the circumstances in such a case as this. Indeed, most cases involving alimony involve circumstances in which "there is not enough money to go around." Martin urges us to focus on the "need" factor, indicating that the award of alimony was beyond what Phyllis needs to meet her monthly expenses, particularly considering her ability to receive interest income from assets awarded to her in the division of property. Martin argues that the award of alimony goes beyond what is necessary to assist Phyllis "during a reasonable time to bridge that period of unavailability for employment or during that period to get proper training for employment." See *Bauerle v. Bauerle*, 263 Neb. 881, 890, 644 N.W.2d 128, 135 (2002).

While need is certainly a factor in analyzing alimony, it is only one of several factors that our analysis comprises. Indeed, if we were to focus solely on the element of need, as suggested by Martin, we would be inclined to note that neither

party really "needs" income beyond that which is necessary to meet their monthly expenses. Focusing solely on Phyllis' needs would require us to ignore several of the other factors relevant to an alimony award. Such factors include the relative economic circumstances, the disparity in the parties' incomes and earning capacities, and the general equities of the case.

This court previously dealt with the issue of alimony in a situation where there was a great disparity between the parties' incomes. In *Myhra v. Myhra*, 16 Neb. App. 920, 756 N.W.2d 528 (2008), we found that an award to the wife of $3,000 per month until she reaches the age of 65 years, dies, or remarries was not an abuse of discretion. In that case, the parties were married for nearly 30 years and each party made substantial contributions to the marriage. The husband earned more than $800,000 in each of the 2 years preceding trial. The wife had previously earned $60,000 a year, but at the time of trial was earning $25 per hour working part time while being primarily responsible for raising the parties' three children. Rejecting the husband's claim that the alimony award was unreasonable, we concluded that an award of $36,000 per year for a maximum of approximately 10 years "seems rather insignificant and completely appropriate" and that the husband will have "no problem" paying the alimony. *Id.* at 933, 756 N.W.2d at 541.

In *Kricsfeld v. Kricsfeld*, 8 Neb. App. 1, 588 N.W.2d 210 (1999), this court was asked to review an alimony award involving relatively high income. The parties had been married for 27 years and had three children, the youngest of whom was nearly 18 years old at the time of trial. The wife had a college degree in education; however, her teaching certificate had lapsed due to her taking care of the children. At the time of trial, the wife had been working part time as a substitute teacher and was taking courses to get her recertification. The record showed that if the wife obtained a teaching position after receiving her recertification, she could earn approximately $21,000 a year. The wife also hoped to get her master's degree. The husband had an annual income of $372,000 and a net monthly income of $17,196. He was also awarded assets of significant value in the property division. The wife was awarded nearly $495,000

of the husband's profit-sharing plan and additional personal property valued at $146,000. The trial court awarded the wife alimony in the sum of $6,000 per month until she reaches age 65, dies, or remarries. At the time of trial, the wife was 48 years of age and the husband was 50 years old. On appeal, the wife claimed that the alimony award was inadequate to meet her monthly needs, which she estimated to be approximately $6,140. The husband challenged the duration of the alimony award. After reviewing the statutory and case law criteria for alimony awards, which mirrors what we have set forth above, this court determined that the alimony award was not an abuse of discretion in either amount or duration.

[6] In reviewing the award of alimony in the case at hand, we are mindful that an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008). After considering all of the factors involved in an award of alimony and the particular facts of this case, we cannot say that the trial court's award is untenable. The award of $15,000 per month is approximately 16 percent of Martin's gross monthly income from 2010. Both parties have the same opportunity to realize additional income from the assets awarded to them in the division of property. Unlike the wives in *Myhra v. Myhra*, 16 Neb. App. 920, 756 N.W.2d 528 (2008), and *Kricsfeld v. Kricsfeld, supra*, Phyllis does not have a college degree and has not worked outside the home for 20 years. The award of $15,000 per month for 10 years, and $7,500 per month for 2 years thereafter, is not an abuse of discretion.

Martin expresses concerns about being able to seek a modification of his alimony obligation at a later date since he testified that he expected his income to decline after the 5-year contract ends. See *Metcalf v. Metcalf*, 278 Neb. 258, 769 N.W.2d 386 (2009) (changes in circumstances within contemplation of parties at time of decree do not justify change or modification of alimony order). In order to address that concern, we find that our decision to affirm the award of alimony is based upon Martin's earnings prior to the time of trial and not

upon Martin's testimony about future changes to his income, which testimony we find to be speculative. We find that in the event a motion to modify because of a reduction in Martin's income is filed, such a change shall not be deemed a change that was in the contemplation of, or anticipated by, the parties. See *Thompson v. Thompson*, 18 Neb. App. 363, 782 N.W.2d 607 (2010).

*Valuation Date.*

Martin asserts that the district court erred in valuing the retirement accounts on December 31, 2010, rather than the date of separation or the date the complaint was filed. He argues that the marriage was clearly over at the time the parties separated and that Phyllis made no contributions to the marriage during the separation which would justify considering the retirement accounts as marital property during that time. Alternatively, he argues that the court should have used the date the complaint was filed or the date Phyllis filed her answer and counterclaim, because she admitted in the answer and counterclaim that the marriage was irretrievably broken.

[7,8] The purpose of assigning a date of valuation in a decree is to ensure that the marital estate is equitably divided. *Blaine v. Blaine*, 275 Neb. 87, 744 N.W.2d 444 (2008). As a general principle, the date upon which a marital estate is valued should be rationally related to the property composing the marital estate, and the date of valuation is reviewed for an abuse of the trial court's discretion. *Id.*

The valuation date used by the district court is consistent with the date used by the parties in valuing other assets in the settlement agreement, and we note that the parties maintained joint finances through the date of trial. Trial was held on January 13, 2011. The court did not abuse its discretion in valuing the retirement accounts on December 31, 2010.

## CONCLUSION

The district court did not abuse its discretion in its award of alimony or in valuing the retirement accounts on December 31, 2010.

AFFIRMED.

# GILL L. PARKS, APPELLEE, V. MARSDEN BLDG MAINTENANCE, L.L.C., AND ZURICH AMERICAN, APPELLANTS.

811 N.W.2d 306

Filed April 17, 2012. No. A-11-610.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the finding of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.
3. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
4. **Workers' Compensation: Negligence.** When a personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury.
5. **Workers' Compensation: Proof.** The two phrases "arising out of" and "in the course of" in Neb. Rev. Stat. § 48-101 (Reissue 2010) are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist.
6. **Workers' Compensation: Words and Phrases.** The phrase "arising out of," as used in Neb. Rev. Stat. § 48-101 (Reissue 2010), describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of," as used in § 48-101, refers to the time, place, and circumstances surrounding the accident.
7. **Workers' Compensation: Trial.** Whether an injury is caused by a work-related accident for workers' compensation purposes is a question of fact.
8. **Workers' Compensation: Witnesses.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
9. **Workers' Compensation.** The test to determine whether an act or conduct of an employee which is not a direct performance of the employee's work "arises out of" his or her employment is whether the act is reasonably incident thereto, or is so substantial a deviation as to constitute a break in the employment which creates a formidable independent hazard.

10. ____. The "arising out of" employment requirement of Neb. Rev. Stat. § 48-101 (Reissue 2010) is primarily concerned with causation of an injury.
11. ____. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his or her work, are regarded as being within the scope or sphere of the employment.
12. **Workers' Compensation: Words and Phrases.** The "in the course of" requirement of Neb. Rev. Stat. § 48-101 (Reissue 2010) has been defined as testing the work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment.
13. ____: ____. An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto.

Appeal from the Workers' Compensation Court. Affirmed.

Justin K. Burroughs and Jason A. Kidd, of Engles, Ketcham, Olson & Keith, P.C., for appellants.

Harry A. Hoch III and Ronald E. Frank, of Sodoro, Daly & Sodoro, P.C., for appellee.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

INBODY, Chief Judge.

## I. INTRODUCTION

Marsden Bldg Maintenance, L.L.C., and its workers' compensation insurer, Zurich American (collectively Marsden), appeal the order of the Workers' Compensation Court review panel affirming the trial court's award of benefits to Gill L. Parks. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. For the following reasons, we affirm.

## II. STATEMENT OF FACTS

In 2009, Parks was employed by two separate employers at two different jobs. Parks was employed by the State of Nebraska as a communications technician or specialist,

installing computers and telephones and running cables through drop ceilings. Parks' hours with the State were from 6 a.m. to 3 p.m. Parks was also employed by Marsden as a janitorial supervisor and worked from 4 p.m. to midnight. Parks was assigned by Marsden to the Dex building located at 94th and Dodge Streets and the Omaha Public Power District (OPPD) building located at 114th and Dodge Streets, both in Omaha, Douglas County, Nebraska. As a supervisor, Parks' duties at the Dex building consisted of inspecting the building, cleaning the first and second floors of the building, cleaning the stairwells, and assisting in the cleaning of the fifth floor. Additionally, Parks would clean empty suites in the building whenever necessary.

Generally, Parks reported to the Dex building at 4 p.m. At that time of the day, a door on the south side of the building was open and required no key or access card. However, Parks' supplies were located in a cleaning cabinet in a janitor's closet on the first floor, each of which required a key for entry. The cabinet also contained a pouch with two access cards issued by the building's landlord with codes to track the specific cardholder. The access card was also necessary to gain access to the building after 6 p.m., when the building was locked entirely, and to gain access to the suites in the building. Parks wore his identification badge on a lanyard around his neck with his access card also attached.

On March 11, 2009, Parks traveled to Marsden's office on 72d Street and Mercy Road to pick up cleaning rags for the Dex building. Upon his arrival at the Dex building, Parks clocked in at 4 p.m. Parks went to the janitor's closet, where he realized that he had left his lanyard with his identification badge and access card at his home. Parks locked the closet and left the building to return home to retrieve those items. On his way back to the Dex building, Parks was involved in a serious motor vehicle accident which required the use of the "Jaws of Life" to extricate him from the vehicle. Parks sustained a traumatic brain injury, spinous process fractures of the T7 through T11 vertebrae, a ruptured spleen, a left-side pneumothorax, and multiple rib fractures. At a hospital, Parks underwent a splenectomy, an exploratory laparotomy,

and placement of a left-side tube thoracostomy. On March 31, Parks was discharged from the hospital and transferred to a rehabilitation center, where he remained until April 14. Parks was eventually terminated from Marsden after being placed on leave and not being able to return by the end of his leave date.

On July 6, 2009, Parks filed a petition in the Workers' Compensation Court alleging that he sustained the above-described injuries in an accident arising out of and in the course of his employment with Marsden. Marsden filed an answer denying the allegations and claiming that Parks was not in the course or scope of his employment at the time of the accident.

Prior to trial, the parties agreed that the sole issue at trial would be whether the automobile accident arose out of and occurred in the course and scope of Parks' employment and that after the trial court had reached its decision regarding that issue, a second hearing would be held to determine the remainder of the issues, if necessary. We will set out the testimony given at both hearings together. As a side note, substantial testimony was given at trial regarding the pass, access, or swipe cards and, to avoid any confusion, we shall refer to those cards hereinafter as "access cards."

Parks testified that at the time of trial, he was 53 years old and had graduated from high school, but had no college degree. Parks explained that he had been employed as a communications technician for the State for 30 years, working full time at a rate of $16 per hour. Parks had also worked for Marsden for 5 years. Parks testified that he worked approximately 20 hours a week for Marsden during the first 4 years and eventually shifted into a full-time position working approximately 40 hours a week. Prior to this position with Marsden, Parks worked for other building maintenance companies.

Parks testified that, with Marsden, he would first go to the Dex building and complete his tasks, and then would drive to the OPPD building and complete his tasks there. Parks supervised one other individual at the Dex building, but did not supervise anyone at the OPPD building. Parks testified that his schedule with Marsden was 4 p.m. to midnight, Monday

through Friday. Parks explained that on many occasions, he would work longer than 8 hours for Marsden but was always paid for only 8 hours a day. Timekeeping reports from dates prior to the accident indicate that Parks regularly clocked in for work at 4 p.m. at the Dex building, although sometimes it was a few minutes before and sometimes a few minutes after 4 p.m.

Parks explained that he parked in the general access parking lot at the Dex building and would enter on the south through an open door. Parks was responsible for the janitor's closet key, which was provided by the Dex building engineer and which he kept on his key chain. Parks also was responsible for the cleaning cabinet key, which was given to him by Marsden and which he similarly kept in his possession. Parks testified that in the cleaning cabinet, there was a pouch for the access cards, in addition to cleaning supplies. Parks testified that two access cards were supposed to be kept in the pouch, but Parks kept his access card attached to his identification badge, which he was required to wear in the Dex building as a Marsden employee. Parks testified that the access card was necessary to gain entrance into the building after 6 p.m., in addition to other secured areas which Parks was required to clean. Parks was not required to maintain an access card for the OPPD building and instead had a key which gave him access to the building for cleaning.

Parks testified that on March 11, 2009, he first went to the Marsden office on 72d Street and Mercy Road for supplies, as he often did. Parks testified that he did not receive extra compensation for picking up the supplies and that it was his responsibility to keep the closet stocked. Parks traveled to the Dex building, clocked in at 4 p.m., and unloaded the supplies, when he realized that he did not have his lanyard with the identification badge and access card. Parks testified that he immediately locked up the cabinet and janitor's closet and drove home for those items. Parks testified that his home was approximately 10 minutes away from the Dex building. Parks testified that he had forgotten his lanyard on other occasions and had traveled home to pick it up. Parks explained that without the access card, he would not have been able to complete

his duties, because once the building was "locked down" at 6 p.m., he would not be able to reenter unless he called his coworker and he still needed the access card for access to the suites in the building. Parks testified that he drove straight home and made no other stops. At his home, Parks opened the garage door, went inside to retrieve his lanyard, and started to drive back to work. At approximately 4:34 p.m., Parks was involved in a serious traffic accident, which he does not remember much about.

Parks testified that at that time, he was required to clock in by calling into a newly instituted automated system and also by compiling a handwritten log of the hours he worked, which he turned in every 2 weeks. Parks testified that in 2003, he was given an employee manual, but that he was never given any written or oral instructions regarding what protocol to follow if his access card had been forgotten and, specifically, was never told he was not allowed to leave to pick up his access card, was never told to call someone else to arrange to have the card picked up, and was never disciplined for leaving work to pick it up prior to that time. Parks testified that his supervisor since January 2009, Thomas Collen, did not instruct Parks to call him if Parks forgot his access card. Parks understood that it was Marsden's policy that he was not supposed to leave the building for personal breaks, but testified that he was unaware of any policy about leaving for an identification badge and/or access card.

Parks testified that Collen had been to the Dex building on one occasion and that Parks had contact with Collen only via telephone calls if Parks needed approval to clean additional suites or for issues with the building engineer. Parks testified that Collen had an access card for access to the Dex building, but that on the one occasion Collen stopped by the building, he had called Parks to let him in because Collen did not have his access card with him. Parks testified that the single access card which was left in the pouch on March 11, 2009, was an extra card and that the building manager had instructed Parks and his coworker to not use the extra access card.

Parks explained that he was also no longer employed with the State. His State position required him to install computers,

set up cablelines, and wire drop ceilings and floors. Those tasks required Parks to get underneath floors and above ceilings, climb up and down ladders, get into crawl spaces, carry equipment, take apart cubicles, and move desks. Parks testified that at Marsden, his duties involved physical work such as taking out trash, vacuuming, dusting, carpet and window cleaning, raking, and mopping stairwells. Parks testified that those duties required bending, lifting, and walking. Parks testified that, after the accident, he did not feel he could perform those duties any longer.

Parks also testified that he receives Social Security disability benefits. Parks testified that he takes numerous medications and still has visits with his doctors for pain and for psychiatric matters. Parks also utilizes a "TENS unit" two or three times a day for rib pain and muscle tension.

Parks' wife, Thelma Parks, testified that Parks wore his Marsden identification badge and access card home every night. Thelma explained that in the 2-year period prior to March 11, 2009, Parks had forgotten those items on several occasions and would call Thelma to inform her that he was coming home and would like her to bring the lanyard out to the car. Thelma described the extensive time that Parks spent in the hospital in intensive care and in rehabilitation after the accident, which included both physical and speech therapy. Thelma testified that Parks has difficulty with his speech, oftentimes slurring his words when he gets tired, that Parks' speech is markedly slower, and that Parks has to take time before speaking.

Thelma testified that she tries to keep Parks on a schedule so that he can take his medications on time, which medications include Abilify, Metformin, Lisinopril, Zoloft, Glupride, Hydrochlorot, Tamsulosin, Clonidine, and a Lidoderm patch. Thelma testified that since the accident, Parks had become increasingly forgetful. For example, Thelma explained that before the accident, Parks was in charge of the family finances, but since has forgotten on several occasions to pay bills or put entries in the checkbook, which resulted in overdrafts. Thelma testified that Parks could no longer do other things he did prior to the accident, such as mowing and lawn care, shopping,

cooking, vacuuming, dusting, and other housework. Thelma testified that he could no longer lift or push much weight and lost his balance easily. Parks is no longer able to participate in sports with his son due to pain and cannot run because he now requires the use of a cane. Parks also no longer engages in recreational activities as he did before, such as fishing, and no longer enjoys socializing with friends and family. Thelma testified that they no longer go to movies because Parks cannot sit for long periods of time. Furthermore, Parks no longer drives a vehicle because he frequently experiences dizzy spells.

Thelma testified that throughout their 29 years of marriage, Parks had almost always worked two jobs, but she did not think that he could work any longer. Thelma also testified that since the accident, Parks was increasingly emotional and had become afraid of numerous things, such as thunderstorms. Thelma described that before the accident, Parks had been fun and had enjoyed joking and having a good time, was outgoing, and had a positive attitude, but since that time was "not the same." Thelma testified that Parks takes medication three times a day as scheduled by his doctors and still undergoes medical care and treatment. Thelma testified that he still has appointments at the hospital, at a psychiatric clinic, and with a doctor for chronic pain.

Douglas Saxton, a branch manager for Marsden, testified that Marsden's policy was to "[p]hone in your clock-in number when you arrive" and to clock out on the way out. Saxton testified that the company handbook further outlined a policy requiring employees to have a supervisor's approval before leaving a client's premises. In his deposition testimony, Saxton testified that the policy regarding access cards was that employees were required to have their own access cards and could not share or "'piggyback'" with others, so the employee with the access card would be allowed to enter the building but the remaining employee would need to get his or her card.

Collen testified that he had been operations manager for Marsden since January 2009, which included the supervision of janitorial services at 18 buildings around Omaha. Collen

testified that the Dex building was one such building and that he was Parks' supervisor on March 11, 2009. Collen explained that one of his duties was to keep a building's cleaning supplies stocked through requests from supervisors and that he advised Parks to contact him if the building was running low on supplies. Collen testified that Parks' specific work schedule at the Dex building was supposed to be Monday through Friday from 5 p.m. to 10 p.m., that Collen had never given Parks permission to work earlier than 5 p.m., and that he had no knowledge that Parks was clocking in prior to that time. Collen testified that he did not know what Parks' schedule was at any other building which Parks had duties at, such as the OPPD building, because Collen was not responsible for that building. Collen testified that Marsden has a strict policy that employees are not allowed to deviate from their specific schedules without permission and that he has fired employees for violating that policy. Collen testified that he visited the Dex building every 2 to 3 weeks and that after 5 p.m., the Dex building required an access card for entrance which was not interchangeable between employees, although Collen had the authority to "loan out" his particular card in a situation where an employee might have forgotten his or her access card. Collen testified that if an employee forgets an access card, he or she could call him. Collen explained that Marsden's policy also required employees to clock in when they arrived at a building and to clock out when they left and that he had also fired employees for violating that policy. Collen testified that on March 11, 2009, Parks did not have permission to leave the Dex building.

On cross-examination, Collen testified that until his deposition, he was unaware Parks was clocking in early, and that he had never had any complaints about Parks' early arrival, so he "presumed that [Parks] was keeping to his schedule." Collen testified that Parks was not allowed to pick up supplies from the Marsden office and that he believed Parks was mistaken in his testimony that he went to the office's supply room on several occasions. Collen testified that he was not aware of and did not look at the timekeeping records until a deposition in this case was held, well after the accident. Collen testified

that he was unaware of any policy set forth by Dex that two employees could not use the same access card.

On June 25, 2010, the trial court entered an order finding that Parks' March 11, 2009, accident and injuries arose out of and occurred in the course and scope of his employment with Marsden. Marsden filed an application for review of the trial court's determination. Parks filed a motion to strike the application for review, alleging that the order was not a final order. On September 7, 2010, the review panel determined that the June 25 order was not final and that Marsden's application for review was premature. On November 15, a second hearing was held to resolve the outstanding issues, during which more testimony was given and numerous medical records, physician notes, evaluations, and letters were also received into the record.

On November 24, 2010, the trial court issued an award finding that Parks was temporarily totally disabled from March 12 through August 10, 2009, for a period of 21⅐ weeks and was entitled to $245.02 a week. The trial court found that Parks returned to work with the State on August 11 for $16 per hour and 20 hours a week and that Parks was earning $47.53 a week less without his earnings from Marsden. The court found that Parks worked through December 11 for a period of 17⅐ weeks and was entitled to compensation at a weekly rate of $31.69. The court further determined that Parks' employment with the State was terminated because of his inability to do his job satisfactorily and that he became temporarily totally disabled again from December 12, 2009, through April 22, 2010, and was entitled to 18⅐ weeks of compensation at a weekly rate of $245.02. The court found that on April 23, Parks reached maximum medical improvement and was therefore permanently and totally disabled and entitled to compensation of $245.02 a week.

The trial court determined that based upon expert testimony, future medical care was necessary, and ordered Marsden to pay for such as is reasonable and necessary. The trial court also ordered that Marsden be responsible for various hospital and medical bills and reimbursement to Blue Cross Blue Shield for expenses incurred as a result of the accident.

On December 6, 2010, Marsden again filed an application for review, alleging that the trial court erred entirely in its findings set forth in the June and November 2010 orders. A hearing was held on the matter, after which the review panel affirmed the trial court's award in its entirety. Marsden has now timely appealed to this court.

## III. ASSIGNMENTS OF ERROR

Marsden assigns, rephrased and consolidated, that the review panel erred by affirming the following findings made by the trial court: (1) that Parks' accident and injuries sustained in the March 11, 2009, accident arose out of and in the course and scope of his employment with Marsden; (2) that Parks was entitled to temporary partial and temporary total disability benefits; (3) that Parks is now permanently and totally disabled as a result of the March 11 accident; (4) that Marsden was responsible for Parks' past hospital and medical expenses resulting from the accident; (5) that Marsden reimburse Parks and Blue Cross Blue Shield for medical expenses; and (6) that Marsden be responsible for future medical care.

## IV. STANDARD OF REVIEW

[1-3] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Pearson v. Archer-Daniels-Midland Milling Co.*, 282 Neb. 400, 803 N.W.2d 489 (2011). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the finding of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong. *Id.* With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Id.*

## V. ANALYSIS

### 1. "Arising Out of" and "In the Course of"

Marsden first contends that the trial court erred by determining that Parks' accident and injuries sustained in a motor vehicle accident on March 11, 2009, arose out of and in the course and scope of his employment with Marsden. Marsden argues that Parks' actions were a substantial deviation from his employment.

[4] When a personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury. See, Neb. Rev. Stat. § 48-101 (Reissue 2010); *Zoucha v. Touch of Class Lounge*, 269 Neb. 89, 690 N.W.2d 610 (2005).

[5,6] The two phrases "arising out of" and "in the course of" in § 48-101 are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist. *Zoucha v. Touch of Class Lounge, supra*; *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000). The phrase "arising out of," as used in § 48-101, describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of," as used in § 48-101, refers to the time, place, and circumstances surrounding the accident. *Zoucha v. Touch of Class Lounge, supra*; *Logsdon v. ISCO Co., supra.*

[7,8] Whether an injury is caused by a work-related accident for workers' compensation purposes is a question of fact. See *Hale v. Vickers, Inc.*, 10 Neb. App. 627, 635 N.W.2d 458 (2001). As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997); *Hernandez v. Hawkins Constr. Co.*, 240 Neb. 129, 480 N.W.2d 424 (1992).

(a) "Arising Out of" Employment

[9,10] The test to determine whether an act or conduct of an employee which is not a direct performance of the employee's work "arises out of" his or her employment is whether the act is reasonably incident thereto, or is so substantial a deviation as to constitute a break in the employment which creates a formidable independent hazard. *Misek v. CNG Financial*, 265 Neb. 837, 660 N.W.2d 495 (2003). The "arising out of" employment requirement is primarily concerned with causation of an injury. *Id.*

[11] All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his or her work, are regarded as being within the scope or sphere of the employment. *Id.*; *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996).

In this case, Parks was not traveling to his home for matters of personal convenience or comfort, but out of what he thought was a necessity arising from his employment with Marsden. The Marsden handbook was referred to by various Marsden employees and received into evidence as an exhibit, although at no time did any of those individuals speak directly as to which portion of the manual they were testifying about. From our review of the record, it appears that there are sections pertinent to this case. Under "General Information," the manual states that "[y]our Manager will specify working hours for your particular job assignment. There is no deviation from such assignment without your Manager's prior permission." The manual further discusses "Effective Security Procedures" and states that employees are to "[n]ever unlock or open a secured door for anyone, even if you recognize them. If they have a right to be there, they will have their own key." The handbook also indicates that employees are required to carry their keys or security cards hung around the neck or attached to a belt loop and that a failure to do so may result in a written warning or termination, but that the keys and security cards are to remain in the building overnight. Specifically, "[i]f an associate takes a set of keys or a security card home, he/she is to notify

his/her supervisor or the Marsden office immediately. It is the associate's responsibility to immediately return the keys to the building or the main office."

The testimony between Saxton and Collen was in conflict with regard to various issues and policies within Marsden, including proper usage of access cards and the new time-clock system which was being introduced at the time of the accident. In his deposition testimony, Saxton testified that the policy regarding access cards was that employees were required to have their own access cards and could not share or "piggyback" with others, so the employee with the access card would be allowed to enter the building but the remaining employee would need to get his or her card, as indicated in the policies. On the other hand, Collen's testimony indicated that employees could share the access cards or that Collen had the authority to loan out his access card. Parks testified that while he was unfamiliar with the various handbook requirements, he did understand that he was required to carry his identification badge and access card with him at the Dex building, that the access card was employee specific, that sharing of those cards was not allowed, and that Parks needed the access card to complete his assigned duties at the Dex building. Parks further testified he had never been told that he was not allowed to leave work to retrieve his access card or that he had to first contact Collen.

Thus, under the facts of this case, we find that while Parks may have deviated from his employment regarding the handbook policy of clocking out and getting permission when leaving the building, that deviation was not substantial and was reasonably incident to his employment with Marsden. Parks' injury arose out of his employment with Marsden, and the trial court did not err in finding as such.

(b) "In the Course of" Employment

[12,13] The "in the course of" requirement of § 48-101 has been defined as testing the work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is

related to the employment. *Misek v. CNG Financial*, 265 Neb. 837, 660 N.W.2d 495 (2003). An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto. *Id.*

In its findings regarding the "in the course of" requirement, the trial court relied upon the case of *Gray v. Broadway*, 146 So. 2d 282 (La. App. 1962), wherein the employee, a truck-driver, reported to work and received instructions from the employer regarding what truck he would be driving. Once the employer left, the employee realized that he had left his driver's license at his home. The employee left work to retrieve the license and was involved in an automobile accident. The Court of Appeal of Louisiana, in reversing the trial court's decision, determined that the employee's trip to retrieve the license was an act naturally related to and incidental to the duties as a truckdriver and was necessary for the employee to drive the truck on the highway and that the employee had already reported to work. Therefore, given those circumstances, the court concluded that the employee's injuries occurred in the course of his employment.

In the case at hand, the accident occurred at approximately 4:34 p.m., after Parks had already arrived at the Dex building to report for work, clocked in, and attempted to begin his duties. A portion of Parks' job required him to travel to different buildings to complete his duties, and Parks testified that he had left the Dex building several times in his 5 years of employment to go home to retrieve the access card, which card was necessary for Parks to fulfill his work duties at the Dex building. Testimony was given by Collen that Parks could fulfill his duties without the access card, while other testimony was also given that each employee was required to have his or her own access card and could not share those cards. Based upon the facts of this case, the trial court determined that Parks' injury arose in the course of his employment. We are mindful that factual determinations made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong, and therefore, we

find that the trial court was not clearly wrong in making this determination. See, *Misek v. CNG Financial, supra*; *Torres v. Aulick Leasing*, 261 Neb. 1016, 628 N.W.2d 212 (2001).

### 2. Remaining Assignments of Error

In its brief, Marsden consolidates the remaining assignments of error regarding temporary total disability benefits, temporary partial disability benefits, permanent total disability benefits, reimbursement of medical expenses and mileage, payment of past hospital and medical expenses, future medical care, and reimbursement of any hospital and medical expenses into a single argument that Parks was not entitled to any of these benefits because the trial court erred by determining that the accident arose out of and in the course and scope of his employment. Marsden's brief contains no other argument or support for its contentions that the trial court erred in these determinations.

Thus, in reviewing this argument, we find that, having determined that the trial court did not err in its determination, we need not address the outstanding assignments of error. See, *In re Interest of Leland B., ante* p. 17, 797 N.W.2d 282 (2011); *Curtis v. Curtis*, 17 Neb. App. 230, 759 N.W.2d 269 (2008) (appellate court is not obligated to engage in analysis which is not necessary to adjudicate case and controversy before it).

## VI. CONCLUSION

Parks' injury, sustained upon his return home to retrieve the access card for the Dex building, arose out of and in the course of his employment with Marsden. The trial court did not err in this determination, and as such, we affirm the trial court's order and award in its entirety.

Affirmed.

# IN RE INTEREST OF ENRIQUE P. ET AL., CHILDREN UNDER 18 YEARS OF AGE.
# STATE OF NEBRASKA, APPELLEE, V. DARLENE H., INTERVENOR-APPELLANT.

813 N.W.2d 513

Filed April 17, 2012. No. A-11-662.

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. ____: ____. An appellate court reviews questions of law independently of the juvenile court's conclusions.
3. **Indian Child Welfare Act: Child Custody: Appeal and Error.** Under the Indian Child Welfare Act, factual support must exist in the trial record for the purpose of appropriate appellate review as to good cause for failure to comply with statutory child placement preference directives.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH, Judge. Reversed and remanded for further proceedings.

Jonathan Seagrass, of Legal Aid of Nebraska, for appellant.

No appearance for appellee.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

MOORE, Judge.

## INTRODUCTION

Darlene H., the maternal grandmother of the children in this case, appeals from an order of the separate juvenile court of Douglas County, which ordered the immediate cessation of all efforts by the Nebraska Department of Health and Human Services (the Department) to place the children with relative foster care or adoptive placements. On appeal, Darlene alleges that the court erred in deviating from the placement preferences set forth in the federal Indian Child Welfare Act (ICWA) and the Nebraska Indian Child Welfare Act (NICWA) without making a finding of good cause for such deviation. The State has waived filing a brief in this case. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev.

2008), this case was ordered submitted without oral argument. Because we find that the juvenile court erred in ordering the cessation of all efforts for relative placement, we reverse the order and remand the cause for further proceedings.

## BACKGROUND

This case revolves around the ongoing and longstanding juvenile proceedings involving four children: Enrique P. (born in June 1993), Carina P. (born in December 1995), Christian P. (born in November 1999), and Christianna P. (born in December 2001). In 2003, the children were adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) in that they lacked proper parental care by reason of the faults or habits of their mother, Shannon P. Because of the children's enrollment, or eligibility for enrollment, in the Omaha Tribe, the NICWA has been applied to the case. The Omaha Tribe was given leave to intervene as a party in March 2004.

Shannon died in January 2007. The Department has been unsuccessful in its attempts to locate the children's alleged fathers. Darlene was given leave to intervene as a party in May 2007. The children have been in numerous out-of-home placements since 2003, and for several years, the permanency objective has been adoption. A previous appeal by Darlene following orders entered in 2009 and 2010 was dismissed, for lack of an appealable order, in a decision without opinion on May 19, 2010, in case No. A-10-329.

The present appeal arises out of orders entered by the juvenile court following an adoption review and permanency planning hearing held on June 16, 2011. This hearing was held at the request of the children's guardian ad litem (GAL), who filed a motion for early review alleging that there had been no movement toward obtaining permanency for the children since the previous court date and asking that the matter be set for an early review to assess the progress of the case toward achieving permanency.

The court received various exhibits into evidence, including a June 9, 2011, court report from the Department, a report from the State Foster Care Review Board (FCRB), and a report from the GAL. In addition, the caseworker who had been assigned to

the case since May 3, 2011, and who prepared the court report, also testified about the Department's efforts to locate adoptive placements for the children.

The record shows that since entering foster care in June 2003, Enrique has lived in 9 foster homes, Carina has lived in 14 foster homes, Christian has lived in 13 foster homes, and Christianna has lived in 11 foster homes. All of the children were placed together in a potential adoptive home in Minnesota in 2009; however, this placement lasted only about 3 months due to allegations by Christianna of physical abuse that eventually proved to be unfounded. The children were returned to Omaha, Nebraska, where they have remained.

At the time of the June 2011 hearing, the permanency objective for all of the children was adoption. Enrique is 18 years old (he turns 19 in June 2012), Carina is 16, Christian is 12, and Christianna is 10. Enrique and Christian are placed together with foster parents who are willing to provide permanency, either through adoption or guardianship. The boys are doing well in this placement and have indicated that they would be happy to remain with their current family. Enrique has stated that he does not want to be placed with relatives due to the length of time it has taken them to care for him and his siblings. Christianna's current foster mother reportedly does not wish to provide permanency for Christianna through adoption or guardianship; however, she is willing to continue to provide foster care to Christianna for as long as necessary. Due to the lack of a permanent placement for Christianna, the caseworker made attempts to contact a relative of Christianna's living in Macy, Nebraska, and also attempted to contact a relative living in Sioux City, Iowa, apparently without any positive results. We note that the only mention of seeking relatives for purposes of placement in the court report was in regard to Christianna. At the time of the June 2011 hearing, Carina was in the process of receiving inpatient treatment for substance abuse and other issues, but she had expressed a desire to return to her most recent foster placement upon completion of her treatment. Carina's most recent foster mother was willing to provide permanency for Carina through adoption or guardianship.

