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REPORTS OF CASES

DECIDED BETWEEN

JUNE 22, 2012 and JANUARY 10, 2013

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCLXXXIV

PEGGY POLACEK

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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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DURING THE PERIOD OF THESE REPORTS

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JOHN F. WRIGHT, Associate Justice
WILLIAM M. CONNOLLY, Associate Justice
KENNETH C. STEPHAN, Associate Justice
MICHAEL M. MCCORMACK, Associate Justice
LINDSEY MILLER-LERMAN, Associate Justice
WILLIAM B. CASSEL, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

EVERETT O. INBODY, Chief Judge
JOHN F. IRWIN, Associate Judge
RICHARD D. SIEVERS, Associate Judge
FRANKIE J. MOORE, Associate Judge
MICHAEL W. PIRTLE, Associate Judge
FRANCIE C. RIEDMANN, Associate Judge[1]

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

[1]As of August 9, 2012

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Robert R. Steinke	Columbus
		Alan G. Gless	Seward
		Michael J. Owens	Aurora
		Mary C. Gilbride	Wahoo
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	John E. Samson	Blair
		Geoffrey C. Hall	Fremont
		Paul J. Vaughan	Dakota City
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Robert B. Ensz	Wayne
		James G. Kube	Madison
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	Mark D. Kozisek	Ainsworth
		Karin L. Noakes	St. Paul
Ninth	Buffalo and Hall	John P. Icenogle	Kearney
		James D. Livingston	Grand Island
		Teresa K. Luther	Grand Island
		William T. Wright	Kearney
Tenth	Adams, Franklin, Harlan, Kearney, Phelps, and Webster	Stephen R. Illingworth	Hastings
		Terri S. Harder	Minden
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Donald E. Rowlands	North Platte
		James E. Doyle IV	Lexington
		David Urbom	McCook
		Richard A. Birch	North Platte
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Randall L. Lippstreu	Gering
		Leo Dobrovolny	Gering
		Derek C. Weimer	Sidney
		Travis P. O'Gorman	Alliance

JUDICIAL DISTRICTS AND COUNTY JUDGES

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

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

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

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

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
Ronald L. Brown	Lincoln
J. Michael Fitzgerald	Lincoln
Michael K. High	Lincoln
John R. Hoffert	Lincoln
Thomas E. Stine	Omaha
Daniel R. Fridrich	Omaha

ATTORNEYS
Admitted Since the Publication of Volume 283

FAISAL KAMEL ABOU-NASR
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ROBERT WILLIAM ALEXANDER
RYAN LEE ALFORD
BREANNA D. ANDERSON
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HEIDI THEODORA DEHAAN BAUER
JESSICA J. BAUER
CHRISTINE ELIZABETH BAUGHMAN
JOHN DAVID BEASLEY
TIFFANY NICOLE BEATY
TYSON BLAINE BENSON
SHEILA ANNE BENTZEN
CARRIE ELIZABETH BERGEN
JOSHUA PHILLIP BERNS
JESSICA JEAN BEUKELMAN
TROY JUSTIN BIRD
LINDSEY LEANN BITZES
ZACHARY LEE BLACKMAN
SUSAN ENDERLE BOKERMANN
RANDALL HAROLD BORKUS
MAUREEN AMBROSE BRACKETT
CHAD DOUGLAS BRAKHAHN
JONATHAN MICHAEL BROWN
SANDRA LEE BROWN
KEITH MICHAEL BUZZARD
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JAMESON DANIEL CANTWELL
CHARLES EDWIN CHAMBERLIN
ZACHARY A. CHAPMAN
JORDAN BARRETT CHESTER
AMANDA M. CIVIC
BENJAMIN WILLIAM CIVIC
ALEXANDER MICHAEL SIMON CLARK
BRANDEN BLAKE COLLINGSWORTH
KATHERINE JEAN COLLINS
SAMUEL JOHN COOPER
BRANDON JOHN CRAINER
KRISTINA LYNN DAY
ASHLEY ANN DREYER
NATALIE JANE DUDEN
JONATHAN ALLEN EDIN
LACEY LEE EGBERT
JOSEPH COLIN EHRICH
JEREMIAH DEAN ELLIOTT
MORGAN ROBERT FARQUHAR
NEELY L. FEDDE
ASHLEY DIANNE FINNEGAN
JESSICA MARIE FORCH
CHRISTOPHER JEFFREY GAMM
CHARLES BAUDAIS GARMAN
ZACHARY WALTER GAVER
SCOTT LAWRENCE GESELL
AMY MARIE GOLTZ
LAURA ELIZABETH GONNERMAN
SARAH JOY GRAHAM
JOHN THOR HAARALA
BRITANIE ANNE HALL
YAIRA NAGY HEARN
TOSHA RAE DEE HEAVICAN
LESLIE RHAE HENDRIX

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PAUL ALBERT HILGERS
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ADAM ARTHUR HOESING
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KELLY LYNN HRITZ
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LOUVONTREE HUNTER
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JASON STEWART JACKSON
AUDREY ANN JOHNSON
STEVE KENNETH JOHNSON
BLAKE CHRISTOPHER JONES
CESAR AUGUSTO JUAREZ
APRIL INDIA KIRKENDALL
ALEXANDRA CATHERINE KISSEL
CHRISTINA MARIE KNOWLES
ERIC WAYNE KNUTSON
KATHRYN A. KOTLIK
WILLIAM ANTHONY KVAS
CHRISTOPHER MICHAEL LACKERT
JACOB C. LANGEVELD
ESTHER HAE-SOO LEE
AUSTIN ALLEN LEIGHTY
PETER LEO
TAYLOR MEGHAN LEWIS
KEVIN ERIC LOCKHART
DAVID ANDREW LOPEZ
SCOTT LLOYD LUNA
GARRETT ANTHONY LUTOVSKY
PATRICK JAMES MACK
TIMOTHY JAMES MALM
ANDREA LAURA MCCHESNEY
MICHAEL GEORGE MCHALE
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MAUREEN JANE MEYER
ADAM SCOTT MORFELD
CHRISTINE ANN MORI
RYAN J. MULDOON
BENJAMIN HARRY MURRAY
NATHANIEL JAY MUSTION
ERIC ALAN NANFITO
IAN ANDREW NEESEN
DARCI LYNN NEUGEBAUER
WILLIAM JAMES NIX III
MATTHEW SCOTT NOREN
TIMOTHY R. O'BRIEN
LISA ANN PALADINO
JOHN RUSSELL PALMTAG
JUSTIN K. PASKETT
SCOTT DAVID PAULEY
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ANN KATHLEEN POST
DARYA V. PULCIANI
ANDREW SAMPSON RAISH
SEVERIN ELIZABETH RANDALL
KATHERINE ELAINE REED
LISA DAWN RITTENHOUSE
MOIRA CATHERINE RITTERBUSH
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FRANCIS JOSEPH SANTO
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ABBIE MICHELE SCHURMAN
HEATHER LYNN SCHUTZ
ROBERT BRANDON SEYBERT
EMILY ANN SHANKS
ANDREA MARIE SMITH
CHARISSA JEAN STEFFENSMEIER
MICHAEL LEE STOREY
HANNAH CAROLYN SUGHROUE

JONATHAN SUN
WILLIAM JOHN CHEUN WAI SUN
JUSTIN LANDIS SWANSON
ERIN ELIZABETH SWETNAM
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ANGELA MARIE TERRY
TRAVIS WILLIAM TETTENBORN
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DAVID MARK THOMPSON
KIRK B. THOMPSON
SCOTT MILLER THORSON
PHILIP H. TINKER
KHANH NGOCLUU TRAN
SARA ALLISON VANBRANDWIJK
JEREMY ROBERT WELLS
CHARLES EDWARD WILBRAND
ALLAN MARTIN WILLIAMS
CHRISTIAN TANNER WILLIAMS
KELLEY MARIE WILSON
SHAWN MICHAEL WOODMAN
TIMOTHY SCOTT ZWEIBACK

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No. S-09-1160: **State v. Henk**. Reversed and remanded with directions. Heavican, C.J. Gerrard, J., not participating in the decision.

No. S-11-674: **Huebert v. Walnut Acres**. Affirmed. Wright, J. Cassel, J., not participating.

No. S-11-675: **Huebert v. Pelster**. Affirmed. Wright, J. Cassel, J., not participating.

No. S-11-1054: **Cain v. Cain**. Appeal dismissed. Heavican, C.J. Stephan, J., participating on briefs. Cassel, J., not participating.

No. S-11-1112: **State v. Robinson**. Reversed and remanded for further proceedings. Heavican, C.J.

No. S-12-263: **State v. Ildefonso**. Affirmed. Connolly, J.

No. S-12-486: **State v. Purdie**. Petition for further review dismissed as having been improvidently granted. Per Curiam. Cassel, J., not participating.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-07-1041: **State ex rel. Counsel for Dis. v. Downey**. Probation plan approved; application for reinstatement granted. Shaun F. Downey reinstated to the practice of law in the State of Nebraska.

No. S-11-528: **State v. Gaskill**. Motion of appellant for rehearing considered and sustained. See § 2-111(B)(1).

No. S-11-541: **Bacon v. Kiewit Constr. Co**. Affirmed in part, and in part dismissed.

No. S-11-762: **Holliday v. Plainview Area Health Sys**. Stipulation allowed; appeal dismissed.

No. S-11-857: **State v. Marrs**. Motion of appellee for summary dismissal sustained. See § 2-107(B)(1).

No. S-11-1114: **Performance Plus Liquids v. Abengoa Bioenergy of Neb**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. S-12-011: **Haas v. Neth**. Stipulation allowed; appeal dismissed.

No. S-12-123: **State v. Young**. Remanded with direction.

No. S-12-211: **State v. Bronson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-12-212: **State v. Hall**. Motion of appellee for summary affirmance sustained. See, *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010); *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009); *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009).

Nos. S-12-216, S-12-331: **State v. Nesbitt**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. S-12-222: **Hall v. Houston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-12-380: **Mills v. Burlington Northern Santa Fe Ry. Co**. 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).

Nos. S-12-394, S-12-552: **State v. Leonor**. Appeals 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. S-12-557: **State v. Mason**. Motion of appellee for summary affirmance sustained; judgment affirmed. See Neb. Rev. Stat. § 29-2103(4) (Reissue 2008).

No. S-12-582: **State v. Parminter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-12-583: **State v. Parminter**. By order of the court, appeal dismissed for failure to file briefs.

No. S-12-631: **Waite v. Regional West Med. Ctr**. Motion of appellee for summary dismissal sustained.

No. S-12-660: **State v. Collins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-12-681: **State v. Cook**. 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. S-12-720: **State ex rel. Counsel for Dis. v. Fuller**. Judgment of public reprimand. Court approves and imposes reciprocal discipline.

No. S-12-835: **State v. Franke**. By order of the court, appeal dismissed for failure to file briefs.

No. S-12-892: **State v. Purdie**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-12-897: **State v. Lewis**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 25-2301.01 (Reissue 2008); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

No. S-12-916: **State v. Griswold**. Stipulation allowed; appeal dismissed.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-10-376: **In re Interest of Kyjsha T. et al**. Petition of appellant for further review denied on July 11, 2012.

No. A-10-376: **In re Interest of Kyjsha T. et al**. Petition of appellee Lakisha T. for further review denied on July 11, 2012.

No. A-10-954: **Woodle v. Curlis**. Petition of appellant for further review denied on August 30, 2012.

No. A-10-1063: **Adams v. Logan Contractors Supply**. Petition of appellant for further review denied on June 27, 2012.

No. A-10-1212: **State v. Davis**. Petition of appellant for further review dismissed on July 11, 2012, as filed out of time. See § 2-102(F)(1).

No. A-10-1238: **Dowd Grain Co. v. County of Sarpy**, 19 Neb. App. 550 (2012). Petition of appellant for further review denied on August 30, 2012.

No. A-11-069: **In re Trust of O'Donnell**, 19 Neb. App. 696 (2012). Petition of appellant for further review denied on June 27, 2012.

No. S-11-083: **Sutton v. Killham**, 19 Neb. App. 842 (2012). Petition of appellant for further review sustained on July 11, 2012.

No. A-11-146: **State v. Kruger**. Petition of appellant for further review denied on July 11, 2012.

No. A-11-284: **State v. Johnson**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-360: **Horne v. Krejci**. Petition of appellant for further review denied on October 4, 2012.

No. S-11-407: **State v. Mitchell**, 19 Neb. App. 801 (2012). Petition of appellant for further review sustained on August 31, 2012.

No. S-11-415: **State v. Pittman**, 20 Neb. App. 36 (2012). Petition of appellant for further review denied on October 31, 2012.

No. S-11-415: **State v. Pittman**, 20 Neb. App. 36 (2012). Petition of appellee for further review sustained on October 31, 2012.

No. A-11-420: **Nordhues v. Maulsby**, 19 Neb. App. 620 (2012). Petition of appellant for further review denied on June 27, 2012, as untimely filed.

No. S-11-424: **State v. Burbach**, 20 Neb. App. 157 (2012). Petition of appellant for further review sustained on October 17, 2012.

No. A-11-462: **Mann v. Rich**. Petition of appellee for further review denied on August 30, 2012.

No. A-11-544: **Penry v. Neth**, 20 Neb. App. 276 (2012). Petition of appellee for further review denied on December 14, 2012, as untimely filed.

No. A-11-570: **State v. Huggins**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-590: **Keiser v. Hohenthaner**. Petitions of appellant for further review denied on August 30, 2012.

No. A-11-598: **Bel Fury Invest. Group v. Palisades Collection**, 19 Neb. App. 883 (2012). Petition of appellant for further review denied on August 30, 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.

No. A-11-610: **Parks v. Marsden Bldg Maintenance**, 19 Neb. App. 762 (2012). Petition of appellant for further review denied on August 30, 2012.

No. S-11-629: **State v. Kitt**. Petition of appellant for further review sustained on June 20, 2012.

No. A-11-630: **Atiqullah v. El-Touny**. Petition of appellant for further review denied on August 17, 2012, as untimely.

No. A-11-655: **Nelson v. Wardyn**, 19 Neb. App. 864 (2012). Petition of appellee for further review denied on July 11, 2012.

No. A-11-661: **Backen v. Backen**. Petition of appellee for further review denied on July 11, 2012.

No. S-11-668: **Jones v. Jones**. Petition of appellant for further review sustained on August 31, 2012, for purpose of discussing propriety of dismissal for lack of prosecution.

No. A-11-683: **Meints v. City of Beatrice**, 20 Neb. App. 129 (2012). Petition of appellant for further review denied on November 14, 2012.

No. A-11-701: **Professional Collection Serv. v. Stuthman**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-702: **State v. Godfrey**. Petition of appellant for further review denied on December 12, 2012.

No. A-11-717: **State v. Ramirez**. Petition of appellant for further review denied on August 30, 2012.

No. S-11-718: **State v. Bromm**, 20 Neb. App. 76 (2012). Petition of appellee for further review sustained on September 26, 2012.

No. A-11-722: **Morehead v. Morehead**. Petition of appellant for further review denied on June 20, 2012.

No. A-11-737: **State v. Hashman**, 20 Neb. App. 1 (2012). Petition of appellant for further review denied on September 13, 2012.

No. S-11-744: **Simon v. Drake**. Petition of appellant for further review sustained on November 14, 2012.

No. A-11-747: **Friedman v. Friedman**, 20 Neb. App. 135 (2012). Petition of appellant for further review denied on October 1, 2012, as untimely filed.

No. A-11-767: **State v. Schuster**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-774: **State v. Riedel**. Petition of appellant for further review denied on September 19, 2012.

No. A-11-775: **State v. Halligan**, 20 Neb. App. 87 (2012). Petition of appellant for further review denied on September 24, 2012, as untimely filed.

No. A-11-803: **Onuachi v. Meylan Enterprises**. Petition of appellee for further review denied on June 27, 2012.

No. A-11-848: **State v. Wiedel**. Petition of appellant for further review denied on July 11, 2012.

No. A-11-851: **In re Interest of Jontaia W**. Petition of appellant for further review denied on July 11, 2012.

No. A-11-852: **State v. Jones**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-856: **Tyler v. O'Reilly Auto. Stores**. Petition of appellant for further review denied on June 27, 2012.

No. A-11-866: **State v. Balvin**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-868: **In re Guardianship of Oltmer**. Petition of appellant for further review denied on September 26, 2012.

No. A-11-884: **In re Interest of Elijah D**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-886: **Haltom v. Haltom**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-890: **State v. Muhammad**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-898: **Dahlquist v. Dahlquist**. Petition of appellee for further review denied on August 30, 2012.

No. A-11-899: **Soderquist v. Soderquist**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-917: **State v. Brown**. Petition of appellant for further review denied on June 27, 2012.

No. S-11-921: **State v. Richardson**. Petition of appellant for further review sustained on November 21, 2012.

No. S-11-940: **State v. Landera**, 20 Neb. App. 24 (2012). Petition of appellee for further review sustained on September 26, 2012.

No. A-11-944: **State v. Davis**. Petition of appellant for further review denied on July 16, 2012, as filed out of time. See § 2-102(F)(1).

No. A-11-951: **State v. Moser**, 20 Neb. App. 209 (2012). Petition of appellee for further review denied on December 19, 2012.

No. S-11-953: **In re Interest of Shaquille H.**, 20 Neb. App. 141 (2012). Petition of appellant for further review sustained on October 31, 2012.

No. A-11-958: **State v. Worley**. Petition of appellant for further review denied on December 12, 2012.

No. A-11-975: **State v. Gonzalez**. Petition of appellant for further review denied on June 27, 2012.

No. A-11-987: **In re Interest of Nyarout T. et al**. Petition of appellant for further review denied on November 28, 2012.

No. A-11-1002: **Henry v. West American Ins. Co**. Petition of appellant for further review denied on December 19, 2012.

No. A-11-1044: **State v. Henderson**. Petition of appellant for further review denied on June 27, 2012.

No. A-11-1055: **Dennis v. Dennis**. Petition of appellant for further review denied on October 17, 2012.

No. A-11-1067: **State v. Murillo**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-1068: **In re Interest of Marco J**. Petition of appellant for further review denied on November 14, 2012.

No. A-11-1068: **In re Interest of Marco J**. Petition of appellee for further review denied on November 14, 2012.

No. A-11-1087: **In re Interest of Lilybelle H. et al**. Petition of appellant for further review denied on October 31, 2012.

No. A-12-027: **State v. Cruz**. Petition of appellant for further review denied on July 11, 2012.

No. A-12-037: **Sea-Hubbert Farms v. Boston**. Petition of appellant for further review denied on June 27, 2012.

No. A-12-042: **State v. Hackett**. Petition of appellant for further review denied on December 12, 2012.

No. A-12-045: **JHK, Inc. v. Heineman**. Petition of appellant for further review denied on September 13, 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-12-053: **In re Interest of Robert R. & Kimberly R**. Petition of appellant for further review denied on October 31, 2012.

No. A-12-053: **In re Interest of Robert R. & Kimberly R**. Petition of appellee for further review denied on October 31, 2012.

No. A-12-058: **State v. Murillo**. Petition of appellant for further review denied on October 4, 2012.

No. A-12-067: **State v. Florea**, 20 Neb. App. 185 (2012). Petition of appellee for further review denied on November 14, 2012.

No. A-12-070: **Soleiman Brothers v. Concord Neighborhood Corp**. Petition of appellee for further review denied on November 21, 2012.

No. A-12-073: **State v. Gonzalez**. Petition of appellant for further review denied on November 28, 2012.

No. A-12-124: **Carper v. Carper**. Petition of appellant for further review denied on August 30, 2012.

No. A-12-146: **State v. Groat**. Petition of appellant for further review denied on October 17, 2012.

Nos. A-12-149, A-12-152 through A-12-154: **State v. Joynes**. Petitions of appellant for further review denied on August 30, 2012.

No. A-12-157: **Jones v. Jones**. Petition of appellant for further review denied on October 17, 2012.

No. A-12-164: **Chae v. Houston**. Petition of appellant for further review denied on December 12, 2012.

No. A-12-205: **State v. Smothers**. Petition of appellant for further review denied on July 11, 2012.

No. A-12-221: **State v. Chol**. Petition of appellant for further review denied on December 12, 2012.

No. A-12-232: **State v. Stephens**. Petition of appellant for further review denied on November 21, 2012.

No. S-12-266: **Petersen v. City of Blair on behalf of Airport Auth**. Petition of appellant for further review sustained on August 31, 2012.

No. A-12-270: **State v. Viltres**. Petition of appellant for further review denied on September 19, 2012.

No. A-12-289: **Hernandez v. Wess**. Petition of appellant for further review denied on November 21, 2012.

No. A-12-292: **State v. Harden**. Petition of appellant for further review denied on September 13, 2012.

No. A-12-412: **Raven v. Raven**. Petition of appellant for further review denied on August 30, 2012.

No. A-12-418: **Pittman v. Rivera**. Petition of appellant for further review denied on August 30, 2012.

No. A-12-430: **State v. Kremer**. Petition of appellant for further review denied on December 19, 2012.

No. A-12-437: **Fisher v. Fisher**. Petition of appellant for further review denied on September 13, 2012.

No. A-12-458: **State v. Means**. Petition of appellant for further review denied on December 19, 2012.

No. A-12-460: **State v. Holloway**. Petition of appellant for further review denied on November 14, 2012.

No. A-12-471: **NRS Properties v. Resilent, LLC**. Petition of appellant for further review denied on December 12, 2012.

No. S-12-486: **State v. Purdie**. Petition of appellant for further review sustained on August 31, 2012.

No. A-12-537: **Cornish v. Neth**. Petition of appellant for further review denied on December 12, 2012.

No. A-12-570: **State v. Eagleboy**. Petition of appellant for further review denied on October 16, 2012, as untimely. See § 2-102(F)(1).

No. A-12-654: **State v. Marchan**. Petition of appellant for further review denied on December 12, 2012.

No. A-12-664: **Hansen v. Nebraska Parole Board**. Petition of appellant for further review denied on November 14, 2012.

No. A-12-689: **In re Guardianship of Oliver M**. Petition of appellant for further review denied on December 12, 2012.

No. A-12-709: **Mihm v. Mihm**. Petition of appellant for further review denied on December 19, 2012.

No. A-12-712: **State v. Hernandez**. Petition of appellant for further review denied on October 31, 2012.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

D & S REALTY, INC., APPELLEE, V.
MARKEL INSURANCE COMPANY,
A CORPORATION, APPELLANT.
816 N.W.2d 1

Filed June 22, 2012. Nos. S-11-664, S-11-764.

1. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Contracts.** Performance of a duty subject to a condition cannot become due unless the condition occurs or its nonoccurrence is excused.
3. ____. A condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition.
4. **Property: Valuation: Words and Phrases.** Actual cash value is the value of the property in its depreciated condition.
5. **Insurance: Real Estate: Words and Phrases.** Replacement cost insurance is optional additional coverage that may be purchased to insure against the hazard that the improvements will cost more than the actual cash value and that the insured cannot afford to pay the difference.
6. **Insurance.** A repair/replace condition to replacement cost coverage is neither ambiguous nor unconscionable.
7. **Contracts.** The doctrine of prevention states that where a promisor prevents, hinders, or renders impossible the occurrence of a condition precedent to his or her promise to perform, the promisor is not relieved of the obligation to perform and may not invoke the other party's nonperformance as a defense when sued upon the contract.
8. **Breach of Contract.** Pursuant to the doctrine of prevention, where the impeding act is the denial of liability in breach of the insurer's obligations under a policy with the insured, the breach may excuse the insured's performance of a repair/replace condition even if made because of a "good faith" misunderstanding of the rights and liabilities of the parties.
9. **Contracts.** The law does not require the doing of a useless act.
10. **Judgments: Contracts.** Whether interference by one party to a contract amounts to prevention so as to excuse performance by the other party is a question of fact to be decided under all of the proven facts and circumstances.

11. **Contracts.** The doctrine of prevention does not require proof that the condition would have occurred "but for" the wrongful conduct of the promisor, but requires only that the promisor's conduct contributed materially to the nonoccurrence of the condition.
12. **Insurance.** The respective interests of parties acting in good faith can, in most cases, be adequately protected by excusing the performance of the repair/replace condition only for such time as it appears the insurer will not honor its obligations under the policy.
13. **Insurance: Liability.** If the delay in determining the insurer's liability materially contributed to a situation where the insured can no longer perform the condition after the coverage dispute is resolved, then the condition will be absolutely excused.
14. **Judgments: Testimony: Attorneys at Law.** It is unreasonable to expect counsel to attempt to present testimony in anticipation that a judge's favorable rulings will be reversed.

Appeals from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded for a new trial.

Richard J. Gilloon and Heather B. Veik, of Erickson & Sederstrom, P.C., and Tory M. Bishop and Angela Probasco, of Kutak Rock, L.L.P., for appellant.

David A. Blagg, Charles F. Gotch, and James D. Garriott, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

I. NATURE OF CASE

This is an appeal after a retrial on remand in a breach of contract claim by the insured against the insurer. At issue in this appeal is the optional replacement cost coverage that the insured contracted. The question is whether the insurer's general denial of liability excused the insured from complying with a policy condition requiring that the insured actually repair or replace the damaged property before replacement costs will be paid.

II. BACKGROUND

D & S Realty, Inc. (D&S), owned a building known as the North Tower, in Omaha, Nebraska. D&S purchased the

property in 1999 for $1.75 million. At the time, it was approximately 40 years old. At some point prior to the loss in question, the building was appraised at $4 million. The first six floors of the building were for commercial use, and the top floors were residential. Markel Insurance Company (Markel) insured the North Tower through a standard indemnity policy with additional coverage for repair and replacement cost payments in the event of a covered loss.

1. Vacancy

D&S embarked on a plan to renovate the building, floor by floor, in small increments. In order to conduct the renovations, D&S began vacating the areas occupied by its tenants. By November 2002, less than 30 percent of the building was occupied. By January 2003, less than 5 percent of the building was occupied. D&S put on a new roof, started demolition of the second floor, and painted and replaced the carpet on most of the residential floors. Markel was aware of the vacancy and the renovations.

As part of the renovation project, in January 2003, D&S decided to drain all the waterlines, put antifreeze into the system so the pipes would not freeze, and shut down the boiler system. However, without D&S' knowledge, the maintenance engineer turned off the boiler on a Friday night and did not flush the lines or inject antifreeze.

The following day, a D&S employee discovered that pipes throughout the building had burst. Massive amounts of water flooded the building and froze into ice. According to witnesses on behalf of D&S, there was extensive damage on every floor of the building. D&S immediately attempted to mitigate the damage and remove debris. In March 2003, when the weather became warmer, the firelines thawed and burst, and again, significant amounts of water flooded the building. Passersby observed water gushing down three exterior sides of the North Tower like a waterfall.

2. Policy

D&S timely filed a claim with Markel for the losses incurred as a result of the water damage in January and March 2003. The policy with Markel explicitly included water damage.

However, the "Loss Conditions" section of the policy contained a "Vacancy" clause stating that Markel would not pay for water damage if the building had been vacant for more than 60 consecutive days before the loss or damage. The vacancy clause defined a building as "vacant" when 70 percent or more of its square footage was neither rented nor used to conduct customary operations. The clause further stated that "[b]uildings under construction or renovation are not considered vacant." "Construction" and "renovation" were not defined in the policy. A Nebraska endorsement to the policy provided that "[a] breach of warranty or condition will void the policy if such breach exists at the time of loss and contributes to the loss."

In the event of a covered loss under the policy, the standard "loss payment" clause of the policy stated that at Markel's option, it would either (1) pay the value of lost or damaged property, (2) pay the cost of repairing or replacing the lost or damaged property, (3) take all or any part of the property at an agreed or appraised value, or (4) repair, rebuild, or replace the property with other property of like kind and quality. The loss payment clause also stated that Markel would not "pay [the insured] more than [its] financial interest in the Covered Property." A "valuation" clause stated that Markel would determine the value of the loss or damage at actual cash value as of the time of loss or damage, subject to certain exceptions for specified items. The policy provided limited coverage for debris removal.

D&S had purchased optional additional coverage for "replacement cost." Under the terms of the policy, "Replacement Cost (without deduction for depreciation) replaces Actual Cash Value in the Loss Condition, Valuation, of [the policy's] Coverage Form." The replacement cost clause provided that the insured had the option of making a claim for loss or damage on an actual cash value basis instead of on a replacement cost basis. And it provided that

> [i]n the event [the insured] elect[s] to have loss or damage settled on an actual cash value basis, [the insured] may still make a claim for the additional coverage this Optional Coverage provides if [the insured] notif[ies

> Markel] of [its] intent to do so within 180 days after the loss or damage.

Further provisions of the replacement cost clause stated:

> **d.** [Markel] will not pay on a replacement cost basis for any loss or damage:
>
> **(1)** Until the lost or damaged property is actually repaired or replaced; and
>
> **(2)** Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.
>
> **e.** [Markel] will not pay more for loss or damage on a replacement cost basis than the least of **(1), (2)** or **(3)** . . . :
>
> **(1)** The Limit of Insurance applicable to the lost or damaged property;
>
> **(2)** The cost to replace, on the same premises, the lost or damaged property with other property:
>
> **(a)** Of comparable material and quality; and
>
> **(b)** Used for the same purpose; or
>
> **(3)** The amount [the insured] actually spend[s] that is necessary to repair or replace the lost or damaged property.

The policy limit of the insurance policy issued by Markel to D&S was $4.5 million, subject to a deductible of $50,000.

Markel generally denied coverage for the claimed water damage loss. Markel informed D&S that its investigation had revealed the North Tower was more than 70-percent vacant at the time of the loss. Markel told D&S that under the vacancy clause of the policy, Markel does not pay for water damage if the property is vacant. Because Markel generally denied liability under the vacancy clause of the contract, the parties did not discuss cash value versus replacement costs and neither specifically made any election between cash value and replacement cost. Believing Markel's denial of liability was wrongful, D&S brought a breach of contract action against Markel.

3. Lawsuit

In its complaint, D&S sought replacement cost damages. D&S acknowledged that it had not yet repaired or replaced the

damaged property. However, D&S pled that it was Markel's denial of coverage, in breach of its policy obligations, which caused D&S to be unable to repair or replace the property.

In its answer, Markel generally denied D&S' claims. In its affirmative defenses, Markel pled the vacancy clause, but did not plead as a defense D&S' failure to actually repair or replace as a condition to replacement cost coverage.

Thus far, D&S' complaint has resulted in two trials. The first trial occurred in 2008. The first trial principally concerned the parties' dispute over the vacancy clause of the policy. D&S attempted to show that the North Tower was not "vacant" because it was "under construction." Alternatively, D&S attempted to show that Markel had waived the vacancy clause or was estopped from asserting it because Markel was aware of the vacancy and continued to accept premiums with that knowledge. Finally, D&S asserted that Neb. Rev. Stat. § 44-358 (Reissue 2010) was applicable to the vacancy clause. Therefore, in the event D&S had breached the vacancy provision, such vacancy would not preclude recovery under the policy unless it contributed to the loss. D&S also relied on the Nebraska endorsement to the policy, which endorsement mirrored § 44-358.

At the close of D&S' case in the first trial, Markel moved for a directed verdict and raised for the first time the issue of D&S' nonperformance of the repair/replace condition to replacement cost coverage. Markel renewed the motion at the close of all the evidence. Markel also asked the court to find (1) the evidence was undisputed that the North Tower was more than 70-percent vacant for more than 60 days immediately prior to the loss, (2) the building was not under construction or renovation, and (3) Markel had not waived the loss conditions regarding vacancy.

The court found as a matter of law that the building was more than 70-percent vacant, but left the question of whether it was under construction or renovation for the jury. The court found, as a matter of law, that Markel had not waived the vacancy clause and was not estopped from relying on the vacancy clause. The court determined that § 44-358 and the Nebraska endorsement did not apply to the vacancy clause.

But the district court overruled Markel's motion for a directed verdict as to replacement cost damages. The court explained that Markel had failed to raise the issue of the repair/replace condition "in anything up until [its] motion for a directed verdict" and that it was "not going to allow [Markel] to go on with that argument under the policy."

Consistent with its rulings on the motion for a directed verdict, during the instructional conference at the first trial, the court refused D&S' request to instruct the jury on § 44-358. It also refused D&S' request to allow an instruction on waiver or estoppel based on the fact that Markel had accepted premiums after learning the building was vacant.

Consistent with its denial of Markel's motion for a directed verdict, the court denied Markel's request for an instruction that D&S could recover replacement costs for only those items D&S had actually replaced prior to trial. At the instructional conference, D&S argued that pursuant to *Bailey v. Farmers Union Co-op Ins. Co.*,[1] its performance of the repair/replace condition to replacement cost coverage was excused. In *Bailey*, the Nebraska Court of Appeals stated that the condition to actually repair or replace was excused because the insurer's denial of the claim prevented the insured's performance of the condition.[2] D&S argued that Markel's wrongful denial of any liability for the water damage loss likewise prevented its performance of the repairs or replacement of the damaged property. D&S suggested it would be unreasonable to expect an insured to repair or replace when the insurer has told the insured it will not pay regardless. The district court agreed: "I have an issue with making [D&S] go spend millions of dollars . . . and then seek recovery . . . ." The court also noted that Markel had failed to raise the replacement cost condition until its motion for a directed verdict.

The instruction given on damages stated in part:

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[1] *Bailey v. Farmers Union Co-op Ins. Co.*, 1 Neb. App. 408, 498 N.W.2d 591 (1992).

[2] *Id.*

> If you find in favor of [D&S] on its claim for breach of the insurance contract, then you must determine the amount of its damages.
>
> In accordance with the insurance policy, [Markel] is obligated to pay the cost of repairing or replacing the damaged property. [Markel] is only obligated to pay the amount it would cost to repair the covered property with comparable material and quality up [to] the policy limits of $4.5 million and less the deductible of $50,000.00.

The jury returned a verdict for Markel, presumably determining that the North Tower was "vacant" and that Markel was therefore not liable under the policy.

D&S appealed the judgment to our court. Markel did not file a cross-appeal. D&S asserted on appeal that the district court erred in refusing to submit to the jury the issues of § 44-358, waiver, and estoppel. D&S did not contest the jury's implicit finding that the building was not under construction or renovation or the district court's conclusion that the building was more than 70-percent vacant for more than 60 days preceding the loss.

In *D & S Realty v. Markel Ins. Co.*,[3] we affirmed the district court's determinations as to waiver and estoppel, but we reversed the district court's determination on § 44-358. We held that the vacancy clause was a condition subsequent. Thus, under § 44-358, vacancy could not operate to avoid liability under the policy unless the vacancy contributed to the loss. We held that the jury should have been so instructed and that D&S should have been allowed to argue that the contribute-to-the-loss standard applied to preclude Markel from denying liability for the loss. We remanded the cause "for further proceedings limited to the issue of whether D&S' breach of the vacancy condition contributed to the loss."[4] In *D & S Realty*, we did not address whether replacement cost was the proper measure of damages or whether the instruction on damages

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[3] *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 789 N.W.2d 1 (2010).

[4] *Id.* at 590-91, 789 N.W.2d at 19.

was erroneous, presumably because neither D&S nor Markel contested that issue.

On remand, during the pretrial conference, it was discussed that the issues to be tried were whether the breach of the vacancy provision contributed to the loss and, if not, the measure of D&S' damages for Markel's breach of the insurance contract. In accordance with the jury instruction given at the first trial, the court appeared to believe replacement cost was the proper measure of damages. Markel filed a motion in limine asking that the court prevent D&S from offering any evidence of repair or replacement costs and that it prohibit D&S from addressing repair or replacement costs in voir dire, its opening statement, and its closing argument. Markel asserted, similarly to the first trial, that D&S failed to satisfy the repair/replace condition to replacement cost coverage. Indeed, Markel noted that D&S had sold the North Tower at the end of the first trial in December 2008. Markel asserted that in the event it was liable under the policy, the proper measure of damages should instead be the difference in actual cash value of the North Tower immediately before and after the water damage.

The district court took the matter under advisement and did not expressly rule on it at that time. But when Markel renewed the motion in limine at trial and objected to D&S' evidence of replacement costs, the court overruled the objections and received the evidence. D&S' expert was allowed to present a detailed document listing, as of July 25, 2003, a total replacement cost of $2,309,721.97 for the damages incurred in January and March 2003. A revised estimate as of August 29, 2008, which took into account inflation, listed the total replacement cost as $3,138,516.45.

David Abboud, the president of D&S, testified that other than removing certain water-logged items, D&S had not actually conducted the repairs or replacements listed in the document presented by D&S' expert. When asked why, Abboud responded, "Lack of money[,] primarily." Markel did not cross-examine Abboud on that point.

The court granted D&S' motion to preclude Markel from eliciting testimony concerning the sale of the North Tower, on

the ground that it would confuse the issues. Markel made an offer of proof that D&S sold the North Tower for $437,000 after the water incidents.

At the close of D&S' case, Markel moved for a directed verdict on the grounds that (1) the vacancy did contribute to the loss and (2) D&S presented evidence of only replacement costs, which it could not recover because it had not actually repaired or replaced the damaged property. The court overruled the motion.

Markel entered into evidence an estimate by its insurance adjuster stating that the total repair and replacement costs for the damaged property were only $59,208. Markel renewed its motion for a directed verdict at the close of all the evidence, based again on D&S' failure to actually conduct any repairs or replace any damaged items. The motion was overruled.

An instruction on damages virtually identical to the instruction in the first trial was given to the jury over Markel's objection. The jury was instructed that the measure of damages was replacement cost.

The court rejected Markel's proposed instruction on the measure of damages, which read in part as follows:

> [D&S] must . . . prove the amount of its damages, that is, the least of the following amounts as provided in the policy:
>
> 1. The limit of insurance applicable to the damaged property;
>
> 2. The cost to replace, on the same premises, the lost or damaged property with other property:
>
> (a) Of comparable material and quality; and
>
> (b) Used for the same purpose; or
>
> 3. The amount [D&S] actually spent that is necessary to repair or replace the damaged property.

On a special verdict form, the jury first found that the vacancy did not contribute to the subject loss. The jury then determined the amount of replacement cost damages to be $784,421.89.

Subsequently, D&S filed a motion to tax costs and fees pursuant to Neb. Rev. Stat. §§ 25-1708 (Cum. Supp. 2010)

and 44-359 (Reissue 2010). On May 19, 2011, Markel filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Markel asserted that the district court erred in failing to sustain its motion for a directed verdict because D&S failed to show it had repaired or replaced any of the damaged property and that furthermore, D&S had failed to offer any evidence of the actual cash value of the North Tower immediately before and immediately after the damage occurred. Thus, according to Markel, D&S had failed to present any evidence of recoverable damages.

Markel also averred that the district court erred in permitting D&S to present evidence of the cost to repair or replace the damage to the North Tower, because D&S did not repair or replace the damaged property. Finally, Markel alleged that the district court erred in failing to instruct the jury that D&S was entitled to the lesser of three items, one of which was "the amount actually spent that is necessary to repair and replace the damaged property," as set forth in Markel's proposed instruction.

On July 1, 2011, the court overruled Markel's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. On August 12, the court entered an order granting attorney fees in the amount of $385,471.50 and costs in the amount of $3,598.49. Markel timely appealed the final judgment.

III. ASSIGNMENTS OF ERROR

Markel assigns that the district court (1) erred in overruling Markel's motions for a directed verdict because D&S did not repair or replace the water-damaged portions of the North Tower; (2) erred in refusing Markel's requested jury instruction on the measure of damages; (3) abused its discretion in overruling Markel's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial; and (4) erred in awarding attorney fees and costs to D&S, because D&S would not have recovered a verdict for damages had the proper jury instructions been given.

IV. STANDARD OF REVIEW

[1] On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[5]

V. ANALYSIS

[2] Markel argues that the district court erred in several rulings below because Markel's duty to pay replacement costs under the policy never became due. Performance of a duty subject to a condition cannot become due unless the condition occurs or its nonoccurrence is excused.[6] D&S failed to fulfill the repair/replace condition to replacement cost coverage under the policy. And Markel argues that its good faith denial of liability for the water-damage loss should not excuse D&S from performing the repair/replace condition.

Markel argues in the alternative that any theory which might excuse performance based on a good faith denial of coverage would involve specific factual showings which D&S failed to make. Markel acknowledges that under the jury's verdict, D&S would have been entitled to actual cash value. However, Markel argues that D&S failed to prove actual cash value. Therefore, Markel asks that we reverse and that we remand with directions to dismiss the case with prejudice.

D&S, in contrast, argues that Markel's denial of liability for the loss excused the repair/replace condition as a matter of law. D&S alternatively asserts that even if excusal is a matter of fact, there was sufficient uncontroverted evidence that the denial of liability actually prevented D&S' performance of the repair/replace condition.

D&S argues that when the insurer has unequivocally stated it will not reimburse any replacement costs, it is unreasonable to require the insured to procure the money for repairs and incur the financial risk of repairing or replacing the damaged property. D&S argues that it paid for replacement cost coverage and

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[5] See *Sarpy Cty. Farm Bureau v. Learning Community*, 283 Neb. 212, 808 N.W.2d 598 (2012).

[6] 13 Samuel Williston, A Treatise on the Law of Contracts § 39:1 (Richard A. Lord ed., 4th ed. 2000).

that Markel should not be allowed to benefit from its wrongful denial of coverage, which forced D&S to bring the current breach of contract action.

1. *Bailey v. Farmers Union Co-op Ins. Co.*

[3] D&S relies on the Nebraska Court of Appeals' opinion in *Bailey v. Farmers Union Co-op Ins. Co.*[7] for the proposition that denial of coverage excuses performance of repair/replace conditions. In *Bailey*, the Court of Appeals held that the insured was "prevented" from satisfying the repair/replace condition of replacement cost coverage "by [the insurer's] refusal to assure [the insured] that, in addition to the actual cash value figure, the cost of rebuilding her home would be covered up to the policy limit."[8] The Court of Appeals reasoned that "an insured should not be barred from recovery for failure to rebuild within the time constraints of the policy when the conduct of the insurer prevented the insured from rebuilding."[9] The court relied on the general principle of law that "[a] condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition."[10] The trial court had found that the insurer's conduct prevented the insured from rebuilding, and the Court of Appeals said such finding was not clearly wrong.

Markel, however, argues that the facts of *Bailey* are distinguishable from those of the case at bar. The insurer in *Bailey* acted in bad faith in delaying acknowledgment of liability for the accidental loss of the insured's home. While the insurer delayed, the remains of the house were condemned and the insured incurred additional demolition costs and other damages.[11] Markel asserts that while a bad faith denial can excuse performance of the repair/replace condition, a good faith denial should not.

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[7] *Bailey v. Farmers Union Co-op Ins. Co., supra* note 1.

[8] *Id.* at 418, 498 N.W.2d at 598.

[9] *Id.* at 419, 498 N.W.2d at 599.

[10] *Id.* at 418, 498 N.W.2d at 598.

[11] *Bailey v. Farmers Union Co-op Ins. Co., supra* note 1.

Neither our court nor the Court of Appeals has had occasion to consider whether a good faith denial of coverage which is ultimately determined to be in breach of contract excuses performance of a repair/replace condition. And our courts have never been squarely presented with the question of whether the prevention of a repair/replace condition by virtue of the insurer's denial of coverage may be determined as a matter of law or must instead be determined by the trier of fact. In order to answer these questions, we turn first to the nature of replacement cost coverage as an optional rider to standard indemnity policies and the reason for the repair/replace condition.

2. What Is Replacement Cost Coverage?

[4] Standard casualty protection for residential and commercial property insures the property only to the extent of its actual cash value.[12] Actual cash value is the value of the property in its depreciated condition.[13] The purpose of actual cash value coverage is indemnification.[14] It is to make the insured whole, but never to benefit the insured because the loss occurred.[15]

Most standard indemnity policies allow the insurer to choose to pay the lesser of actual cash value or the cost of repairing or replacing the damaged property. Thus, where the cost to repair or replace is greater than the actual cash value, the insured, not the insurer, is responsible for the cash difference necessary to replace the old property with new property.[16]

[5] Replacement cost insurance is optional additional coverage that may be purchased to insure against the hazard

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[12] See Johnny Parker, *Replacement Cost Coverage: A Legal Primer*, 34 Wake Forest L. Rev. 295 (1999).

[13] 3 Allan D. Windt, Insurance Claims & Disputes: Representation of Insurance Companies and Insureds § 11:35 (5th ed. 2010).

[14] See Parker, *supra* note 12.

[15] *Id.*

[16] 12 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 176:56 (2005). See, also, Annot., 1 A.L.R.5th 817 (1992).

that the improvements will cost more than the actual cash value and that the insured cannot afford to pay the difference.[17] In essence, replacement cost coverage insures against the expected depreciation of the property.[18] Unlike standard indemnity, replacement cost coverage places the insured in a better position than he or she was in before the loss.[19] "Any purported windfall to an insured who purchases replacement cost insurance is precisely what the insured contracted to receive in the event of a loss."[20] Replacement cost coverage is, accordingly, more expensive than standard indemnification coverage.[21]

But because replacement cost coverage places the insured in a better position than before the loss, there is a moral hazard that the insured will intentionally destroy the insured property in order to gain from the loss.[22] For this reason, most replacement cost policies require actual repair or replacement of the damaged property as a condition precedent[23] to recovery under the replacement cost rider.[24] The repair/replace condition generally requires, as it did here, that the repair or replacement occur "as soon as reasonably possible after the loss," or a similar time constraint.

If the insured has contracted for replacement cost coverage, the insured will normally be entitled under the policy to an immediate payment representing the actual cash value of the loss, which can be used as seed money to start the

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[17] See, *Rockford Mut. Ins. Co. v. Pirtle*, 911 N.E.2d 60 (Ind. App. 2009); Parker, *supra* note 12.

[18] Parker, *supra* note 12. See, also, John H. Magee & David L. Bickelhaupt, General Insurance (7th ed. 1964).

[19] Parker, *supra* note 12.

[20] *Rockford Mut. Ins. Co. v. Pirtle*, *supra* note 17, 911 N.E.2d at 65.

[21] *Id.*

[22] See, e.g., *Ohio Cas. Ins. Co. v. Ramsey*, 439 N.E.2d 1162 (Ind. App. 1982); *Patton v. Mutual of Enumclaw Ins. Co.*, 238 Or. App. 101, 242 P.3d 624 (2010).

[23] See, *Rockford Mut. Ins. Co. v. Pirtle*, *supra* note 17; *Higgins v. Insurance Co. of N. America*, 256 Or. 151, 469 P.2d 766 (1970).

[24] See 12 Russ & Segalla, *supra* note 16, § 176:60.

repairs.[25] Depending on the policy, the acceptance of this actual-cash-value payment may trigger a more limited time constraint for completion of the repairs, as it does here.[26] If the insured repairs or replaces the property within the time period stated in the policy, the insured will then be entitled to an additional payment for the amount by which the cost of the repair or replacement exceeded the actual cash value payment.[27]

[6] When the insurer has not breached its obligations under the policy, provisions which mandate actual repair or replacement as a condition to recovery of replacement cost damages are almost universally found enforceable.[28] In other words, the repair/replace condition is neither ambiguous nor unconscionable.[29] If the insurer accepts liability for the loss under the standard indemnity portion of the policy, the insured is bound to comply with the repair/replace condition before the insured can recover replacement costs.[30] But that is not the situation here.

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[25] See 3 Windt, *supra* note 13. See, also, e.g., *Ward v. Merrimack Mut. Fire Ins.*, 332 N.J. Super. 515, 753 A.2d 1214 (2000).

[26] See Parker, *supra* note 12.

[27] 3 Windt, *supra* note 13.

[28] *Id.*

[29] See *id.*

[30] See, *Versai Management Corp. v. Clarendon America Ins.*, 597 F.3d 729 (5th Cir. 2010); *Kolls v. Aetna Casualty and Surety Company*, 503 F.2d 569 (8th Cir. 1974); *Bourazak v. North River Insurance Company*, 379 F.2d 530 (7th Cir. 1967); *Huggins v. Hanover Ins. Co.*, 423 So. 2d 147 (Ala. 1982); *Rhodes v. Farmers Ins. Co., Inc.*, 79 Ark. App. 230, 86 S.W.3d 401 (2002); *Higginbotham v. Am. Family Ins. Co.*, 143 Ill. App. 3d 398, 493 N.E.2d 373, 97 Ill. Dec. 710 (1986); *Burchett v. Kansas Mut. Ins. Co.*, 30 Kan. App. 2d 826, 48 P.3d 1290 (2002); *Porter v. Shelter Mut. Ins. Co.*, 242 S.W.3d 385 (Mo. App. 2007); *Nicolaou v. Vermont Mut. Ins. Co.*, 155 N.H. 724, 931 A.2d 1265 (2007); *De Lorenzo v. Bac Agency Inc.*, 256 A.D.2d 906, 681 N.Y.S.2d 846 (1998); *Bratcher v. State Farm Fire & Cas. Co.*, 961 P.2d 828 (Okla. 1998); *Burton v. Republic Ins. Co.*, 845 A.2d 889 (Pa. Super. 2004); *Fitzhugh 25 Partners v. KILN Syndicate KLN*, 261 S.W.3d 861 (Tex. App. 2008); *Saleh v. Farmers Ins. Exchange*, 133 P.3d 428 (Utah 2006); *Hess v. North Pacific Ins. Co.*, 122 Wash. 2d 180, 859 P.2d 586 (1993).

We must determine whether and under what circumstances a wrongful denial of coverage excuses the insured's duty to comply with the repair/replace condition.

3. Doctrine of Prevention

When the insurer, in breach of the insurance contract, denies liability for the insured's loss, most courts conclude that such denial may excuse the insured's duty under the repair/replace condition to replacement cost coverage.[31] While other theories are sometimes relied upon,[32] most courts frame the issue in terms of the doctrine of prevention.[33] Thus, in *Bailey*, the court referred to the insurer's denial of liability as having "prevented" the insured's performance of the repair/replace condition.[34]

[7] The doctrine of prevention states that where a promisor prevents, hinders, or renders impossible the occurrence of a condition precedent to his or her promise to perform, the promisor is not relieved of the obligation to perform and may not invoke the other party's nonperformance as a defense when

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[31] 12 Russ & Segalla, *supra* note 16, §§ 176:59 and 176:60; 3 Windt, *supra* note 13. See *Bailey v. Farmers Union Co-op Ins. Co., supra* note 1. See, also, *Zaitchick v. American Motorists Ins. Co.*, 554 F. Supp. 209 (D.C.N.Y. 1982); *City of Hollister v. Monterey Ins. Co.*, 165 Cal. App. 4th 455, 81 Cal. Rptr. 3d 72 (2008); *State Farm Fire & Cas. Ins. Co. v. Miceli*, 164 Ill. App. 3d 874, 518 N.E.2d 357, 115 Ill. Dec. 832 (1987); *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17; *Conrad Brothers v. John Deere Ins. Co.*, 640 N.W.2d 231 (Iowa 2001); *Pollock v Fire Ins Exchange*, 167 Mich. App. 415, 423 N.W.2d 234 (1988); *Cornelius v. Badger Mut. Ins. Co.*, 354 N.W.2d 100 (Minn. App. 1984); *Ward v. Merrimack Mut. Fire Ins., supra* note 25.

[32] See, *City of Hollister v. Monterey Ins. Co., supra* note 31; *Conrad Brothers v. John Deere Ins. Co., supra* note 31.

[33] See *Bailey v. Farmers Union Co-op Ins. Co., supra* note 1. See, also, *State Farm Fire & Cas. Ins. Co. v. Miceli, supra* note 31; *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17; *Pollock v Fire Ins Exchange, supra* note 31; *Cornelius v. Badger Mut. Ins. Co., supra* note 31; *Ward v. Merrimack Mut. Fire Ins., supra* note 25; Parker, *supra* note 12; 1 A.L.R.5th, *supra* note 16, § 13[a].

[34] *Bailey v. Farmers Union Co-op Ins. Co., supra* note 1, 1 Neb. App. at 418, 498 N.W.2d at 598.

sued upon the contract.[35] "In short, under the doctrine of prevention, where a party to a contract is the cause of the failure of the performance of the obligation due him or her, that party cannot in any way take advantage of that failure."[36]

(a) Doctrine of Prevention Is Not Limited to Bad Faith

[8,9] But, at least where the conduct is in breach of the promisor's obligations under the contract, "prevention" is not necessarily limited to "bad faith" acts.[37] Thus, where the impeding act is the denial of liability in breach of the insurer's obligations under a policy with the insured, the breach may excuse the insured's performance of a repair/replace condition even if made because of a "good faith" misunderstanding of the rights and liabilities of the parties.[38] It has been said that "a party typically 'acts at its peril if that party, insisting on what it mistakenly believes to be its rights, refuses to perform its duty.'"[39] Furthermore, whether the denial was in good or bad faith, it would be "wasteful[] and useless" to require the insured to comply with the repair/replace condition when, by doing so, the insured would not obtain recognition of coverage.[40] The law does not require the doing of a useless act.[41] According

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[35] 13 Williston, *supra* note 6, § 39:3.

[36] *Id.* at 519.

[37] See *id.* Accord Restatement of Contracts § 295 (1932).

[38] See, *State Farm Fire & Cas. Ins. Co. v. Miceli, supra* note 31; *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17; *Conrad Brothers v. John Deere Ins. Co., supra* note 31; *Ward v. Merrimack Mut. Fire Ins., supra* note 25; Restatement, *supra* note 37; 13 Williston, *supra* note 6, § 39.3. See, also, *Go Travel Toledo, Inc. v. American Airlines*, 96 Fed. Appx. 290 (6th Cir. 2004); 13 Williston, *supra* note 6, § 39:10.

[39] *Conrad Brothers v. John Deere Ins. Co., supra* note 31, 640 N.W.2d at 241 (quoting 2 E. Allan Farnsworth, Farnsworth on Contracts § 8.21 (2d ed. 1998)).

[40] *Conrad Brothers v. John Deere Ins. Co., supra* note 31, 640 N.W.2d at 241.

[41] *Id.* (quoting 13 Williston, *supra* note 6, § 39:37). See, also, e.g., *BSB Constr. v. Pinnacle Bank*, 278 Neb. 1027, 776 N.W.2d 188 (2009); *Bank of Papillion v. Nguyen*, 252 Neb. 926, 567 N.W.2d 166 (1997).

to Williston on Contracts, "the performance of a condition precedent is waived where the other party has unequivocally declared by word or act that performance of the condition will not secure performance of the counterpromise."[42]

Courts have explained that not allowing claims of prevention based on the erroneous denial of coverage would trap the insured "in a no win situation."[43] The insured, in order to recover under the replacement cost coverage he or she purchased, would have to incur the cost of repairs and replacements when there is no guarantee that a future breach of contract action by the insured will be successful. Indeed, *Bailey* and other cases have recognized that it would be very difficult for most insureds to obtain the financing necessary to conduct the repairs or replacements when the insurer has denied liability for the loss.[44] This is equally true whether the denial has been made in good or bad faith.

In *Ward v. Merrimack Mut. Fire Ins.*,[45] the court thus held that the insurer's good faith denial of the insureds' claim could excuse performance of the repair/replace condition. The trial court below had concluded as a matter of law that the insured was entitled only to actual cash value, because the insured did not perform the repair/replace condition. The trial court had found that the doctrine of prevention did not apply to good faith denials of coverage. The Superior Court of New Jersey reversed, specifically rejecting the trial court's view that a good faith denial of coverage rendered the doctrine of prevention inapplicable. The court explained that an insurer's denial of a claim is no less "'wrongful'" because it is made in good faith.[46]

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[42] 13 Williston, *supra* note 6, § 39:39 at 672-73.

[43] *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17, 911 N.E.2d at 65.

[44] See *Bailey v. Farmers Union Co-op Ins. Co., supra* note 1. See, also, *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17; *Smith v Michigan Basic Ins*, 441 Mich. 181, 490 N.W.2d 864 (1992) (superseded by statute as stated in *Salesin v State Farm*, 229 Mich. App. 346, 581 N.W.2d 781 (1998)); *McCahill v Commercial Ins Co*, 179 Mich. App. 761, 446 N.W.2d 579 (1989); *Ward v. Merrimack Mut. Fire Ins., supra* note 25.

[45] *Ward v. Merrimack Mut. Fire Ins., supra* note 25.

[46] *Id.* at 524, 753 A.2d at 1219.

We agree, and we reject Markel's assertion that a good faith denial of liability cannot excuse D&S' duty to perform the repair/replace condition. We have said in other contexts that if a promisor prevents or hinders the occurrence of a condition precedent, the condition is excused.[47] We have never said the prevention must be in bad faith. And in *Bailey*, while bad faith formed the basis for the insured's separate tort claim, the Court of Appeals never discussed bad faith when it held the insured was excused from performing the repair/replace condition.[48] This was the correct approach. An insurer can prevent the performance of a repair/replace condition without acting in bad faith.

(b) Prevention Is Question of Fact

However, Markel is correct that most courts view prevention as a question of fact under the particular circumstances presented and that the insured has the burden to prove those circumstances.[49] In *Ward*,[50] for example, because the question of prevention was never presented to the jury, the court remanded the matter for the necessary factual determination of whether the insurer's denial actually prevented the insureds from repairing or replacing the property.

In contrast, the court in *Rockford Mut. Ins. Co. v. Pirtle*[51] affirmed the verdict in favor of the insured when the jury had been instructed as follows: "'When one party prevents the other from performing any part of the contract, the other party is excused from the remainder of his duties. The party excused may also recover for any work and any other damages sustained as a direct result of the prevention of performance.'"

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[47] See *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987).

[48] *Bailey v. Farmers Union Co-op Ins. Co., supra* note 1.

[49] See, *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17; *Ward v. Merrimack Mut. Fire Ins., supra* note 25. But see *State Farm Fire & Cas. Ins. Co. v. Miceli, supra* note 31.

[50] *Ward v. Merrimack Mut. Fire Ins., supra* note 25.

[51] *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17, 911 N.E.2d at 66.

There was no determination that the insurer in *Rockford Mut. Ins. Co.* had acted in bad faith. The insurer had offered to "'cash out'" the insurance policy at an amount which would not be enough to repair the insured's damaged building.[52] While the dispute over the value of the claim continued, the insured was unable to keep his tenants in the building and fell behind on his mortgage. When the insurer finally made an actual-cash-value payment with agreement that the insurer would additionally pay for the repairs once conducted, the insured had to use the cash value payment for the mortgage instead of beginning repairs. The court observed that if the condition of actually repairing or replacing the property were not excused under these facts, the replacement cost endorsement paid for by the insured "would be rendered illusory."[53]

[10,11] It is true that some courts have held that the insurer's good faith denial of liability excuses the insured from performing the repair/replace condition as a matter of law.[54] But the greater weight of authority, in accordance with general principles of contract law, is that whether interference by one party to a contract amounts to prevention so as to excuse performance by the other party is a question of fact to be decided under all of the proven facts and circumstances.[55] And the burden to prove those facts is on the party bringing action under the contract.[56] The doctrine of prevention does not require proof that the condition would have occurred "but for" the

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[52] *Id.*

[53] *Id.*

[54] See, *State Farm Fire & Cas. Ins. Co. v. Miceli, supra* note 31; *Conrad Brothers v. John Deere Ins. Co., supra* note 31. See, also, *Smith v Michigan Basic Ins, supra* note 44.

[55] See, e.g., 13 Williston, *supra* note 6, § 39:3.

[56] See, *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717 (4th Cir. 2000); *Chadd v. Midwest Franchise Corp., supra* note 47; 81A C.J.S. *Specific Performance* § 130 (2004). See, also, *Zaitchick v. American Motorists Ins. Co., supra* note 31; *Chambers v. Pingree*, 351 S.C. 442, 570 S.E.2d 528 (S.C. App. 2002); *Paddock v. Mason*, 187 Va. 809, 48 S.E.2d 199 (1948); *O'Brien v. Hunt*, 464 P.2d 306 (Wyo. 1970); 71 Am. Jur. 2d *Specific Performance* § 226 (2001).

wrongful conduct of the promisor, but requires only that the promisor's conduct contributed materially to the nonoccurrence of the condition.[57] However, if the promisee could not or would not have performed the condition, or it would not have happened whatever had been the promisor's conduct, the condition is not excused.[58]

(c) Excusal May Be Only Temporary

Markel is also correct that at least when a good faith denial of liability is the cause of the nonperformance, many courts hold that the duty to perform the condition is merely suspended while the issue of liability is undetermined.[59] These courts reason that it would "not be necessary to excuse the performance of a condition precedent that would still be capable of performance following the resolution of the coverage question."[60] On the other hand, "a coverage dispute may excuse performance by the insured of certain conditions that could no longer be performed even after the coverage dispute is resolved."[61]

In *Smith v Michigan Basic Ins*,[62] the Michigan Supreme Court held that the excusal of the insureds' performance of the repair/replace condition was only temporary. The court distinguished its facts from those in *Pollock v Fire Ins Exchange*,[63]

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[57] See *Moore Bros. Co. v. Brown & Root, Inc., supra* note 56.

[58] *Ward v. Merrimack Mut. Fire Ins., supra* note 25 (citing 5 Samuel Williston, A Treatise on the Law of Contracts § 677 (Walter H.E. Jaeger ed., 3d ed. 1961)).

[59] See, *Dickler v. CIGNA Property and Cas. Co.*, 957 F.2d 1088 (3d Cir. 1992); *Miller v. Farm Bureau Town & Country Ins.*, 6 S.W.3d 432 (Mo. App. 1999); *Todd v. Wayne Co-op. Ins. Co.*, 31 A.D.3d 1026, 819 N.Y.S.2d 179 (2006). See, also, *Conrad Brothers v. John Deere Ins. Co., supra* note 31. But see, *State Farm Fire & Cas. Ins. Co. v. Miceli, supra* note 31; *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17. See, additionally, Restatement (Second) of Contracts § 245 and comment *a*. (1981).

[60] *Conrad Brothers v. John Deere Ins. Co., supra* note 31, 640 N.W.2d at 240.

[61] *Id.*

[62] *Smith v Michigan Basic Ins, supra* note 44.

[63] *Pollock v Fire Ins Exchange, supra* note 31.

a case involving the bad faith denial of a claim and which the Nebraska Court of Appeals extensively discussed in *Bailey*.[64]

The insurer in *Smith* had, in good faith, denied the insureds' claim after fire destroyed their home, believing that the insureds deliberately set the fire.[65] When it appeared that the home would not be repaired, the city demolished what was left of the structure, and the insureds had not replaced it. Prior to trial, the trial judge had made a special determination as a matter of law that the insureds would be entitled to replacement costs if the jury determined they had not committed fraud. The Michigan Court of Appeals had affirmed the judge's ruling that the insureds could recover the replacement costs without actually having repaired or replaced the home. But the Michigan Supreme Court reversed.

The Michigan Supreme Court agreed that "'a bank would be chary to lend money on the basis of an unlitigated law suit in which the defendant and its vast resources intend to present several defenses to payment.'"[66] Thus, the insureds "could not be expected to repair, rebuild, or replace while this litigation was pending."[67] However, once litigation has determined the insureds are entitled to coverage, the insurer's defense to coverage "no longer stands in the way of lender-assisted financing of repair, rebuilding, or replacement."[68]

Although the insured's house in *Smith* had been demolished by the time the policy dispute was decided, the policy allowed the insured to rebuild in a different location from the site of the loss. Accordingly, the Michigan Supreme Court concluded that the insureds' "interest in obtaining payment of replacement cost can be protected without estopping the insurer from requiring actual repair, rebuilding, or replacement."[69] The court

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[64] *Bailey v. Farmers Union Co-op Ins. Co., supra* note 1.

[65] *Smith v Michigan Basic Ins, supra* note 44.

[66] *Id.* at 190, 490 N.W.2d at 867 (quoting *Zaitchick v. American Motorists Ins. Co., supra* note 31).

[67] *Id.* at 190, 490 N.W.2d at 867.

[68] *Id.* at 190, 490 N.W.2d at 868.

[69] *Id.* at 191, 490 N.W.2d at 868.

remanded with directions that the judgment award the insureds actual cash value and require an additional payment by the insurer when and if the insureds actually repaired, rebuilt, or replaced their home.

In other cases, courts have similarly denied an award of replacement costs, while at the same time expressly allowing the insured additional time to repair or replace the property after the judgment which determined that the insurer was liable under the policy.[70] In other words, those courts found that the insurer's denial of liability excused the repair/replace condition only while the question of liability was undecided. We observe that, in those cases, the facts showed that it was still possible to satisfy the repair/replace condition after the decision was rendered.[71]

[12] There are courts which hold that the good faith denial of liability under the policy absolutely and permanently excuses or waives the insured's obligation to perform the repair/replace condition.[72] But we agree with the reasoning in *Smith*.[73] The respective interests of parties acting in good faith can, in most cases, be adequately protected by excusing the performance of the repair/replace condition only for such time as it appears the insurer will not honor its obligations under the policy. Where the insured can still conduct the repairs/replacements and be reimbursed by the insurer, then the good faith denial of liability should not operate to give the insured a benefit it did not contract for.

[13] Neither, however, should the insurer be permitted to take advantage of the insured's failure to perform a condition precedent under the contract when the insurer has materially contributed to that failure. Thus, we conclude that if the delay in determining the insurer's liability materially contributed to

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[70] *Dickler v. CIGNA Property and Cas. Co., supra* note 59; *Todd v. Wayne Co-op. Ins. Co., supra* note 59. See, also, *Miller v. Farm Bureau Town & Country Ins., supra* note 59.

[71] See *id.*

[72] *Rockford Mut. Ins. Co. v. Pirtle, supra* note 17; *Ward v. Merrimack Mut. Fire Ins., supra* note 25.

[73] *Smith v Michigan Basic Ins, supra* note 44.

a situation where the insured can no longer perform the condition after the coverage dispute is resolved, then the condition will be absolutely excused.[74]

4. New Trial

In this case, the trier of fact did not determine whether Markel's conduct materially contributed to D&S' failure to repair or replace the property. Instead, the jury was improperly instructed as a matter of law that the measure of damages was replacement costs. Nevertheless, each of the parties in this case wishes to hold the other to its proofs, or lack thereof, on matters neither tried nor determined below.

Markel argues that Abboud's testimony that a "[l]ack of money[,] primarily," caused D&S not to repair or replace the property is insufficient to make even a prima facie case of prevention. D&S disagrees and argues that since Markel did not rebut D&S' evidence, we should determine prevention as a matter of law.

Markel argues that if D&S' evidence of prevention was insufficient, then D&S cannot recover anything at all. Markel points out that D&S presented no evidence of actual cash value—which Markel concedes was recoverable. Markel argues that D&S chose to focus on only one measure of recovery and that it took the risk of being wrong. While Markel made an offer of proof of the sale price of the North Tower after the loss and D&S presented evidence of the original purchase price and an appraisal after the loss, Markel argues that this evidence is inadequate.

We find neither party's arguments on these points persuasive. The district court conducted both trials under the theory that an insurer's erroneous denial of liability excuses performance of the repair/replace condition as a matter of law. From the time of the first trial, the judge stated, "I have an issue with making [D&S] go spend millions of dollars . . . and then seek recovery . . . ." In both the first and second trials, the district court did not give the jury the opportunity to determine

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[74] See *Conrad Brothers v. John Deere Ins. Co.*, *supra* note 31.

actual prevention and it did not give the jury an opportunity to determine actual cash value.

As a result of the district court's rulings, D&S had no reason to believe evidence of actual cash value was relevant or even admissible. Under the terms of the policy, where replacement costs are recoverable, that measure "replaces Actual Cash Value in the Loss Condition, Valuation, of [the policy's] Coverage Form."

Likewise, D&S presented only Abboud's one-line statement about "[l]ack of money" on the matter of proving prevention, because the district court's rulings indicated it believed the good faith denial of coverage absolutely excused the repair/replace condition as a matter of law. As mentioned, such a view is not unprecedented in other jurisdictions, and we had never before determined this issue. Because Markel was similarly unaware that actual prevention was a factual issue at trial, Markel did not question or rebut Abboud's testimony of causation.

[14] A party may rely on a trial court's favorable ruling.[75] It is unreasonable to expect counsel to attempt to present testimony in anticipation that a judge's favorable rulings will be reversed.[76] D&S' presentation of the evidence, or lack thereof, was in reliance on the trial judge's favorable position. The judge conducted the trials on the theory that the only issues to be determined by the jury were whether the vacancy contributed to the loss and, if it did not, the amount of the replacement costs to be granted D&S. D&S and Markel followed suit.

The parties did not litigate the factual questions necessary to the determination of their respective rights and liabilities, and the jury below was not given an opportunity to determine those factual questions. We will not decide for the first time on appeal the factual question of whether D&S was actually prevented from performing the repair/replace condition. That question is for the trier of fact. We make no comment

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[75] *U.S. ex rel. Bostick v. Peters*, 3 F.3d 1023 (7th Cir. 1993).

[76] See *id.*

on whether the record before us could adequately support a finding that Markel prevented D&S from fulfilling the repair/replace condition. Likewise, we do not reach the issue of whether the record is sufficient to demonstrate actual cash value in the event that D&S was not excused from performing the repair/replace condition.

There is no longer any issue that Markel was liable under the policy for the water damage which occurred at the North Tower. The only question remaining is whether Markel must pay D&S actual cash value or replacement costs. In most cases involving good faith denial of coverage, the interests of the parties would be adequately protected by granting a judgment to the insured for actual cash value and, in addition, a declaratory judgment that the insured will be reimbursed for the difference between actual cash value and any repair/replacement costs actually conducted within the time stated in the policy, running from the time of the judgment.

But the North Tower has been sold. And the policy issued by Markel to D&S required that the replacement be "on the same premises." Thus, future repair or replacement by D&S is now impossible. Therefore, if D&S can demonstrate to the trier of fact on remand that Markel's general denial of liability and the resulting litigation materially contributed to this impossibility, D&S may recover replacement costs without ever actually repairing or replacing the damaged property.

If the jury finds that D&S was thus permanently prevented from repairing or replacing the property, then D&S would be entitled to replacement costs in the amount that the jury has already determined—an amount which D&S has not contested in this appeal. If D&S cannot prove that Markel's general denial of liability for the loss materially contributed to its permanent inability to repair or replace the property, then D&S can recover only actual cash value, which may be determined in a new trial on remand.

We find no merit to Markel's assignment of error on costs and attorney fees, since we find no merit to its argument that good faith denial of coverage can never operate to excuse the insured's performance of the repair/replace condition.

VI. CONCLUSION

We reverse the judgment and remand the cause for a new trial on the limited issue of the extent to which Markel's conduct prevented D&S from complying with the repair/replace condition to replacement cost coverage under the policy. Also to be tried on remand is the amount of the actual cash value of the loss in the event D&S is not excused from the condition precedent to replacement cost coverage.

REVERSED AND REMANDED FOR A NEW TRIAL.

MILLER-LERMAN, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. JOHN E. BELTZER, RESPONDENT.

815 N.W.2d 862

Filed June 29, 2012. No. S-11-688.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. The purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice.
3. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
4. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the alleged misconduct and throughout the proceeding.
5. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.
6. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
7. **Disciplinary Proceedings: Words and Phrases.** In the context of attorney discipline proceedings, misappropriation is any unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom.

8. **Disciplinary Proceedings.** Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is typically disbarment.
9. ____. The fact that the client did not suffer any financial loss does not excuse an attorney's misappropriation of client funds and does not provide a reason for imposing a less severe sanction.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., L.L.O., for respondent.

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

PER CURIAM.