In the court report, the caseworker stated that the children needed to obtain permanent homes immediately due to the length of time the children had been in foster care and the number of placements. The court report recommended continued custody of the children in the Department for appropriate care and placement and showed the goal of achieving the primary permanency plan of adoption by July 1, 2011, for all four children. Because the children remain tightly bonded to one another, the Department continued to support sibling visits and agreed to facilitate a continuance of sibling visits once the children were in permanent homes. The court report indicated that the Department would continue to pursue relatives "for the purpose of maintaining connections with family member[s]." According to the testimony of the caseworker, the efforts he had been making to contact relatives were not interfering with other efforts the Department was making to locate adoptive placements for the children.

The GAL opined in her report dated May 25, 2011, that the children's current placements were in their best interests. The GAL also expressed her belief that Enrique, Christian, and Christianna had found homes willing to provide permanency for them and recommended that permanency for those three children be secured as soon as possible. With respect to Carina, the GAL noted that Carina had expressed a desire to return to her former foster home upon completion of her treatment and that the former foster parents had expressed a desire to have Carina in their home. The GAL recommended that the Department facilitate therapy between Carina and her former foster parents while Carina was in the process of completing her treatment.

The FCRB, in its report dated June 2, 2011, noted current barriers to achieving adoption for the children, including the length of time the children had been in foster care; caseworker turnover; the Department's lack of contact or visitation with the children; Carina's behavioral issues; the fact that the Department was checking into relatives to take all four children, which would mean another placement disruption and more time in foster care; and a report by a child placement worker who did not believe that the children would do well

if placed all together again. The FCRB's recommendations for alleviating those barriers included ceasing efforts to locate relatives to take all four children together, making permanency and placement decisions for each child individually, pursuing adoption for Enrique and Christian in their current placement and completing their adoption as soon as possible, locating an adoptive placement for Carina, and questioning Christianna's foster parents about their willingness to keep her and the possibility of a guardianship. The FCRB report noted that the Department had received the names of three other relatives of the children and that the caseworker intended to follow up with them regarding potential placement of all of the children. The FCRB agreed with the permanency objective of adoption and stated that it would also support guardianship if necessary. The FCRB found that no progress had been made toward the permanency objective of adoption because the Department continued to check into relatives for adoption.

After receiving the documentary evidence and hearing the caseworker's testimony, the juvenile court asked for comments or objections regarding the recommendations outlined in the court report. The county attorney stated his agreement with the recommendations and informed the court, "We're starting to see some progress in terms of permanency for all the children. I think that's just the path we need to maintain at this point in time." The GAL noted that Christianna's placement was not an adoptive placement, even though Christianna felt at home there, and that accordingly, she did not know "how to resolve that issue." The GAL also stated that before Carina was placed back with her prior foster family, Carina and the family needed the opportunity to participate in family therapy to evaluate whether such a placement would be appropriate. During the discussion with the juvenile court, a representative of the FCRB expressed concerns that the Department was pursuing relative placement for all four of the children together. With regard to the search for relatives of the children, the FCRB representative asked the court to ensure individualized plans for the children as opposed to trying to put them all together and "starting over." Darlene's attorney asked that the search for relative placement continue. The county attorney stated that he did not see any reason why

the Department's search for relatives could not continue "if it's not hurting anything."

At the conclusion of the hearing, the juvenile court denied Darlene's request to continue the search for relative placement, stating that the Department's efforts to continue looking for relative placement were "hurting things." The court stated further:

> If the Department is out looking for placement after eight years with relatives, despite all efforts in eight years, then it means they do not have a permanent plan for these kids, and so that is not okay. It does impair our ability to provide for the kids emotionally and psychologically.

The court observed that Enrique and Christian were in a placement where they wanted to stay and stated that the parties did not need to look anywhere else. The court further stated that because the parties were pursuing foster placement of Carina with someone who was willing to provide permanency and because the court was "okay with that," it was time to quit looking for relative placements. With respect to Christianna, the court stated that "all searches are on." The court then stated that it would require Christianna's foster parents to meet with the GAL to determine what barriers were preventing the foster parents from seeking adoption or guardianship of Christianna.

On June 29, 2011, the juvenile court entered an order, finding, among other things, that the children should remain in the temporary custody of the Department for continued appropriate care and placement. The order did not include the court's ruling from the bench regarding the search for relative placement. Darlene filed a motion for an order nunc pro tunc, and on July 26, the court entered an order nunc pro tunc, correcting its June 29 order to include an order that "'[a]ll efforts by the . . . Department . . . to place the children with relative foster care or adoptive placements should end immediately.'" Darlene subsequently perfected her appeal to this court.

## ASSIGNMENTS OF ERROR

Darlene asserts that the juvenile court erred in deviating from the placement preferences set forth in the ICWA and the

NICWA (1) when it ordered the Department to immediately stop all efforts to place the children with relative foster care or adoptive placements, (2) when no party had requested such an order, and (3) because it did not make any findings in the record that good cause existed to deviate from the placement preferences and regarding what good cause was shown.

## 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. *In re Interest of Elizabeth S.*, 282 Neb. 1015, 809 N.W.2d 495 (2012). An appellate court reviews questions of law independently of the juvenile court's conclusions. *Id.*

## ANALYSIS

The juvenile court ordered the immediate cessation of all efforts by the Department to place the children with relatives for foster care or adoption, which is a deviation from the applicable placement preferences set forth in the ICWA and the NICWA. Neither the juvenile court's order of June 29, 2011, nor the nunc pro tunc order contained an explicit written finding of good cause for deviating from the ICWA placement requirements, although the court's statements from the bench show its reasoning for the order. Accordingly, the question before us in this appeal is whether the juvenile court erred in deviating from the placement preferences.

Neb. Rev. Stat. § 43-1508(2) (Reissue 2008), which is the equivalent to the federal ICWA's 25 U.S.C. § 1915(b) (2006), provides:

> Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his or her special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with:

(a) A member of the Indian child's extended family;

(b) A foster home licensed, approved, or specified by the Indian child's tribe;

(c) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(d) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(Emphasis supplied.)

In *In re Interest of Bird Head*, 213 Neb. 741, 331 N.W.2d 785 (1983), the Nebraska Supreme Court considered whether good cause had been shown to deviate from the placement preferences specified in the ICWA. In that case, the Indian child's mother was deceased and the father was unknown. The lower court terminated the parental rights of any potential father, ordered that the child's custody remain with the Department and that the child be placed for adoption, and continued temporary custody with the child's foster parents pending further disposition by the Department. The child's maternal aunt appealed, alleging, among other things, that the court erred in failing to follow the placement preferences outlined in the ICWA or to make any findings of good cause for not doing so. The record in that case showed that there were several possible placements for the child which had statutory preference over the placement with the current foster parents, who had no statutory claim of preference. Although the evidence showed that the foster parents were fit and proper persons to have custody, the lower court made no finding to that effect; nor did it make a finding about the fitness of the foster parents as compared to that of the statutorily preferred individuals.

[3] On appeal, the Nebraska Supreme Court noted that the ICWA did not strictly require placement with a statutorily preferred person or agency, but, rather, required only that the statutory preferences be followed in the absence of good cause to the contrary. The court observed that the only direct finding made by the lower court was that the child's aunt was unfit to have custody of the child, a finding that was supported by the evidence. However, the court observed that the evidence was uncertain and that no finding had been made below as to

good cause for failing to follow the statutory preferences with respect to the other preferred individuals or agencies. The court observed that the ICWA "does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus." *In re Interest of Bird Head*, 213 Neb. at 750, 331 N.W.2d at 791. The court further stated that the legislative history of the ICWA showed that its "good cause" provision was intended to provide state courts with flexibility in determining the placement of Indian children. The court held that under the ICWA, factual support must exist in the trial record for the purpose of appropriate appellate review as to good cause for failure to comply with statutory child placement preference directives. See *In re Interest of Bird Head, supra*. Because the record lacked any findings by the lower court as to what good cause was shown for deviation from the placement preferences with respect to persons other than the child's aunt, the court remanded the cause for consideration of whether good cause existed not to place the child with other family or tribal members.

Neither the ICWA nor the NICWA defines what constitutes good cause for deviating from the statutory placement preferences; however, the Bureau of Indian Affairs has published nonbinding guidelines for determining whether good cause exists. We have previously looked to those guidelines for reference in NICWA cases concerning issues other than those present in this case. See, generally, *In re Interest of Melaya F. & Melysse F., ante* p. 235, 810 N.W.2d 429 (2011) (referencing guidelines for consideration of good cause not to transfer jurisdiction to tribe); *In re Interest of Ramon N.*, 18 Neb. App. 574, 789 N.W.2d 272 (2010) (referencing guidelines on issue of whether expert witnesses meet NICWA requirements). The Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,594 (1979) (not codified), state, under subdivision (a) of the section "Good Cause To Modify Preferences," that for purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference in the ICWA shall be based on one or more of the following considerations:

> (i) The request of the biological parents or the child when the child is of sufficient age.
>
> (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
>
> (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

The guidelines further state that the burden of establishing the existence of good cause not to follow the statutory preferences is on the party urging that the preferences not be followed. The commentary section following the above guidelines states that paragraph (iii) of the guidelines quoted above

> recommends that a diligent attempt to find a suitable family meeting the preference criteria be made before consideration of a non-preference placement be considered. A diligent attempt to find a suitable family includes at a minimum, contact with the child's tribal social service program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources.

*Id.* at 67,595.

In the present case, the juvenile court's written order required that all efforts to place the children with a relative for foster care or an adoptive placement end immediately. The order did not include any findings regarding good cause for deviation from the placement preferences set forth in the NICWA. However, the juvenile court did make oral findings at the conclusion of the hearing that such efforts were "hurting things" and that seeking relative placement "despite all efforts in eight years" was impairing the "ability to provide for the kids emotionally and psychologically." Assuming, without deciding, that such oral statements constitute a finding of good cause for deviation, we must determine whether the record supports such a finding. In conducting this analysis, we also assume, without deciding, that the court's order to cease seeking relative placement is analogous to a finding of good cause under the statute despite the court's failure to use the specific language of the

statute that good cause exists not to follow the placement preferences outlined therein.

In our de novo review, we conclude that the record does not support the order of the court that all efforts to seek relative placement shall end immediately. The evidence at the June 2011 hearing shows that the Department has been unsuccessful in locating relative placements for the children; however, the record does not detail what efforts have been made. Although Darlene has intervened in the proceedings and she filed this appeal, we do not know from this record why the children have not been placed with Darlene, although she makes no argument in this appeal that such should occur. Nor has Darlene asserted that the current placements for the children are not in their best interests. We also do not know from this record if the children's current placements meet any of the other statutory claims of preference. It appears from this record that the juvenile court, in making its decision to cease seeking relative placement, was reacting to the FCRB report. However, that report merely suggested that the Department stop efforts to find a relative placement for all four children together. The FCRB representative clarified at the hearing that it was suggesting an individualized approach for the children in connection with the search for relative placement.

The court's global statement, that all efforts to search for relative placement shall end, does not recognize the particular needs of each child in this case. It appears that the current foster family for the boys, Enrique and Christian, is willing to provide permanency to the boys; the boys are in favor of this permanent placement; and the Department, the GAL, and the FCRB believe that this is in the boys' best interests. The placement and adoption options for the girls, Carina and Christianna, are less certain, and the court's order effectively rules out family placement for them in the future. In addition, application of this broad order to Christianna is inconsistent with the court's oral statement that "all searches are on" for a permanent placement for her. As noted above, the court report reflects a search for relative placement by the Department for Christianna only and, otherwise, reflects that the search for relatives was "for the purpose of maintaining connections

with family member[s].” Finally, the caseworker testified that the search for relatives was not interfering with the pursuit of permanency for these children, and it is clear from the record that other permanency plans are being actively sought. As such, the record before us does not support the juvenile court’s finding that the search for relatives was presently “hurting things,” although such may have been the case in the past, which information we do not have in this record.

We acknowledge that these children need permanency and that such should occur as quickly as possible. However, the court’s order did not adequately address the requirements of the NICWA regarding placement preferences; nor does this record show good cause for the deviation, especially in the manner ordered by the court. As such, we reverse the July 26, 2011, order of the juvenile court requiring the Department to immediately end all efforts to place the children with a relative for foster care or an adoptive placement, and we remand the cause for further proceedings. Our ruling should not be construed as requiring the Department to find relative placement for any of these children; rather, we clarify that placements that do not fit within any of the preferences listed in § 43-1508(2) are to be made only upon a showing of good cause.

## CONCLUSION

Because the juvenile court’s order requiring the Department to cease all efforts to place the children with a relative for foster care or an adoptive placement was not supported by good cause, we reverse the juvenile court’s order of July 26, 2011, and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

# STATE OF NEBRASKA, APPELLEE, V. SAMUEL W. CRAIGIE, APPELLANT.

813 N.W.2d 521

Filed April 24, 2012. No. A-11-529.

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 such discretion a factor in determining admissibility.
2. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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. 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.
3. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
4. **Rules of Evidence: Other Acts: Sexual Assault.** Under Neb. Rev. Stat. § 27-414(1) (Cum. Supp. 2010), evidence of a criminal defendant's commission of another sexual assault offense is admissible if there is clear and convincing evidence otherwise admissible under the Nebraska Evidence Rules that the accused committed the other offense or offenses. If admissible, such evidence may be considered for its bearing on any matter to which it is relevant.
5. **Judgments: Trial: Evidence: Proof: Appeal and Error.** In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury.
6. ____: ____: ____: ____: ____. In order to establish reversible error based on the erroneous admission of evidence in a bench trial, the appellant must show that the trial court made a finding of guilt based exclusively on the erroneously admitted evidence; if there is other sufficient evidence to support the finding of guilt, the conviction will not be reversed.
7. **Trial: Evidence: Proof: Presumptions: Appeal and Error.** The burden rests on the appellant to establish reversible error based on the erroneous admission of evidence in a bench trial because of the presumption that the trial court, sitting as the fact finder, disregards inadmissible evidence.
8. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural

background, past criminal record, and motivation for the offense, as well as the nature of the offense and the violence involved in the commission of the crime.

9. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. 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: JOHN A. COLBORN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Timothy M. Eppler for appellant.

No appearance for appellee.

MOORE, CASSEL, and PIRTLE, Judges.

CASSEL, Judge.

## INTRODUCTION

Samuel W. Craigie appeals his convictions and sentences for third degree sexual assault of a child, with a prior registrable conviction, and for child abuse. He mainly attacks the district court's evidentiary admission, at a bench trial, of his prior sexual assault conviction. Because the prior assault was sufficiently similar to the instant offense, the controlling statute authorized its admission. Moreover, because the court did not expressly rely upon the evidence, its admission would not constitute reversible error. We also find no merit to Craigie's other assignments of error that the evidence was insufficient and that the sentences were excessive. We therefore affirm.

## BACKGROUND

On December 2, 2010, the State filed an amended information charging Craigie with two crimes: third degree sexual assault of a child, with a prior registrable conviction, and child abuse. Craigie filed a motion in limine seeking to prohibit the State from mentioning, among other things, that he had previously been convicted of a sexual assault crime and had been required to register as a sex offender. The State gave notice under Neb. Rev. Stat. §§ 27-404 and 27-414 (Cum. Supp. 2010) of its intent to offer evidence of Craigie's other

crimes, specifically of his sexual contact or penetration of J.W. Following a hearing, the court determined that evidence of Craigie's prior sexual assault was admissible.

Craigie waived his right to a jury trial, and a bench trial followed. The evidence established that Craigie had been friends, off and on, with E.S.' stepfather since the 1990's and that he later developed a relationship with E.S.' mother, who married E.S.' stepfather in 2008. As a friend of the family, Craigie periodically visited E.S.' home, and E.S. visited Craigie's apartment on at least two occasions. E.S., who was 7 years old at the time of trial, testified that his mother would drop him off at Craigie's apartment and that then he and Craigie would play on a computer or watch television.

On September 3, 2009, Nebraska State Patrol investigators went to E.S.' home after finding pictures of E.S. on Craigie's computer. At that time, E.S.' mother repeatedly told the investigators that she had never left E.S. alone with Craigie, but she eventually told them that she may have left E.S. with Craigie on one occasion for about 15 minutes while she ran an errand. One of the investigators spoke with E.S., who said that Craigie was his friend, that he liked Craigie, and that he wanted to go to Craigie's apartment. The investigator testified that E.S. told him that when he was at Craigie's apartment, he would be alone with Craigie and they would play games together, but that he did not go to Craigie's very often. The investigator testified that E.S. initially denied playing "tickle games" with Craigie, but that he later changed his response and stated that they did play tickle games. The investigator testified that E.S. initially said he and Craigie "would tickle almost everywhere," but that when asked where specifically, E.S. referred to his chest.

On September 10, 2009, E.S. was interviewed at the Child Advocacy Center and denied any sort of touching by Craigie. He told the interviewer that he called his penis his "private." After the interview, E.S. and his mother went out to eat, during which time E.S. said something that his mother found to be unusual, so she notified the investigating officer when she got home. E.S. returned to the Child Advocacy Center on September 11 and was interviewed by a sergeant with the Lancaster

County sheriff's office. During that interview, E.S. disclosed that Craigie had touched E.S.' "pee pee" one time. The sergeant testified that E.S. said at least twice that "'it wasn't hard,'" but that E.S was unable to explain what he meant by that. The sergeant testified E.S. said that he was wearing pants at the time and that Craigie touched his penis by putting his hand up E.S.' pant leg, which E.S. also demonstrated on a doll. The sergeant testified that E.S. denied that Craigie touched him by reaching through the top of the pants. The sergeant testified that E.S. told him Craigie did not say anything afterward and that E.S. denied being told by Craigie to not tell anyone.

At trial, E.S. testified that he did not remember anything "weird or strange" happening at Craigie's apartment. When E.S. was asked if anyone other than a doctor or his parents ever touched his "pee pee," he answered, "[Craigie], I think." He testified that Craigie touched him underneath his underwear with his hand by putting his hand down the top of E.S.' pants. E.S. testified that he told Craigie "[t]o not do that" and that Craigie "said okay, then he stopped." E.S. did not think that he told anyone about the incident, and he testified, "I think [Craigie] told me not to."

The State called J.W. to testify, and Craigie objected that such testimony was improper. The court overruled the objection, "consistent with the [c]ourt's prior rulings," and allowed Craigie a continuing objection to J.W.'s testimony. J.W., a male who was born in 1990, testified that on a day when Craigie was babysitting him, Craigie put his penis in J.W.'s anus. Craigie also objected to the testimony of the officer who investigated that incident, stating that it was improper under § 27-404 or § 27-414. The court again overruled the objection and allowed a continuing objection. The officer testified that he investigated a sexual assault of J.W. by Craigie in 1996, that Craigie was frank in answering the officer's questions, and that Craigie admitted to the facts in the matter.

Craigie, who was born in 1972, testified that he and E.S.' mother began having a sexual affair in October 2007. There is no dispute that E.S.' mother kept a bag in Craigie's bedroom which contained women's undergarments, toiletries, and a prescription bottle. Craigie initially told the Nebraska

State Patrol that the bag belonged to a friend who left it there in case she needed a place to stay because she was having marital problems. At trial, Craigie testified that E.S.' mother left the bag in his apartment so she could go home in clean undergarments if they engaged in sexual activity. E.S.' mother denied having a sexual relationship with Craigie. She admitted that she sent Craigie a text message stating that she loved him unconditionally, but claimed that it was "nothing romantic." She testified that she "always ha[s] an emergency bag set up in case I need to go to the hospital or something emergently."

Craigie testified that he went to E.S.' house two to four times a week in 2009, but that his involvement with the family diminished after July 24. Craigie testified that on that day, E.S.' mother asked him to go swimming with her two children and the son of E.S.' stepfather. According to Craigie, he had an agreement with E.S.' stepfather that Craigie would not be involved with the son of E.S.' stepfather and Craigie broke that agreement when they went swimming. He testified that he decreased his time with the family because E.S.' mother did not respect his boundaries with the son of E.S.' stepfather. Craigie testified that on August 22, he ended his sexual relationship with E.S.' mother and his "interpersonal relationship" of "hanging out" with E.S. and his mother. Craigie also testified that he had hemmed six to eight pairs of E.S.' pants, which involved measuring E.S.' inseam. He testified that on one occasion, he cuffed E.S.' pants while E.S. was wearing them, but that he touched only E.S.' ankle area.

E.S.' stepfather testified that he had applied anti-itch ointment to E.S.' penis when E.S. was younger. He also testified that the mother of his son accused him during a custody dispute in late 2008 of inappropriately touching their son, who would have been about 8 years old at the time, which allegation E.S.' stepfather denied.

Immediately after closing arguments, the district court stated that it found Craigie guilty of both crimes beyond a reasonable doubt. On May 31, 2011, the court imposed a sentence of 20 to 40 years' imprisonment for the sexual assault conviction and a concurrent sentence of 4 to 5 years' imprisonment for

the child abuse conviction. Craigie will be subject to lifetime community supervision upon his release.

Craigie timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

## ASSIGNMENTS OF ERROR

Craigie assigns three errors. First, he alleges that the district court erred by admitting evidence of his prior conviction for sexual assault. Second, Craigie claims that the evidence was insufficient to sustain the convictions. Third, he contends that the court abused its discretion by imposing excessive sentences.

## STANDARD OF REVIEW

[1] 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 such discretion a factor in determining admissibility. *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

[2] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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. 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. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[3] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

## ANALYSIS

*Admission of Prior Conviction.*

[4] Craigie argues that under § 27-414, the district court erred by admitting evidence of his prior sexual assault

conviction, because the risk of prejudice substantially outweighed the probative value of the evidence. Under § 27-414(1), evidence of a criminal defendant's commission of another sexual assault offense is admissible "if there is clear and convincing evidence otherwise admissible under the Nebraska Evidence Rules that the accused committed the other offense or offenses. If admissible, such evidence may be considered for its bearing on any matter to which it is relevant." There is no doubt that Craigie committed the prior sexual assault—he described the assault in detail to the investigating officer and entered a plea of guilty. Craigie's point of contention is that his prior conviction was not similar to the allegations in this case.

Pursuant to § 27-414(3), the court held a hearing to determine whether Craigie's prior sexual assault conviction should be admitted. We observe that § 27-414 is a new Nebraska evidentiary rule that became operative on January 1, 2010. According to § 27-414(3),

> the court shall apply a section 27-403 balancing and admit the evidence unless the risk of prejudice substantially outweighs the probative value of the evidence. In assessing the balancing, the court may consider any relevant factor such as (a) the probability that the other offense occurred, (b) the proximity in time and intervening circumstances of the other offenses, and (c) the similarity of the other acts to the crime charged.

We cannot say that the court abused its discretion in admitting the evidence. Craigie admitted to committing the earlier offense, which occurred in 1996 and led to Craigie's incarceration until 2006. Both offenses involved young boys—J.W. was 5 years old and E.S. was 6 years old—and both occurred at a time when Craigie was acting as a babysitter for the boys.

Craigie cites *State v. Welch*, 241 Neb. 699, 490 N.W.2d 216 (1992), in support of his argument. In that case, the defendant argued on appeal that the trial court erred in receiving evidence of a previous conviction for a similar offense, which had occurred 21 years earlier. The Nebraska Supreme Court agreed, determining that the evidence had "an undue tendency to influence the jury's verdict on an improper basis." *Id.* at 704, 490

N.W.2d at 220. We do not find the case to be helpful for three reasons. First, it was decided well before § 27-414 became law. Second, the time between offenses is not as remarkable in the instant case. Although Craigie committed the first offense 13 years earlier, he had been incarcerated until 2006, during which time his opportunity to commit a similar crime was eliminated. From the time of his release from incarceration—when his opportunity to reoffend began—only 3 years elapsed until the time of the assault on E.S. Finally, *State v. Welch* involved a jury trial, whereas Craigie's trial was to the bench. This last difference has a further consequence in law, to which we now turn.

[5-7] Even if admission of the evidence were erroneous, Craigie has failed to establish reversible error. Significantly, we are reviewing the appeal from a bench trial, not a jury trial. In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury. *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009). In order to establish reversible error based on the erroneous admission of evidence in a bench trial, the appellant must show that the trial court made a finding of guilt based exclusively on the erroneously admitted evidence; if there is other sufficient evidence to support the finding of guilt, the conviction will not be reversed. See *id.* The burden rests on the appellant to establish reversible error based on the erroneous admission of evidence in a bench trial because of the presumption that the trial court, sitting as the fact finder, disregards inadmissible evidence. See *id.* Craigie has not met his burden. Because the district court made no factual determinations based upon Craigie's prior sexual assault conviction and E.S.' testimony alone is sufficient to support the finding of guilt, Craigie has not established any reversible error.

*Sufficiency of Evidence.*

Craigie asserts a rational trier of fact could not have concluded that he subjected a person 14 years of age or younger to sexual contact or that he knowingly or intentionally permitted a minor child to be placed in a situation to be sexually abused. His argument focuses on inconsistencies in E.S.' statements and testimony. But under our standard of review, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. See *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

The relevant question for an appellate court reviewing a sufficiency of the evidence claim 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. *Id.* We find the evidence to be sufficient to support both convictions.

The evidence supports a conviction for third degree sexual assault of a child under Neb. Rev. Stat. § 28-320.01(3) and (5) (Reissue 2008). There is no dispute that Craigie was at least 19 years of age, that E.S. was 14 years of age or younger, and that Craigie had previously been convicted of attempted first degree sexual assault on a child. Craigie argues that the missing element for the sexual assault conviction was "sexual contact." Under Neb. Rev. Stat. § 28-318(5) (Reissue 2008), "[s]exual contact means the intentional touching of the victim's sexual or intimate parts . . . . 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." According to E.S.' testimony, Craigie put his hand under E.S.' pants and underwear and touched E.S.' penis. Those circumstances support the finding that the touching was intentional and that it was for the purpose of Craigie's sexual arousal or gratification.

The evidence was also sufficient to support the child abuse conviction. Under Neb. Rev. Stat. § 28-707(1)(e) (Reissue 2008), "[a] person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be . . . [p]laced in a situation to be sexually abused as defined in section 28-319, 28-319.01, or 28-320.01." Craigie argues only

that the State did not prove that he sexually abused E.S.—an argument we have already rejected. Viewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found that Craigie intentionally placed E.S. in a situation to be sexually abused. This assignment of error lacks merit.

*Excessive Sentences.*

Finally, Craigie claims that his sentences were excessive. The district court convicted Craigie of a Class IC felony, see § 28-320.01(5), and a Class IIIA felony, see § 28-707(4). A Class IC felony is punishable by 5 to 50 years' imprisonment, and a Class IIIA felony is punishable by up to 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. § 28-105(1) (Reissue 2008). The sentences imposed by the court of 20 to 40 years' imprisonment for the sexual assault conviction and a concurrent sentence of 4 to 5 years' imprisonment for the child abuse conviction were within the statutory limits. Thus, our inquiry focuses on whether the sentences were an abuse of judicial discretion. See *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

[8,9] When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record, and motivation for the offense, as well as the nature of the offense and the violence involved in the commission of the crime. *Id.* In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. 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. *Id.*

The presentence investigation shows that Craigie was 38 years old at the time of its preparation and that he had completed the 12th grade. Craigie reported to the probation officer that his oldest brother sexually abused him when Craigie was a third grader and that another older brother had sexual contact with him when Craigie was 13—which contact was Craigie's idea. In November 2006, Craigie was accepted into

an outpatient sex-offense-specific treatment program for adults, but he was terminated from the program upon being charged with a crime in this case, which case began as a result of a child pornography investigation. Craigie has a history of criminal activity. He was adjudicated as a juvenile for attempted arson and for breaking and entering. While on probation, he was arrested for additional theft offenses, which were handled in adult court and resulted in jail time. As an adult, Craigie was convicted of other theft crimes, traffic-related offenses, and the attempted first degree sexual assault on a child. A test administered as part of the presentence investigation showed Craigie as a very high risk in the category for "companions" and as a high risk in categories measuring criminal history, family/marital, leisure/recreation, and antisocial pattern.

After considering the nature and circumstances of the crimes and Craigie's "history, character and condition," the district court found that imprisonment was necessary for the protection of the public. In determining the sentences, the court stated that it considered the facts and circumstances of Craigie's prior criminal history, including the 1996 conviction for attempted first degree sexual assault on a child and the resulting sentence of 12 to 20 years' imprisonment. We find no abuse of discretion by the court in sentencing Craigie.

## CONCLUSION

We conclude that the court did not abuse its discretion in admitting evidence of Craigie's prior sexual assault conviction, but that even if the evidence were not admissible, Craigie failed to meet the burden to establish reversible error in a bench trial. We further conclude that sufficient evidence supports Craigie's convictions and that the court did not abuse its discretion in imposing sentences within the statutory limits.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. TRAVIS T. MITCHELL, APPELLANT.

820 N.W.2d 75

Filed May 1, 2012. No. A-11-407.

1. **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.
2. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
3. **Drunk Driving: Prior Convictions: Proof: Legislature: Intent.** It was not the Legislature's intent to prohibit the consideration of prior out-of-state driving under the influence convictions simply because differing elements of the offense or differing quantums of proof made it merely possible that the defendant's behavior would not have resulted in a violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010) had it occurred here.
4. ____: ____: ____: ____: ____. The Legislature implicitly acknowledged that it would be impractical, if not impossible, to prove particular factual predicates which may be necessary elements in Nebraska, and this was why it provided a simple and straightforward means of establishing the State's prima facie evidence of prior convictions as defined by Neb. Rev. Stat. § 60-6,197.02(1)(a)(i)(C) (Reissue 2010).
5. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
6. **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.
7. **Sentences: Probation and Parole: Appeal and Error.** Whether probation or incarceration is ordered is likewise a choice within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

PIRTLE, Judge.

## INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Travis T. Mitchell appeals from an order of the district court for Lancaster County enhancing Mitchell's conviction for driving under the influence (DUI). Mitchell alleges that his prior conviction in Colorado for driving while ability impaired (DWAI) should not be used to enhance the penalty in this case. He also alleges the sentence imposed by the district court was excessive. Based on the reasons that follow, we affirm.

## BACKGROUND

On August 4, 2010, an information was filed in the district court for Lancaster County charging Mitchell with the following: count 1, DUI, fourth offense, a Class IIIA felony in violation of Neb. Rev. Stat. §§ 60-6,196 (Reissue 2010) and 60-6,197.03(7) (Supp. 2009); count 2, no valid registration, a Class III misdemeanor in violation of Neb. Rev. Stat. § 60-362 (Reissue 2010); and count 3, no proof of insurance, a Class II misdemeanor in violation of Neb. Rev. Stat. § 60-3,167 (Reissue 2010). On August 11, Mitchell was arraigned on the information and pled not guilty to all counts. Mitchell was tried in front of a jury on January 3 and 4, 2011. Mitchell was found guilty of count 1 and not guilty of counts 2 and 3, and the district court accepted the jury verdicts.

An enhancement hearing was held on April 18, 2011. At the hearing, the State offered three exhibits as evidence of prior convictions. One of those exhibits involved a Colorado conviction, which exhibit Mitchell objected to on the ground of relevance. He stated the Colorado conviction was not an offense which would have been a violation of § 60-6,196. The trial court took the matter under advisement. On April 27, the court issued an order finding that Mitchell had three prior convictions for enhancement purposes under Neb. Rev. Stat. § 60-6,197.02(1)(a)(i)(C) (Reissue 2010). The court found the

State had met its burden to establish a prima facie case that "the conviction under Colorado's DWAI law could also be a conviction under Nebraska's DUI law." Having found the State met its burden, the burden then shifted to Mitchell to establish that the Colorado DWAI conviction would not be a violation of Nebraska's DUI law. The court concluded that Mitchell did not meet his burden.

On May 3, 2011, Mitchell was sentenced to imprisonment under the jurisdiction of the Nebraska Department of Correctional Services for 3 to 5 years for the DUI conviction. Credit was given for 43 days that Mitchell previously served. Mitchell's driving privileges were revoked for 15 years. Mitchell timely appeals.

## ASSIGNMENTS OF ERROR

Mitchell alleges the district court erred in finding that Mitchell's prior Colorado conviction for DWAI could be used to enhance the penalty for DUI. He also alleges the sentence imposed by the district court was excessive and constituted an abuse of discretion.

## STANDARD OF REVIEW

[1] 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. *State v. Macek*, 278 Neb. 967, 774 N.W.2d 749 (2009).

[2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009).

## ANALYSIS

*Enhancement.*

Mitchell alleges the district court erred in finding that his prior conviction in Colorado for DWAI could be used to enhance the penalty for DUI. Mitchell argues that the State did not meet the burden of producing prima facie evidence of a prior conviction because that prior conviction must be for the offense of DUI. However, that is not what the Nebraska statute requires.

In Nebraska, a prior conviction means a conviction for a violation committed within the 12-year period prior to the offense for which the sentence is being imposed. § 60-6,197.02(1)(a). For violation of § 60-6,196, a conviction can be any conviction under the law of another state if, at the time of the conviction under the law of such other state, the offense for which the person was convicted would have been a violation of § 60-6,196. See § 60-6,197.02(1)(a)(i)(C).