In August 2011, the Counsel for Discipline, relator, filed formal charges against John E. Beltzer, respondent. The charges alleged that respondent violated his oath of office as an attorney and the following provisions of Nebraska's Code of Professional Responsibility: Canon 1, DR 1-102(A) (misconduct), and Canon 9, DR 9-102(A) and (B) (preserving identity of funds and property of client). Respondent filed an answer admitting the facts alleged in the formal charges, and relator moved for judgment on the pleadings. The case is before us to determine the proper sanction.

FACTS

Respondent was admitted to the practice of law in Nebraska in 1983 and at all relevant times was engaged in private practice in Lincoln, Nebraska. In January 2004, respondent settled a personal injury case for a client. When the settlement check came in, respondent disbursed most of it to the client and to medical providers but, with the agreement of the client, kept $2,000 in his trust account to pay subsequent medical bills.

In December 2004, the client asked for the remainder of the money. Respondent admits that at that time, there were insufficient funds in his trust account to pay her because he had transferred funds from the trust account to his operating account in October 2004 to make payroll and cover operating costs. On

the day the client requested the money, the funds were replaced in the trust account and the client paid the balance.

After relator moved for judgment on the pleadings, respondent requested and was given leave to supplement the record with mitigation evidence. This evidence included letters or affidavits from 10 different individuals, all attesting that respondent has an excellent character and an extensive history of both assisting animals and offering shelter and financial assistance to individuals in need. Respondent also submitted his own affidavit. He explained that at the time he transferred the money from his trust account to his operating account, he was in the process of negotiating other settlements and expected to receive funds from them within the next weeks, which funds he knew he could use to replace the money moved from the trust account. Respondent stated that he knew what he did was wrong and that he regretted the poor decision he made in 2004. Nevertheless, respondent stated that he felt he remained qualified and fit to continue to practice law. The record shows that no prior disciplinary action has been taken against respondent.

ASSIGNMENT OF ERROR

The only issue on appeal is the appropriate sanction to be imposed.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record.[1]

ANALYSIS

Grounds for Discipline

The Counsel for Discipline alleged respondent violated his oath of office as an attorney and DR 1-102 and DR 9-102 of Nebraska's Code of Professional Responsibility. DR 1-102 is entitled "Misconduct" and provides that a lawyer shall not "[v]iolate a Disciplinary Rule" or "[e]ngage in conduct

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[1] *State ex rel. Counsel for Dis. v. Lopez Wilson*, 283 Neb. 616, 811 N.W.2d 673 (2012); *State ex rel. Counsel for Dis. v. Walocha*, 283 Neb. 474, 811 N.W.2d 174 (2012).

involving dishonesty, fraud, deceit, or misrepresentation." DR 9-102 is entitled "Preserving Identity of Funds and Property of a Client" and provides:

> (A) All funds of clients paid to a lawyer or law firm shall be deposited in an identifiable account or accounts maintained in the state in which the law office is situated in one or more state or federally chartered banks, savings banks, savings and loan associations, or building and loan associations insured by the Federal Deposit Insurance Corporation, and no funds belonging to the lawyer or law firm shall be deposited therein . . . .
>
> (B) A lawyer shall . . . [p]romptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

In his answer, respondent admitted all of the facts alleged in the formal charges. We find these facts constitute clear and convincing evidence that respondent violated DR 1-102 and DR 9-102.

SANCTION

[2-6] The purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice.[2] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.[3] For purposes of determining the proper discipline of an attorney, we will consider the attorney's acts both underlying the

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[2] *State ex rel. Counsel for Dis. v. Carter*, 282 Neb. 596, 808 N.W.2d 342 (2011); *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009).

[3] *Carter, supra* note 2; *State ex rel. Counsel for Dis. v. Thew*, 281 Neb. 171, 794 N.W.2d 412 (2011).

alleged misconduct and throughout the proceeding.[4] The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.[5] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[6] In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[7]

[7-9] In the context of attorney discipline proceedings, misappropriation is any unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom.[8] This latter form of misappropriation clearly occurred here. Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is typically disbarment.[9] The fact that the client did not suffer any financial loss does not excuse an attorney's misappropriation of client funds and does not provide a reason for imposing a less severe sanction.[10]

Here, respondent concedes that he improperly managed his trust account and that discipline should be imposed. He argues for a sanction of a suspension followed by a period of probation. We find that the mitigating factors in this case include the absence of a prior disciplinary record, the isolated nature of the incident, respondent's extremely cooperative dealings with

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[4] *Carter, supra* note 2; *State ex rel. Counsel for Dis. v. Herzog*, 281 Neb. 816, 805 N.W.2d 632 (2011).

[5] *State ex rel. Counsel for Dis. v. Hutchinson*, 280 Neb. 158, 784 N.W.2d 893 (2010); *State ex rel. Counsel for Dis. v. Tarvin*, 279 Neb. 399, 777 N.W.2d 841 (2010).

[6] *Carter, supra* note 2; *State ex rel. Counsel for Dis. v. Beach*, 272 Neb. 337, 722 N.W.2d 30 (2006).

[7] *Id.*

[8] *Carter, supra* note 2; *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005).

[9] *Carter, supra* note 2; *State ex rel. Counsel for Dis. v. Samuelson*, 280 Neb. 125, 783 N.W.2d 779 (2010).

[10] *Carter, supra* note 2.

the Counsel for Discipline, and the numerous letters in support of respondent's overall character. We note that respondent made no attempt to conceal what had occurred from the Counsel for Discipline during its investigation[11] and that he accepts full responsibility for his egregious error in judgment. There is no indication in the record that respondent has been out of trust or has committed any other disciplinary infraction in the years since the incident which is the subject of this proceeding. Viewed in its entirety, respondent's conduct does not indicate the degree of lack of concern for the protection of the public, the profession, or the administration of justice that would warrant disbarment.[12]

Nevertheless, we cannot ignore that misappropriation is a very serious offense. We therefore order that respondent be suspended from the practice of law for a period of 1 year.

CONCLUSION

Respondent is hereby suspended from the practice of law in the State of Nebraska for a period of 1 year, effective 30 days after the filing of this opinion. Respondent shall demonstrate compliance with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Furthermore, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

STEPHAN, J., participating on briefs.

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[11] Compare *id*.

[12] Compare *id*.

MIDWEST RENEWABLE ENERGY, LLC, APPELLANT, V. LINCOLN COUNTY BOARD OF EQUALIZATION, APPELLEE.

815 N.W.2d 922

Filed July 13, 2012. No. S-10-1106.

1. **Taxation: Appeal and Error.** The Tax Equalization and Review Commission may determine any question raised in a proceeding upon which an order, decision, determination, or action of a county board appealed from is based. The order, decision, determination, or action shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.
2. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.

Petition for further review from the Court of Appeals, IRWIN, MOORE, and CASSEL, Judges, on appeal thereto from the Tax Equalization and Review Commission. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jerrold L. Strasheim for appellant.

Rebecca Harling, Lincoln County Attorney, and Joe W. Wright for appellee.

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

STEPHAN, J.

The Lincoln County Board of Equalization (Board) determined that Midwest Renewable Energy, LLC (Midwest), failed to timely file its 2009 personal property tax return and was therefore subject to a penalty. Midwest appealed this determination to the Tax Equalization and Review Commission (TERC), which affirmed. Midwest then appealed to the Nebraska Court of Appeals, which also affirmed. We conclude that TERC erred in affirming the assessment of the penalty. On further review, we reverse the judgment of the Court of Appeals and remand the cause with directions.

BACKGROUND

Nebraska requires taxpayers to file personal property tax returns by May 1 of each year and imposes penalties for late

filing.[1] On August 27, 2009, the Lincoln County assessor notified Midwest that it had not filed its 2009 personal property tax return and that as a result, a penalty of 25 percent of the tax due had been assessed. Contending its return was timely filed, Midwest appealed the assessor's imposition of the penalty to the Board, which has authority to correct a penalty that is wrongly imposed.[2]

The Board conducted an evidentiary hearing. The assessor produced documentary evidence showing that no return was received from Midwest prior to May 1, 2009. Midwest submitted affidavits to the Board. Its controller, Penny Thelen, averred in her affidavit that she prepared Midwest's personal property tax return on April 21 and mailed it "by first class mail with sufficient postage" to the assessor's address on April 23. Thelen averred that Midwest's return address was on the envelope and that the envelope was not returned. She further averred that when mailing the return she "followed the same practice as she had done . . . in filing hundreds of personal property tax returns." According to Thelen, none of the personal property tax returns she had mailed in the same manner had ever failed to be timely received. James G. Jandrain, a certified public accountant who had been the chairman of Midwest's board of managers since January 2008, also averred in his affidavit that he had reviewed Midwest's office records and that those records confirmed the return was mailed on April 23, 2009.

Pursuant to its policy, the Board did not require witnesses appearing at the hearing to give sworn testimony. Thelen informed the Board that on the evening of April 22, 2009, she put the return in an envelope, "ran it through the postage meter and threw it in the mailbox." The assessor informed the Board that she did not receive a return from Midwest prior to May 1, but, rather, first received a return from Midwest on September 4.

In response to questions from the Board, the county attorney opined that the legal question was whether the return was

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[1] See Neb. Rev. Stat. §§ 77-1229 and 77-1233.04 (Reissue 2009).

[2] Neb. Rev. Stat. § 77-1233.06 (Reissue 2009).

timely received and advised the Board that to avoid imposition of the penalty, Midwest had to show that the assessor had received the return prior to May 1, 2009. After hearing this, one member of the Board stated, "I don't think it's a matter of me doubting whether [Midwest] filled it out, whether they — it got mailed. I'm not questioning that for a second." Another member of the Board stated, "I'm not doubting the honesty, integrity of [Midwest] one — one second either, not for a second. I just have a question mark as to why it wasn't — if it was received or wasn't received, why not?"

Ultimately, the Board voted to affirm the imposition of the penalty due to a lack of evidence that the return had been received by the assessor prior to May 1, 2009. After announcing its decision on the record, a Board member stated to Midwest, "I hope . . . there's a way you can appeal this to [TERC] and for your sake I hope they overturn us." A second board member echoed, "So do I. So do I."

Midwest appealed to TERC. Pursuant to a joint motion of the parties, the case was submitted without a hearing.[3] The joint motion asserted that the case was to be decided based on the record made before the Board and a stipulation of facts.[4] The stipulation included additional affidavits from Thelen and the assessor, and a copy of Neb. Rev. Stat. § 49-1201 (Reissue 2010).

In her affidavit to TERC, the assessor averred, consistent with the evidence she presented to the Board, that she did not receive a personal property tax return from Midwest prior to May 1, 2009. And in her affidavit to TERC, Thelen averred, consistent with her evidence before the Board, that on April 22, she placed the personal property tax return for Midwest in an envelope addressed to the assessor and attached a return address label and sufficient first-class postage. Thelen added in this affidavit that she then placed the envelope in Midwest's "outgoing mail box." She described this box as a "sturdy box located behind the secretary's workspace, inaccessible

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[3] See, Neb. Rev. Stat. § 77-5021 (Reissue 2009); 442 Neb. Admin. Code, ch. 5, § 015 (2009).

[4] See 442 Neb. Admin. Code, *supra* note 3, § 015.02.

to anyone other than the secretary and accountants in our office, and . . . designated solely for pickup of mail by a US Postperson." Thelen averred that every Monday through Saturday, a "US Postperson" came and picked up outgoing mail from this box. She recalled only one stormy day in the last 16 years when a "US Postperson" failed to pick up the outgoing mail.

TERC framed the issue as "whether the . . . Board's determination that a penalty was properly imposed is arbitrary or unreasonable." It noted that because the statements made before the Board were unsworn, it was giving greater weight to the affidavits than to the unsworn statements. TERC also determined that § 49-1201 was applicable. That statute provides:

> Any . . . tax return . . . required or authorized to be filed or made to the State of Nebraska, or to any political subdivision thereof, which is: (1) Transmitted through the United States mail [or] (2) mailed but not received by the state or political subdivision . . . 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.

But TERC did not acknowledge that the Board had failed to recognize the applicability of § 49-1201 and had actually decided the appeal based upon its understanding that the return could not be considered filed until it was received. Instead, TERC undertook its own analysis of whether Midwest had established the elements of § 49-1201 and, specifically, whether Midwest had proved the return was deposited in the U.S. mail. In its analysis, TERC noted that the evidence presented to it was identical to the evidence presented to the Board. This was erroneous, because the affidavits submitted to TERC contained additional information that was not before the Board.

Ultimately, three members of the TERC panel concluded that although different conclusions as to whether the requirements of § 49-1201 were met might be drawn from the factual evidence, because one interpretation of the facts supported the

Board's decision to uphold the penalty, that decision could not be deemed arbitrary or unreasonable. TERC therefore affirmed the Board's decision imposing the penalty on Midwest. A fourth member of the panel filed a dissenting opinion in which he concluded that the evidence submitted to TERC created a presumption that the return was mailed on April 23, 2009, and that the presumption had not been rebutted.

Midwest timely appealed from TERC's decision. The Court of Appeals determined that the Board had applied the wrong law in requiring Midwest to prove the return was received by the assessor and that § 49-1201 was the applicable law.[5] The Court of Appeals did not, however, address TERC's failure to find that the Board had applied the wrong law. Neither did the court address TERC's erroneous conclusion that the evidence before it was the same as the evidence before the Board. Instead, the Court of Appeals found that in order to come within § 49-1201, Midwest had to establish that the return was "'deposited in the United States mail.'"[6] The Court of Appeals then examined the evidence presented to TERC, including the evidence TERC failed to recognize, and found that Midwest had established that each Monday through Saturday, a U.S. postal carrier came to the office to deliver Midwest's mail and retrieve outgoing mail from the box in which the return was placed. But the Court of Appeals found that because Midwest "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," Midwest's evidence simply created "an inference of regular transmission," which was "a question of fact for TERC's resolution."[7] The Court of Appeals concluded that TERC's decision to affirm the penalty (1) was not arbitrary, capricious, or unreasonable; (2) conformed to the law; and (3) was supported by competent evidence. Midwest filed a petition for further review, which we granted.

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[5] See *Midwest Renewable Energy v. Lincoln Cty. Bd. of Eq.*, 19 Neb. App. 441, 807 N.W.2d 558 (2011).

[6] *Id.* at 449, 807 N.W.2d at 565.

[7] *Id.* at 450, 807 N.W.2d at 566.

ASSIGNMENT OF ERROR

Midwest assigns, restated and summarized, that the Court of Appeals erred in affirming TERC's affirmance of the Board's decision that the penalty was not wrongly imposed.

STANDARD OF REVIEW

[1] TERC may determine any question raised in a proceeding upon which an order, decision, determination, or action of the County Board appealed from is based.[8] The order, decision, determination, or action shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.[9]

[2] Appellate courts review decisions rendered by TERC for errors appearing on the record.[10]

ANALYSIS

It is clear from the record that the Board upheld the penalty based on its mistaken belief that mailing the return could not, under any circumstances, constitute filing. This was incorrect, because if the requirements of § 49-1201 are met, mailing can constitute filing.

TERC correctly found that the pertinent inquiry was whether Midwest had met the requirements of § 49-1201. But TERC erred in failing to recognize that the evidence presented to it differed from that presented to the Board. The parties' joint stipulation submitted to TERC included both a copy of § 49-1201 and additional facts relevant to whether the return was mailed by depositing it in the U.S. mail. Further, in finding that one interpretation of the facts supported the Board's decision, TERC improperly deferred to the Board because the Board did not apply the facts to § 49-1201. For these reasons, TERC committed error on the record.

TERC may determine any question raised in a proceeding upon which an order, decision, determination, or action of a

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[8] See Neb. Rev. Stat. § 77-5016(8) (Supp. 2011).

[9] See *id.*

[10] Neb. Rev. Stat. § 77-5019 (Supp. 2011).

county board appealed from is based.[11] Here, TERC should have exercised its authority to make a determination pursuant to § 49-1201 of whether the return was timely mailed and therefore filed, based upon all of the evidence. We reverse, and remand with directions to the Court of Appeals to reverse the order of TERC and to remand the cause with directions to review all the evidence in the record before it and determine whether the return was filed in accordance with § 49-1201.

CONCLUSION

The Board applied the wrong law when it decided Midwest's appeal. TERC erred on the record when it failed to analyze the effects of this and when it failed to recognize that the record before it contained evidence not presented to the Board. Accordingly, we reverse the judgment of the Court of Appeals and remand the cause with directions to reverse the order of TERC and remand the cause with directions to TERC to determine whether the return was timely mailed and filed pursuant to § 49-1201.

REVERSED AND REMANDED WITH DIRECTIONS.

[11] § 77-5016(8).

STATE OF NEBRASKA, APPELLEE, V.
FRANCIS L. SEBERGER, APPELLANT.
815 N.W.2d 910

Filed July 13, 2012. No. S-10-1207.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews factual findings of the trial court for clear error.
3 **Records: Appeal and Error.** It is incumbent upon an appellant to supply a record which supports his or her appeal.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review.

5. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
6. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law—or if the records and files in the case affirmatively show that the movant is entitled to no relief—no evidentiary hearing is required.
7. **Criminal Law: Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error.** In a criminal trial, after a court overrules a defendant's motion for a dismissal or a directed verdict, the defendant waives any right to challenge the trial court's ruling if the defendant proceeds with trial and introduces evidence. But the defendant may challenge the sufficiency of the evidence for the conviction.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Francis L. Seberger, pro se.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

HEAVICAN, C.J.

I. INTRODUCTION

Francis L. Seberger was convicted of first degree murder in 1998. His conviction was affirmed by this court in March 2010. In June 2010, Seberger filed a motion for postconviction relief. That motion was denied without an evidentiary hearing. Seberger appeals.

II. FACTUAL BACKGROUND

A full recitation of the facts surrounding Seberger's conviction for first degree murder can be found in this court's opinion in *State v. Seberger*.[1] As such, only a brief recitation of the underlying facts will be noted here.

Seberger and his wife were estranged. On May 31, 1997, she called the 911 emergency dispatch service to report that

[1] *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010).

someone was trying to break into her residence. Shortly thereafter, her neighbor called to report a fire at that residence. Seberger's wife died from injuries sustained in the fire.

In the investigation that followed, Seberger was arrested and eventually charged with first degree murder and arson. He was convicted on the murder charge, but acquitted of arson. A capital sentencing hearing was held, after which Seberger was sentenced to life imprisonment. Seberger filed no direct appeal initially, but he subsequently filed a postconviction motion seeking a direct appeal. That relief was granted, and Seberger's direct appeal was filed with this court in 2009.

In his appeal, Seberger alleged that the district court erred in failing to make a determination as to the voluntariness of statements made by Seberger in the days following the fire and that he was denied effective assistance of counsel when his trial counsel (1) advised him to waive his right to a jury trial, (2) advised him not to testify at trial, and (3) failed to offer evidence that his wife sold oil-based candles which could have been the source of ignition of the fire.

We affirmed the district court's decision. We found no merit to Seberger's arguments regarding the voluntariness of his statements. We concluded that the record was insufficient to evaluate his claims of ineffective assistance of counsel.

Shortly after we issued our opinion, Seberger, acting pro se, filed a second motion for postconviction relief. In that motion, he raised Sixth Amendment concerns regarding his trial and appellate court representation. In its response to Seberger's motion, the State acknowledged that Seberger might be entitled to an evidentiary hearing with regard to whether he was properly advised as to his right to testify, but otherwise argued that the motion alleged only conclusions of law, not fact, and that thus the claims were insufficient.

The district court denied Seberger's motion in its entirety. In so doing, it first addressed Seberger's contention that appellate counsel was ineffective for failing to raise those allegations regarding the ineffectiveness of trial counsel which Seberger had raised in his first motion for postconviction relief. The district court concluded that Seberger's appellate

counsel was not ineffective for failing to raise all the issues Seberger suggested simply because he wished counsel to do so.

The district court then noted that all allegations of ineffective assistance of trial counsel were procedurally barred. The court discussed the allegations as related to ineffectiveness of appellate counsel and noted:

> Having concluded that [Seberger's] appellate counsel were reasonable in restricting their claims to those they selected to advance on appeal, this Court likewise finds no egregious error or oversight on the part of [Seberger's] trial counsel that was overlooked by his appellate counsel and/or the Nebraska Supreme Court. The case files and records do not support [Seberger's] claims. Furthermore, his trial counsel were entitled to some degree of latitude in their strategy of defending the case. This Court does not find anything upon its review to overcome the presumption defense counsel acted as reasonable and competent attorneys in their representation of [Seberger].

As such, the district court denied Seberger's postconviction motion without an evidentiary hearing. Seberger appeals.

III. ASSIGNMENTS OF ERROR

Seberger assigns that the district court erred in (1) failing to rule on his motion to amend his motion for postconviction relief, (2) failing to find that he received ineffective assistance of trial counsel, (3) failing to find that he received ineffective assistance of appellate counsel, and (4) denying his motion for postconviction relief without an evidentiary hearing.

IV. STANDARD OF REVIEW

[1,2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[2] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews factual findings of the trial court for clear error.[3]

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[2] *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

[3] See *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011).

V. ANALYSIS

1. Motion to Amend

[3] In his first assignment of error, Seberger argues that the district court erred by not ruling on his pending motion for leave to amend his motion for postconviction relief. This motion to amend does not appear in the record before us. It is incumbent upon an appellant to supply a record which supports his or her appeal.[4] And in this case, Seberger failed to do so.

Seberger notes in his brief that he placed the motion in question in the prison mail system. But Nebraska does not have a prison delivery rule,[5] and the fact that Seberger allegedly placed this motion to amend in the mail does not cause the motion to automatically be filed with the district court.

Seberger's first assignment of error is without merit.

2. Ineffectiveness of Trial Counsel

Before we address Seberger's remaining assignments of error, we note that while Seberger's brief contains many arguments, we will address only those that were alleged in his postconviction motion.[6]

[4] In his second assignment of error, Seberger argues that the district court erred in failing to find that his trial counsel was ineffective. But, as was noted by the district court, any claims of ineffective assistance of trial counsel are procedurally barred. A motion for postconviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review.[7] And in this case, Seberger was represented by different counsel on appeal than he was at trial. Thus, any allegations of ineffective assistance of trial counsel should have been raised in Seberger's direct appeal. Seberger's second assignment of error is without merit.

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[4] *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

[5] *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

[6] See *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

[7] *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011).

3. Ineffectiveness of Appellate Counsel

In his third and fourth assignments of error, Seberger contends that his appellate counsel was ineffective in various particulars and that the district court erred in not granting him an evidentiary hearing on those allegations. This case presents, in part, a layered ineffectiveness claim in which Seberger alleges, in part, the ineffectiveness of appellate counsel in failing to raise certain claims of ineffective assistance of trial counsel.

[5,6] A court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[8] However, if the motion alleges only conclusions of fact or law—or if the records and files in the case affirmatively show that the movant is entitled to no relief—no evidentiary hearing is required.[9]

(a) Failure to Raise Certain Issues on Appeal

Seberger's first claim is that his appellate counsel was ineffective in that he failed to raise on appeal certain issues which Seberger believed should have been raised. The district court rejected this contention, finding that counsel was not ineffective simply for failing to raise every issue presented to him by Seberger. We agree. In order to prove that appellate counsel was ineffective, Seberger must specifically allege how appellate counsel's failure to raise these issues violated Seberger's constitutional rights. He failed to do so, and this argument is without merit.

(b) Sufficiency of Evidence

Seberger next argues that his appellate counsel erred in failing to raise on appeal that the evidence was insufficient to support his conviction. The records and files in this case plainly do not support this conclusion—the evidence as presented was clearly sufficient to support Seberger's conviction. The

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[8] *State v. Iromuanya, supra* note 2.

[9] *Id.*

record included Seberger's admissions to spraying the victim with gasoline, as well as eyewitnesses placing Seberger at the victim's home at the time of the fire. This argument is without merit.

(c) Directed Verdict

In his postconviction motion, Seberger also contended that his appellate counsel erred in failing to raise the ineffectiveness of trial counsel in not properly moving for a directed verdict at the close of the State's evidence. The record in this case shows that trial counsel did, in fact, move that the case against Seberger be dismissed, both at the close of the State's evidence and after the defense rested. To the extent that Seberger does not believe that counsel's motion was sufficient, he does not further explain such reasoning in his postconviction motion.

[7] We also note that in a criminal trial, after a court overrules a defendant's motion for a dismissal or a directed verdict, the defendant waives any right to challenge the trial court's ruling if the defendant proceeds with trial and introduces evidence.[10] But the defendant may challenge the sufficiency of the evidence for the conviction.[11] Because Seberger presented a defense, he waived any right to raise on appeal the denial of the motion to dismiss. And as we have noted above, the record does not support any argument that the evidence was insufficient to sustain his conviction. Seberger is not entitled to relief on these grounds.

(d) Admission of Audiotape

Seberger next alleges that appellate counsel erred in failing to raise the ineffectiveness of trial counsel for not objecting to the admission of "[t]he audio tape," and further erred by failing to raise on appeal the error of the district court in admitting such audiotape into evidence.[12] In his postconviction motion, Seberger contended generally that this audiotape

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[10] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[11] *Id.*

[12] Brief for appellant at 21.

was "inaudible"; did not "reveal anything that could be used against [him], due to its poor and paltry condition"; was "highly prejudicial"; and lacked "probative value, because it existed unlawfully." Seberger appears to concede in that motion that his counsel objected to the admission of this audiotape, but did not do so "in a fashion whereas [sic] the court would have thought long and hard of the admissions of this said tape."

We reject Seberger's allegations regarding the audiotape for several reasons. Seberger does not identify in his motion which audiotape he objects to. But our review of the record shows that for each audiotape offered into evidence by the State, Seberger's counsel objected to its admission at trial.

We are not persuaded by Seberger's assertion that his trial counsel did not object in a sufficiently vehement and persuasive manner. The level of trial counsel's perceived vehemence, vigor, or persuasiveness is not relevant to an ineffective assistance of counsel claim. Rather, we are concerned simply with whether the proper objections were made.

We also note that Seberger fails to allege with any specificity how the audiotape was "highly prejudicial" or how it could be both prejudicial and "inaudible." And Seberger fails to explain how the audiotape "existed unlawfully."

Seberger's motion either alleges only conclusions of fact or law or is not supported by the records and files in this case, and as such, he is not entitled to relief.

(e) Testimony of Victim's Treating Physicians

Seberger next contends that his appellate counsel was ineffective by failing to raise errors relating to the admission of the testimony and curriculum vitae of the victim's treating physicians David Voight, Chester Paul, Paul Gobbo, and John Rudersdorf. Seberger appears to contend both that appellate counsel was ineffective in failing to raise trial counsel's ineffectiveness and also that appellate counsel erred in failing to separately raise these issues on appeal. Though most of his allegations are general in nature, Seberger makes more specific allegations with respect to the testimony of Voight and Gobbo.

Seberger contended in his postconviction motion that Voight's testimony was highly prejudicial and was inadmissible and also that trial counsel erred by not objecting to this testimony or by raising only "paltry" objections which should have been further raised on appeal.

But Seberger does not explain in what way this testimony was prejudicial, and we therefore conclude that Seberger's motion alleges only conclusions of law. The records and files in this case do not support Seberger's allegation that his counsel did not properly object; the record shows that Seberger's counsel filed a motion in limine to exclude Voight's testimony and objected often during Voight's testimony. As noted above, the fact that Seberger finds these objections to be "paltry" does not affect our analysis.

With respect to Gobbo, Sebeger asserts that Gobbo's testimony was inconsistent in that Gobbo first testified that the victim's cause of death could have been the fire, but later testified that her cause of death could also have been pneumonia. A review of the record refutes that allegation—Gobbo testified that in his opinion, the victim's cause of death was pneumonia caused by her burns.

With respect to Seberger's more general contention that the testimony of Paul and Rudersdorf, as well as all curriculum vitae, was prejudicial, we note that Seberger does not explain how this evidence was prejudicial.

We conclude that either Seberger has alleged conclusions of law or the records and files do not support his allegations, and he is not entitled to relief.

(f) Photographs of Victim

Seberger also alleges that his appellate counsel was ineffective by failing to raise errors relating to the admission of photographs of the victim into evidence. Seberger again contends that his appellate counsel erred both in failing to raise on direct appeal the admission of the photographs and in failing to raise trial counsel's ineffectiveness for failing to object to the photographs. Seberger contends generally that the photographs were more prejudicial than probative.

A review of the record shows that trial counsel filed a motion in limine regarding these photographs and objected to the introduction of the photographs at trial. And we have reviewed the photographs and conclude that they are necessary to an understanding of the medical testimony regarding the severity of the victim's injuries. As such, the records and files in this case show that Seberger is also not entitled to relief on these grounds.

(g) Admission of Other Evidentiary Items

In his postconviction motion, Seberger also generally argued that

> [t]he evidence submitted, offered, and admitted in this criminal matter (i.e. audio tape, photographs, testimony from witnesses, Death Certificate of victim, the curriculum vitae, lab report, map, photos of tangible items, diagrams, book of matches, gas cap and nozzle, VHS tape, autopsy report, beer bottle, CPU, paper bag, billfold, fire extinguisher, and medical report, etc.) was either not objected to, or not challenged by counsels during introduction.

(We note that some of these items are raised elsewhere in his motion and may be addressed separately within this opinion.)

Seberger does not explain on what grounds any or all of these pieces of evidence were inadmissible. As such, his motion asserts only conclusions of law, and he is not entitled to relief.

(h) Testimony of Law Enforcement

Seberger alleges that several members of law enforcement who testified made statements that were either coerced or concocted and that the evidence given by these witnesses was conflicting. Seberger argues that his appellate counsel erred by failing to raise trial counsel's lack of objection to the testimony of these individuals.

Though Seberger makes specific reference to particular law enforcement personnel in his motion, he fails to allege which of their statements or testimony was false or concocted and further fails to explain how the evidence given by these

individuals was conflicting. As such, Seberger has alleged only conclusions of law, which are insufficient to entitle him to relief.

In addition to his general allegations, Seberger specifically takes issue with the testimony of an investigator with Nebraska's State Fire Marshal's office. Seberger complains that the State asked the fire investigator leading questions and was allowed to offer the investigator's opinion testimony. In addition, Seberger argued in his postconviction motion that the investigator gave inconsistent statements throughout his testimony. Seberger also contends that this testimony was hearsay because the State failed to show that it was "not hearsay" under Neb. Rev. Stat. § 27-801(4) (Reissue 2008).

As with his more general allegations concerning law enforcement testimony, Seberger fails to allege which statements made by the investigator were the result of leading questions, which testimony was opinion testimony, why that opinion testimony was in error, and what statements made by the investigator were inconsistent. As to his hearsay argument, Seberger misapprehends the definition of hearsay statements as opposed to those that are "not hearsay" under § 27-801(4). In sum, Seberger again alleges only conclusions of law, which are insufficient to entitle him to postconviction relief.

(i) Testimony of Other Witnesses

Seberger also alleges that the testimony given by other witnesses was variously outside the scope of the criminal matter, irrelevant, prejudicial, filled with redundant questioning, speculative, or hearsay and that appellate counsel erred by failing to assign on appeal trial counsel's failure to object to this evidence. But in each instance, Seberger fails to allege the testimony or statements to which he objected. So Seberger again alleged only conclusions of law, which are insufficient to entitle him to relief.

(j) Vehicle Stop and Seizure

Seberger argues that his appellate counsel erred in failing to allege trial counsel's ineffectiveness in failing to file a motion to suppress the seizure of his person following an illegal traffic stop. But a review of the record contradicts Seberger's

assertion that the stop was illegal. The officer who effected the stop on Seberger testified that he was dispatched to the victim's residence on the report of a burglary in progress. While en route, a second dispatch reported a fire at the residence. The officer testified that as he approached the residence, he saw flames emanating from the first floor of the residence and further observed a vehicle backing out of the driveway of the residence. When the vehicle was stopped, the driver was identified as Seberger. The records and files in this case clearly establish that there was probable cause to support the stop of Seberger's vehicle and show that Seberger is not entitled to relief on this allegation.

(k) Prosecutorial Misconduct

Seberger alleges that appellate counsel was ineffective for failing to raise his trial counsel's ineffectiveness in not objecting to the misconduct of the prosecutor during closing arguments. In particular, Seberger complains that

> [r]emarks like, "kudos to the defendant who at 10:35 p.m. thought it might be wise to take her back to court," "intentionally doing an act without just cause," and "he must have smelled gasoline on her," were highly prejudicial and egregious in nature because it imparted untrustworthiness from the bench trial and proceedings held during arguments.[13]

Seberger compares these statements to the ones made in *State v. Barfield*.[14] He noted in his postconviction motion that this court was "not having it" in *Barfield* and should also not now "condone this prejudicial and egregious act."

We have reviewed the closing arguments in this case. They do not approach the concerns noted by this court in *Barfield*, in which we recognized that "'[h]yperbole in closing arguments is hardly rare, and juries should be given credit for the ability to filter out oratorical flourishes.'"[15] We went on in *Barfield* to

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[13] *Id.* at 31-32.

[14] *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[15] *Id.* at 513, 723 N.W.2d at 313-14.

condemn the closing arguments of the prosecution, which not only involved extreme hyperbole with respect to the defendant, but also called all defense attorneys, including the defendant's counsel, liars. We noted:

> [T]he remarks made by the prosecutor, especially the prosecutor's statement to the effect that defense lawyers are liars, are of a very serious nature. In addition, the prosecutor's unacceptable remarks do not reflect a single, isolated instance, but were numerous. Moreover, because the disparaging remark as to defense attorneys was made during rebuttal, defense counsel had no opportunity to respond to and mitigate the last impression left with the jury before deliberations: that defense counsel, like all defense lawyers, was a liar.[16]

Conversely, this case presents, at most, mild hyperbole used by the prosecution in making its rebuttal. And we note, too, that unlike the case in *Barfield*, which was tried to a jury, Seberger's case was tried to the bench. We will presume that the trial court was able to disregard any hyperbole and focus on the evidence presented on the issue on Seberger's guilt. The records and files show that Seberger is not entitled to relief as to the prosecution's closing arguments.

(l) Intoxication Defense

Seberger alleged in his postconviction motion that his appellate counsel was ineffective in failing to raise trial counsel's ineffectiveness in not "mount[ing] a vigorous defense" on the issue of Seberger's intoxication. But the record shows that trial counsel asked questions relating to Seberger's level of intoxication and addressed the issue in his closing argument. Also lending support to the conclusion that trial counsel addressed this sufficiently is the specific finding made by the trial court that Seberger had been drinking alcohol on the evening in question. Moreover, the record shows that during sentencing, the three-judge panel noted that intoxication was a mitigating factor for the imposition of the death penalty. As we stated earlier, to the extent Seberger argues that his counsel was not

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[16] *Id*. at 515, 723 N.W.2d at 315.

vigorous enough in presenting that defense, we reject this contention. The records and files show that the intoxication defense was adequately raised and that Seberger is not entitled to relief on that basis.

(m) Discovery Violation

Seberger also asserted in his postconviction motion that "[t]he prosecuting attorney obviously violated the discovery rules and order of the court by failing to provide the defense with a copy of each one of the named above [sic] officers[']s investigative and police reports prior to their testimony" and that such violated his due process rights under the 14th Amendment to the U.S. Constitution. Seberger argued that these reports could have been used to impeach the officers' testimony and that the failure to provide the reports means that all of this testimony was inadmissible and should have been stricken. Seberger further alleged that his trial counsel should have known the reports had not been provided and that appellate counsel erred in not raising the trial court's error and the prosecutor's misconduct on appeal.

To the extent Seberger alleges that any failure of the State to provide the investigative reports of any officer would have resulted in the inadmissibility of that officer's testimony, he is incorrect. Consistent with the 14th Amendment, a prosecutor must fail to turn over evidence "favorable to an accused"[17] before a due process violation is found to have occurred.

And in this case, Seberger has failed to allege any facts which would indicate what information was in those reports that might be favorable to him, let alone allege what information might be included which could be used to impeach the testimony of these officers. As before, Seberger alleges conclusions of law. Given the absence of more specific allegations as to what these reports might include, we must conclude that Seberger is simply fishing for evidence which he hopes might aid him in obtaining postconviction relief. This he cannot do. Seberger is not entitled to relief on these grounds.

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[17] *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

(n) Right to Testify

Finally, Seberger alleged in his postconviction motion that his appellate counsel erred in failing to raise trial counsel's failure "to provide objectively reasonable advice to [Seberger] so that he could make a knowing, intelligent, and voluntary waiver of the right to testify in his own behalf." Seberger further averred that had he received such advice, he would have testified in his own behalf, and that this testimony would have established his innocence. In particular, Seberger contended that he would have testified "that he did not threatened [sic] the victim; that he did not take part in any derogatory tactics inducive [sic] of threatening overtones; and that he did not pose a threat to the victim in any shape, form or fashion."

We note that Seberger claimed in his motion that his appellate counsel failed to assign and preserve this issue on direct appeal. But a review of Seberger's direct appeal shows that appellate counsel did raise this issue, among other claims of ineffective assistance of counsel. This court declined to reach the issue on direct appeal, concluding that the record was insufficient to analyze it. Seberger alleged again in his postconviction motion that he was not advised of this right and that if he had been, he would have testified.

This court recently decided *State v. Iromuanya*,[18] which presented a similar procedural posture—the defendant claimed in his postconviction motion that trial counsel was ineffective in failing to advise him whether he should testify, and that motion for relief was subsequently denied without an evidentiary hearing. In that case, we concluded that the denial was proper because a review of the record affirmatively showed that the defendant had been advised, in that instance by the district court, of his right to testify in his own behalf; the record further showed the defendant had waived that right.

But in this case, we do not have such a record—there is no indication on the record before us whether Seberger was properly advised of and waived his right to testify in his own behalf. We noted that we lacked such a record on direct appeal,

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[18] *State v. Iromuanya, supra* note 2.

and because there was no evidentiary hearing granted in this case, we still lack such a record.

Based upon his allegations, we conclude that Seberger has adequately pled facts which, if true, would have been a violation of his constitutional right to testify in his own behalf. As such, the district court erred when it failed to grant Sebeger an evidentiary hearing on this issue.

VI. CONCLUSION

The district court erred in denying Seberger an evidentiary hearing on his allegation that he was not properly advised of his right to testify. We reverse the decision of the district court on this point and remand the cause for an evidentiary hearing on this single allegation. In all other respects, the decision of the district court is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RAYSHAWN C. ABRAM, APPELLANT.
815 N.W.2d 897

Filed July 13, 2012. No. S-11-057.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
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. **Jurisdiction: Courts: Appeal and Error.** After a party perfects an appeal to an appellate court, the lower courts are generally divested of subject matter jurisdiction over that case.
6. ____: ____: ____. The mere filing of a petition for certiorari does not automatically stay proceedings in a lower court and does not divest a trial court of jurisdiction.

7. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
8. **Constitutional Law: Self-Incrimination: Due Process.** In order to protect the defendant's right against self-incrimination, the 5th Amendment to the U.S. Constitution as applicable to the states by the 14th Amendment forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.
9. **Trial: Words and Phrases: Appeal and Error.** Structural errors are errors so affecting the framework within which the trial proceeds that they demand automatic reversal. They are distinguished from trial errors, which generally occur during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether they were harmless beyond a reasonable doubt.
10. **Constitutional Law: Appeal and Error.** The U.S. Supreme Court has limited structural errors to a few very specific categories—total deprivation of counsel, trial before a judge who is not impartial, unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial.
11. **Constitutional Law: Courts: Appeal and Error.** Constitutional error is subject to automatic reversal only in those limited instances where a court has determined that the error is structural.
12. **Constitutional Law: Jury Instructions: Appeal and Error.** Most constitutional errors, including constitutional errors in the giving of instructions, can be harmless.
13. **Jury Instructions: Appeal and Error.** Harmless error analysis applies to instructional errors so long as the error at issue does not categorically vitiate all the jury's findings.
14. **Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict surely would have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
15. **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 Douglas County: PETER C. BATAILLON, Judge. Reversed and remanded for a new trial.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

CONNOLLY, WRIGHT, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN and PIRTLE, Judges.

MILLER-LERMAN, J.

NATURE OF CASE

Rayshawn C. Abram appeals his convictions for attempted first degree murder, use of a weapon to commit a felony, criminal conspiracy, and tampering with a witness. Regarding his jurisdictional challenge, we reject Abram's claim that the district court for Douglas County was divested of jurisdiction when Abram filed a petition for writ of certiorari part way through the proceedings. Regarding the substance of his appeal, Abram claims, inter alia, that the district court erred when it gave the jury a written instruction stating that the jury must consider Abram's refusal to testify as an admission of guilt. Although we reject Abram's argument that the giving of this instruction was structural error, we conclude that it was error and that it was not harmless; we therefore reverse Abram's convictions and remand the cause for a new trial.

STATEMENT OF FACTS

The charges against Abram arise from an incident in which Sarah Schramm was shot. The State's case focused on Abram's alleged role before, during, and after the shooting. The State's theory did not assert that Abram was the shooter.

Schramm had been dating Abram's brother, Tieres Abram, when Tieres committed suicide in 2007. Members of Tieres' family blamed Schramm for his death. On June 23, 2008, Abram's and Tieres' cousin, Jerrell Abram, encountered Schramm at Tieres' gravesite. Jerrell called his brother, Jamaal Abram, who told Jerrell to take Schramm to another location. Jerrell forced Schramm to come with him and told her he was taking her to see Tieres' mother, Denise Smith. After driving Schramm around over several hours, Jerrell brought her to a location where they met Jamaal. Schramm was shot several times but survived and was able to get help. Schramm and Jerrell testified that Jamaal shot Schramm.

Jamaal was convicted of attempted first degree murder, use of a weapon to commit a felony, and criminal conspiracy.

His convictions and sentences were affirmed by the Nebraska Court of Appeals in a memorandum opinion. *State v. Abram*, No. A-10-219, 2010 WL 5384184 (Neb. App. Dec. 21, 2010) (selected for posting to court Web site). Abram was also charged in connection with the shooting of Schramm. The charges against Abram included attempted first degree murder, use of a weapon to commit a felony, criminal conspiracy, and tampering with a witness.

At Abram's trial, Schramm testified that while Jerrell was driving her around on June 23, 2008, he questioned her about Tieres' death. During the drive, Jerrell made and received numerous telephone calls in which it appeared to Schramm that he was being told where to take her. When they reached the final destination, she saw a parked vehicle that she recognized as one Abram had been driving about 1 month earlier when he had stopped her and confronted her about Tieres' death. Schramm did not testify that she saw Abram in the vehicle; instead, she saw Jamaal walk out from among some trees. Jamaal and Jerrell pulled her out of the car. Jamaal held a gun to her back, walked her away from the car, and began firing shots. She fell to the ground after the first shot, heard a few more shots, and then heard people running and vehicles starting and quickly leaving.

Jerrell testified at Abram's trial that on June 23, 2008, he went to visit Tieres' grave with his cousin Sharie Colbert and two of her friends. Jerrell saw Schramm there and told her she should not be there. Jerrell called Jamaal in an attempt to reach their aunt, Smith, who was Tieres' mother, because he thought Schramm should meet with Smith to talk about Tieres' death. Jamaal told Jerrell he would call him back. Jerrell then forced Schramm to get into his car with the purpose of taking her to see Smith. Jerrell gave Colbert the keys for Schramm's car, and Colbert and her friends took Schramm's car away.

Jerrell drove around with Schramm, and while they were driving, he had various telephone calls with Jamaal, trying to determine where to take Schramm to meet with Smith. As Jerrell was parked waiting at a location near Smith's house, he received a call from Abram, who told him to take Schramm to another location where he would see Abram's vehicle.

When Jerrell reached the location, he saw Abram's vehicle. He then saw Jamaal walk out from among some trees, approach Schramm, and take her out of his vehicle. Jerrell heard Jamaal ask Schramm what happened to Tieres, and then he saw Jamaal shoot Schramm.

After the shooting, Jamaal ran to Abram's vehicle and got into the back seat. Abram's vehicle left, and Jerrell followed it. Abram's vehicle stopped, and Jamaal jumped out and threw the gun into a sewer. They continued on to Jerrell and Jamaal's mother's house, where Jerrell saw Abram in the driver's seat of his vehicle. Jerrell and Jamaal went to the backyard to burn their clothes. When they returned to the vehicles, Jerrell saw Abram come out of Jerrell and Jamaal's mother's house. They all got into Abram's vehicle, where a friend of Abram's was sitting in the front passenger seat. As they drove around, Abram told the passengers not to say anything about what had happened.

The next day, Jerrell learned that Schramm had survived the shooting. Jerrell testified that Abram arranged for Jamaal to leave Omaha and go to Atlanta, Georgia, where he was arrested on July 3, 2008. After Jamaal was arrested, there was a warrant issued for Jerrell's arrest. Abram helped Jerrell to hide out by giving him car rides, a telephone, and video games to pass the time. Abram arranged a meeting with Jerrell, Colbert, and Colbert's two friends who were with Jerrell and Colbert at the grave. Abram told all of them not to say anything about the night of the shooting. Abram also told Jerrell he should burn the car he was driving that night; Jerrell did not, but he had the car cleaned at a detail shop to remove any indication that Schramm had been inside the car. Jerrell was arrested in February 2009. He reached a plea agreement with the State, pursuant to which he testified against Jamaal and Abram.

Prior to Abram's trial, he moved to continue the preliminary hearing on the basis that he had filed a petition for writ of certiorari with the U.S. Supreme Court to review an earlier ruling by the district court. Abram argued that the court did not retain jurisdiction while the petition to the U.S. Supreme Court was pending. After determining that the filing of a petition

for certiorari does not operate as a stay, the court denied the motion to continue the preliminary hearing.

A jury trial was conducted. During the jury instruction conference, neither party objected to the proposed jury instruction No. 17, which in written form stated: "The Defendant has an absolute right not to testify. The fact that the Defendant did not testify *must be* considered by you as an admission of guilt and must not influence your verdict in any way." (Emphasis supplied.) Before reading the instructions to the jury, the court informed the jurors that six copies of the written instructions would be given to them during deliberations and that they would each be given a copy if they wanted. The court then read the instructions to the jury. According to the record, the court read instruction No. 17 as follows: "The Defendant has an absolute right not to testify. The fact that the Defendant did not testify must *not* be considered by you as an admission of guilt and must not influence your verdict in any way." (Emphasis supplied).

The jury found Abram guilty of all charged counts—attempted first degree murder, use of a weapon to commit a felony, criminal conspiracy, and tampering with a witness. The court sentenced Abram to consecutive sentences of imprisonment for 40 to 50 years on the attempted murder conviction, 40 to 50 years on the weapon conviction, and 20 to 30 years on the criminal conspiracy conviction. The court sentenced Abram to imprisonment for 1 to 5 years on the conviction for tampering with a witness and ordered the sentence to be served concurrently with the sentence for criminal conspiracy.

Abram appeals his convictions.

ASSIGNMENTS OF ERROR

Abram claims that the district court erred (1) when it denied his motion to continue the preliminary hearing and rejected his argument that the filing of a petition for writ of certiorari to the U.S. Supreme Court divested the court of jurisdiction and operated as a stay and (2) when it gave the jury the written instruction stating that it must consider his failure to testify as an admission of guilt. Because of our resolution of these assignments of error, we do not reach Abram's remaining

assignments of error regarding jury selection, evidentiary rulings, and effective assistance of trial counsel.

STANDARDS OF REVIEW

[1,2] A jurisdictional issue that does not involve a factual dispute presents a question of law. *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012). We independently review questions of law decided by a lower court. *Id.*

[3,4] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (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. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

ANALYSIS

Abram's Filing of a Petition for Writ of Certiorari to the U.S. Supreme Court Did Not Divest the District Court of Jurisdiction.

Abram claims that because he had filed a petition for writ of certiorari to the U.S. Supreme Court, the district court lost jurisdiction and the district court erred when it denied his motion to continue the preliminary hearing on that basis. We consider this assignment of error first, because the district court's continuing jurisdiction and our appellate jurisdiction are effectively challenged by this assignment of error. However, we conclude that Abram's filing of the petition for certiorari did not divest the district court of jurisdiction and that therefore the court did not err when it denied the motion to continue.

In ruling on the motion to continue, the court cited the Nebraska Court of Appeals' unpublished opinion in *In re Interest of Nicholas C.*, No. A-01-958, 2002 WL 31002490 (Neb. App. Aug. 6, 2002) (not designated for permanent publication), for the proposition that while the actual granting of a writ of certiorari by the U.S. Supreme Court may operate as a stay, the mere filing of a petition for writ of certiorari

does not operate as a stay. We agree with the reasoning of the Court of Appeals and adopt the reasoning in that unpublished opinion.

[5] We have held that after a party perfects an appeal to an appellate court, the lower courts are generally divested of subject matter jurisdiction over that case. *Russell v. Kerry, Inc.*, 278 Neb. 981, 775 N.W.2d 420 (2009). Based on this proposition of law, Abram argues that his petition for certiorari to the U.S. Supreme Court divested the district court of jurisdiction. However, Abram does not cite any authority to the effect that filing a petition for writ of certiorari constitutes "perfecting an appeal." To the contrary, authority from other courts and the rules of the Nebraska appellate courts and of the U.S. Supreme Court indicate that it does not.

One state appellate court has held that "while the actual *granting* of a writ of certiorari by the United States Supreme Court operates as a stay, the mere *filing* of a petition for certiorari does not." *Ligon v. Bartis*, 254 Ga. App. 154, 561 S.E.2d 831, 833 (2002) (emphasis in original). The Court of Appeals for the Eighth Circuit has stated that neither the filing nor the granting of a petition for certiorari operates as a stay. *McCurry v. Allen*, 688 F.2d 581 (8th Cir. 1982). In this case, the U.S. Supreme Court did not grant Abram's petition for certiorari and therefore we need not determine whether the granting of certiorari would divest the state district court of jurisdiction. The only issue before us is whether Abram's filing of a petition for writ of certiorari divested the district court of jurisdiction.

Our resolution of this issue is informed by the procedural rules of the Nebraska appellate courts and of the U.S. Supreme Court which indicate that the filing of a petition for certiorari does not automatically stay proceedings in the state court. Nebraska court rules of appellate practice provide a procedure for a party to obtain a stay of the mandate issued by a Nebraska appellate court during the pendency of the party's attempted appeal to the U.S. Supreme Court. See Neb. Ct. R. App. P. § 2-114(A)(2). The rule requires the party to apply for a stay within 7 days from the date of the Nebraska appellate court's disposition of the case and requires a written showing

that a federal question is involved. Similarly, the U.S. Supreme Court rules provide that a party may apply to the U.S. Supreme Court to stay enforcement of the judgment being appealed and that the party must comply with certain procedures, including a requirement that the party has first requested a stay in the court below. See Sup. Ct. R. 23. Furthermore, the U.S. Supreme Court rules provide that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion" which "will be granted only for compelling reasons." Sup. Ct. R. 10. With these rules in mind, we have reviewed the record and find nothing to indicate that Abram identified a compelling federal question and explicitly sought a "stay" of state court proceedings while his petition for certiorari was being considered by the U.S. Supreme Court.

[6] Given these rules and the stated unlikelihood that certiorari will be granted, we conclude that the mere filing of a petition for certiorari does not automatically stay proceedings in a lower court and does not divest a trial court of jurisdiction. We therefore reject Abram's claim that the district court erred when it denied his motion to continue on the basis that he had filed a petition for writ of certiorari.

The Court Committed Reversible Error When It Gave the Jury an Erroneous Written Instruction Regarding the Import of Abram's Decision Not to Testify in His Defense.

Abram next claims that the district court erred when it gave the jury a written instruction stating that it must consider his failure to testify as an admission of guilt. We reject Abram's argument that the error was structural error and instead determine that it was error subject to harmless error review. As explained below, we conclude that the error was not harmless and that it requires reversal of Abram's convictions.

[7] Abram concedes that he did not object to the written instruction at trial but urges us to review the instruction as plain error. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the

integrity, reputation, and fairness of the judicial process. *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011). The error in the written instruction is plainly evident from the record. As we discuss below, the error prejudicially affects Abram's substantial constitutional right against self-incrimination and is not harmless. It therefore would result in damage to the integrity, reputation, and fairness of the judicial process to leave the error uncorrected. We therefore review the challenged instruction.

[8] The challenged instruction stated in part that the fact that Abram did not testify *must be* considered by the jury as an admission of guilt. This statement is an incorrect statement of the law. In order to protect the defendant's right against self-incrimination, the 5th Amendment to the U.S. Constitution as applicable to the states by the 14th Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). It is therefore clear that an instruction requiring the jury to consider a defendant's failure to testify as an admission of guilt is an error of constitutional magnitude.

[9] However, we must determine whether, as Abram urges, the error is structural error requiring automatic reversal or whether, as the State urges, the error is subject to harmless error review. We have said that structural errors are errors so affecting the framework within which the trial proceeds that they demand automatic reversal. *State v. Barranco*, 278 Neb. 165, 769 N.W.2d 343 (2009). They are distinguished from trial errors, which generally occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. 279, 307-08, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

[10,11] We have stated:

> The Supreme Court limited structural errors to a few very specific categories—total deprivation of counsel, trial before a judge who is not impartial, unlawful exclusion of

> members of the defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial.

State v. Bjorklund, 258 Neb. 432, 504, 604 N.W.2d 169, 225 (2000) (citing *Arizona v. Fulminante, supra*), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008). Constitutional error is subject to automatic reversal only in those limited instances where a court has determined that the error is structural. *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009). The fact that the error in this case was a constitutional error does not in itself mean that it was structural error.

[12] The U.S. Supreme Court has recognized that most constitutional errors, including constitutional errors in the giving of instructions, can be harmless. See *State v. Payan, supra* (citing *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). See, also, *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In *Neder*, the Court determined that "an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence" and that such instructional error was not structural but was subject to harmless error review. 527 U.S. at 9 (emphasis omitted). In *Chapman v. California, supra*, the prosecutor commented on the defendants' failure to testify and the trial court charged the jury that it could draw adverse inferences from their failure to testify. The Court in *Chapman* applied a harmless error analysis to this constitutional error. See, also, *United States v. Hasting*, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983) (finding prosecutor's reference to defendants' failure to testify to be harmless error).

Against this framework distinguishing between structural and nonstructural constitutional errors, Abram argues that the erroneous instruction in this case is similar to a constitutionally deficient reasonable doubt instruction that the U.S. Supreme Court determined to be structural error in *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). The Court in *Sullivan* reasoned that because of the deficient instruction, there had been no jury verdict of guilty beyond

a reasonable doubt, and that therefore harmless error review considering whether the verdict could have been rendered in the absence of the error was utterly meaningless. Because there was no proper verdict, "[t]here [was] no *object*, so to speak, upon which harmless-error scrutiny can operate." 508 U.S. at 280 (emphasis in original). Abram argues that the erroneous instruction in this case deprived him of a proper jury verdict and that it cannot be subjected to harmless error review. We do not agree.

[13] The U.S. Supreme Court has said that harmless error analysis applies to instructional errors so long as the error at issue does not categorically vitiate all the jury's findings. *Hedgpeth v. Pulido*, 555 U.S. 57, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008). In addition to the examples recited above, the Court has found certain instructional errors to be properly subject to harmless error review. See, *Carella v. California*, 491 U.S. 263, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (jury instruction imposing mandatory presumption in violation of due process rights subject to harmless error review); *Kentucky v. Whorton*, 441 U.S. 786, 99 S. Ct. 2088, 60 L. Ed. 2d 640 (1979) (failure to instruct on presumption of innocence subject to harmless error review). We conclude that the erroneous instruction in this case did not vitiate the jury's verdicts in the way a constitutionally deficient reasonable doubt instruction would do. The reasonable doubt instruction in *Sullivan v. Louisiana, supra*, vitiated the entire verdict, because the verdict was presumably based on an erroneous standard of proof. In the present case, the written instruction erroneously instructed the jury how it must consider Abram's failure to testify. But the jury was still instructed that it must reach its verdicts based on the evidence and that it must find Abram guilty beyond a reasonable doubt in order to convict. We conclude that the error in this case did not affect the framework within which the trial proceeded or vitiate the entire verdicts in the manner which occurred in *Sullivan*. We conclude that the error in this case is not structural error requiring automatic reversal and that instead it is subject to harmless error review.

[14] We have stated that harmless error review looks to the basis on which the trier of fact actually rested its verdict; the

inquiry is not whether in a trial that occurred without the error a guilty verdict surely would have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Sorensen*, 283 Neb. 932, 814 N.W.2d 371 (2012). We conclude that we cannot say that the jury's verdicts in this case were surely unattributable to the erroneous written instruction.

We have said that in reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal. *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011). We have also said that an instruction will not be held erroneous simply because of a typographical error which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining. *State v. Swiney*, 179 Neb. 230, 137 N.W.2d 808 (1965).

The State asserts that the erroneous instruction in this case was harmless error. The State contends that when the portion of jury instruction No. 17 at issue is read with the rest of the instruction and other instructions, it is clear the jury was not misled or confused, and that the jury would understand there is a typographical error. The State adds that the instructions as a whole correctly state the law and are not misleading.

The State submits that the jury was adequately instructed that Abram had a right not to testify, because jury instruction No. 14 stated, "Any person has the right to invoke his/her right to remain silent as provided in the Fifth Amendment of the United States Constitution," and the first part of jury instruction No. 17 stated, "The Defendant has an absolute right not to testify." The State further notes that after the written instruction No. 17 erroneously stated, "The fact that the Defendant did not testify *must be* considered by you as an admission of guilt," the instruction continues, "and must not influence your verdict in any way." (Emphasis supplied.) The State emphasizes that the court's spoken instruction stated correctly, "The fact that the Defendant did not testify *must not be* considered by

you as an admission of guilt . . . .” (Emphasis supplied.) The State argues that considering the totality of the instructions, it was clear to the jury that Abram had a right not to testify, and that his decision to exercise that right should not influence the jury's verdicts.

Regarding the typographical error, the State argues it would have been clear to the jury that the written form of instruction No. 17 contained a typographical error and that the word “not” had been inadvertently omitted. The State's argument finds some support in this court's decision in *Fleming Realty & Ins., Inc. v. Evans*, 199 Neb. 440, 259 N.W.2d 604 (1977), where this court concluded that the inadvertent substitution of the word “able” for “unable” in an instruction was not reversible error. In *Fleming Realty & Ins., Inc.*, however, it was clear from the instruction itself and other instructions that the jury would not have been confused or misled as to the applicable law, and the error occurred in a civil case, where the constitutional right against self-incrimination was not at issue.

In evaluating the State's argument that the error was harmless when considered in the context of the totality of the instructions, we believe there are important considerations which outweigh this argument. In this regard, we note that although the spoken instruction was correct, the erroneous written instruction was given to the jury for its use during deliberations. We believe under these circumstances that the jury would resolve the confusion and inconsistency between a fleeting oral instruction and a tangible written instruction in favor of the latter.

With regard to evidence, we have noted the danger that a jury will give undue emphasis to written testimonial evidence to which it has access in the jury room during deliberations. See *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000). See, also, *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000) (discussing tape-recorded telephone conversation made available to jury during deliberation). Although instructions are not evidence and although it is not improper for the court to give the jury a written copy of instructions, these cases support the proposition that if there is an inconsistency between oral and written instructions, the jury will more likely follow the

written instruction because it has been given more emphasis by being made available during deliberations. Contrary to the State's suggestion, we will not presume in this case that the jury detected a typographical error and supplied the missing language in the challenged instruction.

We recently concluded in *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011), that where a jury instruction was an incorrect statement of the law, and where one instruction effectively negated another instruction and the two provisions could not be read harmoniously, prejudicial error occurred and required reversal. The same reasoning and result are warranted in this case.

If taken at face value, the challenged instruction would require the jury to consider Abram to have admitted guilt because he did not testify. The risk and corresponding prejudice due to a misunderstanding of the applicable law must be considered in light of the constitutional principles at issue. The most obvious constitutional right at issue is the criminal defendant's Fifth Amendment right against self-incrimination. His or her exercise of that right resulting in his or her silence is not to be considered as evidence of guilt. *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). In addition, we believe that the Sixth Amendment's command to afford jury trials in serious criminal cases is also implicated. See *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). The U.S. Supreme Court has noted that a trial judge is prohibited from directing a verdict for the prosecution in a criminal trial by jury, *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), and further stated that "a trial judge is prohibited from . . . directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977). Although the challenged instruction did not direct the jury to convict Abram, the erroneous written instruction, to the effect that it must consider his failure to testify as an admission of guilt, had the tendency to remove the fact finding regarding guilt from the jury in this criminal case in a manner

incompatible with robust exercise of the right to jury trial afforded by the Sixth Amendment.

In *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), the U.S. Supreme Court applied harmless error analysis to a case in which the prosecutor commented on the defendants' failure to testify and the trial court charged the jury that it could draw adverse inferences from their failure to testify. The Court concluded that the error was not harmless, because

> the state prosecutor's argument and the trial judge's instruction to the jury continuously and repeatedly impressed the jury that from the failure of [defendants] to testify, to all intents and purposes, the inferences from the facts in evidence had to be drawn in favor of the State—in short, that by their silence [defendants] had served as irrefutable witnesses against themselves.

386 U.S. at 25. We recognize that the present case may be distinguished from *Chapman* in that the jury was not "continuously and repeatedly" told that Abram's silence could be taken as an admission of guilt. However, the erroneous instruction was written and was sent to the jury, thus giving it more weight than a correct oral instruction. Furthermore, the erroneous instruction in this case went further than the court's instruction in *Chapman* which merely stated that the jury could consider the defendants' silence as an admission of guilt; the challenged instruction in this case stated in part: "The fact that the Defendant did not testify *must* be considered by you as an admission of, guilt . . . ." (Emphasis supplied.) Furthermore, the erroneous instruction could not be harmonized with correct instructions, leading to jury confusion. See *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

In light of the important constitutional safeguards at issue, we determine that the risk that the jury at a minimum was confused by the instruction and at worst thought it was required to consider Abram as having admitted guilt prevents us from concluding that the error was harmless. We cannot say that the jury's verdict on any of the charges was "surely unattributable" to the improper written instruction advising the jury that Abram admitted guilt when he chose not to testify. We

therefore conclude that the error is prejudicial and requires reversal of Abram's convictions for attempted first degree murder, use of a weapon to commit a felony, criminal conspiracy, and tampering with a witness.

Abram May Be Retried on Remand.

[15] Having concluded that the erroneous written instruction was reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Abram's convictions. If it was not, then double jeopardy forbids a remand for a new trial. See *State v. Sorensen*, 283 Neb. 932, 814 N.W.2d 371 (2012). But 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.*

After reviewing the record, we conclude that the evidence presented at trial, including Schramm's and Jerrell's testimony recounted above and the testimony of other witnesses, was sufficient to support the verdicts against Abram. We therefore conclude that double jeopardy does not preclude a remand for a new trial and that Abram may be retried on all the charges—attempted first degree murder, use of a weapon to commit a felony, criminal conspiracy, and tampering with a witness.

We Need Not Consider Abram's Remaining Assignments of Error.

Because we have reversed Abram's convictions, we need not reach his remaining assignments of error. Abram assigned error to issues related to jury selection, evidentiary rulings, and effective assistance of trial counsel. These issues either are not likely to recur on remand or must be evaluated in the context of a particular trial, and therefore review of the court's rulings in this trial would not necessarily determine how the court should rule in a new trial. We therefore do not consider Abram's remaining assignments of error.

CONCLUSION

The filing of Abram's petition for writ of certiorari during the pendency of this action did not divest the district court of

jurisdiction, and the district court did not err when it denied the motion to continue. However, we conclude that the district court did err when it gave a written instruction stating that the jury must consider Abram's refusal to testify as an admission of guilt. Although such error is not structural error, we conclude that the error was not harmless and that it requires reversal of Abram's convictions. Because there was sufficient evidence to support the convictions, we remand the cause for a new trial on the charges of attempted first degree murder, use of a weapon to commit a felony, criminal conspiracy, and tampering with a witness.

REVERSED AND REMANDED FOR A NEW TRIAL.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
EDDIE R. KIBBEE, APPELLANT.
815 N.W.2d 872

Filed July 13, 2012. No. S-11-361.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
3. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
4. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
5. **Constitutional Law.** Under both the federal Constitution, U.S. Const. art. I, § 10, and the state Constitution, Neb. Const. art. I, § 16, no ex post facto law may be passed.
6. **Constitutional Law: Statutes: Sentences.** A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.

7. **Constitutional Law: Appeal and Error.** Ordinarily, Nebraska's ex post facto clause is construed to provide no greater protections than those guaranteed by the federal Constitution.
8. **Constitutional Law: Criminal Law: Statutes.** Any statute which punishes as a crime an act previously committed which was innocent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto.
9. **Criminal Law: Statutes: Time.** Statutes governing substantive matters in effect at the time of a crime govern, and not later enacted statutes. In contrast, the procedural statutes in effect on the date of a hearing or proceeding govern, and not those in effect when the violation took place.
10. ____: ____: ____. A change in law will be deemed to affect matters of substance where it increases the punishment or changes the ingredients of the offense or the ultimate facts necessary to establish guilt.
11. **Constitutional Law: Criminal Law.** There are four types of ex post facto laws: those which (1) punish as a crime an act previously committed which was innocent when done; (2) aggravate a crime, or make it greater than it was, when committed; (3) change the punishment and inflict a greater punishment than was imposed when the crime was committed; and (4) alter the legal rules of evidence such that less or different evidence is needed in order to convict the offender.
12. **Constitutional Law: Rules of Evidence.** Ordinary rules of evidence do not violate the Ex Post Facto Clause. Rules of that nature are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case.
13. **Constitutional Law: Criminal Law: Statutes: Witnesses: Time.** Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage.
14. **Rules of Evidence: Witnesses: Juries: Words and Phrases.** A witness competency rule regulates the manner in which facts may be placed before a jury, while a sufficiency of the evidence rule governs the sufficiency of the facts presented to the jury for meeting the burden of proof.
15. **Constitutional Law: Rules of Evidence: Statutes: Sexual Misconduct: Other Acts.** Neb. Evid. R. 414, Neb. Rev. Stat. § 27-414 (Cum. Supp. 2010), does not violate the Ex Post Facto Clauses of the federal and state Constitutions. It is an ordinary rule of evidence which relates to admissibility and simply provides that evidence of prior sexual misconduct may be admitted to prove propensity.
16. **Rules of Evidence: Sexual Misconduct: Other Acts.** Neb. Evid. R. 414, Neb. Rev. Stat. § 27-414 (Cum. Supp. 2010), expands upon Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010), and governs the admission of evidence of an accused person's other sexual misconduct or sex offenses.
17. **Rules of Evidence.** When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.

18. **Rules of Evidence: Other Acts.** Neb. Evid. R. 414, Neb. Rev. Stat. § 27-414 (Cum. Supp. 2010), provides three factors that a court may consider in balancing the probative value of relevant evidence of prior acts with the danger of prejudice from the admission of that evidence: (1) The probability that the other offense occurred, (2) the proximity in time and intervening circumstances of the other offenses, and (3) the similarity of the other acts to the crime charged.
19. **Other Acts: Evidence: Words and Phrases.** Evidence of prior acts may be admitted where there are an overwhelming number of significant similarities, but the term "overwhelming" does not require a mechanical count of the similarities, but, rather, a qualitative evaluation.
20. **Rules of Evidence: Other Acts: Time.** Remoteness, or the temporal span between a prior crime, wrong, or other act offered as evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010), and a fact to be determined in a present proceeding, goes to the weight to be given to such evidence and does not render the evidence of the other crime, wrong, or act irrelevant and inadmissible.
21. ____: ____: ____. Whether evidence of other conduct is too remote in time is largely within the discretion of the trial court. While remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence.
22. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
23. **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.
24. **Trial: Waiver: Appeal and Error.** One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
25. ____: ____: ____. An issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal.
26. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
27. **Lesser-Included Offenses.** For an offense to be a lesser-included offense, it must be impossible to commit the greater offense without also committing the lesser offense.
28. ____. Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.
29. **Lesser-Included Offenses: Sexual Assault.** Under the strict statutory elements approach, third degree sexual assault is not a lesser-included offense of first degree sexual assault.
30. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
31. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.

32. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.

Appeal from the District Court for Thayer County: VICKY L. JOHNSON, Judge. Affirmed.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

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

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

HEAVICAN, C.J.

NATURE OF CASE

Eddie R. Kibbee was convicted by a jury of first degree sexual assault and felony child abuse. At issue in this appeal is the admission of evidence of Kibbee's prior sexual contacts with minors, which he claims violates Nebraska rules of evidence and the Ex Post Facto Clauses of U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16. We affirm his convictions.

FACTS

INCIDENT

According to Kelsey D., she was 16 years old when Kibbee had sexual contact with her on August 9, 2009. Kelsey testified that on August 8, she went to a teen dance from about 9:30 p.m. to midnight. She had planned to spend the night at the home of Crystal J., for whom Kelsey sometimes babysat. Kelsey had met Kibbee through Crystal, and before going to Crystal's home, Kelsey went to Kibbee's house. When she arrived, only Kibbee's roommate, Bobby W., was present. Around 12:45 or 1 a.m., Kibbee arrived along with several other people, including Kelsey's brother. Kelsey began drinking and had one beer and then a vodka and orange juice drink that Kibbee made for her. Kibbee brought her a second drink, but Kelsey did not finish it because it was "too strong."

Because Kelsey was tired and did not want to walk to Crystal's house, she lay down on the couch in the living room of Kibbee's house. She awoke later to find Kibbee sitting next to her. Kelsey's pants and underwear were around her ankles, and Kibbee was touching her vaginal area with his hands. Kibbee placed his fingers into her vagina. Kelsey tried to turn away from him and told him to stop several times. She asked Kibbee to take her to Bobby. Before Kibbee stopped, he put his mouth on her vagina. Kibbee finally stopped, pulled up Kelsey's pants, kissed her on the cheek, and walked away. He returned to his room without saying anything to Kelsey.

Kelsey testified that she sat and thought about what happened for a couple of minutes and then went into Bobby's room, woke him up, and told him what had happened. She lay down next to Bobby in his bed and fell asleep. She awoke the next day at about 11 a.m. when Kibbee came into the bedroom, touched her foot, and told her the time. Kelsey reported the incident the next evening to her brother, her mother, and law enforcement.

Charges

Kibbee was charged with first degree sexual assault, a Class II felony, for subjecting another person to sexual penetration without consent or when Kibbee knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his conduct, and with child abuse, a Class IIIA felony, for knowingly and intentionally causing or permitting Kelsey, a minor, to be placed in a situation that endangered her life or physical or mental health or to be sexually abused.

Prior Bad Acts Evidence

Before trial, the State filed a notice of intent to offer evidence pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010), to show that (1) Kibbee had provided alcohol to minor females in his residence on several occasions; (2) in August 2009, Crystal attended a party at Kibbee's home, fell asleep, awoke to find her pants around her ankles, and saw Kibbee walking out of the room; and

(3) Kibbee had previously had sexual contact with several females in various towns in Iowa between 1985 and 1995.

The State also filed a notice of intent to offer evidence pursuant to Neb. Evid. R. 414, Neb. Rev. Stat. § 27-414 (Cum. Supp. 2010), of similar offenses committed by Kibbee against four females. Kibbee objected to the § 27-414 notice, arguing that its application violated the ex post facto prohibitions of the federal and state Constitutions because § 27-414 was not in effect on August 8 and 9, 2009, the dates of the offense alleged in the information.