In Nebraska, there are two methods of proving DUI: The State may prove either that the defendant had a blood alcohol content of .08 or more, described as "a concentration of eight-hundredths of one gram or more by weight of alcohol per one hundred milliliters" of his or her blood, or that the defendant was under the influence of alcohol or drugs at the time he or she was operating or in control of a vehicle on public property or private property open to public access. § 60-6,196. The phrase "under the influence of alcoholic liquor or of any drug" means the ingestion of a substance in an amount sufficient to impair to any appreciable degree the driver's ability to operate a motor vehicle in a prudent and cautious manner. *State v. Batts*, 233 Neb. 776, 448 N.W.2d 136 (1989).

In Colorado, there are two offenses for degrees of impairment while driving. One is DUI, the other is DWAI. Like Nebraska, the Colorado statutes provide two methods of proving DUI: The State may prove either that the defendant had a blood alcohol content of .08 or more or that the defendant consumed alcohol and/or drugs in such amount that the person is "substantially incapable" of exercising "clear judgment, sufficient physical control, or due care in the safe operation of a vehicle." Colo. Rev. Stat. Ann. § 42-4-1301(1)(f) (West Supp. 2011). DWAI is proved by a blood alcohol content "in excess of 0.05, but less than 0.08," § 42-4-1301(6)(a)(II), or a showing that drugs or alcohol affected the person to the "slightest degree," § 42-4-1301(1)(g).

In the Colorado case, Mitchell was originally charged with DUI, but entered a plea to DWAI. Though Mitchell was convicted of DWAI, not DUI, in Colorado, the offense could still be considered a violation of § 60-6,196 if it meets the statutory requirements. A conviction using the blood alcohol content

method of proof for DWAI in Colorado would not meet the requirements of the Nebraska statute. A defendant's blood alcohol content between the upper and lower limits for DWAI would not meet or exceed the .08 threshold for a violation of § 60-6,196. The record in this case does not contain Mitchell's blood alcohol content results, because he filed a successful motion to suppress.

[3,4] Next, we consider whether the second method of proof for DWAI could qualify as a violation of § 60-6,196. In *State v. Garcia*, 281 Neb. 1, 11, 792 N.W.2d 882, 890 (2011), the Supreme Court stated it "was not our Legislature's intent to prohibit the consideration of prior out-of-state DUI convictions simply because differing elements of the offense or differing quantums of proof make it merely *possible* that the defendant's behavior would not have resulted in a violation of § 60-6,196, had it occurred here." The Supreme Court stated the Legislature "implicitly acknowledged that it would be impractical, if not impossible," to prove particular factual predicates which may be necessary elements in Nebraska, and this was why it provided a simple and straightforward means of establishing the State's prima facie evidence of "'prior convictions'" as defined by § 60-6,197.02(1)(a)(i)(C). *Garcia*, 281 Neb. at 12, 792 N.W.2d at 890.

In *State v. Garcia, supra*, the Supreme Court discussed a prior conviction in California, where a person may be convicted of DUI on either public or private property. The defendant argued the State failed to carry its burden of proof because it had not established the offense had occurred on public property. The Supreme Court held the State did not bear the burden of establishing that every element was met. Rather, the State must show that the elements of the offense, had it occurred in Nebraska, would have resulted in a violation of Nebraska's DUI laws. The court held that if the State demonstrates this, the burden shifts to the defendant to show the facts establishing the offense occurred on private property in California and thus would not have proved a DUI in Nebraska. Essentially, once the State shows that the offense *could* have been a DUI, the defendant then has the burden to bring mitigating factors to the attention of the court.

The Colorado DWAI statute sets a lower threshold limit of proving the person was affected by alcohol to the "slightest degree." As the district court order stated, a defendant could be more than slightly affected by alcohol or drugs and still be convicted of DWAI in Colorado, and if that impairment rose to the level of appreciable degree, the defendant could be convicted under Nebraska's DUI law.

The State presented its prima facie case showing Mitchell's two prior convictions in Nebraska and one prior conviction in Colorado which could have been a violation of § 60-6,196 had the incident occurred in Nebraska. At that point, the burden shifted to Mitchell to establish that the facts supporting the Colorado DWAI would not support a conviction under Nebraska's DUI law, and he failed to do that.

The exhibit regarding the Colorado conviction indicates Mitchell was more than slightly affected by alcohol. This could be viewed as further proof establishing he was affected to an appreciable degree. The record indicates that Mitchell's vehicle drifted and jerked on the road and that when Mitchell was pulled over, the trooper noticed his eyes were bloodshot and glassy. The trooper also reported that he smelled an odor of alcohol coming from Mitchell and the vehicle and that he observed a bottle of alcohol at Mitchell's feet. Mitchell's speech was slurred, and he was unable to satisfactorily perform field sobriety tests. The facts indicate he could have been affected to more than the slightest degree or to the level of appreciable impairment.

We find that the district court correctly determined Mitchell's prior conviction in Colorado could have been a violation of § 60-6,196 and that the prior conviction was correctly used for enhancement of the sentence in the instant case. Mitchell has two additional prior convictions in Nebraska for DUI. These convictions are undisputed for purposes of enhancement.

*Excessive Sentence.*

Mitchell alleges the sentence imposed by the district court was excessive and constituted an abuse of discretion. He asserts he was deprived of a just result by being sentenced to imprisonment for 3 to 5 years when a lesser sentence would have

served any and all purposes of sentencing within the criminal justice system.

[5] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

[6] 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. *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011).

[7] Whether probation or incarceration is ordered is likewise a choice within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion. *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001).

The district court concluded that Mitchell had committed three prior offenses for enhancement purposes, and we agree. This means the current case is a result of his fourth offense in a 12-year period in violation of § 60-6,196. Under the statutes, this is a Class IIIA felony and is punishable by up to 5 years' imprisonment. See § 60-6,197.03(7) and Neb. Rev. Stat. § 28-105(1) (Reissue 2008). Section 60-6,197.03(4) also states that the court "shall, as part of the judgment of conviction, order that the operator's license of such person be revoked for a period of fifteen years from the date ordered by the court." The district court's order is within statutory limits, so we must consider whether an abuse of discretion exists.

Mitchell asserts the court abused its discretion by disregarding "several mitigating factors," brief for appellant at 18, including the motivations behind Mitchell's actions, his mental health history, and his exposure to alcohol and drugs at a young age. Mitchell cites the presentence investigation report as evidence of this history. Mitchell also states the current offense was likely "just an unfortunate slip up." Brief for appellant

at 20. Mitchell requested probation, but he failed to appear for his probation appointment.

The record indicates the court considered the presentence investigation report, the comments made at the hearing, and the applicable statutes. Further, the court's order states the court regarded "the nature and circumstances of the crimes and the history, character and condition" of Mitchell. The court ultimately determined "imprisonment of [Mitchell] is necessary for the protection of the public because the risk is substantial that, during any period of probation, [Mitchell] would engage in additional criminal conduct and because a lesser sentence would depreciate the seriousness of [Mitchell's] crimes and promote disrespect for the law."

Mitchell has committed four qualifying offenses under Nebraska's DUI statutes in the past 12 years, in addition to other criminal offenses. He was placed on probation for terroristic threats, and his probation was revoked. Though he requested probation in this case, he acknowledged at the enhancement hearing that he did not appear for his probation appointment. In addition to these facts, the court cited valid public safety concerns supporting imprisonment due to Mitchell's continued criminal behavior. Given the circumstances, we find the sentence of imprisonment, which was within the statutory limits, was not untenable or unreasonable. We find there was no abuse of discretion.

## CONCLUSION

We find Mitchell's conviction for DWAI in Colorado is a qualifying "prior conviction" under the Nebraska statutes; thus, Mitchell had three prior convictions for enhancement purposes. We also find Mitchell's sentence was within statutory limits and was not an abuse of discretion under the circumstances.

AFFIRMED.

# DANIEL R. KNOSP, APPELLEE, V. SHAFER PROPERTIES, LLC, APPELLEE, ARCHER COOPERATIVE CREDIT UNION, APPELLANT, AND JOHN DOE ET AL., APPELLEES.

820 N.W.2d 68

Filed May 1, 2012. No. A-11-519.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
3. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
4. **Taxation: Real Estate: Liens.** Taxes on real property shall be a first lien on the property taxed until paid or extinguished as provided by law.
5. **Statutes.** Construction of a statute will not be adopted which has the effect of nullifying or repealing another statute.
6. ____. Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision.
7. **Statutes: Intent.** It is a recognized rule of construction that statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the act compel it.
8. **Taxation: Real Estate: Deeds: Title: Liens.** A treasurer's tax deed, issued pursuant to Neb. Rev. Stat. § 77-1837 (Reissue 2009) and in compliance with Neb. Rev. Stat. §§ 77-1801 to 77-1863 (Reissue 2009), passes title free and clear of all previous liens and encumbrances.

Appeal from the District Court for Hall County: JAMES D. LIVINGSTON, Judge. Affirmed.

Patrick M. Heng and Nicholas J. Welding, of Waite, McWha & Heng, for appellant.

Martin P. Pelster and Claire M. Osborne, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellee Daniel R. Knosp.

IRWIN and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

Archer Cooperative Credit Union (Archer) appeals from the decision of the district court holding that its liens on a piece of real property were foreclosed by the issuance of a treasurer's tax deed under Neb. Rev. Stat. § 77-1837 (Reissue 2009). Archer asks us to interpret the statutes allowing for tax sales in a manner that would make Neb. Rev. Stat. § 77-1902 (Reissue 2009) the only avenue by which title to property sold at a tax sale could be obtained free and clear of previous liens. Because this interpretation would nullify other statutes that place tax liens in first priority, fails to promote a consistent statutory scheme, and conflicts with previous case law and common law, we hold that a treasurer's tax deed, issued pursuant to § 77-1837 and in compliance with Neb. Rev. Stat. §§ 77-1801 to 77-1863 (Reissue 2009), passes title free and clear of all previous liens and encumbrances. Accordingly, we affirm the decision of the district court quieting title to the relevant property free and clear of all liens held by Archer.

## BACKGROUND

The property at dispute in this appeal is legally described as "Lot One (1) in Dowd Subdivision to the City of Grand Island, Hall County, Nebraska" (the property). Although Daniel R. Knosp is the current record owner of the property and is the original plaintiff in this action, the majority of the facts relevant to our analysis occurred prior to his acquisition of the property in 2010.

In July 2005, Shafer Properties, LLC, acquired the property by warranty deed. In the years following, it used the property to secure several loans from Archer. Separate deeds of trust were recorded with the Hall County register of deeds on July 22, 2005; July 17, 2007; and April 1, 2008.

In March 2007, the property was sold at a public tax sale to Helen Knosp for delinquent taxes. At that time, Helen received a certificate of tax sale which stated that "unless redemption is made of said real estate in the manner provided by law, [Helen] will be entitled to a deed therefor on and after the 8th day of March, 2010." Accordingly, on March 19, 2010, Helen filed

an application for tax deed after providing notice to Shafer Properties—record owner at the time of the tax sale—and Archer—the sole lienholder on the property. Neither Shafer Properties nor Archer redeemed the property as allowed by law, and on April 2, the Hall County treasurer issued a tax deed to Helen.

Later in April 2010, Archer notified Shafer Properties that Shafer Properties was in breach of its obligations under all three deeds of trust. In three separate notices of default, each dated April 29, 2010, Archer advised Shafer Properties that "because of such default [Archer] has elected to sell or cause to be sold the trust property to satisfy the obligations under said [d]eed of [t]rust."

In May 2010, Daniel acquired the property from Helen by quitclaim deed. Because the register of deeds showed Shafer Properties and Archer as having interests in the property, Daniel subsequently filed a quiet title action with the district court for Hall County, Nebraska, to remove any cloud upon his title. Shafer Properties and Archer were named as defendants, along with "JOHN DOE and MARY DOE, real names unknown; and all persons having or claiming any interest in and to [the property]." Only Shafer Properties and Archer filed answers to the complaint.

In March 2011, Daniel filed a motion for summary judgment, alleging that there was no genuine issue of material fact and that he was entitled to summary judgment as a matter of law. A few weeks later, Archer also filed a motion for summary judgment, claiming it was entitled to summary judgment as a matter of law.

Both Daniel and Archer entered affidavits in support of their motions at a hearing held on March 30, 2011. Daniel offered the affidavit of Helen, in which she attested to purchasing the property at the tax sale, receiving a tax sale certificate, and obtaining the tax deed. She also testified that she sent notice of her application for tax deed to both Shafer Properties and Archer by certified mail and that she received signed return receipts confirming delivery. Daniel also offered the affidavit of the attorney who had prepared the interrogatories and requests for admissions that were served on Shafer Properties and

Archer. In response to the requests for admissions, both Shafer Properties and Archer admitted that they neither paid the back taxes on the property nor took any other action to redeem the property prior to issuance of the tax deed. Specifically, Archer "admit[ted] that it did not redeem the [p]roperty prior to delivery of the [t]reasurer[']s [t]ax [d]eed by the Hall County [t]reasurer, but denie[d] that it had any obligation to redeem the [p]roperty in order to protect its liens against the [p]roperty." In support of its own motion for summary judgment, Archer offered the affidavit of its vice president of lending, who testified that Archer had three liens on the property secured by deeds of trust properly recorded with the Hall County register of deeds.

On May 19, 2011, the district court denied Archer's motion for summary judgment and sustained Daniel's motion for summary judgment, "quieting title to the property . . . free and clear of the encumbrances and liens of [Shafer Properties and Archer] previously on file." In so holding, the court noted:

> [Shafer Properties and Archer] and their claim of an interest in the property were given statutory notice of the tax lien for delinquent real estate taxes on the property. [Shafer Properties and Archer] were put on notice that the purchaser of the [t]ax [s]ales [c]ertificate was going to apply for title to the real estate unless those claiming an interest in the real estate came forward and paid the delinquent real estate taxes. [Shafer Properties and Archer] chose not to do so and the [t]ax [d]eed issued thereafter was valid and foreclosed [Shafer Properties' and Archer's] interest in the real estate.

(Emphasis in original.)

Archer timely appeals.

## ASSIGNMENTS OF ERROR

Archer alleges, restated, that the district court erred (1) in finding that Archer's deeds of trust were not first, paramount, and superior to the tax deed; (2) in finding that the tax deed did convey title free and clear of Archer's liens; and (3) in granting Daniel's motion for summary judgment and denying Archer's motion for summary judgment.

## STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity. *Newman v. Liebig*, 282 Neb. 609, 810 N.W.2d 408 (2011). On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination. *Id.*

[3] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Heritage Bank v. Bruha*, 283 Neb. 263, 812 N.W.2d 260 (2012).

## ANALYSIS

*Effect of Tax Deed.*

Archer's first two assignments of error effectively present the same question: whether a county treasurer's tax deed transfers property free and clear of all previously recorded liens and encumbrances. As such, we address these assignments of error together.

We begin by reviewing the statutory scheme that provides for property to be sold at a tax sale and for the resulting property rights to be enforced.

Under § 77-1801, a county treasurer can sell any real estate on which taxes have not been paid in full by the first Monday of March. Any person who offers to pay the amount of taxes due can purchase the property and, if successful, receives a tax sale certificate and acquires a tax lien on the property. See §§ 77-1807 and 77-1818. At that point in time and for several years thereafter, the owner or occupant of the property or any person having a lien on the property can redeem the property by paying the delinquent taxes plus interest. See § 77-1824.

There are two processes through which the holder of a tax sale certificate can exercise his or her rights to the property purchased at a tax sale. Pursuant to § 77-1837, the holder of the certificate can obtain a tax deed from the county treasurer.

To exercise this option, the holder must provide notice of his or her intent to apply for a tax deed at least 3 months prior to applying for the deed. See § 77-1831. Alternatively, the holder of a tax sale certificate or a tax deed can foreclose upon the tax lien and compel sale of the property pursuant to § 77-1902. The purchaser of the property in the foreclosure proceedings receives a sheriff's deed, the delivery of which "shall pass title to the purchaser free and clear of all liens and interests of all persons who were parties to the proceedings, who received service of process, and over whom the court had jurisdiction." Neb. Rev. Stat. § 77-1914 (Reissue 2009). Under both §§ 77-1837 and 77-1902, the individual who purchases the property at a tax sale must act within a 6-month period upon the expiration of 3 years from the date of sale.

In the instant case, Helen applied for and received a tax deed under § 77-1837, which she later transferred to Daniel. Archer does not contend that the tax deed was issued improperly, but, rather, assigns error to the district court's conclusion that the tax deed transferred title to the property free and clear of Archer's liens. Contrary to the court's conclusion, Archer urges that § 77-1902 provides "the sole method for a holder of a [t]reasurer's [t]ax [d]eed to obtain title 'free and clear' of all previous liens." Brief for appellant at 5. For the reasons that follow, we do not agree with Archer's interpretation of § 77-1837 and the tax sale statutes.

[4] First, this interpretation yields a result contrary to other Nebraska statutes that place tax liens in a position of first priority. Neb. Rev. Stat. § 77-203 (Reissue 2009) mandates that "taxes on real property shall be a first lien on the property taxed until paid or extinguished as provided by law." According to Neb. Rev. Stat. § 77-208 (Reissue 2009), a lien under § 77-203 "shall take priority over all other encumbrances and liens thereon." Similarly, Neb. Rev. Stat. § 14-557 (Reissue 2007), applying to cities of the metropolitan class, states that "[a]ll general municipal taxes upon real estate shall be a first lien upon the real estate upon which it is levied and take priority over all other encumbrances and liens thereon."

Archer's interpretation, when taken to its logical conclusion, places the holder of a tax deed who chooses to follow the

procedure of § 77-1837 instead of § 77-1902 in a position other than first priority. As Archer itself confesses, under its interpretation, the holder of a tax deed who does not foreclose "falls in line behind other liens previously filed." Brief for appellant at 11. We need look no further than the instant case to see how a tax lien could be defeated under this interpretation—a previous lienholder would simply need to wait out the tax sale proceedings and then foreclose on its lien after the issuance of a tax deed.

[5,6] This interpretation is decidedly contrary to §§ 14-557, 77-203, and 77-208 and, if adopted by this court, would nullify not one but three other statutes. Construction of a statute will not be adopted which has the effect of nullifying or repealing another statute. *Sack v. State*, 259 Neb. 463, 610 N.W.2d 385 (2000). Additionally, statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision. *State v. County of Lancaster*, 272 Neb. 376, 721 N.W.2d 644 (2006). In order to reconcile the statutes mandating that tax liens be given first priority with § 77-1837, tax deeds issued pursuant to § 77-1837 must pass title free and clear of all previous liens and encumbrances.

We note that the Nebraska Supreme Court has applied similar reasoning in upholding the passing of title free and clear of liens through foreclosure following a tax sale:

> In the very nature of things[,] a sale under a foreclosure of a first lien cannot be made subject to any other lien, for to do so would be to make the junior lien a senior lien. It would destroy the very purpose of the legislative provisions making general taxes a first lien. . . . If the special assessments remain a lien after title passes under the foreclosure . . . , the result would be that the junior lien could then come forward and destroy the title based on the superior lien. Such a result would nullify the very purpose of the tax foreclosure laws.

*Polenz v. City of Ravenna*, 145 Neb. 845, 849, 18 N.W.2d 510, 512 (1945). Although the court in *Polenz* was discussing the passing of title through an action to foreclose a tax sale certificate, we believe the same reasoning is applicable to § 77-1837,

because the procedure under this statute shares the same goal of recovering delinquent taxes. According to this reasoning, after a tax sale, title must pass free and clear of all liens and encumbrances in order for the tax lien to remain in a position of first priority as mandated by statute.

Second, we decline to adopt the interpretation urged by Archer, because it yields a result contrary to case law. Most cases pertaining to tax sales either do not reach the issue of whether a tax deed passes title free and clear of liens and encumbrances, see *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007), or speak only to the passing of title through foreclosure proceedings, see, *Dent v. City of North Platte*, 148 Neb. 718, 28 N.W.2d 562 (1947); *Polenz v. City of Ravenna, supra*; *County of Garden v. Schaaf*, 145 Neb. 676, 17 N.W.2d 874 (1945); *Coffin v. Old Line Life Ins. Co.*, 138 Neb. 857, 295 N.W. 884 (1941); *Topliff v. Richardson*, 76 Neb. 114, 107 N.W. 114 (1906). However, there is a body of case law that addresses the issuance of tax deeds other than through foreclosure. These cases clearly state that title conveyed under a tax sale is a new title, not derivative, and that the purchaser takes title free from any encumbrances. See, *Sanford v. Scott*, 105 Neb. 479, 484, 181 N.W. 148, 150 (1920) (concluding that county treasurer's tax deed "conveyed the title to the defendant . . . free from the lien of plaintiff's mortgage"); *Rickards v. Coon*, 13 Neb. 420, 422, 14 N.W. 163 (1882) (addressing tax deed from county treasurer and stating that "tax deeds divest the title of the land owner" and that "the purchaser takes the title entirely free from all prior claims"); *Boeck v. Merriam*, 10 Neb. 199, 202, 4 N.W. 962, 963 (1880) (stating that holder of tax deed "takes an absolute title free from all liens and [e]ncumbrances").

[7] Furthermore, it was the rule at common law for tax deeds to convey title free and clear of prior liens even before the statutory scheme for obtaining a tax deed, now codified at § 77-1837, was enacted in 1903. See, *Rickards v. Coon, supra*; *Boeck v. Merriam, supra*. It is a recognized rule of construction that statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a consruction which restricts or removes a common-law right should not be adopted unless the plain words of the act compel

it. *Guzman v. Barth*, 250 Neb. 763, 552 N.W.2d 299 (1996). Thus, because the plain words of § 77-1837 do not demand Archer's interpretation, which would be contrary to common law, we are further constrained from adopting his interpretation of § 77-1837.

[8] In conclusion, our rules of statutory construction compel us to adopt an interpretation of § 77-1837 that does not nullify §§ 14-557, 77-203, and 77-208 but respects their mandates, promotes a consistent statutory scheme, and is consistent with previous holdings of the Nebraska Supreme Court and with common law. We hold that a treasurer's tax deed, issued pursuant to § 77-1837 and in compliance with §§ 77-1801 to 77-1863, passes title free and clear of all previous liens and encumbrances.

Archer does not contend that Helen failed to comply with any of the statutory procedures and dismisses the fact that when it was notified of Helen's intent to apply for a treasurer's tax deed, it could have protected its lien by redeeming the property from sale using the procedure specified in § 77-1824 (authorizing redemption by owner or "any person having a lien thereupon" and allowing redemption at any time before delivery of tax deed). Archer attempts to justify its failure to protect its lien by asserting that foreclosure proceedings "provide adequate protections to a lienholder by way of the disposition of surplus proceeds of the foreclosure sale." Brief for appellant at 10. But this argument utterly fails to explain why Archer should now be protected when it refused to act when given the opportunity. Had Archer redeemed the property under § 77-1824, it not only would have protected its lien position, it would have been entitled under § 77-1828 to reimbursement from Shafer Properties (as the titleholder which would have benefited by redemption) of the moneys expended in redeeming the property. Thus, the statutory framework provided a means for Archer to protect its lien, but it failed to do so.

Therefore, the district court did not err in finding that the tax deed in the instant case conveyed title free and clear of the liens of Archer. Because its liens were foreclosed by the tax deed, Archer's deeds of trust were not first, paramount, and superior to the tax deed, and the district court did not

err in so holding. Archer's first two assignments of error lack merit.

*Summary Judgment.*

Archer finally alleges that the district court erred in sustaining Daniel's motion for summary judgment and denying its motion for summary judgment. We agree with the district court that Daniel proved he was entitled to judgment as a matter of law and that Archer did not.

As the plaintiff in a quiet title action, Daniel was required to prove that he was the owner of the legal or equitable title to the property or had some interest therein superior to the rights of Archer. See *Weesner v. Weesner*, 168 Neb. 346, 95 N.W.2d 682 (1959). Because the tax deed conveyed title free and clear of all other liens and encumbrances, it necessarily follows that Daniel could meet his burden of proof by showing that he was the rightful and current owner of the property and that Archer held no liens on the property that postdated the tax deed. He met a portion of this burden with Helen's affidavit, which established both her original possession of the property under the tax deed and the subsequent transfer of the property to Daniel by quitclaim deed. He met the remainder of his burden of proof with the affidavit of the attorney, who testified that the only parties with an interest in the property other than Daniel were Shafer Properties and Archer and that their interests predated the tax deed.

Given this evidence, the district court did not err in sustaining Daniel's motion for summary judgment, thus quieting his title to the property. It naturally follows that the court correctly overruled Archer's opposing motion for summary judgment.

## CONCLUSION

Because a contrary interpretation would nullify other statutes that place tax liens in first priority, fail to promote a consistent statutory scheme, and conflict with previous case law and common law, we hold that a treasurer's tax deed, issued pursuant to § 77-1837 and in compliance with §§ 77-1801 to 77-1863, passes title free and clear of all previous liens and encumbrances. Given this holding and the evidence that

Daniel's title to the property flowed from a treasurer's tax deed issued in compliance with the statutory procedures, the district court did not err in sustaining Daniel's motion for summary judgment and quieting title to the property originally obtained by tax deed. We affirm the court's decree.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.

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RYAN KRIZ, APPELLANT, V. BEVERLY NETH, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, AND THE NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEES.

811 N.W.2d 739

Filed May 1, 2012. No. A-11-560.

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 may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. 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 not arbitrary, capricious, or unreasonable.
3. **Due Process.** Due process claims are generally subjected to a two-part analysis: (1) Is the asserted interest protected by the Due Process Clause and (2) if so, what process is due?
4. **Administrative Law: Due Process.** Where procedural due process is required, the State must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.
5. **Administrative Law: Due Process: Notice: Evidence.** An administrative hearing must include 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.
6. **Administrative Law: Motor Vehicles.** Pursuant to 247 Neb. Admin. Code, ch. 1, §§ 003.05 and 003.05E (2006), an administrative hearing officer has the duty to take appropriate action to avoid unnecessary delay in the disposition of the proceeding and the power to regulate the course of the proceedings in the conduct of the parties and their representatives.
7. **Administrative Law: Due Process: Motor Vehicles.** Due process does not require administrative hearings at any length demanded by a motorist.

Appeal from the District Court for Box Butte County: LEO DOBROVOLNY, Judge. Affirmed.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellees.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

In this appeal from a district court judgment affirming an administrative license revocation of Ryan Kriz' motor vehicle operator's license, we focus on the due process requirement that an administrative hearing provide reasonable time and opportunity to present evidence. Because the record shows that Kriz refused to request a continuance or ask that the record be held open and failed to provide any showing that the additional evidence would have affected the outcome of the hearing, we find no error appearing on the record and we affirm the district court's judgment.

## BACKGROUND

In October 2010, Officer Patrick Connelly and Sgt. Sean Busch of the Alliance Police Department arrested Kriz for driving under the influence (DUI) after he showed signs of impairment on standardized field sobriety maneuvers and registered a breath alcohol content of .118 on a preliminary breath test. The officers had originally approached Kriz because he was slumped over in the driver's seat of a parked, running vehicle at approximately 5:30 a.m. They initiated a potential DUI investigation after detecting "a strong, distinct odor of an alcoholic beverage coming from the interior of the vehicle and, again, coming from [Kriz'] person." After the arrest, a blood sample was taken from Kriz and tested for blood alcohol content. Upon receiving the blood test results, which indicated that Kriz had a blood alcohol content of .08 or more, Officer Connelly and Sgt. Busch issued a notice of revocation. Kriz objected to the revocation by filing a petition for an administrative hearing.

The requested administrative hearing was held on November 22, 2010, before a designated hearing officer of the Nebraska

Department of Motor Vehicles (the Department). The record shows that the hearing began at 3:35 p.m. Kriz was represented by an attorney. Sgt. Busch, Officer Connelly, and the technician who processed the blood test were present to testify, in that order. At the end of the first witness' testimony, the hearing officer advised Kriz, "The time is 3:56. I do have another hearing at 4:16 . . . . Just to let you know." The hearing officer then completed her examination of the second witness, but the allotted time for the hearing expired in the middle of Kriz' cross-examination. The hearing officer repeatedly gave Kriz the opportunity to request a continuance, but he repeatedly refused. Ultimately, the hearing officer closed the hearing before Kriz finished his cross-examination of the second witness. The third witness—the technician—never testified.

Because Kriz now alleges that his due process rights were violated by the hearing officer's decision to end the hearing, we include the relevant exchange between the hearing officer and Kriz' attorney in full:

> THE HEARING OFFICER: . . . And it's 4:29 p.m. Do you want a continuance . . . ?
>
> [Kriz' attorney]: No. I don't want a continuance. I'm ready to go forward. I — I'm still ready to — ready and able to continue with my examination.
>
> THE HEARING OFFICER: Okay. Well, if you don't want a continuance, this has pretty much been your hearing today. You do have another witness, evidently.
>
> [Kriz' attorney]: I do have a witness, but I — I'm not asking for a continuance.
>
> THE HEARING OFFICER: Okay. Well, how are you going to provide your other evidence, sir? Do you want me to hold the record open for something?
>
> [Kriz' attorney]: (Indiscernible) finish examining this witness, and then I'm going to ask to call my next witness.
>
> THE HEARING OFFICER: Well, unfortunately, we're out of time for the hearing. So, you can ask for a continuance. If you ask for a continuance, the officer might have a chance to bring in his report (indiscernible) time.

[Kriz' attorney]: (Indiscernible) —

THE HEARING OFFICER: It's up to you, sir. Do you want a continuance (indiscernible) —

[Kriz' attorney]: I've already made that clear. I'm not asking for a continuance.

THE HEARING OFFICER: You do not want a continuance.

[Kriz' attorney]: I will not request one. If the Department wants a —

THE HEARING OFFICER: All right. So —

[Kriz' attorney]: — continuance, they're —

THE HEARING OFFICER: — that's it for today. Do you want to make an argument? Do you want (indiscernible) argument —

[Kriz' attorney]: I'm not done with my (indiscernible) make any argument.

THE HEARING OFFICER: You don't want to make an argument?

[Kriz' attorney]: No. I'm not done with my case yet.

THE HEARING OFFICER: Well, you're not asking for a continuance and today's the hearing. So, I guess —

[Kriz' attorney]: (Indiscernible) —

THE HEARING OFFICER: — it's up to you, sir, whether you want some additional time to present your case.

[Kriz' attorney]: Well, I'm not asking for a continuance.

THE HEARING OFFICER: Okay. And it's my understanding that you don't want a continuance, so I'm asking, sir, do you have any argument you want to make?

[Kriz' attorney]: No. I'm not done with my case, so I'm not making any argument.

THE HEARING OFFICER: Okay. So —

[Kriz' attorney]: I'm ready to go forward.

THE HEARING OFFICER: I understand that . . . . But if you want to go forward, you're not asking for a continuance, so the hearing is going to be closed. And I'll be making a recommendation to the Director of the Department. There will be a recommendation made. A

> copy of an order is going to be sent to you. A copy will be sent by certified mail to the appellant.
>
> . . . [D]id you want to hold the record open for any additional information, Title 177, or anything else?
>
> [Kriz' attorney]: No. I don't need to hold it open for that. I didn't get a chance to examine the witness regarding that. So —
>
> THE HEARING OFFICER: Well, you could have requested a continuance, sir. That's up to you.
>
> So, the record, let's see, will not be held open. And the hearing is over at 4:31 p.m.

Following the hearing, the hearing officer issued proposed findings of fact and proposed conclusions of law and recommended that Kriz' license be revoked for 90 days. Beverly Neth, director of the Department, adopted the hearing officer's order and revoked Kriz' license on November 29, 2010.

Immediately following the revocation of his license, Kriz appealed the decision to the district court for Box Butte County, Nebraska, alleging that his due process rights were violated and that Neth and the Department improperly revoked his license, prevented him from presenting evidence and from cross-examining witnesses, and limited the time for hearing. After a short hearing, the district court affirmed the decision to revoke Kriz' license. It found that "Kriz' due process rights do not include a right to have an indefinite period of stay" and that "[b]y opting not to request a continuance, Kriz waived presenting further evidence."

Kriz timely appeals.

## ASSIGNMENT OF ERROR

Kriz alleges that the district court erred in failing to reverse the order of revocation when Neth and the Department violated his due process rights by terminating the hearing prior to the submission of all the evidence.

## STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate

court for errors appearing on the record. *Liddell-Toney v. Department of Health & Human Servs.*, 281 Neb. 532, 797 N.W.2d 28 (2011). 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 not arbitrary, capricious, or unreasonable. *Id.*

## ANALYSIS

[3-5] Due process claims are generally subjected to a two-part analysis: (1) Is the asserted interest protected by the Due Process Clause and (2) if so, what process is due? *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). When it comes to the suspension of motor vehicle operators' licenses, both of these questions have previously been addressed by Nebraska courts. In response to the first question, the Nebraska Supreme Court has held that the "[s]uspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees." *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 824, 743 N.W.2d 758, 762 (2008). Consequently, licenses are not to be taken away without that procedural due process required by the 14th Amendment. See *Stenger v. Department of Motor Vehicles, supra*. As for the specific procedures required in this situation, our due process jurisprudence mandates that the State "provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case." *Murray v. Neth*, 279 Neb. 947, 955, 783 N.W.2d 424, 432 (2010). The Nebraska Supreme Court has alternatively described due process in the context of administrative proceedings as requiring "an opportunity for a full and fair hearing at some stage of the agency proceedings." *Troshynski v. Nebraska State Bd. of Pub. Accountancy*, 270 Neb. 347, 355, 701 N.W.2d 379, 386 (2005). Whether defined as "meaningful" or "full and fair," this hearing must include "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." *Murray v. Neth*, 279 Neb. at 955, 783 N.W.2d at 432.

The specific question before the district court in the instant case was whether Kriz was given reasonable time and opportunity to present evidence when the hearing was closed before all evidence had been introduced. Because (1) the record shows that reasonable time was provided, (2) Kriz refused to request a continuance or to ask that the record be held open, and (3) he failed to provide any showing as to how the additional evidence he wished to introduce would have affected the outcome of the hearing, we find no error appearing on the record in the district court's conclusion that Kriz was given both reasonable time and an opportunity to present evidence.