Hearing Under § 27-404(2)

At a hearing to consider the §§ 27-404(2) and 27-414 issues, evidence was received from three women who had previous contacts with Kibbee in Iowa. In a deposition, Melissa C. testified that in 1983, when she was 10 years old, she went to the home of her aunt, Karen P., to babysit her cousins, Jennifer P. and Jackie P. Karen was living with Kibbee in Grinnell, Iowa. Melissa had been asleep on the couch, but she woke up when Kibbee and Karen returned home. Melissa was wearing a nightgown and underwear. She dozed off again and then awoke to find Kibbee sitting on the floor next to her. He was touching the inside of her right leg, and he told Melissa to be quiet because her aunt was in a nearby bedroom with the door open. Melissa said Kibbee moved his hand upward and touched and rubbed her vaginal area and eventually put his finger in her vagina. Melissa believed the incident lasted about 5 minutes. She told Kibbee to stop. He returned to his bedroom, and Melissa stayed on the couch and cried. Melissa did not tell her aunt, but several months later, she told her mother and her mother's boyfriend. Melissa said there was an investigation, but Kibbee was not charged.

Jennifer, Karen's daughter, testified at the pretrial hearing. She was born in 1982, and her mother dated Kibbee from the time Jennifer was about 3 months old. Jennifer said Kibbee abused her mother and physically and sexually abused Jennifer and her sister, Jackie, who is 2 years older. Jennifer's first memories of sexual abuse were when she was approximately 5 years old and they lived in a farmhouse outside of

Brooklyn, Iowa. Jennifer remembered waking up with a pillow over her face and Kibbee's fingers inside her vagina. He also tried to penetrate her with his penis. Jennifer did not tell anyone because Kibbee threatened to kill her mother and sister. Jennifer said that the abuse continued as long as Kibbee lived in the home and that in every instance, she was asleep and woke up to find Kibbee touching her. When Jennifer was 5 or 6 years old, she told her mother about the abuse, but her mother did not believe her or her sister and told them not to tell anyone else. On one occasion, Jennifer observed Jackie tied to a bed while naked and Kibbee at the end of the bed, also naked. When Jennifer was about 11 years old, she and her sister were placed in foster care and they reported Kibbee's actions.

Heather P. also testified by deposition. Heather, who was born in 1982, met Kibbee when she was about 9 or 10 years old and was friends with Jennifer and Jackie. Heather said that she and her sister were helping the family move and that all the beds had been moved to the new residence. The other girls slept on the floor in the bedroom, but Heather was concerned about bugs and did not want to sleep on the floor. Karen told Heather she could sleep on a sofa sleeper with Karen and Kibbee. Karen slept in the middle of the bed. Heather, who wore shorts and a T-shirt to bed, was awakened to feel a man's hand on her stomach. Kibbee moved his hand under her shirt, but Heather put up her arm to block him from being able to touch her breasts. He then moved his hand into the waistband of her shorts, and she moved his hand away and got up. Heather woke up her sister, and they ran home.

Crystal testified that about 1 week before the incident with Kelsey, she had been drinking alcohol at Kibbee's house and awoke on the floor in Bobby's room to find her underwear pulled down to her thighs and her shorts pulled down to her knees. She saw Kibbee in the doorway, and then he closed the door.

The State also offered several exhibits of Kibbee's prior convictions. In 1994, Kibbee was found guilty of assault with intent to commit sexual assault and was sentenced to 2 years'

probation. In February 1995, Kibbee's probation was revoked after he violated an order forbidding him from having contact with children under the age of 18 and failed to obtain an evaluation for sexual abusers. Kibbee was found guilty of aiding and abetting possession of alcohol by a minor in Iowa in 1998 and was fined $100. Kibbee was incarcerated in Illinois from January 11 to November 16, 2006, after being charged with criminal sexual assault.

Trial Court's Ruling

The trial court found clear and convincing evidence that the sexual assaults against Melissa, Jennifer, and Heather had occurred and that there was a high degree of similarity to the act with which Kibbee was charged. It concluded that evidence of these assaults could be presented at trial. The court found insufficient evidence of alleged sexual assaults by Kibbee against Jackie and Crystal.

The court noted the similarities among the events:

> All of the victims were 16 or younger. All were female. They were all approached while asleep in [Kibbee's] home and digitally penetrated or attempted to be penetrated. All were known to [Kibbee]. Three were visitors to his home; the other lived in his home. Admittedly, there is a significant time lapse between the occurrence of some of the acts and the current crime; however, these incidents are highly probative. The number of victims and assaults on the victims follow serially beginning in approximately 1983, with some gaps, until the present assault. This fact is also probative.

Having found clear and convincing evidence that the other sexual assaults were committed by Kibbee, the court then found that the prior sexual assaults could be admitted to show motive, opportunity, preparation, or plan and that the admission would not be unduly prejudicial to Kibbee. However, the court determined that evidence related to Kibbee's supplying alcohol to minors had limited probative value and would be unduly prejudicial. The court overruled Kibbee's ex post facto objections.

"JUDICIAL ADMISSIONS"

Prior to trial, Kibbee filed "Judicial Admissions," in which he admitted that he had sexual contact with Kelsey on August 9, 2009. He stated that Kelsey, her brother, Bobby, Crystal, and Crystal's friend were all present and all consumed alcoholic beverages. Kibbee stated that Kelsey fell asleep on the couch around 2 or 2:30 a.m. Kelsey's brother, Crystal, and Crystal's friend left the residence, and Kibbee and Bobby went to their bedrooms. Around 4:30 or 5 a.m., Kibbee left his bedroom and knelt on the floor next to Kelsey, who was on the couch. Kelsey's pants and underwear were around her ankles. Kibbee admitted that he touched Kelsey in her groin area with his hand and that Kelsey told him to stop. Kelsey turned on her side, pushed Kibbee away, and covered her vaginal area with her legs. Kibbee said he then stopped touching Kelsey, but he kissed her one last time on the face, pulled up her underwear and pants, and walked out of the living room. Kibbee admitted that his actions in kissing and touching Kelsey were an attempt to sexually stimulate her for the purpose of Kibbee's own sexual gratification and not for a medical or health reason.

Kibbee also filed a motion in limine asking that the State be precluded from presenting evidence regarding Kibbee's sexual activity with the three women from Iowa, since his judicial admissions resolved all factual issues except whether Kelsey was subjected to sexual penetration without her consent or whether Kibbee knew or should have known that Kelsey was mentally or physically incapable of resisting or appraising the nature of Kibbee's conduct. Kibbee argued that motive, opportunity, preparation, and plan are not essential elements of first degree sexual assault and that the prior bad acts evidence should not be admitted.

The court overruled Kibbee's motion in limine, determining that § 27-414 allowed the testimony of the witnesses for any relevant purpose.

JURY TRIAL

During trial, and prior to the testimony of the women from Iowa, the court gave a limiting instruction based on § 27-414. The instruction explained that evidence of the commission of

another offense of sexual assault is admissible and may be considered for any relevant matter, including the similarities of the offenses, to show Kibbee's motive, opportunity, preparation, or plan. However, evidence of a prior offense on its own is not sufficient to prove Kibbee guilty.

The jury found Kibbee guilty of both charges. He was sentenced to a prison term of 30 to 40 years for the sexual assault conviction and to a prison term of 4 to 5 years for the child abuse conviction. The sentences were ordered to be served concurrently to each other, but consecutively to the sentences imposed in any other case. Kibbee was given credit for 464 days served.

ASSIGNMENTS OF ERROR

Kibbee assigns the following errors: The trial court erred in (1) admitting evidence of Kibbee's prior sexual contacts with minors in Iowa, in violation of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), and § 27-404; (2) admitting evidence of prior sexual contact with minors under § 27-414, in violation of the Ex Post Facto Clauses of the U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16; (3) admitting evidence of prior sexual contacts with minors to show character and propensity contrary to § 27-403, if § 27-414 was applicable; (4) rejecting Kibbee's judicial admissions to avoid prejudice associated with the Iowa bad acts evidence; (5) overruling Kibbee's motion for a mistrial after his judicial admissions were offered as part of the State's case in chief during the trial; and (6) failing to instruct the jury on the lesser-included offense of third degree sexual assault after the judicial admissions were received into evidence.

STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[1] Where the Nebraska Evidence Rules commit the

[1] *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[2]

[3] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.[3]

[4] Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[4]

ANALYSIS

Alleged Violation of Ex Post Facto Clause

Kibbee argues that the trial court erred in admitting evidence of his prior sexual contacts with minors under § 27-414, because the statute was not in effect at the time of the sexual contact with Kelsey. The statute was adopted by the Legislature in 2009 and became operative on January 1, 2010. Thus, Kibbee asserts that admission of the evidence violated the Ex Post Facto Clauses of U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16.

Section 27-414 provides in part:

> (1) In a criminal case in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense or offenses of sexual assault 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.

[5-7] Under both the federal Constitution, U.S. Const. art. I, § 10, and the state Constitution, Neb. Const. art. I, § 16,

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[2] *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

[3] *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[4] *State v. Nolan, supra* note 2.

no ex post facto law may be passed.[5] "A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts."[6] Ordinarily, Nebraska's ex post facto clause is construed to provide no greater protections than those guaranteed by the federal Constitution.[7]

[8-10] We have held:

> Any statute which punishes as a crime an act previously committed which was innocent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto. The Ex Post Facto Clause does not, however, extend to limit legislative control of remedies and modes of procedure which do not affect matters of substance. Thus, statutes governing substantive matters in effect at the time of a crime govern, and not later enacted statutes. In contrast, the procedural statutes in effect on the date of a hearing or proceeding govern, and not those in effect when the violation took place.
>
> A change in law will be deemed to affect matters of substance where it increases the punishment or changes the ingredients of the offense or the ultimate facts necessary to establish guilt. In other words, a rule is substantive if it alters the range of conduct or the class of persons that the law punishes. In contrast, rules that regulate only the manner of determining a defendant's culpability are procedural.[8]

[11] The U.S. Supreme Court has identified four types of laws which may violate the proscription against ex post facto

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[5] See *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010).

[6] *Id.* at 503, 779 N.W.2d at 338-39.

[7] See *id.*

[8] *State v. Galindo*, 278 Neb. 599, 614-15, 774 N.W.2d 190, 210 (2009) (emphasis omitted).

laws. In *Carmell v. Texas*,[9] the Court cited Justice Chase, who, in *Calder v. Bull*,[10] cataloged the types of ex post facto laws as those which (1) punish as a crime an act previously committed which was innocent when done; (2) aggravate a crime, or make it greater than it was, when committed; (3) change the punishment and inflict a greater punishment than was imposed when the crime was committed; and (4) alter the legal rules of evidence such that less or different evidence is needed in order to convict the offender.[11]

The *Carmell* Court determined that an amended Texas statute was an ex post facto law under the fourth category. The law in effect at the time the crime was committed required both the victim's testimony and corroborating evidence, and the amended law provided that the defendant could be convicted based only on the victim's testimony. "A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof."[12] In each of those instances, "the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction."[13]

[12] However, in a footnote, the Court stated:

> We do not mean to say that every rule that has an effect on whether a defendant can be convicted implicates the *Ex Post Facto* Clause. Ordinary rules of evidence, for example, do not violate the Clause. . . . Rules of that nature are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case. More crucially, such rules, by simply permitting evidence to be admitted at trial, do not at all subvert the

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[9] *Carmell v. Texas*, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000).

[10] *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798).

[11] *Carmell v. Texas, supra* note 9; *Calder v. Bull, supra* note 10.

[12] *Carmell v. Texas, supra* note 9, 529 U.S. at 532.

[13] *Id.*, 529 U.S. at 533.

> presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption. Therefore, to the extent one may consider changes to such laws as "unfair" or "unjust," they do not implicate the same *kind* of unfairness implicated by changes in rules setting forth a sufficiency of the evidence standard. Moreover, while the principle of unfairness helps explain and shape the Clause's scope, it is not a doctrine unto itself, invalidating laws under the *Ex Post Facto* Clause by its own force.[14]

[13] In *Carmell*, the State of Texas argued that the case was controlled by *Hopt v. Utah*[15] and *Thompson v. Missouri*.[16] In *Hopt*, the Court held that there was no violation of the Ex Post Facto Clause by an amended law that allowed a convicted felon to testify as a witness against the defendant at trial.

> Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not . . . alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.[17]

In *Thompson*, the Court also found no ex post facto violation by an amended statute that allowed the introduction of expert handwriting testimony when such evidence had not previously been permitted.[18]

[14] The *Carmell* Court distinguished *Hopt* and *Thompson* by noting that the statute at issue was not a witness competency rule, which regulates the manner in which facts may be placed before a jury, but, rather, a sufficiency of the evidence rule, which governs the sufficiency of the facts presented to

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[14] *Id.*, 529 U.S. at 533 n.23.

[15] *Hopt v. Utah*, 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262 (1884).

[16] *Thompson v. Missouri*, 171 U.S. 380, 18 S. Ct. 922, 43 L. Ed. 204 (1898).

[17] *Hopt v. Utah, supra* note 15, 110 U.S. at 589-90.

[18] *Thompson v. Missouri, supra* note 16.

the jury for meeting the burden of proof.[19] A rule governing the sufficiency of the evidence would always run in the prosecution's favor because it will always make it easier to convict. However, a witness competency rule could assist either the State or the defendant. For example, a felon witness might help a defendant if the felon is able to relate credible exculpatory evidence.[20] "The issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant. Evidence admissibility rules do not go to the general issue of guilt, nor to whether a conviction, as a matter of law, may be sustained."[21] The Court noted that while prosecutors may meet all the requirements of witness competency rules, they may not have introduced sufficient evidence to convict the offender. Sufficiency of the evidence rules inform as to whether the evidence is sufficient to convict as a matter of law, which does not mean that the jury must convict.[22] The law at issue in *Carmell* was deemed to violate the proscription against ex post facto laws.

Like *Carmell*, the fourth category of ex post facto laws is at issue in the case at bar. We must determine whether § 27-414 altered the legal rules of evidence such that less or different evidence was needed in order to convict Kibbee. We conclude that it did not.

Section 27-414 provides that evidence of a prior sexual assault is admissible "if there is clear and convincing evidence otherwise admissible under the Nebraska Evidence Rules." As such, it governs the admissibility of evidence, not its sufficiency.

In *Schroeder v. Tilton*,[23] the Court of Appeals for the Ninth Circuit affirmed the determination by the state trial court that admission of evidence of the defendant's prior sex crimes

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[19] *Carmell v. Texas, supra* note 9.

[20] See *id.*

[21] *Id.*, 529 U.S. at 546.

[22] *Carmell v. Texas, supra* note 9.

[23] *Schroeder v. Tilton*, 493 F.3d 1083 (9th Cir. 2007).

did not violate the Ex Post Facto Clause. The defendant was charged in 1999 with five counts of sexual misconduct for events that took place in January 1994. The State introduced evidence of prior uncharged conduct, which the court admitted under § 1108 of the California Evidence Code. Section 1108 had become effective in 1996—after the commission of the charged offenses but prior to trial.

Section 1108 provides in part: "'In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.'"[24]

On appeal, the defendant argued that applying § 1108 to him violated the Ex Post Facto Clause of the federal Constitution. The appellate court held that § 1108 was not the type of rule contemplated by *Carmell* because it "'deems more evidence relevant and makes more evidence admissible, but it does not thereby eliminate or lower the quantum of proof required or in any way reduce the prosecutor's burden of proof. The prosecutor still had to prove the same elements beyond a reasonable doubt to convict defendant.'"[25]

The defendant sought habeas corpus relief and again argued that the state court violated the Ex Post Facto Clause when it admitted evidence of his prior sexual misconduct under § 1108.

The court noted that evidence of the commission of another sexual offense was admissible if it did not violate California's general ban on the use of propensity evidence.[26] A balancing was still required to determine whether the probative value of the evidence substantially outweighed the probability that the admission of the evidence would necessitate undue consumption of time or create danger of prejudice, of confusing the issues, or of misleading the jury.[27]

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[24] *Id.* at 1086, quoting Cal. Evid. Code § 1108(a) (West 2009).

[25] *Id.* at 1086.

[26] *Schroeder v. Tilton, supra* note 23, citing Cal. Evid. Code § 1101(b) (West 2009).

[27] *Id.*, citing Cal. Evid. Code § 352 (West 2011).

The court stated: "In sum, § 1108 creates an exception to the general ban on propensity evidence, so that evidence of prior sexual misconduct may be presented to the jury to demonstrate propensity to commit the crime charged, provided that the prejudicial value of that evidence does not substantially outweigh its probative value."[28]

The *Schroeder* court noted that in *Carmell*, the Court held that the amended law violated the Ex Post Facto Clause because it "'changed the quantum of evidence necessary to sustain a conviction.'"[29] Thus, "*Carmell* distinguished ordinary rules of evidence, which govern admissibility or competency, for example, from those rules that affect the sufficiency of the evidence."[30]

However, in *Schroeder*, it was not error to conclude that § 1108 is an ordinary rule of evidence and that it does not violate the Ex Post Facto Clause. The statute "simply states that evidence of prior uncharged sexual misconduct may be admitted to prove propensity."[31] It does not address the sufficiency of the evidence made admissible by the law. Section 1108 relates to admissibility, not sufficiency, as nothing in the statute "suggests that the admissible propensity evidence would be sufficient, by itself, to convict a person of any crime."[32] The court concluded that § 1108 did not affect the quantum of evidence sufficient to convict the defendant. It held that there was no violation of the defendant's right to be free from retroactive punishment.[33]

Other jurisdictions have also found that a statute similar to § 27-414 does not violate the Ex Post Facto Clause. In Louisiana, a statute provided that evidence of the commission of another sexual offense may be admissible and may be

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[28] *Id.* at 1087.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 1088.

[32] *Id.*

[33] *Id.*

considered for any matter to which it is relevant subject to a balancing test.[34] The appellate court found that evidence of prior sex crimes was admissible to prove propensity and was not unfairly prejudicial since a limiting instruction was given to the jury.[35]

A Texas statute was amended to provide that evidence of other crimes committed by the defendant against the child victim shall be admitted for relevant matters.[36] The defendant argued that the statute, which was amended between the dates of the offenses and the date of his trial, was an ex post facto law. The court disagreed, finding that the "statute enlarges the scope of the child's admissible testimony, but leaves untouched the amount or degree of proof required for conviction."[37] The statute "eliminates the necessity of showing the evidence falls within one of the Rule 404(b) exceptions. [B]ut, in no way does it alter the quantum of proof required by law to support the conviction."[38]

In Oklahoma, the appellate court stated that "[t]he mere fact that a retroactively-applied change in evidentiary rules works to a defendant's disadvantage does not mean the law is *ex post facto*. The issue is whether the change affected the quantum of evidence necessary to support a conviction."[39] It found no ex post facto violation by the admission of testimony about other acts of sexual abuse.

A Washington statute that permitted, but did not require, admission of evidence of prior sexual offenses did not violate ex post facto laws.[40] The court disagreed with the defendant's argument that sex offense evidence is propensity evidence that reduces the quantum of evidence the State must produce in

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[34] *State v. Willis*, 915 So. 2d 365 (La. App. 2005).

[35] *Id.*

[36] *McCulloch v. State*, 39 S.W.3d 678 (Tex. App. 2001).

[37] *Id.* at 684.

[38] *Id.*

[39] *James v. State*, 204 P.3d 793, 795 (Okla. Crim. App. 2009).

[40] *State v. Scherner*, 153 Wash. App. 621, 225 P.3d 248 (2009).

order to convict. It found that the statute did not "subvert the presumption of innocence because it does not concern whether the admitted evidence is sufficient to overcome the presumption of innocence."[41] In addition, the statute expressly retained the trial court's ability to balance probative value against prejudicial effect.[42]

In the case at bar, § 27-414 is similar to the California statute discussed in *Schroeder*. Section 27-414 states, in pertinent part:

> (1) In a criminal case in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense or offenses of sexual assault 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.

The California statute allows evidence of the defendant's commission of another sexual offense if the offense is not inadmissible for relevancy. The *Schroeder* court determined that the statute did not affect the quantum of evidence sufficient to convict the defendant.[43] The same is true in this case.

[15] Section 27-414 does not violate the Ex Post Facto Clauses of the federal and state Constitutions. The statute does not affect the sufficiency of the evidence and does not change the quantum of evidence needed for conviction. It is an ordinary rule of evidence which relates to admissibility and simply provides that evidence of prior sexual misconduct may be admitted to prove propensity. The statute does not suggest that the admissible propensity evidence would be sufficient, by itself, to convict a person of any crime. The trial court did not err in finding that § 27-414 does not violate the Ex Post Facto Clauses of the federal and state Constitutions.

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[41] *Id*. at 642, 225 P.3d at 257.

[42] *Id*.

[43] *Schroeder v. Tilton, supra* note 23.

Admission of Evidence of Prior Acts

Kibbee argues that the trial court erred in admitting evidence of prior sexual contacts with minors in Iowa in violation of §§ 27-403 and 27-404. In addition, he claims that even if this court determines that § 27-414 does not violate ex post facto laws and is therefore applicable here, the Iowa bad acts evidence was not admissible "propensity" evidence under § 27-414 because it was prejudicial and its admission substantially outweighed its relevance as set out in § 27-403.

Although the trial court analyzed the admission of the evidence under § 27-404, we find that the first step in determining whether evidence of prior sexual contacts should be admitted is to review the evidence pursuant to § 27-414. Having conducted such a review, we find no error in the admission of prior acts evidence under § 27-414, and therefore, we do not find it necessary to conduct a separate analysis under § 27-404(2).

In relevant part, § 27-414 provides:

> (3) Before admitting evidence of the accused's commission of another offense or offenses of sexual assault under this section, the court shall conduct a hearing outside the presence of any jury. At the hearing, the rules of evidence shall apply and 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.

The trial court followed the procedure of the statute, conducting a hearing outside the presence of the jury. After receiving evidence of Kibbee's previous sexual contacts with minors, the court found by clear and convincing evidence that the State had proved that three of the sexual assaults had occurred. The court then conducted a balancing test under § 27-403 and found similarities among the previous events sufficient to conclude that the evidence was probative.

This court has not yet addressed the application of § 27-414, except to note that § 27-404 had been amended to permit the admission of evidence of a prior sexual assault offense.[44] Section 27-414 was not in effect at the time of the trials in those cases and therefore did not affect our analysis.

Evidence of prior bad acts in sexual assault cases was previously governed solely by § 27-404(2), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[16] Section 27-414 expands upon the admission of evidence of an accused person's other sexual misconduct or sex offenses.[45] It was intended to "harmonize[] provisions in Neb. Rev. Stat. § 27-404 and incorporate[] the applicable federal ev[i]dentiary threshold."[46] Senator Mike Flood, who introduced the bill, stated that it

> puts Nebraska in line with a growing number of other jurisdictions, including the federal government, who have liberalized the admission of other crimes in sex offense cases. It is important to note that such evidence of other sex offenses is not automatically admitted. The court must subject this other crimes evidence to the probative value versus unfair prejudice balancing test found in Section 27-403 in the Nebraska rules of evidence.[47]

The federal rule of evidence from which § 27-414 is drawn provides that when a defendant is accused of an offense of sexual assault, evidence of another sexual assault offense is admissible, as long as it is relevant.[48] Evidence found

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[44] See, *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011); *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011).

[45] Introducer's Statement of Intent, L.B. 39, 101st Leg., 1st Sess. (Mar. 19, 2009).

[46] *Id.*

[47] Floor Debate, L.B. 39, 101st Leg., 1st Sess. 4 (Apr. 22, 2009).

[48] See Fed. R. Evid. 413(a).

admissible under federal rule 413 is still subject to exclusion under federal rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice.[49] The Court of Appeals for the Eighth Circuit has stated that the federal rules were intended to allow the jury to consider a defendant's prior bad acts in the area of sexual abuse for the purpose of showing propensity.[50]

In *U.S. v. Benais*,[51] the court held that in a trial for a second rape, testimony from a first rape victim was admissible because it carried probative value that was not substantially outweighed by the danger of unfair prejudice. "The evidence was probative and the only prejudice was that prejudice made admissible by Rule 413. There was no unfair prejudice as required for exclusion under Rule 403."[52]

Federal rule of evidence 413 "address[es] propensity evidence in the context of sexual assault" and "provide[s] an exception to the general rule codified in Rule 404(a), which prohibits the admission of evidence for the purpose of showing a defendant's propensity to commit bad acts."[53] Rule 413 has three threshold requirements: The court must determine that the defendant is accused of an offense of sexual assault, then it must find that the evidence proffered is evidence of the defendant's commission of another offense of sexual assault, and then it must determine, as with all evidence, that it is relevant.[54] "A defendant with a propensity to commit acts similar to the charged crime is more likely to have committed the charged crime than another. Evidence of such a propensity is therefore relevant."[55]

The federal court has held that "Rule 413 supersedes Rule 404(b)'s restriction and allows the government to offer

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[49] *U.S. v. Benais*, 460 F.3d 1059 (8th Cir. 2006). See Fed. R. Evid. 403.

[50] *U.S. v. Benais, supra* note 49.

[51] *Id.*

[52] *Id.* at 1063 (emphasis omitted).

[53] *U.S. v. Benally*, 500 F.3d 1085, 1089 (10th Cir. 2007).

[54] *Id.*, citing *U.S. v. Guardia*, 135 F.3d 1326 (10th Cir. 1998).

[55] *U.S. v. Guardia, supra* note 54, 135 F.3d at 1328.

evidence of a defendant's prior conduct for the purpose of demonstrating a defendant's propensity to commit the charged offense."[56]

In *U.S. v. Holy Bull*,[57] the Court of Appeals for the Eighth Circuit stated:

> Evidence of prior bad acts is generally not admissible to prove a defendant's character or propensity to commit crime. Fed.R.Evid. 404(b). However, Congress altered this rule in sex offense cases when it adopted Rules 413 and 414 of the Federal Rules of Evidence. After the adoption of Rules 413 and 414, in sexual assault and child molestation cases, evidence that the defendant committed a prior similar offense "may be considered for its bearing on any matter to which it is relevant," including the defendant's propensity to commit such offenses. Fed.R.Evid. 413(a), 414(a). If relevant, such evidence is admissible unless its probative value is "substantially outweighed" by one or more of the factors enumerated in Rule 403, including "the danger of unfair prejudice." *United States v. LeCompte*, 131 F.3d 767, 769 (8th Cir.1997).

[17] When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.[58]

> In Rule 413 cases, the risk of prejudice will be present to varying degrees. Propensity evidence, however, has indisputable probative value. That value in a given case will depend on innumerable considerations, including the similarity of the prior acts to the acts charged, . . . the closeness in time of the prior acts to the charged acts, . . . the frequency of the prior acts, the presence or lack of intervening events, . . . and the need for evidence beyond the testimony of the defendant and alleged victim.[59]

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[56] *Id.* at 1329.

[57] *U.S. v. Holy Bull*, 613 F.3d 871, 873 (8th Cir. 2010).

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

[59] *U.S. v. Guardia, supra* note 54, 135 F.3d at 1331.

[18] Because this is our first consideration of § 27-414, we have not specifically discussed the factors which may need to be taken into consideration in determining whether evidence of a prior sexual assault may be admitted. The statute itself provides three factors that the court may consider in the balancing test: "(a) [T]he 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."[60]

In considering the probability that the other offense occurred, we have noted:

> "[E]vidence of repeated incidents may be especially relevant in proving sexual crimes committed against persons otherwise defenseless due to age—either the very young or the elderly. Without proof by other acts of a defendant, sexual offenses against the defenseless, except in cases of the fortuitous presence of an eyewitness, would likely go unpunished."[61]

As for similarities between previous contacts and those on which current charges are based, we found a number of likenesses in the facts of prior sexual assaults in *State v. Carter*.[62] The issue was whether evidence could be admitted that the defendant, who was charged with murder in the first degree in the commission of a sexual assault, had previously had recurring sexual contact with his two daughters and his half sister. We noted a number of similarities between the sexual assaults of his daughters and half sister and the victim in that case: All assaults occurred when the victims were between the ages of 6 and 11; all of the victims were subjected to multiple assaults; all assaults occurred at the defendant's residence, his mother's residence, or the victim's residence; all of the victims had either a familial or a family-like relationship to the defendant; all assaults occurred while the defendant had

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[60] § 27-414(3).

[61] *State v. Stephens*, 237 Neb. 551, 556, 466 N.W.2d 781, 785-86 (1991), quoting *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

[62] *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997).

custody or was in complete control of the victims; and each of the victims was incapable of giving consent.[63] We also noted some differences, but found they did not compel the exclusion of the evidence. "An absolute identity in every detail cannot be expected."[64]

[19] We held that evidence of prior acts may be admitted where there are "an overwhelming number of significant similarities," but "'[t]he term "overwhelming" does not require a mechanical count of the similarities but, rather, a qualitative evaluation.'"[65]

In the case at bar, we see a number of similarities between the prior acts and the acts upon which the charges are based. All of the victims were under the age of majority at the time the sexual assault occurred. Melissa and Heather were both awakened to find Kibbee touching them inappropriately. Melissa reported that Kibbee was sitting on the floor next to her, similar to the report by Kelsey that Kibbee was kneeling on the floor next to her when he digitally penetrated her. Kibbee digitally penetrated both Melissa and Heather. Jennifer reported similar abuse when she was awakened by Kibbee's touching her. She also reported Kibbee's digitally penetrating her and attempting to penetrate her with his penis. All of the victims knew Kibbee. He was living with Melissa's aunt at the time of the assault on Melissa. Heather was friends with the daughters of the woman with whom Kibbee was living. And Jennifer was the daughter of that woman.

We determine that there were sufficient similarities between Kibbee's prior acts and the charged acts. Kelsey was a visitor in Kibbee's house who fell asleep on the couch. She was awakened to find Kibbee sitting next to her and her pants and underwear around her ankles. Kibbee touched her vaginal area and digitally penetrated her. She knew Kibbee prior to the incident.

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[63] *Id.*

[64] *Id.* at 964-65, 524 N.W.2d at 773.

[65] *Id.* at 965, 524 N.W.2d at 773, quoting *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993).

Another factor which we must take into consideration is the closeness in time of the prior acts to the charged acts. The Iowa acts took place between 1983 and 1995, and the assault against Kelsey took place in 2009.

This court has previously considered the question whether prior acts were too remote in time to be admitted into evidence, although the analysis was conducted pursuant to § 27-404(2). We find that it applies to our analysis under § 27-414.

[20] In *State v. Yager*,[66] the defendant argued that evidence of sexual contacts which occurred from 11 to 20 years prior to trial was too remote to be relevant. After stating that the evidence was relevant to prove motive, intent, and absence of mistake, we stated that the admissibility of evidence concerning other conduct must be determined upon the facts of each case. "[N]o exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is too remote."[67]

> "[R]emoteness, or the temporal span between a prior crime, wrong, or other act offered as evidence under Rule 404(2) and a fact to be determined in a present proceeding, goes to the weight to be given to such evidence and does not render the evidence of the other crime, wrong, or act irrelevant and inadmissible."[68]

[21] We concluded that the prior acts were actually committed between 6 and 9 years earlier and were properly admitted into evidence. The question whether evidence of other conduct "is too remote in time is largely within the discretion of the trial court. While remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence."[69]

Evidence of sexual contacts which began 27 years before the incident on which the charges were based was found

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[66] *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990).

[67] *Id.* at 485, 461 N.W.2d at 744.

[68] *Id.* at 486, 461 N.W.2d at 745, quoting *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989).

[69] *Id.* at 486, 461 N.W.2d at 745.

admissible in *State v. Stephens*.[70] The defendant was charged with sexually assaulting his infant granddaughter, and at trial, his 32-year-old stepdaughter testified that the defendant had sexual contact with her repeatedly over a substantial period of time, starting when she was a child between the ages of 4 and 5. The defendant argued that the contacts were temporally too remote and untrustworthy to have been admitted.

The court noted that the admission of all evidence is subject to the overriding protection of § 27-403, which provides for the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[71] We stated: "The high degree of similarity between the prior acts when his stepdaughter was between 4 and 5 years old and the circumstances surrounding the charged offense here counterbalances the remoteness of the events, leaving us with a solidly positive probative value."[72]

In a case in which the prior act occurred 10 years earlier, this court stated:

> [N]o exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is remote. The question of remoteness in time is largely in the sound discretion of the trial court; while remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence.[73]

Section 27-414 requires the trial court to apply a balancing under § 27-403, and provides that the evidence shall be admitted unless the risk of prejudice substantially outweighs the probative value of the evidence. In this case, the trial court found that there was a high probability that the offenses in Iowa

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[70] *State v. Stephens, supra* note 61.

[71] *Id.*

[72] *Id.* at 558, 466 N.W.2d at 787.

[73] *State v. Kern*, 224 Neb. 177, 185-86, 397 N.W.2d 23, 29 (1986).

occurred and that while they were somewhat remote in time, there was a high degree of similarity to the acts with which Kibbee was charged. The court declined to admit evidence of two other incidents. It conducted a balancing under § 27-403 and determined that the incidents were highly probative, even though there was a significant time lapse between the occurrence of some of the acts and the current crime. The court stated, "The number of victims and assaults on the victims follow serially beginning in approximately 1983, with some gaps, until the present assault. This fact is also probative." The court concluded that the prior sexual assaults could be admitted to show motive, opportunity, preparation, or plan under § 27-404(2) and that the admission of the prior bad acts was not unduly prejudicial to Kibbee.

Each of the Iowa offenses was strikingly similar to the acts charged in the present case. The evidence of the incidents was relevant under the circumstances. The probative value of the evidence of the prior bad acts outweighed any prejudicial effect.

In addition, the trial court gave the jury a limiting instruction concerning the testimony of the victims of the prior acts in Iowa. The instruction stated:

> The testimony of Heather . . . , Melissa . . . , and Jennifer . . . relates to [Kibbee's] commission of other instances of sexual assault or child molestation.
>
> In a criminal case in which [Kibbee] is accused of an offense of sexual assault, evidence of [Kibbee's] commission of another offense or offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant including the similarities of the other offenses for the purpose of determining the credibility of [Kelsey] or for the purpose of showing [Kibbee's] motive, opportunity, plan or preparation as it relates to the sexual assault charge. However, evidence of a prior offense on its own is not sufficient to prove [Kibbee] guilty of the crime charged. Bear in mind as you consider this evidence, at all times the State has the burden of proving that [Kibbee] committed each of the elements of the offense charged. I remind you that [Kibbee]

> is not on trial for any act, conduct or offense not charged in the Information.

The trial court's instruction clearly directed the jury as to the limited use of the evidence.[74] The trial court did not err in admitting the evidence of prior acts.

KIBBEE'S JUDICIAL ADMISSIONS

Kibbee next argues that the trial court erred when it refused to receive into evidence his judicial admissions and allowed the evidence of the prior bad acts.

Kibbee cites *Old Chief v. United States*[75] for support. In that case, the defendant, who was charged with assault with a dangerous weapon and use of a firearm in a crime of violence, offered to stipulate that he was a convicted felon, rather than allowing the State to enter into evidence the full record of his previous conviction. The Court held that a trial court abused its discretion in refusing to allow the defendant to concede the fact of a prior conviction and instead admitting the full record of a prior judgment. The Court stated that the name or nature of the prior offense raised the risk of a tainted verdict when the purpose of the evidence was solely to prove the element of the prior conviction.[76] The Court stated:

> [T]he accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of

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[74] *State v. Carter, supra* note 62.

[75] *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

[76] *Id.*

> narrative evidence, an assurance that the missing link is really there is never more than second best.[77]

The Nebraska Court of Appeals has held that "[t]he 'forced acceptance' of a stipulation of convicted felon status is a narrow exception to the general rule that the State is allowed to choose how it proves the elements of the charges it has lodged against the defendant."[78]

Kibbee's case differs from *Old Chief*, in which the defendant sought to stipulate to the fact that he was a convicted felon. Kibbee's judicial admissions did not admit to any element of first degree sexual assault. He admitted only to sexual contact without the victim's consent and without serious personal injury, which is an element of third degree sexual assault.[79] The State had the burden to prove beyond a reasonable doubt all elements of first degree sexual assault. It was entitled to use the evidence of the prior bad acts from Iowa, which we have found to be admissible under §§ 27-403 and 27-414. The evidence in *Old Chief* concerned only the status of the defendant, not an element of the crime. We find no error in the trial court's refusal to allow Kibbee's judicial admissions as a substitute for the §§ 27-403 and 27-414 evidence.

[22-25] We also note that Kibbee argues that his right to a fair trial under the Due Process Clause was denied by seemingly contradictory positions taken by the State. Prior to trial, the State had objected to Kibbee's judicial admissions. However, at the end of its case in chief, the State read the judicial admissions into evidence. We find no error, because Kibbee did not object when the State offered the admissions into evidence. Nor did he object when the State asked to read the admissions to the jury. Failure to make a timely objection waives the right to assert prejudicial error on appeal.[80] 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

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[77] *Id.*, 519 U.S. at 189.

[78] *State v. McDaniel*, 17 Neb. App. 725, 732, 771 N.W.2d 173, 180 (2009).

[79] See Neb. Rev. Stat. § 28-320 (Reissue 2008).

[80] *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

resolving an issue never presented and submitted to it for disposition.[81] One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.[82] An issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal.[83] The trial court did not err in allowing the State to read the judicial admissions to the jury.

[26] Kibbee also claims that the court erred in overruling his motion for mistrial after the State read the judicial admissions into evidence. A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.[84] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.[85] We find no abuse of discretion in the trial court's denial of Kibbee's motion for a mistrial.

Lesser-Included Offense

Finally, Kibbee argues that the trial court erred in refusing to instruct the jury on third degree sexual assault as a lesser-included offense of first degree sexual assault.

[27] The Nebraska Court of Appeals has held, in *State v. Schmidt*,[86] that under the strict statutory elements approach, sexual assault in the third degree is not a lesser-included offense of sexual assault in the first degree. For an offense to be a lesser-included offense, it must be impossible to commit the greater offense without also committing the lesser offense.[87]

> In examining the elements of each crime, it is possible to have sexual penetration as defined without having

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[81] *Id*.

[82] See *id*.

[83] See *id*.

[84] *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011).

[85] *State v. Huff, supra* note 3.

[86] *State v. Schmidt*, 5 Neb. App. 653, 562 N.W.2d 859 (1997).

[87] See *id*.

> sexual contact as defined. Whereas the latter requires that the sexual contact be "for the purpose of sexual arousal or gratification," the former does not require the same. Because the crime of first degree sexual assault can be committed without at the same time committing third degree sexual assault, the latter is not a lesser-included offense.[88]

[28,29] This court denied further review of the *Schmidt* decision. And we have not changed our approach to determining whether an offense is a lesser-included one: Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.[89] We therefore adopt the reasoning of the Court of Appeals in *Schmidt* and hold that under the strict statutory elements approach, third degree sexual assault is not a lesser-included crime of first degree sexual assault.

[30-32] Whether jury instructions given by a trial court are correct is a question of law.[90] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.[91] The trial court did not err in overruling Kibbee's objection to the jury instruction stating that third degree assault is not a lesser-included offense of first degree sexual assault. All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.[92]

CONCLUSION

There is no merit to any of Kibbee's assigned errors, and the convictions and sentences are affirmed.

AFFIRMED.

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[88] *Id.* at 675-76, 562 N.W.2d at 875-76.

[89] *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

[90] *Id.*

[91] *Id.*

[92] *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

KELLY ROSBERG AND PAUL ROSBERG, APPELLANTS, V. GERALD VAP AND ROD JOHNSON, APPELLEES.

815 N.W.2d 867

Filed July 13, 2012. No. S-11-734.

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 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 a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law that an appellate court independently reviews.
4. ____: ____. An appellate court gives statutory language its plain and ordinary meaning.
5. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court gives effect to the purpose and intent of the Legislature as ascertained from the entire language of a statute considered in its plain, ordinary, and popular sense.
6. **Public Service Commission: Legislature: Intent.** The Legislature did not intend service on the Public Service Commission to be read as a profession for which one must be in good standing according to the established standards of that profession.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Kelly Rosberg and Paul Rosberg, pro se.

Mark A. Fahleson and Tara L. Tesmer, of Rembolt Ludtke, L.L.P., for appellees.

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

CONNOLLY, J.

Kelly Rosberg and Paul Rosberg challenge the results of elections for seats on the Public Service Commission (PSC). Kelly and Paul lost in the primaries to Gerald Vap and Rod Johnson, respectively. After the general election, the Rosbergs filed suit in the district court for Lancaster County, claiming

that Vap and Johnson were ineligible for the seats. The district court rejected the Rosbergs' claims and granted summary judgment to Vap and Johnson. We affirm.

BACKGROUND

Both of the Rosbergs ran for seats on the PSC. Paul ran for the seat in district 4. Although Paul lost in the primary and received only write-in votes in the general election, Paul claims that he received the most votes of the eligible candidates at the general election because the person who was named the winner of the election, Johnson, was ineligible. Paul claimed that because Johnson had an occupation other than public service commissioner,[1] he was not thus "in good standing" with his profession,[2] and that therefore Johnson was ineligible for the seat.

Kelly ran for the seat in district 5. Kelly lost to Vap in the primary. Nevertheless, Kelly received write-in votes in the general election. Based on the write-in votes, Kelly claimed that she received the most votes of any qualified candidates. Kelly makes the same argument as Paul. She claimed that because Vap had an occupation other than the PSC, he was not "in good standing" with his profession and therefore ineligible for the seat.

Vap and Johnson eventually moved for summary judgment. The parties submitted affidavits and exhibits in support of the motion.

Regarding Vap, the evidence showed Vap has been involved with a company called Vap's Seed and Hardware, Inc. Vap stated that although he was president, a corporate officer, and a shareholder, he had had no involvement in the day-to-day operations of the company and had received no income as president in the past 10 years. Further, he stated that the company had ceased doing business. Vap maintained that the PSC was his only occupation.

Johnson stated that he owned land that he rented to his brother in a family farming operation. But he stated that he had

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[1] See Neb. Rev. Stat. § 75-101(3) (Reissue 2009).

[2] See § 75-101(1).

no involvement in the day-to-day operations and that the PSC was his only occupation.

The Rosbergs also submitted affidavits. These affidavits predictably sought to counter those of Vap and Johnson. They generally recounted the same facts as the affidavits of Vap and Johnson but drew different conclusions from those facts—namely, that Vap and Johnson had other occupations. But in addition to Johnson's admitted landholdings, Paul also alleged that Johnson had earned money as a driver for a number of companies, although he makes no mention of how much time Johnson had dedicated to this endeavor.

The district court granted Vap and Johnson summary judgment. The district court seemingly relied on two different reasons. First, the district court ruled that § 75-101(3), which prohibits a commissioner from having another occupation, does not render a candidate ineligible to run for office. Second, even if it did, neither Vap nor Johnson had "occupations" within the meaning of § 75-101(3). According to the court, an "occupation" is a person's usual or principal work or business; it is that to which one's time and attention are habitually devoted. The court found that Johnson's renting of farmland to his brother and Vap's past involvement with Vap's Seed and Hardware were not "occupations." The Rosbergs appeal.

ASSIGNMENTS OF ERROR

The Rosbergs' brief does not separately assign and argue their claimed errors. Nevertheless, the gist of their argument appears to be that the district court erred in granting Vap and Johnson summary judgment and in concluding that they were not ineligible for the seats on the PSC.

STANDARD OF REVIEW

[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 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] In reviewing a summary judgment, an

[3] *Feloney v. Baye*, 283 Neb. 972, 815 N.W.2d 160 (2012).

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]

[3] Statutory interpretation presents a question of law that we independently review.[5]

ANALYSIS

[4,5] This case presents an issue of statutory interpretation. We give statutory language its plain and ordinary meaning.[6] And we give effect to the purpose and intent of the Legislature as ascertained from the entire language of a statute considered in its plain, ordinary, and popular sense.[7]

The statute in question, § 75-101, establishes eligibility requirements for candidates for the PSC and also restrictions upon commissioners once they are elected. It provides:

> (1) The members of the [PSC] shall be resident citizens of this state, registered voters, and, if members of or practitioners in any profession, in good standing according to the established standards of such profession. The members of the [PSC] shall be elected as provided in section 32-509. A candidate for the office of public service commissioner shall be a resident of the district from which he or she seeks election. Each public service commissioner shall be a resident of the district from which he or she is elected. Removal from the district shall cause a vacancy in the office of public service commissioner for the unexpired term.
>
> (2) No person shall be eligible to the office of public service commissioner who is directly or indirectly interested in any common carrier or jurisdictional utility in the state or out of it or who is in any way or manner pecuniarily interested in any common carrier subject to

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[4] *Id.*

[5] *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012).

[6] *Id.*

[7] See *id.*

> Chapter 75 or 86. If any commissioner becomes so interested after election or appointment, his or her office shall become vacant, except that if any commissioner becomes so interested otherwise than voluntarily, he or she shall, within a reasonable time, divest himself or herself of such interest, and failing to do so, his or her office shall become vacant.
>
> (3) A commissioner shall not hold any other office under the government of the United States, of this state, or of any other state and shall not, while such commissioner, engage in any other occupation.

The Rosbergs brought their claims under the election challenge statutes.[8] These statutes allow for a challenge to an election if, among other reasons, "the incumbent was not eligible to the office at the time of the election."[9] As victors in the election, Vap and Johnson were the "incumbents."[10]

The Rosbergs' challenge to Vap's and Johnson's eligibility for the PSC weaves together two provisions of § 75-101. First, the Rosbergs claim that during Vap's and Johnson's previous terms as commissioners, they both had occupations other than holding office as commissioners, which violated subsection (3). The Rosbergs argue that these violations meant that Vap and Johnson did not meet the eligibility requirements for holding a commissioner's office under subsection (1). As stated, subsection (1) requires a commissioner to be "in good standing" in any profession of which he or she is a member or practitioner. Thus, according to the Rosbergs, neither Vap nor Johnson was eligible for a seat on the PSC. We disagree.

Subsections (1) and (2) set out the eligibility requirements to hold the office of commissioner. In contrast, subsection (3) sets out restrictions upon those who hold that office: They may not hold another office or engage in another occupation while holding the office of commissioner. In enacting the eligibility requirements to hold the office of commissioner, the Legislature could not have meant that a person running for office must be

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[8] Neb. Rev. Stat. § 32-1101 et seq. (Reissue 2008).

[9] § 32-1101(2).

[10] See Neb. Rev. Stat. § 32-111 (Reissue 2008).

in good standing in the profession of being a commissioner. This interpretation would mean that incumbents already holding the office were subject to an eligibility requirement that did not apply to persons seeking the office for the first time. If the Legislature had intended to distinguish between incumbents seeking reelection and persons seeking election for the first time, it would have set out separate requirements. But it did not.

Instead, subsection (1) is more sensibly read to set out the requirements for any person seeking the office of commissioner. When interpreted in this manner, the Legislature obviously meant that a commissioner must be in good standing in any profession of which he or she is a member or practitioner—outside of the duties imposed upon a commissioner while holding office.

CONCLUSION

[6] Because the Legislature did not intend service on the PSC to be read as a profession for which one must be "in good standing according to the established standards of" that profession, we conclude that the district court was correct in dismissing the Rosbergs' challenges.

AFFIRMED.

STEPHAN, J., participating on briefs.

DOUGLAS COUNTY HEALTH CENTER SECURITY UNION, APPELLEE, v. DOUGLAS COUNTY, NEBRASKA, APPELLANT.

817 N.W.2d 250

Filed July 13, 2012. No. S-11-778.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Commission of Industrial Relations: Labor and Labor Relations.** Under Nebraska's Industrial Relations Act, the Commission of Industrial Relations has

the authority to decide industrial disputes and to determine whether any party to an agreement has committed a prohibited practice.

3. **Labor and Labor Relations.** It is a prohibited practice for any employer, employee, employee organization, or collective bargaining agent to refuse to negotiate in good faith with respect to mandatory topics of bargaining.
4. **Commission of Industrial Relations.** Neb. Rev. Stat. § 48-818 (Reissue 2010) sets out mandatory topics of bargaining: The Commission of Industrial Relations may issue orders that establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same.
5. **Labor and Labor Relations: Waiver.** Under the clear and unmistakable waiver standard utilized by the National Labor Relations Board, equivocal, ambiguous language in a bargaining agreement is insufficient to establish waiver of bargaining rights under a collective bargaining agreement.
6. ____: ____. Under the clear and unmistakable waiver standard, the parties to a collective bargaining agreement must unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term.
7. **Labor and Labor Relations: Contracts.** Under the contract coverage rule, if the issue was covered by the collective bargaining agreement, then the parties have no further obligation to bargain the issue.
8. **Labor and Labor Relations: Federal Acts.** While decisions under the National Labor Relations Act are helpful in interpreting Nebraska's Industrial Relations Act, such decisions are not binding on the Nebraska Supreme Court.
9. **Commission of Industrial Relations: Administrative Law.** The Commission of Industrial Relations is an administrative agency empowered to perform a legislative function and, as such, has no power or authority other than that specifically conferred on it by statute or by a construction thereof necessary to accomplish the purposes of the act establishing the commission.
10. **Commission of Industrial Relations: Breach of Contract.** The Commission of Industrial Relations does not have the authority to hear cases involving an alleged breach of a contract.
11. **Contracts: Claims: Courts.** The proper forum to pursue claims involving contract interpretation is the district court.

Appeal from the Commission of Industrial Relations. Reversed and remanded with directions.

Donald W. Kleine, Douglas County Attorney, and Diane M. Carlson for appellant.

Raymond R. Aranza, of Scheldrup, Blades, Schrock, Smith & Aranza, P.C., for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

The Douglas County Health Center Security Union (Union) filed a petition before the Commission of Industrial Relations (CIR) alleging that its employer, Douglas County, Nebraska (County), had engaged in certain prohibited practices. The CIR found the County had engaged in a prohibited practice when it failed to negotiate its intention to contract out bargaining unit work to a private security company. The CIR ordered the parties to recommence negotiation and awarded the Union attorney fees and costs. The County appeals. We reverse, and remand the decision of the CIR, with directions to vacate its order and dismiss the Union's petition.

FACTUAL BACKGROUND

The Douglas County Health Center (DCHC) is an agency of the County. The Union is the recognized bargaining unit for all full- and part-time DCHC security guards and represents approximately eight guards. The parties entered into a collective bargaining agreement (CBA) effective from January 1, 2007, to December 31, 2009. The CBA contained the following language, which is relevant to the issues presented by this case:

> **ARTICLE 16**
> **MANAGEMENT RIGHT OF CONTRACTING AND SUB-CONTRACTING**
>
> **Section 1.** The Union recognizes that the right of contracting and sub-contracting is vested in the County. The right to contract or subcontract shall not be used for the purpose or intention of undermining the Union, nor to discriminate against any employees.
>
> **Section 2.** If the contracting out or subcontracting of bargaining unit work has the effect of eliminating bargaining unit jobs, the County agrees to notify the Union as early as possible in advance of the same in order to provide the Union with an opportunity to discuss with the County the necessity and effect on bargaining unit employees.

As noted above, this CBA expired on December 31, 2009. But the record contains uncontested evidence that the parties have continued to operate as if it were still in effect. We will likewise treat the CBA as being in effect.

On approximately March 1, 2011, the DCHC received notice from the budget committee of the county board that it, along with most other of the County's agencies, would be required to reduce by 4 percent its 2011-12 budget. This reduction amounted to about $1.6 million.

The record shows that after receiving this directive, James Tourville, the DCHC administrator, considered different options by which to reduce the DCHC budget. In connection with this process, Tourville contacted a private security firm to determine whether any cost savings would be had by outsourcing that work. According to evidence in the record, a cost savings of between $140,000 and $160,000 could be achieved by privatizing the security work.

At this time, Tourville contacted a deputy county administrator whose job responsibilities included negotiation with labor unions on behalf of the County. The administrator apparently indicated that there were no CBA-related issues with outsourcing the security work. In early April 2011, Tourville approached the county board and was told to "proceed with contracting out the service," which apparently included notifying the Union and beginning the competitive bid process.

On April 25, 2011, Tourville and the deputy county administrator met with Union representatives to inform them that the security work would be outsourced. The County acknowledges that it did not negotiate with the Union, but, rather, informed the Union of the decision. The Union was asked to offer any cost savings it might have to avoid the outsourcing. At some point subsequent to this meeting, the Union offered to reduce the uniform allowance paid to its workers, amounting to a cost savings of between $8,000 and $10,000. At the meeting, the Union was also informed that the Union's members would be allowed to apply for jobs with the new vendor.

On May 24, 2011, the Union filed a petition with the CIR alleging, restated, that the County committed several instances of prohibited practices, including (1) discouraging union

membership and denying the rights afforded to the Union, in violation of Neb. Rev. Stat. § 48-824(2)(a), (c) and (f) (Reissue 2010); (2) failing to negotiate with the Union in advance of outsourcing the security work, in violation of § 48-824(2)(b), (c), and (e); and (3) informing Union representatives that the Union was too expensive, that outsourcing the work would be cheaper, and that the Union's members could probably be hired by the private vendor, in violation of § 48-824(2)(a), (b), and (c).

It appears that following the filing of this petition, the County submitted a request for proposals, placing out for bid DCHC's security work. In response, on June 10, 2011, the CIR entered a status quo order, ordering the County to not alter the employment status, wages, or terms and conditions of the Union's employees.

A hearing was held before the CIR on August 8, 2011. On August 18, the CIR issued an order finding that the County had engaged in a prohibited practice when it failed to negotiate with the Union prior to outsourcing the security work. In particular, the CIR found that the County had undermined the Union when it outsourced all security jobs, thus leaving no members left in the bargaining unit. The CIR ordered the parties to recommence negotiations over outsourcing work within 30 days. The CIR further ordered the County to pay attorney fees and costs, which amounted to $6,029.02.

ASSIGNMENTS OF ERROR

On appeal, the County assigns, restated and consolidated, that the CIR erred in (1) finding that the County committed a prohibited practice by failing to negotiate with the Union over the County's decision to outsource bargaining unit work, (2) finding that the County's motivation was to undermine the Union or discriminate against its members, (3) not properly interpreting article 16 of the CBA, and (4) awarding attorney fees.

STANDARD OF REVIEW

[1] Any order or decision of the CIR may be modified, reversed, or set aside by an appellate court on one or more of

the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.[1]

ANALYSIS

On appeal, the County's primary argument is that the CIR was incorrect in ordering it to bargain over the issue of outsourcing the security jobs at the DCHC, because, according to the County, "the CIR failed to recognize that the parties had already negotiated the topic and that the result of that negotiation is clearly set forth in Article 16 of the CBA."[2] The resolution of this case requires this court to examine issues of contract coverage and waiver in collective bargaining agreements.

Contract Coverage and Waiver.

[2-4] The general principles are familiar ones. Under Nebraska's Industrial Relations Act, the CIR has the authority to decide industrial disputes[3] and to determine whether any party to an agreement has committed a prohibited practice.[4] Under § 48-824(1), it is a prohibited practice for any employer, employee, employee organization, or collective bargaining agent to refuse to negotiate in good faith with respect to mandatory topics of bargaining. Neb. Rev. Stat. § 48-818 (Reissue 2010) sets out mandatory topics of bargaining: The CIR may issue orders that "establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same." And in this case, the parties agree that the topic at hand—the outsourcing of bargaining unit jobs—is a mandatory topic of bargaining.

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[1] *Scottsbluff Police Off. Assn. v. City of Scottsbluff*, 282 Neb. 676, 805 N.W.2d 320 (2011).

[2] Brief for appellant at 12.

[3] Neb. Rev. Stat. § 48-819.01 (Reissue 2010).

[4] § 48-824.

It is here that the parties' views diverge. The Union contends that the County had an obligation to bargain over the outsourcing of bargaining unit jobs because it did not clearly and unmistakably waive its right to bargaining in the CBA. The County, however, argues that it already bargained with the Union on this topic at the time the parties entered into the CBA, that the results of this bargaining are encompassed in article 16 of the parties' CBA, and that no further bargaining is required at this time.

[5,6] The "clear and unmistakable" waiver standard is utilized by the National Labor Relations Board. Under that standard, "[e]quivocal, ambiguous language in a bargaining agreement" is insufficient to establish waiver of bargaining rights under a CBA.[5] Rather, the parties must "'unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term.'"[6] For example, where a contractual provision allowed for benefits to be provided for "'ninety (90) days following termination,'" the language was not "a clear and unmistakable waiver with respect to the continuation of benefits beyond" that time period, because it did not specifically address that time period.[7] The Union contends that article 16 is not a clear and unmistakable waiver of its right to bargain over the elimination of all bargaining unit jobs.

[7] But several circuit courts of appeals have instead determined that the threshold question is whether the issue was "covered by" the CBA. Only if it was not "covered by" the CBA, do these courts consider whether the CBA contained a clear and unmistakable waiver. Those circuits have adopted the "contract coverage" rule, which treats the issue of whether there had been a failure to bargain as a simple matter of contract interpretation—if the issue was "covered by" the CBA, then the parties have no further obligation to bargain the issue.

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[5] *Local Joint Executive Bd. of Las Vegas v. N.L.R.B.*, 540 F.3d 1072, 1079 (9th Cir. 2008).

[6] *Id.* at 1079-80.

[7] *Id.* at 1081. See *N.L.R.B. v. General Tire and Rubber Co.*, 795 F.2d 585 (6th Cir. 1986).

The difference between these theories has been explained by the District of Columbia Circuit:

> [T]he "covered by" and "waiver" inquiries . . . are analytically distinct. A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union *has exercised* its bargaining right and the question of waiver is irrelevant. . . .
>
> "Where the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say the union has 'waived' its statutory right to bargain; rather, the contract will control and the 'clear and unmistakable' intent standard is irrelevant."[8]

In applying this standard, courts first inquire as to whether the subject at issue was "covered by" the CBA. If it was, it becomes a contract interpretation question. But if the subject was not "covered by" the contract, whether the subject was waived is examined.

In fact, the CIR has adopted this "covered by" language,[9] though it has not applied it consistently.[10] In *F.O.P., Lodge No. 21 v. City of Ralston, NE*,[11] the CIR cited to *Dept. of Navy, Marine Corps Logistics Base v. FLRA*[12] for its explanation of the distinction between contract coverage and waiver. The CIR went on to explain why it mattered: If the change in health insurance was "'contained in'" the CBA, the dispute was a

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[8] *Dept. of Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992).

[9] See *F.O.P., Lodge No. 21 v. City of Ralston, NE*, 12 C.I.R. 59 (1994). See, also, *Washington County Police Officers Association/F.O.P. Lodge 36 v. County of Washington, State of Nebraska*, No. 1247, 2011 WL 2286982 (C.I.R. May 31, 2011).

[10] Cf. *General Drivers & Helpers Union, Local No. 554 v. County of Douglas, Nebraska*, No. 1224, 2009 WL 5220888 (C.I.R. Nov. 24, 2009) (status quo order).

[11] *F.O.P., Lodge No. 21, supra* note 9.

[12] *Dept. of Navy, Marine Corps Logistics Base, supra* note 8.

breach of contract claim outside of the scope of the CIR's authority.[13]

[8] While decisions under the National Labor Relations Act are helpful in interpreting Nebraska's Industrial Relations Act, such decisions are not binding on this court.[14] And in this case, we are persuaded, not by the National Labor Relations Board's view of waiver under the National Labor Relations Act, but by the circuit courts that have adopted the contract coverage rule. In particular, we find persuasive the reasoning of the District of Columbia Circuit:

> When parties bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement, they create a set of enforceable rules—a new code of conduct for themselves—on that subject. Because of the fundamental policy of freedom of contract, the parties are generally free to agree to whatever specific rules they like, and in most circumstances it is beyond the competence of . . . the National Labor Relations Board or the courts to interfere with the parties' choice. [Citation omitted.] On the other hand, when a union *waives* its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter. For that reason, the courts require "clear and unmistakable" evidence of wavier and have tended to construe waivers narrowly.[15]

We find the distinction between contract coverage and waiver to be both logically and analytically correct, and as such, we adopt it.

Was Subcontracting "Covered By" CBA?

We therefore consider the threshold question of whether the subcontracting of bargaining unit jobs at DCHC was "covered by" the CBA. In conducting this inquiry, we examine whether the CBA "fully defines the parties' rights" as to this topic.

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[13] *F.O.P., Lodge No. 21, supra* note 9 at 63.

[14] See *Scottsbluff Police Off. Assn., supra* note 1.

[15] *Dept. of Navy, Marine Corps Logistics Base, supra* note 8 at 57.

Whether a topic is "covered by" a CBA was at issue in *Dept. of Navy, Marine Corps Logistics Base*,[16] which involved two separate petitions filed by a union against its employer, the Marine Corps. The first petition dealt with the reassignment of personnel, also referred to as employee "details"; the second petition dealt with a change in performance evaluation factors. As relevant to the first petition, the CBA contained provisions defining when employee "details" would be implemented, how long the detail could last, and the effect of the detail on an employee's salary and liability for union dues. After certain employees were detailed, the union filed a petition with the Federal Labor Relations Authority (FLRA), arguing that bargaining was required. The FLRA agreed, applying what was essentially a waiver analysis, and concluded that individual details on the local level were not addressed in the CBA.

As to the issue of performance evaluations, the CBA established comprehensive procedures for the employer to follow when it modified performance criteria, including advance notice, an opportunity for employee participation, and a requirement that the standards be "'fair and reasonable.'"[17] After the standards were changed, the union objected. The FLRA again agreed that bargaining was not waived, because the CBA did not specifically address the "'full range of impact and implementation'" issues.[18]

The District of Columbia Circuit, applying its contract coverage standard, held that in both instances, the topics at issue were "covered by" the CBA. The court conceded that the FLRA was correct that the CBA did not "'specifically address . . . the full range of impact and implementation issues' that might conceivably arise," but noted that this standard was "both unrealistic and impermissible."[19] We similarly conclude that the dispute over the subcontracting of DCHC security work is "covered by" the parties' CBA in this case.

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[16] *Dept. of Navy, Marine Corps Logistics Base, supra* note 8.

[17] *Id.* at 61.

[18] *Id.* at 53.

[19] *Id.* at 62.

In this case, article 16, § 1, of the CBA provides that the "Union recognizes that the right of contracting and subcontracting is vested in the County. The right to contract or subcontract shall not be used for the purpose or intention of undermining the Union, nor to discriminate against any employees." Section 2 further notes that "[i]f the contracting out or subcontracting of bargaining unit work has the effect of eliminating bargaining unit jobs," the County will notify the Union and "provide the Union with an opportunity to discuss with the County the necessity and effect on bargaining unit employees."

We conclude that the subcontracting of bargaining unit jobs is clearly "covered by" article 16 of the CBA. That article specifically notes the steps that the County needs to follow when "the contracting out or subcontracting of bargaining unit work has the effect of eliminating bargaining unit jobs." And the elimination of bargaining unit jobs is at issue in this dispute.

We recognize that article 16 does not specifically mention the elimination of the entire bargaining unit, which would be the result of the County's action in this case. But we decline to read article 16 so strictly as to conclude that it would not cover the subcontracting dispute at issue in this case. To strictly read article 16 would essentially apply the "unrealistic and impermissible"[20] waiver standard in the first instance, and would be antithetical to the contract coverage principles we now adopt.

Result.

[9,10] The CIR is an administrative agency empowered to perform a legislative function and, as such, has no power or authority other than that specifically conferred on it by statute or by a construction thereof necessary to accomplish the purposes of the act establishing the CIR.[21] Under Nebraska's Industrial Relations Act, the CIR has the authority to decide

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[20] *Id.*

[21] *Central City Ed. Assn. v. Merrick Cty. Sch. Dist.*, 280 Neb. 27, 783 N.W.2d 600 (2010).

industrial disputes[22] and to determine whether any party to an agreement has committed a prohibited practice.[23] But the CIR does not have the authority to hear cases involving the alleged breach of a contract.[24]

[11] We have concluded that the subcontracting issue presented by this case is "covered by" the parties' CBA. And determining whether the County's action was allowed by the CBA involves a question of the proper interpretation of that contract. This is something over which the CIR lacks authority.[25] The proper forum to pursue such claims is the district court.[26] As such, we reverse, and remand the decision of the CIR, with directions to the CIR to vacate its order and dismiss the Union's petition.

CONCLUSION

We conclude that the issue of the subcontracting of bargaining unit jobs resulting in the elimination of bargaining unit jobs is "covered by" the CBA and presents an issue of contract interpretation over which the CIR lacks jurisdiction. We accordingly reverse, and remand to the CIR, with directions to vacate its order and dismiss the Union's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

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[22] § 48-819.01.

[23] § 48-824.

[24] See *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979).

[25] See *id.*

[26] See *id.*

EMPLOYEES UNITED LABOR ASSOCIATION, APPELLEE AND CROSS-APPELLANT, V. DOUGLAS COUNTY, NEBRASKA, APPELLANT AND CROSS-APPELLEE.

816 N.W.2d 721

Filed July 13, 2012. Nos. S-11-712, S-12-121.

1. **Commission of Industrial Relations: Appeal and Error.** In reviewing an appeal from the Commission of Industrial Relations in a case involving wages and conditions of employment, an order or decision of the commission may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Contracts: Labor and Labor Relations.** Generally, when terms or conditions of employment are in a contractual provision, the status quo is determined by reference to the precise wording of the relevant contractual provision, even when that provision is contained in an expired contract.

Appeals from the Commission of Industrial Relations. Affirmed in part, and in part reversed and vacated.

Donald W. Kleine, Douglas County Attorney, and Diane M. Carlson for appellant.

Raymond R. Aranza, of Scheldrup, Blades, Schrock, Smith & Aranza, P.C., for appellee.

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

STEPHAN, J.

In these consolidated appeals, the Commission of Industrial Relations (CIR) determined that Douglas County, Nebraska, committed a prohibited labor practice when it increased union members' monthly health insurance premiums without negotiating. Douglas County appeals, contending that the parties' collective bargaining agreement (CBA) authorized its unilateral action and that its action did not change the status quo. We affirm in part, and in part reverse and vacate.

FACTS

Douglas County and Employees United Labor Association (EULA) entered into a CBA effective January 1, 2009, through December 31, 2010. Article 12 of the CBA is entitled "Insurance and Pension Benefits" and provides in relevant part:

> **Section 1.** The County will publish a rate sheet to the employees that will show the premium equivalencies for medical and dental insurance costs. Such rate sheet shall also show the dollar contribution for each plan for the County and the employee according to the following:
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> 1. The County will pay 95% of the premium for each employee who has employee-only coverage under the County's medical insurance plan, and the employee shall pay the remaining 5%.
>
> 2. The County will pay 77% of the premium for each employee who has employee plus one coverage under the County medical insurance plan, and the employee shall pay the remaining 23%.
>
> 3. The County will pay 80% of the premium for each employee who has employee plus two or more coverage under the County medical insurance plan and the employee shall pay the remaining 20%.
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> . . . .
>
> The County reserves the right to select the method by which health insurance benefits are provided. In the event that health insurance benefits are not provided through an HMO and/or indemnity plan the County/employee contribution rates are subject to renegotiation.

The health insurance premiums are set annually. The CBA does not contain a continuation clause.

No increases were made in the health insurance premium rates for the 2010 calendar year. But on November 16, 2010, Douglas County sent a memorandum to EULA members with an attached health insurance premium rate sheet effective January 1, 2011. This rate sheet showed increases in the overall premium costs for all EULA members for calendar year 2011. The increases were based on the percentage of contribution allocations in the CBA. No changes were made to the health insurance coverage other than the increased premiums. The

November 16 memorandum stated that Douglas County was "pass[ing] along to the employees" "the increased premium cost for 2011" "as specified in the [CBA]." Douglas County began deducting the increased premium costs from employee paychecks in December 2010. Douglas County did not negotiate the increase in premiums with EULA.

On January 3, 2011, EULA filed a prohibited labor practice action alleging that Douglas County unilaterally changed the health insurance benefits of certain of its members without first negotiating. The CIR conducted an evidentiary hearing on the petition in April, and on July 25, the CIR held that in passing on the increase in premiums without first negotiating, Douglas County committed a prohibited labor practice in violation of the Industrial Relations Act.[1] The CIR reasoned Douglas County had a duty to bargain over the change as a mandatory subject of bargaining and ordered Douglas County to negotiate the issue. As a remedy, the CIR required Douglas County to reimburse EULA members for the amount of increased premiums they had paid, plus interest. Douglas County timely appealed, and the case is docketed before us as case No. S-11-712.

Meanwhile, on May 2, 2011, EULA filed three additional petitions alleging that Douglas County also unilaterally changed the health insurance benefits of certain other EULA members. These petitions were consolidated before the CIR. In November, a telephonic hearing was conducted and the parties stipulated that the record and exhibits received by the CIR in case No. S-11-712 should also be received in the pending case. On January 12, 2012, the CIR again held that Douglas County committed a prohibited labor practice by passing on the premium increase without bargaining and ordered Douglas County to negotiate the issue and reimburse EULA members for the amount of increased premiums they had paid, plus interest. Douglas County timely appealed, and the case is docketed before us as case No. S-12-121. We granted Douglas County's motion to consolidate the two appeals.

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[1] Neb. Rev. Stat. §§ 48-801 to 48-838 (Reissue 2010).

ASSIGNMENTS OF ERROR

Douglas County assigns in both appeals that the CIR erred in (1) finding it committed a prohibited labor practice when it passed on a portion of the increased cost of the health insurance plan to the employees; (2) not giving full force and effect to the plain language of the CBA, which unequivocally defined the parties' rights regarding how health insurance premiums were to be shared; and (3) concluding that the health insurance contribution percentages expired when the CBA expired.

In a cross-appeal, EULA contends the CIR erred in failing to award it attorney fees.

STANDARD OF REVIEW

[1] In reviewing an appeal from the CIR in a case involving wages and conditions of employment, an order or decision of the CIR may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.[2]

ANALYSIS

The Legislature has declared that the continuous, uninterrupted, and proper functioning and operation of state government is essential to the welfare, health, and safety of the people of Nebraska.[3] As part of this policy, it is a "prohibited practice" for any state government employer to refuse to negotiate in good faith with employee union representatives on mandatory topics of bargaining.[4] This principle applies

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[2] *Board of Trustees v. State College Ed. Assn.*, 280 Neb. 477, 787 N.W.2d 246 (2010); *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010).

[3] § 48-802.

[4] See § 48-824(1).

before, during, and after the expiration of a collective bargaining agreement.[5]

Here, Douglas County is the governmental entity and EULA is the union representing certain employees of Douglas County. The parties agree that health insurance, including health insurance premiums, is a mandatory topic of bargaining.[6] They further agree that Douglas County refused to negotiate with EULA prior to passing on the increase in health insurance premiums. Under these circumstances, Douglas County's actions would normally be a per se violation of the duty to bargain in good faith on mandatory topics of bargaining.[7]

But Douglas County contends it did not commit a prohibited practice under the facts of these cases because (1) the health insurance premium issue is "covered by" the existing language of article 12 of the parties' CBA and (2) the increased premiums did not change the status quo.[8] In addressing these arguments, we may look to decisions of the National Labor Relations Board for guidance, although its decisions are not binding on this court.[9]

Contractual Language

Douglas County's primary argument is that it had no duty to bargain prior to passing on the increase in health insurance premiums, because the parties had already bargained the issue. Specifically, it contends that "the topic of premiums has

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[5] *Washington County Police Officers Association/F.O.P. Lodge 36 v. County of Washington, State of Nebraska*, No. 1247, 2011 WL 2286982 (C.I.R. May 31, 2011).

[6] See, e.g., *Scottsbluff Police Off. Assn. v. City of Scottsbluff*, 282 Neb. 676, 805 N.W.2d 320 (2011); *F.O.P., Lodge No. 21 v. City of Ralston, NE*, 12 C.I.R. 59 (1994).