The record does not support Kriz' contention that the hearing officer deprived him of a reasonable opportunity to present evidence. The hearing was originally scheduled to last 45 minutes, but it was extended to almost an hour. The issues at the hearing were limited by statute and by regulation to two narrowly defined questions: (1) whether the police officer had probable cause to believe Kriz was operating or in actual physical control of a motor vehicle in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010) and (2) whether Kriz was operating or in actual physical control of a motor vehicle while having an alcohol concentration in violation of § 60-6,196(1). See, Neb. Rev. Stat. § 60-498.01(6)(c)(ii) (Reissue 2010); 247 Neb. Admin. Code, ch. 1, § 018.02 (2006). Kriz was notified in writing of these specific issues to be discussed when he received the notice of revocation and again orally at the start of the hearing. When he requested an administrative hearing, he was again directed to the regulations governing the hearing, including § 018.02.

Nevertheless, the record shows that despite the limited issues, Kriz spent a large portion of the hearing cross-examining Officer Connelly about repetitive and irrelevant matters and arguing with the hearing officer about her ruling regarding the police report. Even after Officer Connelly testified that he did not have access to the police report, Kriz continued to ask questions about the availability of the report. The hearing officer advised Kriz to return to a relevant line of questioning over 10 different times, reminded him that he could have acquired the police report through discovery prior

to the hearing, and ultimately ruled that "[e]ither you have other questions and you're going to ask them, or we're going to conclude this portion of the hearing." Kriz briefly moved on to other questions, but soon returned to the availability of the police report yet again. Shortly after that, the hearing officer closed the hearing.

[6,7] Pursuant to 247 Neb. Admin. Code, ch. 1, §§ 003.05 and 003.05E (2006), the administrative hearing officer has the duty "to take appropriate action to avoid unnecessary delay in the disposition of the proceeding" and the power to "regulate the course of the proceedings in the conduct of the parties and their representatives." Given Kriz' repeated refusal to move on to the merits of his defense and his insistence that he "make clear" the matter of the police report, the hearing officer did not misuse her powers by limiting the length of the hearing. Due process does not require administrative hearings at any length demanded by a motorist. See *Jensen v. County of Sonoma*, No. C-08-3440, 2010 WL 2330384 at *16 (N.D. Cal. June 4, 2010) ("Due Process Clause does not dictate the length of the hearing").

We agree with the district court's conclusion that Kriz was given reasonable opportunity to present evidence, given the fact that the hearing officer was willing to grant him a continuance or to hold the record open for the submission of further evidence. She emphasized that these were the only options available to Kriz if he wished to submit further evidence, because she was already late for another hearing, but also seemed quite willing to grant either request. Kriz adamantly refused to ask for a continuance or to request that the record be held open so that he could submit the remainder of his evidence. There was no error in the district court's finding that "[b]y opting not to request a continuance, Kriz waived presenting further evidence."

Kriz argues on appeal that the "hearing officer's demand that [he] request a continuance or forgo a full and fair hearing [was] improper" because it effectively required him to forfeit his license pending the conclusion of the hearing if he wanted to present further evidence. Brief for appellant at 13. Under the original notice of revocation, Kriz' license was scheduled

to be automatically revoked on November 28, 2010, barring reversal by the Department after the hearing or the issuance of a stay of revocation. A stay of revocation would be issued only if the Department requested a continuance of the hearing. See, § 60-498.01(6)(b); 247 Neb. Admin. Code, ch. 1, § 010.06 (2006). Therefore, if Kriz had requested a continuance, he would not have had the benefit of a stay of revocation and it was likely that the hearing officer would not have concluded the hearing until after November 28, leaving Kriz without a license for at least some period of time.

According to Kriz, the solution to this dilemma was that the Department should have requested a continuance itself. Along those lines, he argues that "[i]t was the [D]epartment who needed a continuance," brief for appellant at 13, and that "the [D]epartment [was] the one who [was] not prepared to go forward," *id.* at 14. This argument, however, ignores the fact that the Department had already met its burden in the hearing by entering into evidence the arresting officer's sworn report, at which time the order of revocation acquired prima facie validity. See § 60-498.01(7). From that point forward, the Department's order of revocation would be upheld unless Kriz proved by a preponderance of the evidence that his license should not be revoked. See *id.* Therefore, the Department had no need to request a continuance for its own purposes. In fact, the Department would have needed to request a continuance only if due process demanded that it obtain a stay of revocation on Kriz' behalf. On this issue, the district court ruled that "Kriz' due process rights do not include a right to have an indefinite period of stay." For the reasons that follow, we find no error in this holding and agree that it was not a violation of Kriz' due process rights for the hearing officer not to ask for a continuance on her own motion.

When determining whether a specific administrative procedure of the Department satisfies due process, the Nebraska Supreme Court has regularly applied the due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). See, e.g., *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006); *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005); *Hass v. Neth*, 265 Neb. 321,

657 N.W.2d 11 (2003). This analysis considers the following factors:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Chase v. Neth*, 269 Neb. at 893-94, 697 N.W.2d at 685.

In the instant case, the private interest at stake is the continued possession of an operator's license, which we have already recognized as being significant. See *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008). The Department's interest, as in the other revocation cases cited above, is "to protect the public from the health and safety hazards of drunk driving by quickly getting DUI offenders off the road." *Kenley v. Neth*, 271 Neb. at 409, 712 N.W.2d at 259. This interest is also substantial. See *Hass v. Neth*, 265 Neb. at 329, 657 N.W.2d at 21 (recognizing that "[t]here is no doubt of the substantial governmental interest in protecting public health and safety by removing drunken drivers from the highways"). Therefore, the due process analysis in the instant case turns on the second factor—the risk of an erroneous deprivation through the procedures used by the Department.

The hearing officer's requirement that Kriz ask for a continuance in order to present more evidence theoretically could have resulted in an erroneous deprivation of his license under two circumstances. He would have been wrongly deprived of his license if he had asked for a continuance without the benefit of a stay—if the revocation took place on November 28, 2010, as originally planned—and if the hearing officer later overturned the revocation based upon additional evidence adduced by Kriz at the second hearing. Under this scenario, Kriz would have been unnecessarily deprived of his license for the period between his first and second hearings. On the other hand, if Kriz' refusal to request a continuance had prevented him from adducing evidence that would have proved that his

license should not have been revoked, he would have been erroneously deprived of his license for the full 90-day revocation period. Given these two scenarios, it is obvious that the risk of an erroneous revocation existed *only if* Kriz possessed sufficient evidence to meet his burden of proof in the administrative hearing, which evidence would have to have been provided by the one witness who did not testify in the original hearing—the technician.

Significantly, when discussing a continuance, Kriz provided no information to the hearing officer to indicate that the technician's testimony would bring into question the validity of the blood test. We also note that he did not provide any explanation of why he believed the revocation of his license was improper on either the petition for an administrative hearing, which specifically asked him to "explain why the Department should not revoke your license," or his request to subpoena the technician. Furthermore, Kriz refused to give any argument during the hearing, leaving us without any indication as to how exactly he planned to meet his burden of proof. It may be that Kriz hoped the technician's testimony would reveal some flaw in the blood test, but the complete absence of any showing as to how he hoped to discredit the blood test leads us to conclude that he had no concrete evidence in advance of the hearing. In that case, Kriz would not have been able to prove that the revocation was improper even if he had been granted a continuance, his license would have been revoked anyway, and there was no risk that the hearing officer's decision caused an erroneous deprivation of his license.

Had Kriz provided any indication of the content of the testimony he was planning to present in the time gained through a continuance or how that testimony would prove the revocation was improper, our weighing of the three factors from *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), could differ and we might well have found error in the district court's conclusion. But given the Department's strong interest in removing DUI offenders from the road, we agree with the district court that the hearing officer was not required by due process to grant a continuance on her own motion when Kriz made no showing in support of the need for

a continuance and refused to request one himself. Although it was not designated for permanent publication, we reached the same conclusion in *Sanderson v. Department of Motor Vehicles*, No. A-05-043, 2006 WL 1596468 at *6 (Neb. App. June 13, 2006) (not designated for permanent publication) (holding that "some showing needs to be made to support having the hearing officer continue the hearing on his own motion . . . before one can conclude that a failure by the hearing officer to continue the matter on his own motion is a denial of due process"). And other courts have also found that an individual must make some showing of prejudice by pointing to the specific evidence he or she was prevented from adducing and explaining how the length of the hearing affected the outcome before a court will be required by due process to extend the length of an administrative hearing. See, *Chavez-Vasquez v. Mukasey*, 548 F.3d 1115 (7th Cir. 2008); *Jensen v. County of Sonoma*, No. C-08-3440, 2010 WL 2330384 (N.D. Cal. June 4, 2010); *Hobgood v. Hollie*, No. 2010-CA-000958-ME, 2011 WL 4633103 (Ky. App. Oct. 7, 2011) (unpublished opinion); *D.Z. v. Bethlehem Area School Dist.*, 2 A.3d 712 (Pa. Commw. 2010). Due process demands a reasonable opportunity to present evidence; it does not require a hearing officer to facilitate "fishing expeditions."

## CONCLUSION

Because the record shows that an adequate amount of time was provided for the hearing and that Kriz could have requested a continuance or asked that the record be held open, the district court did not err in finding that Kriz was given reasonable time and opportunity to present evidence despite the hearing officer's termination of the administrative hearing prior to the submission of all the evidence. Additionally, because he made no showing as to what evidence he would have presented had the hearing been continued and how that evidence would have affected the outcome of the hearing, the hearing officer was not required by due process to grant a continuance on her own motion. Accordingly, we affirm.

AFFIRMED.

# In re Interest of Taeven Z., a child under 18 years of age. State of Nebraska, appellee and cross-appellant, v. Alishia M.-Z., appellant and cross-appellee.

812 N.W.2d 313

Filed May 1, 2012. No. A-11-649.

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. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Criminal Law: Indictments and Informations.** Nebraska criminal procedure does not require a comprehensive and particularized factual description of elements for the offense charged in the information or complaint against a defendant.
3. **Juvenile Courts: Pleadings: Affidavits.** Neb. Rev. Stat. § 43-274(1) (Reissue 2008) requires a Neb. Rev. Stat. § 43-247(3) (Reissue 2008) petition to set forth the facts verified by affidavit.
4. **Juvenile Courts: Parental Rights: Notice.** The factual allegations of a petition seeking to adjudicate a child must give a parent notice of the bases for seeking to prove that the child is within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008).
5. **Juvenile Courts: Jurisdiction.** It is the adjudication that a child is a juvenile, as characterized in Neb. Rev. Stat. § 43-247 (Reissue 2008), which vests subject matter jurisdiction in a juvenile court, not the petition by which an adjudication is requested.
6. **Trial: Witnesses.** In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited.
7. **Juvenile Courts.** The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child and ensure the child's safety.
8. **Juvenile Courts: Jurisdiction: Parental Rights: Proof.** When establishing that a child comes within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), it is not necessary for the State to prove that the child has actually suffered physical harm, only that there is a definite risk of future harm.
9. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), the State must prove the allegations of the petition by a preponderance of the evidence, and the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247.
10. ____: ____: ____. While the State need not prove that the juvenile has actually suffered physical harm, at a minimum, the State must establish that without intervention, there is a definite risk of future harm.

Appeal from the County Court for York County: CURTIS H. EVANS, Judge. Affirmed in part, and in part reversed and remanded with direction.

Bruce E. Stephens, of Stephens Law Offices, P.C., L.L.O., for appellant.

Candace L. Dick, York County Attorney, and Benjamin B. Dennis for appellee.

Steven B. Fillman, guardian ad litem.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

## INTRODUCTION

The county court, sitting as a juvenile court, adjudicated Taeven Z. based upon his mother's ingestion of a morphine pill that was not prescribed to her. The mother, Alishia M.-Z., appeals, challenging the court's jurisdiction of her child and the overruling, in part, of her motion to dismiss. The State cross-appeals, arguing that the court erred in sustaining the motion to dismiss in part and in limiting the introducible evidence only to that directly relating to the facts pled in the petition. We affirm in part, and in part reverse and remand with direction to dismiss.

## BACKGROUND

Alishia is the biological mother of Taeven, born in May 2009. On May 3, 2011, the State filed a petition to adjudicate Taeven. The pertinent paragraphs of the petition are as follows:

> 4. That the juvenile is within Neb. Rev. Stat. [§] 43-247(3)(a) [(Reissue 2008)] for the reason that:
>
> he is abandoned by his . . . parent . . . ;
>
> he lacks proper parental care by reason of the fault or habits of his . . . parent . . . ;
>
> his parent . . . neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; and/or

> his parent is in a situation or engages in occupation dangerous to life or limb or injurious to the health or morals of such juvenile.
>
> 5. That on April 11, 2011, . . . Alishia . . . left Taeven . . . playing outside [an apartment complex] unsupervised. Taeven's maternal grandmother . . . stated that Alishia had left and didn't say where she was going or when she would come home. At that time, [the grandmother] took Taeven into her home.
>
> At 6:00 p[.]m[.] on April 11, . . . Sarah Nunnenkamp with Department of Health & Human Services gave Alishia a urinary analysis. Alishia tested positive for Opiates (morphine), Benzodiazepines (clonazepam, oxazepam, temazepam), and Amphetamines (methamphetamine).

We digress to note that despite the allegation indicating methamphetamine use by Alishia, the State did not adduce during trial any evidence concerning the positive test result or otherwise to demonstrate methamphetamine use by Alishia.

The juvenile court held a hearing, during which two witnesses testified. Sarah Nunnenkamp testified that she was formerly employed by the Department of Health and Human Services as a child and family services specialist, but that she has been employed as a family permanency specialist with a behavioral health care company for the past 6 months. In that capacity, she was assigned to Taeven's case on April 11, 2011. She became involved based upon a referral requesting services with regard to a different child of Alishia. Nunnenkamp went to Alishia's apartment that morning and obtained Alishia's consent to submit to a drug test, but Alishia was unable to produce a urine sample. Nunnenkamp told Alishia that she would return to Alishia's apartment at approximately 3 p.m. At 3 p.m., Nunnenkamp arrived at Alishia's apartment and observed Taeven in the middle of the courtyard area for a couple of minutes with no adults around. Nunnenkamp knocked on Alishia's door, but Alishia's mother, who was in a different apartment, told Nunnenkamp that Alishia was not there and that she was supposed to be watching Taeven. Nunnenkamp testified that at a later date, Alishia's mother said that Taeven was outside by himself because she had gone to the restroom

and asked a neighbor to watch Taeven. There was no fence or barrier to prevent Taeven from going into the street—which Nunnenkamp estimated was 50 to 75 yards away—and he was about 30 feet away from a parking lot where cars would be driving. Although Nunnenkamp testified that Taeven was not in any imminent danger, the circumstances concerning the removal of Taeven's half brother caused her concern because Nunnenkamp learned that the half brother was unsupervised and that Alishia had left that child in the home of his father, who was believed to be under the influence. Nunnenkamp obtained a urine sample from Alishia, who reported being prescribed hydrocodone, Xanax, and clonazepam and taking a morphine pill from a friend the previous day to alleviate back pain.

Taeven's biological grandfather testified that on one occasion, Alishia had taken painkillers and become incapacitated. Alishia's counsel objected, stating that "[t]here's nothing in the petition that gives me any notice that that is something that's being alleged to show that my client is unfit." The State directed the court's attention to the second subparagraph of paragraph 5. The court sustained the objection, stating that "the State has held out that paragraph five was the factual basis and there's nothing in here to give them notice of that." The State then rested.

Alishia's counsel moved to dismiss, arguing that there was no showing that Taeven was in any danger or that Alishia was neglectful by leaving Taeven in his grandmother's care. The court overruled the motion as to the subparagraph of paragraph 4 which alleged that the parent was in a situation dangerous to life or limb or injurious to the health or morals of the child, stating that it "directly related to the morphine pill" and that "the taking of an illegal drug under an illegal circumstances [sic] would be sufficient for that." The court sustained the motion to dismiss as to the other subparagraphs of paragraph 4, including the allegation that the child lacked proper parental care by reason of the fault or habits of his parent. Alishia rested without adducing evidence.

In ruling, the court orally stated that it was a crime to take a morphine pill without having a prescription for it. It noted

that Alishia was taking other "rather serious medications," that she was self-medicating, and that she was doing so illegally. The court concluded that doing so was "dangerous or injurious to the health and morals of the juvenile if the parent is of a mind to do that because the parent should not be doing that." The court entered a written order finding that jurisdiction was proper, sustaining the allegations of the "amended" petition, and finding that Alishia took a morphine pill that was not prescribed to her.

Alishia timely appeals, and the State cross-appeals.

## ASSIGNMENTS OF ERROR

Alishia assigns that the juvenile court (1) lacked jurisdiction because the pleading and evidence at the adjudication hearing did not justify the juvenile court's accepting jurisdiction and (2) erred in overruling her motion to dismiss at the close of the State's case.

On cross-appeal, the State assigns that the court erred by (1) granting Alishia's motion to dismiss three of the grounds set forth in paragraph 4 of the petition and (2) limiting the introducible evidence to only evidence which directly related to the facts pled in paragraph 5 of the petition.

## STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012).

## ANALYSIS

*Cross-Appeal.*

We deem it more efficient to address the State's cross-appeal before considering Alishia's assigned errors and to consider the State's claim of evidentiary error before reaching its substantive argument. But the State's assignment of evidentiary error requires that we first discuss the pleading requirements of a juvenile petition.

The governing statute prescribes a specific pleading standard for other types of juvenile cases but omits cases under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) without specifying an alternative standard. Neb. Rev. Stat. § 43-274(1) (Reissue 2008) provides:

> The county attorney, having knowledge of a juvenile in his or her county who appears to be a juvenile described in subdivision (1), (2), (3), or (4) of section 43-247, may file . . . a petition in writing specifying which subdivision of section 43-247 is alleged, setting forth the facts verified by affidavit . . . . *Allegations under subdivisions (1), (2), and (4) of section 43-247 shall be made with the same specificity as a criminal complaint.* It shall be sufficient if the affidavit is based upon information and belief.

(Emphasis supplied.)

Although the State contends that the absence of subsection (3) in the italicized language "indicates the legislature did not intend petitions brought under this subdivision to be plead [sic] with higher specificity," brief for cross-appellant at 23, we come to the opposite conclusion. Subsections (1), (2), and (4) of § 43-247 relate to varying levels of criminal offenses allegedly committed by a juvenile. On the other hand, § 43-247(3) relates, respectively, in subsection (a) to juvenile nonoffenders and in subsection (b) to status offenders. See Neb. Rev. Stat. § 43-245(12) and (19) (Cum. Supp. 2010) (definitions of nonoffender and status offender).

[2] The mandate that allegations under § 43-247(1), (2), and (4) be made with the same specificity as a criminal complaint merely reconciles the pleading practice regarding juvenile offenders with that of adult criminals. And with respect to adults, it has long been held that it is generally sufficient if the information describes the crime in the language of the statute. See *Leisenberg v. State*, 60 Neb. 628, 84 N.W. 6 (1900). "Nebraska criminal procedure does not require a comprehensive and particularized factual description of elements for the offense charged in the information or complaint against a defendant." *State v. Schaaf*, 234 Neb. 144, 149, 449 N.W.2d 762, 766 (1989). We do not view the criminal pleading

requirement as calling for "higher specificity." To the contrary, pleading in the language of the statute represents a conclusory rather than a strictly fact-based form of pleading.

[3,4] Section 43-247(3) cases, on the other hand, are not comparable to adult criminal cases, and the pleading standard for such cases stems from the requirements of due process in this context. As we quoted above, § 43-274(1) requires a § 43-247(3) petition to "set[] forth the facts verified by affidavit." The factual allegations of a petition seeking to adjudicate a child must give a parent notice of the bases for seeking to prove that the child is within the meaning of § 43-247(3)(a). See *In re Interest of Christian L.*, 18 Neb. App. 276, 780 N.W.2d 39 (2010).

Our decision in *In re Interest of Christian L., supra*, shows how the failure to adequately allege facts would deprive a parent of the notice that is constitutionally required. In that case, the State's petition alleged that a child lacked proper parental care through the fault or habits of his mother and that he was at risk of harm. The only factual grounds stated in the petition were that the home was filthy and that it did not contain enough food. The court adjudicated the child upon evidence and testimony concerning the mother's mental health, an issue not raised by the petition. On appeal, this court concluded that the allegation that the child was at risk because of his mother's fault did not sufficiently encompass an assertion that a mental health condition from which she may have suffered constituted fault-based conduct on her part.

[5] This pleading requirement is not, however, a matter of the juvenile court's subject matter jurisdiction. In *In re Interest of Kelly D.*, 3 Neb. App. 251, 526 N.W.2d 439 (1994), *disapproved, In re Interest of Devin W. et al.*, 270 Neb. 640, 707 N.W.2d 758 (2005), we found a lack of jurisdiction because the petition did not have any allegations claiming that the child lacked proper parental care by reason of the custodial parent's conduct and, therefore, the pleadings did not give that parent notice of any claim against him. But in *In re Interest of Devin W. et al.*, upon a petition for further review, the Nebraska Supreme Court reversed our decision where we concluded, in reliance upon *In re Interest of Kelly D.*, that the

juvenile court did not acquire jurisdiction due to the omission of allegations showing that the child lacked proper parental care by reason of the inadequacy of the father, a parent whose custody of the child might be affected. The Supreme Court stated that we "misapprehend[ed] the juvenile court's jurisdiction and the purpose of the adjudication procedure," *In re Interest of Devin W. et al.*, 270 Neb. at 653, 707 N.W.2d at 767, and reiterated that "'it is the adjudication that a child is a juvenile, as characterized in § 43-247, which vests subject matter jurisdiction in a juvenile court, not the petition by which an adjudication is requested,'" 270 Neb. at 652, 707 N.W.2d at 766. Thus, the allegations of the petition serve not to grant the juvenile court with subject matter jurisdiction over a parent, but, rather, to afford the parent notice of the basis upon which the court is being asked to assume jurisdiction. This case teaches us that notice is a requirement of due process rather than a matter of jurisdiction.

[6] Although the petition in the instant case gave adequate notice of an issue relating to ingestion of drugs, the State failed to properly preserve its claim of evidentiary error. The factual grounds set forth in the juvenile court petition in this case gave notice of two issues: Taeven's being left outside unattended and Alishia's testing positive for various drugs. As the State attempted to elicit testimony from Taeven's grandfather about Alishia's taking pills and becoming incapacitated, Alishia's counsel objected on the basis of lack of notice. Even though the State directed the court to paragraph 5 of the petition, which listed drugs for which Alishia tested positive, the court sustained the objection. In our view, the factual allegation in paragraph 5 sufficiently put Alishia on notice that her ingestion of various drugs would be at issue. However, in order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). Here, the State did not make an offer of proof. And from the question posed, we cannot tell whether the child was present at any time when Alishia may have

become incapacitated. Accordingly, this error has not been properly preserved for appellate review.

The State argues that the evidence of Taeven's being left unattended in the courtyard which was approximately 30 feet away from a parking lot and approximately 50 to 75 yards from the street was sufficient to support adjudication. We disagree. The critical factor missing from the State's evidence is the duration that this occurred.

[7,8] We observe that the purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child and ensure the child's safety. See *In re Interest of Rebekah T. et al.*, 11 Neb. App. 507, 654 N.W.2d 744 (2002). When establishing that a child comes within the meaning of § 43-247(3)(a), it is not necessary for the State to prove that the child has actually suffered physical harm, only that there is a definite risk of future harm. *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App. 529, 614 N.W.2d 790 (2000).

The petition alleged that Alishia left Taeven unsupervised outside at a time when the child was not quite 2 years old, but the evidence does not establish that the event lasted long enough to show a definite risk of future harm. Alishia had arranged for her mother to watch him, and Nunnenkamp believed that he was unattended for only a few minutes. But all that Nunnenkamp's testimony establishes with any significant weight is that Taeven was unattended at the time she arrived and remained so for "[a] couple of minutes. It wasn't very long." Nunnenkamp simply had no personal knowledge as to how long Taeven had been unsupervised before she arrived. And while there was a parking lot and a street nearby in the area, Taeven was not in either and thus, there can be no inference that he was in imminent danger. We cannot say that Taeven was at a definite risk of harm or that he lacked proper parental care due to Alishia's fault or habits. Accordingly, the court did not err in sustaining Alishia's motion to dismiss the ground in paragraph 4 alleging that Taeven "lacks proper parental care by reason of the fault or habits of his . . . parent." We affirm the juvenile court's order dismissing this ground of the petition.

*Alishia's Appeal.*

[9,10] Alishia's two assignments of error can be considered together. She essentially argues that the juvenile court lacked jurisdiction and erred in overruling part of her motion to dismiss because the evidence was not sufficient to prove by a preponderance of the evidence that Taeven was abused or neglected. At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence, and the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *In re Interest of Cornelius K.*, 280 Neb. 291, 785 N.W.2d 849 (2010). While the State need not prove that the juvenile has actually suffered physical harm, at a minimum, the State must establish that without intervention, there is a definite risk of future harm. *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008).

In *In re Interest of Carrdale H.*, 18 Neb. App. 350, 781 N.W.2d 622 (2010), the juvenile court adjudicated a child based upon the father's possession of illegal drugs, and this court reversed the adjudication order. We observed that the State failed to adduce any evidence regarding whether the father was charged with a crime, whether the father had any history of drug use in or out of the child's presence, whether the child was present when the father possessed the drugs, or whether the child was affected in any way by the father's actions. Thus, we reasoned that the State failed to prove by a preponderance of the evidence the allegation of the petition that the father's "'use of alcohol and/or controlled substances places said child at risk for harm.'" *Id.* at 353, 781 N.W.2d at 625. In *In re Interest of Carrdale H.*, we noted that in *In re Interest of Anaya, supra*, the parents' failure to submit their infant to mandatory blood testing due to their religious beliefs was not enough, by itself, to establish neglect warranting adjudication even though the parents engaged in illegal activity by refusing to submit their child to the blood test.

This court also reversed an order of adjudication in *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App. 529, 614

N.W.2d 790 (2000). In that case, the adjudication was based on a pattern of alcohol use by the parents. We found that "[a]lthough the evidence presented shows that [the parents] had consumed alcohol on occasions when the children were in the house, there was no evidence presented to show any impact such drinking had on the children." *Id.* at 533, 614 N.W.2d at 794. We concluded that the State failed to adduce evidence to show that the children lacked proper parental care due to the parents' alcohol consumption.

Like in *In re Interest of Carrdale H.* and *In re Interest of Brianna B. & Shelby B.*, we conclude that the State did not adduce sufficient evidence to support the adjudication. There was no evidence that Taeven was affected by Alishia's taking the unprescribed morphine pill or any other evidence to suggest that Alishia's taking the pill placed Taeven at risk for harm. While taking an unprescribed medication may be illegal, a parent's illegal activity—without more—is not sufficient to adjudicate a child. Here, there is no evidentiary nexus between the consumption of drugs, mostly pursuant to prescription, and any definite risk of future harm to Taeven. Accordingly, we reverse the juvenile court's adjudication on this ground.

## CONCLUSION

Upon our de novo review of the record, we affirm the order of the juvenile court dismissing the ground of the petition alleging that Taeven lacked proper parental care by reason of the fault or habits of his parent, but we reverse its adjudication upon the ground that Alishia ingested a morphine pill that was not prescribed for her. We therefore remand the matter with direction to dismiss the petition.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

# RITA A. SUTTON AND KAI CARLSON, APPELLEES, V. HELEN KILLHAM ET AL., APPELLEES, AND 3RP OPERATING, INC., INTERVENOR-APPELLANT.

820 N.W.2d 292

Filed May 8, 2012. No. A-11-083.

1. **Oil and Gas: Mines and Minerals: Words and Phrases.** A working interest is an operating interest under an oil and gas lease that provides its owner with the exclusive right to drill, produce, and exploit the minerals.
2. **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.
3. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. **Judgments: Receivers: Appeal and Error.** All orders appointing receivers, giving them further directions, and disposing of the property may be appealed to the Court of Appeals in the same manner as final orders and decrees.
5. **Final Orders: Appeal and Error.** There are three types of final orders which may be reviewed on appeal. The three types are (1) an order which affects a substantial right in an action and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
6. **Judgments: Receivers.** The appointment of a receiver is a provisional remedy governed by Neb. Rev. Stat. §§ 25-1081 to 25-1092 (Reissue 1995), which precludes it from falling in the category of a special proceeding.
7. **Receivers: Words and Phrases.** The provisional remedy governed by Neb. Rev. Stat. §§ 25-1081 to 25-1092 (Reissue 1995) includes § 25-1087, which provides for further directions to a receiver from the court upon the application of any party.
8. **Summary Judgment: Receivers.** An order granting summary judgment to a receiver is not an order affecting a substantial right and not made during a special proceeding.
9. **Judgments: Receivers: Appeal and Error.** Neb. Rev. Stat. § 25-1090 (Reissue 2008) specifically authorizes an appeal from all orders appointing receivers, giving them further directions, and disposing of the property; however, the denial of the appointment of a receiver is not expressly within the ambit of § 25-1090.
10. **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.
11. **Statutes.** When general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same.

12. **Actions: Parties: Final Orders: Appeal and Error.** An appeal can be taken pursuant to Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.
13. **Summary Judgment: Receivers: Words and Phrases: Appeal and Error.** A summary judgment in a receiver's favor that he is not liable for a claim is a direction by the court to a receiver from which an appeal can be taken pursuant to Neb. Rev. Stat. § 25-1090 (Reissue 2008).
14. **Appeal and Error.** To be considered by an appellate court, an error must be both assigned and specifically argued in the brief of the party claiming error.

Appeal from the District Court for Cheyenne County: BRIAN C. SILVERMAN, Judge. Affirmed.

Gregory J. Beal for intervenor-appellant.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellees Helen Killham et al.

Sterling T. Huff, of Island & Huff, P.C., L.L.O., receiver.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

## INTRODUCTION

Fred L. Carlson and Twila A. Carlson had six children during the course of their marriage. Fred and Twila, through their wills, each created a trust generally for the benefit of their children. Twila died on July 9, 1999, and Fred died on January 21, 2000. Their only son, Dan Carlson, is the trustee of both trusts, which contain farmland in Cheyenne and Kimball Counties, and located on some of the land are two oil wells. Two of the daughters, Rita Sutton (Rita) and Kai Carlson, have been involved in protracted litigation with Dan and the other three sisters, Helen Killham, Dianne Johnson, and Beth Zajonc (Beth), that has gone on more than 10 years, although we note that the record suggests that Kai died in approximately 2010. That litigation began in the Cheyenne County Court, but ultimately ended up in the Cheyenne County District Court as the instant case. This case has twice been before this

court, but we determined in both prior appeals that we did not have jurisdiction and dismissed the appeals. See cases Nos. A-05-847 (appeal dismissed on August 30, 2005, because order being appealed did not dispose of all claims of all parties) and A-07-1133 (appeal dismissed on March 3, 2008, because order being appealed was not definite enough to show final determination of all issues raised by counterclaims).

The complexity of the litigation is illustrated by the fact that between the two previous appeals and the instant appeal, there are 719 pages of pleadings and orders in the transcripts.

## PROCEDURAL AND FACTUAL BACKGROUND

The present appeal is being pursued by 3RP Operating, Inc., which filed a "Claim . . . for Operating Expenses on Oil Well" on January 11, 2007, seeking payment by the court-appointed receiver of its claim for $39,024.38. 3RP Operating is designated as an intervenor. The issue being appealed is the decision of the Cheyenne County District Court that granted summary judgment to the court-appointed receiver, Sterling T. Huff, on his denial of the intervenor's claim. The claim was for costs and fees for the operation of one of the two oil wells that were part of the trusts. The wells have been referenced as "Carlson No. 1" and "Carlson No. 1A," but as far as we can discern, only one of the two wells, Carlson No. 1A, has been operational. The ownership of the mineral rights and working interests in the oil wells has been one of many disputes in this litigation involving the six Carlson siblings, as well as who was, or who would be, the operator of the wells.

[1] We believe the explanation of some unique terms that are common to the oil and gas industry will be of benefit to the reader. The Supreme Court's opinion in *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007), is helpful in this regard, even though the contracts involved provide for application of Texas law. The *Coral Prod. Corp.* opinion explained that a "working interest is an operating interest under an oil and gas lease that provides its owner with the exclusive right to drill, produce, and exploit the minerals." 273 Neb. at 396, 730 N.W.2d at 372, citing *H.G. Sledge v.*

*Prospective Inv. & Trading*, 36 S.W.3d 597 (Tex. App. 2000). In evidence is the affidavit of a petroleum engineer which provides some helpful definitions. The engineer says that a holder of a "mineral interest" or "royalty interest" is the mineral owner, who is referenced as the "lessor" in an oil and gas lease and typically receives a 12½-percent share of the revenue from the sale of a well's production, but is not required to pay any operating expense and does not have any voice in oil and gas production matters. The engineer says that "working interest" owners are the owners of the physical oil well and all equipment, who gain their ownership as the lessee in an oil and gas lease and typically receive 87½ percent of lease revenues, but pay 100 percent of the drilling and production costs and have full responsibility for all decisions regarding the well. An "operator," according to the engineer, is responsible for the day-to-day operation of the well and is bound by the operating agreement (a verbal or written agreement by and between all working interest holders and the operator). The engineer further explains that an "operator of record" of a well must post a bond with the Nebraska Oil and Gas Conservation Commission (NOGCC) and comply with the NOGCC's regulatory and reporting requirements.