[7] See, *IBEW Local 763 v. Omaha Pub. Power Dist.*, 280 Neb. 889, 791 N.W.2d 310 (2010); *FOP Lodge 41 v. County of Scotts Bluff*, 13 C.I.R. 270 (2000).

[8] Reply brief for appellant at 3.

[9] See *Scottsbluff Police Off. Assn.*, *supra* note 6. See, also, *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999).

already been negotiated and the result of that negotiation is specifically memorialized in [article 12 of] the CBA."[10]

We assume without deciding that the language of article 12 authorized Douglas County to unilaterally pass on a percentage of the increase in health insurance premiums during the term of the CBA. But that is not the circumstance before us. Here, Douglas County increased EULA members' health insurance premiums effective January 2011, after the CBA had expired. Although Douglas County repeatedly asserts in its brief that the parties agreed to abide by the terms of the CBA until a new one was negotiated, no evidence in the record supports a finding that the actual CBA remained in effect after December 31, 2010. Indeed, Douglas County's primary witness testified that the contract with EULA expired on December 31, 2010, and that the parties were "not under any existing contract" at the time of trial. The CBA had no continuation clause, and on the record before us, we conclude that it had expired before Douglas County implemented the increase in EULA members' health insurance premiums.

Because the CBA had expired, Douglas County's argument that it had no duty to bargain on the issue of health insurance premiums because the parties' bargain was memorialized in the CBA is without merit.[11] Instead, upon expiration of the CBA, either Douglas County or EULA could demand bargaining on any mandatory subject, including health insurance benefits, whether or not that subject was addressed in the previous agreement.[12] EULA effectively requested bargaining on the health insurance premiums when it asserted Douglas County improperly passed on the increases to its members, and it is clear from the record that Douglas County refused to bargain the issue. The CIR did not err in finding that Douglas County committed a prohibited labor practice and in ordering Douglas County to commence negotiations.

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[10] Reply brief for appellant at 4.

[11] See 1 N. Peter Lareau, Labor and Employment Law § 12.04[9][b] (2010).

[12] *Id.*

Status Quo

Douglas County also contends that it did not commit a prohibited practice because its action in passing on the premium increases pursuant to the percentage allocations in the CBA did not change the status quo. To support this argument, it contends that even though the CBA expired, legally, its terms continue in effect until a new agreement is reached. According to Douglas County, because the increase was implemented pursuant to the continuing contractual terms, there was no change in the status quo, and thus it had no duty to bargain on the issue.

The CIR has broadly held that "parties to a collective bargaining agreement continue it in effect beyond its expiration date until" a new agreement has been reached.[13] A more precise recitation of the rule is that once a CBA expires, the parties' obligations to one another are governed by the doctrine of maintaining the status quo while they continue to negotiate a successor agreement.[14] And the principle of maintaining the status quo demands that all terms and conditions of employment remain the same during collective bargaining after a CBA has expired.[15]

But, contrary to the argument advanced by Douglas County, this does not mean that the expired CBA continues in effect. Rather, it means that the conditions under which the employees worked endure throughout the collective bargaining process.[16] Here, the CBA expired, and although its terms and conditions of employment continue in effect as a temporary means of

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[13] *Locals 601 et al. v. State of Nebraska Department of Public Institutions*, 6 C.I.R. 78, 80 (1982).

[14] *Appeal of Alton School Dist.*, 140 N.H. 303, 666 A.2d 937 (1995). See, *Intermountain Rural Elec. Ass'n v. N.L.R.B.*, 984 F.2d 1562 (10th Cir. 1993); *N.L.R.B. v. Southwest Sec. Equipment Corp.*, 736 F.2d 1332 (9th Cir. 1984); *R.E.C. Corp.*, 296 N.L.R.B. 1293 (1989); *Police Benev. Ass'n v. Orange County*, 67 So. 3d 400 (Fla. 2011); *Hill v. J.C. Penney, Inc.*, 70 Wash. App. 225, 852 P.2d 1111 (1993); *San Joaquin Cy. Emp. Ass'n v. City of Stockton*, 161 Cal. App. 3d 813, 207 Cal. Rptr. 876 (1984).

[15] *Id.*

[16] See *id.*

governing the parties' relationship during the period of renegotiations, Douglas County was not excused from its obligation to bargain for a successor agreement. The CIR properly found that Douglas County committed a prohibited practice when it refused to bargain on the issue of health insurance premium increases after the expiration of the CBA.

But we do find that Douglas County's argument that the percentage allocation of health insurance premiums in the CBA is the status quo is relevant to the remedy imposed by the CIR in these appeals. As noted, the CIR ordered Douglas County to both bargain the issue of health insurance and reimburse EULA members the amount of the increase in premiums, plus interest. The reimbursement was based on the CIR's implicit determination that the term or condition of employment surviving the expiration of the CBA was the amount EULA members were paying for health insurance premiums when the CBA expired.

[2] Generally, when terms or conditions of employment are in a contractual provision, the status quo is determined by reference to the precise wording of the relevant contractual provision, even when that provision is contained in an expired contract.[17] Here, the relevant contractual provision was contained in article 12 of the CBA, which set the percentages each party would pay for health insurance premiums. This provision unequivocally expressed the obligations of both Douglas County and EULA members. There is no other reasonable interpretation of the CBA, and thus the term or condition of employment that continued in effect after expiration of the CBA was the percentage allocations set forth in the CBA.[18] Therefore, Douglas County properly paid only its fixed percentage of the increased premiums, and EULA members were to continue to pay their fixed percentage as well, even when the

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[17] *Police Benev. Ass'n, supra* note 14. See, *Intermountain Rural Elec. Ass'n, supra* note 14; *San Joaquin Cy. Emp. Ass'n, supra* note 14.

[18] See, generally, *Intermountain Rural Elec. Ass'n, supra* note 14 (holding contract language setting precise percentage amounts of health insurance premiums established status quo).

premiums increased. We conclude the CIR erred when it found the status quo was the amount of health insurance premiums EULA members were paying at the time the CBA expired. We reverse and vacate that portion of the order requiring Douglas County to reimburse EULA members for the increased health insurance premiums.

Attorney Fees

In a cross-appeal, EULA alleges the CIR erred when it failed to award it attorney fees. This assignment of error is limited to case No. S-11-712, because no attorney fees were requested in case No. S-12-121.

The CIR has the power and authority to make such findings and to enter such temporary or permanent orders that it may find necessary to provide adequate remedies to the injured party or parties, to effectuate the public policy enunciated in § 48-802, and to resolve the dispute.[19] CIR rule 42(B)(2)(a) provides that "[a]ttorney's fees may be awarded as an appropriate remedy when the [CIR] finds a pattern of repetitive, egregious, or willful prohibited conduct by the opposing party."[20]

In refusing to award attorney fees, the CIR found that Douglas County's conduct "borders on the line between repetitive misconduct and overtly creative contract interpretation" but found "no direct evidence in the record of repetitive, egregious, or willful conduct." It also found no evidence that Douglas County "willfully" refused to bargain, but reasoned that it instead mistakenly believed that it was not required to bargain.

EULA argues that CIR precedent demonstrates Douglas County's persistent practice of bargaining in bad faith over health insurance. It notes that the day after the CIR issued the decision in this case, it found in another case an "emerging pattern of Douglas County and its refusal to negotiate over

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[19] § 48-819.01.

[20] See Rules of the Nebraska Commission of Industrial Relations 42 (rev. 2008).

mandatory subjects of bargaining."[21] EULA further argues that on August 18, 2011, the CIR awarded attorney fees against Douglas County based on its pattern of past practice in refusing to negotiate.[22] Essentially, EULA contends the CIR should have recognized the pattern earlier and issued attorney fees in this case as well.

The record fully supports the CIR's decision not to award attorney fees in this case, and we affirm the denial of attorney fees.

CONCLUSION

Health insurance premiums are a mandatory subject of bargaining, and Douglas County therefore had a duty to bargain on the issue. It cannot rely on the terms of the expired CBA to excuse it from this duty, but the percentage allocation formula of the expired CBA constitutes the status quo after the CBA expired and governs the parties' obligations until a successor agreement is reached. We affirm (1) the CIR's determination that Douglas County committed a prohibited labor practice in failing to negotiate health insurance premium increases effective January 1, 2011, and (2) the CIR's decision not to award attorney fees. But we reverse and vacate those portions of the CIR's orders requiring Douglas County to reimburse EULA members for increased insurance premiums deducted from their wages, plus interest.

AFFIRMED IN PART, AND IN PART REVERSED AND VACATED.

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[21] *International Brotherhood of Electrical Workers Local 1483 v. Douglas County, Nebraska*, No. 1245, 2011 WL 3487525 at *5 (C.I.R. July 26, 2011).

[22] See *Douglas Cty. Health Ctr. Sec. Union v. Douglas Cty.*, *ante* p. 109, 817 N.W.2d 250 (2012).

Rachel Connelly, a minor, individually and by and through her next friends and natural parents, Timothy James Connelly and Kelly Jean Connelly, appellee and cross-appellant, and Chelsea Connelly, a minor, individually and by and through her next friends and natural parents, Timothy James Connelly and Kelly Jean Connelly, appellee, v. City of Omaha, appellant and cross-appellee.

Kelly Jean Connelly and Timothy James Connelly, wife and husband and natural guardians of Rachel and Chelsea Connelly, appellees, v. City of Omaha, appellant.

816 N.W.2d 742

Filed July 20, 2012. Nos. S-10-879, S-10-880.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong. When determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can be deduced from the evidence.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, an appellate court is obligated to reach a conclusion independent of the decision reached by the court below.
4. **Damages.** While the amount of damages presents a question of fact, the proper measure of damages presents a question of law.
5. **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, i.e., duty, breach of duty, causation, and damages.
6. **Negligence: Liability: Invitor-Invitee: Proximate Cause: Proof.** An owner or occupier is liable for injury to a lawful visitor resulting from a condition on the owner or occupier's premises if the lawful visitor proves: (1) The owner or occupier either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the owner or occupier should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the owner

or occupier failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the lawful visitor.

7. **Negligence: Liability.** Generally, when the danger posed by a condition is open and obvious, the owner or occupier is not liable for harm caused by the condition.
8. **Negligence: Proximate Cause.** A plaintiff is contributorily negligent if (1) she or he fails to protect herself or himself from injury, (2) her or his conduct concurs and cooperates with the defendant's actionable negligence, and (3) her or his conduct contributes to her or his injuries as a proximate cause.
9. **Trial: Negligence: Damages: Appeal and Error.** Because the purpose of comparative negligence is to allow triers of fact to compare relative negligence and to apportion damages on that basis, the determination of apportionment is solely a matter for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial.
10. **Negligence: Damages.** A person who suffers injury as a result of the negligence of another is entitled to recover for the reasonable value of medical care and expenses incurred for the treatment of the injuries.
11. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.
12. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
13. ____: ____: ____. The unconstitutionality of a statute must be clearly established before it will be declared void.
14. **Constitutional Law: Statutes: Legislature: Presumptions.** The Nebraska Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality.
15. **Constitutional Law: Due Process.** The Due Process Clauses of both the federal and the state Constitutions forbid the government from infringing upon a fundamental liberty interest, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.
16. **Due Process.** Substantive due process relates to the content of the statute specifying when a right can be lost or impaired.
17. **Constitutional Law: Due Process: Statutes.** In cases involving due process challenges under the Nebraska Constitution, when a fundamental right or suspect classification is not involved in the legislation, a legislative act is a valid exercise of the police power if the act is rationally related to a legitimate state interest.
18. **Statutes: Courts: Legislature: Intent.** Courts will not independently review the factual basis on which the Legislature justified a statute, nor will a court independently review the wisdom of a statute. Instead, courts inquire whether the Legislature reasonably could conceive to be true the facts on which the challenged statute was based.
19. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

20. **Actions: Torts: Minors: Damages.** Under Nebraska law, injury to a minor results in two causes of action—one on behalf of the minor and the other on behalf of the minor's parent. The minor's claim is based on damages caused by the personal or bodily injury sustained by the minor, while the claim of a parent is based on the loss of services during minority and the necessary expenses of treatment for the injured child.
21. **Actions: Torts: Minors.** The cause or right of action of parents is distinct from the cause of action of their child.
22. **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.
23. ____. 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.

Appeals from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Judgment in No. S-10-879 affirmed. Judgment in No. S-10-880 affirmed as modified.

Thomas O. Mumgaard, Deputy Omaha City Attorney, for appellant.

Thomas M. Locher, Timothy M. Morrison, and Joseph J. Kehm, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellees.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN and PIRTLE, Judges.

STEPHAN, J.

Rachel Connelly and Chelsea Connelly are the minor daughters of Kelly Jean Connelly and Timothy James Connelly. On December 29, 2000, Rachel and Chelsea were injured in Memorial Park in Omaha, Nebraska, when their saucer-type plastic sled collided with a tree. Two actions were commenced against the City of Omaha (City) in the district court for Douglas County under the Political Subdivisions Tort Claims Act (PSTCA).[1] One action was brought by the parents to recover medical expenses and loss of services based on their daughters' injuries. The second action was brought by the daughters, by and through their parents, for injuries incurred

[1] Neb. Rev. Stat. §§ 13-901 to 13-927 (Reissue 2007 & Cum. Supp. 2010).

in the accident. The district court found that the accident and resulting injuries were proximately caused by the negligence of the City, and awarded damages in both actions. On appeal, the City argues that the district court erred in its assessment of both liability and damages. In her cross-appeal, Rachel, by and through her parents, contends that the damage cap set forth in § 13-926 as applied in this case violates her right to due process. We affirm the judgment of the district court in the daughters' action, and affirm as modified the judgment in the parents' action.

I. FACTS

Kelly, Timothy, Rachel, and Chelsea are residents of Omaha. The accident occurred in Memorial Park, which is public property owned by the City and may be used free of charge for recreational purposes. The City was solely responsible for planting, maintaining, and removing all trees in the park. The City knew that the park had been used by the public for sledding for many years, and it was aware of prior incidents in which persons sledding in the park had collided with trees.

1. Events Prior to Accident

In the late 1990's, the City began planning to restore and renovate Memorial Park. The primary purpose was to improve the park's infrastructure. The project involved planting 300 new trees.

The City held meetings to hear public comment on the project. At the first meeting held on March 7, 1997, attendees commented on "the essence, character, image and purpose of Memorial Park," which included "sledding opportunities." At a second meeting on April 25, attendees commented that new plantings should be avoided in the area of the park used for sledding. Mary Slaven, a park planner and the project manager for the City's reforestation project, understood these comments to mean that trees should not be planted in the area of the park used for sledding. Slaven thus made that one of her goals in planning the renovation project. But Slaven did not know which specific area of the park was used for sledding. During one meeting, one person showed Slaven the general area used

for sledding and city forester Philip Pierce offered to show her the area more specifically "when the time came." Slaven understood this to mean that when the time came for plantings to be made, she would contact Pierce in order to avoid planting trees in the sledding area. Pierce was familiar with the sledding area at the park.

Despite this offered assistance, Slaven moved forward on the project without soliciting information from Pierce and without observing sledding activity in the park. Trees were planted in 1998, including a set of small crab apple trees, which were placed on the southeast slope of the park next to a sidewalk.

After this initial renovation project was completed, federal funds became available to plant 500 additional trees in Memorial Park. In conjunction with the new reforestation project, Slaven asked Pierce to identify the sledding area on an aerial photograph. In April 1999, Pierce went to the park to view the crab apple trees and recommended that they be moved, partly because he believed the trees presented a hazard to people sledding in the park. Pierce's comments surprised Slaven, because she assumed people would not sled over a sidewalk. Without further inquiring about Pierce's comments, Slaven decided to leave the crab apple trees on the southeast slope. She reasoned the trees had made it through one sledding season without incident.

Several sledding injuries occurred after the renovation project was completed. One accident occurred on December 17, 2000. A father had sent his two children, who were 3 and 8 years old at the time, down the slope on a saucer sled. The sled got turned around, and they hit one of the crab apple trees on the right side of the slope that Pierce had told Slaven to move. One child sustained injuries as a result of the collision.

2. Daughters' Accident

On December 29, 2000, Timothy decided to take his daughters sledding at Memorial Park. Rachel and Chelsea were 5 and 10 years old, respectively, at the time. This was the first time Timothy had been to Memorial Park. He chose the park because his daughters were getting older and looking for a

longer sledding hill, and he knew Memorial Park was used by the public for sledding.

Upon arriving at the park, Timothy walked to the southeast slope. He assessed the slope's dangers and noticed trees to the left, to the right, and at the bottom. He chose a starting point near what appeared to be the center of the slope.

Chelsea then placed a saucer sled on the slope. The sled had no steering mechanism, and Timothy knew it could go in an unintended direction. Rachel sat on the saucer behind Chelsea, and Chelsea pushed off. The sled began veering right, and the sled collided with one of the crab apple trees on the right side of the slope.

Rachel and Chelsea were taken by ambulance to a nearby hospital. Chelsea sustained injuries to her ribs and chest, from which injuries she recovered. Rachel sustained a fracture dislocation of her spine, which resulted in permanent paralysis from the shoulders down.

II. PROCEDURAL HISTORY

1. Parents' Action

Kelly and Timothy filed tort claims with the City on December 27, 2001, pursuant to the PSTCA. When the City did not render a final disposition of the claims within 6 months, Kelly and Timothy withdrew their claims and filed a lawsuit against the City.

They alleged that the City's willful negligence proximately caused the injuries sustained by their daughters, and they sought damages for past and future medical expenses, loss of services, and emotional distress. They also challenged the constitutionality of the $1 million cap on damages imposed by § 13-926.

The district court entered an order on March 29, 2006, following a bench trial on the issue of liability. The court found that because the Recreational Liability Act[2] applied and was constitutional, the City would be liable only if it was willfully negligent. The court found the City liable under that standard,

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[2] Neb. Rev. Stat. §§ 37-729 to 37-736 (Reissue 2008).

because "prior to December 29, 2000, the City was aware that the crab apple trees posed a danger to persons sledding in Memorial Park," and the City failed to take action. The court reasoned the City knew that sledding occurred in the park, that Pierce had instructed Slaven to move the crab apple trees, and that a sledding accident occurred with one of the crab apple trees 12 days before the Connelly accident. The court determined that Timothy bore 25 percent of the fault for his daughters' injuries and that his fault would be considered in the court's subsequent assessment of damages. Finally, the court dismissed the parents' claims for negligent infliction of emotional distress, finding the claims failed as a matter of law.

2. Daughters' Action

Shortly after this order was entered, Rachel and Chelsea, by and through their parents, filed a separate action which sought general damages arising from the same accident. They had previously filed tort claims with the City, which failed to finally dispose of the claims within 6 months. The operative complaint alleged that the City was both negligent and willfully negligent and that § 13-926 was unconstitutional. The district court consolidated this action with the parents' previously filed action.

3. Interlocutory Order of February 7, 2008

In an order ruling on motions for partial summary judgment, the district court concluded that four separate damage caps applied in these actions—one for each of the four individual claimants. Focusing on the language of § 13-926(1), which limits damages to "[o]ne million dollars for any person for any number of claims arising out of a single occurrence," the court concluded that each minor and each parent was asserting a separate cause of action.

In the same order, the district court determined that any negligence on the part of Timothy could not be imputed to reduce Kelly's recovery because of the lack of evidence that the two were engaged in a joint enterprise at the time of

their daughters' injuries. The court further determined that our decision in *Bronsen v. Dawes County*,[3] which held that the Recreational Liability Act did not shield political subdivisions from liability for ordinary negligence, required reconsideration of Timothy's comparative fault. The court then concluded that Timothy remained 25 percent at fault for his daughters' injuries, but that such fault could not be imputed to the daughters to reduce their recovery. The court also determined that Nebraska law did not recognize the parents' claims for loss of consortium for their daughters' nonfatal injuries.

On the City's motion, the district court certified its orders finding the City liable and apportioning fault among the parties as final for purposes of appeal. We dismissed the City's appeal, finding there was no final order because the issue of damages remained unresolved.[4]

4. Final Order of August 11, 2010

On remand, a trial was held on the remaining issues and the district court entered a final order on August 11, 2010. The court reiterated that the City was liable "for its actions in planting and maintaining the tree in Memorial Park." The court found that Chelsea was 25 percent at fault for failing to take steps to avoid the accident and determined her fault would reduce both her recovery and her parents' recovery with respect to losses stemming from her injury. The court determined that due to her young age and inability to see where the sled was going, Rachel had no fault in the accident.

After adjusting for the comparative negligence of Timothy and Chelsea, the court awarded $10,063,669.41 to Rachel, $8,176.84 to Chelsea, $623,661.02 to Timothy, and $831,775.17 to Kelly. The parents' damages award included in-home nursing services provided by Kelly to Rachel based upon the replacement cost for such services of $20 per hour. Finally, the district court determined that our decision in *Staley v. City*

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[3] *Bronsen v. Dawes County*, 272 Neb. 320, 722 N.W.2d 17 (2006).

[4] See *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

of Omaha,[5] which upheld the constitutionality of the PSTCA damage cap, required it to reduce Rachel's damage award to $1 million.

The City perfected these timely appeals, and we granted the appellees' petitions to bypass. The cases were originally argued on September 7, 2011. Due to a change in court personnel and the presence of a constitutional issue, we ordered reargument before a new panel and supplemental briefing.

III. ASSIGNMENTS OF ERROR

In the parents' action, the City assigns, restated and renumbered, that the district court erred in (1) finding the City liable for negligence, (2) apportioning the comparative fault of Timothy, (3) interpreting § 13-926 to entitle each plaintiff to a separate damage cap of $1 million, and (4) assessing the amount of damages recoverable by the parents for their care of Rachel.

In the action brought on behalf of the daughters, the City assigns, restated and renumbered, that the district court erred in (1) finding the City liable for negligence and (2) apportioning the comparative fault of Timothy.

In Rachel's cross-appeal, she asserts, by and through her parents, that the district court erred in holding § 13-926(1) was constitutional.

IV. STANDARD OF REVIEW

[1] In actions brought pursuant to the PSTCA, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong. When determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can be deduced from the evidence.[6]

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[5] *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006).

[6] *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012); *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010).

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[7]

[3] Whether a statute is constitutional is a question of law; accordingly, we are obligated to reach a conclusion independent of the decision reached by the court below.[8]

[4] While the amount of damages presents a question of fact, the proper measure of damages presents a question of law.[9]

V. ANALYSIS

1. Determination of Liability

[5] The City contends that the district court erred in finding it liable. Subject to certain exceptions, "in all suits brought under the [PSTCA] the political subdivision shall be liable in the same manner and to the same extent as a private individual."[10] Thus, a negligence action brought under the PSTCA has the same elements as a negligence action against an individual, i.e., duty, breach of duty, causation, and damages.[11]

[6] This is a premises liability case, as the City owns Memorial Park, the tree struck by the sled was a condition on the premises, and Timothy, Rachel, and Chelsea were lawful visitors to the park when the accident occurred.[12] We have recognized that an owner or occupier is liable for injury to a lawful visitor resulting from a condition on the owner or occupier's premises if the lawful visitor proves:

> (1) the owner or occupier either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the owner

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[7] *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011); *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010).

[8] See, *Sarpy Cty. Farm Bureau v. Learning Community*, 283 Neb. 212, 808 N.W.2d 598 (2012); *Kiplinger v. Nebraska Dept. of Nat. Resources*, 282 Neb. 237, 803 N.W.2d 28 (2011).

[9] *Tolliver v. Visiting Nurse Assn.*, 278 Neb. 532, 771 N.W.2d 908 (2009).

[10] § 13-908.

[11] See, *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001); *Drake v. Drake*, 260 Neb. 530, 618 N.W.2d 650 (2000).

[12] See *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004).

> or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the owner or occupier should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the owner or occupier failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the lawful visitor.[13]

The City contends that the evidence at trial did not support the second and third elements.

(a) City's Realization of Risk

Evidence showed that at the time of the accident, the City knew the area of the park where the accident occurred was used by the public for sledding and knew there had been prior sledding accidents involving trees. Before planting the tree which Rachel and Chelsea's sled struck, the City was aware of public sentiment that new plantings should be avoided in the area of the park used for sledding. Indeed, the City had made that a goal of the project. After the crab apple trees were planted on the southeast slope, Pierce, the city forester, recommended that they be removed. One of the reasons for his recommendation was that the trees presented a hazard to sledders. And 12 days before the Connelly accident, a sled with two children on it struck one of the crab apple trees. Viewing this evidence in a light most favorable to the Connellys, as our standard of review requires, the district court did not err in finding that the City should have realized the crab apple trees posed an unreasonable risk of harm to sledders.

(b) Lawful Visitors' Realization of Risk

The City argues the evidence failed to show that it should have expected that lawful visitors such as the Connellys would either not discover or realize the danger posed by the crab apple trees or would fail to protect themselves against the

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[13] *Id.* at 807, 678 N.W.2d at 89, citing *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003).

danger. Succinctly stated, the City's position is that the "open and obvious tree did not present an unreasonable risk of harm to sledders who should [have] discover[ed] it, realize[d] the danger, and [gone] elsewhere."[14]

[7] Generally, when the danger posed by a condition is open and obvious, the owner or occupier is not liable for harm caused by the condition.[15] But the Restatement (Second) of Torts § 343A,[16] which we have adopted, states that despite this general rule, the landowner may be liable if the landowner "should anticipate the harm despite such knowledge or obviousness." Thus, a determination that a danger is "open and obvious" does not end the analysis; a court must also determine whether the landowner should have anticipated that persons using the premises would fail to protect themselves, despite the open and obvious risk.[17] Reason to anticipate harm from an open and obvious danger

> may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.[18]

Also pertinent to our analysis is another portion of the Restatement commentary, which provides:

> There is . . . a special reason for the possessor to anticipate harm where the possessor is . . . the government, or

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[14] Reply brief for appellant in case No. S-10-879 at 5 (emphasis omitted).

[15] *Aguallo, supra* note 12; *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982).

[16] Restatement (Second) of Torts § 343A(1) at 218 (1965). See, *Aguallo, supra* note 12; *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989).

[17] *Aguallo, supra* note 12; *Burns, supra* note 16. See, also, Restatement, *supra* note 16, comment *f*.

[18] Restatement, *supra* note 16, comment *f*. at 220.

> a government agency, which maintains land upon which the public are invited and entitled to enter as a matter of public right. Such defendants may reasonably expect the public, in the course of the entry and use to which they are entitled, to proceed to encounter some known or obvious dangers which are not unduly extreme, rather than to forego [sic] the right.
>
> Even such defendants, however, may reasonably assume that members of the public will not be harmed by known or obvious dangers which are not extreme, and which any reasonable person exercising ordinary attention, perception, and intelligence could be expected to avoid. This is true particularly where a reasonable alternative way is open to the visitor, known or obvious to him, and safe.[19]

The district court concluded that "regardless of whether the crab apple tree was an open and obvious danger, the City should have anticipated a plaintiff, such as the Connelly's [sic] 'would fail to protect himself or herself against the danger.'" The court reasoned that the City was a "government agency maintaining land upon which the Connelly's [sic] were entitled to enter as a matter of public right" and that it should have anticipated that persons sledding in the park "would fail to protect themselves, because they may be distracted by the other people and activities involved with the sledding."

The City argues that the court should not have included the "distraction" argument in its rationale, because there was no evidence that Rachel and Chelsea were actually distracted at the time of the accident. This argument has merit. We agree with the reasoning of an Illinois appellate court that "in order for the distraction exception to apply, it must have been foreseeable that [the] plaintiff would become distracted *and* there must be evidence that [the] plaintiff actually became distracted."[20]

But we agree with the district court's alternative reasoning that as a governmental entity operating a park that was open

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[19] *Id.*, comment *g*. at 221-22.

[20] *Belluomini v. Stratford Green Condominium*, 346 Ill. App. 3d 687, 695, 805 N.E.2d 701, 708, 282 Ill. Dec. 82, 89 (2004) (emphasis in original).

to the public and commonly used for sledding, the City should have expected the public to encounter some dangers which were not unduly extreme, rather than forgo the right to use the park for sledding. The danger posed by the tree was based on its position along one side of the sledding slope. The tree did not present an unduly extreme danger, as evidenced by the fact that Slaven did not appreciate the danger when she determined the location for the tree, or even after Pierce suggested that it be removed because of its proximity to the sledding area. Viewing the evidence in a light most favorable to the Connellys, as our standard of review requires, we conclude that the district court did not err in finding that the City should have expected that lawful visitors such as the Connellys would fail to protect themselves against the danger posed by the crab apple trees.

2. Comparative Fault Apportionment

The City makes two arguments with respect to the district court's determination of Timothy's comparative fault. First, although it makes no specific assignment of error on this point, the City contends that the daughters' claims "must be reduced by Timothy's negligence."[21] The district court, relying upon long-established precedent of this court,[22] determined as a matter of law that Timothy's fault could not be imputed to either Rachel or Chelsea so as to reduce each of their recoveries. This determination was correct, and to the extent that the City's argument to the contrary was preserved, it is without merit.

The City also argues that in the parents' separate action, the district court erred in determining that Timothy bore 25 percent of the fault for the accident, when compared to the negligence of the City. It argues that Timothy's negligence "exceeds the blameworthiness of the City's conduct"[23] and should therefore bar recovery on the parents' claims.

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[21] Brief for appellant in case No. S-10-879 at 33.

[22] See, *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007); *Wilson v. Thayer County Agricultural Society*, 115 Neb. 579, 213 N.W. 966 (1927).

[23] Brief for appellant in case No. S-10-880 at 31.

Under Nebraska's comparative fault statutes,

> [a]ny contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery.[24]

[8,9] This court has recognized that "a plaintiff is contributorily negligent if (1) she or he fails to protect herself or himself from injury, (2) her or his conduct concurs and cooperates with the defendant's actionable negligence, and (3) her or his conduct contributes to her or his injuries as a proximate cause."[25] Because the purpose of comparative negligence

> is to allow triers of fact to compare relative negligence and to apportion damages on that basis, the determination of apportionment is solely a matter for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial.[26]

We conclude that there is credible evidence, as summarized above, to support the district court's apportionment of fault and that the apportionment bears a reasonable relationship to the respective elements of negligence proved at trial. The City, as the owner of a public park historically used for sledding, knew that the crab apple trees posed a risk to those who used the park for sledding, yet took no action to decrease or eliminate the risk. The record reflects that the district court carefully considered the City's factual arguments regarding Timothy's comparative responsibility for the accident, but determined that it was significantly less than that of the City. Under our deferential standard of review, we cannot conclude

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[24] Neb. Rev. Stat. § 25-21,185.09 (Reissue 2008).

[25] *Baldwin v. City of Omaha*, 259 Neb. 1, 12, 607 N.W.2d 841, 850 (2000).

[26] *Id.* at 18, 607 N.W.2d at 853.

the district court erred in its apportionment of comparative fault.

3. Measure of Damages for In-Home Nursing Care

[10] A person who suffers injury as a result of the negligence of another "is entitled to recover for the reasonable value of medical care and expenses incurred for the treatment of the injuries."[27] The City concedes that this element of damage may include services provided in the home of the injured party. But it takes issue with the manner in which the district court valued the nursing services which Kelly provides to Rachel.

The district court found the proper measure of damages was the replacement cost of the services, which it assessed at $20 per hour based upon expert testimony regarding the average charges of Omaha businesses which provide in-home health care. The City contends this measure of damages results in a windfall, because it gives the parents "the same profit, overhead, and other elements of pricing that a business would include in its charges."[28] The City argues that the services should have been valued in the range of $7.50 and $12.50 per hour, representing the compensation that a home health aide employed by an agency would receive for providing in-home services. In rejecting this argument, the district court reasoned that its concern was "not that the Parents may receive a windfall but that the City not avoid liability for its negligence merely because a mother and father chose to care for their child themselves."

The evidence supports a reasonable inference that if Kelly were unable or unwilling to provide the in-home nursing services which Rachel requires, she and Timothy would have been required to contract with a commercial provider of such services at a cost to them of $20 per hour. Their expert testified that this was "the only option," due to certain requirements applicable to in-home health care providers. We conclude that

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[27] *Steinauer v. Sarpy County*, 217 Neb. 830, 843, 353 N.W.2d 715, 724 (1984), citing *Stanek v. Swierczek*, 209 Neb. 357, 307 N.W.2d 807 (1981).

[28] Brief for appellant in case No. S-10-880 at 45.

the district court did not err in finding that the reasonable value of the services provided to Rachel by her parents was $20 per hour.

4. Damage Cap

All parties assign error with respect to the district court's disposition of issues pertaining to § 13-926, which limits the amount recoverable under the PSTCA to "(1) One million dollars for any person for any number of claims arising out of a single occurrence; and (2) Five million dollars for all claims arising out of a single occurrence." Rachel contends the district court erred in rejecting her claim that the cap unconstitutionally deprives her of a substantive due process right to compensation for proven economic damages. The City argues the district court erred in rejecting its argument that all claims resulting from Rachel's injury were subject to a single cap of $1 million.

(a) Constitutionality: Substantive Due Process

[11-14] We consider Rachel's constitutional challenge within the framework of well-established legal principles. A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.[29] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.[30] The unconstitutionality of a statute must be clearly established before it will be declared void.[31] The Nebraska Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality.[32]

[15-17] The Due Process Clauses of both the federal and the state Constitutions forbid the government from infringing upon a fundamental liberty interest, no matter what process is

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[29] *Sarpy Cty. Farm Bureau, supra* note 8; *Kiplinger, supra* note 8.

[30] *Id.*

[31] *Id.*

[32] See *Staley, supra* note 5.

provided, unless the infringement is narrowly tailored to serve a compelling state interest.[33] "Substantive due process relates to the content of the statute specifying when a right can be lost or impaired."[34] "When a fundamental right or suspect classification is not involved in the legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate state interest."[35]

We upheld the constitutionality of the damage cap established by § 13-926 in *Staley*.[36] In rejecting a substantive due process challenge, we reasoned that the cap did not involve a fundamental right or a suspect classification and "the Legislature had a rational basis for limiting the amount of damages recoverable in claims under the [PSTCA]."[37] We noted that the damage cap was enacted "because of legislative concern regarding the cost and availability of liability insurance for political subdivisions, and the perceived need of the state to protect the fiscal stability of its political subdivisions."[38]

Rachel attempts to distinguish *Staley*, arguing that the damage cap as applied in that case deprived the plaintiff of only 4 percent of his proven economic damages, whereas Rachel is deprived of more than 75 percent of her proven economic damages by application of § 13-926(1). Rachel argues that this case affects her fundamental rights because "[c]ompensating negligently injured individuals for economic damages—which, unlike noneconomic damages, can be fully compensated by the payment of money—is the fundamental motivating purpose of our tort system."[39] But this argument overlooks the context in which these claims are asserted. An injured party

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[33] *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007).

[34] *Staley, supra* note 5, 271 Neb. at 555, 713 N.W.2d at 469, citing *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001).

[35] *Id.*, citing *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997).

[36] *Staley, supra* note 5.

[37] *Id.* at 555, 713 N.W.2d at 470.

[38] *Id.* at 554, 713 N.W.2d at 469.

[39] Brief for appellees in case No. S-10-879 at 48.

has no fundamental right to a tort recovery against a political subdivision. In the absence of legislation, all such claims are barred by sovereign immunity. The PSTCA eliminates, in part, the traditional immunity of political subdivisions for the negligent acts of their employees.[40] But we have characterized this as a "limited waiver," because certain types of tort claims are exempt from its operation.[41] Because the right of an injured party to recover in tort against a political subdivision exists solely as a matter of legislative grace, it cannot be considered a fundamental right.

[18] And we are not persuaded by Rachel's argument that the Legislature lacked a rational basis for including Omaha with all other political subdivisions to which § 13-926 applies. They contend that the Legislature's concerns regarding insurability and fiscal stability of political subdivisions which led to the enactment of the damage cap do not apply to Omaha, due to its size and ability to self-insure. But that is a determination best left to a legislative body, not a court. As we said in *Staley*, courts will not independently review "the factual basis on which a legislature justified a statute, nor will a court independently review the wisdom of a statute. Instead, courts inquire whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based."[42] The PSTCA creates a single class of tortfeasors, consisting of all political subdivisions.[43] The scope of § 13-926 is consistent with that scheme. We will not second-guess the decision of the Legislature to treat the City in the same manner as all other political subdivisions with respect to capping damages recoverable under the PSTCA. We conclude, as we did in *Staley*, that the Legislature had a rational basis for enacting § 13-926. Rachel's substantive due process challenge is without merit.

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[40] *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

[41] *Britton v. City of Crawford*, 282 Neb. 374, 380, 803 N.W.2d 508, 514 (2011), citing *Stonacek, supra* note 6.

[42] *Staley, supra* note 5, 271 Neb. at 554, 713 N.W.2d at 469.

[43] *Id.*; *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976).

(b) Statutory Interpretation: Number of Caps

[19] The City contends that the district court erred in determining that Rachel's injuries triggered three separate damage caps—one for Rachel and one for each of her parents. It argues that the parents' claims are "derivative" and "must logically be subsumed" in the $1 million cap applicable to Rachel's tort claim.[44] This argument requires us to interpret § 13-926. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[45]

[20,21] Under Nebraska law, injury to a minor results in two causes of action—one on behalf of the minor and the other on behalf of the minor's parent.[46] The minor's claim is based on damages caused by the personal or bodily injury sustained by the minor, while the claim of a parent is based on the loss of services during minority and the necessary expenses of treatment for the injured child.[47] The cause or right of action of parents is distinct from the cause of action of their child.[48] Thus, from Rachel's significant injuries, two separate causes of action arose—one in favor of Rachel and the other in favor of her parents for loss or damage sustained on account of Rachel's injury. The issue presented here is whether all of these claims are subject to a single damage cap of $1 million.

(i) Parents Entitled to Cap Separate From That of Rachel

In support of the City's argument that the parents' claims are subsumed within Rachel's claim and therefore are subject to a single damage cap, the City relies on *City of Austin v.*

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[44] Brief for appellant in case No. S-10-880 at 41.

[45] *American Amusements Co., supra* note 7; *Skaggs v. Nebraska State Patrol*, 282 Neb. 154, 804 N.W.2d 611 (2011).

[46] *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984).

[47] *Id.*

[48] *Id.*

Cooksey.[49] In that wrongful death case, several heirs asserted claims against a city under the Texas Tort Claims Act, which limited liability "'to $100,000 per person and $300,000 for any single occurrence for bodily injury or death.'"[50] The issue presented was whether the statutory phrase "per person" referred to the injured person, or a person asserting a claim as a result of an injury to someone else. In concluding that it meant the former, the court noted that under insurance law, phrases such as "per person" or "each person" refer to the person injured, and further noted that "[t]his is especially true in cases in which the words of limitation refer to 'bodily injury' as they do in the Texas Tort Claims Act."[51]

We do not find the reasoning of *Cooksey* persuasive in this case, because of differences in the language used in the Texas and Nebraska statutes. As we have noted, § 13-926 limits damages under the PSTCA to "[o]ne million dollars for any person for any number of claims arising out of a single occurrence." The term "person" necessarily refers to a person asserting a tort claim, as the PSTCA provides "the exclusive means" by which a person may maintain a "tort claim . . . against a political subdivision."[52] The PSTCA defines a "[t]ort claim" as

> any claim against a political subdivision for money only . . . on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the political subdivision, while acting within the scope of his or her office or employment, under circumstances in which the political subdivision, if a private person, would be liable to the claimant for such damage, loss, injury, or death.[53]

Based on this definition, a party may recover up to the statutory limit of $1 million if the party is "any person" asserting "any

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[49] *City of Austin v. Cooksey*, 570 S.W.2d 386 (Tex. 1978).

[50] *Id*. at 387, quoting Tex. Rev. Civ. Stat. Ann. art. 6252-19, § 3 (West 1970).

[51] *Id*. at 388.

[52] *Geddes v. York County*, 273 Neb. 271, 275, 729 N.W.2d 661, 665 (2007). See, *Jessen v. Malhotra*, 266 Neb. 393, 665 N.W.2d 586 (2003); *Keller v. Tavarone*, 265 Neb. 236, 655 N.W.2d 899 (2003); § 13-902.

[53] § 13-903(4).

claim . . . on account of personal injury." The U.S. Supreme Court has recognized that "[t]he words '*any claim* against the United States . . . *on account of* personal injury' . . . are broad words in common usage" and "are not words of art."[54] This court has also determined that a claim for contribution against a joint tort-feasor constituted a "[t]ort claim" within the meaning of Neb. Rev. Stat. § 81-8,210(4) (Cum. Supp. 2010), which is the State Tort Claims Act equivalent to § 13-903(4).[55] Thus, one need not suffer bodily injury to assert a tort claim under § 13-903(4).

Other courts have interpreted damage cap statutes similar to § 13-926 as providing a cap for the claims of an injured minor and a separate cap for his or her parents' claims. In *Independent School Dist. I-29 v. Crawford*,[56] parents of a child injured in a school bus accident asserted in a single action both the child's personal injury claim and their claim for medical expenses. An Oklahoma statute provided that the liability of a political subdivision "'shall not exceed . . . Fifty Thousand Dollars (50,000.00) to any claimant for all other claims arising out of a single accident or occurrence.'"[57] The court noted that under Oklahoma law, a "parent's right of action for consequential damages based on loss of services and on the expenses incurred as a result of the child's injury is distinct from the child's right of action for his or her own injuries."[58] Accordingly, the court concluded that the parents and the child were separate "claimants" within the meaning of the damage cap provision and could recover a maximum of $100,000 from the school district.[59]

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[54] *United States v. Yellow Cab Co.*, 340 U.S. 543, 548, 71 S. Ct. 399, 95 L. Ed. 523 (1951) (emphasis in original).

[55] See *Northland Ins. Co. v. State*, 242 Neb. 10, 492 N.W.2d 866 (1992).

[56] *Independent School Dist. I-29 v. Crawford*, 688 P.2d 1291 (Okla. 1984) (superseded by statute as stated in *Carlson v. City of Broken Arrow*, 844 P.2d 152 (Okla. 1992)).

[57] *Id.* at 1293, quoting Okla. Stat. tit. 51, § 154 (Supp. 1979) (emphasis omitted).

[58] *Id.* at 1293-94.

[59] *Id.* at 1294.

Other courts have similarly held that persons having separate and distinct claims arising from a single occurrence are entitled to separate statutory damage caps. In *Faber v. Roelofs*,[60] a Minnesota statute limited a municipality's liability to "'$25,000 when the claim is one for death by wrongful act or omission and $50,000 to any claimant in any other case.'"[61] The court held that under this statute, an injured minor and his father were separate claimants, each entitled to recover up to $50,000, because the father's action was separate and distinct from that of the minor. In *Schwartz v. Milwaukee*,[62] the court held that under a statute which limited "'[t]he amount recoverable by any person for any damages'" to $25,000, a husband's claim for loss of consortium was separate and distinct from his wife's personal injury claim, and that each was therefore entitled to recover up to $25,000. And in *State, Bd. of Regents v. Yant*,[63] the court held that because the claim of an injured minor child was separate and distinct from his mother's claim for medical expenses incurred as a result of his injury, each was entitled to recover up to $50,000 under a statute which limited the state's liability to $50,000 on "'a claim or a judgment by any one person.'"

The City would have us read § 13-926(1) to limit its liability to $1 million for all claims arising from a single bodily injury. The Legislature could have written the statute that way, but it did not. Instead, it imposed the $1 million cap on "*any person for any number of claims* arising out of a single occurrence."[64] Rachel and her parents are separate persons under § 13-926(1), as the parents' claims are separate and distinct from Rachel's claim. Therefore, Rachel's claim and her parents' claims are subject to separate damage caps.

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[60] *Faber v. Roelofs*, 298 Minn. 16, 212 N.W.2d 856 (1973).

[61] *Id.* at 24, 212 N.W.2d at 861, quoting Minn. Stat. Ann. § 466.04(1)(a) (West 1963).

[62] *Schwartz v. Milwaukee*, 54 Wis. 2d 286, 288, 195 N.W.2d 480, 482 (1972).

[63] *State, Bd. of Regents v. Yant*, 360 So. 2d 99, 100 (Fla. App. 1978).

[64] § 13-926(1) (emphasis supplied).

(ii) Claims of Parents Subject to Single $1 Million Cap

[22,23] We must next determine whether Kelly and Timothy are each entitled to recover up to $1 million for their claims against the City under § 13-926(1), or whether their combined claims are subject to a single $1 million cap. In response to our order for supplemental briefing on this issue, the Connellys briefed the substantive issue but also argued that it was not preserved for appeal. In the City's opening brief, it argued that the district court erred in determining that "the damages limit in the [PSTCA] allows the maximum recovery not just for Rachel, who suffered personal injury, but also for *each of her parents* who only incurred damages derivatively through their daughter."[65] We acknowledge that this argument does not focus squarely on the question of whether the claims of each parent are subject to a separate damage cap in the event that they are not subsumed within the cap applicable to Rachel's claim. But the City's assignment of error and argument did raise the issue of whether all claims related to Rachel's injury are subject to a single cap, as the City contends, or multiple caps, as the district court held. In order to provide a meaningful resolution of this question of law, we conclude that it is necessary to determine whether the parents' claims are subject to one or two caps. For that reason, we requested supplemental briefing on this issue. To the extent that it was not preserved in the City's opening brief, we reach the issue under the doctrine of plain 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.[66] 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.[67]

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[65] Brief for appellant in case No. S-10-880 at 40 (emphasis supplied).

[66] *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011); *In re Interest of Brandon M.*, 273 Neb. 47, 727 N.W.2d 230 (2007).

[67] *Id.*

In determining that the parents' claims were not subject to the same damage cap as Rachel's personal injury claim, we focused on the separate and distinct nature of a minor's personal injury claim and her parents' claims for damages resulting from the injury. Applying the same reasoning here, we must determine whether the claims asserted by Kelly and Timothy are separate and distinct from each other. It is clear from the record that they are not.

The district court held as a matter of law that Kelly and Timothy had no cause of action for loss of consortium, and that holding was not challenged on appeal. But the court awarded damages for loss of Rachel's services during minority, which is permissible under Nebraska law.[68] These damages, which differ from loss of consortium damages,

> arose in a day when children during minority were generally regarded as an economic asset to parents. Children went to work on farms and in factories at age 10 and even earlier . . . A child's earnings and services could be generally established and the financial or pecuniary loss which could be proved became the measure of damages for the wrongful death of a child.[69]

The district court noted that in seeking these damages, the parents claimed that due to Rachel's injury, she would not have a job, thereby "eliminating her ability to contribute some of her earned money to the household" and would be unable to assist with household chores. The parents collectively requested $450,000. The district court found the evidence did not support damages in this amount, but based upon evidence of Chelsea's earnings at a part-time job during high school, it awarded $15,984.

The district court employed similar reasoning with respect to the parents' claim for past and future medical expenses and modifications to their home and vehicles to accommodate Rachel's loss of mobility.

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[68] See *Macku, supra* note 46.

[69] *Selders v. Armentrout*, 190 Neb. 275, 278, 207 N.W.2d 686, 688 (1973). See, also, *Dorsey v. Yost*, 151 Neb. 66, 36 N.W.2d 574 (1949).

> [E]ach parent has a separate interest in the recovery of medical expenses and neither recovery will be impacted by the other spouses [sic] contributory negligence. However, this is subject to ensuring that there will be no double recovery. Therefore, if Timothy and Kelly . . . establish they have jointly provided medical expenses, each will be entitled to half the amount, with Timothy's recovery being reduced by his contributory negligence.

Following the trial on damages, the district court found that the parents' proven damages totaled $1,663,550.32, which included past and future medical expenses, accommodation costs, and the loss of Rachel's services. The court divided this amount by two, reduced Timothy's "share" by the 25-percent factor attributable to his comparative fault, and awarded $623,661.02 to Timothy and $831,775.17 to Kelly. In ruling that each parent's claim would be subject to a separate damage cap, the district court reasoned that each parent had a separate cause of action for medical expenses, which could be asserted by each parent individually or by them jointly.

But it is clear that the parents' claims were not distinct from one another, in the same sense that the parents' claims were distinct from those of Rachel. The parents asserted their claims jointly, the claims were established by the same proof, and the claims became "separate" only when the district court divided the proven damages by two and then reduced Timothy's award due to his comparative fault.

In deciding to treat the parents' claims as separate from each other and thus subject to separate caps, the district court relied in part on *Dunkel v. Motorists Mut. Ins. Co.*,[70] in which an Ohio appellate court held that an injured child and each of her parents could recover up to $100,000 each under an insurance policy with limits of $100,000 for each person up to a limit of $300,000 per accident. The trial court treated each parent's claim for loss of services as separate, not joint, and reasoned, "'To suggest that [a mother] does not suffer a loss unique

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[70] *Dunkel v. Motorists Mut. Ins. Co.*, 41 Ohio App. 3d 130, 534 N.E.2d 950 (1987).

from that of her husband . . . for the society, love, comfort, and companionship of her daughter is to deny what any parent knows in relation to their own special relationships with their children as individuals.'"[71] The appellate court adopted this reasoning.

But the claims asserted by Kelly and Timothy here do not depend upon any "special relationship" that each may have with Rachel. As noted, their loss of consortium claims which may have been based on such relationships were rejected as a matter of law. Their loss of services claim is based upon the services that Rachel would have provided to the household, not to each parent individually, and the medical expenses claim is likewise joint in nature. Accordingly, we do not find *Dunkel* persuasive on the issue before us.

In *Elkhart Community Schools v. Yoder*,[72] an Indiana appellate court took what we believe is the correct approach to determining whether two parents' claims for damages resulting from a child's personal injury were entitled to separate caps. Indiana's Tort Claims Act limited a governmental entity's liability to $300,000 "'for injury to or death of one [1] person in any one [1] occurrence.'"[73] A jury returned a verdict of $450,000 in favor of the parents of a child who was seriously injured in a school bus accident. Pursuant to the statutory cap, the trial court reduced the award to $300,000. On appeal, the parents contended that a separate cap should have applied to each of their claims. The appellate court rejected this argument. Although recognizing that under Indiana law, the parents of a negligently injured minor child had a separate cause of action than that of the minor, the court opined:

> [I]n analyzing the effect of the Tort Claims Act limitation of liability, it is necessary to determine whether there are separate causes of action for each plaintiff seeking to recover separately up to the statutory limit. The limitation cannot be invoked for the benefit of each plaintiff found

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[71] *Id.* at 132, 534 N.E.2d at 952.

[72] *Elkhart Community Schools v. Yoder*, 696 N.E.2d 409 (Ind. App. 1998).

[73] *Id.* at 416, quoting Ind. Code § 34-4-16.5-4 (1986).

> to be a "person" under the Act without regard for whether his or her claim is separate from others in the action.[74]

The court noted that under Indiana law, a parent's action for damages resulting from injury to a child could be brought by the parents jointly, or by either parent individually, if the other parent was joined as a codefendant. The court determined that because the parents were awarded an undivided joint verdict, the parents "suffered a single injury, regardless of whether each parent is a separate 'person.'"[75] Thus, the court concluded that a single $300,000 cap applied to the parents' joint claims.

The same principle was applied in a slightly different context by the Wisconsin Supreme Court in *Wilmot v. Racine County*.[76] There, the applicable statute limited a governmental subdivision's tort liability to $50,000 for "'any person for any damages, injuries or death in any action.'"[77] The issue presented was whether the injured plaintiff and a subrogated health fund that had paid some of his medical bills were subject to one or two $50,000 caps. The court concluded that only one cap applied because the plaintiff's cause of action was not separate and distinct from that of his subrogee. The court relied in part on its prior decision in *Schwartz*[78] for the proposition that in order for multiple caps to apply, "not only must each claimant be 'a person' but . . . each claimant must also have a separate cause of action, be it independent or derivative."[79] As noted, we relied on *Schwartz* in concluding that the parents' claims were subject to a damage cap separate from the cap applicable to Rachel's claim.

Clearly, Kelly and Timothy are both "persons" having "claims" resulting from Rachel's injury, but their claims for

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[74] *Id.*

[75] *Id.*

[76] *Wilmot v. Racine County*, 136 Wis. 2d 57, 400 N.W.2d 917 (1987).

[77] *Id.* at 62, 400 N.W.2d at 919, quoting Wis. Stat. Ann. § 893.80(3) (West 1983).

[78] *Schwartz, supra* note 62.

[79] *Wilmot, supra* note 76, 136 Wis. 2d at 62-63, 400 N.W.2d at 919.

medical expenses and loss of services are not separate and distinct. Rather, these claims are joint in nature. The parents' joint claims were based on the same proof, and the parents could not each separately recover the full amount of damages for medical expenses and loss of services. As the district court correctly found, and the parties do not dispute, "all expenses associated with the accident are paid out of the coffers of the marital unit." The parents' claims did not become separate and distinct merely because the district court divided the total damages by two. Based upon our independent interpretation of § 13-926(1), we conclude that the parents' claims are subject to a single damage cap of $1 million.

There remains the issue of how to apportion Timothy's comparative fault against the single damage cap applicable to the joint parental claim, given that Kelly was not found to be at fault. We agree that a statutory limitation on damages such as that of § 13-926(1) "applies to cap the total recovery after the reduction of the plaintiff's damages for his or her comparative negligence, rather than applying to the total damages established before the reduction for comparative negligence, since the latter approach would multiply the effect of the damage limitation."[80] Here, the district court determined that the parents sustained damages in the total amount of $1,663,550.32. It reduced one half of that amount by 25 percent due to Timothy's comparative fault, thus arriving at an award for Timothy of $623,661.02 and an award for Kelly of $831,775.17. The total of these awards is $1,455,436.19. We conclude that this award must be reduced to $1 million pursuant to § 13-926(1), with this judgment payable jointly to Kelly and Timothy. We modify the judgments in the parents' action accordingly, and affirm as modified.

VI. CONCLUSION

For the reasons discussed, we affirm the judgment in the daughters' action awarding damages to Chelsea in the amount

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[80] 57 Am. Jur. 2d *Municipal, etc., Tort Liability* § 602 at 611 (2012). See, also, *University of Texas at El Paso v. Nava*, 701 S.W.2d 71 (Tex. App. 1985).

of $8,176.84 and to Rachel in the amount of $1 million. In the parents' action, we modify the judgment in favor of Kelly and Timothy by combining the amounts and reducing the total to $1 million payable to them jointly; and we affirm as modified.

JUDGMENT IN NO. S-10-879 AFFIRMED.

JUDGMENT IN NO. S-10-880 AFFIRMED AS MODIFIED.

WRIGHT, J., not participating.

MCCULLY, INC., DOING BUSINESS AS MCCULLY RANCH COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. BACCARO RANCH, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLEE.

816 N.W.2d 728

Filed July 20, 2012. No. S-11-952.

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 their testimony.
2. **Witnesses: Evidence: Appeal and Error.** An appellate court will not reevaluate the credibility of the witnesses or reweigh testimony but will review the evidence for clear error.
3. **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.
4. ____: ____. 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.
5. **Brokers: Contracts.** In determining whether a commission is due a broker, the court must look to the terms and conditions of the listing agreement.
6. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
7. ____. If a contract is unambiguous, the court will enforce the contract in accordance with the plain meaning of the words of the contract.
8. ____. Enforcement of a contract depends upon the terms of the contract and the facts that are applicable to the contract.
9. **Brokers: Real Estate: Contracts: Sales.** Ordinarily, a real estate broker who, for a commission, undertakes to sell land on certain terms and within a specified period is not entitled to compensation for his or her services unless he or she produces a purchaser within the time limit who is ready, willing, and able to buy upon the terms prescribed.

10. **Brokers: Property: Contracts: Sales.** When a broker secures a prospective buyer who is ready, willing, and able to purchase the subject property, the person who hired the broker has received the service for which he or she has contracted, and the broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed.
11. **Brokers: Property: Sales.** A seller is under no obligation to sell his or her property to a purchaser procured by a broker.
12. **Brokers: Property: Contracts: Sales.** The fact that a seller exercises his or her right not to sell the listed property to a purchaser produced by a broker does not relieve the seller of his or her obligation to pay the broker the agreed-upon commission.
13. **Contracts: Sales: Words and Phrases.** A prospective purchaser is financially able if he or she has the capability to make the downpayment and all deferred payments required under the proposed contract of sale.

Appeal from the District Court for Hooker County: DONALD E. ROWLANDS, Judge. Reversed and remanded for further proceedings.

Ward F. Hoppe and Colby Rinker, of Hoppe Law Firm, for appellant.

Steven P. Vinton, of Bacon & Vinton, L.L.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, McCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF THE CASE

McCully, Inc., a broker doing business as McCully Ranch Company (McCully), brought suit against its client Baccaro Ranch, L.L.C. (Baccaro), as seller, claiming that Baccaro breached the real estate listing agreement and that McCully was entitled to a commission from Baccaro under contract theory or, in the alternative, under the theory of unjust enrichment. In a previous appeal, we concluded that the listing agreement was enforceable and remanded the cause for further proceedings. *McCully, Inc. v. Baccaro Ranch*, 279 Neb. 443, 778 N.W.2d 115 (2010). After trial, the district court for Hooker County determined that McCully was not entitled to a real estate commission. McCully appeals. Following our review for clear error, we determine that

McCully produced a ready, willing, and able purchaser during the term of the listing agreement on terms acceptable to Baccaro and that McCully is entitled to a commission. Because the district court clearly erred, we reverse, and remand for further proceedings.

STATEMENT OF FACTS

This matter was tried to the court, and many facts taken from the record are not in dispute. The issue in the case is whether McCully was entitled to a real estate commission from Baccaro resulting from the exchange of the "Baccaro Ranch" for a ranch owned by the exchanger, Greg Stine.

McCully and Baccaro entered into an exclusive listing agreement on or about December 23, 2006. Baccaro wished to sell or exchange the Baccaro Ranch, also called the River Ranch, which is located in Hooker County. The listing agreement provided that the listing period began on December 23, 2006, and ended on December 1, 2007. The listing agreement further stated that the listing price for the Baccaro Ranch "shall be $1,600,000.00 on the following terms: cash or other terms acceptable to [Baccaro]." Paragraph 13 of the listing agreement provided a scale of the commission rate based on the purchase price to determine the commission owed to McCully. Paragraph 13 also provided:

> Commission rate based on the gross sale price of the property shall be payable to BROKER payable upon the happening of any of the following:
>
> a) If, during the term of the Listing, Seller, Broker or any other person:
>
> I. seller exchanges the Property; or
>
> II. finds a Buyer/Exchang[e]r who is ready, willing and able to purchase/exchange the Property at the above price and terms or for any other price and terms to [sic] which Seller agrees to accept or
>
> . . . .
>
> d) If Broker is unfairly hindered by Seller in showing or attempting to sell or exchange this Property; or
>
> e) If within 180 days after the expiration of this Listing Agreement, Seller sells/exchanges this Property

> to any person found during the term of this listing, or due to Broker[']s efforts or advertising, under this Listing Agreement[.]

During the term of the listing agreement, the exchanger, Stine, made several offers on the Baccaro Ranch. Stine is trained as a lawyer, was active in a banking business which had recently been sold, and was interested in the Baccaro Ranch because of its recreational potential stemming from the fact that the Dismal River flowed through it. In December 2006, Stine initially offered to buy the Baccaro Ranch for $1,200,000 subject to a partial survey. Baccaro rejected that offer.

In February 2007, Stine purchased the "Pados Ranch," also called the Lake Ranch or the Lake and Baldwin Ranch, which is also located in Hooker County. The record shows that Baccaro had previously expressed interest in exchanging the Baccaro Ranch for the Pados Ranch because the latter was better for Baccaro's ranching needs and was approximately 2,000 acres larger than the Baccaro Ranch. In correspondence dated February 24, 2007, Stine offered to exchange his recently acquired Pados Ranch for the Baccaro Ranch with Baccaro paying an additional $180,000 "boot" to Stine. Stine indicated that he had paid $1,534,500 for the Pados Ranch. In this correspondence to Baccaro, Stine noted that there had evidently developed an understanding regarding boundary lines between the Baccaro Ranch and its only neighboring ranch and Stine suggested that a survey be done to facilitate the proposed exchange. Some evidence showed that Baccaro wished to avoid the expense of a survey. Stine did not receive a response from Baccaro. On March 25, Stine sent a letter to Garth Bullington, a managing member of Baccaro, stating that Stine was withdrawing this offer.

In May 2007, Baccaro and the owner of its only neighbor, the "Dismal River Ranch," executed corrective deeds so that the boundary lines of their ranches would "more accurately reflect the recognized boundary lines as established by the existing fences." Thereafter, on June 18, Baccaro offered to do a straight trade of the Baccaro Ranch for the Pados Ranch. Stine did not accept this offer.

During the summer of 2007, Kevin McCully, McCully's president, and Stine toured the Baccaro Ranch on four-wheelers. They were equipped with maps including a satellite aerial map and a section, township, and range map and were able to examine the placement of the fences relative to the boundaries. Garth Bullington testified at trial that the fences were not moved during all relevant periods. Kevin McCully testified at trial that during their summer 2007 visit, Stine gave Kevin McCully the impression that he was satisfied with the fence lines and the boundaries of the ranch.

Following this inspection of the Baccaro Ranch, on September 6, 2007, Stine offered a straight exchange of the Pados Ranch and the Baccaro Ranch in a document entitled "Real Estate Exchange Agreement." That document contains 5 articles in 11 pages, covering a range of terms including mutual representations and warranties, and was signed by Stine, whose signature was notarized. Following trial, the court found that the Real Estate Exchange Agreement which was actually signed by the parties "contains only minor modifications from Stine's original offer." In his September 2007, offer, Stine listed the two properties to be exchanged, with their legal descriptions. This offer did not require a survey.

The legal description in the exchange agreement for the Baccaro Ranch stated that it consisted of approximately 3,010 acres. The offer stated that the Baccaro Ranch was legally described as follows:

> All in Hooker County, Nebraska
>
> S5-T21-R31 N N1/2 SE1/4 NW1/4; N1/2 SW1/4 NE1/4; N1/2 NE1/4; NE1/4 NW1/4; Lot 4 (Four)
>
> S19-T22-R31 S1/2; S1/2 N1/2
>
> S20-T22-R31 SW1/4; NW1/4 SE1/4; S1/2 SW1/4 NW1/4
>
> S29-T22-R31 E1/2 NW1/4; W1/2 W1/2; Lot 2 (Two); Lot 3(Three); Lot 4 (Four); that part of Lot 1 (One) claim 38, except that part conveyed to Dismal Ranch Company described in that warranty deed recorded with the Hooker County Clerk, Book 14 Pages 74-75
>
> S30-T22-R31 ALL
>
> S31-T22-R31 N1/2; N1/2 SE1/4; NE1/4 SW1/4

S32-T22-R31 ALL, consisting of approximately 3,010 acres (the "Baccaro Property").

The Pados Ranch was described in the proposed exchange agreement as consisting of approximately 5,040 acres as follows:

> E ½ SW ¼, Lots 3-4, Section 7 Township22 Range 31, All Section 13 Township22 Range 32, E 1/2 , E ½ NW ¼, SW ¼ NW ¼, SW ¼ Section 14 Township 22 Range 32, S ½ NE ¼, SE ¼ Section 15 Township22 Range 32, NE ¼; N ½ SE ¼, Section 22 Township 22 Range 32, All Section 23 Township 22 Range 32, S ½ SE ¼ Section 12 Township 22 Range 32 Hooker County Nebraska and All Section 2 Township 22 Range 32, N ½ NE ¼; NE ¼ NW ¼ Section 11 Township 22 Range 32, All Section 1 Township 22 Range 32, S ½ Section 6 Township 22 Range 31, NW ¼ Section 7 Township 22 Range 31 and N ½; SW ¼; N ½ SE ¼ Section 12 Township 22 Range 32 all in Hooker County Nebraska, consisting of approximately 5,040 acres (the "Pados Property").

Due to the importance of Stine's September 7, 2007, exchange offer, the members of Baccaro, with one exception, met on September 28 at the office of their attorney, George Vinton, to discuss Stine's offer. There is evidence that the full membership had not previously met. The members of Baccaro include Alma Bullington and her eight children. The three managing members of Baccaro are Alma Bullington, Garth Bullington, and Valma Smith. At the meeting, the members discussed Stine's exchange offer. They also discussed the real estate commission which would be owed to McCully if they accepted Stine's offer, and Garth Bullington testified that he believed that the commission would be $30,000. Garth Bullington called Kevin McCully to ask what the commission would be, and Kevin McCully advised him that the commission would be approximately $90,000. Vinton advised the members of Baccaro to wait on Stine's offer until they found out what the commission to McCully would be. Vinton testified he had also advised Baccaro that a fair market value needed to be assigned for exchange purposes and that it would be prudent to include a term which in effect

indicated that the fences did not necessarily coincide with the legal boundaries.

On October 2, 2007, Vinton sent McCully's attorney a letter discussing formulas by which to calculate a commission. The letter indicates that Baccaro had tabled the exchange. The letter acknowledged that Stine valued the Pados Ranch at $1,534,500.

On October 31, 2007, Vinton sent McCully's attorney a letter stating that the terms of the September 2007 Real Estate Exchange Agreement presented to Baccaro by Stine were acceptable. Vinton also stated that Baccaro wished to add two terms, and this October 31 correspondence has been referred to as the "counteroffer" tendered by Baccaro. Baccaro wished to add a provision stating that the fair market values of both the Pados Ranch and the Baccaro Ranch were $1,532,160 and that each party "accept[ed] the real estate to be conveyed to it subject to the location of existing fences." The letter recognized the issue regarding McCully's commission, but stated that it was premature to resolve it. For purposes of the listing agreement, the October 31 counteroffer contained the terms that Baccaro agreed to accept.

The Real Estate Exchange Agreement was not signed during the listing period, which expired on December 1, 2007. Vinton testified he did not know of his own knowledge "why we didn't get a response" to the counteroffer. Stine testified that he was ready to exchange based upon the proposed exchange agreement in the fall of 2007 and that he never withdrew his September 2007 proposal. Stine testified that the exchange agreement language regarding fences was added for assurance for the members of Baccaro and that the disagreement between McCully and Baccaro regarding the commission "led to just a total lack of progress" in the fall of 2007.

Garth Bullington testified at trial that in January 2008, he arranged for an employee of the Natural Resources Conservation Service to come to the Baccaro Ranch. The employee used a global positioning system (GPS) instrument to plot coordinates along the fence lines of the Baccaro Ranch and created a map using the coordinates which indicated that the acreage inside the fence lines of the ranch was 3,226.6 acres.

During the term of the listing agreement, Baccaro had also received offers from other potential buyers, including one for $1,320,000 and another for $1,400,000. However, the parties agree that Stine was the only possible ready, willing, and able exchanger presented during the term of the listing agreement, and the record as a whole shows that early on, Baccaro expressed an interest in exchanging the Baccaro Ranch for the Pados Ranch.

On July 10, 2008, a closing was held whereby the Baccaro Ranch was exchanged for the Pados Ranch. It is obvious that the actual closing between Baccaro and Stine took place after the real estate listing agreement had expired on December 1, 2007, and outside the protected period, which was 180 days after the expiration of the listing agreement. The Real Estate Exchange Agreement signed by Baccaro and Stine is the actual agreement tendered by Stine in September 2007 with only the date on the first page changed in handwriting from September 2007 to June 18, 2008, and the addition of Alma Bullington's, Garth Bullington's, and Valma Smith's notarized signatures dated June 18, 2008. Stine's notarized signature on the executed agreement remained dated September 6, 2007.

Vinton prepared an addendum to the Real Estate Exchange Agreement, dated July 1, 2008, which Baccaro and Stine signed. Stine did not participate in the creation of the addendum. The addendum stated that the fair market values of the Pados Ranch and the Baccaro Ranch were both $1,532,160, which approximates the amount Stine had paid to purchase the Pados Ranch in February 2007. The addendum provided that the parties accept the properties subject to the location of existing fences and to any claims of third parties resulting from fences' not being on the legal boundary lines and that neither party warranted an exact number of acres that were being exchanged.

Baccaro never paid a real estate commission to McCully. McCully filed its complaint in the district court for Hooker County on August 11, 2008, seeking a commission. Baccaro responded with an August 21 motion to dismiss, which was granted, along with leave to amend. McCully filed an amended complaint on November 3, alleging both breach

of contract and unjust enrichment by Baccaro. Baccaro filed a motion to dismiss for failure to state a claim under Neb. Ct. R. Pldg. § 6-1112(b)(6). Other motions and rulings were filed. The district court determined that the listing agreement was unenforceable under the statute of frauds, determined that McCully could not circumvent the statute of frauds by pleading unjust enrichment, and granted Baccaro's motion to dismiss.

McCully appealed the dismissal and claimed, inter alia, that the district court erred when it found that McCully failed to state a claim for breach of contract or unjust enrichment. In *McCully, Inc. v. Baccaro Ranch*, 279 Neb. 443, 778 N.W.2d 115 (2010), we concluded that the listing agreement was enforceable and that McCully's amended complaint alleged a claim and a set of facts upon which relief could be granted. We reversed the decision of the district court granting Baccaro's motion to dismiss, reinstated McCully's amended complaint, and remanded the cause for further proceedings.

On February 23, 2011, the district court overruled both parties' motions for summary judgment. A trial to the court was conducted commencing in June 2011. On August 17, the court filed a memorandum opinion and judgment in which it found generally in favor of Baccaro and against McCully. Regarding the claim based on an alleged breach of the listing agreement, the court found that McCully failed to find a ready, willing, and able buyer to purchase or exchange the Baccaro Ranch at a price and on the terms which were acceptable to Baccaro during the term of the listing agreement or within the 180-day protected period under paragraph 13(e) of the listing agreement. Regarding the claim based on unjust enrichment, the court found that Baccaro did nothing to hinder or impede McCully's ability to show or attempt to sell or exchange the Baccaro Ranch. Although both parties had introduced evidence regarding valuation for purposes of determining a commission, if any, in view of its disposition of McCully's claims, the court made no ruling on the amount of a commission. The court dismissed both claims with prejudice.

McCully sought a new trial. On October 13, 2011, the district court denied McCully's motion. McCully appeals.

ASSIGNMENTS OF ERROR

McCully claims that the district court erred when it found (1) that no ready, willing, and able exchanger was procured during the term of the listing agreement between McCully and Baccaro and (2) that Baccaro did not unfairly hinder or impede McCully's ability to affect an exchange.

Because we determine that McCully found Stine as a ready, willing, and able exchanger during the listing period on terms acceptable to Baccaro, and because the district court clearly erred when it found to the contrary, we find merit to McCully's first assignment of error and reverse the court's decision and remand the cause on this basis. Accordingly, we do not consider McCully's second assignment of error. See *In re Interest of Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011) (stating that appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

STANDARDS OF REVIEW

[1-4] 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 the 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. *Smalley v. Nebraska Dept. of Health & Human Servs.*, 283 Neb. 544, 811 N.W.2d 246 (2012). 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. *Hooper, supra*.

ANALYSIS

McCully generally claims that the district court erred when it found that McCully was not entitled to a commission for the exchange of the Baccaro Ranch with the Pados Ranch.

McCully claims in particular that the district court clearly erred when it found that no ready, willing, and able exchanger was procured during the term of the listing agreement between McCully and Baccaro; McCully contends the evidence showed that Stine was found by McCully and that Stine was a ready, willing, and able exchanger during the listing period on terms acceptable to Baccaro. In response, Baccaro asserts that no ready, willing, and able purchaser or exchanger was produced during the term of the listing agreement and that therefore, the district court correctly determined that McCully was not owed a commission. For the reasons which follow, we determine that the district court clearly erred when it found that no ready, willing, and able exchanger was procured during the term of the listing agreement, and therefore, we find that McCully is entitled to a commission.

[5-8] We have stated that in determining whether a commission is due a broker, the court must look to the terms and conditions of the listing agreement. *Trimble v. Wescom*, 267 Neb. 224, 673 N.W.2d 864 (2004). When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011). If a contract is unambiguous, the court will enforce the contract in accordance with the plain meaning of the words of the contract. *Trimble, supra*. Enforcement of a contract depends upon the terms of the contract and the facts that are applicable to the contract. *Id*.

The contract which controls our analysis with respect to whether McCully is entitled to a commission is the listing agreement quoted earlier in this opinion. By its terms, the listing agreement between McCully and Baccaro began on December 23, 2006, and expired on December 1, 2007. The relevant portion of the listing agreement at paragraph 13(a) provided that a commission would be payable to McCully if, during the term of the listing period, McCully found a buyer or exchanger who was ready, willing, and able to purchase or exchange the property at the price and on the terms contained in the listing agreement or for any other price and on

any other terms which Baccaro agreed to accept. The listing agreement also provided at paragraph 13(e) that McCully would receive a commission if within 180 days after the expiration of the listing agreement, Baccaro sold or exchanged the property to any person found during the term of the listing or due to McCully's efforts or advertising under the listing agreement.

[9-12] We have previously stated that ordinarily, a real estate broker who, for a commission, undertakes to sell land on certain terms and within a specified period is not entitled to compensation for his or her services unless he or she produces a purchaser within the time limit who is ready, willing, and able to buy upon the terms prescribed. *Coldwell Banker Town & Country Realty v. Johnson*, 249 Neb. 523, 544 N.W.2d 360 (1996). Furthermore, we have stated:

> "When the broker secures a prospective buyer who is ready, willing, and able to purchase the subject property, the person who hired the broker has received the service for which he or she has contracted, and the broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed."

Agri Affiliates, Inc. v. Bones, 265 Neb. 798, 811-12, 660 N.W.2d 168, 179 (2003) (quoting *Marathon Realty Corp. v. Gavin*, 224 Neb. 458, 398 N.W.2d 689 (1987)). A seller is under no obligation to sell his or her property to a purchaser procured by a broker. *Fleming Realty & Ins., Inc. v. Evans*, 199 Neb. 440, 259 N.W.2d 604 (1977). The fact, however, that the seller exercises his or her right not to sell the listed property to the purchaser produced by the broker does not relieve the seller of his or her obligation to pay the broker the agreed-upon commission. *Id.* See, similarly, *Dworak v. Michals*, 211 Neb. 716, 320 N.W.2d 485 (1982) (stating that broker is entitled to commission where failure of completion of deal results from wrongful act or interference of seller). Thus, although Baccaro was under no obligation to sell or exchange its property to Stine or any other purchaser or exchanger procured by McCully, if Stine or another purchaser was actually a ready, willing, and able purchaser procured by McCully during the

term of the listing agreement on terms acceptable to Baccaro, McCully is entitled to its commission.

In *Trimble v. Wescom*, 267 Neb. 224, 673 N.W.2d 864 (2004), a real estate broker brought a breach of contract claim to recover a commission on the sale of land. Because the potential buyers were not able to go forward with an exchange during the listing period and the sale was not consummated during the protection period, the broker was not entitled to a commission. In *Trimble*, we indicated that where the terms of the listing agreement are clear and unambiguous, the broker is entitled to a commission where he or she obtains a ready, willing, and able buyer during the term of the listing agreement or a sale of the property to such buyer is consummated during the protection period provided for in the listing agreement. We apply the framework in *Trimble* to the present case.

In the instant action, the exchange of the property occurred in July 2008. A sale or exchange was not consummated during the term of the listing agreement, which expired on December 1, 2007, or within the 180-day protection period provided for in the listing agreement between McCully and Baccaro. Therefore, the question before us is whether McCully found a ready, willing, and able buyer or exchanger during the term of the listing agreement. If McCully did obtain a ready, willing, and able buyer or exchanger during the term of the listing agreement, it was entitled to a commission.

[13] In explaining what is meant by a ready, willing, and able buyer, it has been stated:

> Each of the words "ready," "willing," and "able" expresses an idea that the others do not convey. All three of these elements must exist in the customer, in order to entitle the broker to a commission. It is not sufficient that the customer is ready and willing, but he or she must also have the ability to carry out the loan, sale, purchase, or exchange. So also, the procurement of a ready, willing, and able purchaser by a broker involves not only a showing that the purchaser has the financial ability to complete the contract, but also that the purchaser is ready and willing to purchase at a price and on terms prescribed by the vendor.

12 C.J.S. *Brokers* § 225 at 295 (2004). The Iowa Supreme Court has stated that "to be ready means to be ready to purchase on such terms as are agreeable to the owner at the time." *Jones v. Ford*, 154 Iowa 549, 554, 134 N.W. 569, 571 (1912). The Iowa Supreme Court has further stated that "to be willing means to be willing to make the purchase upon such terms." *Id.* We have stated that a prospective purchaser is financially able if he or she has the capability to make the downpayment and all deferred payments required under the proposed contract of sale. *Fleming Realty & Ins., Inc. v. Evans*, 199 Neb. 440, 259 N.W.2d 604 (1977).

The district court generally found that McCully failed to find a ready, willing, and able buyer to purchase or exchange the Baccaro Ranch at the price and on the terms that were acceptable to Baccaro during the term of the listing agreement or within the 180-day protected period and denied McCully's claim for a real estate commission. The district court did not make specific factual findings as to the individual terms "ready," "willing," or "able"; nor did it identify the items which composed the terms acceptable to Baccaro. Even after considering the evidence in a light favorable to Baccaro, we nevertheless determine that the district court clearly erred when it found that Stine was not a ready, willing, and able buyer during the term of the listing agreement.

There is no question that McCully found Stine as a potential buyer or exchanger for the Baccaro Ranch during the term of the listing agreement. There is no question that Stine was an "able" purchaser during the term of the listing agreement. He was financially able. Furthermore, he was ably positioned because he had purchased the Pados Ranch in February 2007 and owned it when he offered to complete a straight exchange of the Pados Ranch and the Baccaro Ranch. Given that Stine was an "able" exchanger, the issue becomes whether Stine was "ready" and "willing" to exchange his property for the Baccaro Ranch during the term of the listing agreement on terms which Baccaro agreed to accept.

Stine testified without contradiction that he remained agreeable throughout the listing period to the terms contained in the signed Real Estate Exchange Agreement he submitted to

Baccaro in September 2007. It is clear that Baccaro was agreeable to the terms contained in Stine's September 2007 agreement, as evidenced, in part, by Vinton's letter of October 31 to that effect. This letter further stated that Baccaro wished to include two additional terms, to wit: setting the fair market value of each of the ranches at $1,532,160 and providing that the parties accept that the real estate would be conveyed subject to the location of existing fences. The letter noted the absence of a survey requirement and explained that there was some question whether the fences were on proper legal boundary lines on both ranches. With respect to the fence term in the context of the sale of ranchland, Vinton testified that he advised Baccaro to be vigilant regarding fences because he had previously been involved with lawsuits over fences' not being on legal boundary lines.

Given Stine's September 2007 Real Estate Exchange Agreement and Baccaro's October 31 counteroffer containing two additional terms, the evidence shows that for purposes of the listing agreement's paragraph 13(a)(II), the "terms to [sic] which Seller [Baccaro] agrees to accept" consisted of (1) Stine's September 6, 2007, Real Estate Exchange Agreement; (2) a term regarding value; and (3) a term regarding fences. If Stine, who was undisputably "able," was agreeable to these three items during the term of the listing agreement, he was "ready" and "willing" and McCully was entitled to a commission.

With regard to the first term, regarding the proposed Real Estate Exchange Agreement, as noted, Stine testified that he remained agreeable to his September 2007 offer and did not withdraw it and there was no evidence that that document was unacceptable to Baccaro; to the contrary, the October 31 counteroffer embraced it.

With regard to the second term, concerning the value to be placed on the ranches, the record indicates that there was no real dispute about Baccaro's additional term listing the fair market values of the ranches for exchange purposes at $1,532,160. This value approximates the amount that Stine paid for the Pados Ranch in February 2007, as Vinton had acknowledged in his October 2 correspondence on behalf

of Baccaro. Both Baccaro and Stine were agreeable to this term.

With regard to the third term, pertaining to "fences," there was considerable testimony offered by Baccaro at trial and much emphasis placed on it in Baccaro's appellate brief. Baccaro argues that because Stine had concededly expressed concern about the actual acreage of the Baccaro Ranch, Stine was not agreeable during the term of the listing agreement to the fence term, which essentially provided that the parties acknowledge that the fences might not coincide with the legal boundaries. Baccaro asserts in its brief that "the primary reason the Counteroffer was not accepted is because . . . Stine had to have assurance of acreage which included knowing where the fence lines were in connection with the described boundary lines." Brief for appellee at 23. Baccaro further contends that Stine would not have participated in the exchange without having received the GPS map prepared in January 2008. The admitted testimony does not support this. On the contrary, Stine testified that Garth Bullington wanted the GPS map produced because Garth Bullington, not Stine, had an issue with the fences.

It appears from its findings that the district court accepted Baccaro's argument equating acreage and fences and that it confused the topics of acreage and fences. However, the subject of actual acreage and the issue of fences are two separate matters, and they should not have been conflated. The court found that Stine was concerned as to the actual acreage of the Baccaro Ranch, which was a nonissue, but failed to make a finding regarding Stine's view of the fence term, which was an issue vis-a-vis being a ready and willing exchanger.

In his September 2007, offer, Stine provided the legal descriptions for the Pados Ranch and the Baccaro Ranch, the latter being described as approximately 3,010 acres. In his testimony, Stine was asked if he needed to know the acreage of the Baccaro Ranch before he traded for it. Stine answered that he would not have been concerned with 3 or 4 acres more or less than what was listed, but he "wanted some assurance that [he] was getting essentially what [he] had bargained for." When questioned about the fence term, Stine testified that the

parties understood the properties would be conveyed subject to the existing fences and "that [the fence term] was really something that maybe Garth or the Bullingtons wanted." Stine's testimony is consistent with Vinton's. The record thus indicates that Baccaro was concerned with the issue of fences and that although Stine was concerned with acreage, he was not hesitant to exchange because of the fence term.

The evidence from the record shows that Stine was agreeable to the term regarding fences. In his previous offers to Baccaro, Stine had included a requirement that Baccaro conduct a survey of the Baccaro Ranch; a survey would have indicated, inter alia, whether the fences were on the legal boundary lines. However, Stine purposely and with reason did not include a survey requirement in his signed September 2007 offer, which included a legal description of the ranches and approximate acreages and became the basis for the actual exchange.

Stine testified that he was aware of the corrective deeds that Baccaro had completed with its only neighbor, the Dismal River Ranch. These corrective deeds alleviated the most problematic boundary issue. Kevin McCully testified at trial that during the summer of 2007, after Stine had rejected Baccaro's straight-trade offer and before Stine's September 2007 straight-trade offer, Kevin McCully took Stine for a drive on four-wheelers around the Baccaro Ranch. Kevin McCully testified that Stine wanted to see all of the boundary fences. Kevin McCully testified that during the visit to the ranch, Stine gave him the impression that he was satisfied with the fence boundaries of the ranch. Because Stine was aware of the corrective deeds with Baccaro's only neighbor and dropped the survey requirement from his September 2007 offer, and because Stine toured the fence lines of the Baccaro ranch and was satisfied, it is clear that Stine was agreeable to a term that the property was to be conveyed subject to the location of the existing fences.

The legal significance of the foregoing facts supports the determination that Stine was a ready, willing, and able buyer during the listing period. The fact that he signed the Real Estate Exchange Agreement in September 2007 indicated that he was ready and willing to enter into a binding agreement

with Baccaro. See *McAllister Hotel, Inc. v. Porte*, 98 So. 2d 781 (Fla. 1957) (stating that buyer was not ready and willing when buyer declined to sign memorandum prepared by seller's attorney). See, also, *East Kendall Inv. v. Bankers Real Estate*, 742 So. 2d 302, 305 (Fla. App. 1999) (stating that nonbinding letter of intent or "'agreement to agree'" was insufficient to demonstrate that buyer was ready and willing). The fact that the exact legal descriptions of the properties to be traded were contained in the September 2007 offer shows evidence of the certainty of Stine's readiness and willingness. See *Kenerly v. Yancey*, 144 Ga. App. 295, 241 S.E.2d 28 (1977) (stating that buyer was not ready and willing when sales contract and, in particular, description of land were impermissibly vague). But see *Whitefield v. Haggart*, 272 Ark. 433, 615 S.W.2d 350 (1981) (determining that vague description of property in offer was enough to show buyer was ready and willing). The fact that Stine dropped the requirement that a survey be conducted from his September 2007 offer, which survey he had required in his previous two offers, further indicated his readiness and willingness. See *Renfro v. Meacham*, 50 N.C. App. 491, 274 S.E.2d 377 (1981) (determining that buyer was not ready and willing when sales price in offer was contingent on conducting survey).

The essential terms of the exchange were assented to by both parties during the listing period. See *D. M. Kaufman Assoc. v. Lake Co. Tr. Co.*, 157 Ill. App. 3d 926, 510 N.E.2d 919, 109 Ill. Dec. 851 (1987) (stating in brokerage commission case that agreement can be determined by assent and that if terms objected to by sellers were incidental terms, rather than essential terms, then prospective buyer was ready, willing, and able). The words and acts of Stine showed that he was a ready, willing, and able exchanger. See *Dziga v. Muradian Business Brokers, Inc.*, 28 Ark. App. 241, 773 S.W.2d 106 (1989) (determining in brokerage commission case that acts and deeds of buyer can show readiness and willingness). The deal Baccaro and Stine agreed to in June 2008 was in every important respect what Stine had bargained for in September 2007, and indeed, the final Real Estate Exchange Agreement signed in June 2008 is the very document Stine tendered in

September 2007. It has been observed that in the context of evaluating whether a broker is entitled to a commission, the contract of sale is evidence that contract terms were "satisfactory and acceptable . . . elsewise the [parties] would not have agreed to them." Arthur R. Gaudio, Real Estate Brokerage Law § 145 at 201 (1987). The addition of an exchange value for the ranches was an important term given the structure of the deal, but was not contentious; the addition of the fence term, while prudent, was unremarkable in the context of the sale or exchange of ranchland.

Enforcement of a real estate brokerage contract depends on the terms of the contract and the facts that are applicable to the contract. See *Trimble v. Wescom*, 267 Neb. 224, 673 N.W.2d 864 (2004). Given the contract and the facts that are applicable to it, it is clear based on the admitted evidence that Stine was ready, willing, and able to exchange on terms acceptable to Baccaro during the term of the listing agreement. The district court clearly erred when it determined that McCully failed to find a ready, willing, and able buyer or exchanger during the term of the listing agreement between McCully and Baccaro and erred when it dismissed McCully's amended complaint. Because McCully produced a ready, willing, and able buyer to Baccaro during the term of the listing agreement on terms agreeable to Baccaro, it was entitled to receive a commission.

CONCLUSION

McCully found an exchanger during the term of the listing agreement between McCully and Baccaro who was ready, willing, and able to exchange on terms acceptable to Baccaro. Therefore, the district court clearly erred when it found to the contrary and determined that McCully was not entitled to a real estate commission. Accordingly, we reverse the dismissal and remand the cause for further proceedings to determine the amount of the commission owed to McCully.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. RUFUS B. FREEMONT, APPELLANT.

817 N.W.2d 277

Filed July 27, 2012. No. S-11-243.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404(2) (Cum. Supp. 2010), and the trial court's decision will not be reversed absent an abuse of discretion.
3. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
4. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.
5. **Jury Instructions: Apeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
6. **Criminal Law: Convictions: 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.
7. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010), does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime. This rule includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.
8. **Trial: Evidence: Verdicts: Juries: Appeal and Error.** Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant. Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

9. **Trial: Evidence: Appeal and Error.** Harmless error review looks to the entire record and views the erroneously admitted evidence relative to the rest of the untainted, relevant evidence of guilt.
10. **Pretrial Procedure: Evidence.** Neb. Rev. Stat. § 29-1912(1)(e) (Cum. Supp. 2010) allows a defendant charged with a felony to request that the prosecuting authority provide him with copies of the results and reports of scientific tests or experiments made in connection with the case.
11. ____: ____. Pursuant to Neb. Rev. Stat. § 29-1912(1)(e) (Cum. Supp. 2010), following a proper discovery request, the State has an obligation to disclose information which is material to the preparation of a defense to the charge against the defendant.
12. **Pretrial Procedure: Evidence: Prosecuting Attorneys.** Whether a prosecutor's late disclosure of evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal.
13. **Homicide: Photographs.** In a homicide prosecution, photographs of a victim may be received into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.
14. **Criminal Law: Evidence.** The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing.
15. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
16. **Jury Instructions.** Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.
17. **Jury Instructions: Appeal and Error.** Although the Nebraska pattern jury instructions are to be used whenever applicable, a failure to follow the pattern jury instructions does not automatically require reversal.
18. **Effectiveness of Counsel: Records: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
19. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Peder Bartling, of Bartling Law Offices, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

MCCORMACK, J.

I. NATURE OF CASE

Following a trial by jury, Rufus B. Freemont was convicted in Douglas County District Court of second degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. The court imposed an aggregate sentence of 80 to 90 years' imprisonment. Freemont appeals.

II. BACKGROUND

Freemont was charged with second degree murder in connection with the killing of Andrew Galligo on June 18, 2010. The following evidence was adduced at trial.

Police responded to a report of a shooting on 24th and Vinton Streets in Omaha, Nebraska. Sgt. Matthew Rech observed Galligo lying on the ground, surrounded by four individuals. Galligo had been shot in the chest and died as a result of the injury.

Several bystander witnesses, who were either at the scene or nearby at the time of the shooting, testified at trial. Each witness testified that prior to the shooting, Galligo had been engaged in a confrontation with a woman, later identified as Claudette Loera, in a parking lot.

According to witnesses, prior to the shooting, Loera was driving a white Chevrolet Cobalt, which was later identified as belonging to Samantha Vawter. Loera's sister, Christa Harlan, was seated in the passenger seat, and Vawter and Freemont were seated in the back seat. According to Harlan and Vawter, as the vehicle approached 24th and Vinton Streets, the passengers saw Galligo walking down 24th Street. Galligo was

wearing red and black, colors which are associated with a gang to which Loera belonged. Loera turned the car around and yelled at Galligo, asking about his gang affiliation. Loera "flipped" a gang sign at Galligo by making a gesture with her hand. Galligo was a member of a different gang, and "threw up" a gang sign at Loera in response. Loera then pulled the vehicle into a nearby parking lot, exited the vehicle, and confronted Galligo.

Loera and Galligo had a verbal confrontation, during which Harlan exited the vehicle and told Loera to leave Galligo alone and get back in the vehicle. Loera spit on Galligo and moved to return to the vehicle. Galligo asked Loera if she was getting a gun, and attempted to walk away from the vehicle. Loera followed Galligo, at which time four or five gunshots were fired from the vehicle and Galligo was struck in the chest.

Following the shooting, Loera immediately returned to the vehicle and drove from the scene. Freemont was let out at 17th and Ontario Streets. Loera then drove to an alley where she, Vawter, and Harlan changed their clothes to avoid being identified. Loera attempted to hide the vehicle behind an abandoned house, and then she walked with the others to the house of a friend named "Melissa."

1. Witness Testimony

At trial, a witness testified that she and her sister were shopping at a strip mall near 24th and Vinton Streets at the time of the shooting. As they were leaving a nearby store, the witness saw a white car, which was parked in front of the exit to the parking lot. The witness entered her car and waited for the white car to move so she could exit. She testified that she saw Loera and Galligo arguing and observed a man in the back seat of the white car place his hand, holding a gun, out of the window and shoot Galligo. The witness' sister also testified that she saw the argument between Loera and Galligo and witnessed shots being fired from the back seat of the white car, but she did not see who fired the gun.

Another witness who was also in the parking lot at the time of the shooting testified that he observed an altercation taking

place in front of a white Chevrolet Cobalt and that he heard gunfire, though he did not see who fired the shots.

An individual who was also present in the parking lot witnessed the altercation in front of a white vehicle. He testified that he witnessed a person, whom he identified as a passenger of the vehicle, attempting to break up the fight between the driver of the vehicle and another person. He stated that the person who shot Galligo was seated in the back seat of the vehicle. He testified that he had observed three persons in the vehicle at the time of the shooting—the driver, front passenger, and the rear passenger—and that he did not see the gun that fired the shots.

Another witness testified that she was in the area of 24th and Vinton Streets at the time of the shooting and that she observed two people dressed in red engaged in an argument. She heard the gunfire that followed, and the windshield of her car was struck with a bullet. She was unaware of who fired the shots.

Another witness also testified that he was in the area at the time of the shooting. He was previously acquainted with Loera and Galligo and heard them arguing in the parking lot. He heard the gunshots, but could not identify who fired the shots.

Harlan and Vawter testified. Harlan is Loera's sister, and she had been living with Melissa at the time of the shooting. Harlan testified that she knew Freemont and was acquainted with Vawter. Loera had contacted Vawter for a ride earlier that day to go to Westroads Mall and "get some weed." Loera was driving Vawter's car, and on the way home, Harlan and Loera stopped to pick up Freemont. Harlan testified that Vawter and Freemont had a child together, but that she was not well acquainted with Vawter. Freemont was carrying a backpack when they picked him up earlier that day. After picking up Freemont, Loera was driving, Harlan was seated in the front passenger seat, Vawter was in the back seat behind the driver, and Freemont was in the back passenger seat. They saw Galligo walking when they stopped at a light.

Harlan recounted the argument that followed and testified that she got out of the car and told Loera to leave Galligo

alone, that he was their cousin, and to get back into the car. Loera started back to the car, and Harlan told Galligo to keep walking, when Loera turned around as if to follow Galligo. Loera then turned to Harlan and returned to the car. As Harlan was getting into the car, she heard gunshots and was startled because neither Loera nor Galligo had a weapon. Harlan testified that the shots came from the back seat of the car and that Freemont had fired the gun. She did not observe what kind of gun it was. Harlan observed Freemont holding the gun toward the car window. Loera returned to the car and drove Harlan, Vawter, and Freemont from the scene.

The State asked Harlan if she had witnessed Freemont carrying a gun "a few days before" the incident. Freemont objected to this question, and an off-the-record discussion was held at the bench, after which the objection was overruled. Harlan answered that she had seen Freemont a few days earlier with a gun. Harlan stated that at the time, Freemont was carrying the gun in a backpack that looked the same as the one he was carrying on the day of the shooting.

The day after the incident, Harlan was questioned by police, at which time she gave the officers a fake name. Police showed Harlan a photographic array, and she identified a person other than Freemont as the shooter. Harlan said she had lied because she knew she had outstanding warrants and because she was scared. Loera had apparently threatened Harlan and Vawter, telling Harlan that if she was going to "cry," Loera would have to kill her.

Loera was arrested the day after the incident in connection with Galligo's death. Harlan spoke to Loera after she was arrested, and Harlan told Loera that she had purposely named the wrong person as Galligo's shooter. Police confronted Harlan with this conversation, showed her the same photographic array, and asked her again to identify the shooter. Harlan identified Freemont as the shooter at that time.

Vawter testified that she was seated in the back seat of the car at the time of the shooting. She stated she knew neither Loera nor Galligo possessed a weapon because both had lifted their shirts to show that they did not. Vawter said that Freemont told Loera to get back into the car while the

two were arguing. After Harlan got out of the car, Freemont reached into his backpack and pulled out a gun. He told Vawter to "sit back," and leaned across her and shot four rounds out the window at Galligo. Freemont then put the gun back into his backpack.

Vawter went to Melissa's house with Harlan and Loera. Loera threatened Vawter, told her she would probably be charged because the car was in her name, and told her she should not say anything. Vawter left the house and returned to her home. That night, Loera texted her and told her to get new license plates and hubcaps for the car. The next day, Vawter returned to Melissa's house, where Loera told Vawter to "go dump the car" because the license plate number was all over the news. Vawter left the house and called the police, informing them that she had information about the murder.

Vawter met with the police and told them that Freemont was the shooter. Vawter changed her story a number of times in speaking to the police, but consistently maintained that Freemont had fired the shots. Vawter testified that she had lied because she was afraid of Loera.

Loera was charged with being an accessory to a felony as a result of her involvement in the incident. Loera testified at Freemont's trial and stated that she had not made a deal with the prosecutor in exchange for her testimony. Loera testified to the events leading up to the altercation with Galligo and identified Freemont as the shooter. Loera stated that she was yelling at Galligo when she heard gunshots. When she looked behind her, she saw Freemont holding a gun out of the car window.

The State asked Loera if she had seen Freemont carry a gun prior to the day of the shooting. Freemont again objected to this line of questioning on the grounds of relevance and Neb. Evid. R. 403 and 404, Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404 (Cum. Supp. 2010). The objection was overruled, and Loera answered that Freemont had gotten into an altercation with one of her cousins a week before the shooting, during which he displayed a gun. Loera testified that Freemont kept the gun in his backpack and that it was a .22-caliber revolver.

When the Omaha Police Department discovered Freemont's whereabouts, the fugitive unit was directed to the address to arrest Freemont. Investigator Dan Martin was involved in the arrest of Freemont. Martin testified that the fugitive unit entered the building identified as Freemont's location and that Martin heard a window break and saw someone attempting to crawl out of a second-story window. The State offered exhibit 74, which shows the building and the window out of which Freemont leapt. Freemont objected to the admission of the exhibit on the bases of relevance and §§ 27-403 and 27-404; the objection was overruled. Exhibit 73 shows the same window from a different perspective; it was also admitted into evidence. Freemont fell to the ground and was immediately tasered and arrested. Following the arrest, the officers recovered a black backpack. A gun was not recovered at any time in the investigation.

The pathologist who performed the autopsy of Galligo testified at trial. During his testimony, the State offered exhibits 56 through 58, showing the injuries Galligo suffered to his face. Freemont objected to these exhibits on the basis that they were overly prejudicial under § 27-403; the objection was overruled. The State also offered exhibit 63, showing the "exit" site of a bullet which was removed from Galligo's back. Freemont again objected on the basis of § 27-403; the objection was overruled.

Daniel Bredow, a senior crime laboratory technician and firearm and toolmark examiner employed by the Omaha Police Department, was called to testify for the State. Bredow testified regarding a bullet that had been removed from Galligo's body, marked as exhibit 41. Bredow stated that the bullet was a ".22 rimfire caliber" that was consistent with one of "96 different models" of .22-caliber weapons, including handguns, rifles, revolvers, and semiautomatics. However, Bredow ultimately testified that it was not possible to specifically determine what weapon fired the bullet marked as exhibit 41.

Freemont objected to the entirety of Bredow's testimony, and the court held a hearing outside the presence of the jury. Freemont objected on the basis that the testimony violated a discovery order previously entered in the case in July 2010.

Freemont stated that he had not received a report regarding Bredow's testimony until a week prior to the start of trial.

Freemont argued that he did not know the purpose of Bredow's proffered testimony, that he was not allowed to review the expert's report, and that he was therefore not able to retain his own expert for rebuttal purposes. The State requested the court take judicial notice of the "notice to endorse" Bredow, which was delivered to defense counsel on October 25, 2010. Defense counsel conceded that he had received the notice. The State also argued it had complied with the July 2010 discovery order by advising defense counsel of Bredow's forthcoming testimony in the form of a report sent January 3, 2011, by e-mail. The State asserted that the report was transmitted to defense counsel immediately after the State had received a copy. Neither the e-mail correspondence nor the report was offered into evidence. The trial court permitted Bredow to testify and offered defense counsel an opportunity to depose Bredow before proceeding with cross-examination, which counsel declined.

Only one witness testified on behalf of the defense. She was employed by the Omaha Police Department and assisted in the investigation of Galligo's death. She interviewed an eyewitness who testified for the prosecution. Freemont offered the videotaped interview between the defense witness and the eyewitness as exhibit 79. The court gave a limiting instruction to inform the jury that exhibit 79 was to be used for the sole purpose of impeaching the eyewitness' testimony at trial. In the video, the eyewitness identified the shooter as the driver of the white car and stated that the shooter wore a "do-rag" and had a thick mustache.

2. Jury Instructions

Following the presentation of evidence, an instruction conference was held. Freemont objected to the step instruction proposed by the court and requested that the court use the pattern jury instruction contained in NJI2d Crim. 3.1. The State objected to Freemont's proposed instruction. The court agreed with the State and ultimately gave the step instruction as jury instruction No. 4.

Freemont proposed an instruction regarding eyewitness identification based on a Connecticut pattern instruction. The State objected, noting that Nebraska has not created an eyewitness instruction and that it is not required in this jurisdiction. Freemont's proposed instruction states:

> [Y]ou should bear in mind that there has been a number of instances where responsible witnesses, whose honesty was not in question and whose opportunities for observation had been adequate, made positive identifications which identifications were subsequently proved to be erroneous; and accordingly you should be specially cautious before accepting such evidence of identification as correct.[1]

The court denied Freemont's request to issue the instruction.

3. Convictions and Sentencing

The jury convicted Freemont on all three charges. At the sentencing hearing, the court noted that the jury apparently found Freemont guilty "fairly quickly," that there was no rational way to understand the incident, and that it bordered on "pure evil." The court sentenced Freemont to serve a term of 55 to 60 years' imprisonment on the murder count, 20 years' imprisonment for use of a deadly weapon, and 5 to 10 years' imprisonment for possession of a deadly weapon, to be served consecutively. The court awarded Freemont 264 days' credit against his sentences for time served. Freemont timely appeals.

III. ASSIGNMENTS OF ERROR

Freemont assigns that the trial court erred in (1) allowing the State to introduce evidence that Freemont possessed a firearm prior to the homicide, (2) allowing the State to introduce evidence of Freemont's "consciousness of guilt," (3) allowing the ballistics expert to testify after failing to comply with Neb. Rev. Stat. § 29-1912 (Cum. Supp. 2010), (4) allowing the State to introduce evidence of autopsy photographs, (5) failing to give the jury an instruction regarding eyewitness identification

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[1] See *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972).

and in giving a step instruction, and (6) finding sufficient evidence to support the verdicts. Freemont also argues that he received ineffective assistance of counsel at trial.

IV. STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[2] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under §§ 27-403 and 27-404(2), and the trial court's decision will not be reversed absent an abuse of discretion.[3]

[3] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[4]

[4] The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.[5]

[5] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[6]

[6] 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.[7] The relevant question for an appellate court is whether, after viewing the evidence in the light most

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[2] *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011), *cert. denied* 565 U.S. 967, 132 S. Ct. 463, 181 L. Ed. 2d 302.

[3] *Id.*

[4] *Id.*

[5] *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009), *cert. denied* 559 U.S. 1010, 130 S. Ct. 1887, 176 L. Ed. 2d 372 (2010).

[6] *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011).

[7] See *State v. Nero*, 281 Neb. 680, 798 N.W.2d 597 (2011).

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[8]

V. ANALYSIS

1. Evidence of Freemont's Gun Possession

At trial, Harlan and Loera testified that sometime before Galligo's murder, they had seen Freemont with a gun, and that he carried his gun in his backpack. Freemont argues that this testimony was evidence of a prior crime—possession of a firearm by a felon[9]—and fell under § 27-404(2). As such, the trial court erred in failing to hold a hearing outside the presence of the jury to determine whether the incident occurred pursuant to § 27-404(3). The State, on the other hand, contends that the testimony was substantive evidence of a charged crime and that therefore, § 27-404(2) did not apply. We agree with Freemont that the testimony fell under § 27-404(2) and that the trial court erred in failing to hold a hearing pursuant to § 27-404(3). However, viewed in the context of the whole record, we find this error harmless.

(a) Form of Objection

As a preliminary matter, the State argues that Freemont made only a general objection to Harlan's testimony, rather than a specific one, and so no error may be predicated upon that objection. We disagree.

Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103 (Reissue 2008), explains that error may not be predicated upon an evidentiary ruling unless "a timely objection . . . appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context."

Here, the specific grounds for the objection are apparent from the record. Although Freemont made only a general objection during the relevant portions of Harlan's testimony, Freemont made a specific objection toward the same line of questioning during Loera's testimony. Specifically, Freemont

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[8] See *id.*

[9] Neb. Rev. Stat. § 28-1206 (Supp. 2009).

objected on the grounds of relevance and §§ 27-403 and 27-404. Thus, when viewed in the context of Freemont's objection to Loera's testimony, the basis for Freemont's objection to Harlan's testimony is apparent. We will therefore consider the merits of Freemont's arguments.

(b) Applicability of § 27-404(2) and (3)

Section 27-404(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Freemont contends that the testimony in question was evidence of a prior crime under § 27-404(2). If so, then the trial court erred in not holding a hearing pursuant to § 27-404(3), which provides:

> When such evidence is admissible pursuant to this section, in criminal cases evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and convincing evidence that the accused committed the crime, wrong, or act. Such proof shall first be made outside the presence of any jury.

The State argues, however, that § 27-404(2) does not apply because the evidence was substantive evidence of a charged crime—possession of a deadly weapon by a prohibited person.

Here, the State charged Freemont only in relation to the events of June 18, 2010. The prior incident at issue occurred several days or a week (the record is unclear) before that date. It was a separate incident. And although it was a crime, it was not *charged* by the State in this prosecution. If the State intended to charge that separate incident, it stands to reason that there would be *two* counts charged for possession of a deadly weapon by a prohibited person—one for the day of the shooting and one for the prior incident. But the State charged only one count for the day of the murder. Thus, the State did

not charge Freemont for the prior incident, and evidence of the incident was therefore not substantive evidence of the charged crime. The evidence is not excluded from § 27-404(2) on that basis.

[7] Nor is Freemont's prior misconduct excluded from § 27-404(2) by being "inextricably intertwined" with the charged crime.[10] Section 27-404(2) does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime. This rule includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.[11]

The exception does not apply to the challenged evidence in this case. The prior misconduct involved an altercation with Loera's cousin, who played no part in Galligo's murder on June 18, 2010. The prior misconduct did not provide any insight into Freemont's reason for allegedly killing Galligo. Moreover, it was not part of the same transaction and occurred several days or a week before Galligo's murder. Accepting the State's argument would open the door to abuse of the inextricably intertwined exception. Its susceptibility to abuse is why some federal courts have limited or rejected the exception.[12] We conclude that the prior incident was not inextricably intertwined with the charged crime. As such, and because the prior misconduct was not substantive evidence of a charged crime, the evidence falls under § 27-404(2) as a prior uncharged crime.

As a result, the prosecution was required by statute to prove by clear and convincing evidence that the prior misconduct

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[10] See *State v. Wisinski*, 268 Neb. 778, 781, 688 N.W.2d 586, 590 (2004).

[11] See, *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *State v. Wisinski, supra* note 10.

[12] See, *U.S. v. Green*, 617 F.3d 233 (3d Cir. 2010), *cert. denied* 562 U.S. 942, 131 S. Ct. 363, 178 L. Ed. 2d 234; *U.S. v. Gorman*, 613 F.3d 711 (7th Cir. 2010); *U.S. v. Bowie*, 232 F.3d 923 (D.C. Cir. 2000).

occurred.[13] Such proof must be set forth at a hearing outside the presence of the jury.[14] The trial court did not hold such a hearing. Thus, the court erred when it allowed Harlan and Loera to testify regarding Freemont's prior misconduct. The remaining issue is whether that error was harmless.

(c) Harmless Error

[8] Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant.[15] Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[16]

Here, the prosecution used the evidence to help link Freemont to the murder. Both Harlan and Loera testified that they had previously seen Freemont with a gun, which he carried in his backpack. Harlan testified that it was "[p]robably" the same backpack that Freemont had on the day of Galligo's murder. Loera testified that Freemont had the same gun—a .22-caliber revolver—on the day of the shooting as he had during his prior "altercation" with her cousin. The prosecution then referenced their testimony during closing argument to reinforce the connection between that prior incident and Galligo's murder. For example, at one point the prosecutor stated that "[j]ust like [Harlan] and just like [Vawter], [Loera] sees the gun in [Freemont's] hand, the same gun that she saw him with two to three days before this incident."

[9] These statements, if viewed in isolation, would tend to militate against a finding that this error was harmless. But harmless error review looks to the entire record and views the erroneously admitted evidence relative to the rest of the

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[13] See § 27-404(3).

[14] *Id*.

[15] See *State v. Reinhart*, 283 Neb. 710, 811 N.W.2d 258 (2012).

[16] See *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

untainted, relevant evidence of guilt.[17] And after our review of the whole record, we find this error harmless.

There is no reason to believe that this evidence materially influenced the jury's verdicts. It is true that Freemont's previous possession of the murder weapon was probative of his identity as the murderer. But the evidence was relatively minor in the context of other evidence proving that he shot Galligo. For example, Vawter testified that Freemont reached into his backpack and pulled out a gun. Vawter testified that Freemont told her to sit back and then leaned across her and shot Galligo. And while Vawter changed her story a number of times in speaking to the police, she consistently maintained that Freemont had fired the shots.

The evidence was also undisputed that Freemont was the only man in the car and that he was seated in the back seat. The crux of the defense theory involved showing Loera to be the shooter, rather than Freemont. But all the witnesses with a view of the crime testified that the driver, Loera, was outside the car when Galligo was shot. Moreover, there was repeated testimony from unbiased third parties, whose credibility was not in question, that the shots came from the back seat of the car. One witness and her sister both testified that a man sitting in the back seat of the car shot Galligo. And another witness testified that the shots came out of the rear window of the car.

In short, when viewed in relation to the whole record, the erroneously admitted evidence was relatively insignificant. The State charged Freemont with second degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. The jury could find each and every element of those crimes to be met by the above testimony. Moreover, Harlan and Loera both testified that Freemont shot and killed Galligo. The erroneously admitted evidence did not provide some crucial link to allow the State to make its case and was largely unnecessary. Thus, the erroneously admitted evidence was relatively insignificant and did not materially influence the jury's verdicts.

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[17] See *id.*

Furthermore, Freemont's defense strategy involved specifically and repeatedly attacking Harlan's and Loera's credibility. If the jury was convinced by Freemont's tactics, as it very well could have been, then it stands to reason that it would disregard their testimony, including their testimony regarding Freemont's prior misconduct. And even assuming the jury gave weight to their testimony, it would still be tempered by Freemont's effective undercutting of Harlan's and Loera's credibility. Combined with the relative insignificance of the testimony in the first place, we can safely say that the jury's verdicts are surely unattributable to its erroneous admission.

2. Evidence of Freemont's "Flight"

Freemont argues that the trial court erred in allowing the State to introduce evidence intended to show Freemont's "consciousness of guilt." The court admitted testimony and exhibits 71 through 74, relating to Freemont's alleged attempt to avoid arrest by jumping out a second-story window. Freemont did not object to Martin's testimony in which he recounted witnessing Freemont jump from a second-story window. Following this testimony, the State offered the related exhibits. Freemont objected to the admission of the exhibits, citing §§ 27-401, 27-403, and 27-404.[18] The objections were overruled, and the exhibits were admitted into evidence.

Because the exhibits were admitted after Martin's testimony recounting the events, the exhibits are cumulative evidence.[19] The testimony indicates that Freemont could have only leapt out of a second-story window to avoid apprehension. This testimony was properly admitted without objection. So, even if we were to determine that the exhibits were erroneously admitted, such error would be harmless, because Martin's testimony presents the primary evidence related to the issue of flight.[20] We therefore cannot say that the trial court abused its discretion in admitting the related exhibits.

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[18] Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008), and §§ 27-403 and 27-404.

[19] See *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

[20] See *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000).

3. Expert Testimony Regarding Ballistics Comparison

Freemont argues that the trial court abused its discretion in allowing Bredow to testify regarding his ballistics testing and report. Freemont argues that the evidence admitted was within the scope of the court's July 2010 discovery order and that the State failed to provide a report detailing Bredow's findings and proffered testimony. Freemont also asserts that the trial court's proposed remedy—allowing Bredow to testify and then allowing defense counsel to depose Bredow prior to cross-examination—would have forced defense counsel "into a position where he was investigating the case at the same time he was trying it and, therefore, was insufficient to cure any prejudice caused by the State's belated disclosure of the report."[21] The order upon which Freemont apparently relies is a journal entry dated July 20, 2010, which states in part: "Mutual and reciprocal discovery ordered pursuant to statute."

[10,11] Section 29-1912(1)(e) allows a defendant charged with a felony to request that the prosecuting authority provide him with copies of the results and reports of scientific tests or experiments made in connection with the case. Pursuant to § 29-1912(1)(e), following a proper discovery request, the State has an obligation to disclose information which is material to the preparation of a defense to the charge against the defendant.[22]

The record reflects that the State made Bredow's report available to Freemont as soon as the State received it; therefore, there is no evidence of prosecutorial misconduct in the instant case. The only remaining issue we must determine is whether Freemont was prejudiced by the trial court's failure to exclude the expert witness evidence when Freemont only received the report a week prior to the commencement of trial.

[12] Whether a prosecutor's late disclosure of evidence results in prejudice depends on whether the information sought

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[21] Brief for appellant at 24.

[22] See *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal.[23]

Defense counsel stated that he received the notice of Bredow's endorsement as an expert witness sometime before December 2010 and, at that time, was made aware that Bredow would testify regarding the characteristics of a slug recovered during the victim's autopsy. At no time prior to trial did defense counsel ask to depose Bredow. At the hearing, the court gave defense counsel an opportunity to depose Bredow, but counsel stated that he did not need to. The court overruled Freemont's objection and allowed Bredow to testify.

While recognizing that receiving Bredow's report so close to the commencement of trial may have posed a burden on defense counsel, we do not conclude that such delay rose to the level of prejudicial error.[24] Any prejudice that Freemont may have suffered as a result of the delay was cured by the fact that the State and the trial court made every opportunity available to Freemont to depose Bredow prior to the continuation of trial. And there is nothing to indicate Bredow could not have been deposed in the days leading up to trial regarding the tests already conducted. Because Freemont had the opportunity to depose Bredow prior to trial and was given ample opportunity to take a continuance to depose him at a later date, we determine that Freemont was not prejudiced by the late disclosure of Bredow's report. Accordingly, the trial court did not abuse its discretion in allowing Bredow to testify.

4. Admission of Autopsy Photographs

The State offered exhibits 56 through 58, which contained images of Galligo's face post mortem, and exhibit 63, which showed the site on Galligo's back where a bullet was removed during the autopsy. Freemont objected, on § 27-403 grounds,[25]

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[23] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[24] See *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998).

[25] See § 27-403.

to the admission of exhibits 56 through 58 and 63 and also asserted a foundational objection to exhibit 63. The objections were overruled, and the exhibits were entered into evidence.

Freemont argues that the exhibits were unfairly prejudicial and that they lacked any probative value. Freemont asserts that the parties did not contest that Galligo's death was a result of a gunshot wound to the chest; therefore, there was no legitimate purpose for the admission of the photographs. Freemont argues that the photographs of Galligo's face were especially prejudicial and lacked any probative value in light of the fact that Galligo's death did not result from any wounds or blows to the face. Because the State introduced evidence and testimony regarding the fatal gunshot wound, and a photograph of Galligo taken prior to his death for purposes of identification, Freemont argues the autopsy photographs only served to incense the jury. Freemont also states that exhibit 63 was irrelevant to the case, as it depicted "a post-mort[e]m, pathologist-generated, autopsy-related event" independent of the shooting.[26]

The State argues that the photographs contained in exhibits 56 through 58 were not admitted to show the cause of death, but to corroborate the witnesses' version regarding what took place at the scene—that Galligo was shot in the chest and then fell to the ground, hitting his face and knocking off his glasses. The State asserts that the photographs are not gruesome in nature, stating that "[a]s autopsy photographs go, they are pretty tame."[27]

Exhibit 63, the State argues, was necessary to form the foundation of Bredow's testimony. Exhibit 63 establishes that the bullet Bredow examined was taken from Galligo's body during the autopsy, as it did not exit the body at the time Galligo was shot.

[13] Pursuant to § 27-403, "'unfair prejudice' means an undue tendency to suggest a decision based on an improper basis."[28] In a homicide prosecution, photographs of a victim

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[26] Brief for appellant at 26.

[27] Brief for appellee at 31.

[28] *State v. Canbaz*, 259 Neb. 583, 592, 611 N.W.2d 395, 403 (2000).

may be received into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.[29]

[14] A defendant cannot negate an exhibit's probative value through a tactical decision to stipulate.[30] The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing.[31] Though the State and Freemont agreed that a gunshot to the chest was the cause of Galligo's death, the photograph remained probative of the condition of the body. The record also reflects that the exhibits were relevant to Bredow's expert testimony and to corroborate eyewitness testimony.

The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.[32] Because the exhibits here were used to present a coherent picture of the crime and to corroborate witness observations of the events leading up to the shooting, we cannot say that the trial court abused its discretion in admitting the photographs of Galligo's body.

5. Jury Instructions

Freemont argues that the trial court erred in refusing to give his proposed instruction regarding eyewitness identification and in giving an "acquit first" step instruction that is contrary to the Nebraska pattern jury instructions.[33] For the following reasons, we determine Freemont's arguments to be without merit.

(a) Eyewitness Identification Instruction

Though the jury was instructed as to issues of witness credibility, Freemont proposed an additional instruction regarding reliability of eyewitness identification. Freemont argued that

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[29] *State v. Galindo*, *supra* note 5.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Brief for appellant at 29.

the instruction was proper because the facts of the case support the contention that there was "the possibility of an honest but mistaken" eyewitness identification. The State objected, noting that Nebraska has not created a pattern eyewitness instruction and that such an instruction is not required in this jurisdiction.

Freemont's proposed instruction states:

> [Y]ou should bear in mind that there has been a number of instances where responsible witnesses, whose honesty was not in question and whose opportunities for observation had been adequate, made positive identifications which identifications were subsequently proved to be erroneous; and accordingly you should be specially cautious before accepting such evidence of identification as correct.[34]

The court denied Freemont's request to issue the instruction.

[15] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[35]

Freemont relies on *United States v. Telfaire*[36] and its progeny for the proposition that, when requested, trial courts should give a cautionary instruction when identification is a major factor or when the circumstances of the identification call into question its reliability. This court has not had occasion to analyze the implications of *Telfaire* in this context. However, we need not determine whether the instruction proposed by Freemont amounts to a correct statement of the law in this jurisdiction, because we determine that such instruction was not warranted by the evidence here.

It has been recognized that it is reversible error to refuse to give an eyewitness identification instruction where the

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[34] See *United States v. Telfaire, supra* note 1.

[35] *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

[36] *United States v. Telfaire, supra* note 1.

government's case rests solely on questionable eyewitness identification.[37] And *Telfaire* specifically dealt with issues arising out of the reliability of cross-racial identifications.[38] Such issues are not present here. A number of the witnesses knew Freemont, and there is no indication of racial bias among any of the eyewitnesses who identified him as the shooter. Each identification was corroborated by another witness and by circumstantial evidence.

Furthermore, the jury here was directed to consider the ability of each witness to observe matters on which the witness had testified. Jury instruction No. 17 specifically directed the jury to consider factors that could impact credibility, including the circumstances of the testimony, the witnesses' conduct and demeanor, any interest in the outcome, and the witnesses' opportunity to observe the matters on which they testified. The court further instructed that the jury should consider the witnesses' ability to remember and relate the events accurately and the extent to which the testimony is or is not corroborated. We determine that Freemont cannot establish prejudice as a result of the court's refusal to give the tendered instruction. The credibility instruction was sufficient to protect against any prejudice related to the reliability of the eyewitness identifications, of which there were many. Accordingly, the trial court did not err in refusing to give the eyewitness identification instruction in this case.

(b) Step Instruction

Freemont objected to the step instruction given by the court and proposed that the court use the pattern jury instruction contained in NJI2d Crim. 3.1. Freemont also informed the trial court of our previous holding in *State v. Goodwin*,[39] which encourages trial courts to use the pattern instruction. The State objected to Freemont's proposed instruction. The

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[37] See, *U.S. v. Grey Bear*, 883 F.2d 1382 (8th Cir. 1989); *U.S. v. Mays*, 822 F.2d 793 (8th Cir. 1987).

[38] *United States v. Telfaire, supra* note 1.

[39] *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

court agreed with the State, overruled Freemont's objection, and ultimately gave its proposed step instruction as jury instruction No. 4.

In *State v. Taylor*,[40] we recently addressed a step instruction similar to the instruction given here. *Taylor* was published after Freemont's trial and convictions. In *Taylor*, we determined that the defendant was not prejudiced by the step instruction, but again encouraged courts to use the pattern jury instruction in the future.[41] We similarly conclude that Freemont was not prejudiced by jury instruction No. 4. Therefore, the trial court did not err in giving the step instruction.

[16,17] Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.[42] However, although the Nebraska pattern jury instructions are to be used whenever applicable, a failure to follow the pattern jury instructions does not automatically require reversal.[43]

NJI2d Crim. 3.1 includes a listing of the offenses which the jury is to consider and the elements of each offense. It then provides the following direction for the jury:

> You must separately consider in the following order the crimes of (here insert crimes charged beginning with the greatest and listing included crimes in sequence). For the (here insert greatest crime) you must decide whether the state proved each element beyond a reasonable doubt. If the state did so prove each element, then you must find the defendant guilty of (here insert greatest crime) and [stop]. If you find that the state did not so prove, then you must proceed to consider the next crime in the list, the (here insert first lesser included). You must proceed in this fashion to consider each of the crimes in sequence

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[40] *State v. Taylor, supra* note 6.

[41] See NJI2d Crim. 3.1.

[42] *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003).

[43] *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

> until you find the defendant guilty of one of the crimes or find (him, her) not guilty of all of them.[44]

Jury instruction No. 4 includes two sections, each of which spells out the material elements for the two grades of homicide at issue here. Each section of the instruction then states that if the jury finds that the State has proved by evidence beyond a reasonable doubt that each and every one of the material elements set out in that section was true, the jury should find the defendant guilty of that crime. Each section goes on to state that if, on the other hand, it is found that the State had failed to prove beyond a reasonable doubt any one or more of the material elements in that section, it is the jury's duty to find the defendant not guilty of that crime. The instruction then directs the jury to "proceed to consider the lesser included offense."

Freemont correctly asserts that we encouraged courts to use NJI2d Crim. 3.1 in *Goodwin*, and we reiterated this statement in *Taylor*.[45] However, though this court noted the pattern instruction provides a clearer and more concise explanation of the process by which the jury is to consider lesser-included offenses, we found no constitutional infirmity in the step instructions given in *Goodwin* and *Taylor*.[46]

Freemont fails to specify how he was prejudiced by the step instruction, nor does he specify a theory which the instruction prevented the jury from considering. Freemont's argument that he lacked the intent to kill and should therefore be found guilty of manslaughter and acquitted of second degree murder was presented at trial and argued by defense counsel to the jury. Accordingly, we determine that Freemont was not prejudiced by jury instruction No. 4. However, we again urge trial courts to use the pattern jury instruction in the future. It may not always be the case that the defendant is not prejudiced by the failure to give the pattern jury instruction.

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[44] NJI2d Crim. 3.1.

[45] See, *State v. Taylor, supra* note 6; *State v. Goodwin, supra* note 39.

[46] See *id*.

6. Sufficiency of Evidence

Freemont asserts that the State failed to present evidence sufficient to support his conviction. He argues that the witness testimony presents a factual conflict: On the one hand, the bystander witnesses, who were not involved in the incident, failed to make an in-court identification of Freemont as the shooter, and some witnesses even identified Loera as the shooter prior to trial. On the other hand, the witnesses involved in the incident identified Freemont as the shooter, but those individuals have a vested interest in the outcome of the case. Freemont states:

> For a trier of fact to conclude that Freemont was the shooter on the basis of this evidence would require the trier of fact to ignore facts in evidence from a set of witnesses with no vested interest in the outcome of the prosecution who indicated that a person other than Freemont shot Galligo.[47]

Freemont also states that the testimonies of Harlan, Vawter, and Loera are not reliable because each witness lied to police prior to testifying. In essence, Freemont argues that the witness testimony presented by the State was "not sufficient to allow the jury to rely on it to convict Freemont."[48]

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.[49] 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.[50]

The record reflects that a number of witnesses observed the altercation between Loera and Galligo, heard gunshots, and

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[47] Brief for appellant at 31.

[48] *Id.* at 32.

[49] *State v. Nero, supra* note 7.

[50] *Id.*

saw either a gun or smoke from the gun coming from the back seat of a white car. Two bystander witnesses testified that they observed a male fire the shots from the back seat of the car, and two others similarly testified that the shots came from the back seat of the car, though they could not see the shooter. And each witness who was directly connected with Freemont and present in or near the car on the day of the shooting identified Freemont as the shooter.

Freemont's arguments expressly ask this court to resolve conflicts in the evidence presented at trial and to pass on the credibility of witnesses. These are not matters to be resolved by an appellate court.[51] After viewing the evidence presented in the light most favorable to the prosecution, we conclude that any rational trier of fact could have found Freemont committed the essential elements of the crime beyond a reasonable doubt. Accordingly, the evidence is sufficient to sustain Freemont's conviction.

7. Ineffective Assistance of Counsel

[18,19] Finally, Freemont raises several issues with regard to his claims of ineffectiveness of trial counsel. A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal.[52] The determining factor is whether the record is sufficient to adequately review the question.[53] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[54]

Freemont argues that counsel was ineffective for failing to (1) elicit evidence of third-party guilt, (2) object to inadmissible identification evidence during a pretrial suppression hearing, (3) request a cautionary instruction regarding accomplice testimony, (4) request a mistrial when the State put forward a consciousness of guilt argument during closing arguments, (5) request a continuance in order to investigate

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[51] See *id.*

[52] *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

[53] *Id.*

[54] *Id.*

fully Bredow's ballistics report, (6) adduce significant forensic evidence regarding bullet trajectory, and (7) elicit evidence regarding Freemont's lack of motive. For the reasons that follow, we determine that the record is insufficient to address Freemont's arguments.

Freemont's arguments regarding third-party guilt rest on claims that three witnesses identified Loera as the shooter prior to trial and that counsel failed to use this evidence at trial to impeach those witnesses. There is nothing in the present record that reflects why counsel did or did not elicit certain testimony during cross-examination. And we have no way of determining whether action taken by counsel was misguided or based upon sound strategic motive. A resolution of this question would require an evidentiary hearing, and we thus determine that it is not appropriate for review on direct appeal.

Freemont argues that counsel was ineffective in failing to object to inadmissible identification evidence. Prior to trial, counsel filed a motion to suppress identification on the basis that the procedures used to procure Harlan's identification of Freemont were unduly and innately suggestive and, therefore, prejudicial to Freemont. At the suppression hearing, Martin testified regarding the identification procedure. Martin conducted the photographic array with Harlan on two occasions. Martin testified that Harlan told Loera that she had purposely picked out the wrong photograph in the first array and that Harlan had told Martin she did so because she was scared. Freemont claims that these statements, among others, were inadmissible hearsay and that counsel was ineffective in failing to object to the statements. Freemont also appears to claim that counsel should have called Harlan to testify at the hearing. Again, the record is not sufficient to address these claims, because it does not disclose counsel's reasons for failing to call Harlan as a witness or to object to the admission of certain evidence.

Freemont next claims an accomplice testimony instruction should have been given regarding Loera's testimony. But there is nothing in the record that establishes Loera as an accomplice. The record reflects that Loera was charged as an accessory to a felony in relation to Galligo's death, but such a

charge is distinct from the determination that she acted as an accomplice.[55] The record is therefore insufficient to address this claim.

Freemont asserts that trial counsel was ineffective for failing to move for a mistrial based on the State's closing argument. Freemont claims that because the court declined to issue the State's proposed instruction regarding consciousness of guilt, it was improper for the State to reference this theory during closing arguments. Again, we cannot speculate as to why trial counsel did not interpose such an objection, and the issue is inappropriate for review here.

Freemont claims trial counsel was ineffective for failing to request a continuance in order to investigate Bredow's ballistics report. As noted above, the court gave counsel the opportunity to depose Bredow and offered a half-day continuance for that purpose. Though counsel declined this offer, the record does not indicate counsel's reasons or motive for doing so. Nor does the record suggest what evidence, if any, would have resulted from further investigation into the ballistics report. Thus, the record is insufficient to address this claim.

Freemont argues that his trial counsel failed to adduce evidence regarding bullet trajectory. Counsel cross-examined the pathologist who performed Galligo's autopsy regarding the trajectory of the bullet that killed Galligo, but there is nothing in the record which reflects that further evidence of this nature would have been probative or exculpatory. Without the identification of what evidence could have been produced that would be probative or exculpatory, this claim cannot be reached.

Finally, Freemont claims that trial counsel was ineffective in failing to elicit evidence regarding Freemont's lack of a motive to kill Galligo. Freemont argues that counsel should have offered evidence to establish that Freemont barely knew Galligo and that he was not a member of any group or organization that bore hostility toward Galligo. Again, this claim cannot be addressed on the record before us—there is no indication of trial counsel's strategy in presenting or declining to

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[55] See *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006).

present certain evidence. Freemont is free to raise these issues of ineffective assistance of counsel in a motion for postconviction relief.

8. Cumulative Errors

Because we find only one error in this case, and that error was harmless, a reversal cannot be predicated on cumulative error. Freemont's arguments to the contrary are without merit.

VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

Heavican, C.J., and Wright, J., not participating.

Cassel, Judge, concurring.

I agree with the majority opinion except in one respect. I write separately because I agree with the State that the testimonies of Harlan and Loera were not rule 404(2)[1] evidence, but, rather, substantive evidence relating to the charge of possession of a weapon by a felon.

Because the State charged Freemont with possession of a deadly weapon by a prohibited person, it had the burden to prove, as relevant to the facts of this case, that Freemont possessed a firearm and that he had previously been convicted of a felony.[2] Thus, Harlan's testimony that she saw Freemont with a gun a few days before the shooting which looked like the gun used in the shooting and Loera's testimony that she saw Freemont display the same gun that was used in the shooting a week before the shooting were relevant to prove the charge of possession of a gun by a prohibited person.

Evidence of Freemont's earlier possession is intrinsic to and directly bears on an element of the charged crime of being a felon in possession of a deadly weapon. Four reasons support my conclusion. First, this court has previously recognized that intrinsic evidence is not subject to rule 404(2). Second, several federal circuit courts, faced with strikingly similar facts, have

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[1] Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010).

[2] See Neb. Rev. Stat. § 28-1206 (Supp. 2009).

determined that evidence of the accused's prior possession was intrinsic to and a part of the government's direct proof of the charged crime of unlawful possession of a firearm. Third, the rationale underlying rule 404 does not require the majority's narrow view of permissible evidence. Finally, I am not persuaded by the majority's articulated rationale.

This court has repeatedly excluded certain evidence from the reach of rule 404. In *State v. Aguilar*,[3] the court said, "Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of rule 404(2) coverage." In *State v. Wisinski*,[4] the court again held that rule 404 did not apply to the evidence. The court accepted that where evidence of other crimes is so blended or connected with the ones on trial as that proof of one incidentally involves the others, or explains the circumstances, or tends logically to prove any element of the crime charged, it is admissible as an integral part of the immediate context of the crime charged.[5] And in *State v. Robinson*,[6] this court recognized that such evidence is often referred to as "intrinsic evidence." The court again accepted that a trial court does not err in finding rule 404 inapplicable and in accepting prior conduct evidence where the prior conduct evidence is so closely intertwined with the charged crime that the evidence completes the story or provides a total picture of the charged crime.[7] Thus, this court has long recognized that such evidence falls outside the rubric of rule 404.

I next turn to several federal cases that closely parallel the factual circumstances present in the case before us and begin by discussing a case from the circuit that includes Nebraska. In *U.S. v. Adams*,[8] the Eighth Circuit treated testimony from the defendant's roommate that he observed the defendant possess

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[3] *State v. Aguilar*, 264 Neb. 899, 909, 652 N.W.2d 894, 903 (2002).

[4] *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

[5] See *id.*

[6] *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

[7] See *id.*

[8] *U.S. v. Adams*, 604 F.3d 596, 599 (8th Cir. 2010).

a firearm on four occasions, all within a year prior to his arrest, as intrinsic to the crime charged—being a felon in possession of a firearm—and determined that the testimony was "evidence of possession that 'directly supports' the charge." The court reasoned that the testimony helped establish the defendant's ownership or control of the gun and that the evidence was not subject to rule 404(b) of the Federal Rules of Evidence because it "'tends logically to prove [an] element of the crime charged.'"[9] Similarly, in the instant case, Harlan's and Loera's testimonies that Freemont possessed a gun directly supported the charged crime and tended to prove an element of the crime.

At least two other circuit courts have reached a similar conclusion. In *U.S. v. Dorsey*,[10] the defendant was charged with several crimes, including discharging a firearm, and he challenged the admission of testimony from two witnesses regarding his possession of a Glock-like gun 3 to 4 months before the shooting. The Ninth Circuit determined that the testimony was not evidence of prior bad acts under rule 404(b), but, rather, evidence that the defendant had a gun of the same or a similar type as the gun used in the shooting, which was relevant to show that the defendant had the means to commit the charged crimes and was the shooter. The Ninth Circuit reasoned that the evidence was inextricably intertwined with the charged crimes because it bore directly on the commission of those crimes and that the testimony "added to the circumstantial case" and "formed part of the prosecution's 'coherent and comprehensible story regarding the commission of the crime.'"[11] The Ninth Circuit further concluded that the probative value of the testimony was not outweighed by a danger of unfair prejudice because the testimony linked the defendant "to a gun that was the same as or similar to the gun likely used in the shooting."[12] The *Dorsey* court reasoned, "Evidence that [the defendant] had

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[9] *Id.*

[10] *U.S. v. Dorsey*, 677 F.3d 944 (9th Cir. 2012).

[11] *Id.* at 952.

[12] *Id.*

a Glock-like gun in January or February of 2008 made it more likely that he still had that gun on the night of the shooting in May."[13]

The 10th Circuit considered a situation in *United States v. Mitchell*,[14] where the defendant was charged with possession of an unregistered firearm based upon the discovery of a sawed-off shotgun which was found approximately 100 feet from the defendant's home. The government adduced testimony from witnesses who observed the defendant the night before the discovery of the firearm: One witness testified that he saw the defendant with a shotgun that looked similar to the shotgun introduced in evidence, while another witness testified that he saw the defendant carrying a sawed-off shotgun. The federal court concluded that the testimony was not rule 404(b) evidence because the government had to connect the defendant with the sawed-off shotgun found near the defendant's home. The court reasoned that the defendant's earlier conduct was closely and inextricably connected with the offense charged because it showed his possession of a sawed-off shotgun.

In the case before us, the State had the burden of proving beyond a reasonable doubt that Freemont possessed a deadly weapon, specifically, a firearm. His possession of a firearm on the earlier occasions, shortly before the date of the charged offense, provides circumstantial evidence that he possessed the firearm on the date of the offense.

I turn to the underlying purpose of rule 404, which operates to exclude evidence of a person's past misdeeds if the sole purpose of the evidence is to prove the existence of a trait of character, and, from that trait, an inference of particular conduct. As a commentator long ago summarized, "'[o]ur rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character.'"[15] As the U.S. Supreme Court stated,

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[13] *Id.*

[14] *United States v. Mitchell*, 613 F.2d 779 (10th Cir. 1980).

[15] David P. Leonard, The New Wigmore: Evidence of Other Misconduct and Similar Events § 1.2 at 3 n.5 (Richard D. Friedman ed., 2009), quoting 1 John H. Wigmore, Evidence in Trials at Common Law § 57 (1904).

"The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."[16]

But in the case before us, the evidence speaks not to Freemont's character, but, rather, to the likelihood of his possession of a firearm at the time of the charged crimes. Indeed, this circumstantial evidence of possession of the gun occurred much closer in time to the charged crimes than did the similar evidence admitted by the federal courts.

I am not persuaded by either of the reasons articulated by the majority, which first contends that Freemont's possession of a deadly weapon a few days or a week before the shooting was an uncharged crime because the State charged the possession crime as occurring on June 18, 2010—the day of the murder. The majority reasons that because the State did not charge Freemont with a separate crime for either of the prior incidents, evidence of the incidents was therefore not substantive evidence of the charged crime. But the federal cases I have already cited emphatically reject this reasoning. To take the clearest example, evidence that a person possessed a gun both on the day before and on the day after he is charged with its possession provides powerful circumstantial evidence that he or she possessed it on the day of the charge. This evidence does not speak to the defendant's character; rather, it is evidence tending to prove that he or she possessed the gun on the date charged. The majority's approach would require a rule 404 analysis simply because the observations were not on the precise day of the charged crime. In the case before us, the evidence is not so removed in time as to lose its temporal connection to the charged date of possession. While I concede that such an interval exists, it is clear to me that a matter of a few days or a week is well within the relevant time.

Second, the majority focuses on the murder, while the disputed evidence bears on the possession of the gun. The

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[16] *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948).

majority states that "[t]he prior misconduct did not provide any insight into Freemont's reason for allegedly killing Galligo." This, I contend, misses the point—the evidence directly spoke to Freemont's possession of a gun similar, if not identical, to the one he was charged with possessing on the date of the crime.

Moreover, the majority overlooks the significance of the language of the information setting forth the date of the offense. Notably, the information charged Freemont with unlawfully possessing a deadly weapon "on or about the 18th day of June, 2010." Testimony that Freemont possessed the gun a few days before June 18 provided confirmation that he possessed it "on or about" that date. The Eighth Circuit similarly concluded in *U.S. v. Adams*.[17] In that case, the defendant was convicted of being a felon in possession of a firearm "'on or about March 14, 2008,'"[18] and one of the defendant's roommates testified that he observed the defendant possess the firearm on four occasions, all within a year prior to his arrest. The defendant argued that the prior possession testimony altered the date of the offense, but the Eighth Circuit reasoned that "the government never wavered in its theory of the case at trial: the location where the gun was found established [the defendant] possessed the firearm 'on or about' the charged date and [the roommate's] testimony simply provided confirmation of possession."[19] In my view, Harlan's and Loera's testimonies simply provided confirmation that Freemont was in possession of a gun "on or about the 18th day of June, 2010." Because such testimony proved an element of the crime charged, no analysis under rule 404 was necessary.

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[17] *U.S. v. Adams, supra* note 8.

[18] *Id.* at 597.

[19] *Id.* at 600.

STATE OF NEBRASKA, APPELLEE, V. JASON HARRIS, APPELLANT.

817 N.W.2d 258

Filed July 27, 2012. No. S-11-527.

1. **Constitutional Law: Statutes: Judgments: Appeal and Error.** The constitutionality and construction of a statute are questions of law, regarding which an appellate court is obligated to reach conclusions independent of those reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.
3. **Constitutional Law: Standing.** Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right.
4. **Constitutional Law: Convictions: Statutes.** A defendant is prohibited from attempting to circumvent or avoid conviction under a particular statute by asserting a constitutional challenge to another, collateral statute which is irrelevant to the prosecution.
5. **Constitutional Law: Statutes: Proof.** A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. But a plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications.
6. **Constitutional Law: Statutes: Waiver.** In order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash, and all defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue.
7. **Constitutional Law: Statutes: Pleas.** Challenges to the constitutionality of a statute as applied to a defendant are properly preserved by a plea of not guilty.
8. **Constitutional Law: Appeal and Error.** The Nebraska Supreme Court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.
9. **Constitutional Law: Statutes: Sentences.** Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.
10. **Constitutional Law: Criminal Law: Other Acts: Time.** The retroactive application of civil disabilities and sanctions is permitted; it is only criminal punishment that the Ex Post Facto Clause prohibits.
11. **Sentences: Statutes: Legislature: Intent.** In order to determine whether a statute imposes civil sanctions or criminal punishment, a court must apply the

two-pronged intent-effects test. It must first ascertain whether the Legislature intended the statute to establish civil proceedings. This is a question of statutory construction. If the intention of the Legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, a court must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it "civil."

12. **Sentences: Statutes: Legislature: Intent: Proof.** Because an appellate court ordinarily defers to the Legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.
13. **Sentences: Statutes: Intent.** In determining whether a statutory scheme is so punitive that it effectively transforms the statute from a civil statute to a criminal statute, a court refers to the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). The factors are neither exhaustive nor dispositive but are useful guideposts. The following seven factors serve as guideposts: (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned.
14. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
15. **Constitutional Law: Equal Protection: Statutes: Presumptions: Proof.** Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid, and the burden of establishing the unconstitutionality of the statute is on the one attacking its validity.
16. **Equal Protection.** The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.
17. **Equal Protection: Proof.** The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim. In other words, the dissimilar treatment of dissimilarly situated persons does not violate equal protection rights.
18. **Equal Protection: Statutes.** In an equal protection challenge to a statute, the level of judicial scrutiny applied to a particular classification may be dispositive.
19. **Constitutional Law: Statutes.** Legislative classifications involving either a suspect class or a fundamental right are analyzed with strict scrutiny, and legislative classifications not involving a suspect class or fundamental right are analyzed using rational basis review.
20. **Equal Protection: Words and Phrases.** The "right to travel" includes at least three different components: (1) the right of a citizen of one state to enter and to leave another state, (2) the right to be treated as a welcome visitor rather than an

unfriendly alien when temporarily present in the second state, and (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of that state.

21. **Equal Protection: Statutes.** When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.
22. **Constitutional Law: Statutes: Legislature: Intent.** Under rational basis review, an appellate court will uphold a classification created by the Legislature where it has a rational means of promoting a legitimate government interest or purpose. In other words, the difference in classification need only bear some relevance to the purpose for which the difference is made.
23. **Equal Protection: Proof.** Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.

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

Joshua W. Weir, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Jason Harris appeals his Class IV felony conviction under Neb. Rev. Stat. § 29-4011(1) (Cum. Supp. 2010) based on his failure to comply with certain registration provisions of Neb. Rev. Stat. § 29-4004(9) (Cum. Supp. 2010) of the Sex Offender Registration Act (SORA), Neb. Rev. Stat. §§ 29-4001 through 29-4014 (Reissue 2008, Cum. Supp. 2010 & Supp. 2011). Harris claims that the district court for Lancaster County erred when it rejected his constitutional challenges to SORA. We conclude that the challenges asserted by Harris are without merit, and we therefore affirm Harris' conviction.

STATEMENT OF FACTS

Harris was convicted of sexual assault of a child and third degree sexual assault in 2001. He was sentenced by the district court for Sheridan County to imprisonment for 3 to 5 years on the first count and for 1 year on the second count. The court found that Harris was not a "'violent sexual offender.'" At his sentencing, Harris was given notice that he would be required to register as a sex offender upon his release from prison and for the next 10 years thereafter. Harris began registering upon his release from prison in 2003.

In 2009, Harris began to register as what is commonly referred to as a "transient" because he was frequently on the road either for his job as a truckdriver or for his work providing sound, light, and tour support for national bands. He maintained an office and mailing address at an apartment in which he had lived in Lincoln, Nebraska. As a transient, Harris was required under § 29-4004(9) to update his registration information at least once every 30 days.

Harris updated his registration with the Lancaster County sheriff on April 5, 2010, and was therefore required to complete his next update by May 5. Harris failed to timely provide his update. Harris asserted that he intended to update his information on May 5, but his truck broke down in Iowa that day, he arrived in Lincoln late on May 5, and he had to leave on a band tour the next day. Harris did not return to Lincoln until May 13, and he was not in Lincoln during the business hours that the sheriff's office was open to allow him to update his information. On May 14, the sheriff's office contacted Harris to inform him he had not updated his registration. Harris went to the sheriff's office to register that day; he was arrested and charged with failing to timely update his SORA registration.