Returning to the claim filed by 3RP Operating, it is important to point out that the records of the Nebraska Secretary of State in evidence show that 3RP Operating, the named claimant, did not have a legal corporate existence until September 8, 2006. However, on April 23, 2003, a "sundry notice" was filed with the NOGCC by Rita designating herself as "owner" concerning Carlson No. 1A. The notice is designated as a "change of [o]perator" and states, "change operations to protect lease—Rita . . . dba 3RP [O]perating [address omitted] Effective date 1 [M]ay 2003." The evidence is clear, as the trial court found in its journal entry and order of December 30, 2010, granting summary judgment to the receiver, that 3RP Operating was the "alter ego of [Rita's husband] and his family, inclusive of Rita . . . but during the relevant period of 2003 through June 2006 it was not a corporation." The receiver, Huff, filed a notice of disallowance of 3RP Operating's claim on September 22, 2008. Nothing further happened concerning the claim until the

receiver filed a motion on November 1, 2010, seeking summary judgment on his denial of 3RP Operating's claim. The matter was heard in the district court on December 17, and it was clearly stated by the court and counsel that the only matter then before the court was the motion for summary judgment of the receiver with respect to the claim of 3RP Operating. Whether there were other matters, issues, or motions pending and unresolved at that time was not stated one way or another by the court or counsel, although as eventually recounted later, the court ruled on a number of other matters.

The Cheyenne County District Court, as alluded to above, entered its decision on the summary judgment motion on December 30, 2010. The court found that 3RP Operating was a corporation, but that it had no corporate existence during the time period for which payment for oil well operation was sought in the claim—from 2003 through June 2006—and that "Rita . . . dba 3RP Operating took over as operator of the well after Dan [the trustee who had initially been the operator following the parents' deaths], without the agreement or permission of the other [holders of] working interests in the Carlson Wells." The court further found that there was never an operating agreement signed or agreed to by all interested parties. While not expressly stated, the implicit holding of the district court was that the corporation making the claim, 3RP Operating, lacked standing to do so because it had not even existed during the time period for which operating expenses were being sought. The court also found that it had "not been shown any substantial or material benefit to the Defendants or Receiver from the actions of 3RP Operating . . . or [Rita's family] dba 3RP Operating." The court concluded as a matter of law that the receiver's motion for summary judgment should be sustained and that 3RP Operating shall recover nothing from "either Receiver." (The record shows that before Huff was appointed by the court as receiver on April 2, 2007, a different receiver had been appointed on April 22, 2003, and that he resigned and was relieved of his duties in December 2006.

In the course of this court's normal initial jurisdictional review of all appeals, we issued an order in this appeal to show

cause with respect to whether the underlying action had been finally resolved. Receiving no response to our order, we dismissed the appeal. 3RP Operating filed for a rehearing, which we granted, and we reinstated the appeal; however, in our order doing so, we directed the parties to address the issue of jurisdiction. Thus, we turn to the jurisdictional issue.

## JURISDICTION

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case, *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009), and the defendants-appellees' claims also assert that we lack jurisdiction. Nonetheless, notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Id.* The issues raised in this protracted litigation are not easily summarized, and it might be said that this case has traveled a rough road to get to this point.

Before proceeding further, we believe it is helpful to summarize a proceeding before the district court that occurred on August 26, 2004. What we know about that proceeding is contained in a court reporter's transcript of that proceeding, duly certificated and offered and received in evidence in the summary judgment proceeding, which the district court directed its court reporter to prepare. This transcript is about 60 pages, so we limit ourselves to trying to capture the gist of it, as such relates to the jurisdictional issue we are going to discuss—and ultimately to the summary judgment.

Present for the proceeding, when it began at approximately 10 p.m. on August 26, 2004, were the six sibling litigants, their counsel, and a lawyer-mediator. Counsel began by saying to the court, "As you know, the parties have been in mediation all day . . . . We . . . believe that we've reached a resolution of this litigation and I'd like to recite what my understanding of the terms of that resolution is based on the lengthy mediation that we've had." Then, over the next nearly 60 pages, counsel, the court, and the parties attempted to agree on what they had agreed on in the mediation. First was the fact that Rita was going to purchase all of the trust real estate from her siblings

for $460,000 and that she would receive good and merchantable title. This then led to an extensive discussion of the terms of the purchase, interest rates, what would happen if she defaulted on payment, et cetera. In Rita's counsel's recitation of the agreement was included the fact that while the parties had agreed upon what would happen with the land that the parents had placed in the trusts, the parties had not agreed and could not agree upon the oil wells. We quote from counsel's statement to the court:

> The issue of the oil well and the working interest has not been resolved by the parties. The parties have agreed that — It's my understanding that — Well, they've agreed that that issue would be submitted and would be tried to this court. And the issue, as I understand it, would be whether or not the purchaser of the land is entitled, pursuant to the terms of the Trust or Deeds of Distribution and law, to purchase the working interest, the mineral/royalty interest for the land that's being purchased. . . .
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> . . . .
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> . . . But the issue of that oil well would be left to try to this court. I guess to phrase it alternatively, would be, [M]ay the defendant's [sic] partition the working interest and mineral rights that are part of the land and sell [such] at public auction[?] . . . [A]nd . . . when the issue of the oil well has been finally litigated and determined the parties would dismiss with prejudice any pending litigation.

The trial court then asked counsel for Dan and his three codefendant sisters if that was the understanding of his clients. From this point forward, the discussion involved what sort of releases would be given; when such would be given; how past land taxes would be handled; how the pending receivership would be wound up; who would replace the then-receiver, if that became necessary; whether a new trustee was needed and, if so, who; dismissal of pending county court litigation; the receiver's unpaid bills; title insurance; the certified public accountant's bills; past farming expenses; how to convey clear title to the land; and payment of closing costs on the land transfer.

Eventually, near the end of the proceeding, the lawyers told the judge they were "at ease" with the agreement. The judge then asked each of the six sibling litigants, "Is the agreement outlined here in the courtroom today your agreement?" When the court got to Beth, she said, "[B]ut on the oil well, we'll still — that's still to be worked out?" and the court responded, "Yeah, we're still going to meet each other again. . . . But all other litigation is resolved by you saying yes," and Beth then said, "Yes." The court then made several clear statements about the oil wells, including that "the interest in the oil well and the working interest in the oil well [would be resolved] at trial." And in fact, the court mentioned still having a "November trial date for the remaining issues."

The trial court made a finding that the agreement was fair and the land was going to be sold, that "it [was] now the order of [the] court" that an order would be prepared, and that the agreement could and should be performed before the November 2004 trial date that was previously mentioned. The last eight pages of the transcript dealt with the spouses' signing necessary documents and with the release of a $15,000 bond held at a bank.

However, the record reveals that the mediated agreement was never reduced to a written agreement or a "traditional" court order. Rather, some 7 months later, on March 31, 2005, the district court entered an order finding that "various Motions pending decision as of August 27, 2004, were rendered moot" by the parties' agreement of that evening, although the order did not specify which motions. The court then found that "no journal entry satisfactory to the parties[']counsel [had been] proposed to the Court." Thus, the court recited that it had directed the preparation of a transcript of the proceeding of August 27, which transcript is attached to the order "and is incorporated [by reference th]erein." (The district court is in error insofar as the evening hearing was on August 26, not 27.) Finally, the order provides, "[T]he parties' agreement is approved, the parties are directed to comply with the agreement and the Court specifically orders said compliance." In short, the transcript of August 26 became, in effect, the court's order.

The status of this litigation, after the late-night proceeding when the mediated agreement was attempted to be put on the record, followed by the rather unique order of March 31, 2005, "incorporating" the approximately 60-page transcript of that proceeding by reference, appears to be that all issues concerning the parties' inheritance from their parents' trusts insofar as the land was concerned were settled by agreement. However, all issues and matters concerning the oil wells and the working interests therein were to be resolved by trial—supposedly in November. However, another order was entered by the district court on March 31 that needs to be part of the story.

The second March 31, 2005, order rules on four motions filed by Dan and the three sisters who are his codefendants in the present case: a "rule 12(f)" motion, a "rule 12(b)" motion, a motion in limine, and a motion for "whole or partial summary judgment." The order begins with some history in that the court noted that prior to any district court action, Rita, her husband, and her son and his wife (for convenience hereafter collectively referenced as Rita) had filed two actions in the Cheyenne County Court against Dan and the four other sisters, cases Nos. CI 01-10 and CI 02-188—by inference cases filed in the years 2001 and 2002 respectively. The district court's order then recounts that case No. CI 01-10 was an action for declaratory judgment by which Rita sought a determination that she had a right to purchase "the oil production rights and mineral interests" for a price in accord with her appraisal or "such other fair market appraisal as shall be determined pursuant to the terms of the trust agreements." According to the district court, the county court on January 3, 2002, directed the trustee (Dan) to convey the land in undivided equal interests to the six sibling litigants as beneficiaries. The record shows that such conveyances were done, but that apparently Rita continued to advance her claim that under the trusts, she was entitled to a "right of first refusal" to acquire her siblings' interests therein—including their working interests in the oil wells. The mediated agreement put all of the land in Rita's ownership, but left open the issue of whether she was entitled to the working interests also, as well as any other issues concerning the oil wells.

Additionally, the district court's second March 31, 2005, order recited that the county court's decision addressed whether the "'Sale Provision'" and the "'Lease Provision'" applied to mineral rights. By way of additional background, it is clear that Rita took the position after both parents' deaths that the right of first refusal given to her with respect to the land included the right to acquire her other siblings' working interests in the oil wells. That said, the district court's second March 31 order quoted the county court's decision: "'The Court concludes from the language used that the two rights [regarding the sale provision and the lease provision] do not apply to the mineral interests.'" The transcript in the first appeal contains this order of the county court, dated January 4, 2002, and the district court's recitation of its contents is accurate. This appears to have been a final resolution of Rita's claim to all working interests under the sale provision and the lease provision in the oil wells that was never appealed. The district court's second March 31, 2005, order further recites that a county court trial was scheduled for January 23, 2002, on the request for a permanent injunction—a temporary injunction had previously been entered on April 19, 2001—barring the defendants-appellees from interfering with Rita's possession of the land as lessee or her right to farm the land. The district court's recitation of the county court proceeding said that on January 22, 2002, the parties signed a letter agreement in an attempt to resolve all litigation. And the district court recites that upon the plaintiffs' motion, the county court released the $50,000 bond Rita had posted for the temporary injunction. This settlement was never completed, according to the district court's order, which also recites that the final pleading in case No. CI 01-10, the first county court case, was Rita's dismissal with prejudice filed November 12, 2004. We note that the transcript concerning the mediated settlement contains the statement by Rita's counsel, "The only pending litigation besides this case is CI 01[-]10 in [the] county court. We'll dismiss it." Immediately after that statement, discussion was had about mutual releases and dismissal of actions so that the result would be that only the "working interest/mineral interest issue" would remain and any other issues would be mutually dismissed by the parties.

We used the plural "actions" in the sentence immediately above because the district court's second March 31, 2005, order recites that on July 29, 2002, Rita filed another action in the Cheyenne County Court, case No. CI 02-188 mentioned above. This was a "Petition for Declaratory Judgment, Specific Performance of Agreement and for Damages," which included enforcement of the January 22 letter agreement. The district court's order says that after a special appearance was filed, "the County Court held that it had no jurisdiction and transferred the action to this Court" and that "the transferred action became this case." Our transcript from the first appeal contains the county court's order of November 21, 2002, in which it ordered the case transferred to the district court, citing Neb. Rev. Stat. § 25-2706 (Reissue 2008).

The district court's second March 31, 2005, order then recounts that "[t]rial of the Plaintiff's Petition was completed, resulting in the finding of the [district c]ourt that the Plaintiff had failed to meet her burden" because there was no meeting of the minds, and that Rita's petition was dismissed. The district court then says:

> The portion of the action remaining is the Defendants' Counterclaims. In the meantime, a Receiver was appointed to manage the real estate during the pendency of this action. Upon the Motion of the Receiver, the parties agreed to mediation. The mediation occurred on August 2[6], 2004. . . . A stipulation was made on the record.
>
> The Defendants agreed to sell their interest in the farmland to the Plaintiff, Rita . . . . The parties agreed the settlement did not include mineral interests. Plaintiff retained the right to pursue purchase of the mineral interests under the terms of the Trust, and the Defendants reserved their right to seek partition of the mineral rights pursuant to their Counterclaims Nos. 3, 4, 5 and 6. The Defendants' other Counterclaims were dismissed by the Defendants.
>
> The [district c]ourt finds that the Plaintiff, Rita . . . , did reserve [in the mediated agreement her] right to pursue the purchase of the mineral interests and oil wells pursuant to the . . . Trusts.

We take this quoted finding to mean that the matter of the working interests and mineral (or royalty) rights was reserved and unresolved by the settlement agreement that resulted from the mediation. This would be consistent with our reading of the transcript of the proceeding on the evening of August 26, 2004.

The district court then turned to its decision on the defendants' motion for summary judgment in whole or in part. In this regard, the district court initially recited the determination of the county court that the mineral interests were not subject to the right of first refusal apparently granted to Rita in her father's trust and observed that no appeal was filed from that decision. Next, the district court recited that the county court directed the trustee, Dan, to convey title to the six beneficiaries and that he had conveyed an undivided one-sixth of the land to each as directed. The district court said that Dan, as trustee, had "sever[ed] the mineral interests and convey[ed] an undivided 1/6 interest in the mineral interests to the six beneficiaries." The court then discussed the right of first refusal, recounting that the county court had ruled that the mineral interests were not subject to such and stating that in any event, the right of first refusal would apply only if an owner wanted to sell, and no owner had indicated a desire to sell. The district court concluded this issue, holding that the mineral interests "are not subject to the first right of refusal," that Rita "ha[d] no right to purchase the mineral interests from the other beneficiaries," and that all beneficiaries "have an undivided 1/6 interest in the mineral interests as described in the Deeds of Distribution." Finally, the court set a pretrial hearing on "the Defendants' Counterclaims Nos. 3, 4, 5 and 6"—which are the defendants-appellees' action to partition the working interests in the Carlson oil wells—for April 12, 2005. An appeal was filed in this court from what we have referred to as the second order of March 31, i.e., the order we have just detailed. That appeal was docketed as our case No. A-05-847, and, as said, was dismissed for lack of jurisdiction. Thus, it appears that Rita's claim that she acquired the mineral rights and working interests of her siblings was resolved against her, the appeal that was filed was dismissed,

and no cross-appeal concerning the decision is made in the instant appeal.

Whether there was a trial on the defendants' counterclaims mentioned in the district court's order is not revealed by the record, or at least not that we can discern. However, in an order from the district court dated August 1, 2007, reciting that the matter for decision was the "Referee's Report Recommending Sale and Proposing Procedure," the court found that because working interests are recorded and tracked as an interest in real estate, "a partition action is the appropriate legal response to a dispute between working interest owners," and that the court had jurisdiction. The court then listed the six owners of the working interest in question and ordered a partition sale of the working interest as the referee had apparently recommended.

We have attempted to track the tortuous course of this litigation because whether an appellate court has jurisdiction may be determined by whether all claims between all parties have been resolved. Given the size and complexity of the record in this case, plus the transcripts in the two previous appeals, that determination is hardly easy. Although we have attempted to trace this rather jumbled procedural background, we have studiously avoided determining or commenting on the correctness or propriety of the numerous orders and journal entries beyond the summary judgment. We now attempt to return our focus to the initial question—do we have jurisdiction of this appeal?

[4] The brief for the defendants-appellees, citing Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) and *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007), asserts that we lack jurisdiction because there are multiple parties, claims, and causes of action and that the law is that all claims between all parties must be resolved before there is a final, appealable order. Conspicuously absent from the defendants-appellees' argument, despite our request that the parties address the jurisdiction issue, is any assertion of any unresolved claim between any parties with accompanying citation to where such is found in this massive record. On the other hand, the appellant, 3RP Operating, claims that Neb. Rev. Stat. § 25-1090 (Reissue

2008) in effect allows an interlocutory appeal in a case such as this, where a receiver is appointed and given directions by the court—as has obviously happened in this case via the trial court's ruling that the receiver is not obligated to pay the charges that 3RP Operating seeks to recover from him. Section 25-1090 provides:

> When a decree is rendered in a suit in which a receiver has been appointed and such decree does not finally determine the rights of the parties, any one of them may apply to the court for the possession of the property and proceeds thereof in the receiver's hands. If such application is resisted, the matter may be referred to a master to take and report to the court the testimony of the parties. Upon the filing of the report, the court shall, by its order, award the possession of the property and the proceeds thereof to the party entitled thereto, and thereupon the receiver shall surrender the property and the proceeds thereof to such party. *All orders appointing receivers, giving them further directions, and disposing of the property may be appealed to the Court of Appeals in the same manner as final orders and decrees.*

(Emphasis supplied.)

[5] The well-known general rule in Nebraska is that only final orders are appealable. See Neb. Rev. Stat. § 25-1911 (Reissue 2008). The leading case, *O'Connor v. Kaufman*, 255 Neb. 120, 122, 582 N.W.2d 350, 352-53 (1998), holds:

> [T]here are three types of final orders which may be reviewed on appeal. The three types are (1) an order which affects a substantial right in an action and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.

[6-8] Given the more than 10-year history of claims and counterclaims involving probate, trust construction, oil and gas law, and a variety of other issues, we find it a bit difficult to hang a descriptive label on this litigation. However, focusing on what is before us in this appeal, we have a claim for

payment asserted by an intervenor against a receiver. We note that it has been held that the appointment of a receiver is not a special proceeding. See *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). Citing *Slaymaker v. Breyer*, 258 Neb. 942, 607 N.W.2d 506 (2000), the court in *Nebraska Nutrients v. Shepherd* held that the appointment of a receiver is a provisional remedy governed by Neb. Rev. Stat. §§ 25-1081 to 25-1092 (Reissue 1995), which precludes it from falling in the category of a special proceeding. See, also, *Federal Farm Mtg. Corporation v. Ganser*, 145 Neb. 589, 17 N.W.2d 613 (1945) (where record showed that assets remained in hands of receiver, there was no court order distributing these assets to either appellee or appellant, and receivership was continuing, there was no final order, and without such order of distribution, there was nothing for Supreme Court to determine until such was properly brought before it). It seems to follow that if the appointment of a receiver is not a special proceeding, the many decisions that a court might make to give a receiver direction, such as whether to pay a bill such as that submitted by 3RP Operating, would likewise not be special proceedings. In this regard, we note that the provisional remedy governed by §§ 25-1081 to 25-1092 said not to be a special proceeding in *Nebraska Nutrients v. Shepherd* includes § 25-1087, which provides for "further directions" to a receiver from the court upon the application of any party. Whether the receiver has to pay the claim of 3RP Operating was placed in the hands of the court by the receiver's motion for summary judgment, and the "direction" was not to pay it. Therefore, we conclude that the order granting summary judgment to the receiver is not an order affecting a substantial right and not made during a special proceeding, and thus, it is not a final, appealable order under the second type of final order from *O'Connor v. Kaufman, supra*.

The evidentiary record is quite clear, and counsel admitted at oral argument that the receivership has not been wound up and the receiver discharged. Thus, the summary judgment before us is not a "category one" order under *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998), that affects a substantial right in an action and which determines the action

and prevents a judgment. And finally, the order on appeal is not within the third category of final orders delineated in *O'Connor v. Kaufman, supra*, either, i.e., a summary application in an action after judgment is rendered. We say this because while the land issues were settled via the mediated agreement and the working interests of the beneficiaries were determined by the district court's August 1, 2007, order which ordered a partition sale thereof, the record does not reveal that such partition of the working interests has been completed, nor that the receivership has been wound up and closed out. Accordingly, if our analysis were limited to the teachings of *O'Connor v. Kaufman, supra*, we would necessarily find that we lack jurisdiction.

However, as mentioned earlier, counsel for 3RP Operating argues that § 25-1090 gives us jurisdiction by allowing, in effect, an interlocutory appeal of a nonfinal order entered in the course of the receivership, despite the restrictions found in *O'Connor v. Kaufman, supra*. In *Robertson v. Southwood*, 233 Neb. 685, 447 N.W.2d 616 (1989), the court briefly discussed § 25-1090 in a partnership dispute in which the trial court had appointed a receiver and had ultimately entered a judgment effectively resolving all matters between the partnership and the plaintiff-appellant partner, who had filed a declaratory judgment action seeking a determination that he was free from all liability to the partners or the partnership, and in which the partners had counterclaimed for an accounting.

One of the assignments of error in *Robertson v. Southwood, supra*, was that the trial court erred in appointing a receiver. The Nebraska Supreme Court, citing § 25-1090, said "[t]he appointment of a receiver may be treated as a final order," but noted that the plaintiff chose not to appeal within 30 days after the receiver was appointed and stated that since the "cause must be remanded in any event, the plaintiff's assignment of error in this regard will not be addressed." *Robertson v. Southwood*, 233 Neb. at 693, 447 N.W.2d at 621. The Supreme Court noted that the receiver's accounting was not properly done under applicable statutes and did not consider some assets and that the partnership had not been properly wound up and terminated even though it had been dissolved some 5 years

previously. Thus, for these reasons, the cause was remanded for further proceedings, the court noting that "[w]hether a receiver may be appointed on remand remains an issue to be determined at that time." *Id*. Although the court in *Robertson v. Southwood, supra*, did not actually determine the assignment of error that a receiver should not have been appointed, there is at the very least the suggestion in the opinion that § 25-1090 creates a "special" class of final orders, involving the appointment of receivers and directions given to them by trial courts, that is not subject to the traditional jurisdictional analysis of *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998). There is, of course, some compelling logic to this conclusion given that it is easy to imagine actions taken by a receiver, with court direction, which could be undone only with an investment of considerable time and expense—if at all.

[9] The next instance when the Supreme Court addressed § 25-1090 was in *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). While we think it unnecessary to recount the complicated procedural and factual background of that case, the issue was squarely presented to the Supreme Court as to whether an order denying the appointment of a receiver was a final, appealable order—the exact opposite of the claim of error in *Robertson v. Southwood*. The *Nebraska Nutrients v. Shepherd* court reasoned as follows:

> The order denying [the] application for appointment of a receiver clearly does not fall within the first or third [of the *O'Connor v. Kaufman*] categories, but [the applicant] argues that the order was one affecting a substantial right and made in a special proceeding. He relies upon *Robertson v. Southwood*, 233 Neb. 685, 693, 447 N.W.2d 616, 621 (1989), in which we held pursuant to . . . § 25-1090 . . . that "[t]he appointment of a receiver may be treated as a final order." This statement was simply a recognition of the fact that § 25-1090 specifically authorizes an appeal from "[a]ll orders appointing receivers, giving them further directions, and disposing of the property . . . ." The statute makes no mention of orders *denying* a request for appointment of a receiver, and *Robertson* is therefore inapposite.

261 Neb. at 744, 626 N.W.2d at 494 (emphasis in original). As we earlier noted, the Supreme Court in *Nebraska Nutrients v. Shepherd, supra*, held that the appointment of a receiver is a provisional remedy and thus does not fall within the category of a special proceeding. Accordingly, the court said that regardless of whether a substantial right was affected, the denial was not a final order; but as the court noted, the denial of the appointment of a receiver was not expressly within the ambit of § 25-1090. *Nebraska Nutrients v. Shepherd, supra*, is the last Nebraska appellate decision to discuss § 25-1090.

We must admit to some difficulty in reconciling these two decisions discussing § 25-1090, as well as determining how our now well-known final order jurisprudence from *O'Connor v. Kaufman, supra*, fits into the analysis. Our research reveals that the key last sentence of § 25-1090 has been in the statute unchanged, except that at the time of this court's creation, the statute was changed so that it provided that the appeal would go to the Nebraska Court of Appeals instead of the Supreme Court. See 1991 Neb. Laws, L.B. 732, § 46. Other than this change, the last sentence has been intact since 1867, and there is no legislative history available that goes back that far to enlighten us. That said, we turn to the well-known doctrines of statute construction.

[10-12] 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. *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006). When general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000); *In re Invol. Dissolution of Battle Creek State Bank*, 254 Neb. 120, 575 N.W.2d 356 (1998). With reference to the issue under discussion, we believe that the general statute is § 25-1315(1), and the effect of that statute is that an appeal can be taken pursuant to such statute only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order as to one or more but fewer than all of the causes of action

or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal. See *Halac v. Girton*, 17 Neb. App. 505, 766 N.W.2d 418 (2009). In the present case, while the first two conditions for an "interlocutory appeal" under § 25-1315(1) are present, there is no certification or direction from the trial court that allows such an appeal even though there are unresolved claims between some of the parties to the case. In *Jones v. Jones*, 16 Neb. App. 452, 747 N.W.2d 447 (2008), we dismissed an appeal for lack of jurisdiction because the trial court simply had not certified the case under § 25-1315(1). Thus, this appeal cannot fit into the very small "pigeonhole" created by § 25-1315(1) for an immediate appeal when one claim in a multiclaim or multiparty case is resolved but other claims remain pending.

[13] However, when we consider the specific statute allowing for appeal of orders that provide directions to a receiver, § 25-1090, we conclude that the summary judgment in the receiver's favor that he is not liable for the claim brought by 3RP Operating is a "direction" to a receiver from which an appeal is allowable. Moreover, the summary judgment is "final" in the broad sense of that term because it fully and completely determines the dispute between the intervenor, 3RP Operating, and the receiver. Accordingly, we determine that we have jurisdiction, and we now turn to the merits of the summary judgment decision.

## SUMMARY JUDGMENT

### *Did District Court Properly Enter Judgment for Receiver?*

The district court's basic rationale for the finding that the receiver did not have to pay the claim of 3RP Operating was that the claim was being brought by a corporation for costs and expenses for the operation of the Carlson oil wells, but that such corporation did not even exist during the time when the claim was asserted. After thorough review of the record, there is no question that the claim at issue is asserted by a corporation, and the evidence is undisputed that such corporation did not gain legal existence until September 8, 2006.

On April 23, 2003, Rita filed a "sundry notice" with the NOGCC to change the operator of the Carlson No. 1A well (the only operational well of the two Carlson wells) from "C & S Productions" to "Rita . . . dba 3RP [O]perating." The "Affidavit of 3RP Operating," which identified Rita's husband as that company's president, was offered and received in evidence on the summary judgment motion. In that affidavit, Rita's husband states that "Rita . . . d/b/a 3RP posted a bond and began operating the oil well on April, 21, 2003." The rebuttal affidavit of the receiver, Huff, stated that as of December 13, 2010, 3RP Operating had not resigned as operator, and that the NOGCC rejected his attempt to become operator of the Carlson well and returned the bond he submitted. Thus, the evidence shows that Rita, "d/b/a 3RP" (sometimes referenced in the record as "d/b/a 3RP Operating,") remains the operator and that insofar as the record reveals, 3RP Operating, the corporate entity making the claim before us in this appeal, has never been the operator of either of the two Carlson wells. And, Rita in various pieces of evidence in our record disclaims any ownership or position in the corporation 3RP Operating. The evidence offered in support of the claim is the claim itself made on behalf of the corporation and signed by counsel for the corporation without any oath, meaning that such is not an affidavit. See Neb. Rev. Stat. § 25-1332 (Reissue 2008). Thus, for a variety of reasons, we conclude that there is no issue of material fact as to whether the corporate claimant, 3RP Operating, is entitled to be paid for operating fees or for costs advanced for the operation of the Carlson wells. The district court was clearly correct in granting the receiver's motion for summary judgment, and we affirm the grant of summary judgment to the receiver.

That said, the claim filed by 3RP Operating asserts as a "second basis" for payment that "under the legal theory of quantum meruit, the claimant [3RP Operating] should have and recover the reasonable costs of operating this well." But, there simply is no evidence that the corporation was ever the operator of the well so as to entitle it to payment under either a contract or a quantum meruit theory. With that said, the record does contain evidence that Rita, her husband, or both individually have done work to operate the well, but there is

no claim before us, or filed with the receiver to our knowledge on their behalf as individuals, for compensation for operating the oil wells. We merely acknowledge that there is such evidence and make no ruling, or further comment, about any entitlement to payment either or both of them may have as individuals.

*Did District Court Err by Entering, as Part of Its Decision on Motion for Summary Judgment, Orders on Matters Which Were not Part of Summary Judgment Proceeding?*

This brings us to the fact that when the trial court granted the summary judgment on December 30, 2010, its order also stated, "Since other orders of the Court were awaiting a new Judge [insofar as the previous trial judge was not being retained in office following the 2008 general election,] those matters shall now be addressed by this Court." The court then makes the following orders, which we summarize:

1. 3RP Operating, within 5 days, shall withdraw as operator of both Carlson wells on the records of the NOGCC, and failure to comply results in the "officers[']or managing agents[' being] in contempt of the Orders of this Court."

2. After such withdrawal, the receiver shall post his bond (we assume this to mean an operator's bond) and place his name as "Operator to the Carlson wells."

3. The receiver shall commence oil production and maintain a complete record of all earnings and expenditures.

4. After the "Receiver is producing oil, the Referee shall then proceed . . . with the sale of the Carlson Wells as previously ordered and directed."

5. "The Receiver shall endeavor to fulfill all duties previously set out by this Court's Orders as expeditiously as possible."

6. "All restraining and other orders of this Court are continued and all parties are Ordered to not inhibit the fulfillment of those Orders."

[14] The intervenor, 3RP Operating, assigns error to the entry of these "extraneous orders" asserting (in the assignment of error itself) that such were not addressed in the summary judgment motion, no hearing was had, no evidence was

introduced, and no notice was provided that such matters would be addressed by the court. However, there is absolutely no argument in support of this assignment of error in the intervenor's brief. The requirement of the appellate courts is clear that to be considered by the court, an error must be both assigned and specifically argued in the brief of the party claiming error. See *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007). That was not done here, and we do not address the orders Nos. 2, 3, and 5 summarized above. Additionally, and equally important, it is apparent that the district court's orders summarized above as Nos. 1, 4, and 6 are not "directions" to the receiver that fall within the ambit of appealable orders under § 25-1090. Accordingly, even if there had been argument of this assignment of error, we would not have jurisdiction of those three orders under our analysis of § 25-1090 as set forth in the section on jurisdiction.

*Was It Error for Trial Court to Determine Receiver Had Standing, When Receiver Was Acting Without Posting Bond Required by § 25-1084 (Reissue 2008)?*

This issue was addressed by the trial court in a journal entry of May 20, 2011, on the receiver's motions that raised three issues upon which he sought the court's guidance—one of which was "[D]oes the receiver need additional bonding?" The trial court referenced the order now on appeal in this case and the "extra" orders contained therein, which we detailed in the foregoing section of our opinion. The district court referred to the order of April 2, 2007, by the previous trial judge in which the current receiver was appointed and orders were made regarding disposition of certain funds held by the clerk of the district court, and in that order, the court said that of such funds, the clerk was to retain $1,000 for the "bond of the Receiver as heretofore ordered." That order is part of our record, and it appears that such amount was retained by the clerk.

The trial court's May 20, 2011, order also recited that when the first receiver was appointed via an order of May 2, 2003, the court said "consistent with the stipulation of the counsel for both parties, that the receiver may serve without

the necessity of posting bond." The district court found that such waiver was not permissible under § 25-1084 and that the receiver had to comply with that section. Therefore, the court decreed that if the parties could not agree on the appropriate bond by June 1, 2011, the receiver should notice the matter for hearing. The supplemental transcript in this case shows that a "receiver's bond" was issued to the receiver on July 8 in the sum of $10,000.

The intervenor's argument is that given that the receiver had in excess of $40,000 in his possession, he should have had a bond. We cannot disagree, but the intervenor, 3RP Operating, is not a party to this case and, by virtue of the summary judgment which we have affirmed, has no financial interest in the estate or what remains of this case. In short, the intervenor does not make any argument telling us how this error in the proceedings caused it prejudice, and no other party complains about the matter in this appeal. Accordingly, we find no prejudice to the intervenor or any other ground for any relief to the intervenor on this basis.

## CONCLUSION

After our exhaustive review of this voluminous record, we find that we have jurisdiction of this appeal under § 25-1090 and that the district court properly granted summary judgment to the receiver, Huff, and against the intervenor corporation, 3RP Operating.

AFFIRMED.

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# HEATHER NELSON, APPELLANT, V. NEIL WARDYN AND SELENA WARDYN, APPELLEES.

820 N.W.2d 82

Filed May 8, 2012. No. A-11-655.

1. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given to their testimony.
2. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.

3. ____: ____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court considers the evidence in the light most favorable to the successful party and resolves conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Negligence: Fraud: Liability.** Liability for negligent misrepresentation is based upon the failure of the actor to exercise reasonable care or competence in supplying correct information.
5. ____: ____: ____. In a claim of negligent misrepresentation, one who, in a transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused by justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
6. **Negligence: Fraud.** Negligent misrepresentation has essentially the same elements as fraudulent misrepresentation, with the exception of the defendant's mental state.
7. **Actions: Fraud: Proof.** To set forth a prima facie case for misrepresentation, one must show (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false, or made recklessly or negligently; (4) that it was made with the intention that it should be relied upon; (5) that the party did so rely; and (6) that he or she suffered damages as a result.
8. **Negligence: Fraud.** In a claim for negligent misrepresentation, one may become liable even though acting honestly and in good faith if one fails to exercise the level of care required under the circumstances.
9. ____: ____. In a case of negligent misrepresentation, the defendant need not know that the statement is false; the defendant's carelessness or negligence in ascertaining the statement's truth will suffice for negligent misrepresentation.
10. **Real Estate: Sales: Attorney Fees.** Neb. Rev. Stat. § 76-2,120(5) (Reissue 2009) provides that a real estate disclosure statement is to be completed to the best of the seller's belief and knowledge. Section 76-2,120(12) provides that if the seller fails to comply with the requirements of the statute, the purchaser shall have a cause of action against the seller and may recover the actual damages, court costs, and reasonable attorney fees.

Appeal from the District Court for Hall County, JAMES D. LIVINGSTON, Judge, on appeal thereto from the County Court for Hall County, PHILIP M. MARTIN, JR., Judge. Judgment of District Court reversed, and cause remanded with directions.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellant.

Brian J. Davis, of Berreckman & Davis, P.C., for appellees.

IRWIN and CASSEL, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Heather Nelson appeals an order of the district court for Hall County, Nebraska, in which the district court reversed a judgment of the county court in Nelson's favor on a claim of negligent misrepresentation and affirmed the county court's denial of attorney fees. We find that the county court's factual findings concerning negligent misrepresentation were not clearly erroneous, and we reverse the district court's judgment on that issue. We find that the county court erred in finding that there was no violation of Neb. Rev. Stat. § 76-2,120 (Reissue 2009) and declining to award attorney fees. Therefore, we reverse, and remand with directions.

## II. BACKGROUND

The events giving rise to this action concern Neil Wardyn and Selena Wardyn's sale of a home to Nelson in 2008. In February 2008, Nelson and the Wardyns entered into a purchase agreement for a home located in Grand Island, Nebraska. When the Wardyns listed the home for sale, they completed a "Nebraska Real Estate Commission Seller Property Condition Disclosure Statement," which they signed in November 2007. See § 76-2,120. Nelson reviewed the disclosure statement prior to entering into the purchase agreement. The disclosure statement contained a disclaimer that it was not intended to be a warranty, but that the purchaser "may rely on the information contained" within the disclosure statement "in deciding whether and on what terms to purchase the property."

The disclosure statement represented that the Wardyns had owned the property for 7 years, but the record indicates that they had actually owned the property for closer to 4½ years. Neil Wardyn testified that during the time the Wardyns lived in the home, they did experience leakage or seepage in the basement of the home. He testified that they experienced such leakage or seepage on at least two occasions in the spring of 2007.

The disclosure statement included, among other subjects, a question asking the sellers, "Has there been leakage/seepage in the basement or crawl space?" The disclosure statement

then included three boxes that the sellers could choose from in responding to this question: "yes," "no," and "do not know." Even though the Wardyns had personally experienced leakage or seepage on at least two occasions in the year prior to completing the disclosure statement, they checked the box indicating "do not know" in response to the question about leakage and seepage.

Nelson testified that she reviewed the disclosure statement prior to signing the purchase agreement. She testified that the disclosure statement did not reflect that the Wardyns had experienced any problems and that the way the form was completed "[told her] that the basement [did not] leak and that there was no problem." She testified that she elected not to have an inspection performed on the house because it was a newer construction, that "[e]verything seemed to be fine," and that "[a]ccording to the disclosure statement, nothing was wrong." She testified that she would have acted differently if the "yes" box had been checked and prior problems explained.

Neil Wardyn testified at trial that he believed the disclosure statement was asking whether there was then a current leakage or seepage problem and that because it had been several months since the Wardyns had experienced any leakage or seepage, a "yes" answer on the disclosure statement was inappropriate. He also testified that he explained the prior experiences to the Wardyns' real estate agent and confirmed with the agent that a "do not know" answer would be appropriate. He acknowledged at trial that the answer to the question should have been "yes" as opposed to "do not know."

Approximately 1 or 2 months after moving into the home, Nelson experienced problems with water entering the basement. During a period of rain, Nelson experienced a significant amount of water entering the basement; her then boyfriend testified that when he cleaned the water from the room with a Shop-Vac, he removed in excess of 36 gallons of water. Nelson continued to experience problems with water entering the basement after rainfalls.

Nelson hired a professional with 18 years of experience waterproofing and doing construction work to inspect the home and provide an estimate for fixing the leakage problem. The

professional testified that "it would have been very unlikely that [there] had not [been] previous water damage" in the home. He testified that his bid for performing the necessary work to remedy the leakage problem would be $16,100.

In July 2008, Nelson filed a complaint in county court, based on the Wardyns' failure to sufficiently disclose the prior water leakage before Nelson purchased the home. Nelson alleged three causes of action: (1) fraudulent misrepresentation, (2) negligent misrepresentation, and (3) violation of § 76-2,120. Nelson requested monetary damages.

After a bench trial, the county court entered a judgment in favor of Nelson. The court found that Nelson had demonstrated that "with respect to the [leakage/seepage] answer the [Wardyns] answered 'don't know' when clearly the correct answer would have been 'yes.' [Nelson] relied on this incorrect answer and entered into the purchase agreement." The court found that although the evidence suggested that Nelson did not closely or carefully examine the disclosure form, "even scanning a disclosure document when there is an affirmative answer in a particular problem area, that would be a red flag for any reader more so than a 'don't know' answer would be."

The county court specifically found that based upon the Wardyns' explanation at trial, they had not intentionally or fraudulently misrepresented the prior leakage or seepage problems, but that their answer given the realities of the situation was negligent misrepresentation. The court also specifically found that this misrepresentation was not a violation of § 76-2,120. The court awarded $16,000 damages.

The Wardyns appealed to the district court. On appeal, the district court reversed the county court's judgment. The district court held that the checking of the "do not know" box on the disclosure statement was not an assertion that there was not a problem and that the evidence of Nelson's reliance on the disclosure statement was insufficient to meet her burden of proof. The district court placed great emphasis on the fact that Nelson did not conduct an inspection or inquire further what was meant by the "do not know" box being checked. This appeal followed.

## III. ASSIGNMENTS OF ERROR

On appeal, Nelson has assigned two errors. First, Nelson asserts that the district court erred in reversing the county court's judgment on negligent misrepresentation. Second, Nelson asserts that the court erred in not reversing the county court's failure to award attorney fees under § 76-2,120.

## IV. ANALYSIS

### 1. Negligent Misrepresentation

Nelson first asserts that the district court erred in reversing the county court's judgment in her favor on the issue of negligent misrepresentation. We agree that under the applicable standard of review, the county court's factual conclusions were not clearly erroneous and the district court erred in reversing the judgment.

[1-3] In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008). An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error. *Id.* Similarly, the trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Id.* In reviewing a judgment awarded in a bench trial of a law action, an appellate court considers the evidence in the light most favorable to the successful party and resolves conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

[4,5] Liability for negligent misrepresentation is based upon the failure of the actor to exercise reasonable care or competence in supplying correct information. *Kramer v. Eagle Eye Home Inspections*, 14 Neb. App. 691, 716 N.W.2d 749 (2006), *overruled on other grounds, Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010). In a claim of negligent misrepresentation, one who, in a transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused by

justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. See *Kramer v. Eagle Eye Home Inspections, supra*, quoting *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 660 N.W.2d 168 (2003).

[6-9] Negligent misrepresentation has essentially the same elements as fraudulent misrepresentation, with the exception of the defendant's mental state. *Lucky 7 v. THT Realty*, 278 Neb. 997, 775 N.W.2d 671 (2009). To set forth a prima facie case for misrepresentation, one must show (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false, or made recklessly or negligently; (4) that it was made with the intention that it should be relied upon; (5) that the party did so rely; and (6) that he or she suffered damages as a result. See *Eicher v. Mid America Fin. Invest. Corp., supra*; *Kramer v. Eagle Eye Home Inspections, supra*. In a claim for negligent misrepresentation, one may become liable even though acting honestly and in good faith if one fails to exercise the level of care required under the circumstances. *Lucky 7 v. THT Realty, supra*. In a case of negligent misrepresentation, the defendant need not know that the statement is false; the defendant's carelessness or negligence in ascertaining the statement's truth will suffice for negligent misrepresentation. *Id.*

In the present case, the evidence is undisputed that the Wardyns represented on the disclosure statement that they owned the property for 7 years (although they actually had owned the property for approximately 4½ years) and that they did not know whether there had been leakage or seepage in the basement of the home. There is no dispute that this representation about leakage or seepage was false, as they had personally experienced leakage or seepage on at least two prior occasions, had attempted to remedy the problem with caulking, and explained the prior issues to their real estate agent. Thus, the first two elements of a negligent misrepresentation claim were satisfied.

The county court held that the representation was made negligently. The Wardyns attempted to explain at trial that they were unsure whether there was still a leakage or seepage

potential because they had not experienced any problems for the past several months before filling out the disclosure statement. However, the question on the disclosure statement did not ask whether there existed ongoing problems or whether there would be future problems; the question on the disclosure statement simply asked, "Has there been leakage/seepage in the basement or crawl space?" There had been, the Wardyns knew there had been, and the Wardyns elected to falsely represent that they did not know. Neil Wardyn testified at trial that the question on the disclosure statement should have been answered "yes." The county court's conclusion that the Wardyns made their false representation negligently is not clearly wrong. Thus, the third element of a negligent misrepresentation claim was satisfied.

The disclosure statement itself includes a statement, in all capital letters at the top of the page, indicating that although the disclosure statement is not intended to be a warranty, it is intended to be a disclosure of the condition of the property known by the seller on the date on which it is signed and that "the purchaser may rely on the information contained [therein] in deciding whether and on what terms to purchase the real property." In addition, the purchase agreement between Nelson and the Wardyns provided that "[i]n making the offer to purchase and determining what inspections to elect, [Nelson] relie[d] upon the condition of the property as represented by [the Wardyns] in the [Wardyns'] Property Condition Disclosure Statement . . . ." The county court's implicit conclusion that the Wardyns' statement on the disclosure statement was made with the intention that it be relied upon was not clearly wrong. Thus, the fourth element of a negligent misrepresentation claim was satisfied.

The basis for the district court's reversal of the county court's decision was largely the district court's conclusion that Nelson failed to demonstrate that she reasonably relied upon the representation. The county court made a factual determination that she did reasonably rely upon the representation. Nelson testified that she reviewed the disclosure statement prior to signing the purchase agreement and that it affected her decision to enter into the purchase agreement.

She testified that when she reviewed the disclosure statement, it did not reflect any problems, and that if it had, she would have acted differently. She testified that the fact that the Wardyns chose to answer "do not know" to the question of whether there had been any leakage or seepage problems indicated to her that there was no problem. Nelson's testimony supports the county court's conclusion that she did rely on the disclosure statement, and the court's conclusion was not clearly wrong.

The record indicates that the Wardyns had owned and resided in this home for 4½ years at the time they completed the disclosure statement. On the disclosure statement, they actually indicated that they had owned the home for 7 years. As the county court concluded, it is reasonable that a purchaser would view an answer of "do not know" to a question of whether there had been leakage or seepage in the basement, by someone who had resided in the home for several years, as meaning that the Wardyns were not aware of any such leakage or seepage and that the Wardyns had not experienced such leakage or seepage during their time in the home; they might have been unaware of whether there had been some latent issues or whether there had been issues prior to their ownership. The county court's conclusion that Nelson's reliance was reasonable was not clearly wrong. Thus, the fifth element of a negligent misrepresentation claim was satisfied.

Finally, Nelson presented evidence that she had secured the services of a professional with 18 years of experience waterproofing and doing construction work who submitted a bid of approximately $16,000 to remedy the problem. He testified that he was certified through an international company to provide waterproofing services and that he had provided services to "[p]robably 500 to 600" structures, and "[p]robably 200 of them [had] been existing" structures. The Wardyns challenge the evidence of damages by suggesting that the professional retained by Nelson to submit a bid was unqualified. It is unclear to this court why it is relevant that the professional "did not graduate high school and only received his GED." Brief for appellee at 44. Nelson presented evidence of the cost to repair the problem, and there was no contrary evidence

adduced by the Wardyns. Thus, the sixth element of a negligent misrepresentation claim was satisfied.

In this case, the district court appears to have disregarded the standard of review and substituted its own factual conclusions for those of the county court. The district court appears to have disagreed on the conclusions of whether Nelson relied upon the misrepresentation and whether such was reasonable in light of the circumstances of this case and the specific misrepresentation. The county court, however, was not clearly erroneous in reaching its conclusions, and the district court was not free to disregard those conclusions without finding that there was clear error. We reverse the district court's reversal of the county court's judgment in favor of Nelson on the negligent misrepresentation claim.

### 2. Attorney Fees

Nelson next challenges the county court's finding that there was no violation of § 76-2,120 and the court's failure to award attorney fees. Because, as noted above, we conclude that the county court did not err in finding sufficient evidence of a negligent misrepresentation in the disclosure statement, we conclude that the county court erred in finding that there was no violation of § 76-2,120.

[10] Section 76-2,120(5) provides that the disclosure statement is to be completed to the best of the seller's belief and knowledge. Section 76-2,120(12) provides that if the seller fails to comply with the requirements of the statute, the purchaser shall have a cause of action against the seller and may recover the actual damages, court costs, and reasonable attorney fees. Although the statute indicates that the purchaser "may" recover attorney fees, in *Pepitone v. Winn*, 272 Neb. 443, 722 N.W.2d 710 (2006), the Nebraska Supreme Court held that attorney fees are mandatory under § 76-2,120.

In the present case, as discussed above, the county court did not err in finding that the Wardyns negligently misrepresented whether they were aware of leakage or seepage when completing the disclosure statement. This finding indicates that the Wardyns did not complete the disclosure form to the best of their belief or knowledge. This finding is inconsistent with

the county court's conclusion that there was not a violation of § 76-2,120, and the county court provided no explanation or rationale for concluding that there was both a negligent misrepresentation and no violation of the statute.

No issue has been presented regarding any failure of proof as to the attorney fees in this case, and affidavits supporting those fees are found in the record. See *Pepitone v. Winn, supra*. Because we conclude that the negligent misrepresentation by the Wardyns was a violation of § 76-2,120, we remand the matter to the district court with directions to remand the matter to the county court to enter an appropriate attorney fee award.

## V. CONCLUSION

We reverse the district court's judgment reversing the county court's judgment. The county court was not clearly erroneous in its factual findings on the record in this case. We find that the county court erred in denying attorney fees under § 76-2,120. We remand the matter to the district court with directions to remand the matter to the county court to enter an appropriate attorney fee award.

REVERSED AND REMANDED WITH DIRECTIONS.

MOORE, Judge, participating on briefs.

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TRISTAN BONN, APPELLANT, V. CITY OF OMAHA, A POLITICAL SUBDIVISION, ET AL., APPELLEES.

814 N.W.2d 114

Filed May 15, 2012. No. A-11-604.

1. **Appeal and Error.** To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
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, giving that party the benefit of all reasonable inferences deducible from the evidence.

4. **Fair Employment Practices: Discrimination.** The Nebraska Fair Employment Practice Act makes it unlawful for an employer to discriminate against its employee on the basis of the employee's opposition to an unlawful practice.
5. **Judgments.** Although an Attorney General's opinion is entitled to substantial weight and is to be respectfully considered, it nonetheless has no controlling authority on the state of the law discussed in it and, standing alone, is not to be regarded as legal precedent or authority of such character as is a judicial decision. An Attorney General's opinion is, simply, not a judicial utterance.
6. **Fair Employment Practices.** The evil addressed by Neb. Rev. Stat. § 48-1114(3) (Reissue 2010) is the exploitation of the employer's power over the employee when used to coerce the employee to endorse, through participation or acquiescence, the unlawful acts of the employer.
7. ____. The text of Neb. Rev. Stat. § 48-1114(3) (Reissue 2010) and reasonable policy dictate that an employee's opposition to any unlawful act of the employer, whether or not the employer pressures the employee to actively join in the illegal activity, is protected under § 48-1114(3).
8. **Fair Employment Practices: Words and Phrases.** The unlawful practices covered by Neb. Rev. Stat. § 48-1114 (Reissue 2010) are activities related to the employment.
9. ____: ____. Seen in the context of the entirety of the Nebraska Fair Employment Practice Act and in light of the apparent purposes the act is meant to serve, the term "practice" in Neb. Rev. Stat. § 48-1114(3) (Reissue 2010) refers to an unlawful practice of the employer, not unlawful or prohibited actions of coemployees.
10. **Fair Employment Practices: Statutes.** The Nebraska Fair Employment Practice Act is not a general bad acts statute, and there are many abuses not proscribed by fair employment legislative acts, including discharge for opposition to racial discrimination by other employees against the public.
11. **Federal Acts: Civil Rights: Fair Employment Practices.** The Nebraska Fair Employment Practice Act is patterned after 42 U.S.C. § 2000e et seq. (2006), and it is appropriate to look to federal court decisions construing similar and parent federal legislation.
12. **Fair Employment Practices.** A violation under Neb. Rev. Stat. § 48-1114(3) (Reissue 2010) must include either the employee's opposition to an unlawful practice of the employer or the employee's refusal to honor an employer's demand that the employee do an unlawful act.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Brent Nicholls, of Kasaby & Nicholls, L.L.C., for appellant.

Michelle Peters, Assistant Omaha City Attorney, for appellees.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

PIRTLE, Judge.

## INTRODUCTION

Tristan Bonn appeals an order of the district court for Douglas County, which order granted summary judgment in favor of the City of Omaha; Mike Fahey, in his official capacity as mayor of Omaha; and Paul Landow, in his official capacity as the mayor's chief of staff (collectively the City) on Bonn's retaliation claim under the Nebraska Fair Employment Practice Act (FEPA). Based on the reasons that follow, we affirm.

## BACKGROUND

Bonn was hired by the City of Omaha as an independent public safety auditor in June 2001. An Omaha Municipal Code established the public safety auditor position, which was funded by the Omaha City Council. The ordinance created an independent audit and review process for citizen complaints against Omaha firefighters and police officers to increase public confidence in the internal investigations process. The public safety auditor was a "classified employee" for purposes of firing and other personnel actions. A "classified employee" can only be terminated for cause. Shortly after Bonn was hired, the Omaha City Council terminated funding for the position. Fahey secured private funding for the position, which allowed Bonn to continue as public safety auditor through December 2005.

After the private funds were exhausted, Fahey offered to make Bonn a member of his staff. Bonn expressed concern about losing her "classified employee" protection, as she was aware that members of the mayor's staff were at-will employees, but she accepted Fahey's offer. There was no written contract of employment between Bonn and the mayor's office, nor was there any written job description for Bonn, despite Bonn's request for one. Bonn proposed an executive order from Fahey outlining her job description and including a clause that she could not be fired except for cause, but this document was not adopted by the mayor's office. Landow, the mayor's chief of staff, represented to Bonn that she would continue the work she performed as the public safety auditor by evaluating

and reviewing police procedures. Bonn was also made aware, before she began working in the mayor's office, that her hours and pay would be reduced and that she would no longer have an administrative staff.

In August 2006, Bonn notified Landow that she would soon be filing an unfavorable report in regard to the practices of the Omaha Police Department (OPD) regarding traffic stops. In the late afternoon of October 19, Bonn sent her report entitled "Anatomy of Traffic Stops" in an e-mail to Fahey, Landow, and the OPD chief of police and asked them for comments on the report. On October 20, Bonn distributed her report before Fahey, Landow, or the chief of police had a chance to comment on the report. There is no dispute that the report was prepared as part of her official duties with the City of Omaha. Bonn's report stated that it would "describe, by analyzing traffic stop complaints, how [OPD] finds itself currently estranged from many of the communities it serves and [it] offers suggestions about how it can repair those relations." Through accounts of alleged improper traffic stops and other conduct, Bonn concluded that members of OPD acted with discrimination toward minority members of the public. She alleged that a possible result of the harsh and poor policing tactics in minority communities was that young members of those communities did not select policing as a career. She also inferred that improper stops may have resulted in criminal records for potential applicants that excluded them from employment with OPD.

After Bonn's "Anatomy of Traffic Stops" report was distributed, Bonn spoke with media outlets, including one radio station and an Omaha newspaper about her report. On October 24, 2006, the Omaha newspaper printed a story in which quotes attributable to Bonn criticized the mayor's office for ignoring her and her recommendations. On October 30, Fahey sent a letter to Bonn notifying her that she had been terminated from her position with his office for insubordination.

On January 24, 2007, Bonn filed a charge of discrimination with the Nebraska Equal Opportunity Commission and the federal Equal Employment Opportunity Commission. The Nebraska Equal Opportunity Commission determined that

sufficient evidence supported a reasonable cause finding that discrimination occurred. Following this determination, both commissions issued right-to-sue letters.

On October 22, 2008, Bonn filed a complaint against the City alleging that her employment had been wrongfully terminated in retaliation for her "Anatomy of Traffic Stops" report, which discussed discriminatory activities of OPD. Bonn's complaint alleged four causes of action: (1) retaliation and discrimination under 42 U.S.C. § 2000e et seq. (2006) (Title VII); (2) retaliation under FEPA, specifically Neb. Rev. Stat. § 48-1114(1) and (3) (Reissue 2010); (3) violation of the "First Amendment to the United States Constitution, 42 U.S.C. § 1983 [(2006)]"; and (4) wrongful discharge. Thereafter, the City filed a notice of removal of the case to the U.S. District Court for the District of Nebraska. The City subsequently filed a motion for summary judgment before the U.S. District Court. The court granted the City's motion for summary judgment on the first and third causes of action and dismissed those causes of action with prejudice. The U.S. District Court remanded the second and fourth causes of action to the state court for further proceedings. See *Bonn v. City of Omaha*, 2009 WL 3103833 (D. Neb., Sept. 22, 2009).

The decision of the U.S. District Court was appealed to the Eighth Circuit Court of Appeals, which affirmed the decision of the federal district court. See *Bonn v. City of Omaha*, 623 F.3d 587 (8th Cir. 2010).

After Bonn's FEPA and wrongful discharge causes of action were remanded to the district court for Douglas County, the City filed a motion for summary judgment alleging that Bonn did not oppose an unlawful employment practice of the City of Omaha. Following a hearing, the district court granted summary judgment in favor of the City on both causes of action, finding that there were no genuine issues of any material fact and that the City was entitled to judgment as a matter of law. Specifically, the court found that Bonn was not asserting that the City of Omaha was engaging in discriminatory employment practices, nor was she refusing to carry out any unlawful action. It further stated that Bonn was not opposing the policies of the City, since it was part of her job to uncover such

information. The court concluded that Bonn's termination of employment did not come within the ambit of FEPA.

## ASSIGNMENT OF ERROR

Bonn assigns that the trial court erred in finding she was not opposing unlawful employment practices of the City of Omaha pursuant to FEPA and that therefore, summary judgment should not have been granted in favor of the City.

[1] Although Bonn assigns six errors in her brief, she argues only the one stated above, and that is the only one we will address. See *Gengenbach v. Hawkins Mfg.*, 18 Neb. App. 488, 785 N.W.2d 853 (2010) (to be considered by appellate court, error must be both specifically assigned and specifically argued in brief of party asserting error).

## STANDARD OF REVIEW

[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. *Village of Hallam v. L.G. Barcus & Sons*, 281 Neb. 516, 798 N.W.2d 109 (2011). 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. *Id.*

## ANALYSIS

[4] Bonn argues that summary judgment should not have been granted in favor of the City because the trial court erred in finding that she was not opposing unlawful employment practices of the City of Omaha pursuant to FEPA. FEPA makes it unlawful for an employer to discriminate against its employee on the basis of the employee's opposition to an unlawful practice. See, § 48-1114; *Helvering v. Union Pacific RR. Co.*, 13 Neb. App. 818, 703 N.W.2d 134 (2005). Section 48-1114, under which Bonn brings her claim, states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his or her

> employees . . . because he or she (1) has opposed any practice made an unlawful employment practice by [FEPA] . . . or (3) has opposed any practice or refused to carry out any action unlawful under federal law or the laws of this state.

Bonn alleged in her complaint that her firing was an unlawful retaliatory act in violation of FEPA, specifically subsections (1) and (3) of § 48-1114. However, Bonn appears to have abandoned her argument under subsection (1). Bonn argues only a violation of subsection (3) in her brief, and in her reply brief, she admits that the federal court's dismissal of her Title VII claim disposes of her identical claim made under § 48-1114(1). Therefore, the only remaining claim is that the City violated subsection (3) of § 48-1114.

Bonn argues that the trial court's finding that she was not opposing unlawful employment practices of the City of Omaha was made in error. Bonn alleges that the release of her "Anatomy of Traffic Stops" report was a protected activity under FEPA because she was opposing unlawful practices used by OPD in conducting traffic stops. She claims that her report cited many examples of actions by police officers which either were in violation of established law or were discriminatory in their application and that the inaction of the City to change such actions was evidence the City approved of such practices.

[5] Bonn's counsel at oral argument cited and relied on Att'y Gen. Op. No. 87033 (Mar. 6, 1987) in support of the contention that the trial court erred in finding that Bonn was not opposing unlawful employment practices of the City of Omaha pursuant to FEPA. The opinion involved a nurse who worked for a hospital and was fired for reporting to the county attorney's office a suspected incident of sexual abuse upon a minor by a patient, which report went against the hospital's policy of reporting such incidents to a designated employee. The Attorney General concluded that the nurse's act of reporting the suspected incident of sexual abuse to the county attorney was a protected act under § 48-1114(3). Although an Attorney General's opinion is entitled to substantial weight and is to be respectfully considered, it nonetheless has no controlling

authority on the state of the law discussed in it and, standing alone, is not to be regarded as legal precedent or authority of such character as is a judicial decision. An Attorney General's opinion is, simply, not a judicial utterance. *State v. Coffman*, 213 Neb. 560, 330 N.W.2d 727 (1983).

[6,7] The evil addressed by § 48-1114(3) is the exploitation of the employer's power over the employee when used to coerce the employee to endorse, through participation or acquiescence, the unlawful acts of the employer. *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53, 662 N.W.2d 599 (2003). The text of § 48-1114(3) and reasonable policy dictate that an employee's opposition to any unlawful act of the employer, whether or not the employer pressures the employee to actively join in the illegal activity, is protected under § 48-1114(3). *Wolfe v. Becton Dickinson & Co., supra.*

[8-10] As previously stated, FEPA makes it unlawful for an employer to discriminate against its employee on the basis of the employee's opposition to an unlawful practice. See, § 48-1114; *Helvering v. Union Pacific RR. Co.*, 13 Neb. App. 818, 703 N.W.2d 134 (2005). The Nebraska Supreme Court has held that the "unlawful" practices covered by § 48-1114 are activities related to the employment. *Helvering v. Union Pacific RR. Co., supra*, citing *Wolfe v. Becton Dickinson & Co., supra*. As such, seen in the context of the entirety of FEPA and in light of the apparent purposes FEPA is meant to serve, the term "practice" in § 48-1114(3) refers to an unlawful practice of the employer, not unlawful or prohibited actions of coemployees. *Helvering v. Union Pacific RR. Co., supra*, citing *Wolfe v. Becton Dickinson & Co., supra*. FEPA is not a general bad acts statute, and there are many abuses not proscribed by FEPA-type legislative acts, including discharge for opposition to racial discrimination by other employees against the public. *Helvering v. Union Pacific RR. Co., supra*, citing *Wolfe v. Becton Dickinson & Co., supra*. See, also, *Wimmer v. Suffolk County Police Dept.*, 176 F.3d 125 (2d Cir. 1999).

[11] In *Wimmer v. Suffolk County Police Dept., supra*, a Title VII case, the Second Circuit found that the plaintiff failed to show he engaged in a protected activity where he reported racial slurs and causeless traffic stops of minority citizens by

police officers. The *Wimmer* court reasoned that the plaintiff offered evidence only as to the police department's discriminatory conduct toward the public, and presented no evidence as to the department's discrimination regarding the terms and conditions of employment within the department. The Second Circuit concluded that the plaintiff's "claim of retaliation is not cognizable under Title VII because [the plaintiff's] opposition was not directed at an unlawful *employment practice* of his employer." *Wimmer*, 176 F.3d at 135. Although *Wimmer* is a Title VII federal case, FEPA is patterned after 42 U.S.C. § 2000e et seq., and it is appropriate to look to federal court decisions construing similar and parent federal legislation. *Helvering v. Union Pacific RR. Co., supra.*

Bonn's "Anatomy of Traffic Stops" report set out what she perceived as problems with how members of OPD conducted traffic stops, specifically as they related to minority citizens. Similar to the plaintiff in *Wimmer v. Suffolk County Police Dept., supra*, Bonn presented evidence of alleged discriminatory conduct by police officers toward the public and did not present any evidence of discriminatory conduct by the City of Omaha in regard to the terms and conditions of employment within the City of Omaha.

[12] A violation under § 48-1114(3) must include either the employee's opposition to an unlawful practice of the employer or the employee's refusal to honor an employer's demand that the employee do an unlawful act. *Wolfe v. Becton Dickinson & Co., supra*. Bonn has failed to prove either of these. Bonn does not contend that her FEPA claim is based on her refusal to honor a demand by the City of Omaha that she do an unlawful act. Her claim is based on her contention that she was fired for opposing unlawful practices of the City of Omaha. The unlawful practices that Bonn opposed were the alleged discriminatory tactics by some police officers against minority members of the public. Bonn's opposition was to those alleged unlawful practices by police officers, rather than unlawful practices of the City of Omaha. The practices being opposed must be unlawful practices of the employer, here the City of Omaha, and not unlawful actions by individuals or coemployees. See *Helvering v. Union Pacific RR. Co.*, 13 Neb.

App. 818, 703 N.W.2d 134 (2005). Bonn's opposition was not directed at unlawful employment practices of the City of Omaha pursuant to FEPA. Therefore, her assignment of error is without merit.

## CONCLUSION

We conclude that the trial court did not err in finding that Bonn was not opposing unlawful employment practices of the City of Omaha. Accordingly, there is no genuine issue of material fact regarding whether Bonn engaged in a protected activity under FEPA and the City is entitled to judgment as a matter of law. The trial court did not err in granting summary judgment in favor of the City. The judgment of the district court is affirmed.

AFFIRMED.

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# BEL FURY INVESTMENTS GROUP, L.L.C., APPELLEE, V. PALISADES COLLECTION, L.L.C., ET AL., APPELLEES, AND RITA BOWER, APPELLANT.

814 N.W.2d 394

Filed May 22, 2012. No. A-11-598.

1. **Limitations of Actions: Appeal and Error.** The determination of which statute of limitations applies is a question of law, and an appellate court must decide the issue independently of the conclusion reached by the trial court.
2. **Equity: Quiet Title.** A quiet title action sounds in equity.
3. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
4. **Judgments: Appeal and Error.** A correct result will not be set aside even when the lower court applied the wrong reasoning in reaching that result.
5. **Real Estate: Liens.** The purchaser at the sale of property is not responsible for liens that are found to be junior and inferior to the foreclosed lien.
6. **Unjust Enrichment: Proof.** To recover on a claim for unjust enrichment, the plaintiff must show that (1) the defendant received money, (2) the defendant retained possession of the money, and (3) the defendant in justice and fairness ought to pay the money to the plaintiff.
7. **Subrogation.** The doctrine of equitable subrogation applies where a party is compelled to pay the debt of a third person to protect his own rights or interest or to save his own property.

8. ____. Subrogation is never awarded in equity to one who is merely a volunteer in paying the debt of another.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

James Walter Crampton for appellant.

Brian J. Muench for appellee Bel Fury Investments Group, L.L.C.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

PIRTLE, Judge.

## INTRODUCTION

Rita Bower appeals from a finding and order of the district court for Douglas County dated June 9, 2011. Based on the reasons that follow, we affirm.

## BACKGROUND

Lynn and Janet Bower, husband and wife, were the owners of a single-family residence in Omaha, Douglas County, Nebraska, subject to a primary mortgage. At some point, they started experiencing financial difficulties and Lynn's mother, Rita, attempted to help them. Rita paid approximately $6,000 to the mortgage company to save the property from foreclosure in 2003. Lynn and Janet promised to pay back Rita in 8 weeks. They did not pay her back, and Rita did not demand payment. Later that year, PRA III, LLC, obtained a county court judgment against Janet and this judgment was registered in the Douglas County District Court.

On September 14, 2005, Rita paid another sum of $7,000 to the mortgage company to avoid foreclosure of the mortgage after a notice of default. On the same day, Lynn and Janet executed a promissory note for the $13,000 Rita had paid toward the property to date, a deed of trust securing the note, and a document purportedly giving Rita a power of attorney for them both. On October 28, Rita filed the deed of trust with the Douglas County register of deeds. She also executed a quitclaim deed purporting to transfer the property

from Lynn and Janet to herself, but she did not record the quitclaim deed.

On January 25, 2006, PRA III held an execution sale of Lynn and Janet's home to satisfy the judgment lien and the home was purchased by Bel Fury Investments Group, L.L.C. (Bel Fury). A confirmation of sale hearing was conducted, and a sheriff's deed was issued to Bel Fury. The order was issued March 7, and Bel Fury recorded the sale in the register of deeds' office on March 14. On June 7, Bel Fury filed a partition action in Douglas County District Court, and Lynn and Janet were both served with summons and a copy of the complaint.

On July 6, 2006, Janet died before an answer could be filed on her behalf. Lynn filed an answer, and Janet's daughter, as personal representative of Janet's estate, filed an answer on behalf of the estate. However, Bel Fury never filed a motion to revive the case against Janet's estate, and the case was dismissed as to Janet. Rita testified she was not aware of the partition proceedings at the time Lynn was served, but she was present at the hearings and did not enter an appearance or attempt to intervene either in her capacity as power of attorney or in her own behalf.

On September 1, 2006, Rita made another payment of $8,375 to the mortgage company because she said she hoped it would avoid foreclosure and allow Janet's daughter the opportunity to buy the property from Bel Fury. At this point, Rita knew of the Bel Fury deed and its ownership of the property, but she paid the money anyway. Bel Fury was awarded summary judgment on September 18, because Lynn did not claim any interest in the property and Bel Fury had purchased Janet's interest in the property through the prior execution sale. Bel Fury paid off the mortgage on the property and paid approximately $30,000 to fix the property for sale. In March 2007, the property was subsequently sold for $200,000 to Jonathan L. Boothe, Jr., and Samara Boothe.

Bel Fury filed a complaint to quiet title in September 2009, and in February 2010, Rita answered and counterclaimed for foreclosure of the deed of trust, partition, and unjust enrichment. This matter went to trial in the district court for Douglas

County in April 2011, and in June, the trial court issued a finding and order concluding that Rita no longer had a security interest via the promissory note and deed of trust, because the applicable 5-year statute of limitations had run.

Rita timely filed this appeal on July 11, 2011.

## ASSIGNMENTS OF ERROR

Rita assigns two errors: The district court erred in finding Rita no longer had a security interest, because the 5-year statute of limitations had run, and the district court erred in failing to find for Rita on her foreclosure action and her claim of unjust enrichment.