The State filed an information in the district court for Lancaster County charging Harris under § 29-4011(1), which provides that "[a]ny person required to register under [SORA] who violates the act is guilty of a Class IV felony." Although the State did not cite § 29-4004(9) in the information, it used the language of § 29-4004(9) when it alleged that Harris had "fail[ed] to update his . . . registration, in person, to

the sheriff of the county in which he [was] located . . . at least once every thirty calendar days during the time he . . . remain[ed] without residence, temporary domicile, or habitual living location."

Harris filed a motion to quash the information because "the statutory scheme from which the criminal complaint arises is unconstitutional on its face and as applied to [Harris]." In the motion, he asserted two constitutional challenges to certain sections of SORA: an ex post facto challenge to §§ 29-4001.01 through 29-4006 and 29-4009 through 29-4013, and a due process challenge to §§ 29-4009 and 29-4013. Harris generally challenged amendments made to SORA by two legislative enactments—2009 Neb. Laws, L.B. 97, which became operative on May 21, 2009, and 2009 Neb. Laws, L.B. 285, which became operative on January 1, 2010. With regard to the ex post facto challenge, Harris contended that the 2009 amendments imposed retroactive and additional punishment for his 2001 convictions. With regard to the due process challenge, Harris contended that the 2009 amendments violated his due process rights by eliminating the individual assessment to determine the level of community notification and by imposing public Web site notification for all registrants.

The district court overruled Harris' motion to quash. In its order ruling on the motion, filed November 16, 2010, the court noted a case pending in the U.S. District Court for the District of Nebraska, in which the federal court had preliminarily enjoined the State of Nebraska from enforcing certain provisions of SORA as amended by L.B. 97 and L.B. 285 as to those previously convicted of sex crimes but not on probation, parole, or court-monitored supervision after January 1, 2010. See *Doe v. Nebraska*, 734 F. Supp. 2d 882 (D. Neb. 2010). The court noted in particular that the federal court had enjoined the enforcement of § 29-4006(2) (requiring consent to search and installation of monitoring hardware and software) and Neb. Rev. Stat. § 28-322.05 (Cum. Supp. 2010) (making it crime to use Internet social networking sites accessible by minors by person required to register under SORA). The district court noted that in a subsequent order, the federal court had ordered that a trial was necessary to determine the constitutionality

of § 29-4006(1)(k) and (s) (requiring disclosure of certain identifiers, e-mail addresses, electronic domains, and Internet sites); § 29-4006(2) (requiring registrant to consent to search and monitoring of hardware and software); and § 28-322.05 (making it crime to use social networking sites or chat room services accessible by minors). See *Doe v. Nebraska, supra*. The court finally noted that the federal court had concluded in *Doe* that there was no merit to the plaintiffs' constitutional challenges to all other statutory provisions enacted or amended by L.B. 97 and L.B. 285. See *Doe v. Nebraska, supra*. Based on the federal court's rulings in *Doe*, the court concluded that Harris' motion to quash should be overruled.

Thereafter, Harris entered a plea of not guilty. After the State rested its case in a stipulated bench trial, Harris renewed the objections he made in the motion to quash and the district court overruled the motion. After Harris rested his defense, he moved the court to dismiss the action as unconstitutional because it violated the Ex Post Facto, Due Process, Equal Protection, and Commerce Clauses as applied to him. The court overruled the motion and thereafter found Harris guilty of violating SORA, a Class IV felony under § 29-4011, because he had failed to update his registration in violation of § 29-4004(9). The court sentenced Harris to pay a fine of $2,500 and costs of the action.

Harris appeals his conviction.

ASSIGNMENTS OF ERROR

Harris claims that the district court erred when it rejected his constitutional challenges to SORA as amended in 2009. He specifically asserts that SORA as amended violates the Ex Post Facto, Due Process, Equal Protection, and Commerce Clauses of the U.S. and Nebraska Constitutions on its face and as applied to him.

STANDARD OF REVIEW

[1] The constitutionality and construction of a statute are questions of law, regarding which we are obligated to reach conclusions independent of those reached by the court below. *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011).

ANALYSIS

Only Challenges to §§ 29-4004(9) and 29-4011 Are at Issue in This Case.

[2] We note first that a statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality. *Sarpy Cty. Farm Bureau v. Learning Community*, 283 Neb. 212, 808 N.W.2d 598 (2012). We note that Harris makes constitutional arguments regarding various provisions of SORA. As an initial matter, we must determine which constitutional provisions and which portions of SORA are properly at issue in this appeal.

Harris argued to the district court in his motion to quash that SORA as amended in 2009 violated the Ex Post Facto and Due Process Clauses on its face. Harris additionally argued in his motion to dismiss at trial that the act violated the Ex Post Facto, Due Process, Equal Protection, and Commerce Clauses as applied to him. Harris' arguments on appeal encompass SORA as a whole, whereas his motion to quash limited his challenge to §§ 29-4001.01 through 29-4006 and 29-4009 through 29-4013 as violative of ex post facto rights and §§ 29-4009 and 29-4013 as violative of due process rights and his motion to dismiss, while less focused on certain SORA provisions, expanded his constitutional "as applied" rationale. Much of Harris' appellate argument focuses on the public notification provisions of §§ 29-4009 and 29-4013.

[3,4] Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right. *State v. Cushman*, 256 Neb. 335, 589 N.W.2d 533 (1999). A defendant is prohibited from attempting to circumvent or avoid conviction under a particular statute by asserting a constitutional challenge to another, collateral statute which is irrelevant to the prosecution. *Id.* Although Harris was subject to the public notification and other provisions of SORA, and although he may therefore have had standing to challenge the entirety of SORA in an action for declaratory judgment, in this criminal

case, he had standing to challenge only those statutes that were relevant to the prosecution.

The State charged in the information that Harris violated § 29-4011(1), which provides that "[a]ny person required to register under [SORA] who violates the act is guilty of a Class IV felony." Although the State did not cite § 29-4004(9) in the information, it used the language of § 29-4004(9) when it alleged that Harris had failed to update his registration within the time required under this section. Because §§ 29-4004(9) and 29-4011 were the only portions of SORA that were relevant to this prosecution, we conclude that they were the only statutes for which Harris had standing in this action to raise constitutional challenges. To the extent Harris' arguments relate to SORA in its entirety or to portions of SORA other than §§ 29-4004(9) and § 29-4011, they are not relevant in this appeal. Accordingly, conclusions in this appeal are limited to §§ 29-4004(9) and 29-4011 and do not determine the constitutionality of SORA as a whole or necessarily determine the outcome of different challenges to §§ 29-4004 and 29-4011 or constitutional challenges to other sections of SORA.

[5-7] We also note that Harris challenges the statutes at issue under various constitutional provisions and that he fashions such challenges as facial or as-applied challenges, or both. We therefore comment on the difference between facial and as-applied challenges and the differing procedures by which such challenges are raised and preserved. A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011). But a plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications. *Id*. In order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash, and all defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue. See *State v. Kanarick*, 257 Neb. 358, 598 N.W.2d 430 (1999). A motion to quash is the proper method to challenge

the constitutionality of a statute, but it is not used to question the constitutionality of a statute as applied. *State v. Perina, supra*. Instead, challenges to the constitutionality of a statute as applied to a defendant are properly preserved by a plea of not guilty. *Id*. With these principles in mind, we note that while Harris preserved the as-applied challenges that he raised to the district court when he pled not guilty, the only facial challenges that Harris preserved for appeal are those he raised in the motion to quash.

Harris' Facial Challenge Is Limited.

In his motion to quash, Harris stated that the specific statutes he was challenging were: "Neb. Rev. Stat. §§ 29-4001.01 through [29-]4006, and [29-]4009 through [29-]4013 (now constituting an ex post facto statutory scheme); Neb. Rev. Stat. §[§] 29-4009 and [29-]4013 (now eliminating the individual assessment to determine the level of community notification and imposing website notification for all registrants)." The challenges he raised in the motion to quash were therefore an ex post facto challenge to various provisions of SORA and a due process challenge to the notification provisions of §§ 29-4009 and 29-4013, the latter two of which, as noted, are not at issue in this case.

As discussed above, the only statutes that Harris had standing to challenge in this prosecution were §§ 29-4004(9) and 29-4011. Harris did not raise a facial challenge to § 29-4004(9), regarding periodic registration, and § 29-4011, regarding the Class IV felony consequence of violating SORA based on due process; therefore, the only facial challenge properly raised and preserved in this action was an ex post facto challenge to §§ 29-4004(9) and 29-4011, which were within the range of statutes Harris specified in his motion to quash with regard to his ex post facto challenge. With regard to his facial challenge, for completeness, we note that after the State rested its case at trial, Harris purportedly raised a facial challenge, arguing that SORA "violates his due process rights and it also constitutes an ex post facto law on its face." This reference to due process was not effective in expanding his facial challenge previously circumscribed by his motion to quash.

Harris' As-Applied Challenge Is Limited.

With regard to Harris' as-applied challenges, we note that after he rested his defense, Harris moved "to dismiss this action as unconstitutional, a violation of his due process rights as an ex post facto law." He further moved that "this is a violation of his equal protection of rights and it's also in violation of the commerce clause." Harris argued that § 29-4004(9) singles out registrants who are transients and discriminates against them by placing an undue burden on them by its requirement to register every 30 days as opposed to nontransients who are not required to register as frequently. He also argued that the requirement to register every 30 days placed an undue burden on his interstate travel and commerce as a person who travels frequently as part of his work. Having pled not guilty and as a result of these arguments at trial, Harris preserved his as-applied constitutional challenges based on the Equal Protection and Commerce Clauses.

With these principles and background in mind, we proceed to analyze Harris' constitutional challenges as they relate to §§ 29-4004(9) and 29-4011.

Harris Has Not Shown That Either § 29-4004(9) or § 29-4011 Is an Ex Post Facto Punishment Either on Its Face or as Applied.

Harris first claims that the district court erred when it rejected his facial and as-applied challenges based on the Ex Post Facto Clauses of the Nebraska and U.S. Constitutions. Although Harris aims his arguments at SORA as a whole, as noted above, the only statutes properly challenged in this action are §§ 29-4004(9) and 29-4011. We reject Harris' ex post facto challenges to these statutes.

[8] Harris first urges is to adopt the proposition that the Nebraska Constitution's ex post facto clause provides greater protection than does the equivalent clause in the U.S. Constitution. We decline to do so. As we have stated, we ordinarily construe Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution. *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010). See, also, *In re Interest of A.M.*, 281 Neb. 482, 797

N.W.2d 233 (2011), *cert. denied* 565 U.S. 919, 132 S. Ct. 341, 181 L. Ed. 2d 214. Harris has not provided a convincing reason to depart from our ex post facto jurisprudence in our analysis of Harris' ex post facto challenges to §§ 29-4004(9) and 29-4011, and therefore the same analysis applies to both the Nebraska and the U.S. provisions.

[9] Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts. *State v. Simnick, supra*.

Section 29-4011 clearly imposes a criminal penalty because it provides that a person who violates SORA is guilty of a Class IV felony. However, § 29-4011 on its face and as applied to Harris does not punish behavior that occurred before the statute's enactment. Instead, it operates prospectively to punish violations of SORA requirements occurring after its enactment. Section 29-4011 is not additional punishment for the crimes that resulted in a person's being subject to SORA; instead, it punishes the act of failing to comply with SORA once a person is subject to its requirements. Because § 29-4011 does not punish an offense that occurred before its enactment, we reject Harris' ex post facto challenges—facial and as-applied—to § 29-4011.

[10,11] By contrast, § 29-4004(9), like other portions of SORA, imposes requirements on persons based on their past crimes. The retroactive application of civil disabilities and sanctions is permitted; it is only criminal punishment that the Ex Post Facto Clause prohibits. See *In re Interest of A.M., supra*. Thus, we must determine whether § 29-4004(9) imposes civil sanctions or criminal punishment. To do so, we apply the two-pronged intent-effects test. See *In re Interest of A.M., supra*. We must first ascertain whether the Legislature intended the statute to establish civil proceedings. This is a question of statutory construction. *Id*. If the intention of the Legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory

scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it "civil." *Id.*

[12,13] Because we ordinarily defer to the Legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty. *In re Interest of A.M.*, 281 Neb. 482, 797 N.W.2d 233 (2011), *cert. denied* 565 U.S. 919, 132 S. Ct. 341, 181 L. Ed. 2d 214. In determining whether the statutory scheme is so punitive that it effectively transforms the statute from a civil statute to a criminal statute, we refer to the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). The factors are neither exhaustive nor dispositive but are useful guideposts. *In re Interest of A.M., supra*. The following seven factors serve as our guideposts: (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned. *Id.*

This court has had previous occasions to consider ex post facto challenges with regard to SORA. In *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004), we considered whether lifetime registration requirements for an aggravated offense violated the Ex Post Facto Clause. In the intent phase of the analysis, we concluded that "the Legislature intended to create a civil regulatory scheme to protect the public from the danger posed by sex offenders." 268 Neb. at 84, 680 N.W.2d at 161. In the effects phase of the analysis, we concluded that the defendant had "failed to show by the clearest proof that [SORA's] registration provisions are so punitive in either purpose or effect as to negate the State's intention." 268 Neb. at 88, 680 N.W.2d at 163.

In *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004), we again considered a challenge to SORA's registration provisions as well as to its notification provisions. We reaffirmed that the legislative intent was as set forth in *Worm*. *Slansky v. Nebraska State Patrol, supra*. We further concluded that the adverse effects of SORA's notification provisions were "limited and not so punitive as to negate the Legislature's intent to enact a civil regulatory scheme." 268 Neb. at 383, 685 N.W.2d at 354.

In *Welvaert v. Nebraska State Patrol*, 268 Neb. 400, 683 N.W.2d 357 (2004), a notification case, we rejected additional arguments and again concluded that punishment was not the intent of the Legislature in enacting SORA and that the effects of the notification provisions were not so punitive as to negate such intent. Compare *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010), (holding that lifetime community supervision pursuant to Neb. Rev. Stat. § 83-174.03 (Reissue 2008) was punishment and was ex post facto as applied to crime committed before its enactment).

Section 29-4004(9) is part of the registration requirements of SORA. Our holding in *Worm* that the registration requirements of SORA were not punitive in intent or effect applied to the statute as it then existed. However, SORA has been amended, and therefore, we must consider whether the Legislature intended the 2009 amendments to SORA to be a punishment or whether the effects of such amendments are so punitive as to negate a legislative intent to create a civil regulatory scheme. As noted earlier in this opinion, § 29-4004(9) is the only portion of SORA's registration provisions that is at issue in this case and the notification provisions are not at issue. Therefore, our analysis does not consider whether any of the 2009 registration or notification amendments other than the amendment of § 29-4004(9) were punitive in intent or effect.

Section 29-4004(9) is sometimes referred to as applying to "transients." After the 2009 amendments, it provides:

> Any person required to register or who is registered under the act who no longer has a residence, temporary domicile, or habitual living location shall report such change in person to the sheriff of the county in which he or she

> is located, within three working days after such change in residence, temporary domicile, or habitual living location. Such person shall update his or her registration, in person, to the sheriff of the county in which he or she is located, on a form approved by the sex offender registration and community notification division of the Nebraska State Patrol at least once every thirty calendar days during the time he or she remains without residence, temporary domicile, or habitual living location.

Subsection (9) was not part of § 29-4004 at the time of our decision in *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004). The general substance of the present subsection (9) was first added to the statute by 2006 Neb. Laws, L.B. 1199, and was substantially similar to its current form, except that a registrant was allowed 5 working days to report a change and was not required to report a change or an update to his or her registration in person. L.B. 1199 made amendments to various provisions of the law regarding sex offenses and convicted sex offenders. With respect to the addition of what is now § 29-4004(9), the Introducer's Statement of Intent stated that L.B. 1199 was intended in part to "[c]larif[y] certain requirements under [SORA]." Judiciary Committee, 99th Leg., 2d Sess. (Feb. 16, 2006). The introducer's comments to the Judiciary Committee stated that the bill "clarifies the obligations of homeless offenders relating to address notification." Committee Statement, L.B. 1199, 99th Leg., 2d Sess. 4 (Feb. 16, 2006). We determine that the Legislature's intent in enacting § 29-4004(9) in 2006 was to clarify the existing civil regulatory scheme and that its intent was not punitive.

Regarding the amendments to § 29-4004(9), which changed 5 days to 3 days and added the in-person reporting requirement, the Statement of Intent for L.B. 285 in 2009 stated that SORA was being amended to comply with federal guidelines and that the amendments had the purpose of creating "a more comprehensive, nationalized system for registration of sex offenders." Judiciary Committee, 101st Leg., 1st Sess. 1 (Mar. 18, 2009). Similar to our holding in *Worm*, we believe that the Legislature's intent with the addition and amendment to § 29-4004(9) was to clarify and expand the already established

civil regulatory scheme for sex offenders and that it was not the Legislature's intent to punish.

Having determined that the Legislature did not intend § 29-4004(9) as punishment, we look to the seven factors in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), to determine if the effect of the challenged statute is punitive. Regarding the *Kennedy* factors, Harris claims, summarized, that the registration requirements of § 29-4004(9) as amended are onerous, punitive, excessive, and impose a disability. Again, we note that only the clearest proof of a punitive effect will suffice to overcome our view that the Legislature intended § 29-4004(9) to operate as a civil statute.

Foremost among Harris' arguments that § 29-4004(9) is punitive is his claim that the in-person reporting requirement is punitive in effect, generally and specifically, as applied to him because his work requires extensive travel. As a transient, Harris is required under § 29-4004(9) as amended to report his whereabouts to the county sheriff in person at least once every 30 days. He states that the incident that gave rise to the charge against him in this case resulted from his failure to report, which was caused by a vehicle breakdown in Iowa that delayed his return to Nebraska and caused him to miss the 30-day in-person registration deadline in Nebraska.

In response to Harris' claim that the in-person registration requirement is punitive, the State notes in its appellate brief that § 29-4004(9) requires only that a transient registrant update his or her registration in person "'to the sheriff of the county in which he or she is located.'" Brief for appellee at 11. The State says in its brief that "the county sheriff to whom Harris must report is where he is located at the time regardless if it is a county in Nebraska or not." *Id.* at 52. The State repeated this interpretation at oral argument. With respect to the incident that gave rise to this case, the State asserts that Harris could have updated his registration in Iowa. In this regard, because on this record there is no indication that Harris attempted to register in Iowa, we make no comment involving a scenario in which a registrant has in fact unsuccessfully attempted to register in a location outside of Nebraska. The

State further notes that § 29-4004(9) provides that a transient registrant update his or her registration "*at least once* every thirty calendar days" rather than "every thirty calendar days," meaning that the updating does not have to be done on a specific day and can be done more than once during any particular 30-day period. Therefore, if a transient registrant knows that it will be difficult to go to a county sheriff on a particular day or period of days, he or she may update his or her registration in advance of that time.

We have reviewed the statutory language of § 29-4004(9). We agree with the State's reading of the requirements of § 29-4004(9) and conclude that the in-person registration requirement of § 29-4004(9) is not limited to presenting oneself to a sheriff in a county in Nebraska. Given our shared understanding of the statute, we conclude that the in-person feature of the statute is not excessive nor punitive in effect. We agree with the observation that "[a]ppearing in person may be more inconvenient, but requiring it is not punitive." *U.S. v. W.B.H.*, 664 F.3d 848, 857 (11th Cir. 2011). This observation is especially apt where the in-person requirement is not limited by geography.

We have examined Harris' remaining arguments that § 29-4004(9) is punitive in effect under the *Kennedy* factors and find them to be without merit. Section 29-4004(9) imposes no affirmative disability or restraint; it does not prohibit a sex offender from doing anything he or she would otherwise be able to do. See *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). Section 29-4004(9) does not further the traditional punitive justifications of retribution or deterrence; registration is a legitimate nonpunitive governmental objective. See *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004). There are alternative purposes for § 29-4004(9) other than punishment, such as protecting the public and enhancing future law enforcement efforts. In *Worm*, we observed that the two main reasons for originally enacting SORA were the recognition that sex offenders present a high risk to commit repeat offenses and, prior to SORA, law enforcement agencies lacked current information. See *American Civil Liberties Union of Nevada v. Masto*, 670 F.3d 1046 (9th Cir. 2012) (discussing reasons for

enacting sex offender registration statutes). The Nebraska statute is well tailored to further these purposes, and the burdens in § 29-4004(9) are not onerous. For completeness, we note that an ex post facto challenge to other provisions of SORA as amended was rejected in *Doe v. Nebraska*, 734 F. Supp. 2d 882 (D. Neb. 2010), and the reasoning in *Doe* is consistent with our analysis.

We recognize that some of the *Kennedy* factors may weigh in favor of § 29-4004(9) as being considered punishment. We conclude, however, that most of the factors weigh in favor of § 29-4004(9) as being a civil statute. Certainly, the evidence to the contrary does not rise to the clearest proof standard. In this regard, we have considered Harris' arguments that the effects of § 29-4004(9) as applied to him are punitive and we find them unconvincing. We conclude that § 29-4004(9) is not punitive and thus does not violate the Ex Post Facto Clause.

Having determined that Harris has failed to show that either § 29-4004(9) or § 29-4011 is unconstitutional on its face or as applied to him, we conclude that the district court did not err when it rejected Harris' ex post facto challenges.

Harris Makes No Due Process Challenge to §§ 29-4004(9) and 29-4011.

Harris next claims that the district court erred when it rejected his due process challenges. As noted above, Harris' facial challenge based on the Due Process Clause, as set forth in his motion to quash, was limited to an argument regarding the notification provisions of §§ 29-4009 and 29-4013. As further explained above, neither of those statutes is relevant to the present criminal prosecution, and in resolving the present case, we specifically make no comment on whether those statutes comport with constitutional due process.

Harris does not make a facial due process challenge to the only statutes at issue in this case—§§ 29-4004(9) and 29-4011. We further note that Harris does not make any argument with regard to §§ 29-4004(9) and 29-4011 as being in violation of the Due Process Clause as applied to him. We therefore conclude that the district court did not err when it rejected Harris' due process challenge.

Harris' Commerce Clause Challenge Has Been Abandoned and Harris' Equal Protection Challenge Is Without Merit.

As his final two assignments of error, Harris claims that the district court erred when it rejected his Equal Protection and Commerce Clauses challenges to SORA.

Although Harris asserts that SORA violates the Equal Protection Clauses of the Nebraska and U.S. Constitutions and the Commerce Clause of the U.S. Constitution on its face and as applied to him, as we noted above, Harris did not preserve a facial challenge based on the Equal Protection and Commerce Clauses, because he did not include such challenges in his motion to quash. Therefore, Harris has only preserved as-applied challenges based on these constitutional provisions.

Harris' Commerce Clause Challenge Has Been Abandoned.

[14] With regard to his Commerce Clause challenge, Harris refers to "the Commerce Clause of the U.S. Constitution" in his assignment of error on appeal; however, in the argument section of his brief, he does not cite the Commerce Clause and does not cite to authority that relies on the Commerce Clause. Instead, in the argument section, he asserts that SORA violates his right to travel and he cites cases that deal with an infringement of the fundamental right to travel as a violation of the Due Process Clause. It is unclear whether Harris made an argument with regard to the Commerce Clause to the district court. In any event, to the extent Harris raised a Commerce Clause challenge below and assigned error to it on appeal, he has failed to argue a challenge based on the Commerce Clause and has abandoned such challenge on appeal. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011). Therefore, to the extent Harris has made a challenge based on the Commerce Clause elsewhere in these proceedings, we do not address it on appeal. However, we note that the argument he makes with regard to a fundamental right to travel is relevant to the equal

protection challenge and will be considered in connection therewith below.

Harris' Equal Protection Challenge Is Without Merit.

In regard to the equal protection challenge, we note Harris' argument on appeal is directed to § 29-4004(9) and is properly at issue in this case. We also note that although Harris did not preserve a facial equal protection challenge, he did preserve an as-applied equal protection challenge, which we consider below. In this regard, we recognize that the analysis necessary to address Harris' as-applied challenge to some extent requires us to employ the vocabulary of a facial challenge. Harris argues that that statute's requirement that he update his registration in person at least once every 30 days is a violation of equal protection, because it classifies registrants who are transient differently from registrants who have a regular residence and imposes additional reporting requirements on transient registrants. He asserts that the additional requirements infringe on certain fundamental rights, particularly, in his case, the right to travel.

[15-17] Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid, and the burden of establishing the unconstitutionality of the statute is on the one attacking its validity. *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009). The Equal Protection Clause of the 14th Amendment, § 1, mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike. *State v. Rung, supra*. The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim. *Id*. In other words, the dissimilar treatment of dissimilarly situated persons does not violate equal protection rights. *Id*.

[18,19] In an equal protection challenge to a statute, the level of judicial scrutiny applied to a particular classification may be dispositive. *Id*. Legislative classifications involving either a suspect class or a fundamental right are analyzed with strict scrutiny, and legislative classifications not involving a suspect class or fundamental right are analyzed using rational basis review. *Id*.

Harris contends that § 29-4004(9) classifies and treats differently registrants who are transients compared to registrants generally. Harris argues that as a registrant who travels for work, § 29-4004(9) as it applies to him denies him equal protection. Harris does not attempt to argue that such classification targets a suspect class. Instead, he argues that the classification should receive strict scrutiny because it jeopardizes the exercise of fundamental rights, including the right to travel.

We have recognized that the right to interstate travel has been characterized as fundamental and that therefore, courts examine statutes impairing that right using the strict scrutiny standard of review. *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008). We determine that the reporting requirements of § 29-4004(9) do not impair such right.

[20] The U.S. Supreme Court has stated that the "'right to travel'" includes at least three different components: (1) the right of a citizen of one state to enter and to leave another state, (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state, and (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State. *Saenz v. Roe*, 526 U.S. 489, 500, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999). Harris does not argue that § 29-4004(9) infringes the second or third component of the right to travel noted by the U.S. Supreme Court; instead, he argues that it infringes the first component, because he cannot travel freely outside Nebraska and into other states for his work because he is required to report in person every 30 days.

Although the in-person reporting requirement admittedly places some burden on Harris, "mere burdens on a person's ability to travel from state to state are not necessarily a violation of their right to travel." *Doe v. Moore*, 410 F.3d 1337, 1348 (11th Cir. 2005). In *Doe v. Moore*, the Court of Appeals for the 11th Circuit rejected an argument that a sex offender registry requirement that the registrant notify law enforcement in person of a permanent or temporary change of residence infringed the right to travel. The court determined that although the requirement was "burdensome," it was not "unreasonable by constitutional standards, especially in light of the reasoning behind such registration." *Id.* at 348. We similarly determine that although the requirement of § 29-4004(9) places some burden on registrants like Harris by requiring them to update their registrations in person at least once every 30 days, we do not think it is an unreasonable burden, considering the purpose of the registration is to keep track of the whereabouts of known sex offenders.

The burdens of § 29-4004(9) are less onerous than Harris appears to perceive them to be. As noted above in our ex post facto analysis, the State suggests, and we agree, that the statute should be construed such that the registrant may update his or her registration with the sheriff of the county in which he or she is located, whether that county is the county in which he or she normally resides and whether or not the county is in Nebraska or another state. Further, an update must be made "at least once" every 30 days rather than exactly every 30th day; therefore, the update may be done sooner than 30 days after the last update if necessary for the registrant who plans to travel. In light of this construction, § 29-4004(9) does not place an unreasonable burden on a registrant's right to travel between Nebraska and other states. See *Doe v. Nebraska*, 734 F. Supp. 2d 882, 929 (D. Neb. 2010) (in case challenging Nebraska's SORA after 2009 amendments, federal district court was "not persuaded that SORA's in-person reporting requirements create an actual barrier to travel").

Harris also asserts in his appellate brief that SORA implicates other fundamental rights; however, other than the right to travel, Harris does not identify fundamental rights specifically

implicated by § 29-4004(9). We therefore determine that, other than the right to travel, Harris has not shown that the classification in § 29-4004(9) involves a fundamental right.

[21-23] Because Harris asserts no suspect classification and because the statute does not jeopardize a fundamental right, the classification in § 29-4004(9) treating transient registrants different than registrants with a regular residence is subject to a rational basis review for equal protection purposes. When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009). Under rational basis review, we will uphold a classification created by the Legislature where it has a rational means of promoting a legitimate government interest or purpose. *Id.* In other words, the difference in classification need only bear some relevance to the purpose for which the difference is made. *Id.* Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification. *Id.*

On its face, § 29-4004(9) creates a classification based on whether a registrant "has a residence, temporary domicile, or habitual living location" and requires that if a registrant does not, he or she is subject to more frequent updating of his or her registration than registrants who have a regular residence. As noted in connection with our ex post facto analysis, the legislative purpose behind SORA is to create a civil regulatory scheme to protect the public from the danger posed by sex offenders. This is a legitimate government interest or purpose, and we determine that the classification created by § 29-4004(9) is rationally related to such purpose. In order to protect the public, the registration system is used by law enforcement to keep track of the whereabouts of known sex offenders. Insofar as it is more difficult to keep track of registrants who do not have a regular residence, domicile, or living location than it is for those registrants who have a regular

residence, it is rational to require such persons to update their registration more frequently than other registrants.

In his as-applied challenge, Harris contends that because he travels frequently for work, he is more heavily burdened than other registrants by frequent registration requirements. However, in terms of equal protection analysis, Harris' travel profile makes the classification more compelling. Measured against Harris' facts, the classification is rationally related to SORA's purpose.

We conclude that Harris has not met his burden to show that § 29-4004(9) violates equal protection standards. The district court did not err when it rejected Harris' equal protection challenge to the statute.

CONCLUSION

We conclude that the district court did not err when it rejected the constitutional challenges that were properly raised by Harris in this criminal proceeding that implicated §§ 29-4004(9) and 29-4011. We therefore affirm Harris' Class IV felony conviction under § 29-4011(1) based on his failure to comply with § 29-4004(9) of SORA.

AFFIRMED.

STEPHAN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
TIMOTHY GASKILL, APPELLANT.
817 N.W.2d 754

Filed July 27, 2012. No. S-11-528.

1. **Constitutional Law: Statutes: Judgments: Appeal and Error.** The constitutionality and construction of a statute are questions of law, regarding which an appellate court is obligated to reach conclusions independent of those reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.

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

Joshua W. Weir, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Timothy Gaskill appeals his Class IV felony conviction under Neb. Rev. Stat. § 29-4011(1) (Cum. Supp. 2010) based on his failure to comply with certain registration provisions of Neb. Rev. Stat. § 29-4004(9) (Cum. Supp. 2010) of the Sex Offender Registration Act (SORA), Neb. Rev. Stat. §§ 29-4001 through 29-4014 (Reissue 2008, Cum. Supp. 2010 & Supp. 2011). Gaskill claims that the district court for Lancaster County erred when it rejected his constitutional challenges to SORA. We conclude that the challenges asserted by Gaskill are without merit, and we therefore affirm Gaskill's conviction.

STATEMENT OF FACTS

Gaskill was convicted of attempted first degree sexual assault in 1995. He was sentenced by the district court for Buffalo County to 45 days in jail and probation for 2 years. SORA had not been enacted at the time of Gaskill's conviction, but because he was still on probation on January 1, 1997, he became subject to then newly enacted SORA. See § 29-4003. Gaskill was released from probation in April 1997. In 2009, Gaskill was notified that because of changes to SORA effective January 1, 2010, he would be subject to lifetime registration.

Since approximately July 2007, Gaskill, his wife, and their two daughters lived in an apartment in Lincoln, Nebraska, on a year-to-year lease. Gaskill asserted that they never missed a rent payment and had not received complaints or had any problems. However, on April 1, 2010, Gaskill and his family

received a notice to vacate their apartment and were given 3 days to move out. Gaskill was told by the apartment manager that the family was being evicted because other tenants had complained after learning that he was listed on the Nebraska sex offender registry. Gaskill had not previously been listed on the sex offender Web site because he was determined to be at low risk to reoffend, but because of changes to SORA, he had been listed on the Web site since January 1, 2010.

On April 4, 2010, the family went to an extended-stay hotel while they searched for a new home. On April 9, they were informed that they could no longer stay at the extended-stay hotel because Gaskill was listed on the sex offender registry, and they were given 1 hour to leave. They stayed at another hotel on the night of April 9, and on April 10, they moved into a new residence.

On April 30, 2010, deputies with the Lancaster County sheriff's office attempted to locate Gaskill at the apartment for a compliance check to verify his last registered address. Deputies were told that Gaskill had been evicted but had not left a forwarding address. Deputies contacted Gaskill by telephone on May 1 and asked him to come to the sheriff's office to update his registration. Gaskill complied and completed a form reporting his new address. Gaskill was then arrested for failing to timely report his change of address and his transient status after being evicted from the apartment. Under § 29-4004(9), a registrant "who no longer has a residence, temporary domicile, or habitual living location shall report such change in person to the sheriff of the county in which he or she is located, within three working days after such change in residence, temporary domicile, or habitual living location."

The State filed an information in the district court for Lancaster County charging Gaskill under § 29-4011(1), which provides that "[a]ny person required to register under [SORA] who violates the act is guilty of a Class IV felony." Although the State did not cite § 29-4004(9) in the information, it used the language of § 29-4004(9) when it alleged that when Gaskill "no longer ha[d] a residence, temporary domicile, or habitual living location," and he had "fail[ed] to report such change in person to the sheriff of the county in which he [was] located,

within three working days after such change in residence, temporary domicile, or habitual living location."

Gaskill filed a motion to quash the information because "the statutory scheme from which the criminal complaint arises is unconstitutional on its face and as applied to [Gaskill]." In the motion, he asserted two constitutional challenges to certain sections of SORA: an ex post facto challenge to §§ 29-4001.01 through 29-4006 and 29-4009 through 29-4013, and a due process challenge to §§ 29-4009 and 29-4013. Gaskill generally challenged amendments made to SORA by two legislative enactments—2009 Neb. Laws, L.B. 97, which became operative on May 21, 2009, and 2009 Neb. Laws, L.B. 285, which became operative on January 1, 2010. With regard to the ex post facto challenge, Gaskill contended that the 2009 amendments imposed retroactive and additional punishment for his 1995 conviction. With regard to the due process challenge, Gaskill contended that the 2009 amendments violated his due process rights by eliminating the individual assessment to determine the level of community notification and by imposing Web site notification for all registrants.

The district court overruled Gaskill's motion to quash. In its order ruling on the motion, filed November 16, 2010, the court noted a case pending in the U.S. District Court for Nebraska, in which the federal court had preliminarily enjoined the State of Nebraska from enforcing certain provisions of SORA as amended by L.B. 97 and L.B. 285 as to those previously convicted of sex crimes but not on probation, parole, or court-monitored supervision after January 1, 2010. See *Doe v. Nebraska*, 734 F. Supp. 2d 882 (D. Neb. 2010). The court noted in particular that the federal court had enjoined the enforcement of § 29-4006(2) (requiring consent to search and installation of monitoring hardware and software) and Neb. Rev. Stat. § 28-322.05 (Cum. Supp. 2010) (making it crime to use Internet social networking sites accessible by minors by person required to register under SORA). The district court noted that in a subsequent order, the federal court had ordered that a trial was necessary to determine the constitutionality of § 29-4006(1)(k) and (s) (requiring disclosure of certain identifiers, e-mail addresses,

electronic domains, and Internet sites); § 29-4006(2) (requiring registrant to consent to search and monitoring of hardware and software); and § 28-322.05 (making it crime to use social networking sites or chat room services accessible by minors). See *Doe v. Nebraska, supra*. The court finally noted that the federal court had concluded in *Doe* that there was no merit to the plaintiffs' constitutional challenges to all other statutory provisions enacted or amended by L.B. 97 and L.B. 285. See *Doe v. Nebraska, supra*. Based on the federal court's rulings in *Doe*, the court concluded that Gaskill's motion to quash should be overruled.

Thereafter, Gaskill entered a plea of not guilty. After the State rested its case in a stipulated bench trial, Gaskill renewed the objections he made in the motion to quash and the district court overruled the motion. After Gaskill rested his defense, he moved the court to dismiss the action as unconstitutional because it violated the Ex Post Facto and Due Process Clauses as applied to him. The court overruled the motion, and thereafter, the court found Gaskill guilty of violating SORA, a Class IV felony under § 29-4011, because he had failed to report a change in his residence, temporary domicile, or habitual living condition to the sheriff within 3 working days after such change in violation of § 29-4004(9). The court sentenced Gaskill to pay a fine of $250 and costs of the action and to serve 200 hours of community service.

Gaskill appeals his conviction.

ASSIGNMENTS OF ERROR

Gaskill claims that the district court erred when it rejected his constitutional challenges to SORA as amended in 2009. He specifically asserts that SORA as amended violates the Ex Post Facto and Due Process Clauses of the U.S. and Nebraska Constitutions on its face and as applied to him.

STANDARD OF REVIEW

[1] The constitutionality and construction of a statute are questions of law, regarding which we are obligated to reach conclusions independent of those reached by the court below. *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011).

ANALYSIS

[2] We note first that a statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality. *Sarpy Cty. Farm Bureau v. Learning Community*, 283 Neb. 212, 808 N.W.2d 598 (2012). We note further that Gaskill filed a motion to quash raising facial challenges to SORA based on the Ex Post Facto and Due Process Clauses that was substantially the same as the motion to quash filed by the defendant in *State v. Harris, ante* p. 214, 817 N.W.2d 258 (2012), a decision filed this same day. Similar to the defendant in *Harris*, Gaskill also raised as-applied challenges based on the Ex Post Facto and Due Process Clauses. Unlike the defendant in *Harris*, Gaskill did not raise as-applied challenges based on the Equal Protection and Commerce Clauses.

Similar to our analysis in *Harris*, we conclude that Gaskill had standing in this criminal action to challenge only those statutes under which he was being prosecuted—§§ 29-4004(9) and 29-4011. See *State v. Cushman*, 256 Neb. 335, 589 N.W.2d 533 (1999). In *Harris*, we concluded that a facial due process challenge was not properly before us because the motion to quash did not assert such a challenge to the statutes at issue. In addition, in *Harris*, we concluded that § 29-4011 was prospective and § 29-4004(9) was not punitive and that therefore, the statutes at issue were not facially violative of ex post facto principles under the intent-effects framework articulated in *In re Interest of A.M.*, 281 Neb. 482, 797 N.W.2d 233 (2011), *cert. denied* 565 U.S. 919, 132 S. Ct. 341, 181 L. Ed. 2d 214. We reject Gaskill's facial challenges to §§ 29-4004(9) and 29-4011 based on due process and ex post facto grounds for the same reasons we rejected the same challenges in *Harris*. Because the present case involves a different set of facts than those in *Harris*, we separately analyze Gaskill's as-applied challenges.

As was the case in *Harris*, Gaskill makes no as-applied challenge based on the due process clause with regard to §§ 29-4004(9) and 29-4011; his due process arguments focus on the notification provisions of §§ 29-4009 and 29-4013, which are not the subject of this prosecution. We therefore

conclude that the district court did not err when it rejected Gaskill's as-applied due process challenge.

Gaskill claims that § 29-4004(9) violated ex post facto principles as applied to him. Gaskill argues that § 29-4004(9) was punitive under the circumstances of his case and therefore unconstitutional as applied to him, because § 29-4004(9) required him to report his change to transient status within 3 working days after he no longer had a residence. He contends that such timeframe was too stringent because he was evicted from his apartment, had to leave immediately, and could not meet the 3-day timeframe.

The record shows that Gaskill received an eviction notice on April 1, 2010, and moved out of his residence on April 4. Gaskill did not report the change until May 1, after being contacted by the sheriff's office. Gaskill failed to comply with § 29-4004(9) for several weeks. Therefore, whether or not the 3-day requirement of § 29-4004(9) might be too stringent as applied to another registrant who was unable to comply or whose compliance was interfered with, Gaskill did not report his change until nearly 30 days after required to do so, and he has not demonstrated facts that show that the effect of § 29-4004(9) was punitive as applied to him. We therefore reject Gaskill's as-applied ex post facto challenge to § 29-4004(9).

CONCLUSION

We reject Gaskill's facial constitutional challenges based on due process and ex post facto grounds on the same basis we rejected these challenges in *State v. Harris, ante* p. 214, 817 N.W.2d 258 (2012), generally for the reasons that his due process challenge is not before us and the statutes at issue were either prospective or not punitive and thus not violative of ex post facto principles. Regarding Gaskill's as-applied challenges, Gaskill did not make an as-applied due process challenge to the statutes at issue and for reasons explained above, we reject Gaskill's as-applied ex post facto challenge. The district court did not err when it rejected the constitutional challenges that were properly raised by Gaskill in his criminal proceeding that implicated §§ 29-4004(9) and 29-4011. We

therefore affirm Gaskill's Class IV felony conviction under § 29-4011(1) based on his failure to comply with § 29-4004(9) of SORA.

AFFIRMED.

STEPHAN, J., participating on briefs.

BRADLEY E. GREEN, APPELLEE AND CROSS-APPELLANT,
v. BOX BUTTE GENERAL HOSPITAL,
APPELLANT AND CROSS-APPELLEE.
818 N.W.2d 589

Filed August 3, 2012. No. S-11-576.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives the party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there exists no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom and show the moving party is entitled to judgment as a matter of law.
3. ____. As a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed.
4. **Malpractice: Health Care Providers: Words and Phrases.** Malpractice is defined as a health care provider's failure to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his or her profession engaged in a similar practice in his or her locality or in similar localities.
5. **Health Care Providers: Negligence.** The proper measure of the duty of a hospital to a patient is the exercise of that degree of care, skill, and diligence used by hospitals generally in the community where the hospital is located or in similar communities.
6. **Malpractice: Health Care Providers: Proof: Proximate Cause.** The plaintiff patient in a medical malpractice action must provide proof of the generally recognized medical standard involved, that there was a deviation from that standard by the physician or medical care provider, and that such deviation was the proximate cause of the plaintiff's injury.
7. **Summary Judgment: Proof.** A party makes a prima facie case that it is entitled to summary judgment by offering sufficient evidence that, assuming the evidence went uncontested at trial, would entitle the party to a favorable verdict.

8. ____: ____. After the moving party makes a prima facie case for summary judgment, the burden to produce contrary evidence showing the existence of a material issue of fact shifts to the party opposing the motion.
9. ____: ____. In the absence of a prima facie showing by the movant that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial.
10. **Health Care Providers: Negligence.** Hospital policies and rules do not conclusively determine the standard of care owed.
11. **Summary Judgment: Affidavits.** Affidavits filed on behalf of the parties moving for summary judgment are to be strictly construed.
12. ____: ____. The absence of counter-affidavits does not relieve a moving party plaintiff from the burden of establishing the evidentiary facts of every element necessary to entitle the plaintiff to summary judgment.
13. ____: ____. Supporting affidavits in summary judgment proceedings 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.
14. **Negligence.** While the identification of the applicable standard of care is a question of law, the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact.
15. **Negligence: Evidence: Tort-feasors.** It is for the finder of fact to resolve what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with that standard.
16. **Trial: Expert Witnesses.** The trier of fact is not bound to accept expert opinion testimony.
17. **Summary Judgment: Trial.** Summary judgment should not be used to deprive a litigant of a formal trial if there is a genuine issue of fact.
18. **Summary Judgment: Jury Trials.** The purpose of summary judgment is not to cut litigants off from their right of trial by jury if they really have issues to try.
19. **Summary Judgment: Directed Verdict: Trial.** A motion for summary judgment is not a substitute for a motion for a directed verdict or for error proceedings taken after a full trial.

Appeal from the District Court for Box Butte County: BRIAN C. SILVERMAN and LEO DOBROVOLNY, Judges. Reversed and remanded.

David A. Blagg and Brien M. Welch, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Robert O. Hippe and Robert G. Pahlke, of Robert Pahlke Law Group, P.C., L.L.O., for appellee.

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

McCormack, J.

I. NATURE OF CASE

Bradley E. Green sued Box Butte General Hospital (Hospital) after he fell and injured his left shoulder while admitted as a patient. Green is a paraplegic. The Hospital allowed Green to have his shower chair brought from home and attempt an unassisted transfer from his wheelchair to the shower chair. The district court granted partial summary judgment in favor of Green on liability and proximate cause and ultimately found damages of $3,733,022, which it capped at $1 million. The issue is whether there was a genuine issue of material fact precluding summary judgment.

II. BACKGROUND

Green has been a paraplegic since 1985. He was admitted to the Hospital on March 6, 2005, with pneumonia. On March 7, Green wanted to take a shower. The staff allowed Green to have someone bring his personal shower chair from home. A nurse's aide placed the shower chair in the shower of the patient bathroom. She then allowed Green to attempt to transfer himself from his wheelchair to the shower chair unassisted. During the transfer, the shower chair slipped and Green fell, sustaining injuries to his left shoulder.

Green filed a complaint against the Hospital, alleging that the Hospital was negligent and that it had failed to exercise a degree of skill and care ordinarily exercised by a hospital in Alliance, Box Butte County, Nebraska, or a similarly situated area. Green alleged that such negligence and breach of the standard of care were the proximate cause of Green's injuries. The Hospital generally denied that it had breached the standard of care or that its employees' actions had caused any injury or damage to Green.

1. Summary Judgment on Liability

After discovery, Green moved for partial summary judgment on the issues of negligence and causation. In support of the motion, Green offered his deposition testimony, the affidavit of a professor of nursing, and the Hospital's responses to Green's request for admissions. Green also introduced the deposition testimony of his treating physician, the deposition testimony of

a registered practical nurse at the Hospital, and the deposition testimony of a registered nurse at the Hospital. In opposition to the motion for summary judgment, the Hospital presented the affidavits of two of its employees who were present at the time of Green's fall.

The district court granted Green's motion for partial summary judgment. The district court did not specifically state that there was no material issue of fact, but instead stated that it was "find[ing]" that the Hospital was "guilty of negligence" and that the Hospital's "negligence was a proximate cause of injuries to [Green] the nature and extent of which will have to be determined at trial."

(a) Melissa Lucas and Carol Glass

Melissa Lucas, a nurse's aide, testified that when Green attempted to transfer from his wheelchair to his shower chair, she was standing in the doorway of the bathroom. She testified that she stood monitoring the situation with the intent of helping Green if he needed help. She explained that the bathroom was not large enough to allow her to be inside with the wheelchair, the shower chair, and Green. Lucas stated that before the transfer, she had asked Green whether he wanted assistance and he had indicated that he did not.

Carol Glass, a licensed practical nurse, testified that she was in Green's room changing the linens on his bed when Green fell. She generally confirmed that the bathroom size was too small to accommodate both a shower chair and a wheelchair. She also confirmed that Green had fallen attempting to transfer himself into his shower chair. Glass testified that after the fall, Green was checked by a nurse for injuries before he was assisted back into the shower chair. Glass testified that when she asked Green whether he was injured, he indicated that he was not.

(b) Green

Green testified in his deposition that when he requested to take a shower, the "nurse," presumably Lucas, asked "if I had any means of taking a shower." Green testified that the staff did not seem to know what a shower chair was. Nevertheless,

the staff tried to find one in the Hospital. When they were unable to, they allowed Green to have someone bring his shower chair from home.

Green testified that in order to use the shower chair, nothing more was required than to set it on the shower floor. Green stated that after Lucas placed the shower chair in the bathroom, she went back into his room. Because the bathroom was not big enough to accommodate both the shower chair and his wheelchair, Green parked his wheelchair halfway inside the bathroom. Green then attempted to transfer himself from the wheelchair to the shower chair.

According to Green, the shower chair suction cups did not hold and the chair slipped out from underneath him, causing him to fall. Green testified that he was alone in the bathroom when he fell and that he had to push a call button to receive assistance. Green stated that when two staff members came to his aid, he instructed them how to get him back into his shower chair. This was accomplished, and Green proceeded with his shower without further incident. Green testified that after the shower, there was no one around to assist him and he could not reach the call button. But he was able to transfer himself back into his wheelchair and get himself back into bed.

Green stated that when he fell, he hit his head and right arm on the toilet, while his left arm was caught up in the air on the shower chair. Green described the injuries resulting from the fall, which included a tear of his left rotator cuff. Green testified that in his 20 years of being paraplegic, he had never fallen before while transferring himself from his wheelchair to a shower chair.

(c) Susan Hoff and Hospital Policies

Susan Hoff, a registered nurse at the Hospital, testified that a nurse assistant was qualified to move patients and help with bathing. Hoff was apparently confronted with a copy of the Hospital's policies and procedures. Those policies and procedures were not themselves placed in evidence at the summary judgment hearing. Hoff noted that the policies regarding patient transfers were for the safety of both the patient and the employee doing the transfer.

In light of the policies and procedures presented to her, Hoff admitted it was the Hospital's policy to get additional assistance when in doubt about the ability to transfer a patient safely. And, if the patient is unable to bear his or her own weight, it was the Hospital's policy to use a mechanical lift. Hoff explained that lifting usually required at least two people.

Hoff testified that it was the Hospital's policy that all patients upon admission to the Hospital have a fall risk assessment conducted. Hoff could not see, from the documents presented to her, evidence that such a fall risk assessment was conducted for Green when he was admitted on March 6, 2005. Based on his paraplegia alone, Hoff admitted that Green should have been assessed at a high risk for a fall.

Hoff testified that mechanical lifts were commonly used for transfers of paraplegic patients, although "[i]t kind of depends on the situation." Hoff stated that when a paraplegic patient wishes to shower, it was her practice to place a wheeled shower chair in the patient's room, where a mechanical lift would assist in the transfer of the patient to the shower chair. Once the patient is in the shower chair, the patient is wheeled into the bathroom and into the shower. This type of transfer with a mechanical lift could not be done within the bathroom because of the limited space.

Hoff explained that a gaited belt would also be appropriate for transferring a paraplegic patient, "[d]epend[ing] on [the patient's] upper body strength . . . ." When asked whether just one person assisting a transfer was not in keeping with Hospital policy, she said: "I don't know for sure how to answer that one because every situation is slightly different. But I guess based on that I'd have to say yes."

(d) Tina Pryor

Tina Pryor, a registered practical nurse at the Hospital, described the different kinds of mechanical lifts available at the Hospital, but was unfamiliar with the Hospital's lift policy. She had never used a mechanical lift to transfer a patient into the bathroom to the shower, but noted that she worked the night

shift, when few people shower. Pryor was apparently deposed because she had signed Green's admission sheet.

(e) Dr. Joyce Black

The affidavit of Dr. Joyce Black was admitted over the Hospital's objections on the basis of hearsay and foundation. Black received an associate degree in nursing and a bachelor of science degree in nursing from colleges in Minnesota, and she worked in Minnesota in various nursing positions from 1972 to 1979. Black later graduated from the University of Nebraska Medical Center College of Nursing in Omaha, Nebraska, first with a master of science degree in nursing and later with a doctor of philosophy degree in nursing. Since 1982 to the present, Black has worked in various teaching positions at the University of Nebraska Medical Center College of Nursing. Black did not aver that she is familiar with the standard of care in Box Butte County or in similar communities.

Black stated that she had reviewed Green's medical records and the witness affidavits. Black stated that the medical records revealed Green was a fall risk when admitted on March 6, 2005. Black opined "to a reasonable degree of probability in my field of nursing expertise" that the Hospital violated "the standard of care" in its treatment of Green by (1) failing to have a reasonably safe environment for its patients, (2) failing to be in compliance with the Americans with Disabilities Act, (3) failing to have the equipment necessary to care for patients such as Green, (4) failing to monitor and properly assess Green before the fall, (5) failing to adequately assess and determine that it was unsafe to allow Green to transfer himself into the shower chair, (6) failing to either support Green's transfer to a shower chair in a safe and secure manner or prohibit the unassisted transfer, (7) failing to properly secure the shower chair, (8) failing to continue to monitor the transfer, and (9) failing to conduct an adequate injury assessment of Green after his fall. Black did not opine as to whether any of the listed breaches of "the standard of care" proximately caused injury to Green.

(f) Dr. Michele Arnold

Dr. Michele Arnold is a specialist in rehabilitation medicine. She has been treating Green since before the fall for conditions common to paraplegics relating to overuse of the arms and hands, as well as for continued care for his spinal cord injury. Arnold opined within a reasonable degree of medical certainty that Green's fall in the Hospital was the likely cause of a full tear of Green's left rotator cuff. She described the medical, logistical, and psychological impact such an injury has on paraplegics who rely primarily on upper body strength for their mobility.

(g) Request for Admissions

The Hospital's responses to Green's request for admissions admitted that Green injured his left shoulder while a patient at the Hospital and that at the time Green was injured, he was transferring himself, without assistance, from his wheelchair to a shower chair. The Hospital admitted that there were no shower chairs with accommodations for paraplegics available at the Hospital at the time of Green's fall and that Green had his personal shower chair brought from home. But the Hospital denied that the transfer was in contravention of its policies and procedures, and the Hospital denied it had breached the recognized standard of care. The Hospital also denied that any breach of the standard of care was the proximate cause of Green's injuries.

2. Trial and Verdict on Damages

After granting partial summary judgment in favor of Green, the action proceeded to a bench trial on damages. The court rendered a verdict in the amount of $31,687.18 for past medical expenses, $701,334.95 for future medical expenses, $450,000 in past pain and suffering, and $2,550,000 in future pain and suffering.

The parties agreed that Green's action involved a political subdivision governed by the Political Subdivisions Tort Claims Act (PSTCA),[1] as well as medical malpractice, governed by

[1] Neb. Rev. Stat. §§ 13-901 to 13-927 (Reissue 2007).

the Nebraska Hospital-Medical Liability Act (NHMLA).[2] The PSTCA has a $1 million cap on damages, while the NHMLA has a cap of $1,750,000.[3] Hospitals under the NHMLA are responsible for only $500,000 of the recovery, however, and the balance is paid by the Excess Liability Fund.[4] Green's attorney repeatedly conceded to the district court that the lesser of the two caps, the PSTCA, would apply, and the Hospital did not disagree. Therefore, the court capped damages under the PSTCA at $1 million.

The court found that 19.6 percent of the capped award, $196,000, was for medical needs and 80.4 percent, $804,000, was for noneconomic losses. The court denied the Hospital's motions for new trial and to alter or amend the judgment, and granted Green costs of $1,377.74, above and beyond the cap.

The Hospital appeals the district court's grant of partial summary judgment, the amount of damages, and the fact that the costs of $1,377.74 were not included in the capped damages. Green cross-appeals the district court's order of damages insofar as it employed the PSTCA cap instead of the NHMLA cap and it failed to tax additional costs requested by Green.

III. ASSIGNMENTS OF ERROR

The Hospital assigns that the district court erred in (1) granting summary judgment on negligence, (2) admitting the Black affidavit in support of Green's motion for summary judgment, (3) its determination of the amount of damages, (4) taxing costs above the cap provided by the PSTCA, and (5) denying its motion for new trial.

Green assigns in his cross-appeal that the district court erred in (1) applying the recovery cap from the PSTCA rather than the cap from the NHMLA and (2) finding that the Hospital had a reasonable chance of a successful defense and, accordingly, denying costs and attorney fees under § 44-2834.

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[2] Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 2010).

[3] See §§ 13-926 and 44-2825.

[4] See §§ 44-2829 and 44-2832.

IV. STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[5]

V. ANALYSIS

[2,3] Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there exists no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom and show the moving party is entitled to judgment as a matter of law.[6] As a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed.[7] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[8] We agree with the Hospital that the district court erred in granting summary judgment in favor of Green.

We begin with the elements of Green's cause of action. Green's petition was framed as a cause of action for hospital malpractice.[9] A court may not enter a summary judgment on an issue not presented by the pleadings.[10] Green alleged the following in his petition:

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[5] *Westin Hills v. Federal Nat. Mortgage Assn.*, 283 Neb. 960, 814 N.W.2d 378 (2012).

[6] See, *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002); *State Farm Fire & Cas. Co. v. van Gorder*, 235 Neb. 355, 455 N.W.2d 543 (1990).

[7] *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000).

[8] *Westin Hills v. Federal Nat. Mortgage Assn., supra* note 5.

[9] See *Casey v. Levine*, 261 Neb. 1, 621 N.W.2d 482 (2001).

[10] *Slagle v. J.P. Theisen & Sons*, 251 Neb. 904, 560 N.W.2d 758 (1997).

> The treatment, care and supervision rendered by Defendant HOSPITAL and its employees [were] negligent and failed to exercise a degree of skill and care ordinarily exercised by hospitals engaged in providing medical care such that there was a breach of the standard medical care for a hospital in Alliance, Box Butte County, Nebraska or a similarly situated area, and were the proximate cause of injuries to GREEN . . . .

[4,5] Malpractice is defined as a health care provider's failure to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his or her profession engaged in a similar practice in his or her locality or in similar localities.[11] The NHMLA specifically provides for use of the locality rule.[12] The proper measure of the duty of a hospital to a patient is the exercise of that degree of care, skill, and diligence used by hospitals generally in the community where the hospital is located or in similar communities.[13]

[6] The plaintiff patient in a medical malpractice action must provide proof of the generally recognized medical standard involved, that there was a deviation from that standard by the physician or medical care provider, and that such deviation was the proximate cause of the plaintiff's injury.[14] In hospital and other medical malpractice cases, the plaintiff must usually produce expert testimony to support his or her prima facie case of negligence and causation.[15]

Under the so-called common knowledge exception, where negligence or causation may be inferred from the facts by a layman with common knowledge and experience and with

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[11] See *Murray v. UNMC Physicians*, 282 Neb. 260, 806 N.W.2d 118 (2011).

[12] Neb. Rev. Stat. § 44-2810 (Reissue 2010).

[13] *Casey v. Levine, supra* note 9; *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992).

[14] See *Anderson v. Moore*, 202 Neb. 452, 275 N.W.2d 842 (1979).

[15] See, *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008); *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008); *Fossett v. Board of Regents, supra* note 7. See, also, e.g., *Krenek v. St. Anthony Hosp.*, 217 P.3d 149 (Okla. Civ. App. 2008).

no technical knowledge, then expert medical testimony is not essential for those elements of proof.[16] In such a case, the locality rule does not apply. But Green does not argue that the common knowledge exception applies. Certainly, the conflict between the opinions of Black and the Hospital—to the extent that they could be considered for a standard of care within common knowledge—would preclude the determination that Green was entitled to judgment as a matter of law.

The parties instead debate whether Black was qualified to opine on the standard of care for Box Butte County or similar communities. Thus, we will treat the issue of the hospital's negligence in this case as subject to the requirement that the plaintiff produce expert testimony as to the standard of care in accordance with the locality rule.

[7-9] In light of the above, we must consider whether Green, as the plaintiff, established that there was no material fact as to each and every element of his cause of action against the Hospital and that he was therefore entitled to judgment as a matter of law. A party makes a prima facie case that it is entitled to summary judgment by offering sufficient evidence that, assuming the evidence went uncontested at trial, would entitle the party to a favorable verdict.[17] After the moving party makes a prima facie case for summary judgment, the burden to produce contrary evidence showing the existence of a material issue of fact shifts to the party opposing the motion.[18] In the absence of a prima facie showing by the movant that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial.[19]

[10] The Hospital asserts that Green failed to make a prima facie case for summary judgment because Green failed to

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[16] See, *Thone v. Regional West Med. Ctr., supra* note 15; *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004); *Walls v. Shreck*, 265 Neb. 683, 658 N.W.2d 686 (2003). See, also, *Krenek v. St. Anthony Hosp., supra* note 15.

[17] *Thone v. Regional West Med. Ctr., supra* note 15.

[18] See, *In re Estate of Cushing*, 283 Neb. 571, 810 N.W.2d 741 (2012); *Schafersman v. Agland Coop*, 268 Neb. 138, 681 N.W.2d 47 (2004).

[19] See *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002).

present proof that the Hospital had breached the standard of care of hospitals generally in the community where the hospital is located or in similar communities. We agree. Hospital policies and rules do not conclusively determine the standard of care owed.[20] And those policies and procedures were not, in any event, entered into evidence at the summary judgment hearing. Hoff's testimony was insufficient to establish that Green was entitled to judgment as a matter of law. Pryor's testimony that she knows nothing about this case, the Hospital's policies, or the use of mechanical lifts is of no consequence. And while the testimonies of Green and Arnold and the Hospital's answers to Green's request for admissions arguably make a prima facie case that the fall caused some injury, the only evidence purporting to show that the Hospital breached the standard of care in connection with the fall is the affidavit of Black.

[11,12] Affidavits filed on behalf of the parties moving for summary judgment are to be strictly construed.[21] The absence of counter-affidavits does not relieve a moving party plaintiff from the burden of establishing the evidentiary facts of every element necessary to entitle the plaintiff to summary judgment.[22]

[13] Under Neb. Rev. Stat. § 25-1334 (Reissue 2008), supporting affidavits in summary judgment proceedings 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.[23] Black failed to affirmatively demonstrate that she was competent to testify as to the standard of care of hospitals in Box Butte County or similar communities. While Black attached her curriculum vitae to her affidavit, the degrees, experiences, and other accomplishments listed therein do not necessarily demonstrate knowledge of the relevant community standard for

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[20] See, *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972); *Darling v. Charleston Hospital*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965).

[21] See *House v. Lala*, 180 Cal. App. 2d 412, 4 Cal. Rptr. 366 (1960).

[22] *Id.*

[23] See, also, e.g., *Chism v. Campbell*, 250 Neb. 921, 553 N.W.2d 741 (1996).

Box Butte County.[24] And Black at no point averred in her affidavit that she was familiar with the standard of care for hospitals in Box Butte County or in similar communities.

If Black was not familiar with the standard of care of Box Butte County or similar communities, then she was unqualified to conclude that the Hospital had breached "the standard of care" and that conclusion—insofar as we can construe it as the standard of care of the same community or similar communities—must be disregarded. Without expert testimony of the standard of care of hospitals in the same community or similar communities, Green would not be entitled to a favorable verdict at trial. Thus, Green failed to make a prima facie case that he was entitled to summary judgment.

We need not determine the weight to be given the Hospital's averments in its answers to Green's request for admissions that it did not violate the standard of care—for which the Hospital, as the nonmoving party, is granted all reasonable inferences. But we note that there is evidence preserved in the bill of exceptions in connection with the motion for summary judgment which controverts whether the Hospital breached the applicable standard of care.

[14-16] Moreover, while the identification of the applicable standard of care is a question of law, the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact.[25] It is for the finder of fact to resolve what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with that standard.[26] And the trier of fact is not bound to accept expert opinion testimony.[27]

[17-19] Summary judgment should not be used to deprive a litigant of a formal trial if there is a genuine issue of fact.[28] The

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[24] Compare *Medley v. Davis*, 247 Neb. 611, 529 N.W.2d 58 (1995).

[25] *Murray v. UNMC Physicians, supra* note 11.

[26] See *id.*

[27] See *Jones v. Meyer*, 256 Neb. 947, 594 N.W.2d 610 (1999). See, also, *Wilson v. Muhanna*, 213 Ga. App. 704, 445 S.E.2d 540 (1994).

[28] *Medley v. Davis, supra* note 24.

purpose of summary judgment is not to cut litigants off from their right of trial by jury if they really have issues to try.[29] A motion for summary judgment is not a substitute for a motion for a directed verdict or for error proceedings taken after a full trial.[30] When viewing the evidence presented at the summary judgment hearing in a light most favorable to the nonmoving party, in this case the defendant, the plaintiff-movant failed to establish each element of his cause of action as a matter of law. Therefore, the district court erred in granting partial judgment. Because we reverse the partial summary judgment in favor of Green and remand the cause for a new trial which will include the issues of negligence and liability, we need not address the parties' remaining assignments of error concerning damages and costs.

VI. CONCLUSION

For the foregoing reasons, we reverse the judgment below and remand the cause for a new trial.

REVERSED AND REMANDED.

WRIGHT, J., not participating in the decision.

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[29] *Ingersoll v. Montgomery Ward & Co., Inc.*, 171 Neb. 297, 106 N.W.2d 197 (1960).

[30] *Illian v. McManaman*, 156 Neb. 12, 54 N.W.2d 244 (1952).

STATE OF NEBRASKA EX REL. JON BRUNING, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, RELATOR, V. JOHN A. GALE, SECRETARY OF STATE OF THE STATE OF NEBRASKA, RESPONDENT.

817 N.W.2d 768

Filed August 3, 2012. No. S-11-933.

1. **Constitutional Law: Statutes.** Whether a statute is constitutional is a question of law.
2. ____: ____. The general rule is that when part of an act is held unconstitutional, the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions.
3. **Constitutional Law: Statutes: Proof.** Laws that burden political speech are subject to strict scrutiny, which requires the government to prove that the

restriction furthers a compelling interest and is narrowly tailored to achieve that interest.

4. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.
5. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
6. ____: ____: ____. The unconstitutionality of a statute must be clearly established before it will be declared void.
7. **Constitutional Law.** The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions.
8. **Statutes: Constitutional Law.** The public financing provisions of the Campaign Finance Limitation Act impose a substantial burden on the free speech rights of Nebraska citizens without serving a compelling state interest.
9. **Statutes: Constitutional Law: Legislature: Intent: Appeal and Error.** To determine whether an unconstitutional portion of a statute may be severed, an appellate court considers (1) whether a workable statutory scheme remains without the unconstitutional portion, (2) whether valid portions of the statute can be enforced independently, (3) whether the invalid portion was the inducement to passage of the statute, (4) whether severing the invalid portion will do violence to the intent of the Legislature, and (5) whether the statute contains a declaration of severability indicating that the Legislature would have enacted the bill without the invalid portion.
10. **Statutes: Constitutional Law.** The unconstitutional portions of the Campaign Finance Limitation Act are not severable from the remaining portions, and therefore, the entire act is unconstitutional.

Original action. Judgment for relator.

Jon Bruning, Attorney General, Dale A. Comer, and Lynn A. Melson for relator.

Jeffry D. Patterson and Robert F. Bartle, of Bartle & Geier Law Firm, for respondent.

Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for amici curiae Common Cause Nebraska and League of Women Voters of Nebraska.

HEAVICAN, C.J., CONNOLLY, STEPHAN, and MCCORMACK, JJ., and IRWIN, CASSEL, and PIRTLE, Judges.

HEAVICAN, C.J.

I. NATURE OF CASE

In this original action, the court is asked to determine the constitutionality of Nebraska's Campaign Finance Limitation

Act (CFLA).[1] After the U.S. Supreme Court declared a campaign finance statute in Arizona to be unconstitutional, the Nebraska Accountability and Disclosure Commission (Commission) sought an opinion from the Nebraska Attorney General as to the constitutionality of the CFLA. The Attorney General opined that the CFLA would likely be found to be unconstitutional by a court, and the Commission determined it would not enforce the CFLA.

Pursuant to Neb. Rev. Stat. § 84-215 (Reissue 2008), the Attorney General was then directed to file an action in court to determine the validity of the CFLA. Section 84-215 charges the Secretary of State with defending the action. We find that the CFLA substantially burdens the First Amendment rights of Nebraska citizens and that it is, therefore, unconstitutional.

II. FACTUAL BACKGROUND

In 1992, the Nebraska Legislature passed the CFLA as 2009 Neb. Laws, L.B. 556. Under the CFLA, candidates for certain covered elective offices, including the Governor, State Treasurer, Secretary of State, Attorney General, and Auditor of Public Accounts, as well as members of the Legislature, Public Service Commission, Board of Regents of the University of Nebraska, and State Board of Education, may choose to abide or to not abide by voluntary spending limits.[2] A candidate who abides by the limits and raises and spends qualifying amounts in accordance with the CFLA becomes eligible for public funds.[3] That candidate is then entitled to receive public funds depending on the estimated maximum expenditures or reported expenditures filed by any of the candidate's opponents.[4]

In 2011, in *Arizona Free Enterprise Club v. Bennett*,[5] the U.S. Supreme Court, by a vote of 5 to 4, found that a provision

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[1] Neb. Rev. Stat. §§ 32-1601 to 32-1613 (Reissue 2008 & Supp. 2011).

[2] §§ 32-1603 and 32-1604.

[3] § 32-1604.

[4] *Id.*

[5] *Arizona Free Enterprise Club v. Bennett*, 564 U.S. 721, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011).

of Arizona's public campaign funding law, which granted matching funds to candidates, substantially burdened political speech and was not sufficiently justified by a compelling state interest. The Court held that the Arizona statutory scheme violates the First Amendment to the U.S. Constitution.

In response to the *Bennett* opinion, the executive director of the Commission requested an opinion from the Nebraska Attorney General as to the effect of the *Bennett* decision on the CFLA. Section 84-215 provides that the Attorney General may issue a written opinion as to the constitutionality of an act of the Legislature.

In the Attorney General's opinion, he found it "likely" that the matching funds provisions of the CFLA would be found to impose a substantial burden on the speech of privately financed candidates and that a court would "likely" find that the matching funds provisions of the CFLA are unconstitutional.[6] The opinion also stated that the public financing provisions would not be severable and that the portion of the CFLA providing for a limit on aggregate contributions from independent committees, businesses, associations, and political parties could not be enforced independently.[7] The opinion concluded that under *Bennett*, the public financing provisions of the CFLA substantially burden the political speech of those candidates who choose to not abide by the voluntary spending limits and that this burden was not sufficiently justified by a compelling state interest. The Attorney General opined that the CFLA creates a public financing system which unconstitutionally abridges the free speech rights of Nebraska citizens and that the public financing provisions of the CFLA are not severable, making the CFLA unconstitutional in its entirety.[8]

Under § 84-215, if the Attorney General issues a written opinion that an act is unconstitutional and any state officer charged with the duty to implement the act, in reliance on the opinion, refuses to implement the act, the Attorney General is

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[6] Att'y Gen. Op. No. 11003 (Aug. 17, 2011).

[7] *Id.*

[8] *Id.*

required to file a court action to determine the act's validity. In reliance upon the opinion, the Commission adopted a resolution refusing to implement, administer, or enforce the CFLA in connection with the 2012 state election cycle or subsequent election cycles. The Commission also notified the Attorney General of its resolution.

The Attorney General then instituted this original action. The parties stipulated that the action is a civil one in which the State of Nebraska is a party and that it involves public funds; therefore, it is a case relating to the revenue of the State under Neb. Rev. Stat. § 24-204 (Reissue 2008).

III. ISSUES BEFORE COURT

(1) Whether the public financing provisions of the CFLA violate the free speech provisions of article I, § 5, of the Nebraska Constitution and the Free Speech Clause of the First Amendment to the U.S. Constitution.

(2) Whether the public financing provisions of the CFLA are severable or whether the CFLA is unconstitutional in its entirety.

IV. STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law.[9]

[2] The general rule is that when part of an act is held unconstitutional, the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions.[10]

V. ANALYSIS

1. Jurisdiction

The Secretary of State asserts that there is a question as to whether this court has jurisdiction. Under § 84-215, the Attorney General is responsible for filing an action in court to determine the validity of a statute after the Attorney General has issued an opinion as to the constitutionality of a statute

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[9] See, *Sarpy Cty. Farm Bureau v. Learning* Community, 283 Neb. 212, 808 N.W.2d 598 (2012); *Kiplinger v. Nebraska Dept. of Nat. Resources*, 282 Neb. 237, 803 N.W.2d 28 (2011).

[10] *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992).

and a state officer or agency that is charged with implementing the statute relies on the opinion and refuses to implement it.

In this case, the Attorney General did not issue a definitive opinion stating that the CFLA is unconstitutional. Rather, he surmised that a court "would likely find the public financing provisions of the [CFLA] to be unconstitutional" and that "a court could find" the entire CFLA invalid, because the offending provision is not severable. The Secretary of State argues that § 84-215 requires a definitive conclusion of unconstitutionality before an agency can reasonably rely on the Attorney General's opinion and refuse to implement the act in dispute.