## STANDARD OF REVIEW

[1] The determination of which statute of limitations applies is a question of law, and an appellate court must decide the issue independently of the conclusion reached by the trial court. *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997).

[2,3] A quiet title action sounds in equity. *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007). On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *Channer v. Cumming*, 270 Neb. 231, 699 N.W.2d 831 (2005).

## ANALYSIS

*Statute of Limitations.*

The trial court found Rita no longer had a security interest via the promissory note and deed of trust, because the 5-year statute of limitations had run per the Nebraska Trust Deeds Act, see Neb. Rev. Stat. § 76-1015 (Reissue 2009), and per the limitation of actions on written instruments, Neb. Rev. Stat. § 25-202 (Reissue 2008). See *PSB Credit Servs. v. Rich, supra*.

We find, however, that § 76-1015 does not apply to the current situation. In *PSB Credit Servs. v. Rich, supra*, the Nebraska Supreme Court stated the plain reading of the statute pertains to a situation where the trustee exercises a power of sale upon

default. That case involved a judicial foreclosure, as opposed to a trustee foreclosure; thus, § 76-1015 was determined to be inapplicable. That same reasoning applies in this case, as it was not a trustee foreclosure; thus, the 5-year statute of limitations applied by the trial court was incorrect. Rather, the procedure used for foreclosure of mortgages or deeds of trust as mortgages would apply under § 25-202. Pursuant to that statute, a party must bring the action within 10 years of the date the debt secured by the mortgage matured. Or, where there is no date of maturity listed within the deed of trust, the cause of action accrues no later than 30 years after the date of the mortgage or deed of trust under § 25-202(2)(b).

[4] Notwithstanding this error by the trial court, we have said many times in the past that a correct result will not be set aside even when the lower court applied the wrong reasoning in reaching that result. See *Stoetzel v. Neth*, 16 Neb. App. 348, 744 N.W.2d 465 (2008).

In this case, the record indicates the deed of trust, which contained no date of maturity, was executed on September 14, 2005, and Rita filed a counterclaim for foreclosure in February 2010. Regardless of whether § 76-1015 or § 25-202 applies, the foreclosure was filed within 5 years of the creation of the deed of trust; thus, the statute of limitations as it relates to the deed of trust had not expired.

*Foreclosure.*

We must now consider whether Rita had a valid security interest in the property via the promissory note and deed of trust and whether she is entitled to recover under any such interest.

[5] The purchaser at the sale of property is not responsible for liens that are found to be junior and inferior to the foreclosed lien. See *First Nat. Bank of York v. Critel*, 251 Neb. 128, 555 N.W.2d 773 (1996). There were three potential encumbrances on the property. First, the property was subject to a primary mortgage. Then PRA III established a judgment lien against Janet in 2003. Finally, Rita's deed of trust was filed in 2005. Rita's claim on the property was junior to the judgment lien when Bel Fury purchased the property at

the execution sale. Thus, Bel Fury was responsible for the primary mortgage but not for Rita's claim upon the sale of the property.

The sheriff's sale terminated Janet's interest in the property, but not Lynn's. Rita testified that she was not aware of the partition proceedings at the time Lynn was served, but she was present at the hearings and did not enter an appearance or attempt to intervene either in her capacity as power of attorney or in her own behalf. Rita's power of attorney was never publicly recorded or acknowledged, nor is there any indication in the record before us that Bel Fury was made aware of its existence.

In the partition proceedings, the court determined Janet no longer held an interest in the property, and any interest Lynn had in the property was extinguished because he failed to claim any interest in his answer. The court granted summary judgment on September 18, 2006, and found Bel Fury had fee simple title to the property subject only to the prior mortgage.

Following that decision, Bel Fury sold the property to the Boothes on March 13, 2007, and the Boothes were good faith purchasers for value. Rita's answer and counterclaim for foreclosure of the deed of trust, partition, and unjust enrichment was filed February 16, 2010, in response to Bel Fury's complaint to quiet title. Rita's counterclaim for foreclosure, although technically brought within the applicable statute of limitations, was not timely, given the prior judicial sale and confirmation to Bel Fury and Rita's failure to participate in the earlier partition proceedings. We find that the property was not subject to any viable interest attributable to Rita and that she failed to prove her counterclaim at the time the quiet title action was tried in the Douglas County District Court.

*Equitable Relief.*

Rita also alleges she should recover from Bel Fury under theories of unjust enrichment and quasi-contract for the payments she made toward the mortgage. Rita cites *Bush v. Kramer*, 185 Neb. 1, 3, 173 N.W.2d 367, 369 (1969), which states, "Where benefits have been received and retained

under such circumstances that it would be inequitable and unconscionable to permit the party receiving the benefits to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay the reasonable value of them."

Rita claims she is owed for the $13,000, plus interest, detailed in the deed of trust, but, as discussed above, she is not entitled to this after she failed to protect her interest during the partition action. In addition, Rita paid the $13,000 to the mortgage company for the benefit of Lynn and Janet, prior to Bel Fury's involvement with the property. Bel Fury clearly did not receive these payments directly.

Further, Rita argues she is owed for the third payment to the mortgage company in September 2006, during the pendency of the partition action. Rita argues the district court should have found for her on theories of unjust enrichment and quasi-contract.

Rita cites *Washa v. Miller*, 249 Neb. 941, 950, 546 N.W.2d 813, 818-19 (1996), which states that the "doctrine of unjust enrichment is recognized only in the absence of an agreement between the parties," and Rita argues that she is entitled to recovery because there is no evidence of an agreement between Bel Fury and Rita. However, the issue in *Washa* was not whether there was an agreement between parties; rather, it was whether there was an agreement on a specific item as part of a larger deal. The party seeking a finding of unjust enrichment must be a party to a transaction with the party allegedly unjustly enriched. Rita and Bel Fury were not parties to the same transaction; thus, Rita cannot recover for unjust enrichment on this basis.

[6] To recover on a claim for unjust enrichment, Rita must show that (1) Bel Fury received money, (2) Bel Fury retained possession of the money, and (3) Bel Fury in justice and fairness ought to pay the money to Rita. See *Kanne v. Visa U.S.A.*, 272 Neb. 489, 723 N.W.2d 293 (2006). Rita asserts the first two elements are undisputed, and the third was not addressed by the court. However, a de novo review of the record reveals that each time Rita made payments on the mortgage, the money was sent directly to the mortgage

company. Rita's analysis assumes that any money paid to the mortgage company is automatically considered "received" by Bel Fury.

Though Bel Fury arguably received the benefit of the third payment from Rita, because it was presumably applied to the outstanding balance of the mortgage, they did not receive the money or at any time gain or retain possession of her payment. Further, we must consider whether justice and fairness require Bel Fury to pay the money to Rita when she knowingly made payments despite being aware of Bel Fury's interest in the property.

[7,8] Rita testified that at the time of the third payment, she was aware of Bel Fury's interest in the property and made the payment despite that knowledge. The doctrine of equitable subrogation applies where a party is compelled to pay the debt of a third person to protect his own rights or interest or to save his own property. *Rawson v. City of Omaha*, 212 Neb. 159, 322 N.W.2d 381 (1982). However, Rita was not acting to protect her own interest in the property; she was merely trying to avoid foreclosure so Janet's daughter could possibly purchase the property from Bel Fury. Rita was not the owner of the property, she was not subject to the terms of the mortgage, and she was not obligated in any way to make the payment. "[S]ubrogation is never awarded in equity to one who is merely a volunteer in paying the debt of another." 212 Neb. at 165, 322 N.W.2d at 384. Rita's payment was voluntary, and therefore, she is unable to recover for unjust enrichment for the value of the voluntary third payment.

Finally, at the trial before the district court, Rita testified that Lynn and Janet never made a payment on the promissory note, she never formally demanded payment, and at no time had she ever received money from anyone for the voluntary payments she made to the mortgage company. She also testified that she did not make any claim against Janet's estate, although she could have. Despite these facts, Rita testified at the trial that Lynn and Janet did not owe her anything on the promissory note. As a result, Bel Fury effectively argued that if there was no amount due on the promissory note, then the claims are extinguished.

We find the district court correctly determined Rita is not entitled to a recovery for unjust enrichment or under any other theory of recovery.

## CONCLUSION

We find the applicable statute of limitations had not run with regard to the foreclosure of Rita's promissory note and deed of trust. However, for the reasons discussed above, we find Rita had no viable security interest in the property or any other equitable claim. We affirm the decision of the trial court finding for Bel Fury on Rita's claims for foreclosure and unjust enrichment.

AFFIRMED.

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# MARTIN MARIETTA MATERIALS, INC., APPELLEE AND CROSS-APPELLANT, V. CASS COUNTY BOARD OF EQUALIZATION, APPELLANT AND CROSS-APPELLEE.

815 N.W.2d 201

Filed June 12, 2012. Nos. A-11-469 through A-11-479.

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. **Taxation: Valuation: Presumptions: Evidence: Appeal and Error.** There is a presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.

5. **Taxation: Valuation: Constitutional Law.** The object of the uniformity clause is accomplished if all of the property within the taxing jurisdiction is assessed and taxed at a uniform standard of value.
6. **Taxation: Valuation: Public Policy.** No difference in the method of determining the valuation or rate of tax to be imposed can be allowed unless separate classifications rest on some reason of public policy or some substantial difference of situation or circumstance that would naturally suggest justice or expediency of diverse legislation with respect to the objects to be classified.
7. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeals from the Tax Equalization and Review Commission. Affirmed.

Nathan B. Cox, Cass County Attorney, for appellant.

Michael L. Schleich and Timothy J. Thalken, of Fraser Stryker, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

INBODY, Chief Judge.

## I. INTRODUCTION

The Cass County Board of Equalization (Board) appeals from an order of the Tax Equalization and Review Commission (Commission) which reversed the Board's valuation of mineral interests located on real property within Cass County, Nebraska. For the following reasons, we affirm.

## II. STATEMENT OF FACTS

### 1. BACKGROUND

Martin Marietta Materials, Inc. (Martin), owns or leases the mineral interests within several parcels of land located in Cass County. Martin maintains a limestone mining operation with a primary product of concrete stone for use in roads, highways, and base material.

In 2007, Martin received property valuations for those mineral interests and timely filed a protest as to each valuation. The protests were consolidated and came on for hearing before the Board, which adopted the Cass County assessor's valuation. Martin appealed the Board's decision to the Commission, asserting that the taxable value of the property as of January 1,

2007, was not equalized with the taxable value of other real property. Those 14 cases were consolidated for the Commission hearing and orders which followed. With regard to this court, only 11 of those 14 parcels are at issue, and they have also been consolidated in this court for purposes of this appeal. Those specific appeals before the Commission involve Commission cases Nos. 07M-003 through 07M-012 and 07M-014. These properties, together with their parcel identification numbers, valuations, and Commission and appellate case numbers, are summarized as follows:

| Parcel Identification Number | Commission Case Number | Appellate Case Number | Cass County Assessor's Underground Mineral Valuation |
|---|---|---|---|
| 130391914 | 07M-003 | A-11-469 | $1,343,105 |
| 130302988 | 07M-004 | A-11-470 | $ 455,731 |
| 130380865 | 07M-005 | A-11-471 | $ 375,238 |
| 130302198 | 07M-006 | A-11-472 | $ 142,370 |
| 130302065 | 07M-007 | A-11-473 | $ 450,570 |
| 130391197 | 07M-008 | A-11-474 | $ 427,111 |
| 130303062 | 07M-009 | A-11-479 | $ 315,397 |
| 130380784 | 07M-010 | A-11-478 | $ 866,136 |
| 130306529 | 07M-011 | A-11-477 | $ 392,386 |
| 130302626 | 07M-012 | A-11-476 | $ 566,949 |
| 130392874 | 07M-014 | A-11-475 | $ 372,630 |

### 2. May 15, 2007, Appraisal Report

In 2006, the Cass County assessor retained the services of Michael Cartwright, a certified geologist and appraiser, in order to review certain property in Cass County to determine the value of mineral interests therein. Cartwright's assignment was to identify parcels of land in Cass County which were actively mined, may be mined within a certain timeframe in the future, or have been mined out and are now unsuitable for mineral extraction purposes. On May 15, 2007, Cartwright submitted a report to the Cass County assessor's office with a current actual value appraisal of 184 parcels in Cass County. The report indicated that out of those 184 parcels, 31 were owned

by individuals or companies, 36 involved severed mineral interests by deed and/or lease, 43 involved mineral leases, and 122 were owned by closely related business entities.

Out of two types of property parcels, minerals nonproducing and minerals producing, the appraisal established seven classes of mineral interests: mineral future, mineral exhausted, mineral active, mineral obsolescence, mineral processing, mineral unknown, and nonmineral in character. The report indicated that the only mineral interest parcels subject to an increase in the mineral interest property tax in the appraisal were those which have been designated as "[m]ineral [a]ctive," defined as those parcels currently being mined and those which may be mined in the next 5 years. Cartwright directed that a "five-year forward looking time frame" had been used to define the "several year time frame" noted in the property tax regulations. See 350 Neb. Admin. Code, ch. 13, § 002.07 (2009). The report further indicates that there were no comparable sales of mineral interest properties in the area.

Throughout the report, there are several instances where Cartwright notes that various "mineral interest operators" refused to cooperate with requests for documents and information and that he had not contacted individual lessors of mineral interests for that information when it was not provided by the operator. The report indicated that only one mineral operator cooperated fully, while yet another mineral operator refused access to the property entirely. The report concluded by recommending the assessed value and estimated property tax for 20 parcels.

### 3. Commission Hearing Testimony and Evidence

Numerous exhibits were received and testimony was given at the Commission's hearing on the valuation of Martin's mineral interests. Martin's manager of land and zoning testified that his job included Martin's mines in Cass County and that he was very familiar with those mines. He testified that if the company is observing or discussing a possible property to mine, Martin routinely looks at properties for as far as 30 years out for purposes of obtaining leases or ownership in the mineral interests. Martin's manager also explained that there was no

timeframe on when a conditional use permit would actually be used, although those issues may have been discussed during the hearing to obtain the permits. He further gave testimony that Martin had, on at least four separate occasions, made offers in excess of $1 million to the owner of the parcel identified as "A" on the map which was admitted as an exhibit and used by the parties throughout the proceedings. Parcel A did not have a conditional use permit filed or issued and was given a mineral interest valuation of $0.

Cartwright, a mineral property appraiser and geologist who submitted the assessment report, also testified at a deposition received into evidence and in person at the hearing regarding the valuation of the parcels in Cass County. Cartwright testified that in 2006, he made his first visit to Nebraska to retrieve and review documents. Cartwright testified that the Cass County assessor at the time instructed him to stay off the properties and that therefore, he only drove by or around the land during the first visit. Cartwright testified he understood that his assignment was to look at mineral interests and then value the parcels that were actually producing and generating income. Cartwright testified that in order to differentiate properties, the Cass County assessor's office operated under the assumption that those properties which did not have a conditional use permit could not be mining material and could not be generating any income, because a permit was required for any mining activity. Cartwright testified that the parcels with nonproducing mineral interests, those without conditional use permits, were valued by default at $0 because they were not adding any value to those properties:

> [Counsel for appellant]. Well, if one of those landowners that had non-producing mineral interests came to you and said I want to sell my land, can you appraise my land for me, would you attribute any value to the underlying mineral?
>
> [Cartwright]. If he had a conditional use permit?
>
> Q. If he didn't have a conditional use permit.
>
> A. If he didn't have a conditional use permit, he can't really do anything with those minerals until such time as he does have one.

Q. So you would put no value on that?
A. I would put no value on that.

Cartwright testified that an offer on a parcel of land would also have an impact on his opinion of the value of the land and that he would always consider such offer.

Cartwright testified that as to the nonproducing mineral interests, he looked at the possibility of production as criteria and if that possibility was too remote, then the mineral interest value would be $0. Cartwright explained that the criteria in that determination included whether there had been testing of the minerals and whether any mining permits had been applied for. Cartwright testified that he was again instructed by the county assessor to not speak with any of the individual landowners of the parcels without going through the assessor first. Cartwright testified that the landowner's intent with regard to the nonproducing parcels would be important information to know, such as permit status and any negotiations for sale of nonproducing land, but again, Cartwright testified he was not authorized, per the assessor, to retrieve any of that information. Cartwright testified that he was allowed to speak only with mineral producers in Cass County.

On another visit, Cartwright observed live operations of some of the mining companies and was told to leave the property of another, although Cartwright testified that Martin was cooperative with his inquiries. Cartwright began to investigate all of the properties to ascertain whether or not there was a conditional use permit for each parcel. Cartwright made several additional trips to Nebraska through March 2007. Cartwright testified that "[a]ll properties were reviewed. The only ones that could have an increase in value due to the extraction of mineral are those that possess conditional use permits or [those] actively being mined at the time of the examination." Cartwright agreed that his position was that unless a property had a conditional use permit, the mineral interest added no value to the property. Cartwright explained that "[d]ifferent uses are allowed with these things, and it cannot be mined, at least legally mined, without a conditional use permit."

Cartwright testified that parcel A, as discussed earlier by Martin employees as a tract of land for which Martin had

made several offers, had been reviewed and valued at $209,246 as a surface appraisal only for the 155.41 acres on the tract. Cartwright testified that parcel A contained limestone content but was not currently leased. Cartwright concluded that the mineral interest on parcel A did not add any value to the parcel, because the parcel lacked a conditional use permit, indications on how many reserves might be on the property, and indications of whether or not the minerals could be mined at a profit. Cartwright also testified that several parcels akin to parcel A were not included in the 184 parcels Cartwright appraised.

With regard to the 5-year time period adopted to define the timeframe at when production might occur within a reasonable time as set forth in Nebraska's regulations, Cartwright testified that he met with the county assessor, the Cass County Attorney, and a deputy county assessor and determined that "several years" could reasonably be defined as 5 years.

### 4. Commission's Findings and Order

On May 11, 2011, the Commission entered a decision and order reversing and affirming decisions of the Board. The portion of the order affirming the Board's decision deals with three property valuations which are not at issue in this court. The Commission found that the appraiser was retained to develop an actual value appraisal for all real property in Cass County operating under conditional use permits for mining in order to determine the valuation of mineral interests, mineral leases, and mineral reserves. The Commission found that the appraiser had investigated equalization for similar properties in Cass County in order to ensure that all of the identified mineral interests were valued uniformly and proportionately.

The Commission explained that the appraiser had testified that the Cass County assessor had prohibited contact with property owners who were not conducting mining operations, which, in turn, prohibited the appraiser from contacting owners of parcel A and another parcel. The Commission determined that the county assessor's constraint, coupled with a lack of cooperation from the mining companies, forced the appraiser to focus solely on properties with conditional use

permits, which focus was prohibited because it created a de facto ownership classification which violated the uniformity clause. The Commission determined that there were parcels for which the minerals contributed to the actual value of the fee simple, parcels which contained minerals that contributed to the actual value and had been assessed by a separate assessment of mineral interests, and parcels which contained minerals that would contribute to the actual value of the fee simple that were assessed at a value of $0. The Commission found that the difference in assessed values, due to the actions of the Cass County assessor and the lack of information received from certain mining operations, created de facto classifications favoring one group of taxpayers over another.

The Commission concluded by finding that the taxable value of the mineral interests in the parcels in cases 07M-003 through 07M-012 and 07M-014 were not determined by the Board uniformly and proportionately with other parcels in Cass County, that Martin produced competent evidence that the Board failed to faithfully perform its official duties and to act on sufficient competent evidence, that the determinations of the Board were unreasonable or arbitrary, and that the assessments of the parcels were void for the taxation of the producing mineral interests. The Commission vacated and reversed the Board's determination of mineral interest valuations as of January 1, 2007. The Commission found the assessments void and assigned each a value of $0. The Board has timely appealed the Commission's determination to this court.

## III. ASSIGNMENTS OF ERROR

The Board assigns that the Commission erred in the following determinations: (1) that the taxable value of Martin's mineral interests had not been determined uniformly and proportionately with other parcels in Cass County, (2) that the system of valuing mineral interests for parcels with a conditional use permit created a de facto classification arbitrarily favoring one group of taxpayers, and (3) that the value of Martin's mineral interests was $0. However, upon a careful review of the Board's brief, we find that the Board has failed

to set forth any argument regarding its third assignment of error, and, as such, we will not address the Commission's determination of the value of Martin's mineral interests at $0. See *Walsh v. State*, 276 Neb. 1034, 759 N.W.2d 100 (2009) (to be considered by appellate court, alleged error must be both specifically assigned and specifically argued in brief of party asserting error).

On cross-appeal, Martin assigns that the Commission erred by finding that Cass County could classify minerals for differential tax valuation based on whether the minerals would be extracted within 5 years.

## IV. STANDARD OF REVIEW

[1-3] Appellate courts review decisions rendered by the Commission for errors appearing on the record. *Vandenberg v. Butler County Bd. of Equal.*, 281 Neb. 437, 796 N.W.2d 580 (2011). 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. *Id.* Questions of law arising during appellate review of Commission decisions are reviewed de novo on the record. *Id.*

## V. ANALYSIS

### 1. Cass County's Appeal

#### (a) Taxable Value of Mineral Reserves

The Board argues that the Commission erred by reversing its determination of the taxable value of Martin's mineral reserves.

[4] There is a presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the

taxpayer on appeal from the action of the board. *Constructors, Inc. v. Cass Cty. Bd. of Equal.*, 258 Neb. 866, 606 N.W.2d 786 (2000); *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999).

In this case, the Commission found that the taxable mineral interests were not determined by the Board uniformly and proportionately with other parcels in Cass County and that Martin had produced competent evidence that the Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.

The Board contends that the Cass County assessor's system for appraisal and valuation of mineral interests is a reasonable method for determining mineral interests. We disagree. The record contains evidence which called into question the reasonableness of the actions taken by the Board. Cartwright, the appraiser hired by the Cass County assessor's office, gave testimony which quite candidly revealed that he had been specifically instructed by the assessor to speak only with mine operators and to not speak with individual landowners. Cartwright testified that he requested the assessor set up several meetings with individual landowners and that no meetings were ever arranged. Testimony was adduced which indicated that there are properties nearby, in some cases directly adjacent to, which contained limestone with commercial value that were owned by individual landowners or did not have a conditional use permit that the appraiser was unable to obtain information about and, as such, were assessed a mineral interest value of $0. Cartwright testified that his appraisal was affected by the restriction of not speaking with individual landowners and that the lack of information had an impact on the ultimate valuations. Cartwright also indicated that his work was affected by the refusal of a mining operator to discuss operations or to allow Cartwright on the property.

Therefore, the presumption that the Board has faithfully performed its official duties in making the assessment of the value of mineral interests and has acted upon sufficient competent evidence has disappeared. The Commission's determination regarding the presumption of the Board's actions is supported

by competent evidence and is neither arbitrary, capricious, nor unreasonable.

(b) Classification

The Board contends that the Commission erred in its determination that the county assessor's system of valuing mineral reserves arbitrarily favored one group of taxpayers over another. The Commission found that as a result of the assessor's constraint coupled with the lack of information from the mining companies, Cartwright was forced to focus on those properties with conditional use permits controlled by the mining companies. The Commission determined that the valuation on this basis created a de facto ownership classification, which violated the Nebraska Constitution's uniformity clause, article VIII, § 1.

[5,6] The Nebraska Constitution's uniformity clause provides that "[t]axes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution . . . ." Neb. Const. art. VIII, § 1. While absolute uniformity of approach for taxation may not be possible, there must be a reasonable attempt at uniformity. *Constructors, Inc. v. Cass Cty. Bd. of Equal.*, 258 Neb. 866, 606 N.W.2d 786 (2000). The object of the uniformity clause is accomplished if all of the property within the taxing jurisdiction is assessed and taxed at a uniform standard of value. *Id.* No difference in the method of determining the valuation or rate of tax to be imposed can be allowed unless "separate classifications rest on some reason of public policy or some substantial difference of situation or circumstance that would naturally suggest justice or expediency of diverse legislation with respect to the objects to be classified." *Id.* at 874, 606 N.W.2d at 793.

This case is not the first time that Cass County mineral interests have been before the courts. In a trilogy of cases released in February and March 2000, the Nebraska Supreme Court determined that the valuation plan first utilized by Cass County to value mineral interests was unconstitutional. See *Constructors, Inc. v. Cass Cty. Bd. of Equal., supra*; *Ash Grove*

*Cement Co. v. Cass Cty. Bd. of Equal.*, 258 Neb. 990, 607 N.W.2d 810 (2000); and *Lyman-Richey Corp. v. Cass Cty. Bd. of Equal.*, 258 Neb. 1003, 607 N.W.2d 806 (2000).

In those three cases, mining companies whose Cass County properties were assessed at a higher value for tax purposes due to mineral interests lying beneath the land sought review of the Board's valuations. The scheme under which the property was valued at was one in which the mineral interests were assessed only on the properties owned or under lease to mining companies. In *Constructors, Inc. v. Cass Cty. Bd. of Equal.*, the court held that "the classification scheme created in which only those minerals contained in lands owned by the [mining companies] were given value for tax purposes, whereas other mineral interests were ignored, violates the uniformity provisions of article VIII, § 1, of the Nebraska Constitution." 258 Neb. at 875, 606 N.W.2d at 793.

The Board argues that the classification in this case rests upon real differences of situations, because the classification was made based upon use and not ownership and because the classification rests on sound public policy reasons.

We do not doubt that the review of whether or not a property has a conditional use permit is an important tool for the assessor's office in making assessments for the purpose of mineral interest valuations. However, the problem in this case is that the conditional use permit was the only tool utilized, which singled out mining operations in the eventual valuations issued by the assessor's office and approved by the Board.

Again, as we have previously discussed, Cartwright testified that in his investigation for the compilation of his report, he was instructed by the assessor to speak only with mining operators and to stay away from individual landowners. Cartwright testified that the parcels of land which held conditional use permits or those on which mining would occur within the next 5 years were given a mineral interest value. Cartwright testified that those parcels without permits were given a default value of $0. The record indicates that parcel A, a parcel located near many of the parcels at issue in this case, was owned by an individual landowner. That landowner was never interviewed,

and no information was attained about the parcel. Cartwright testified that parcel A had minerals below the surface, which was substantiated by Martin employees, who also testified that over the past several years, Martin had made substantial offers, in excess of $1 million for parcel A. The record also indicates that parcel A is surrounded by two active mines, consists of approximately 155 acres, and was attributed a value of $0 for mineral interests.

Therefore, upon our de novo review of the record, we find that there is no substantial difference or public policy reason that justifies differential tax treatment between those parcels of land with conditional use permits and those without. Thus, the classification utilized by Cass County was not based upon use, but instead ownership, and this violates the uniformity provisions of article VIII, § 1, of the Nebraska Constitution. The Commission did not commit error by reversing the Board's determinations, and this assignment of error is without merit.

### 2. Martin's Cross-Appeal

[7] On cross-appeal, Martin argues that the Commission erred by holding that Cass County could classify minerals for differential tax valuation based on whether the minerals would be extracted within 5 years. However, having determined that the Commission did not err by reversing the Board's determinations which resulted in a finding that Martin's properties had a value of $0, we need not address Martin's cross-appeal. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

## VI. CONCLUSION

In sum, we find that the Commission's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. As such, we affirm the Commission's decision in its entirety.

Affirmed.

# STATE OF NEBRASKA, APPELLEE, V. RYAN L. VYHNALEK, APPELLANT.

814 N.W.2d 768

Filed June 19, 2012. No. A-11-739.

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: 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.
3. **Warrantless Searches.** The warrantless search exceptions 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.
4. **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.
5. **Police Officers and Sheriffs: Search and Seizure: Evidence.** A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself.
6. **Police Officers and Sheriffs: Search and Seizure: Probable Cause.** For an object's incriminating nature to be immediately apparent, the officer must have probable cause to associate the property with criminal activity.
7. **Search and Seizure: Probable Cause: Presumptions.** A seizure of property that is in plain view is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.
8. **Probable Cause: Words and Phrases.** 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. A practical, nontechnical probability that incriminating evidence is involved is all that is required.
9. **Search and Seizure: Probable Cause.** When a container is readily identifiable as a gun case, it is a single-purpose container, and the officers do not need a warrant to open the gun case, because it falls under the plain view exception.

Appeal from the District Court for Saline County: VICKY L. JOHNSON, Judge. Affirmed.

Kirk E. Naylor, Jr., for appellant.

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

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

PIRTLE, Judge.

## INTRODUCTION

Ryan L. Vyhnalek appeals from his conviction for possession of a deadly weapon by a prohibited person in the district court for Saline County. On appeal, Vyhnalek asserts that the district court erred in overruling his motion to suppress evidence because the seizure of a gun case and rifle found within his home cannot be justified under the plain view exception to the warrant requirement of the Fourth Amendment. Because we find the district court did not err in overruling the motion to suppress, we affirm.

## BACKGROUND

The State filed an information on June 25, 2010, charging Vyhnalek with one count of possession of a deadly weapon by a prohibited person, in violation of Neb. Rev. Stat. § 28-1206 (Reissue 2008), a Class III felony. Vyhnalek pled not guilty and subsequently filed a motion to suppress evidence, asking the trial court to suppress the rifle seized from his residence on the date of his arrest.

On February 24, 2011, a hearing was held on Vyhnalek's motion to suppress. The evidence presented at the hearing is summarized as follows:

On May 4, 2010, Deputy Kevin Vogel of the Saline County Sheriff's Department was on duty and received a call from the Jefferson County Sheriff's Department advising him that an individual who had just been stopped for a traffic violation relayed that he was worried about his daughter, Deanna Vyhnalek, because she and her husband, Vyhnalek, were having some type of confrontation at their residence

in Saline County. Vogel contacted Deputy Matt Jonas of the Saline County Sheriff's Department, and they drove in separate cruisers to the Vyhnalek residence. The two officers approached the residence, and Vogel knocked on the door. Deanna answered the door and appeared to be upset. Vogel asked if he and Jonas could speak to her, and she invited both officers into the residence. Deanna told the officers that she and Vyhnalek were having an argument about Deanna's children. Deanna indicated Vyhnalek was in the living room, so Vogel stayed with Deanna and Jonas made contact with Vyhnalek.

Deanna told Vogel that the altercation with Vyhnalek had not been violent, but that similar altercations had led to violence in the past. Vogel knew that Vyhnalek was a convicted felon and that he had been in possession of firearms in the past, despite being prohibited from doing so as a convicted felon, so Vogel asked Deanna if Vyhnalek had any weapons in the residence. Deanna told him that Vyhnalek had a ".30-06" in the bedroom, which Vogel knew was a hunting rifle.

Vogel then went into the living room where Vyhnalek and Jonas were located and asked Vyhnalek if he had any weapons in the residence. Vyhnalek denied that he did. Vogel told him that he had information to the contrary, to which Vyhnalek stated that the rifle belonged to Deanna. Vogel told Vyhnalek he was being arrested for being in possession of a weapon and placed him in handcuffs. Vyhnalek was wearing only boxer shorts at the time, and he asked if he could put on a shirt. Vyhnalek indicated that his clothes were located in a bedroom that was just off of the living room. Vogel and Jonas escorted Vyhnalek to the bedroom to get him a shirt. There were piles of folded clothes on the bed, and Jonas began looking through the clothes for a shirt for Vyhnalek. While in the bedroom, Vogel and Jonas both observed a black gun case leaning against a wall in the bedroom. Vogel testified that the gun case was large enough to contain a rifle or shotgun and that the case was a type used to store firearms.

After finding a shirt for Vyhnalek, both officers escorted Vyhnalek from the bedroom. Vogel then escorted Vyhnalek out of the house, and Jonas went back into the bedroom to retrieve

the gun case. Jonas picked up the gun case, placed it on the bed, and opened it, finding a rifle inside. Jonas made sure the rifle was not loaded, put it back in the case, and carried it outside. He gave the case to Vogel, who opened it and observed the weapon inside, a hunting rifle which was the same caliber of weapon Deanna had described. The officers seized the gun case and the rifle.

Following the motion to suppress hearing, the trial court overruled Vyhnalek's motion to suppress, finding that the gun case and rifle were seized lawfully under the plain view exception to the warrant requirement of the Fourth Amendment. A jury trial was subsequently held, and Vyhnalek renewed his motion to suppress by seeking a continuing objection to any testimony relating to the rifle and to the admission of the rifle itself. The continuing objection was overruled. The jury found Vyhnalek guilty of possession of a deadly weapon by a prohibited person. He was subsequently sentenced, and this appeal followed.

## ASSIGNMENT OF ERROR

Vyhnalek assigns that the trial court erred in overruling his motion to suppress, because the seizure of the gun case and rifle cannot be justified under the plain view exception to the warrant requirement.

## 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. *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011).

## ANALYSIS

The issue before us in regard to Vyhnalek's motion to suppress is whether the seizure of the gun case and rifle was accomplished lawfully. There is no dispute in this case that the gun case and rifle were seized without a warrant. Therefore,

this case must be analyzed as a warrantless search and seizure case.

[2-4] 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. *State v. Borst, supra.* The warrantless search exceptions 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. See *id.* 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. *Id.*

[5] The district court in this case found the warrantless seizure of the gun case and rifle to have been justified as a seizure of evidence in plain view. A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself. *Id.*

Vyhnalek argues that neither the seizure of the gun case nor the seizure of the rifle can be justified under the plain view doctrine. We first address the seizure of the gun case.

The evidence establishes, and Vyhnalek does not contest, that the officers had a legal right to be in the bedroom of Vyhnalek's home, where they observed the gun case, and had a lawful right of access to the gun case. The only issue in regard to the seizure of the gun case itself is whether its incriminating nature was immediately apparent.