We find that the court has jurisdiction to determine the constitutionality of the CFLA, and we decline to parse the language of § 84-215 to require that an Attorney General's opinion must definitively state that a statute is unconstitutional. Our review arises from the decision of the Commission to refuse to implement the CFLA. We are asked to determine whether the statute is unconstitutional, not to decide whether the Attorney General's opinion is correct.

The amici curiae, Common Cause Nebraska and the League of Women Voters of Nebraska, also question this court's jurisdiction, asserting that there is no justiciable controversy because the interests of the Attorney General and the Secretary of State, who both represent the State of Nebraska, are not inherently adverse.

The statutory scheme set forth in § 84-215, as passed by the Legislature, by its very nature establishes adverse interests between the Attorney General and the Secretary of State. The statute requires the Attorney General to bring a court action if a state officer refuses to implement the act. A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.[11]

We conclude that there is a present, substantial controversy between the Attorney General, who believes that the CFLA

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[11] *In re Estate of Reading*, 261 Neb. 897, 626 N.W.2d 595 (2001).

is unconstitutional, and the Secretary of State, who by statute is directed to defend the constitutionality of all laws. The Commission has stated that it will not enforce the CFLA unless its constitutionality is determined. We find that this court has jurisdiction to decide the constitutionality of the CFLA under state laws.

2. Campaign Finance Limitation Act

The Legislature incorporated into the CFLA its findings that the cost of running for statewide offices and legislative seats has risen and results in the exclusion of qualified candidates from the democratic process.[12] Thus, its opinion that providing public funds to assist in the financing of campaigns would increase the number of qualified candidates carries greater weight than if the finding were only a part of legislative history.

However, the Legislature noted that based on holdings of the U.S. Supreme Court, "any limitation on campaign expenditures must be entered into voluntarily."[13] Use of "public financing of campaigns is a constitutionally permissible way in which to encourage candidates to adopt voluntary campaign spending limitations."[14]

The Legislature stated in the statute that there are

> compelling state interests in preserving the integrity of the electoral process in state elections by ensuring that these elections are free from corruption and the appearance of corruption; in providing the electorate with information that will assist them with electoral decisions; and in gathering the data necessary to permit administration and to detect violations of the [CFLA].[15]

The Legislature found that the State's interests could only be achieved if

> (a) reasonable limits are placed on the amount of campaign contributions from certain sources, (b) the sources

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[12] § 32-1602(1).

[13] *Id.*

[14] *Id.*

[15] § 32-1602(2).

> of funding and the use of that funding in campaigns are fully disclosed within the time periods prescribed by the [CFLA], and (c) public funds are provided to candidates who voluntarily accept spending limitations and otherwise comply with conditions for such funding under the [CFLA].[16]

The CFLA lays out a procedure for candidates to qualify for public funds to support their campaigns. It requires that every candidate, whether or not the candidate seeks public funds, must make timely filings under the CFLA.[17]

The CFLA designated certain statewide offices as "covered."[18] A candidate for a covered office must file an affidavit stating whether he or she agrees to abide or to not abide by spending limitations.[19] The spending limits were established in 2006, at which time they ranged from $2,297,000 for candidates for Governor to $70,000 for candidates for the Public Service Commission or the State Board of Education.[20] Beginning in 2008 and every 4 years thereafter, the spending limits are required to be adjusted for inflation based upon the Consumer Price Index.[21] The candidate may qualify for public funds "if he or she limits his or her campaign spending for the election period," meets other statutory requirements, and faces an opponent who does not agree to limit campaign spending.[22]

A candidate who indicates that he or she will not abide by the spending limits must also file an affidavit providing a reasonable estimate of his or her maximum expenditures for the primary election.[23] If the nonabiding candidate is successful in the primary, he or she must submit another estimate of

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[16] *Id*.

[17] § 32-1604(4) and (5).

[18] § 32-1603(1).

[19] § 32-1604(1) and (4)(a).

[20] § 32-1604(3)(a).

[21] § 32-1604(3)(b).

[22] § 32-1604(2).

[23] § 32-1604(5)(a).

expenditures for the general election on or before the 40th day following the primary.[24]

In order to qualify for public funding, an abiding candidate must raise at least 25 percent of the spending limit for the covered office sought.[25] This amount must be raised from persons who are residents of Nebraska or from a business, corporation, partnership, limited liability company, or association that transacts business in and has an office in Nebraska, all of whom are considered residents.[26] However, at least 65 percent of the qualifying amount must be received from individuals.[27]

The CFLA provides that no candidate shall accept contributions from "independent committees, businesses, including corporations, unions, industry, trade, or professional associations, and political parties" which, when aggregated, exceed 75 percent of the spending limitations for the office under § 32-1604.[28]

A candidate seeking public funds may request such funds upon making expenditures which equal or exceed 25 percent of the spending limitation for the election period.[29] The distribution of public funds to participating, abiding candidates under the CFLA is therefore triggered by either the expenditures or the estimate of expenditures of privately financed or nonabiding candidates.

A nonabiding candidate must also file an affidavit with the Commission when his or her expenditures equal or exceed 40 percent of the spending limitation for the primary election period and a second affidavit for the general election period.[30] If a 40-percent disclosure affidavit is not filed, no public funds will be distributed to the qualified abiding candidate unless

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[24] *Id.*

[25] § 32-1604(4).

[26] *Id.*

[27] *Id.*

[28] § 32-1608.

[29] § 32-1606(1).

[30] § 32-1604(5)(b).

preelection campaign statements show that a candidate has made expenditures requiring the filing of a 40-percent disclosure affidavit.[31]

Public funds are disbursed to the qualified abiding candidate "no earlier than the last date to amend an affidavit stating a reasonable estimate of expenditures," which is up to 30 days before a primary and up to 60 days before the general election, but no later than 14 days after the election.[32]

After an abiding candidate meets the fundraising and filing requirements of § 32-1604(4), he or she is entitled to receive public funding of the greater of either (a) the difference between the office-specific spending limitation and the nonabiding candidate's estimate of expenditures for either the primary or the general election or (b) the difference between the spending limit and the "highest amount of expenditures reported in preelection campaign statements" filed by any of the candidate's opponents.[33] Hence, the distribution of public funds to participating, abiding candidates under the CFLA is clearly triggered by the actual or anticipated expenditures of privately financed or nonabiding candidates, either by the estimate in § 32-1606(1)(a) or the actual reported expenditures as provided in § 32-1606(1)(b). The Commission has authority to assess a civil penalty for violations of the spending limitations.[34]

According to the stipulation of facts entered into by the parties, since the enactment of the CFLA, there have been 486 candidates for elective offices covered by it. Of those 486 candidates, 11 have been advised by the Commission that public funding was available and 10 have received all or part of the public funding available under the CFLA. At least three candidates have challenged the constitutionality of the CFLA through litigation. Two percent of all candidates have received public funding.

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[31] § 32-1604(6).

[32] § 32-1606(2).

[33] § 32-1606(1).

[34] § 32-1612.

3. *Arizona Free Enterprise Club v. Bennett*

The Commission requested the Attorney General's opinion after the U.S. Supreme Court issued its opinion in *Bennett*.[35] In *Bennett*, the Court held that the Arizona statutes providing matching funds for campaign financing "substantially burden[] protected political speech without serving a compelling state interest and therefore violate[] the First Amendment."[36]

Bennett arose under Arizona's Citizens Clean Elections Act, which created a voluntary public financing system to fund campaigns of candidates for state office.[37] The Court explained that the act provides money which is collected from Arizona voters who contribute $5 to the fund. Publicly funded candidates must agree to limit their expenditure of personal funds to $500, participate in at least one public debate, adhere to an overall expenditure cap, and return all unspent public moneys to the state.[38]

Candidates who accept these conditions are given public funds and may be granted additional equalizing or matching funds in both primary and general elections.[39] The funds in a primary are "triggered when a privately financed candidate's expenditures, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the primary election allotment of state funds to the publicly financed candidate. §§ 16-952(A), (C)."[40] In the general election, the trigger occurs when the contributions received by a privately financed candidate, "combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate,

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[35] *Bennett, supra* note 5.

[36] *Id.*, 564 U.S. at 728.

[37] See Ariz. Rev. Stat. Ann. §§ 16-940 to 16-961 (2006 & Cum. Supp. 2009).

[38] See, *Bennett, supra* note 5; Ariz. Rev. Stat. Ann. §§ 16-941(A)(2), 16-956(A)(2), and 16-953.

[39] See, *Bennett, supra* note 5; Ariz. Rev. Stat. Ann. § 16-952(A), (B), and (C)(4) and (5).

[40] *Bennett, supra* note 5, 564 U.S. at 729.

exceed the general election allotment of state funds to the publicly financed candidate. § 16-952(B).”[41]

Once matching funds are triggered, publicly financed candidates receive $1 in state funding for each additional dollar that a privately financed candidate spends in the primary (less a 6-percent reduction to cover fundraising expenses).[42] The Court determined that during a general election, “every dollar that a candidate receives in contributions—which includes any money of his own that a candidate spends on his campaign—results in roughly one dollar in additional state funding to his publicly financed opponent.”[43] If “a privately funded candidate faces multiple publicly financed candidates, one dollar raised or spent by the privately financed candidate results in an almost one dollar increase in public funding to each of the publicly financed candidates.”[44]

In addition, spending by independent groups on behalf of a privately funded candidate or in opposition to a publicly funded candidate results in dollar-for-dollar matching funds once the public financing cap is exceeded.[45] A privately financed candidate may raise and spend unlimited funds, subject to state-imposed contribution limits and disclosure requirements.[46]

The Court provided several examples to demonstrate how the public financing scheme operates. If the privately funded candidate spent $1,000 of his or her own money to distribute a direct mailing or held a fundraiser that generated $1,000 in contributions, each of his or her publicly funded opponents would receive $940 ($1,000 less the 6-percent offset). And if an independent group spent $1,000 on a brochure opposing one of the publicly financed candidates, but did not mention

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[41] *Id.*

[42] *Id.*; Ariz. Rev. Stat. Ann. § 16-952(A).

[43] *Bennett, supra* note 5, 564 U.S. at 730.

[44] *Id.*

[45] See, *id.*; Ariz. Rev. Stat. Ann. § 16-952(C).

[46] *Id.*

the privately financed candidate, the publicly financed candidate would receive $940 directly.[47]

The petitioners in *Bennett* were five past and future candidates for Arizona state office and two independent groups that spent money in campaigns. They argued that the matching funds provision unconstitutionally penalized their speech and burdened their ability to fully exercise their First Amendment rights.[48]

The Court stated that "'[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation' of our system of government."[49] The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office."[50]

[3] The Court has stated that "[l]aws that burden political speech are" accordingly "'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[51]

In *Bennett*, the Court stated that the "matching funds provision 'imposes an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right[s].'"[52] The Arizona provision awards almost one additional dollar to a publicly financed candidate after a privately financed candidate has raised or spent more than the State's initial grant to a publicly financed candidate. "That plainly forces the privately financed candidate to 'shoulder a special and potentially significant

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[47] *Bennett, supra* note 5.

[48] *Id.*

[49] *Id.*, 564 U.S. at 734, quoting *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

[50] *Id.*, 564 U.S. at 734, quoting *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989).

[51] *Citizens United v. Federal Election Com'n*, 558 U.S.310, 340, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

[52] *Bennett, supra* note 5, 564 U.S. at 736, quoting *Davis v. Federal Election Comm'n*, 554 U.S. 724, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008).

burden' when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy."[53]

"The direct result of the speech of privately financed candidates and independent expenditure groups is a state-provided monetary subsidy to a political rival."[54] The Court stated that the constitutional problem is not the amount of funding provided by the State to publicly financed candidates, but, rather, "[i]t is the manner in which that funding is provided—in direct response to the political speech of privately financed candidates and independent expenditure groups."[55]

Having found that the matching funds provision imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups, the Court then considered whether the provision was justified by a compelling state interest. The Court determined that providing a level playing field to opposing candidates is not a compelling state interest that can justify undue burdens on political speech.[56] In addition, any state interest in combating corruption does not justify burdens imposed on protected political speech. Indeed, the Court stated that "'the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse' of money in politics."[57] A candidate's expenditures of his or her own money on his or her own campaign are counted as contributions under the matching funds provision. To that extent, the provision cannot be supported by "any anticorruption interest."[58]

The Court concluded that Arizona's campaign financing scheme gives money to a candidate in direct response to the campaign speech of an opposing candidate or an independent group when the opposing candidate has chosen not to accept

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[53] *Id.*

[54] *Bennett, supra* note 5, 564 U.S. at 742.

[55] *Id.*, 564 U.S. at 747.

[56] *Id.*

[57] *Id.*, 564 U.S. at 751, quoting *Buckley, supra* note 49.

[58] *Bennett, supra* note 5.

public financing and has engaged in political speech above a level set by the state.[59] The matching funds provision "substantially burdens the speech of privately financed candidates and independent expenditure groups without serving a compelling state interest. . . . Laws like Arizona's matching funds provision that inhibit robust and wide-open political debate without sufficient justification cannot stand."[60]

4. Is CFLA Unconstitutional?

We now consider whether the CFLA violates the First Amendment in the wake of the *Bennett* decision. The Attorney General argues that the public financing provisions of the CFLA unconstitutionally infringe on the free speech rights of Nebraska citizens by imposing a substantial burden on the free speech rights of candidates. He also argues that the public financing provisions are not narrowly tailored to serve a compelling state interest.

[4-6] Whether a statute is constitutional is a question of law.[61] A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.[62] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.[63] The unconstitutionality of a statute must be clearly established before it will be declared void.[64]

[7] The 1st Amendment to the U.S. Constitution, as applied to the states through the 14th Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."[65] The Nebraska Constitution states that "[e]very person may freely speak . . . on all subjects . . . ."[66] We

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[59] *Id.*

[60] *Id.*, 564 U.S. at 754-55.

[61] See, *Sarpy Cty. Farm Bureau, supra* note 9; *Kiplinger, supra* note 9.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] U.S. Const. amend. I.

[66] Neb. Const. art. I, § 5.

have held that the "parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions."[67]

In *Bennett*, the Court stated that because discussion of public issues and debate on the qualifications of candidates are integral to the system of government, the First Amendment "'"has its fullest and most urgent application" to speech uttered during a campaign for political office.'"[68] Therefore, "'[l]aws that burden political speech are' accordingly 'subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'"[69] We therefore apply a strict scrutiny test in this case.

(a) Compelling State Interest

The CFLA states:

> The Legislature finds that there are compelling state interests in preserving the integrity of the electoral process in state elections by ensuring that these elections are free from corruption and the appearance of corruption; in providing the electorate with information that will assist them with electoral decisions; and in gathering the data necessary to permit administration and to detect violations of the [CFLA].[70]

However, in *Bennett*, the Court held that neither a state's interest in equalizing electoral opportunities nor a state's interest in combating corruption justified the burden imposed on privately financed candidates by the Arizona matching funds provision.[71]

Under the CFLA, a candidate who has agreed to abide by the voluntary spending limits becomes eligible for public funds after meeting the following two requirements: The

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[67] *State ex rel. Lemon v. Gale*, 272 Neb. 295, 310, 721 N.W.2d 347, 360 (2006).

[68] *Bennett, supra* note 5, 564 U.S. at 734, quoting *Eu, supra* note 50.

[69] *Id.*, quoting *Citizens United, supra* note 51.

[70] § 32-1602(2).

[71] *Bennett, supra* note 5.

candidate must raise from residents of Nebraska an amount equal to at least 25 percent of the spending limit for the office, and the candidate must file an affidavit indicating his or her intent to abide by the spending limitations.[72] Candidates who choose not to agree to abide by the spending limits must also file an affidavit with the Commission.[73] The public funds are disbursed when the abiding candidate has spent 25 percent of the spending limit and filed an affidavit requesting public funds.[74] The candidate is entitled to receive the greater of "(a) the difference between the spending limitation and the highest estimated maximum expenditures filed by any of the candidate's opponents or (b) the difference between the spending limitation and the highest amount of expenditures reported in preelection campaign statements."[75] Under either circumstance, the distribution of public funds to abiding candidates is triggered by the expenditures of privately financed or nonabiding candidates.

The Nebraska statutory scheme is similar to that of Arizona, which was found unconstitutional in *Bennett*. In both states, publicly funded candidates may become eligible for matching funds as a direct result of the spending of privately financed candidates who have not agreed to the voluntary spending limits.

As the *Bennett* Court noted, the amount of funding provided by the State is not the problem. "It is the manner in which that funding is provided—in direct response to the political speech of privately financed candidates and independent expenditure groups."[76] The privately financed candidate "'shoulder[s] a special and potentially significant burden' when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy."[77]

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[72] § 32-1604(4).

[73] § 32-1604(5)(a).

[74] § 32-1606(1).

[75] *Id*.

[76] *Bennett, supra* note 5, 564 U.S. at 747.

[77] *Id*., 564 U.S. at 737, quoting *Davis, supra* note 52.

The Secretary of State argues that the CFLA does not impose a substantial burden on political speech unrelated to a compelling state interest merely by establishing voluntary campaign spending limits and allocating public funds to encourage participation in the spending limitation scheme. The Secretary of State claims that the CFLA furthers compelling and substantial state interests in preventing corruption and the appearance of corruption and in encouraging greater participation in the electoral process.

The CFLA is not identical to the Arizona statute which was found to be unconstitutional. In both states, candidates could voluntarily participate in a public financing campaign system if they accepted certain restrictions and obligations. However, in Arizona, candidates who chose to participate were given an initial outlay of public funds for their campaigns. Once a set spending limit was exceeded, the publicly financed candidate received virtually $1 for every dollar spent by a privately financed opponent or certain independent expenditure groups. In addition, under the Arizona law, spending by independent groups was included in the amount that triggered the distribution of public funds.[78]

The Nebraska financing scheme does not provide an initial outlay of public funds to all candidates who opt to participate. However, each candidate must raise private money up to the spending limit provided by statute. As an example, a candidate who chooses to not abide by the CFLA runs for an office which has a spending limit of $100,000. The candidate's affidavit states that he or she reasonably estimates his or her expenditures to be $120,000. The opponent who abides by the limit could therefore receive a public subsidy of $20,000, which is the difference between the spending limit for the office and the nonabiding candidate's estimated expenditures. The abiding candidate could receive the public subsidy of $20,000 even though he or she has raised only the initial $25,000 qualifying amount. In such a case, the nonabiding candidate could spend $120,000, while the abiding candidate would have available the public subsidy of $20,000 and the $25,000 qualifying amount,

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[78] Ariz. Rev. Stat. Ann. § 16-952(A) and (C).

or $45,000. The maximum amount the abiding candidate could raise would be $80,000, which when added to the $20,000 public subsidy, equals the $100,000 spending limit for the office. Therefore, the CFLA does not equalize the campaign funds, but lessens the gap.

Under the Nebraska law, both abiding and nonabiding candidates must file with the Commission affidavits indicating their intention to abide or to not abide within 10 days after a candidate committee is formed.[79] A candidate committee must be formed when a candidate raises, receives, or spends more than $5,000 in a calendar year.[80] Thus, the nonabiding candidate indicates his or her intention to exceed the spending limits before he or she knows whether an opponent will decide to abide or to not abide by the spending limitations. A candidate must make decisions about his or her campaign expenses without knowledge of the opponent's plan to accept public funding.

Although the U.S. Supreme Court has held that a voluntary system of "public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest,"[81] the *Bennett* Court stated that the constitutionality of the matching funds provision of the Arizona statute was not established by the fact that "burdening constitutionally protected speech might indirectly serve the State's anticorruption interest, by encouraging candidates to take public financing."[82]

[8] Under the CFLA's public financing provisions, public funds are disbursed to abiding candidates in response to the political speech of privately financed candidates. Such restrictions on campaign spending create substantial burdens on the rights of free speech under the First Amendment, as determined by the *Bennett* Court. The public financing provisions impose a substantial burden on the free speech rights of Nebraska citizens without serving a compelling state interest.

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[79] § 32-1604.01(1).

[80] Neb. Rev. Stat. § 49-1445 (Reissue 2010).

[81] *Buckley, supra* note 49, 424 U.S. at 96.

[82] *Bennett, supra* note 5, 564 U.S. at 752-53.

(b) Narrowly Tailored

We must also consider whether the CFLA's public financing provisions are narrowly tailored to serve a compelling state interest. In the CFLA, the Legislature found several compelling state interests in providing public funds for campaigns. It stated that the integrity of the electoral process would be preserved "by ensuring that these elections are free from corruption and the appearance of corruption," by "providing the electorate with information that will assist them with electoral decisions," and by "gathering the data necessary to permit administration and to detect violations of the [CFLA]."[83]

The *Bennett* Court held that the burden imposed on privately financed candidates by the Arizona matching funds provision was not justified by a state's interest in equalizing electoral opportunities or a state's interest in combating corruption. "Burdening a candidate's expenditure of his own funds on his own campaign does not further the State's anticorruption interest. Indeed, we have said that 'reliance on personal funds *reduces* the threat of corruption[.]'"[84] The Court held that "[l]aws like Arizona's matching funds provision that inhibit robust and wide-open political debate without sufficient justification cannot stand."[85]

In *FEC v. National Conservative PAC*,[86] the Court stated that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."

Thus, the CFLA, like the Arizona statutes, is not narrowly tailored to serve a compelling state interest, because the interests identified by the Legislature—maintaining the integrity of the electoral process and ensuring elections that are free from corruption—have been held not to be sufficient in *Bennett*. The

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[83] § 32-1602(2).

[84] *Bennett, supra* note 5, 564 U.S. at 751, quoting *Davis, supra* note 52 (emphasis in original).

[85] *Bennett, supra* note 5, 564 U.S. at 755.

[86] *FEC v. National Conservative PAC*, 470 U.S. 480, 496-97, 105 S. Ct. 1459, 84 L. Ed. 2d 455 (1985).

Court stated that "'[t]he interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations.'"[87]

The Court also addressed Arizona's argument that the matching funds provision indirectly served the anticorruption interest by ensuring that enough candidates participate in the State's public funding system.[88] The Court determined that such an indirect way of serving the anticorruption interest does not establish the constitutionality of the matching funds provision.[89]

The CFLA provides for public funds for campaigns which are triggered by the expenditures of privately financed candidates, just as the Arizona statutes provided. The Court has held that a state's interests in equalizing opportunities for candidates and in combating corruption do not serve a compelling state interest to justify the burdens placed on a candidate's First Amendment rights. The CFLA is not narrowly tailored to serve a compelling state interest, and it does not pass constitutional muster.

5. Is Unconstitutional Portion of CFLA Severable?

Having determined that the public financing provisions of the CFLA are unconstitutional, we must decide whether those provisions are severable. Our general rule provides that when part of an act is held unconstitutional, the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions.[90]

[9] To determine whether an unconstitutional portion of a statute may be severed, an appellate court considers (1) whether a workable statutory scheme remains without the unconstitutional portion, (2) whether valid portions of the statute can be enforced independently, (3) whether the invalid portion was the inducement to passage of the statute, (4) whether

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[87] *Bennett, supra* note 5, 564 U.S. at 751, quoting *Buckley, supra* note 49.

[88] *Id.*

[89] *Id.*

[90] *Jaksha, supra* note 10.

severing the invalid portion will do violence to the intent of the Legislature, and (5) whether the statute contains a declaration of severability indicating that the Legislature would have enacted the bill without the invalid portion.[91]

Only one section of the CFLA, § 32-1606, specifically concerns disbursement of public funds. Other sections include legislative findings,[92] definitions,[93] requirements for voluntary participation in the spending limitation scheme,[94] and penalties and rules.[95]

In *State ex rel. Stenberg v. Moore*,[96] this court determined that one section of the CFLA which concerned expenditures by independent committees or political parties was unconstitutional as a burden on speech and that its restrictions were not narrowly tailored to serve the State's interest. However, we concluded that the particular section was severable from the remainder of the CFLA.

The portions of the CFLA which do not concern the public financing scheme address aggregate contribution limits,[97] civil penalties for violation of the CFLA,[98] the statute of limitations for CFLA violations,[99] and the acceptance of contributions from independent groups.[100] Section 32-1608 prohibits candidates from accepting contributions "from independent committees, businesses, including corporations, unions, industry, trade, or professional associations, and political parties which, when aggregated, are in excess of seventy-five percent of the spending limitation for the office set pursuant to section 32-1604."

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[91] *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

[92] § 32-1602.

[93] § 32-1603.

[94] §§ 32-1604, 32-1605, 32-1606.01, 32-1608.02, and 32-1608.03.

[95] §§ 32-1606.01, 32-1607, 32-1608.01, 32-1612, and 32-1613.

[96] *State ex rel. Stenberg v. Moore*, 258 Neb. 738, 605 N.W.2d 440 (2000).

[97] § 32-1608.

[98] § 32-1612.

[99] § 32-1613.

[100] § 32-1608.

The first two factors we are to consider in determining severability are whether a workable statutory scheme remains without the unconstitutional portion and whether valid portions of the statute can be enforced independently.[101] We find that § 32-1608, which covers aggregate contribution limits, cannot be enforced independently of the voluntary campaign limits. Section 32-1608 specifically sets a limit on contributions to a percentage tied to the limitations established in § 32-1604. Section 32-1608 also refers to candidates for a "covered elective office," which is defined by § 32-1603(1).

The statute concerning civil penalties also specifically provides for penalties based on violations of spending limitations set out in § 32-1604.01, and it cannot stand if the campaign financing limitations are unconstitutional.[102]

We next consider whether the invalid portion of the CFLA was an inducement to its passage. The legislative history shows that the CFLA was introduced to "help control the rapidly escalating costs of running political campaigns."[103] The goal was to open up the elective process and to decrease reliance on large contributors.[104] The introducer stated that the bill had financing provisions and contribution provisions and that "one doesn't have to take place for the other one to go into effect because we have a contribution limitation side and also the spending limitation side."[105] Thus, it does not appear that the public matching funds were the *sole* reason the Legislature passed the CFLA, but the Legislature sought to establish spending limits to control the cost of running for public office, and it set up the matching public funds to assist candidates with the cost of campaigns. The provision of public funds appears to have been a factor in the passage of the CFLA.

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[101] See *Gales, supra* note 91.

[102] § 32-1612.

[103] Introducer's Statement of Intent, L.B. 556, Committee on Government, Military, and Veterans' Affairs, 92d Leg., 1st Sess. (Feb. 14, 1991).

[104] *Id.*

[105] Floor Debate, 92d Leg., 1st Sess. 7-8 (Feb. 14, 1991).

Finally, we note that the CFLA did not include a severability clause when it was passed in 1992.[106] "Such a clause is an aid to interpretation, and is a declaration of the intent of the Legislature that it would have passed the act with the invalid parts omitted."[107]

[10] The Legislature specifically found that campaign finance limits, disclosure of the sources of funding, and the provision of public funds were all necessary to achieve its goals in passing campaign election reform.[108] The unconstitutional portions of the CFLA are not severable from the remaining portions, and therefore, the entire act is unconstitutional.

VI. CONCLUSION

Based upon the decision of the U.S. Supreme Court in *Bennett*, the CFLA, §§ 32-1602 through 32-1613, violates the First Amendment and is unconstitutional in its entirety.

JUDGMENT FOR RELATOR.

WRIGHT and MILLER-LERMAN, JJ., not participating.

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[106] See L.B. 556 (operative Jan. 1, 1993).

[107] See *State ex rel. Meyer v. Duxbury*, 183 Neb. 302, 310, 160 N.W.2d 88, 94 (1968).

[108] See § 32-1602(2).

FARMINGTON WOODS HOMEOWNERS ASSOCIATION, INC., APPELLEE, V. GLEN WOLF AND RHONDA WOLF, HUSBAND AND WIFE, APPELLANTS.

817 N.W.2d 758

Filed August 3, 2012. No. S-11-970.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting 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 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 judgment was

granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.

3. **Summary Judgment.** Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
4. ____. Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.
5. **Restrictive Covenants: Waiver.** The right to enforce restrictive covenants may be lost by waiver or acquiescence in the violation of the same. Whether there has been such a waiver or acquiescence depends upon the circumstances of each case.
6. ____: ____. Generally, mere acquiescence in the violation of a restrictive covenant does not constitute an abandonment thereof, so long as the restriction remains of any value, and a waiver does not result unless there have been general and multiple violations without protest.
7. **Restrictive Covenants: Waiver: Proof.** In order to prove a waiver of a restrictive covenant, a defendant must prove that a plaintiff has waived the covenant through substantial and general noncompliance.
8. **Restrictive Covenants: Intent.** The enforcement of valid restrictive covenants may be denied only when noncompliance is so general as to indicate an intention or purpose to abandon the condition.
9. **Restrictive Covenants: Waiver.** The criteria for determining whether a waiver of a restrictive covenant has occurred include, but are not limited to, whether those seeking to enforce the covenants had notice of the violation and the period of time in which no action was taken, the extent and kind of violation, the proximity of the violations to those who complain of them, any affirmative approval of the same, whether such violations are temporary or permanent in nature, and the amount of investment involved.
10. **Equity: Estoppel.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.
11. **Laches.** Laches occurs only if a litigant has been guilty of inexcusable neglect in enforcing a right and his or her adversary has suffered prejudice.
12. **Equity.** Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.
13. **Equity: Words and Phrases.** Generally, conduct which forms a basis for a finding of unclean hands must be willful in nature and be considered fraudulent, illegal, or unconscionable.

14. **Evidence: Appeal and Error.** Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Reversed and remanded with directions.

Jason M. Bruno and Thomas D. Prickett, of Sherrets, Bruno & Vogt, L.L.C., for appellants.

Larry R. Forman and Ryan Baldridge, Senior Certified Law Student, of Hillman, Forman, Childers & McCormack, for appellee.

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

STEPHAN, J.

The issue in this appeal is whether a homeowners' association may enforce a covenant prohibiting "business activities of any kind whatsoever" against homeowners who have operated a daycare in their home for a period of 12 years. We conclude that the covenant is generally enforceable, but that the district court erred in granting summary judgment in favor of the homeowners' association because there are genuine issues of material fact with respect to an affirmative defense raised by the homeowners.

I. BACKGROUND

In December 1994, a "Declaration of Covenants, Conditions, Restrictions and Easements for Farmington Woods in Douglas County, Nebraska" (declaration), was filed with the Douglas County register of deeds. The declaration is applicable to all lots in the Farmington Woods subdivision. The declarant was listed as R.S. Land, Inc., and the declaration was signed by Ronald E. Smith as president of R.S. Land. Included in the declaration was a restrictive covenant providing that "no business activities of any kind whatsoever shall be conducted on any Lot."

In November 1998, Glen Wolf and Rhonda Wolf purchased a lot in Farmington Woods and subsequently built a home.

Ralph Marasco was their real estate agent, and because he was selling other lots in the subdivision, the Wolfs believed that Marasco owned all of the lots. The Wolfs told Marasco and their homebuilder that they intended to operate a daycare from the new home, and neither told them a daycare would not be allowed on the property. Marasco has no legal relationship with R.S. Land or Smith.

The Wolfs both testified that they did not read the declaration, but they acknowledge its 1994 filing. The declaration provided that after either 10 years or the "closing of eighty (80%) percent of the lots to independent third party homeowners," the right to enforce the covenants would transfer to the Farmington Woods Homeowners Association, Inc. (FWHOA). In approximately 2000, the FWHOA formed and became the enforcer of the covenants. The Wolfs continued to operate their daycare from and after 2000.

In 2010, the Wolfs and one of their neighbors became involved in a dispute regarding drainage on their respective properties. The neighbor filed a complaint with FWHOA, alleging the Wolfs were violating the covenant prohibiting business activities by operating a daycare. Through its attorney, FWHOA gave written notification to the Wolfs that operating a daycare violated the covenant. FWHOA then filed suit to enjoin the Wolfs from operating the daycare.

After the complaint and answer were filed, both parties moved for summary judgment. At a hearing on the motions, FWHOA presented evidence that the "no business activities" covenant was in effect in 1994 and that the Wolfs purchased their lot subject to the covenant in 1998. Evidence was also offered that showed FWHOA's unwritten policy was to act on an alleged covenant violation only after a complaint had been filed. No complaint had been filed with respect to the Wolfs' or any other homeowners' business activities prior to the 2010 complaint. The Wolfs presented evidence that at least two members of FWHOA were aware as early as 1998 that the Wolfs operated a daycare out of their home. The Wolfs also presented evidence that at least one member of FWHOA knew of the operation of another daycare in Farmington Woods

sometime between 2000 and 2010 and took no action to enforce the "no business activities" covenant. In addition, the Wolfs presented evidence that a number of home-based businesses had operated "openly and notoriously" in Farmington Woods, with no action by FWHOA. And, finally, the Wolfs presented evidence that the president of FWHOA had operated businesses from his home since 2000, with the knowledge of at least one other FWHOA member, and that no action was taken to enforce the "no business activities" covenant against him prior to 2010.

The district court granted summary judgment in favor of FWHOA, finding that the Wolfs had at least constructive knowledge of the "no business activities" covenant. Without detailed analysis, the district court determined that the Wolfs' defenses had no basis as a matter of law. The Wolfs filed this timely appeal.

II. ASSIGNMENTS OF ERROR

The Wolfs assign, restated, that the district court erred in (1) finding their operation of a home daycare violates the "no business activities" covenant; (2) failing to apply the defenses of waiver, estoppel, and laches; (3) failing to find FWHOA was barred from receiving relief by the doctrine of unclean hands; (4) failing to hold FWHOA in contempt for discovery violations; and (5) granting FWHOA's motion for summary judgment.

III. STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's granting 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 those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that

[1] *In re Estate of Cushing*, 283 Neb. 571, 810 N.W.2d 741 (2012); *Doe v. Board of Regents*, 283 Neb. 303, 809 N.W.2d 263 (2012).

party the benefit of all reasonable inferences deducible from the evidence.[2]

IV. ANALYSIS

1. Enforceability of Covenant Against Daycare

The Wolfs argue that their daycare does not violate the "no business activities" covenant because its operation does not infringe on the neighborhood. We rejected a similar argument in *Southwind Homeowners Assn. v. Burden*,[3] decided during the pendency of this appeal. In that case, we held that operation of an in-home daycare violated a covenant which provided that "'[n]o business activities of any kind whatsoever shall be conducted on any Lot'" in the residential subdivision.[4] We reasoned that the covenant was unambiguous and found that the residents were operating their home-based daycare in violation of the terms of the covenant. The language of the covenant at issue in this case is identical to the covenant we held to be enforceable in *Southwind Homeowners Assn.*, and it is undisputed that the Wolfs are operating a daycare business from their home. Thus, the Wolfs are in violation of the covenant unless there is merit to one or more of their affirmative defenses.

2. Affirmative Defenses

[3,4] In their answer, the Wolfs alleged that FWHOA was barred from enforcing the covenant by the doctrines of waiver, estoppel, laches, and unclean hands. In disposing of these affirmative defenses, the district court found that "there is no question of fact relating to whether or not the defendants were prejudiced by the delay in bringing this action" and that "as a matter of law" the defenses did not exist. In reviewing the district court's order, we are mindful that summary judgment

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[2] *Doe v. Board of Regents, supra* note 1; *Alsidez v. American Family Mut. Ins. Co.*, 282 Neb. 890, 807 N.W.2d 184 (2011).

[3] *Southwind Homeowners Assn. v. Burden*, 283 Neb. 522, 810 N.W.2d 714 (2012).

[4] *Id.* at 524, 810 N.W.2d at 716.

proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.[5] Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.[6]

(a) Waiver

[5-8] In *Pool v. Denbeck*,[7] this court recognized that the right to enforce restrictive covenants may be lost by waiver or acquiescence in the violation of the same. Whether there has been such a waiver or acquiescence depends upon the circumstances of each case.[8] Generally, "mere acquiescence in the violation of a restrictive covenant does not constitute an abandonment thereof, so long as the restriction remains of any value, and . . . a waiver does not result unless there have been general and multiple violations without protest."[9] Thus, in order to prove a waiver, a defendant must prove that a plaintiff has waived the covenant through substantial and general noncompliance.[10] The enforcement of valid restrictive covenants may be denied only when non-compliance is so general as to indicate an intention or purpose to abandon the condition.[11]

[9] The criteria for determining whether a waiver of a restrictive covenant has occurred include, but are not limited to,

> whether those seeking to enforce the covenants had notice of the violation and the period of time in which no action was taken; the extent and kind of violation; the proximity of the violations to those who complain of them; any affirmative approval of the same; whether such violations

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[5] *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009); *Sweem v. American Fidelity Life Assurance Co.*, 274 Neb. 313, 739 N.W.2d 442 (2007).

[6] *Sweem, supra* note 5; *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006).

[7] See *Pool v. Denbeck*, 196 Neb. 27, 241 N.W.2d 503 (1976).

[8] See *id.*

[9] 20 Am. Jur. 2d *Covenants, Etc.* § 229 at 755 (2005).

[10] 21 C.J.S. *Covenants* § 75 (2006).

[11] *Id.*

are temporary or permanent in nature; and the amount of investment involved.[12]

Viewed in the light most favorable to the Wolfs, the record shows that FWHOA (1) was aware of the Wolfs' daycare by at least 2000 and took no action to enforce the "no business activities" covenant until 2010; (2) knew sometime after 2000 but prior to 2010 of another daycare in the neighborhood and took no action to enforce the "no business activities" covenant; (3) knew as early as 2000 that its president was operating a business from his home but took no action to enforce the covenant; and (4) should have known of the existence of other "openly and notoriously" operated business operations in the neighborhood, yet took no action to enforce the covenant. The evidence also shows that from its inception, FWHOA's unwritten policy has been to take action to enforce an alleged covenant violation only when it receives a complaint, formal or informal. And the evidence further shows that no complaint of business activity was made to FWHOA prior to the instant one.

Whether waiver occurred depends on consideration of all these relevant facts. And based on these facts, we cannot conclude as a matter of law that waiver did not occur. Thus, there are genuine issues of material fact on the issue of waiver which precluded summary judgment as to this defense.

(b) Estoppel

[10] The Wolfs also alleged that FWHOA is estopped from enforcing the covenant against them. The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and

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[12] *Pool, supra* note 7, 196 Neb. at 34, 241 N.W.2d at 507. Accord *Hoff v. Ajlouny*, 14 Neb. App. 23, 703 N.W.2d 645 (2005).

of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.[13]

Here, the Wolfs argue that a genuine issue of material fact exists on their defense of equitable estoppel because they "relied, in good faith, upon the inaction, silence, and active condoning of the daycare by the FWHOA."[14] They assert that FWHOA cannot now enforce the covenant against them because it did not do so previously and the Wolfs relied to their detriment on FWHOA's inaction. But even if FWHOA's inaction can be considered conduct which amounts to a false representation or concealment of material facts, the record does not support any reasonable inference that the Wolfs lacked knowledge of or the means of discovering the truth. The Wolfs purchased their lot subject to the declaration, and thus at all times, they were operating their daycare with at least constructive knowledge that it violated the "no business activities" covenant. There also is no evidence that the Wolfs detrimentally changed their position or status in reliance on FWHOA's nonenforcement of the covenant. Rather, the Wolfs benefited from the long period of nonenforcement. We find there is no genuine issue of material fact on the affirmative defense of estoppel.

(c) Laches

[11] The Wolfs also alleged that FWHOA is barred from enforcing the covenant by the doctrine of laches. The defense of laches is not favored in Nebraska.[15] Laches occurs only if a litigant has been guilty of inexcusable neglect in enforcing a right and his or her adversary has suffered prejudice.[16]

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[13] See *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003).

[14] Brief for appellant at 16.

[15] *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 716 N.W.2d 87 (2006).

[16] See *id.*

Even if FWHOA is guilty of inexcusable neglect, an issue we do not decide, the Wolfs have not been prejudiced. They argue enforcement of the covenant prejudices them because if the daycare is shut down, they could lose a large portion of their income and could be forced out of their home. But this argument focuses on what prejudice would occur in the future if the covenant were enforced, which is not the appropriate legal timeframe.

Laches does not result from the mere passage of time, but from the fact that *during the lapse of time*, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another.[17] Here, there is no evidence that in the 12 years preceding enforcement of the covenant, circumstances changed such that to enforce the covenant would prejudice the Wolfs. Rather, the Wolfs benefited from the long period of nonenforcement. We conclude there is no genuine issue of material fact on the defense of laches.

(d) Unclean Hands

[12,13] Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.[18] Generally, conduct which forms a basis for a finding of unclean hands must be willful in nature and be considered fraudulent, illegal, or unconscionable.[19] Although there is evidence that FWHOA knew of other violations of the "no business activities" covenant but did not seek to enforce it, there is no evidence to support a reasonable inference that FWHOA's failure to do so was so inequitable or unfair that it should deny it from seeking relief in this court. As noted, FWHOA is not equitably estopped from enforcing

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[17] *Id.*; *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994).

[18] *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007).

[19] *Richardson v. Anderson*, 8 Neb. App. 923, 604 N.W.2d 427 (2000). See, also, *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004).

the covenant against the Wolfs. In addition, FWHOA presented evidence that its failure to enforce the covenant was based upon its policy of not acting until a complaint was filed. On these facts, no reasonable fact finder could find that FWHOA is barred by the doctrine of unclean hands, and the district court did not err in granting FWHOA summary judgment on this defense.

3. Discovery Violation

During discovery, the Wolfs served interrogatories on FWHOA. One interrogatory asked FWHOA to "set forth the name and address of each and every person or resident that currently conducts any business activities within Farmington Woods, and include the type of business activity conducted by each." FWHOA's answer, which was verified by its president, was "None other than Rhonda Wolf Daycare."

During the president's deposition, however, he admitted that he had operated businesses out of his home from approximately 2000. The Wolfs also obtained evidence "from other sources showing numerous other business activities within Farmington Woods that the FWHOA either knew or should have known about."[20] The Wolfs therefore filed an application for contempt and a motion for sanctions, asking the district court to sanction FWHOA for its answers to the interrogatories. The court took evidence on the motion and ultimately overruled it.

[14] Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.[21] FWHOA's president clarified in his deposition that when he answered the interrogatory, he answered it in light of FWHOA's policy to not seek out covenant violations, but instead to act only when a complaint was filed. In light of this explanation, the district court did not abuse its discretion in neither finding FWHOA in contempt nor imposing sanctions.

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[20] Brief for appellant at 23.

[21] *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 794 N.W.2d 685 (2011); *Podraza v. New Century Physicians of Neb.*, 280 Neb. 678, 789 N.W.2d 260 (2010).

V. CONCLUSION

We affirm the district court's order to the extent it found that the Wolfs' daycare violated the "no business activities" covenant and to the extent it granted summary judgment on the defenses of estoppel, laches, and unclean hands. But as to the Wolfs' affirmative defense of waiver, we reverse the district court's grant of summary judgment and remand the cause with directions to conduct further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MCCORMACK, J., not participating.

BRIDGEPORT ETHANOL, LLC, APPELLANT, V. NEBRASKA DEPARTMENT OF REVENUE, A NEBRASKA ADMINISTRATIVE AGENCY, AND DOUGLAS EWALD, IN HIS CAPACITY AS THE STATE TAX COMMISSIONER FOR THE STATE OF NEBRASKA, APPELLEES.

818 N.W.2d 600

Filed August 10, 2012. No. S-11-916.

1. **Administrative Law: Judgments: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record.
2. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Statutes: Legislature: Intent: Appeal and Error.** In discerning the meaning of a statute, an appellate 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.
5. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
6. **Sales: Taxation: Words and Phrases.** The definition of manufacturing machinery and equipment limits the exemption from sales tax for the purchase of such machinery and equipment to items purchased by a person engaged in the business of manufacturing for use in manufacturing.

7. **Statutes: Taxation.** Tax exemption provisions are strictly construed, and their operation will not be extended by construction.
8. ____: ____. Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.
9. **Statutes: Legislature: Intent.** In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.
10. **Taxation: Proof.** The burden of establishing a tax exemption is placed upon the party claiming the exemption.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

William E. Peters, of Peters & Chunka, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellees.

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

CASSEL, J.

INTRODUCTION

After the claimant's attempt to obtain a refund of sales tax on building materials used in the construction of an ethanol production plant was administratively denied in part, the claimant sought judicial review. This appeal turns on a statutory limitation of the exemption for manufacturing machinery and equipment and the limited statutory authority for appointment of a purchasing agent. Because the statute limits the exemption to purchases by the manufacturer and because a contractual provision purporting to entitle the manufacturer to all tax credits for taxes paid by a construction contractor was not effective as a purchasing agent appointment, we affirm.

BACKGROUND

The Nebraska Revenue Act of 1967[1] exempts from sales tax the gross receipts from the sale, lease, or rental of

[1] Neb. Rev. Stat. §§ 77-2701 to 77-27,135.01 and 77-27,228 to 77-27,236 (Reissue 2003 & Cum. Supp. 2008).

manufacturing machinery and equipment.[2] The definition of "[m]anufacturing machinery and equipment"[3] includes a number of categories of machinery or equipment but limits the definition to such items that are "purchased, leased, or rented by a person engaged in the business of manufacturing for use in manufacturing."[4]

In June 2007, Bridgeport Ethanol, LLC (Bridgeport), entered into a contract with ICM, Inc., for the design and construction of a dry mill fuel-grade ethanol plant located near Bridgeport, Nebraska. The contract set the total price for completion of the work at $67,450,000. The contract obligated ICM to furnish such items as materials, equipment, labor, and tools. The contract also contained a provision stating that the contract price included all sales and use taxes, that Bridgeport "for all purposes has paid for such taxes," and that Bridgeport was entitled to all tax credits for the payment of such taxes from any state agency. The sales and use taxes applicable to the project were estimated to be $2,100,000. Under the contract, ICM was obligated to keep all receipts and to account for all taxes it paid and Bridgeport would then use those receipts and the accounting to obtain the tax credits.

As applicable to the facts of this case, a contractor is defined as a person who annexes building materials to real estate.[5] A contractor can elect to be taxed as a retailer or as the consumer of building materials annexed to real estate.[6] A contractor's election status is described by one of three "option" numbers, depending upon which statutory subsection the contractor has elected. For example, an "Option 1" contractor is taxed as a retailer and is not considered the final consumer of building materials annexed to real estate.[7] On the other hand, "Option 2" and "Option 3" contractors

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[2] § 77-2704.22.

[3] § 77-2701.47(1).

[4] *Id.*

[5] See § 77-2701.10.

[6] *Id.*

[7] See, § 77-2701.10(1); 316 Neb. Admin. Code, ch. 1, § 017.05 (2009).

are taxed as the consumers of building materials annexed to real estate.[8]

ICM elected to be an Option 3 contractor. As such, ICM maintained a tax-free inventory of building materials that were intended to be annexed to real estate and agreed to remit the use tax when the materials were withdrawn from ICM's inventory.[9] As an Option 3 contractor, ICM agreed to pay sales tax on all tools and materials consumed in the completion of its projects that were not annexed to real estate,[10] including projects performed for an exempt entity. The bill of exceptions contains records of numerous purchases by ICM, as well as the sales and use taxes ICM paid, in performing its work under the contract.

In September 2010, Bridgeport filed a claim for overpayment of sales and use tax. Specifically, the claim requested reimbursement for sales tax paid on manufacturing equipment for the claim period "[b]eginning 12/01, 2006 and [e]nding 02/28, 2009." The claim set forth an overpayment of $1,602,182.34 in state and local sales and use taxes. Of that amount, $1,570,294.22 was based on sales and use taxes paid by ICM and $31,888.12 represented the sales and use taxes paid by Bridgeport.

In March 2011, the Nebraska Department of Revenue and Douglas Ewald in his capacity as the State Tax Commissioner (collectively the Department) partially approved Bridgeport's refund claim. The Department approved an overpayment of $6,324.84 of sales tax for Bridgeport's direct purchases of software and equipment used in the manufacturing process. But the Department disapproved $1,570,294.22 of the claim, representing sales and use taxes paid by ICM on building materials and equipment. The Department noted that ICM, not Bridgeport, was the purchaser of the building materials and that under § 77-2708(2)(a), the erroneously collected tax could

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[8] See, § 77-2701.10(2) and (3); 316 Neb. Admin. Code, ch. 1, §§ 017.06 and 017.07 (2009).

[9] See § 77-2701.10(3).

[10] See § 77-2701.10.

be refunded only to the purchaser. And under §§ 77-2701.47 and 77-2704.22, the exemption for manufacturing machinery and equipment is limited to purchases made directly by a manufacturer. Thus, the Department concluded that the sales and use taxes paid by ICM on building materials were not eligible for a refund.

Bridgeport sought judicial review in the district court, which affirmed the decision of the Department. The court observed that there was no statutory authority allowing Bridgeport to claim ICM acted as its purchasing agent. The court agreed with the Department that Bridgeport was not the purchaser of building materials and manufacturing machinery and equipment purchased and annexed at the plant and was not eligible to claim the manufacturing machinery and equipment exemption.

Bridgeport timely appealed to the Nebraska Court of Appeals, and we moved the case to our docket.[11]

ASSIGNMENTS OF ERROR

Bridgeport assigns, restated and consolidated, that the district court erred in (1) determining that Bridgeport was not the purchaser of the manufacturing machinery and equipment and was not entitled to the exemption granted by § 77-2704.22, (2) finding that the tax provision of the contract with ICM was not effective as a purchasing agent appointment and that there must be statutory authority before such an appointment may be used under the sales tax statutes, and (3) finding that Bridgeport was not entitled to an exemption on "personal property" in the nature of manufacturing machinery and equipment or parts purchased by ICM.

STANDARD OF REVIEW

[1] In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record.[12]

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

[12] *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810 N.W.2d 149 (2012).

[2] The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[13]

ANALYSIS

[3-5] Resolution of Bridgeport's assignments of error entails statutory interpretation. Thus, we begin by recalling basic principles of statutory interpretation. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[14] In discerning the meaning of a statute, we 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.[15] If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.[16]

Manufacturing Machinery and Equipment Exemption.

[6] The Legislature has provided an exemption from sales tax for the purchase of manufacturing machinery and equipment.[17] But the definition of manufacturing machinery and equipment limits the exemption to such items purchased by "a person engaged in the business of manufacturing for use in manufacturing."[18] There does not appear to be any dispute that Bridgeport was engaged in the business of manufacturing, while ICM was not. But ICM, and not Bridgeport, made the purchases of the machinery and equipment.

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[13] *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012).

[14] *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011).

[15] See *Concrete Indus. v. Nebraska Dept. of Rev.*, 277 Neb. 897, 766 N.W.2d 103 (2009).

[16] *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

[17] § 77-2704.22.

[18] § 77-2701.47(1).

[7,8] We are mindful that tax exemption provisions are strictly construed, and their operation will not be extended by construction.[19] Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.[20]

Under the plain language of the statutes, Bridgeport is not entitled to the exemption, because it was not the purchaser of the manufacturing machinery and equipment. Bridgeport tries to circumvent this issue by characterizing its payment of $67,450,000 for a design-built ethanol plant as a purchase of manufacturing machinery and equipment entitling Bridgeport to the exemption. But ICM purchased the component parts to build the plant and paid the applicable sales and use taxes on such purchases. Bridgeport cannot obtain a refund of taxes that it never paid.[21]

Bridgeport cites to our opinion in *Concrete Indus. v. Nebraska Dept. of Rev.*,[22] but that case does not support Bridgeport's position. In *Concrete Indus.*, a manufacturer purchased parts that it used to build its own manufacturing machinery and equipment and filed a claim for overpayment of sales and use tax. The Department denied the manufacturer's claim, and the district court determined that parts purchased by the manufacturer were not machinery or equipment within the meaning of the statutes. This court determined that the purchase was exempt from sales tax. We reasoned that it would make little sense to exempt from sales and use tax machinery that is already assembled and each part of that machinery if it was purchased to replace an original part, but to impose a tax on the purchase of the same parts when they are purchased to assemble the machinery in the first place. Significantly, and unlike the situation in the instant case, the manufacturer made the purchase of the component parts.

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[19] See *Concrete Indus. v. Nebraska Dept. of Rev., supra* note 15.

[20] *Id.*

[21] See § 77-2708.

[22] *Concrete Indus. v. Nebraska Dept. of Rev., supra* note 15.

[9] ICM's election to be an Option 3 contractor had important consequences under the sales and use tax statutes and regulations. "Contractors may choose how they want to treat building materials for tax purposes."[23] An Option 3 contractor "must pay use tax on all manufacturing machinery and equipment and any related repair or replacement parts [it] purchase[s] and annex[es] for a customer."[24] Such contractor has to pay use tax on manufacturing machinery and equipment even if the contractor had a purchasing agency appointment from a manufacturer.[25] As earlier mentioned, an Option 3 contractor is taxed as the consumer of building materials annexed to real estate and remits tax on building materials when withdrawn from inventory for the purpose of being annexed to real estate.[26] And because property that will be attached to real estate or an improvement to real estate constitutes building materials,[27] any manufacturing machinery and equipment annexed to real estate are building materials. Bridgeport quotes legislative history regarding the exemption and argues that the exemption is not affected by the classification of a contractor. But in order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.[28] Seeing no ambiguity, we need not resort to legislative history.

We reject Bridgeport's argument that the Department's regulation effectively repeals the manufacturing machinery and equipment exemption. Bridgeport contends that the regulation requiring Option 3 contractors to pay use tax on manufacturing machinery and equipment that the contractor purchases and annexes for a customer[29] had the effect of voiding the

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[23] 316 Neb. Admin. Code, ch. 1, § 017.03 (2009).

[24] 316 Neb. Admin. Code, ch. 1, § 017.07F(1) (2009).

[25] *Id.*, § 017.07F(1)(a).

[26] See § 77-2701.10(3).

[27] § 77-2701.44.

[28] *Knapp v. Village of Beaver City*, 273 Neb. 156, 728 N.W.2d 96 (2007).

[29] See 316 Neb. Admin. Code, ch. 1, § 017.07F(1).

manufacturing machinery and equipment exemption. But, based on the definition of manufacturing machinery and equipment,[30] in order to obtain the exemption under § 77-2704.22, the purchases of manufacturing machinery and equipment must be made by a person engaged in manufacturing for use in manufacturing. An Option 3 contractor who makes qualifying purchases but is not engaged in manufacturing will not be entitled to the exemption. On the other hand, manufacturers who make the purchases are entitled to the exemption. So, too, are manufacturers who buy qualifying manufacturing machinery and equipment from an Option 1 contractor. This is because an Option 1 contractor is considered a retailer and does not collect sales tax on qualifying manufacturing machinery and equipment sold to a manufacturer, regardless of whether the equipment remains tangible personal property or is annexed.[31] On the other hand, an Option 3 contractor is considered a consumer of annexed materials[32] but is a retailer for sales of building materials or other property that is not annexed and must collect sales tax on the amount charged.[33] We conclude that the district court correctly determined that Bridgeport was not entitled to the exemption based upon purchases of building materials, including manufacturing machinery and equipment, made by ICM.

Purchasing Agent Appointment.

The provision in the contract concerning taxes did not constitute an appointment of a purchasing agent. Bridgeport claims that for sales tax purposes, the contractual provision had the effect of making Bridgeport the purchaser of materials.

Nebraska statutes specifically authorize the appointment of purchasing agents by certain entities. Such agents may be appointed by certain nonprofit religious, service for the blind or developmentally disabled, educational, medical, child-caring, or child placement organizations "for the purpose of

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[30] § 77-2701.47(1).

[31] See 316 Neb. Admin. Code, ch. 1, § 017.05F(1) (2009).

[32] § 77-2701.10(1) and (3).

[33] 316 Neb. Admin. Code, ch. 1, § 017.07D(1) (2009).

altering the status of the construction contractor as the ultimate consumer of building materials which are physically annexed to the structure and which subsequently belong to the owner of the organization or institution."[34] The appointment of purchasing agents by the state or certain governmental units is similarly authorized for the same purpose.[35]

But there is no statutory authority for the appointment of a purchasing agent under the facts of this case. Our conclusion is supported by *A & D Tech. Supply Co. v. Nebraska Dept. of Revenue*.[36] In that case, we stated that because the Legislature set forth the circumstances under which an agent of a tax-exempt organization could assume the benefit of tax-exempt status, the Legislature intended to exclude the possibility that an agent of a tax-exempt organization could assume the benefit of tax-exempt status under other circumstances. We further reasoned:

> Were we to conclude that the existence of an agency relationship generally allows the agent to assume the tax-exempt status of the principal, then the statutes providing for such an assumption of status would be an unnecessary redundancy. Instead, basic principles of statutory interpretation require us to interpret §§ 77-2704.12(3) and 77-2704.15(2) as delimiting the circumstances under which the agent of a tax-exempt organization may assume the tax-exempt status of the principal.[37]

We think similar reasoning applies here. If Bridgeport could alter the parties' statuses by including a provision in the contract, the statutes specifically authorizing a purchasing agent appointment in only a few circumstances would be unnecessary. Further, we find no authority for such an appointment under a tax incentive program.[38]

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[34] § 77-2704.12(3).

[35] § 77-2704.15(2).

[36] *A & D Tech. Supply Co. v. Nebraska Dept. of Revenue*, 259 Neb. 24, 607 N.W.2d 857 (2000).

[37] *Id.* at 31, 607 N.W.2d at 863-64.

[38] See Neb. Rev. Stat. §§ 77-27,187.02(4) and 77-5723(5) (Cum. Supp. 2008) and 77-4104(4) (Reissue 2009).

Personal Property.

Finally, Bridgeport claims that it was error to "consider all personal property involved in the building of the manufacturing plant as real estate."[39] Bridgeport points to a statute defining tangible personal property,[40] which statute is found outside of the Nebraska Revenue Act of 1967. The Nebraska Revenue Act of 1967, on the other hand, sets forth a different definition of tangible personal property.[41]

[10] But these definitions ultimately have no effect upon the issues in this case because there is simply no evidence that ICM sold personal property to Bridgeport or that ICM collected sales tax from Bridgeport. The burden of establishing a tax exemption is placed upon the party claiming the exemption.[42] Because ICM was the purchaser and consumer of the property annexed to real estate, Bridgeport failed to establish entitlement to the exemption from sales tax for purchases of manufacturing machinery and equipment.

CONCLUSION

We conclude that under the plain language of the statutes, Bridgeport was not entitled to the exemption from sales tax based upon ICM's purchases of manufacturing machinery and equipment. Because the statutes specifically allow for the appointment of purchasing agents in certain circumstances not present here, we conclude that the provision in the contract purporting to entitle Bridgeport to all tax credits for taxes paid by ICM was not effective as a purchasing agent appointment. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

STEPHAN, J., participating on briefs.

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[39] Brief for appellant at 19.

[40] See Neb. Rev. Stat. § 77-105 (Cum. Supp. 2008).

[41] § 77-2701.39.

[42] See *Concrete Indus. v. Nebraska Dept. of Rev.*, *supra* note 15.

STATE OF NEBRASKA, APPELLEE, V. EUELAUNDA L. PAYNE-MCCOY, APPELLANT.

818 N.W.2d 608

Filed August 17, 2012. No. S-11-530.

1. **Criminal Law: Judgments: Appeal and Error.** An appellate court will affirm a trial court's ruling that the defendant committed an uncharged extrinsic crime or bad act if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found with a firm conviction the essential elements of the uncharged crime.
2. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404(2) (Cum. Supp. 2010), and the trial court's decision will not be reversed absent an abuse of discretion.
3. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
4. **Rules of Evidence: Proof.** Under Neb. Evid. R. 404(3), Neb. Rev. Stat. § 27-404(3) (Cum. Supp. 2010), before a court can admit evidence of an extrinsic act in a criminal case, the State must prove by clear and convincing evidence, outside the presence of the jury, that the defendant committed the extrinsic act.
5. **Evidence: Words and Phrases.** 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 a fact to be proved.
6. **Rules of Evidence: Other Acts.** Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010).
7. **Evidence: Words and Phrases.** Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.
8. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010), considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
9. **Evidence: Other Acts.** Other acts evidence may have probative value as to identity where there are overwhelming similarities between the other crime and the charged offense or offenses, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature.
10. **Criminal Law: Words and Phrases.** Motive is defined as that which leads or tempts the mind to indulge in a criminal act.

11. **Rules of Evidence.** Evidence that is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010), may be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), if its probative value is substantially outweighed by the danger of unfair prejudice.
12. **Evidence.** The probative value of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the fact from the ultimate issue of the case.
13. **Evidence: Words and Phrases.** Unfair prejudice means an undue tendency to suggest a decision based on an improper basis.
14. **Trial: Evidence.** Balancing the probative value of evidence against the danger of unfair prejudice is within the discretion of the trial court.
15. **Trial: Evidence: Jury Instructions.** In any situation in which a limiting instruction was given at the time evidence was introduced, NJI2d Crim. 5.3 must be given at closing if requested.
16. **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 would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Reversed and remanded for a new trial.

Thomas C. Riley, Douglas County Public Defender, Scott C. Sladek, John L. Jedlicka, and Jessica P. Clark for appellant.

Jon Bruning, Attorney General, and Carrie A. Thober for appellee.

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

WRIGHT, J.

NATURE OF CASE

Euelaunda L. Payne-McCoy was charged with one count of possession of crack cocaine with intent to deliver and one count of criminal conspiracy. The conspiracy charge, as instructed, was that Payne-McCoy allegedly conspired with Lawrence Carbon to distribute crack cocaine. At trial, evidence of previous drug deals between a confidential informant and Payne-McCoy was admitted with a limiting instruction informing the jury that it could consider the evidence only for the purpose of identifying Payne-McCoy or to establish motive or intent. At the close of the case, the trial court denied defense counsel's oral motion to give the jury a written instruction on

the limited use of evidence of Payne-McCoy's prior bad acts. The jury convicted Payne-McCoy on both counts, and the court sentenced her to consecutive terms of 4 to 8 years' imprisonment. Payne-McCoy appeals. For the reasons set forth herein, we reverse the judgments of conviction and remand the cause for a new trial.

SCOPE OF REVIEW

[1] We will affirm a trial court's ruling that the defendant committed an uncharged extrinsic crime or bad act if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found with a firm conviction the essential elements of the uncharged crime. *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012).

[2] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404(2) (Cum. Supp. 2010), and the trial court's decision will not be reversed absent an abuse of discretion. *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

[3] Whether jury instructions given by a trial court are correct is a question of law. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id.*

FACTS

In October 2008, Douglas Cook worked for the Omaha Police Department doing controlled buys of narcotics. Through an acquaintance, Cook had met a woman called Green Eyes, who was later identified as Payne-McCoy. At trial, Cook testified that he had known Payne-McCoy for over a year and had purchased crack cocaine from her over 20 times before October 2008.

Cook did not deal with Payne-McCoy except to purchase crack cocaine. Cook would call her cellular telephone and ask whether he could "meet up." She would usually ask what "street" Cook was going to, which meant what dollar value

of crack cocaine he wanted to purchase. For example, "30th Street" meant buying $30 of crack cocaine. Cook's deals with Payne-McCoy were always arranged using this code. After Cook called Payne-McCoy and talked about the amount of crack cocaine to be purchased, a meeting place would be arranged, usually selected by her. The meeting location varied from purchase to purchase, but Payne-McCoy would personally deliver the crack cocaine to Cook.

On October 24, 2008, Cook met police officers in order to arrange a controlled purchase of crack cocaine from Payne-McCoy. Cook called her, using the telephone number he had always used to contact her. Payne-McCoy answered the telephone and asked to what "street" Cook was going. Using the code, Cook indicated he wanted to purchase $30 of crack cocaine. She told Cook to go to the University of Nebraska Medical Center (UNMC). Cook was to call her once he arrived at UNMC. Officers kept Cook under surveillance as he drove to UNMC.

When Cook reached the vicinity of UNMC, he again called Payne-McCoy's telephone number. This time, a male voice, unknown to Cook, answered the telephone. The man, later identified as Carbon, directed Cook to a meeting place near UNMC. Cook drove where he was directed, and a white Cadillac pulled up behind his car. Carbon was the only person in the Cadillac. He exited the Cadillac and walked to the driver's side of Cook's car. Carbon handed Cook the crack cocaine, and Cook handed him $30. Cook did not recognize Carbon, but he recognized the Cadillac as Payne-McCoy's because she had driven the car to previous drug deals. Cook had given the police her license plate number. Cook did not see Payne-McCoy on October 24, 2008.

Shortly after the drug deal, the Cadillac, which was registered to Payne-McCoy, was stopped by Omaha police. The driver was identified as Carbon. He was driving on a suspended license, and marijuana was found in the Cadillac.

The next day, October 25, 2008, Payne-McCoy reported her white Cadillac stolen. An officer later spoke to Payne-McCoy. She and Carbon, who was her boyfriend, had driven to a pancake feed in separate vehicles, and when they left, she gave

Carbon the keys to the Cadillac so he could get new tires. When Payne-McCoy went home, the side door of her house was open and Carbon's clothes were gone. The Cadillac was later recovered in Louisiana.

Payne-McCoy was charged with one count of possession of crack cocaine with intent to deliver and one count of criminal conspiracy. The instruction given to the jury regarding the conspiracy charge allowed the jury to consider whether Payne-McCoy conspired with Carbon to sell the crack cocaine to Cook. The jury was instructed as to the conspiracy that it had to find beyond a reasonable doubt that Payne-McCoy, or another person with whom she conspired (Carbon), agreed to arrange to deliver crack cocaine to Cook in exchange for money or agreed to deliver crack cocaine to Cook at UNMC or that Carbon delivered the crack cocaine and received $30 in exchange.

Prior to trial, the State filed a notice of its intent to offer evidence of Payne-McCoy's prior drug sales to Cook. The trial court held a rule 404 evidence hearing. Cook was the only person to testify, and he identified Payne-McCoy as the person he knew as Green Eyes. He testified that he had purchased drugs from Payne-McCoy over an 8- to 9-month period and as to the manner in which the drug deals were arranged. The court found that the State had proved by clear and convincing evidence that the prior bad acts were committed by Payne-McCoy. It specifically found that the evidence offered satisfied the requirements of rule 404(2) and that Payne-McCoy's prior bad acts were offered to show her *plan*, *knowledge*, and *identity*.

At trial, before Cook could testify how he knew Payne-McCoy, defense counsel raised a rule 404 objection. The objection was overruled, and the court cautioned the jury that the information was to be used solely to show *identity*, *motive*, or *intent*. Later, when the prosecutor asked a police officer if he knew whether Cook had purchased drugs from Payne-McCoy before October 24, 2008, defense counsel again objected on the basis of rule 404. The objection was overruled, and the jury was again instructed on *identity*, *motive*, or *intent*.

During the jury instruction conference at the end of the trial, defense counsel made an oral motion requesting a

written instruction regarding the limited purpose of the rule 404 evidence. The trial court refused to give the instruction. It concluded that it had already instructed the jury on the rule 404 issue when the evidence was received and that further instruction would highlight Payne-McCoy's prior bad acts and make it more difficult for the jury to correctly consider that evidence.

The jury found Payne-McCoy guilty of both counts. The trial court sentenced her to 4 to 8 years' imprisonment on each count, with the sentences to run consecutively. She received credit for 1 day served. Payne-McCoy appealed. We moved the case to our docket pursuant to our authority to regulate the dockets of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

On appeal, Payne-McCoy assigns, restated, that (1) the State did not meet its burden of proof at the rule 404 hearing, (2) the prior bad acts evidence was not relevant for any permissible purpose under rule 404, (3) the prior bad acts evidence was more prejudicial than probative even if it was admissible under rule 404, (4) the trial court erred in refusing to give jury instructions orally requested by Payne-McCoy, and (5) her sentences should have been ordered to run concurrently rather than consecutively.

ANALYSIS

Sufficiency of Evidence to Prove Prior Bad Acts

We first consider whether the evidence offered by the State was sufficient to prove by clear and convincing evidence that Payne-McCoy committed the prior bad acts. Payne-McCoy claims that the trial court erred by admitting evidence of her past drug deals with Cook because the State failed to prove by clear and convincing evidence that Payne-McCoy committed the prior criminal acts. We will affirm a trial court's ruling that the defendant committed an uncharged extrinsic crime or bad act if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found with a

firm conviction the essential elements of the uncharged crime. *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012).

At the rule 404 hearing, Cook testified that he had met Payne-McCoy about 8 or 9 months before October 24, 2008, through a mutual acquaintance. When they met, Cook did not know Payne-McCoy's real name, but knew her as Green Eyes. He had made multiple contacts with Payne-McCoy, all of which were to purchase crack cocaine. Payne-McCoy was present at the hearing, and Cook identified her as the person he knew as Green Eyes.

Cook's testimony established the similarities between the crime charged of possession of crack cocaine with intent to deliver and the prior bad acts. On every prior occasion, Cook called Payne-McCoy at the same telephone number. On each occasion, a code was used to establish the amount of crack cocaine Cook wanted to purchase. Payne-McCoy would direct him to a specific location, and the purchase was then completed.

[4] Under rule 404(3), before a court can admit evidence of an extrinsic act in a criminal case, the State must prove by clear and convincing evidence, outside the presence of the jury, that the defendant committed the extrinsic act. See *State v. Kofoed, supra*.

[5] 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 a fact to be proved. *Id.*; *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009).

Cook's testimony could produce a firm belief or conviction in the trier of fact that the prior bad acts were committed by Payne-McCoy. See *State v. Kofoed, supra*. Viewing the evidence presented by the State in a light most favorable to the prosecution, the court could have found the evidence was sufficient to prove by clear and convincing evidence that Payne-McCoy committed the prior uncharged crimes or bad acts.

Relevance of Rule 404
Prior Bad Acts

Payne-McCoy next argues that the prior bad acts were not relevant for any permissible reason under rule 404. The trial

court found that the evidence satisfied the requirements of rule 404(2) and that the evidence was offered for the purpose of proving Payne-McCoy's *plan*, *knowledge*, and *identity*.

[6,7] Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2). *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012). Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity. *Id.*

[8] An appellate court's analysis under rule 404(2) considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. *State v. Torres, supra.*

[9] The State had the burden to prove that the evidence was independently relevant for a proper purpose. Payne-McCoy did not deliver the crack cocaine to Cook, as she had done previously. Carbon delivered it, and therefore, the prior bad acts were relevant to prove the identity of the person who committed the crime charged. Other acts evidence may have probative value as to identity where there are overwhelming similarities between the other crime and the charged offense or offenses, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature. *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011). For example, previous sexual assaults were admissible to show identity in *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000), when the prior sexual assaults were similar to the charged crime and, with one exception, the victims had been featured in press articles indicating they were likely to be living alone.

Payne-McCoy's prior bad acts were overwhelmingly similar to the crime charged of possession with intent to deliver. They bore the same signature and were independently relevant.

On October 24, 2008, Cook called Payne-McCoy and was directed to UNMC. Once there, he called for further instructions. Carbon answered and directed Cook to a meeting place. In prior purchases, Cook had always received the crack cocaine from Payne-McCoy. Because Carbon, and not Payne-McCoy, delivered the crack cocaine to Cook, the identity of the perpetrator was an issue in the trial. See *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

The State sustained its burden to show by clear and convincing evidence that the rule 404 evidence was independently relevant for the purpose of identifying Payne-McCoy as the perpetrator of the charged crime of possession of crack cocaine with intent to deliver. We conclude that the evidence was relevant to establish Payne-McCoy's identity and that the trial court did not abuse its discretion in its admission of the rule 404 evidence to show identity of the perpetrator.