[6-8] For an object's incriminating nature to be immediately apparent, the officer must have probable cause to associate the property with criminal activity. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003). A seizure of property that is in plain view is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. *Id.* Probable cause is a flexible, commonsense standard. *Id.* 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. *Id.* A practical, nontechnical probability that incriminating evidence is involved is all that is required. *Id.*

The officers needed probable cause to associate the gun case with criminal activity. In the instant case, the evidence shows that both officers observed a black gun case in the bedroom where Vyhnalek indicated his clothes were located. Before observing the gun case, Vogel knew that Vyhnalek was a convicted felon and had been in possession of firearms in the past. In addition, Deanna had told Vogel that Vyhnalek had a ".30-06" in the bedroom, which Vogel knew was a hunting rifle. Vyhnalek had also admitted that there was a weapon in the house when he told Vogel that the rifle belonged to Deanna. Vogel testified that the gun case he saw in the bedroom was of the size and shape consistent for holding a rifle and that the case was a type used to store firearms. Further, based on the substituted picture of the gun case in the record before us, the gun case had a tag on it that read, "SE Series Single Scope Rifle/Shotgun," and the case was molded to fit a rifle-sized firearm.

We conclude that the facts known to the officers gave them probable cause to associate the gun case with criminal activity, i.e, that it contained the rifle that Deanna had described and which Vyhnalek was prohibited from possessing. Accordingly, the incriminating nature of the gun case was immediately apparent and the officers had probable cause to seize the gun case under the plain view doctrine.

Our analysis does not end there, as Vyhnalek also argues that even if the officers were justified in seizing the gun case under the plain view exception to the warrant requirement, the search of the gun case and seizure of its contents were not. He argues that a warrant was required before the gun case could be opened and the rifle seized.

The Eighth Circuit Court of Appeals has previously addressed the issue of whether a search of a gun case and

seizure of its contents without a warrant violated a defendant's Fourth Amendment rights. In *U.S. v. Banks*, 514 F.3d 769, 775 (8th Cir. 2008), police officers had obtained consent to search a residence for contraband, and while doing so, they found a locked, hard plastic container with the words "PHOENIX ARMS." An officer opened the container and found a Phoenix Arms semi-automatic pistol. The officer seized the gun and the gun case. In determining whether there was a violation of the defendant's Fourth Amendment rights, the court provided the following analysis:

> Observing objects in plain view violates no reasonable expectation of privacy, which obviates the need for a search warrant. *Horton v. California*, 496 U.S. 128, 133, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990) (stating that no invasion of privacy occurs when an item is observed in plain view). Ordinarily, a warrant is necessary before police may open a closed container because by concealing the contents from plain view, the possessor creates a reasonable expectation of privacy. *Robbins v. California*, 453 U.S. 420, 427, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981), *overruled on other grounds by United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). However, like objects that sit out in the open, the contents of some containers are treated similarly to objects in plain view. In *Arkansas v. Sanders*, the Court suggested that no warrant is required to open such containers: "some containers (for example . . . *a gun case*) by their very nature cannot support a reasonable expectation of privacy because their contents can be inferred from their outward appearance." *Arkansas v. Sanders*, 442 U.S. 753, 764-65 n. 13, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) (emphasis added), *overruled on other grounds by California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991). . . . This exception is limited to those rare containers that are designed for a single purpose, *Texas v. Brown*, 460 U.S. 730, 750-51, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (Stevens, J., concurring in the judgment), because the "distinctive configuration of [such] container[s] proclaims [their] contents; [consequently,] the

> contents cannot fairly be said to have been removed from a searching officer's view," *Robbins*, 453 U.S. at 427, 101 S.Ct. 2841. Individuals, therefore, possess a lesser expectation of privacy in the contents of such containers when the container is observed from a lawful vantage point.
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> . . . .
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> . . . A gun case is the very model of a single-purpose container. *Robbins*, 453 U.S. at 427, 101 S.Ct. 2841; *Sanders*, 442 U.S. at 764-65 n. 13, 99 S.Ct. 2586. However, because gun cases vary in characteristics, each case must be evaluated on its own facts. If the container at issue is readily identifiable as a gun case by its distinctive configuration, then we will treat it as being a single-purpose container.

*U.S. v. Banks*, 514 F.3d at 773-75.

The Eighth Circuit Court of Appeals determined that the container at issue in *Banks* was readily identifiable as a gun case and that therefore, the container constituted a single-purpose container and fell within the plain view exception to search warrant requirements. The court concluded that the search of the gun case and the seizure of the gun inside did not violate the defendant's Fourth Amendment rights.

[9] Similarly, in the present case, the gun case was readily identifiable as a gun case by its distinctive configuration. As previously set forth, Vogel testified that the gun case was of the size and shape consistent for holding a rifle and was a type used to store firearms. The case had a tag on it indicating that its intended use was for storing an "SE Series Single Scope Rifle/Shotgun," and the case was molded to fit a rifle-sized firearm. Because the container at issue was readily identifiable as a gun case, it was a single-purpose container. Accordingly, we conclude that the officers did not need a warrant to open the gun case, because it fell under the plain view exception. The search of the gun case and the seizure of the rifle were lawful and did not violate Vyhnalek's Fourth Amendment rights.

The trial court did not err in overruling Vyhnalek's motion to suppress evidence, and his assignment of error is without merit.

## CONCLUSION

We conclude that the district court was correct in determining that the gun case and the rifle were lawfully seized from Vyhnalek's home under the plain view exception to the warrant requirement of the Fourth Amendment. Accordingly, we affirm the order of the district court overruling Vyhnalek's motion to suppress and affirm Vyhnalek's conviction and sentence for possession of a deadly weapon by a prohibited person.

AFFIRMED.

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HARRY CHARLES SUGHROUE, APPELLANT, V.
LORRAINE ANNE SUGHROUE, APPELLEE.

815 N.W.2d 210

Filed June 19, 2012. No. A-11-947.

1. **Child Custody: Property Division: Child Support: Alimony.** Domestic matters such as child custody, division of property, child support, and alimony are entrusted to the discretion of trial courts.
2. **Appeal and Error.** A trial court's determinations on domestic matters are reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
3. **Divorce: Property Division.** In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties.
4. **Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
5. ____. Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 2008) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
6. **Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim.
7. **Divorce: Property Division.** As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule.
8. **Property Division.** With some exceptions, the marital estate does not include property acquired by one of the parties through gift or inheritance.

Appeal from the District Court for Red Willow County: DAVID URBOM, Judge. Affirmed.

Nathan A. Schneider, of Mousel, Brooks, Garner & Schneider, P.C., L.L.O., for appellant.

R. Bradley Dawson, of Lindemeier, Gillett, Dawson & Troshynski, for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

PIRTLE, Judge.

## INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Harry Charles Sughroue appeals from a decree of dissolution issued by the district court for Red Willow County on September 13, 2011. For the reasons that follow, we affirm the decision of the trial court.

## BACKGROUND

Harry and Lorraine Anne Sughroue were married on July 5, 1991. Harry filed a complaint for dissolution of the marriage in the district court for Red Willow County on September 15, 2010.

On October 15, 2002, Harry's father, Charles Sughroue, died. Charles' wife was bequeathed a life estate in certain real estate located in Frontier County, Nebraska. Harry and his sisters entered into a family settlement agreement with Charles' wife and thereafter obtained title to the real estate in Frontier County. At the time of his death, Charles owed Adams Bank and Trust $416,107.02, and this debt was partially secured by the real estate in Frontier County. Harry and his sisters assumed a portion of the debt Charles owed to Adams Bank and Trust.

Harry and his sisters formed a limited liability company named "Poverty Knob, LLC." Harry and his sisters are the only members of Poverty Knob. The real estate was transferred from Harry and Lorraine, Harry's sisters, and the sisters' spouses to Poverty Knob on February 10, 2004. At that time, Harry and his sisters owed Adams Bank and Trust approximately $243,000. Poverty Knob borrowed money in 2004 to pay the existing debt of Charles' estate and to pay a debt to Charles'

wife pursuant to a family settlement agreement. Poverty Knob has paid $153,434.75 on the debt. The annual amortized payment to the lender has been $21,919.25. Of the $153,434.75 paid, $88,894.60 is attributable to the interest on the debt and $64,540.15 is the reduction of the principal portion of the debt.

The real estate owned by Poverty Knob was leased to a cash tenant. Poverty Knob received annual rental income from 2004 through 2011. The tenant's annual payment was $60,000 at the date of trial, and this is Poverty Knob's only income during the year.

The evidence adduced at trial showed Poverty Knob is a "pour-through" entity. It receives income, pays farm-related expenses, and reports income through its members. The income generated by Poverty Knob was included on the joint income tax returns filed by Harry and Lorraine as rental real estate income. Harry testified that he receives $2,000 from Poverty Knob for each tax year and that this cash payment is made to defray the tax consequences incurred by the members resulting from reporting Poverty Knob's income. Harry also receives $1,000 as a yearly management fee.

The decree of dissolution divided Harry and Lorraine's marital assets and debts. One-third of the decrease in Poverty Knob's debt, or $21,513.38, was included in the calculation of marital property. A judgment was entered in the decree in favor of Lorraine and against Harry in the amount of $8,000 to equalize the property distribution. Harry asserts the marital property should have been calculated without the decrease in Poverty Knob's debt. He suggests the marital property assigned to him should have been $8,146.04 rather than $29,659.42.

## ASSIGNMENT OF ERROR

Harry asserts the trial court erred by including the decrease in Poverty Knob's debt from 2004 to 2010 as marital property for the purposes of equalizing the property distribution.

## STANDARD OF REVIEW

[1,2] Domestic matters such as child custody, division of property, child support, and alimony are entrusted to the

discretion of trial courts. *Gress v. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007). A trial court's determinations on such issues are reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Id.*

## ANALYSIS

[3,4] In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002). The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Id.*

[5] Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 2008) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Tyma v. Tyma, supra.*

[6-8] The burden of proof to show that property is nonmarital remains with the person making the claim. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004); *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *McGuire v. McGuire*, 11 Neb. App. 433, 652 N.W.2d 293 (2002). With some exceptions, the marital estate does not include property acquired by one of the parties through gift or inheritance. *Id.*

The trial court did not include Harry's share of the real estate inherited from Charles in the calculation of marital assets. Therefore, we must consider only whether the income generated by or resulting from the inherited property is considered marital or nonmarital.

Between 2004 and 2010, Poverty Knob earned $60,000 per year and paid $153,434.75 to Adams Bank and Trust, decreasing the principal debt by $64,540.15. The trial court determined that Harry's one-third share of the decrease in the debt during the marriage should be included as a marital asset. Harry

asserts that any income from Poverty Knob belongs solely to him and is thus nonmarital.

In *Williams v. Williams*, No. A-07-1103, 2008 WL 5064933 (Neb. App. Dec. 2, 2008) (selected for posting to court Web site), this court was presented with a similar factual situation and came to the same conclusion as the trial court in this case. In *Williams*, the husband owned stock prior to the parties' marriage and the stock was clearly nonmarital property. Nonetheless, in the calculation of marital assets, the trial court included the reduction in debt on the stock occurring during the marriage. The court found this was adequate compensation for the wife's contribution to the payment of the debt on the husband's separate property.

We apply the same logic to this case. Though the Poverty Knob property was clearly nonmarital, the income generated between 2004 and 2010 is marital, because it was "accumulated and acquired" by Harry during the marriage. This income was included in the joint income tax returns prepared by Harry and Lorraine's accountant and filed by Harry and Lorraine as rental real estate income. Though the income was not paid to the parties, it was directed to Adams Bank and Trust for payments on the Poverty Knob debt, thereby decreasing the debt owed. Lorraine is entitled to a portion of that decrease, because it was achieved through contributions from marital income. Thus, it was not an abuse of discretion for the trial court to include a one-third share of the decrease in debt as a marital asset subject to equitable division.

## CONCLUSION

We find it was not an abuse of discretion for the trial court to include the reduction of principal on a debt in the calculation of marital assets, because it was obtained by the use of marital income.

AFFIRMED.

# IN RE INTEREST OF DAMIEN S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. JESSICA S., APPELLANT, AND JERRY S., APPELLEE AND CROSS-APPELLANT.

815 N.W.2d 648

Filed June 26, 2012. No. A-11-941.

1. **Judgments: Appeal and Error.** When an appellate court reviews questions of law, it resolves the questions independently of the lower court's conclusions.
2. **Juvenile Courts: Parental Rights.** It is clear from the language of Neb. Rev. Stat. § 43-279.01 (Reissue 2008) that the juvenile court must advise a parent of the nature of the proceedings, the possible consequences of such proceedings, and the rights the parent is entitled to during the proceedings.
3. ____: ____. At a detention hearing, the only matter to be considered is whether a child should continue to be detained in the custody of the Department of Health and Human Services pending further juvenile court proceedings.
4. ____: ____. The juvenile court need not necessarily advise a parent of the information contained in Neb. Rev. Stat. § 43-279.01 (Reissue 2008) and, in particular, of the possible consequences after adjudication, during a parent's initial appearance in juvenile court, or during an initial detention hearing. Instead, a juvenile court must provide such advisement prior to or at an adjudication hearing where a parent enters a plea to the allegations in the petition.
5. **Juvenile Courts: Parental Rights: Proof.** Continued detention pending adjudication is not permitted under the Nebraska Juvenile Code unless the State can establish by a preponderance of the evidence at an adversarial hearing that such detention is necessary for the welfare of the juvenile.
6. **Juvenile Courts: Parental Rights.** A detention hearing is a parent's opportunity to be heard on the need for removal and the satisfaction of the State's obligations.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH, Judge. Affirmed.

Susan Reff, of Hightower Reff Law, L.L.C., for appellant.

Donald W. Kleine, Douglas County Attorney, Jennifer C. Clark, and Erin Hurley, Senior Certified Law Student, for appellee State of Nebraska.

Susanne M. Dempsey-Cook, of Dempsey-Cook Law, for appellee Jerry S.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Jessica S. appeals and Jerry S. cross-appeals from an order of the juvenile court, which order granted the Department of Health and Human Services (Department) continued custody of their son, Damien S., and provided that placement of Damien was to be outside of Jessica's and Jerry's homes. On appeal, Jessica asserts that the juvenile court erred by failing to advise her of her statutory rights pursuant to Neb. Rev. Stat. § 43-279.01 (Reissue 2008). In addition, she challenges the sufficiency of the evidence to support the juvenile court's order granting the Department's continued custody of Damien. On cross-appeal, Jerry also challenges the sufficiency of the evidence to support the juvenile court's order. For the reasons set forth herein, we affirm the order of the juvenile court granting the Department continued custody of Damien.

## II. BACKGROUND

Jessica and Jerry have three children together. This appeal involves only their youngest child, Damien. Jessica's and Jerry's parental rights to their two older children were involuntarily terminated by the juvenile court in December 2010.

Damien was born in May 2011. At the time of his birth, Jessica disclosed to hospital staff that her parental rights to her two older children had recently been involuntarily terminated. As a result of Jessica's disclosure, the Department was contacted concerning Damien's birth.

Melissa Humphrey, an employee of the Department, contacted Jessica at her home in May 2011, immediately after she and Damien were released from the hospital. At that time, Jessica and Damien were residing with Adrian B., Jessica's boyfriend. Jessica indicated that she and Jerry were still legally married, but that Jerry was incarcerated as a result of a domestic violence incident which had occurred between the two of them in March 2011.

At that May 2011 meeting, Jessica discussed with Humphrey the circumstances surrounding the termination of her parental rights to her two older children. She indicated that during the pendency of the juvenile court proceedings involving those

children, she had been struggling with her mental health, as she had been diagnosed with bipolar disorder. She stated that she was not in the "right frame of mind" and was not taking any medication. Jessica also disclosed that during that time, she was still involved with Jerry, and that their relationship entailed extreme domestic violence. Jessica indicated that she had been using marijuana on a regular basis.

Jessica told Humphrey that despite her past problems, she wanted to do everything she could to maintain custody of Damien. She reported that she had obtained a protection order against Jerry and planned on initiating divorce proceedings. She also reported that she was working on enrolling in domestic violence classes and that she was receiving therapy and medication to treat her bipolar disorder. Jessica stated that she was no longer using marijuana.

Ultimately, Humphrey concluded that Damien's basic needs were being met in Jessica's home and, as a result, determined that it was safe to leave Damien in Jessica's care. Humphrey did recommend that Jessica participate in an intensive family support program, which Jessica agreed to do.

Approximately 1 month after the May 2011 meeting with Jessica, Humphrey received another report regarding Jessica and Damien. On June 23, Adrian telephoned Humphrey to report that he and Jessica had a disagreement, that Jessica's moods were very unstable, and that Adrian did not know what to do. Humphrey went to Adrian and Jessica's home later that day to assess Damien's current safety. At that meeting, Jessica admitted that she and Adrian had not been getting along. She also admitted that she had stopped taking her medication because it was making her too tired. She explained that when she stopped taking the medication, her moods had become unstable. Jessica agreed to see a doctor to discuss her medication options and to assist her in taking her medications again. After this meeting, Humphrey again determined that Damien was safe in Jessica's care.

On September 29, 2011, Humphrey received a third report regarding Jessica and Damien. This report revealed that Jessica and Adrian had been involved in a domestic violence incident. Humphrey met with Jessica about this report on September 30.

Jessica reported that she and Adrian had been drinking and then got into a disagreement. Adrian began calling her vulgar names and grabbed Jessica and bit her lip. Jessica required stitches on her lip as a result of the bite. When Adrian assaulted Jessica, she was holding Damien in her arms. Jessica admitted that this was not the first domestic violence incident that had occurred between her and Adrian.

Adrian was arrested and incarcerated after this incident, and Jessica was forced to move out of his home. At that time, Jessica was unemployed and unable to financially support herself. She indicated that she planned on moving in with a childhood friend. Jessica also indicated that she no longer wanted to be in a relationship with Adrian and that she planned on obtaining a protection order against him.

After the meeting with Jessica, Humphrey conducted an investigation into Jessica's new living arrangements. Humphrey discovered that Jessica's friend's home was not an appropriate place for Damien, because Jessica's friend was also currently involved with the Department and the juvenile court system.

Humphrey also attempted to make contact with Jerry, who had been released from jail on September 13, 2011. Jessica had indicated that she no longer had any contact with Jerry and did not know his current whereabouts. Humphrey was unable to locate Jerry to notify him of the situation with Damien.

On September 30, 2011, the State filed a petition with the juvenile court alleging that Damien was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), because Jessica had engaged in domestic violence with Adrian in the presence of Damien and because previous juvenile court proceedings involving Jessica's two older children were unsuccessful in that those proceedings had resulted in her parental rights to those children being terminated. The petition also alleged that Damien was a child within the meaning of Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2010), because Jessica had substantially and continuously or repeatedly neglected and refused to give Damien or Damien's siblings necessary parental care and protection. Finally, the petition alleged

that termination of Jessica's parental rights was in Damien's best interests.

On that same day, the juvenile court entered an ex parte order granting the Department temporary custody of Damien. The court's order indicated that placement of Damien was to exclude Jessica's and Jerry's homes. The court scheduled a detention hearing for October 12, 2011, to determine whether the custody order should remain in effect.

On October 6, 2011, prior to the scheduled detention hearing, the State filed a supplemental petition alleging that Damien was a child within the meaning of § 43-247(3)(a), because Jerry engaged in domestic violence with Jessica when she was pregnant with Damien and because previous juvenile court proceedings involving Jerry's two older children were unsuccessful in that those proceedings had resulted in his parental rights to those children being terminated. The supplemental petition also alleged that Damien was a child within the meaning of § 43-292(2), because Jerry had substantially and continuously or repeatedly neglected and refused to give Damien or Damien's siblings necessary parental care and protection. Finally, the petition alleged that termination of Jerry's parental rights was in Damien's best interests.

On October 12, 2011, a detention hearing was held. At the hearing, the State indicated that it was requesting that Damien remain in the Department's custody. Jessica and Jerry indicated that they wished to contest the State's request.

The State presented the testimony of Humphrey. Humphrey testified about her contacts with Jessica and Damien. She testified that after meeting with Jessica in September 2011, she determined that Damien would be at risk for harm if he was returned to Jessica's or Jerry's care. Humphrey indicated that Jessica has demonstrated an inability to be involved in a healthy relationship with a significant other and that her choice of relationships has placed Damien at risk for harm. In addition, Jessica is currently choosing to live in a home that she knows is not suitable for Damien and she does not have any source of income. Humphrey testified that Jerry has been incarcerated for the majority of Damien's life as a result of a domestic violence incident between Jessica and Jerry when Jessica was

pregnant with Damien. Jerry has not provided any information to establish that he has received any therapy or assistance in overcoming his problems with domestic violence. In addition, Humphrey had no information about Jerry's current residence or employment situation.

After Humphrey testified, Jessica called to testify a family permanency specialist who met with Jessica on a few occasions between May and September 2011. Additionally, she worked to set up visitation between Jessica and Damien after Damien was removed from Jessica's care. The family permanency specialist testified that she had been to Jessica's current residence and had determined that Jessica's supervised visits with Damien could take place at that location.

At the close of the evidence, the juvenile court entered an order finding that it would be in Damien's best interests to remain in the temporary custody of the Department. The court went on to find that it would be contrary to Damien's health, safety, or welfare to be returned to the home of Jessica or Jerry at this time.

Jessica appeals and Jerry cross-appeals from the juvenile court's order. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

## III. ASSIGNMENTS OF ERROR

On appeal, Jessica asserts that the juvenile court erred by failing to advise her of her statutory rights pursuant to § 43-279.01. In addition, she challenges the sufficiency of the evidence to support the juvenile court's order granting the Department continued custody of Damien.

On cross-appeal, Jerry also challenges the sufficiency of the evidence to support the juvenile court's order granting the Department continued custody of Damien.

## IV. ANALYSIS

### 1. Standard of Review

Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is

in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. See *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012).

[1] When an appellate court reviews questions of law, it resolves the questions independently of the lower court's conclusions. *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007).

### 2. Jessica's Appeal

#### (a) Advisement of Rights

On appeal, Jessica alleges that the juvenile court erred in failing to advise her of her statutory rights pursuant to § 43-279.01 prior to the start of the October 2011 detention hearing. We find that Jessica's assertion has no merit. Based upon our reading of the language in § 43-279.01 and the limited purpose of a detention hearing, we conclude that the juvenile court's failure to advise Jessica of her rights prior to the October 2011 hearing did not constitute an abuse of discretion. We further conclude that the rights provided in § 43-279.01 do not necessarily have to be read to a parent at an initial detention hearing, but instead must be read to a parent at some point in time prior to the parent's entry of a plea to the allegations contained in the petition, which typically occurs at an adjudication hearing.

Section 43-279.01 provides in pertinent part:

> (1) When the petition alleges the juvenile to be within the provisions of subdivision (3)(a) of section 43-247 . . . and the parent or custodian appears with or without counsel, the court shall inform the parties of the:
>
> (a) Nature of the proceedings and the possible consequences or dispositions pursuant to sections 43-284, 43-285, and 43-288 to 43-295;
>
> (b) Right to engage counsel of their choice at their own expense or to have counsel appointed if unable to afford to hire a lawyer;
>
> (c) Right to remain silent as to any matter of inquiry if the testimony sought to be elicited might tend to prove the parent or custodian guilty of any crime;

> (d) Right to confront and cross-examine witnesses;
>
> (e) Right to testify and to compel other witnesses to attend and testify;
>
> (f) Right to a speedy adjudication hearing; and
>
> (g) Right to appeal and have a transcript or record of the proceedings for such purpose.
>
> (2) After giving the parties the information prescribed in subsection (1) of this section, the court may accept an in-court admission, an answer of no contest, or a denial from any parent or custodian as to all or any part of the allegations in the petition. The court shall ascertain a factual basis for an admission or an answer of no contest.

[2] It is clear from the language of the statute that the juvenile court must advise a parent of the nature of the proceedings, the possible consequences of such proceedings, and the rights the parent is entitled to during the proceedings. See, *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 634 N.W.2d 290 (2001); *In re Interest of Billie B.*, 8 Neb. App. 791, 601 N.W.2d 799 (1999). However, the statute does not explicitly state exactly when such an advisement must be given.

Before we discuss when the information provided in § 43-279.01 must be provided to a parent, we note that at the October 2011 detention hearing, Jessica had counsel, exercised her right not to testify, cross-examined the State's witness, and called her own witness to testify. In addition, she filed an appeal from the court's detention order and, as a part of that appeal, requested and received a transcript and record of the proceedings held in the juvenile court. As such, the only pertinent information in § 43-279.01 that Jessica may not have been aware of was the "[n]ature of the proceedings and the possible consequences or dispositions pursuant to sections 43-284, 43-285, and 43-288 to 43-295." Essentially, Jessica may not have been aware of the possible consequences or dispositions after adjudication, including the possibility of termination of her parental rights.

In her argument on appeal, Jessica asserts that the juvenile court was required to provide her with an advisement of all of the information contained in § 43-279.01, including the

possible consequences after adjudication, when she appeared in court for the October 2011 detention hearing. In making this assertion, Jessica does not point to any specific language in the statute. Rather, she appears to assume that the advisement must be given during a parent's first appearance before the juvenile court. There is nothing to support Jessica's reading of the language contained in § 43-279.01.

In fact, our reading of the statute supports a different conclusion. The statute appears to indicate that the advisement does not necessarily have to be given at a parent's first appearance, but instead must be given at some point in time prior to a parent's entering a plea to the allegations in the petition. Specifically, we point to the language contained in § 43-279.01(2), which states that after the court informs a parent of the information in § 43-279.01(1), it may proceed to accept the parent's plea to the allegations in the petition. A plea to the allegations in the petition is typically provided at an adjudication hearing. As such, the language in § 43-279.01(2) suggests that a court need only advise a parent of the statutory rights prior to the adjudication hearing.

We previously discussed our understanding of § 43-279.01 in *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 634 N.W.2d 290 (2001). There, this court concluded that the language contained in § 43-279.01(2) "means that a juvenile court should accept a parent's in-court admission only after informing the parties as to the nature of the proceedings and the possible consequences or dispositions, including termination of parental rights." 10 Neb. App. at 583, 634 N.W.2d at 297. We went on to explain that a juvenile court's failure to inform a parent of the information contained in § 43-279.01 prior to an admission to the allegations in the petition would be "fatal to the adjudication." 10 Neb. App. at 584, 634 N.W.2d at 297.

Furthermore, the Nebraska Supreme Court has also previously discussed when a juvenile court must advise a parent of the information contained in § 43-279.01. In *In re Interest of N.M. and J.M.*, 240 Neb. 690, 696, 484 N.W.2d 77, 81 (1992), the court indicated:

> It is clear . . . that adequate notice of the possibility of the termination of parental rights must be given

> in adjudication hearings before the juvenile court may accept an in-court admission, an answer of no contest, or a denial from a parent as to all or any part of the allegations of the petition before the juvenile court.

This discussion appears to imply that the crucial point in time for the advisement of statutory rights is at the adjudication hearing and not at the initial detention hearing. We find further support for this implication when we examine the purpose of a detention hearing as compared to later hearings held during juvenile court proceedings.

[3] A detention hearing serves a very limited purpose. At a detention hearing, the only matter to be considered is whether a child should continue to be detained in the Department's custody pending further juvenile court proceedings. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). A detention hearing occurs prior to the juvenile court's taking jurisdiction over a juvenile and prior to a parent's coming within the direct purview of the juvenile court. In addition, the decisions made at a detention hearing are only temporary in nature as the detention order will be revisited at the adjudication hearing. See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998). Because of the limited purpose of a detention hearing, a parent's rights and interests are different than at later juvenile court proceedings. See *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991).

[4] Based upon our reading of § 43-279.01 and the limited purpose of a detention hearing, we conclude that the juvenile court need not necessarily advise a parent of the information contained in § 43-279.01 and, in particular, of the possible consequences after adjudication, during a parent's initial appearance in juvenile court, or during an initial detention hearing. Instead, a juvenile court must provide such advisement prior to or at an adjudication hearing where a parent enters a plea to the allegations in the petition. We do note that while an earlier advisement of those rights may not be necessary, it is a matter of good practice to advise a parent of the information contained in § 43-279.01 at the earliest possible time. Here,

we find that the juvenile court did not abuse its discretion in failing to advise Jessica of all of the information contained in § 43-279.01 at the October 2011 detention hearing. The juvenile court can still advise her of that information in a timely fashion prior to or at the adjudication hearing.

(b) Custody and Placement of Damien

Jessica also alleges that the juvenile court erred in finding sufficient evidence to warrant the Department's continued custody of Damien. Upon our de novo review of the record, we find that the juvenile court did not abuse its discretion in ordering that the Department retain custody of Damien pending further juvenile court proceedings.

[5,6] Neb. Rev. Stat. § 43-254 (Cum. Supp. 2010) sets forth the requirements for continuing to withhold a juvenile from his or her parent pending adjudication, and it provides, in part, as follows:

> If a juvenile has been removed from his or her parent [without a warrant as a result of concerns for the juvenile's safety], the court may enter an order continuing detention or placement upon a written determination that continuation of the juvenile in his or her home would be contrary to the health, safety, or welfare of such juvenile and that reasonable efforts were made to preserve and reunify the family if required under subsections (1) through (4) of section 43-283.01.

Continued detention pending adjudication is not permitted under the Nebraska Juvenile Code unless the State can establish by a preponderance of the evidence at an adversarial hearing that such detention is necessary for the welfare of the juvenile. *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998). A detention hearing is a parent's opportunity to be heard on the need for removal and the satisfaction of the State's obligations. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

A review of the record from the October 2011 detention hearing reveals that the State presented sufficient evidence to demonstrate that continued placement of Damien in Jessica's home would be contrary to his health, safety, or welfare. In

addition, there was evidence that reasonable efforts to preserve and reunify the family were not required pursuant to Neb. Rev. Stat. § 43-283.01 (Cum. Supp. 2010).

The evidence presented at the detention hearing revealed that a few months prior to Damien's birth, Jessica's parental rights to her two older children were involuntarily terminated, because she was unable to overcome her struggles with mental health issues and a drug problem and because she continued to be involved in an abusive, volatile relationship with Jerry. After Damien's birth, Jessica continued to struggle with her mental health issues. She did not take her medication on a consistent basis, even though she knew that such inconsistency affected her moods and her ability to care for Damien. In addition, Jessica became involved in another abusive relationship. This relationship resulted in Jessica's becoming injured while she was holding Damien, and as Jessica admitted, this was not the first instance of abuse in the course of that relationship.

Jessica lost her housing, was unemployed, and was unable to support herself and Damien. She chose to move into a home with a friend who she knew was also involved with the juvenile court system and who was not approved of by the Department. As a result, she is unable to provide safe and stable housing for Damien. Taken together, this evidence is sufficient to establish that the continued detention of Damien is necessary for his health, safety, and welfare.

The evidence also revealed that reasonable efforts to preserve and reunify the family were not required. Section 43-283.01(4) provides, in part, "Reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that . . . [t]he parental rights of the parent to a sibling of the juvenile have been terminated involuntarily." The uncontradicted evidence presented at the detention hearing demonstrated that Jessica's parental rights to her two older children, Damien's two older siblings, were terminated in December 2010. As such, it is clear that reasonable efforts were not required in this instance. However, we note that the evidence demonstrated that although it was not required, the Department did provide Jessica with reasonable

efforts to preserve her family. A Department worker repeatedly met with Jessica after Damien's birth to check on her progress and to assist her in maintaining a stable and safe lifestyle. The Department also provided to Jessica the opportunity to participate in an intensive family support program.

Upon our de novo review of the record, we conclude that the juvenile court did not abuse its discretion in ordering that the Department retain custody of Damien pending further juvenile court proceedings. The evidence revealed that the continued detention of Damien is necessary for his health, safety, and welfare and that reasonable efforts to preserve and reunify the family were not required. Accordingly, we affirm the order of the juvenile court.

### 3. Jerry's Cross-Appeal

In Jerry's cross-appeal, he also alleges that the juvenile court erred in finding sufficient evidence to warrant the Department's continued custody of Damien. Jerry's assertion has no merit. Upon our de novo review of the record, we find that the State presented sufficient evidence to warrant the Department's continued custody of Damien.

As we discussed more thoroughly above, in order to continue the Department's custody of Damien, the juvenile court had to find that the continued detention of Damien in Jerry's home would be contrary to his health, safety, or welfare and that reasonable efforts were made to preserve and reunify the family if required under subsections (1) through (4) of § 43-283.01. A review of the record from the October 2011 detention hearing reveals that the State presented sufficient evidence to warrant the Department's continued custody of Damien.

In December 2010, Jerry's parental rights to his two older children were involuntarily terminated. Shortly after that time, Jerry was arrested and jailed after being involved in a domestic violence incident with Jessica. Jerry remained in jail at the time of Damien's birth in May 2011 and through September. When Jerry was released from jail, he did not have any contact with Damien, and the Department was unable to locate Jerry to notify him of Damien's removal from Jessica's care despite its best efforts. As such, at the time of the detention hearing,

Jerry had not had any contact with Damien since his birth. Additionally, there is no indication that Jerry had sought treatment for his domestic violence issues or that he had corrected any of the issues that had resulted in the termination of his parental rights to his older children. There was also no indication that Jerry was employed and able to provide for Damien or that he had safe and stable housing that was appropriate for Damien. Taken together, this evidence is sufficient to establish that the continued detention of Damien is necessary for his health, safety, and welfare.

The evidence also revealed that reasonable efforts to preserve and reunify the family were not required pursuant to § 43-283.01(4). As in Jessica's case, the uncontradicted evidence presented at the detention hearing demonstrated that Jerry's parental rights to his two older children, Damien's two older siblings, were terminated in December 2010. As such, it is clear that reasonable efforts were not required in this instance.

Upon our de novo review of the record, we conclude that the juvenile court did not abuse its discretion in ordering that the Department retain custody of Damien pending further juvenile court proceedings. The evidence revealed that the continued detention of Damien is necessary for his health, safety, and welfare and that reasonable efforts to preserve and reunify the family were not required. Accordingly, we affirm the order of the juvenile court.

## V. CONCLUSION

Upon our de novo review of the record, we affirm the order of the juvenile court which granted the Department continued custody of Jessica and Jerry's son, Damien, and provided that placement of Damien was to be outside of Jessica's and Jerry's homes.

AFFIRMED.

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