However, it was an abuse of discretion to admit the prior bad acts as proof of motive or intent. 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 the evidence. *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

[10] Payne-McCoy's prior drug deals with Cook were not admissible to show motive. Motive is defined as that which leads or tempts the mind to indulge in a criminal act. *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011). For example, in *Collins*, evidence of a relationship between the defendant and two drug dealers was admissible to show the defendant's motive to kill the two drug dealers so he could take a shipment of cocaine, sell it, and avoid splitting the profits. Payne-McCoy's prior drug sales to Cook do not explain her motive to sell crack cocaine to Cook on October 24, 2008, except on the logic that she sold drugs to him before, so she sold to him again. Such thinking "is precisely what rule 404(2) is designed to prevent." See *State v. Collins*, 281 Neb. at 945, 799 N.W.2d at 709. Therefore, it was an abuse of discretion to admit the prior bad acts evidence to show motive.

Evidence of Payne-McCoy's prior drug sales to Cook was not admissible to show intent. Prior bad acts are not admissible

to show intent unless intent is at issue in the case. See *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012). In *Torres*, there was no question the crimes were intentional; the question was who committed them. Similarly, in the case at bar, there is no question that if Payne-McCoy was the person who committed the crimes, they were committed intentionally. Therefore, intent was not at issue, and evidence of Payne-McCoy's previous drug sales to Cook was not admissible to show intent. See *id*. The court abused its discretion in permitting the State to use Payne-McCoy's prior drug sales to Cook to show intent.

Probative Value Versus Unfair Prejudice

[11,12] We next consider whether the probative value of the evidence to show identity was substantially outweighed by the danger of unfair prejudice to Payne-McCoy. Evidence that is admissible under rule 404(2) may be excluded under rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice. See *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). "The probative value of the evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the fact from the ultimate issue of the case." *State v. Pullens*, 281 Neb. 828, 858, 800 N.W.2d 202, 227-28 (2011). Accord *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

[13,14] Most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party. *State v. Pullens, supra*. Only evidence tending to suggest a decision on an improper basis is unfairly prejudicial. *Id*. Unfair prejudice means an undue tendency to suggest a decision based on an improper basis. See *id*. Balancing the probative value of evidence against the danger of unfair prejudice is also within the discretion of the trial court. *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997).

Having determined that there was sufficient evidence to prove Payne-McCoy's prior bad acts and that the evidence was relevant to prove the identity of Payne-McCoy as the person

who committed the acts charged, we consider whether the evidence was unfairly prejudicial. The prior bad acts evidence was highly probative of the identity of the perpetrator; in fact, the State's case against Payne-McCoy may depend upon its admission.

The question is whether such evidence was unfairly prejudicial. There were overwhelming similarities between the prior bad acts and the crime charged in the case at bar. The trial court cautioned the jury as to the limited use of such evidence to prove identification. Therefore, we conclude that the probative value of the prior bad acts to show identity was not substantially outweighed by their prejudicial value and that Payne-McCoy was not unfairly prejudiced by the admission of such evidence.

Refusal to Give Written Instruction to Jury

Payne-McCoy alleges the trial court should have given a written instruction at the close of the evidence regarding the proper use of evidence of her prior acts. During the jury instruction conference, defense counsel made an oral motion to add a rule 404 instruction. Defense counsel stated:

> [D]ue to the fact that . . . jurors are not lawyers and don't necessarily have the same legal training, I think that for the purposes of . . . making it clear for them what 404 is and . . . the purpose[s for which] they can [use] the evidence . . . that they heard yesterday, I think, Judge, as a safety precaution it would be appropriate to have some sort of instruction to the jury reminding them what the Court . . . said to them yesterday regarding that particular testimony.

The trial court refused to give the requested instruction, stating that it had adequately instructed the jurors on rule 404 when the prior bad acts evidence was admitted. The court concluded that additional instruction would emphasize the prior bad acts and make it harder for the jury to properly use the evidence. It determined that once it had adequately instructed the jury on rule 404 evidence during the trial, it was not required to give an additional instruction.

[15] The court's refusal to give a written instruction on the limited use of rule 404 evidence was an abuse of discretion. Instructing the jury on rule 404 evidence during trial did not *eliminate* the court's duty to give, if requested, a written instruction on the limited purpose of the evidence; it *created* that duty. This court has made it clear that in criminal cases, "[i]n any situation in which a limiting instruction was given at the time evidence was introduced, NJI2d Crim. 5.3 must be given at closing if requested." *State v. Carter*, 246 Neb. 953, 967, 524 N.W.2d 763, 774 (1994), *overruled on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997). Accord *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). In addition, this court has specifically held that in reviewing the admissibility of other crimes evidence under rule 404(2), we will consider whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. See, *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012); *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

NJI2d Crim. 5.3A sets forth in general terms the required written instruction: "During this trial I called your attention to some evidence that was received for specified limited purposes; you must consider that evidence only for those limited purposes and for no other." The court should identify the evidence received and the limited purpose for which the jury may consider such evidence. A written instruction, if given properly, acts as a permanent reference to guide the jury during its consideration of evidence received. Oral instructions given during trial that limit the use of certain evidence for a particular purpose may be misinterpreted by the jury, especially in a lengthy trial that requires the jury to examine the evidence and to resolve numerous questions of fact. If given a proper written instruction, the jury may refer to the instruction when considering the limited use of the evidence relevant to that instruction. See, generally, Susan R. Schwaiger, Note, *The Submission of Written Instructions and Statutory Language to New York Criminal Juries*, 56 Brook. L. Rev. 1353 (1991).

Rule 404 instructions given during the course of the trial limiting the use of certain evidence received may also be confused with instructions that limit the use of other evidence for a different purpose. For example, some evidence may be limited to the proof of motive or opportunity, while other evidence may be limited by rule 404(2) to show the identity of the perpetrator. Preventing such confusion supports the giving of proper written instructions as a permanent reference for the jury regarding the limited use of the evidence received for a particular limited purpose.

The trial court's refusal to give NJI2d Crim. 5.3 on the limited use of the prior acts to prove identity was unfairly prejudicial to Payne-McCoy. None of the witnesses for the State saw her participate in the controlled buy on October 24, 2008. A man, Carbon, driving Payne-McCoy's car delivered the crack cocaine to Cook. The next day, Payne-McCoy reported that her car had been stolen.

Without the written instruction, the jury may have considered Payne-McCoy's previous criminal acts as evidence that she acted in conformity therewith and sold crack cocaine to Cook on October 24, 2008. This "is precisely what rule 404(2) is designed to prevent." *State v. Collins*, 281 Neb. 927, 945, 799 N.W.2d 693, 709 (2011). The trial court had a duty to give a written instruction to the jury on the proper limited use of evidence of Payne-McCoy's prior bad acts. Its failure to do so was an abuse of its discretion.

The failure to properly limit the use of the prior bad acts evidence involving Payne-McCoy and the refusal to give the jury a written instruction on the limited use of this evidence were reversible error. We cannot conclude the convictions were surely unattributable to such error.

Double Jeopardy

[16] Having found reversible error, we are required to determine whether all of the evidence admitted by the district court was sufficient to sustain Payne-McCoy's convictions. The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict. *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

The evidence admitted showed that Cook telephoned Payne-McCoy and arranged for the purchase of $30 of crack cocaine. There was evidence of Payne-McCoy's prior dealings with Cook which was overwhelmingly similar to the crime charged of possession with intent to deliver. There was sufficient evidence that Payne-McCoy conspired with Carbon to complete the sale of the crack cocaine to Cook and that Carbon used Payne-McCoy's car to complete the sale. Thus, all the evidence, whether properly admitted or not, was sufficient to sustain a guilty verdict of the crimes charged, and the Double Jeopardy Clause does not bar retrial.

CONCLUSION

The trial court admitted evidence of Payne-McCoy's prior sales of crack cocaine to Cook for the purpose of showing identity, motive, or intent. The evidence was admissible to show identity, but it was reversible error and an abuse of discretion for the court to admit the prior bad acts evidence to show motive or intent. During the jury instruction conference, the court denied an oral motion to instruct the jury on the limited use of this evidence. It was reversible error and an abuse of discretion to not give NJI2d Crim. 5.3 following Payne-McCoy's request.

Because the sum of all the evidence, whether erroneously admitted or not, was sufficient to sustain the convictions, we reverse the judgments of conviction and remand the cause for a new trial. We need not address any of Payne-McCoy's other alleged errors.

The judgments of conviction are reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CONNOLLY, J., concurring.

I concur in the majority's judgment. I write separately for two reasons. First, I disagree with the majority opinion's analytical framework for reviewing the admissibility of the other crimes evidence to prove Payne-McCoy's identity as the seller in the charged drug transaction and its reasoning for concluding that the evidence was admissible for this purpose. Second, although I agree that the court improperly admitted

the evidence to show motive or intent, I believe that the error requires harmless error analysis.

ADMITTING EVIDENCE TO PROVE IDENTITY

Generally, when rule 404(2)[1] evidence is introduced to prove the defendant's identity as the perpetrator, we have analyzed whether the other crimes are so similar that the trial judge could conclude that they bear the same signature.[2] But I disagree with statements in the majority opinion that the charged crime was overwhelmingly similar to the uncharged transactions because in the previous transactions, Cook had always received drugs from Payne-McCoy. Payne-McCoy did not deliver the drugs on October 24, 2008. So her past role in making deliveries is a difference, not a similarity, between the charged transaction and the uncharged transactions.

But showing that the same signature was present in both crimes is not the only method of showing the defendant's identity in the charged crime through evidence of other crimes.[3] Specifically, in some circumstances, courts have admitted a witness' testimony of a defendant's other sales to show how the witness could identify the defendant as the seller in the charged transaction.[4]

It is true that legal commentators have criticized courts for admitting evidence of a defendant's previous crimes when the prosecution only uses the other crimes to bolster the witness' credibility that he or she knew the defendant because of these criminal contacts. Commentators have argued that a court can allow a witness to testify that he or she knew the defendant without admitting the witness' highly prejudicial testimony about the nature of the contacts.[5] And evidence of a defendant's

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[1] Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010).

[2] See, e.g., *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

[3] See, e.g., 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5246 (1978 & Supp. 2012).

[4] See, *United States v. Aguirre*, 716 F.2d 293 (5th Cir. 1983); 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence § 3:07 (rev. ed. 2001).

[5] See, e.g., 1 Imwinkelried, *supra* note 4; 22 Wright & Graham, *supra* note 3.

previous drug transactions usually presents a danger that jurors will find guilt by reasoning that "'once a drug-dealer, always a drug dealer.'"[6]

So if Payne-McCoy had delivered the drugs herself, then I believe that evidence of her previous transactions with Cook would be inadmissible to show that Cook was a reliable witness who could identify her. But a court must consider the admissibility of evidence in the light of the factual context and trial issues. And the issue was not whether Cook could identify Payne-McCoy. Here, Payne-McCoy's identity as the seller was genuinely at issue because Carbon delivered the drugs in Payne-McCoy's vehicle, but she claimed that someone had stolen her vehicle. In addition, she did not tell Cook that she would sell drugs to him on the charged occasion, nor did she deliver drugs to him. So the issue was *how* Cook knew that he had arranged a drug buy from Payne-McCoy absent her presence during the actual exchange.

Of course, a defendant's past involvement in drug activities does not necessarily establish his or her identity as the seller in a charged transaction. "In evaluating other acts evidence in criminal prosecutions, the other act must be so related in time, place, and circumstances to the offense or offenses charged so as to have substantial probative value in determining the guilt of the accused."[7] To be independently relevant, the State must show a defendant's previous drug transactions are sufficiently linked to the charged transaction in a manner that does not depend solely upon establishing the defendant's character as a drug dealer.[8] Here, the State satisfied that requirement by showing two unique factors common to all the transactions: (1) Payne-McCoy's unique pattern of dealing with Cook up to, and including, the charged transaction; and (2) Cook's consistent use of her personal telephone number to initiate drug buys.

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[6] David P. Leonard, The New Wigmore: Evidence of Other Misconduct and Similar Events § 12.3 at 696 (Richard D. Friedman ed., 2009).

[7] *State v. Trotter*, 262 Neb. 443, 459, 632 N.W.2d 325, 339 (2001).

[8] See, *U.S. v. McBride*, 676 F.3d 385 (4th Cir. 2012); *U.S. v. Bell*, 516 F.3d 432 (6th Cir. 2008).

Cook testified that he had called the same telephone number each time that he arranged a drug buy from Payne-McCoy and that he had used the same street code to indicate the amount of drugs that he wanted to purchase. So under this evidence, jurors could reason that Payne-McCoy was the seller in the charged crime without relying on propensity reasoning.

Even apart from Cook's use of the same telephone number to initiate each transaction, Payne-McCoy's method of determining the amount of the drug purchase was unique enough that a person could conclude that same person had sold Cook drugs on every occasion. This conclusion did not require the jurors to reason that because Payne-McCoy had sold drugs in the past, she had likely done so in the charged transaction. Because the jurors could find the evidence relevant without relying on propensity reasoning, I agree that the independent relevance requirement under rule 404(2) was satisfied.

But in reviewing the court's admission of rule 404(2) evidence for abuse of discretion, independent relevance is not all that we require. As the majority opinion states, in reviewing a court's admission of rule 404(2) evidence for abuse of discretion, we will consider (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.[9] I believe that the majority opinion takes an improper analytical shortcut by effectively ignoring the third component of the abuse-of-discretion inquiry on the specific issue of identity.

I believe that this case illustrates a court could abuse its discretion in admitting rule 404(2) evidence for one purpose but not in admitting it for another purpose. And whether the error is harmless will often depend on considerations different than whether the court abused its discretion in admitting the

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[9] See *Glazebrook, supra* note 2.

evidence. Our harmless error analysis is not the same as our abuse-of-discretion inquiry.

Returning to the balancing component of the abuse-of-discretion inquiry under rule 404(2), the State had a substantial need to present this evidence. It had to show that Payne-McCoy was the seller, despite her stolen vehicle report and her absence when Cook and Carbon exchanged the money and drugs. The State had no other evidence to establish that Payne-McCoy was the actual seller and linked to a conspiracy to distribute the drugs. In addition, because the rule 404(2) evidence was independently relevant, I believe that the risk of unfair prejudice to Payne-McCoy was minimized. Therefore, I agree that the evidence's potential for unfair prejudice did not substantially outweigh its probative value for proving her identity as the seller.[10]

Under the jury instruction component, I believe that the court abused its discretion in admitting this evidence to prove Payne-McCoy's identity without giving the requested limiting instruction to the jury at the close of evidence. It is true that the court informed the jurors during trial that they could consider the rule 404(2) evidence solely for identifying Payne-McCoy or as evidence of Payne-McCoy's motive or intent. But a proper limiting instruction to guide the jury's deliberations is a crucial safeguard against unfair prejudice in the admission of rule 404(2) evidence.[11] "The limiting instruction is required because even though another proper purpose may exist for the admission of evidence under rule 404(2), there is always the danger that the jury will draw the forbidden inference of propensity."[12]

The lack of a limiting instruction is particularly important here because the court admitted the rule 404(2) evidence to show Payne-McCoy's identity as the perpetrator. Proving a defendant's identity as the perpetrator necessarily involves

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[10] See Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008).

[11] See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999), citing *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988).

[12] See *State v. McManus*, 257 Neb. 1, 9, 594 N.W.2d 623, 629 (1999).

an inference about Payne-McCoy's conduct. So when the State offers rule 404(2) evidence to prove identity, trial courts should vigilantly ensure that the theory of relevance does not require an inference about the defendant's character.[13] But from the court's admonition during trial, jurors would not have understood that they should not use the prior bad acts to determine whether Payne-McCoy acted in conformity with a bad character. The court specifically instructed the jurors that they could consider the evidence for determining Payne-McCoy's identity, motive, or intent. And the evidence was relevant to motive or intent only through propensity reasoning. So the court's admonition during trial ran counter to rule 404(2)'s requirement that other crimes evidence not be considered to determine that Payne-McCoy "acted in conformity therewith."[14]

Finally, I agree with the majority opinion that after a lengthy trial, jurors are likely to forget even a court's proper admonitions about rule 404(2) evidence when it was received. To avoid this, trial courts should ensure that limiting instructions are repeated in writing for the jury's deliberations.

ADMISSION OF PREVIOUS TRANSACTIONS TO PROVE MOTIVE OR INTENT WAS NOT HARMLESS ERROR

I agree with the majority opinion that the court improperly admitted evidence of Payne-McCoy's previous transactions with Cook to prove her motive or intent. But I believe that when we conclude that a trial court improperly admitted evidence of a defendant's uncharged crimes, the next step should be harmless error analysis.

An erroneous admission of evidence is prejudicial to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.[15] So once we determined that the court erred in admitting evidence of Payne-McCoy's extrinsic crimes under rule 404(2), we need not

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[13] See 22 Wright & Graham, *supra* note 3.

[14] See § 27-404(2).

[15] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

analyze whether its potential for unfair prejudice outweighed its probative value.[16] Obviously, if we conclude that the court erred in admitting the evidence, a rule 403 analysis is unnecessary, except for determining whether Payne-McCoy was prejudiced by the error. Regarding the jury instructions, we are primarily interested in whether the court corrected its erroneous admissibility ruling or its earlier admonition to jurors about the purpose for which they could consider the evidence. But if the trial court instructed the jury that it could consider the evidence for the very purposes that we have concluded were improper under rule 404(2), then the court's instruction only compounded the error.[17]

So instead of considering the rule 403 component and the jury instruction component, we must conduct a harmless error analysis.[18] The majority opinion concludes that the evidence was not admissible to prove motive because the evidence was relevant for this purpose only through propensity reasoning. I agree.

Similarly, jurors likely used straight propensity reasoning to find the evidence relevant to proving Payne-McCoy's intent to sell drugs, i.e., that she intended to sell drugs because she had done this in the past. Alternatively, jurors could have reasoned that she intended to commit the act that would accomplish the goal implied by her motive—to get money from selling drugs.[19] But because using the evidence to infer her motive depended on propensity reasoning, determining that she intended to accomplish the goal implied by her motive also depended on propensity reasoning. In either case, the jurors could only determine that Payne-McCoy intended to sell drugs by reasoning that she acted in conformity with the bad character trait that the State established through evidence of her previous crimes.

Obviously, then, under rule 403, the potential for unfair prejudice was unacceptably high when the jury considered

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[16] See *Sanchez, supra* note 11.

[17] See *Bell, supra* note 8.

[18] See *Sanchez, supra* note 11.

[19] See 22 Wright & Graham, *supra* note 3, § 5240.

the evidence for motive or intent. And the court specifically admonished the jury that it should consider the evidence for these purposes. No final written instruction corrected its instruction during trial.

Because the jurors could find the evidence of the previous transactions relevant to motive or intent only by relying on propensity reasoning, I believe that the court's error could be harmless only if other evidence overwhelmingly established Payne-McCoy's guilt.[20] Instead, however, the rule 404(2) evidence was the State's strongest evidence of Payne-McCoy's guilt. So I do not believe that the error was harmless.

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[20] See, *U.S. v. Davis*, 547 F.3d 520 (6th Cir. 2008); *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

STATE OF NEBRASKA, APPELLEE, V. LEODAN ALARCON-CHAVEZ, APPELLANT.

821 N.W.2d 359

Filed August 17, 2012. No. S-11-779.

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. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
3. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
4. **Trial: Prosecuting Attorneys.** Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.
5. **Trial: Prosecuting Attorneys: Juries.** Prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and

impartial trial, and prosecutors are not to inflame the prejudices or excite the passions of the jury against the accused.

6. ____: ____: ____. A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.
7. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.
8. **Trial: Prosecuting Attorneys: Appeal and Error.** When a prosecutor's conduct was improper, an appellate court considers the following factors in determining whether the conduct prejudiced the defendant's right to a fair trial: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury, (2) whether the conduct or remarks were extensive or isolated, (3) whether defense counsel invited the remarks, (4) whether the court provided a curative instruction, and (5) the strength of the evidence supporting the conviction.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed.

Melissa A. Wentling, Madison County Public Defender, Kyle M. Melia, and Todd W. Lancaster, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

PER CURIAM.

Maria Villarreal died after sustaining multiple stab wounds on March 10, 2010. Leodan Alarcon-Chavez was convicted of first degree murder, use of a deadly weapon to commit a felony, and tampering with a witness. In this direct appeal, Alarcon-Chavez contends that the district court erred in overruling his motion to suppress evidence and in giving a jury instruction that incorrectly stated the law. He also asserts that the prosecutor's closing remarks were so inflammatory that reversal under the plain error standard is warranted. We affirm.

BACKGROUND

EVENTS PRIOR TO STABBING

Alarcon-Chavez and Villarreal began dating and moved into an apartment together in January 2009. Alarcon-Chavez was

the sole leaseholder for their apartment, which was located in Norfolk, Nebraska. Their relationship ended after Alarcon-Chavez informed Villarreal that he was seeing another woman. After the breakup, Villarreal stayed in the apartment and Alarcon-Chavez moved in with a friend. While he was living with his friend, Villarreal called to threaten him on several occasions. Once, she told him that her boyfriend would "adjust accounts" with him.

On two occasions when he knew Villarreal would not be present, Alarcon-Chavez went back to the apartment he had shared with Villarreal. One time, he noticed another man's clothes.

In late February 2010, Villarreal began dating Aniel Campo Pino, and he moved into the apartment with Villarreal and her 3-year-old son.

On March 9, 2010, Alarcon-Chavez saw Villarreal and Pino at a store. Alarcon-Chavez returned to his friend's house around 7 p.m. and began consuming alcohol. Around 11 p.m., he drove across town to Wal-Mart to purchase more beer. While at Wal-Mart, Alarcon-Chavez saw a set of Sunbeam knives, and he testified he decided to purchase them for cooking purposes. He purchased the knives and beer just after 11:30 p.m. He returned to his friend's house and took the beer inside, but left the knife set in the vehicle.

Alarcon-Chavez knew Villarreal went to work early in the morning. So, around 5 a.m. on March 10, 2010, he drove to the apartment where Villarreal was living. He testified that he intended to tell Villarreal and Pino to get out of his apartment. He explained he did not want to live with his friend anymore because he had been sleeping on the floor and using clothes for a pillow.

Stabbing

Alarcon-Chavez arrived at the apartment around 5:10 or 5:20 a.m. He initially got out of the vehicle, but then, after remembering Villarreal's threat that Pino would "adjust accounts" with him, reentered it. Alarcon-Chavez then remembered the knife set, so he opened the package with his teeth and concealed one of the knives on his body.

Alarcon-Chavez entered the apartment and found Villarreal in the kitchen making her lunch. She had a knife in her hand. Villarreal came toward Alarcon-Chavez and grabbed his body and somehow dropped the knife. She was holding Alarcon-Chavez and yelling for the police and for Pino, and Alarcon-Chavez was struggling to escape her grip. Fearing that Pino would attack him, he drew the knife he had concealed on his body. Alarcon-Chavez and Villarreal continued to struggle, and as he tried to get loose, he stabbed Villarreal in the abdomen. Alarcon-Chavez did not remember stabbing her anywhere else. After the stabbing, Villarreal sat on the floor and leaned back onto the carpet. Alarcon-Chavez then heard someone coming and locked the door.

Pino had gone outside before Alarcon-Chavez arrived. He went back to the apartment after he heard Villarreal scream. When he arrived, the door was locked. Villarreal was screaming that he should not come in because a man was stabbing her. Pino told Alarcon-Chavez to come out of the apartment so he could help Villarreal, but Alarcon-Chavez did not respond. Pino left for a few minutes to give Alarcon-Chavez an opportunity to leave, but Alarcon-Chavez was still inside when Pino returned. Pino heard Villarreal saying, "Leo, don't kill me, Leo, don't kill me." Alarcon-Chavez then told Villarreal he was going to kill her and said, "I told you not to leave me because if you did this was going to happen to you." Pino told a neighbor to call the police and then retrieved a friend.

Police officers were dispatched to the apartment. One officer knocked at 6:06 a.m. and tried unsuccessfully to open the door. An officer standing outside of the apartment activated a tape recorder. Villarreal can be heard on the recording pleading for help. She told Alarcon-Chavez to go away and not to kill her. She said that she had been stabbed five times and that Alarcon-Chavez was still in the apartment with her. The recording also revealed numerous expressions of pain from Villarreal, several of which occurred just before the officers entered the apartment. Alarcon-Chavez testified that Villarreal was not asking him not to kill her, but, rather, was begging him not to kill himself.

When another officer arrived, he knocked and announced his presence and tried to open the door. Either Pino or his friend told the officers they needed to get inside. The officers entered the apartment by kicking the door several times. When the officers opened the door, they observed Alarcon-Chavez standing over Villarreal's body with a knife in each hand. Alarcon-Chavez was shot with an electric stun gun and handcuffed. He was covered in blood. As Alarcon-Chavez was being taken out of the apartment, Pino's friend asked him "why [he] didn't do this to [Pino and his friend]," and he responded that "he didn't want to do any harm to [them], the problem wasn't with [them]."

Although she was obviously in pain, Villarreal was alert, coherent, and talking when the officers first entered the apartment. Within a few minutes, her color turned to an ash gray and she stopped speaking. There was a large amount of blood around her. She died as a result of multiple stab wounds. Her most traumatic wound traversed the upper right side of her abdomen. The cut went through the right lobe of her liver and pierced her inferior vena cava. The wound caused a massive intra-abdominal hemorrhage. She also had stab wounds on the right side of her back, on her right tricep, and under her left armpit. She had several deep cuts on her hands which were described at trial by one of the officers as classic defense wounds. The officer explained, "[I]f somebody is attacking you with a knife, your natural reaction is to protect your body [by] bring[ing] your hands up."

Investigation

Several items from the crime scene underwent DNA testing. Villarreal was included as a match for blood found on two knives discovered at the scene, and testing revealed an infinitely low possibility that the blood belonged to anyone else. Villarreal was also a match for blood found on a blue shirt Alarcon-Chavez was wearing at the time of his arrest. Blood found on the shirt also revealed a single male profile. While this blood was never compared with the blood of Alarcon-Chavez, one officer opined that the blood came from Alarcon-Chavez' being shot with the electric stun gun, which would

have penetrated his skin. There were no defensive wounds on Alarcon-Chavez' hands.

Officers learned that a vehicle parked outside the apartment belonged to Alarcon-Chavez. By looking through the window, an officer saw a package for three Sunbeam knives protruding from a Wal-Mart bag; one of the knives was missing. An officer believed that a knife found inside the apartment was the missing knife. After discussing with the prosecutor what was observed in the vehicle, officers decided to tow the vehicle without first obtaining a warrant. Department policy permitted the officers to seize the vehicle and later obtain a search warrant. The vehicle was transported and secured in the Norfolk Police Division's sally port, and a search warrant was obtained.

The following items were recovered from the vehicle: a knife; a package of three knives in a Wal-Mart bag with the middle knife missing; an unbent piece of plastic, which appeared to be cut from the package of knives; a barbell; a baseball bat; a warning citation for speeding; a purchase contract showing the vehicle was purchased on March 7, 2010; and another Wal-Mart bag with a holder for jumper cables. The State charged Alarcon-Chavez with murder in the first degree, use of a deadly weapon to commit a felony, and tampering with a witness. The latter charge was based upon an incident between Alarcon-Chavez and Villarreal for which Alarcon-Chavez was charged with terroristic threats and use of a weapon to commit a felony.

Motion to Suppress

Alarcon-Chavez moved to suppress all physical evidence seized by the officers during the search of his vehicle, and following a hearing, the court made the following factual findings:

> Officers were called to an apartment where [Villarreal] was found with multiple stab wounds. [Alarcon-Chavez] was present in the apartment in the possession of a knife and was arrested. Law enforcement officers were directed to an automobile in the apartment parking lot. A three-knife set was in plain view in the vehicle in which

one knife was missing. The knife recovered at the apartment appeared to be part of that set. The vehicle was then impounded and transported into police custody. A search warrant was obtained the next day and the car was searched.

Based upon this evidence, the district court concluded that the officers had probable cause to seize the vehicle. The court reasoned that because the officers had probable cause to conduct a warrantless search of the vehicle, they were also authorized to seize the vehicle and to search it after obtaining a warrant. Accordingly, the court denied the motion to suppress.

Trial and Jury Instructions

A jury trial was held from June 13 to 16, 2011. At the jury instruction conference, the court proposed giving NJI2d Crim. 3.1, the standard step instruction defining the elements of first degree murder, second degree murder, and manslaughter, in that order. Alarcon-Chavez objected to the proposed instruction.

Alarcon-Chavez' proposed instruction did not challenge the elements of the crimes. Rather, it contested the order in which the jury was to consider them. The court overruled Alarcon-Chavez' objection, reasoning that the jury was required to read all instructions in connection with one another and that the instructions adequately informed the jury there were three levels of homicide.

Closing Arguments

During closing argument, the State discussed Alarcon-Chavez' credibility and truthfulness. The prosecutor questioned Alarcon-Chavez' claim that he opened the package of knives with his teeth, arguing the evidence showed it was cut open. The prosecutor asserted that the knife purchase was not a spontaneous decision, as claimed by Alarcon-Chavez, and that Alarcon-Chavez did not go back to the apartment for the purpose of telling Villarreal and Pino to leave. The prosecutor called Alarcon-Chavez' claim that Villarreal was begging for him not to kill himself "absolutely preposterous and insulting." The prosecutor also likened the case to

the O.J. Simpson case. In concluding, the prosecutor said, "[T]he defense told you to focus on credibility. But they call [Alarcon-Chavez] anyway."

When Alarcon-Chavez' defense attorney began his closing argument, he told the jury he would not go through all the evidence or "sit and read [the jury] instructions." One of the prosecutor's first statements in rebuttal was that it was smart for the defense not to discuss the evidence or the jury instructions very much because both essentially said to "go back and find [Alarcon-Chavez] guilty." The prosecutor asked the jury to be "fair to dead people" and again challenged Alarcon-Chavez' credibility, commenting, "You saw him lying."

Finally, the prosecutor told a story about General Anthony McAuliffe's being informed that he was surrounded and that he should surrender. McAuliffe responded, "'Nuts,'" and when General George Patton learned of the response, he said, "[A] man that eloquent has to be saved." Turning back to the case, the prosecutor asked, "[W]hat do you say to this crazy theory[?]" and stated, "What you're going to have to do is go back there and fill out guilty. That is the most eloquent answer you can give, and that is the short answer, the same answer [General] McAuliffe would have given." Alarcon-Chavez did not object to any of the prosecutor's closing remarks.

Verdict and Sentencing

Alarcon-Chavez was found guilty on all counts. He was sentenced to life imprisonment, with credit for 534 days of time served, for murder in the first degree; to an indeterminate term of not less than 19 nor more than 20 years' imprisonment for use of a deadly weapon to commit a felony; and to an indeterminate term of not less than 1 nor more than 2 years' imprisonment for tampering with a witness. The sentences were to run consecutively. Alarcon-Chavez timely appealed.

ASSIGNMENTS OF ERROR

Alarcon-Chavez assigns the district court erred in denying his motion to suppress and in failing to give his proposed jury instruction. He also assigns that reversal is warranted under the plain error standard due to the prosecutor's closing remarks.

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.[1] Regarding historical facts, we review the trial court's findings for clear error.[2] 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.[3]

[2] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.[4]

ANALYSIS

Motion to Suppress

Alarcon-Chavez asserts the district court erred in finding it was lawful for the officers to seize his vehicle without a warrant. The district court relied on *Chambers v. Maroney*[5] and *State v. Franklin*[6] in concluding that the officers could lawfully seize the vehicle and then search it at a later time after obtaining a warrant.

In *Chambers*, a gas station was robbed by two men. Witnesses described the clothing of the robbers and a vehicle which sped away just after the robbery. Within an hour, police stopped a vehicle fitting the description, occupied by men wearing the described clothing. The occupants were arrested, and police drove the vehicle to the station and searched it without a warrant.

The U.S. Supreme Court first recognized:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting

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[1] *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012).

[2] *Id.*

[3] *Id.*

[4] *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

[5] *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970).

[6] *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975).

> the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.[7]

The Court then reasoned that the vehicle could have been searched when stopped because there was probable cause to search it and it was readily mobile. The Court held the warrantless search was valid because both factors still existed at the station house.

In *Franklin*, the defendant was arrested as he approached and entered a vehicle on a public street. Officers began to search the vehicle, but after a disturbance, the vehicle was towed to the police lot and the search continued. Partly relying on *Chambers*, we upheld the entire search. We opined that if there is "probable cause for the arrest of an accused in his motor vehicle on a public highway" and "probable cause for the search of the vehicle at that time, a search a short time later while the vehicle is still in police custody is not unreasonable even though made without a warrant."[8]

Alarcon-Chavez argues the district court erred in relying on *Chambers* and *Franklin* because the defendants in those cases were arrested in their motor vehicles in public areas, whereas he was arrested inside the apartment and the vehicle was parked on private property. To support the distinction he draws between a seizure of a vehicle on private property and one on public property, he relies on *Coolidge v. New Hampshire*.[9] There, the U.S. Supreme Court held that exigent circumstances were required for the automobile exception to apply and that no such circumstances existed because officers developed probable cause well before the warrantless search, the vehicle was parked in the defendant's driveway, the objects sought from the vehicle were neither dangerous nor stolen, and the suspect was not fleeing the area.

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[7] *Chambers, supra* note 5, 399 U.S. at 52.

[8] *Franklin, supra* note 6, 194 Neb. at 642, 234 N.W.2d at 617.

[9] *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), *overruled on other grounds, Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990).

The U.S. Court of Appeals for the Fourth Circuit addressed similar arguments in *U.S. v. Brookins*.[10] Officers were patrolling open-air drug markets when they observed a vehicle backing into a driveway. They saw the defendant and another man standing near the vehicle. The defendant reached into the vehicle and then handed the other man a clear plastic sandwich bag. Both men then speedily walked away from the vehicle, and the plastic bag was discarded. Upon inspection, the bag contained 26 small rocks of "suspected crack cocaine."[11] The defendant was arrested nearby.

The defendant's wife fled the scene in the vehicle, which officers found about 15 minutes later in the driveway of a residence belonging to her mother. Police obtained the keys and in subsequent warrantless searches recovered several items of evidentiary value. The defendant's motion to suppress was granted. The district court found that the automobile exception, which allows law enforcement officers to search a vehicle without a warrant under certain circumstances, did not justify the warrantless search because the vehicle was not readily mobile.

On appeal, the Fourth Circuit reversed. The court rejected the defendant's argument that under *Coolidge*,[12] the automobile exception would never apply to a vehicle situated on private, residential property. The court noted that in an opinion[13] postdating *Coolidge*, the U.S. Supreme Court held that the automobile exception has no separate exigency requirement and applies if the vehicle is readily mobile and probable cause exists to believe it contains contraband. The Fourth Circuit found that the two requisites were met and that therefore, the automobile exception justified the warrantless search.

The Fourth Circuit also discussed the district court's determination that for a search to come within the holding of

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[10] *U.S. v. Brookins*, 345 F.3d 231 (4th Cir. 2003).

[11] *Id.* at 233.

[12] *Coolidge, supra* note 9.

[13] *Maryland v. Dyson*, 527 U.S. 465, 119 S. Ct. 2013, 144 L. Ed. 2d 442 (1999).

Chambers,[14] the seizure must occur immediately incident to arrest. In rejecting this determination, the Fourth Circuit opined that although *Chambers* involved a situation in which the vehicle was seized immediately after an arrest, "the reasoning supporting the subsequent search was that probable cause still obtained."[15] The court then held that the seizure and subsequent searches were lawful because the officers had probable cause to search the vehicle without obtaining a warrant.

The facts Alarcon-Chavez relies upon to distinguish *Chambers* are of no consequence. He argues that probable cause alone was not sufficient to support the seizure of his vehicle, because his vehicle was located on private property and he was not arrested in his vehicle following a traffic stop. But *Brookins*[16] also involved a seizure of a vehicle from private property and an arrest that occurred away from the vehicle that did not follow a traffic stop. The search in *Brookins* was upheld because the vehicle was readily movable, the officers had probable cause to search the vehicle at the time it was discovered, and the probable cause factor still obtained at the time of the search.

The pertinent inquiry in this case, which differs from *Brookins* in that the officers obtained a warrant before searching Alarcon-Chavez' vehicle, is whether officers could have immediately searched the vehicle without a warrant.[17] That is determined by whether the vehicle was readily mobile and the officers had probable cause to believe the vehicle contained contraband or evidence of a crime.[18]

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[14] *Chambers, supra* note 5.

[15] *Brookins, supra* note 10, 345 F.3d at 238.

[16] *Brookins, supra* note 10.

[17] See *Chambers, supra* note 5 (opining that if there is probable cause to conduct immediate warrantless search of vehicle, it is constitutionally permissible to seize and hold vehicle until warrant is obtained).

[18] See, *Dyson, supra* note 13; *U.S. v. Claude X*, 648 F.3d 599 (8th Cir. 2011); *U.S. v. Kennedy*, 427 F.3d 1136 (8th Cir. 2005); *Brookins, supra* note 10; *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996); *State v. Sanders*, 15 Neb. App. 554, 733 N.W.2d 197 (2007).

Both requisites were met in this case. The vehicle was operational and therefore readily movable. Probable cause supported an at-the-scene search because officers knew Villarreal had been severely injured with a knife, a Sunbeam knife was found in the apartment, and a set of Sunbeam knives with one knife missing was clearly visible from outside of the vehicle. Given probable cause to search the vehicle in the parking lot of the apartment, it was equally permissible for the officers to tow the vehicle and later obtain a warrant. We therefore conclude the district court did not err in overruling Alarcon-Chavez' motion to suppress.

Jury Instructions

Alarcon-Chavez argues that under *State v. Smith*,[19] his murder conviction must be reversed because the jury instruction on manslaughter did not require the State to prove that the killing was not the result of a sudden quarrel. We assume without deciding that Alarcon-Chavez' objection to the instruction was sufficient to preserve this issue for our review.

In *Smith*, we found a jury instruction erroneous because it required the jury to convict on second degree murder if it found the killing was intentional and because the instruction did not permit the jury to consider the alternative possibility that the killing was intentional but provoked by a sudden quarrel. The jury instruction here is substantially similar to the one given in *Smith*.

Despite Alarcon-Chavez' contentions, this is not a structural error requiring automatic reversal. In *Smith*, we classified the error as trial error and noted:

> 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. The appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[20]

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[19] *Smith, supra* note 4.

[20] *Id.* at 734-35, 806 N.W.2d at 394.

We concluded in *Smith* that the defendant failed to meet his burden because the evidence was insufficient for a jury to reasonably conclude that provocation existed so as to justify an instruction on sudden quarrel manslaughter.

We reach the same conclusion here, although for a slightly different reason. The jury was instructed that it could return one of several verdicts: guilty of first degree murder, guilty of second degree murder, guilty of manslaughter, or not guilty. From these, the jury convicted Alarcon-Chavez of first degree murder.

We have held that a defendant convicted of first degree murder under a step instruction cannot be prejudiced by any error in the instructions on second degree murder or manslaughter because under the step instruction, the jury would not have reached those levels of homicide.[21] And other courts have also concluded that when a jury is instructed on first and second degree murder and the defendant is found guilty of first degree murder, any error in the instruction for manslaughter or any improper failure to instruct the jury on manslaughter does not require reversal.[22]

Here, the jury considered how Villarreal's death occurred and concluded Alarcon-Chavez killed her purposely and with deliberate and premeditated malice. In so concluding, the jury necessarily considered and rejected that the killing was the result of provocation and was therefore without malice. The jury found the evidence met the elements of first degree murder. Under these circumstances where the jury found that premeditation, intent, and malice existed beyond a reasonable doubt, Alarcon-Chavez was not prejudiced and his substantial rights were not affected by the manslaughter instruction.

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[21] See *State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005). See, also, *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004).

[22] See, *State v. Soto*, 162 N.H. 708, 34 A.3d 738 (2011); *State v. Yoh*, 180 Vt. 317, 910 A.2d 853 (2006); *State v. Williams*, 977 S.W.2d 101 (Tenn. 1998); *People v. Mullins*, 188 Colo. 23, 532 P.2d 733 (1975); *McNeal v. State*, 67 So. 3d 407 (Fla. App. 2011), *review denied* 77 So. 3d 1254 (Fla. 2011); *State v. Barnes*, 740 S.W.2d 340 (Mo. App. 1987).

PROSECUTORIAL MISCONDUCT

[3] Alarcon-Chavez argues that the prosecutor's closing remarks deprived him of his right to a fair trial and that reversal under the plain error standard is proper. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.[23] The U.S. Supreme Court has noted that "the plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'"[24]

[4-8] Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.[25] Prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and impartial trial, and prosecutors are not to inflame the prejudices or excite the passions of the jury against the accused.[26] A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.[27] Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.[28] When a prosecutor's conduct was improper, this court considers the following factors in determining whether the conduct prejudiced the defendant's right to a fair trial: (1) the degree to which the prosecutor's conduct or remarks tended to

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[23] *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[24] *United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). Accord *Barfield, supra* note 23.

[25] See *State v. Gresham*, 276 Neb. 187, 752 N.W.2d 571 (2008).

[26] *Id.*

[27] *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

[28] *Id.*

mislead or unduly influence the jury, (2) whether the conduct or remarks were extensive or isolated, (3) whether defense counsel invited the remarks, (4) whether the court provided a curative instruction, and (5) the strength of the evidence supporting the conviction.[29]

Alarcon-Chavez relies on *State v. Barfield*,[30] in which this court held under the plain error standard that a prosecutor's statements during closing arguments required reversal and a new trial. In closing arguments, the prosecutor referred to the defendant as a "'vicious dictator,'" a "'tower of terror,'" a "'two-headed hydra,'" a "'monster of mayhem,'" and a "'king of killers.'"[31] As a part of the defense's closing argument, the defense attorney read the definition of "lie" from a dictionary. On rebuttal, the prosecutor's first statement to the jury was as follows:

> "You know, in 20 years as a prosecutor the hardest thing I think I've had to do is sit there with a straight face when a criminal defense lawyer had to look up the definition of 'lie' in a dictionary. Why, I thought that was printed on the back of their business cards."[32]

We concluded that these comments were "clearly improper"[33] and that to leave such conduct uncorrected would result in damage to the integrity, reputation, and fairness of the judicial process. We noted that the prosecutor's comments were "of a very serious nature" and that "the prosecutor's unacceptable remarks" did not "reflect a single, isolated instance, but were numerous."[34] After finding the evidence was not overwhelming against the defendant, we determined a retrial was necessary.

Alarcon-Chavez asserts that the prosecutor improperly described portions of his testimony as untruthful. At one

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[29] See *id.*

[30] *Barfield, supra* note 23.

[31] *Id.* at 512, 723 N.W.2d at 313.

[32] *Id.* at 514, 723 N.W.2d at 314.

[33] *Id.* at 511, 723 N.W.2d at 312.

[34] *Id.* at 515, 723 N.W.2d at 315.

point, the prosecutor questioned Alarcon-Chavez' claim that he opened the knife set using his teeth. But this statement was not improper because it was supported by evidence adduced at trial[35] which showed the set was cut open. The prosecutor also argued that the knife set was purchased with the purpose of killing Villarreal and that Alarcon-Chavez did not return to the apartment simply to reclaim the premises. These statements are also not improper, because evidence supported them. Specifically, Alarcon-Chavez purchased the knife set less than 6 hours before entering the apartment and stabbing Villarreal, and although he brought the beer into his friend's apartment, he left the knife set in his vehicle. Pino overheard Alarcon-Chavez tell Villarreal he was going to kill her and overheard him say, "I told you not to leave me because if you did this was going to happen to you." A reasonable inference from this evidence is that Alarcon-Chavez purchased the knives, and later entered the apartment, for the purpose of killing Villarreal.

The prosecutor also called Alarcon-Chavez' claim that Villarreal was begging for him not to kill himself "absolutely preposterous and insulting." Evidence supported this because nothing from the tape recording indicated that Villarreal was begging Alarcon-Chavez not to kill himself, and, rather, the evidence showed that Villarreal was begging for her own life.

Alarcon-Chavez also challenges the prosecutor's statements, "[T]he defense told you to focus on credibility. But they call [Alarcon-Chavez] anyway" and "You saw [Alarcon-Chavez] lying." He asserts these also were improper attacks on his credibility. The first comment came after the prosecutor had detailed specific examples of evidence that contradicted Alarcon-Chavez' testimony. And following the second statement, the prosecutor gave an example of where other evidence contradicted Alarcon-Chavez' testimony. Viewed in context, these comments simply summarized the prosecutor's remarks

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[35] See, *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006) (stating that prosecutor's argument must be based on evidence); *State v. Swillie*, 240 Neb. 740, 484 N.W.2d 93 (1992) (opining that it is not prejudicial for prosecutor to make remarks based on deductions and inferences drawn from evidence).

concerning the inconsistencies between Alarcon-Chavez' testimony and other evidence and were not improper.

The remainder of the challenged comments consist of the prosecutor's story about General McAuliffe, the request to the jury to be "fair to dead people," the prosecutor's likening the case to the O.J. Simpson case, and the prosecutor's statement early in rebuttal that it was smart for the defense not to discuss the evidence or the jury instructions very much because they essentially said to "go back and find [Alarcon-Chavez] guilty." Even assuming these comments were improper, it cannot be said that they prejudiced Alarcon-Chavez. These were a few isolated comments in a long closing argument and rebuttal, and the evidence that the murder was premeditated and deliberate was, as described earlier, plenary.

Moreover, any resulting prejudice to Alarcon-Chavez was not of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, and fairness of the judicial process. The comments from *Barfield*[36] that met that standard were repetitive, clearly improper, and quite egregious. The comments at issue here simply do not rise to that level.

CONCLUSION

For the reasons discussed, we conclude Alarcon-Chavez' assignments of error are without merit, and we affirm his convictions.

AFFIRMED.

STEPHAN, J., participating on briefs.
HEAVICAN, C.J., not participating.

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[36] *Barfield, supra* note 23.

IN RE INTEREST OF ERICK M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ERICK M., APPELLANT.

820 N.W.2d 639

Filed September 14, 2012. No. S-11-919.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
2. ____: ____. Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
3. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous.
4. ____: ____: ____: ____. An appellate court can examine an act's legislative history when a statute is ambiguous.
5. **Statutes.** A statute is ambiguous if it is susceptible of more than one reasonable interpretation.
6. **Juvenile Courts: Judgments: Abandonment: Proof.** For obtaining special immigrant juvenile status under 8 U.S.C. § 1101(a)(27)(J) (Supp. IV 2010), a petitioner can show an absent parent's abandonment by proof that the juvenile has never known that parent or has received only sporadic contact and support from that parent for a significant period.
7. **Juvenile Courts: Judgments: Child Custody: Proof.** If a juvenile lives with only one parent when a juvenile court enters a guardianship or dependency order, the reunification component under 8 U.S.C. § 1101(a)(27)(J) (Supp. IV 2010) is not satisfied if a petitioner fails to show that it is not feasible to return the juvenile to the parent who had custody.
8. **Juvenile Courts: Judgments: Evidence.** If a juvenile alien's absent parent has abused, neglected, or abandoned the juvenile, a petitioner seeking special immigrant juvenile status for the juvenile should offer evidence on this issue. Thus, when ruling on a petitioner's motion for an eligibility order under 8 U.S.C. § 1101(a)(27)(J) (Supp. IV 2010), a court should generally consider whether reunification with either parent is feasible.

Appeal from the Separate Juvenile Court of Lancaster County: LINDA S. PORTER, Judge. Affirmed.

Kevin Ruser, of University of Nebraska Civil Clinical Law Program, and Amanda M. Civic, Senior Certified Law Student, for appellant.

John C. McQuinn, Chief Lincoln City Prosecutor, for appellee.

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

CONNOLLY, J.

SUMMARY

Erick M., a juvenile, requested that the juvenile court issue an order finding that under 8 U.S.C. § 1101(a)(27)(J) (Supp. IV 2010), he was eligible for "special immigrant juvenile" (SIJ) status. SIJ status allows a juvenile immigrant to remain in the United States and seek lawful permanent resident status if federal authorities conclude that the statutory conditions are met.[1] Under § 1101(a)(27)(J)(i), the conditions include a state court order determining that the juvenile's reunification with "1 or both" parents is not feasible because of abuse, neglect, or abandonment.[2] The juvenile court found that Erick did not satisfy that statutory requirement. Erick appeals.

The crux of this appeal is the meaning of the phrase "1 or both" parents under § 1101(a)(27)(J)(i). We conclude that Congress wanted to give state courts and federal authorities flexibility to consider a juvenile's family circumstances in determining whether reunification with the juvenile's parent or parents is feasible. Erick lived with only his mother when the juvenile court adjudicated him as a dependent. So the juvenile court did not err in finding that because reunification with Erick's mother was feasible, he was not eligible for SIJ status. We affirm.

BACKGROUND

SIJ STATUS

Under § 1101(a)(27)(J), a juvenile's petition for SIJ status must include a juvenile court order showing that the juvenile satisfies the statutory criteria.[3] The court's findings in an "eligibility order" are a prerequisite to SIJ status, but they are not

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[1] See, *Zheng v. Pogash*, 416 F. Supp. 2d 550 (S.D. Tex. 2006); *F.L. v. Thompson*, 293 F. Supp. 2d 86 (D.D.C. 2003); *Yu v. Brown*, 36 F. Supp. 2d 922 (D.N.M. 1999). See, also, 8 U.S.C. § 1255(h) (Supp. IV 2010).

[2] See 8 C.F.R. § 204.11(d) (2012).

[3] See *id*.

binding on federal authorities' discretion whether to grant a petition for SIJ status.[4]

There are two eligibility provisions under § 1101(a)(27)(J), which we will refer to as "the reunification and best interest components." Subparagraph (i) is the reunification component and has two requirements: (1) The juvenile must be one whom a state juvenile court has determined to be a dependent, *or* has committed to or placed under the custody of a state agency or department, *or* has committed to or placed with an individual or entity appointed by the state or court; and (2) "reunification with *1 or both* of the immigrant's parents [must not be] viable due to abuse, neglect, abandonment, or a similar basis found under State law."[5]

Subparagraph (ii) is the best interest component. It requires a judicial or administrative finding that "it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence."[6] If a state court finds that both of the eligibility components are satisfied, then federal authorities may grant a petition for SIJ status.[7]

The Facts of Erick's Case

Here, the juvenile court adjudicated Erick and committed him to the care and custody of a state agency. The court committed him to the Office of Juvenile Services (OJS) in December 2010 because of two charges of being a minor in possession of alcohol. The court initially placed him in a residential treatment center. In July 2011, the juvenile court heard OJS' motion to transfer Erick to the Youth Rehabilitation and Treatment Center in Kearney, Nebraska. While in the residential treatment center, Erick had continually disappeared from the residential center, used alcohol and drugs, committed

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[4] See § 1101(a)(27)(J)(iii).

[5] § 1101(a)(27)(J)(i) (emphasis supplied).

[6] See § 1101(a)(27)(J)(ii).

[7] See § 1101(a)(27)(J)(iii).

law violations, and threatened staff. Erick did not resist the motion for more restrictive custody, but his attorney stated that Erick's goal was to "get back home" and work on a rehabilitation program from there. The court sustained the motion for the transfer.

In September 2011, the court heard Erick's motion for an eligibility order for SIJ status. Erick's family permanency specialist testified that she had no contact information for Erick's father. In fact, she did not know whether paternity had ever been established. She said Erick was unsure whether his father was in Mexico or New York. She anticipated that she would continue to work with Erick's mother after OJS released Erick from the Youth Rehabilitation and Treatment Center in Kearney. She did not know of any reports or investigations of abuse or neglect by Erick's mother.

Erick's mother testified that she did not know where Erick's father was and had not spoken to him in many years. She had never been accused of abusing or neglecting Erick.

The court overruled Erick's motion for an eligibility order. It found that the first requirement was met because Erick was committed to a state agency or department. But the court found that the facts failed to show that reunification with Erick's mother was not viable because of abuse, neglect, or abandonment. The court found that (1) it had removed Erick from his home because of his alcohol abuse and he had never been removed from his mother's home because of abuse, neglect, or abandonment; (2) Erick's mother had been present at almost every hearing; (3) Erick had lived with her before the court committed him to OJS; and (4) no evidence showed that he would not be returned to his mother when he was paroled or discharged from the Youth Rehabilitation and Treatment Center in Kearney.

The court concluded that there was no evidence that Erick's father had ever abused or neglected Erick. It made no findings whether he had abandoned Erick. Because the reunification component was not met, the court did not consider whether return to Erick's country of origin would be in his best interest.

ASSIGNMENT OF ERROR

Erick argues that the court erred in denying his motion for an eligibility order for SIJ status.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, which we review independently of the lower court's determination.[8]

ANALYSIS

As stated, this case hinges on the meaning of the federal statute's requirement that a juvenile court determine that reunification with "1 or both of the immigrant's parents" is not feasible because of abuse, neglect, or abandonment.[9] Both parties argue that the plain language of the statute supports their interpretation.

Erick argues that § 1101(a)(27)(J)(i) requires that he show only that reunification with one parent is not feasible because of abuse, neglect, or abandonment. He contends that by using the word "or" in the phrase "1 or both," Congress intended the statute to be disjunctive. And he argues that the evidence shows his father abandoned him.

The State counters that if Congress had intended that a juvenile could satisfy the statute by showing only that reunification with one parent was not feasible, then it would not have included the words "or both." It contends that Erick's interpretation renders this language superfluous and that Congress did not intend courts to ignore the presence of a parent with whom reunification is feasible. It argues that under Erick's interpretation, a juvenile court would be required to find that the reunification component was satisfied every time the State could not identify or find a juvenile's parent, even when reunification with the other parent was appropriate. In addition, the State argues that the evidence fails to show that Erick's father ever established paternity or abandoned him.

[2-5] Interpreting this statute to reach a legal conclusion presents a challenge. To construe it as something other than

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[8] See *State v. Jimenez*, 283 Neb. 95, 808 N.W.2d 352 (2012).

[9] See § 1101(a)(27)(J)(i).

an indigestible lump, we turn to familiar statutory canons. Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[10] We will not look beyond the statute to determine the legislative intent when the words are plain, direct, or unambiguous.[11] But we can examine an act's legislative history when a statute is ambiguous.[12] A statute is ambiguous if it is susceptible of more than one reasonable interpretation.[13]

Although Erick's argument is reasonable, Congress' use of the word "or" does not necessarily decide the issue in his favor. Because "or" describes what a juvenile court must determine in the alternative, we could also reasonably interpret the phrase "1 or both" parents to mean that a juvenile court must find, depending on the circumstances, that *either* reunification with one parent is not feasible *or* reunification with both parents is not feasible. Unfortunately, there are no related provisions in the act from which we can discern Congress' intent.[14]

It is true that courts will sometimes look to an agency's interpretation of a governing, ambiguous statute for guidance.[15] But here, the proposed regulations for the 2008 amendment to § 1101(a)(27)(J)(i), which is the source of the confusion, have not yet been adopted.[16] And as proposed, they fail

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[10] See *J.M. v. Hobbs*, 281 Neb. 539, 797 N.W.2d 227 (2011).

[11] See, *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012); *State ex rel. Parks v. Council of City of Omaha*, 277 Neb. 919, 766 N.W.2d 134 (2009).

[12] See *State v. Halverstadt*, 282 Neb. 736, 809 N.W.2d 480 (2011).

[13] See *id.* Accord, e.g., *Consolidated Irr. Dist. v. Superior Court*, 205 Cal. App. 4th 697, 140 Cal. Rptr. 3d 622 (2012); *SOCC, P.L. v. State Farm Mut. Auto. Ins. Co.*, No. 5D11-783, 2012 WL 2864384 (Fla. App. July 13, 2012); *County of Du Page v. Illinois Labor Rel.*, 231 Ill. 2d 593, 900 N.E.2d 1095, 326 Ill. Dec. 848 (2008).

[14] See *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810 N.W.2d 149 (2012).

[15] See, *Chase Bank USA, N. A. v. McCoy*, 562 U.S. 195, 131 S. Ct. 871, 178 L. Ed. 2d 716 (2011); *Project Extra Mile, supra* note 14, quoting *Ameritas Life Ins. v. Balka*, 257 Neb. 878, 601 N.W.2d 508 (1999).

[16] See Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54,978 (proposed Sept. 6, 2011).

to clarify the issue that we must decide.[17] Absent any statutory or regulatory guidance, we conclude that the statute is ambiguous because the parties have both presented reasonable, but conflicting, interpretations of its language. And if an ambiguous statute is to make sense, we must read it in the light of some assumed purpose. So we consider the statute's legislative history.

In 2008, Congress amended the eligibility requirements for SIJ status under § 1101(a)(27)(J)(i).[18] Before 2008, subparagraph (i) defined a special immigrant juvenile as one whom a state juvenile court had (1) determined to be a dependent under its jurisdiction, (2) placed in the custody of a state agency or department, and (3) deemed eligible for long-term foster care due to abuse, neglect, or abandonment.[19]

Under the 2008 amendment, the eligibility requirements under subparagraph (i) hinge primarily on a reunification determination. The amendment expanded eligibility to include juvenile immigrants whom a court has committed to or placed in the custody of an individual or a state-appointed entity—not just those whom a court has committed to or placed with a state agency or department. In addition, Congress removed the requirement that the juvenile be under the court's jurisdiction because of abuse, neglect, or abandonment. Finally, Congress removed the requirement that a state juvenile court find that a juvenile is eligible for long-term foster care because of abuse, neglect, or abandonment. Instead, a court must find that reunification is not possible because of abuse, neglect, or abandonment.

So under the amended subparagraph (i), a juvenile court no longer needs to find that the juvenile is in the juvenile system because of abuse, neglect, or abandonment. It is sufficient that the court has placed the juvenile with a court-approved individual or entity and that reunification with "1 or both" parents is not feasible because of abuse, neglect, or abandonment. For

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[17] *Id.*

[18] See, Pub. L. No. 110-457 § 235(d)(1), 122 Stat. 5044, 5074 (2008); 8 U.S.C. § 1101(a)(27)(J)(i) (Supp. II 2008).

[19] See § 1101(a)(27)(J)(i) (2006).

example, a juvenile alien could be eligible for SIJ status if a juvenile court has appointed a guardian for the juvenile for any reason and reunification is not feasible because of parental abuse, neglect, or abandonment.[20]

These 2008 changes expanded the pool of juvenile aliens who could apply for SIJ status. But an earlier 1997 amendment to the statute shows that despite this expansion, these juveniles must still be seeking relief from parental abuse, neglect, or abandonment.

We start with the original language. Congress enacted the SIJ statute as part of the Immigration Act of 1990.[21] The original eligibility requirements were a judicial or administrative order determining only that the juvenile alien was dependent on a juvenile court and that it would not be in the juvenile's best interest to be returned to the juvenile's or parent's home country.

In 1997, however, Congress amended § 1101(a)(27)(J) to require that a court, in its order, determine that the juvenile (1) is eligible for long-term foster care "'due to abuse, neglect, or abandonment'" and (2) has been declared a dependent of a juvenile court or committed or placed with a state agency.[22] "Congress intended that the amendment would prevent youths from using this remedy for the purpose of obtaining legal permanent resident status, rather than for the purpose of obtaining relief from abuse or neglect."[23]

Even before the 1997 amendment, immigration authorities interpreted the "eligible for long-term foster care" requirement to mean that "a determination has been made by the juvenile court that family reunification is no longer a viable option."[24]

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[20] See, e.g., *In re* [*Male Juvenile From Honduras*], 2011 WL 7790475 (U.S. Dept. of Just., Imm. & Nat. Serv., Admin. App. Ofc., Mar. 28, 2011); *In re* [*Male Juvenile From Mexico*], 2011 WL 7790423 (U.S. Dept. of Just., Imm. & Nat. Serv., Admin. App. Ofc., Mar. 15, 2011).

[21] See Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005 (1990).

[22] Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460 (1997).

[23] See 3 Charles Gordon et al., Immigration Law and Procedure § 35.09[1] at 35-36 (rev. ed. 2011), citing H.R. Rep. No. 105-405 (1997) (Conf. Rep.).

[24] 8 C.F.R. § 204.11(a) (1996).

Since 1997, however, that determination must be specifically tied to parental abuse, neglect, or abandonment. And guidance memorandums from the operational directors of the U.S. Citizenship and Immigration Services (USCIS) to field directors show that protecting the juvenile from parental abuse, neglect, or abandonment must be the petitioner's primary purpose. USCIS will not consent to a petition for SIJ status if it was "'sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment.'"[25]

Moreover, administrative appeal decisions from the denial of petitions for SIJ status illustrate how USCIS applies the requirement that a juvenile court find that reunification with "1 or both" parents is not feasible. We recognize that only designated decisions rendered in administrative appeals are published and considered binding precedent on immigration officials.[26] But USCIS' unpublished decisions nonetheless enlighten and confirm our analysis.[27]

A petition for SIJ status is typically filed for two general categories of juveniles: (1) for juvenile aliens who came to the United States without their parents or who began living with someone else soon after coming with their parents[28]; and

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[25] See Memorandum from Donald Neufeld, Acting Assoc. Dir., Dom. Ops., and Pearl Chang, Acting Chief, Ofc. of Policy & Strategy, U.S. Dept. of Homeland Sec., U.S. Citizenship & Imm. Servs., to Field Leadership, No. HQOPS 70/8.5 (Mar. 24, 2009), reprinted in 14 Bender's Immigration Bulletin, No. 10 appx. D at 616 (May 15, 2009). Accord Memorandum from William Yates, Assoc. Dir., Dom. Ops., U.S. Dept. of Homeland Sec., U.S. Citizenship & Imm. Servs., No. HQADN 70/23 (May 27, 2004), reprinted in 9 Bender's Immigration Bulletin, No. 13 appx. A (July 1, 2004).

[26] See 8 C.F.R. § 103.3(c) (2012).

[27] Because USCIS redacts identifying information from its case names, we have substituted descriptive case names for citing them.

[28] See, e.g., *In re Alamgir A.*, 81 A.D.3d 937, 917 N.Y.S.2d 309 (2011); *In re* [*Male Juvenile From Mexico*], *supra* note 20; *In re* [*Male Juvenile From El Salvador*], 2010 WL 4687105 (U.S. Dept. of Just., Imm. & Nat. Serv., Admin. App. Ofc., Mar. 30, 2010).

(2) for juveniles who came to the United States with one or both parents but later became a juvenile court dependent.[29] In either circumstance, if the petitioner shows that the juvenile never knew a parent or that a parent has failed to provide care and support for the juvenile for a significant period, USCIS and courts have agreed that reunification with the absent parent or parents is not feasible because of abandonment.[30]

But even when reunification with an absent parent is not feasible because the juvenile has never known the parent or the parent has abandoned the child, USCIS and juvenile courts generally still consider whether reunification with the known parent is an option.[31] Thus, if the juvenile lives in the United States with only one parent and never knew the other parent, the reunification component is satisfied if reunification with the known parent is not feasible.[32]

We believe that this result shows that the "1 or both" parents rule is consistent with Congress' intent to expand the pool of potential applicants. That is, under the "1 or both" parents rule, a juvenile is not disqualified from SIJ status solely because one parent is unknown or cannot be found and, thus, cannot be excluded from the possibility of reunification.[33]

[6] So we reject the State's argument that Erick was required to show that his father had established paternity before Erick could prove abandonment. Because Erick has lived with only his mother, his family circumstances appear

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[29] See *In re* [*Female Juvenile From Jamaica*], 2010 WL 3426795 (U.S. Dept. of Just., Imm. & Nat. Serv., Admin. App. Ofc., Feb. 26, 2010).

[30] See, *In re Alamgir A.*, *supra* note 28; *In re* [*Male Juvenile From Mexico*], *supra* note 20; *In re* [*Female Juvenile From Mexico*], 2009 WL 6520647 (U.S. Dept. of Just., Imm. & Nat. Serv., Admin. App. Ofc., Oct. 13, 2009).

[31] See, *Trudy-Ann W. v. Joan W.*, 73 A.D.3d 793, 901 N.Y.S.2d 296 (2010); *In re* [*Male Juvenile From Mexico*], *supra* note 20; *In re O.Y.*, slip op., No. 52669(U), 2009 WL 5196007 (N.Y. Fam. Sept. 22, 2009) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 26 Misc. 3d 1205(A), 906 N.Y.S.2d 781 (2009)).

[32] See *In re* [*Female Juvenile From Jamaica*], *supra* note 29.

[33] See Jacqueline Bhabha and Susan Schmidt, *From Kafka to Wilberforce: Is the U.S. Government's Approach to Child Migrants Improving?*, Immigration Briefings (West Feb. 2011).

to fall within Congress' intent that a juvenile court may sometimes focus primarily on whether reunification with only one parent (the custodial parent) is feasible. In accordance with USCIS cases, we hold that for obtaining SIJ status under § 1101(a)(27)(J), a petitioner can show an absent parent's abandonment by proof that the juvenile has never known that parent or has received only sporadic contact and support from that parent for a significant period.[34] Whether an absent parent's parental rights should be terminated is not a factor for obtaining SIJ status.

These cases also illustrate, however, that USCIS does not consider proof of one absent parent to be the end of its inquiry under the reunification component. A petitioner must normally show that reunification with the other parent is also not feasible.[35]

[7] But if a juvenile lives with only one parent when a juvenile court enters a guardianship or dependency order, the reunification component under § 1101(a)(27)(J) is not satisfied if a petitioner fails to show that it is not feasible to return the juvenile to the parent who had custody. This is true without any consideration of whether reunification with the absent parent is feasible[36] because the juvenile has a safe parent to whose custody a court can return the juvenile.

In contrast, if the juvenile was living with both parents before a guardianship or dependency order was issued, reunification with both parents is usually at issue.[37] These varied results are all consistent with Congress' intent that SIJ status be available to only those juveniles who are seeking relief from parental abuse, neglect, or abandonment.

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[34] See cases cited *supra* note 30.

[35] See cases cited *supra* note 31.

[36] See *In re* [*Female Juvenile From Albania*], 2009 WL 6521113 (U.S. Dept. of Just., Imm. & Nat. Serv., Admin. App. Ofc., Oct. 30, 2009). Compare *Tung W.C. v. Sau Y.C.*, 34 Misc. 3d 869, 940 N.Y.S.2d 791 (2011).

[37] See, e.g., *In re Alamgir A., supra* note 28; *Jisun L. v. Young Sun P.*, 75 A.D.3d 510, 905 N.Y.S.2d 633 (2010); *In re* [*Male Juvenile From Haiti*], 2009 WL 6607581 (U.S. Dept. of Just., Imm. & Nat. Serv., Admin. App. Ofc., Nov. 30, 2009).

Erick relies on *In re E.G.*,[38] an unpublished New York decision. We find it unpersuasive. In that case, a 13-year-old boy left his mother and siblings in Guatemala and made his way to the United States, where his biological father lived. The father squandered his wages on alcohol and eventually left the child alone. Social services removed the child from his father's custody when he was almost age 16; an attorney for the child sought an eligibility order for SIJ status. The mother filed an affidavit stating that she wanted her son to stay in the United States because he would have better education and employment opportunities. She also stated that because gang members in Guatemala had threatened him, she feared for his safety if he returned. The family court determined that under the "1 or both" parents language, the child could petition for SIJ status even if he had a fit parent abroad "so long as the minor has been abused, neglected or abandoned by *one* parent."[39]

In re E.G. is distinguishable because the only parent with whom the juvenile was living when the dependency order was issued was the parent who had neglected and abandoned him. Also, the court's order does not show whether his mother had attempted to support or contact him. She did not attempt to intervene in the neglect proceedings. So her absence may have been the equivalent of abandonment. Most important, we disagree with the court's reasoning. Although many parents in other countries might be willing to relinquish custody of their child so the child could remain in the United States, the question for SIJ status is parental abuse, neglect, or abandonment.[40]

So we disagree that when a court determines that a juvenile should not be reunited with the parent with whom he or she has been living, it can disregard whether reunification with an absent parent is not feasible because of abuse, neglect, or

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[38] *In re E.G.*, slip op., No. 51797(U), 2009 WL 253556 (N.Y. Fam. Aug. 14, 2009) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 24 Misc. 3d 1238(A), 899 N.Y.S.2d 59 (2009)).

[39] *Id.* at *3.

[40] See *Yeboah v. U.S. Dept. of Justice*, 345 F.3d 216 (3d Cir. 2003).

abandonment. Although a literal reading of the statute would seem to permit a state court to ignore whether reunification with an absent parent is feasible, in practice, courts and USCIS officials normally consider whether the petitioner has shown that an absent parent abused, neglected, or abandoned the juvenile.

[8] We believe that this is the better rule. If a juvenile alien's absent parent has abused, neglected, or abandoned the juvenile, a petitioner seeking SIJ status for the juvenile should offer evidence on this issue. Thus, when ruling on a petitioner's motion for an eligibility order under § 1101(a)(27)(J), a court should generally consider whether reunification with either parent is feasible.[41]

But this case presents the exception. Because Erick was living with only his mother when the juvenile court adjudicated him, he could not satisfy the reunification component without showing that reunification with his mother was not feasible. Because he failed to satisfy this requirement, the court had no need to consider whether reunification with Erick's father was feasible. We conclude that the juvenile court did not err in concluding that Erick did not satisfy the reunification component. Erick was not seeking SIJ status to escape from parental abuse, neglect, or abandonment. There is no claim that reunification with his mother is not feasible for those reasons.

AFFIRMED.

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[41] See *In re Interest of Luis G.*, 17 Neb. App. 377, 764 N.W.2d 648 (2009).

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DOUGLAS D. PALIK, RESPONDENT.

820 N.W.2d 862

Filed September 21, 2012. No. S-11-257.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. The basic issues in a disciplinary proceeding against an attorney are whether the Nebraska Supreme Court should impose discipline and, if so, the appropriate discipline under the circumstances.
3. ____. Under Neb. Ct. R. § 3-304, the Nebraska Supreme Court may impose one or more of the following disciplines: (1) disbarment; (2) suspension; (3) probation in lieu of or subsequent to suspension, on such terms as the court may designate; or (4) censure and reprimand.
4. ____. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
5. ____. In imposing attorney discipline, the Nebraska Supreme Court evaluates each case in light of its particular facts and circumstances.
6. ____. In determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
7. ____. When determining appropriate discipline, the Nebraska Supreme Court considers aggravating and mitigating factors.
8. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents and justify more serious sanctions.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Douglas D. Palik, pro se.

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

PER CURIAM.

The Counsel for Discipline of the Nebraska Supreme Court (the Relator) filed formal charges against Douglas D. Palik, an attorney licensed since 1984. The Relator alleged that Palik

had lied to the son of a distributee of a will to cover up Palik's procrastination and incompetence in his administration of the estate. The referee recommended that Palik be suspended for 1 year with a 1-year probationary term to follow upon reinstatement. The Relator filed exceptions to the referee's report and argues that this sanction is too lenient. Palik's behavior and the mitigating factors presented convince us that the referee's recommended sanctions are appropriate, provided that Palik makes good on his proffered restitution to both his client and the distributee's son. Assuming that such restitution will be made, we impose a 1-year suspension upon Palik, to be followed by a 1-year term of probation.

BACKGROUND

The Relator's formal charges alleged that Palik violated his oath of office as an attorney[1] and the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communications), 3-504.1 (truthfulness in statements to others), and 3-508.4 (misconduct). Palik admitted to the underlying facts and the violations. The referee found that Palik had violated his oath of office and the professional rules.

Palik has not taken any exceptions to the referee's report. And if no exceptions are taken to the referee's findings of fact, we may consider them final and conclusive.[2] Accordingly, in our presentation of the facts, we draw heavily from the referee's findings of fact.

On March 6, 2007, Blanche Thompson passed away, leaving an estate of $1.7 million. Her will named William Olson as personal representative. Olson hired Palik to assist him in administering the estate, and on May 22, Palik filed a petition for formal probate. On May 23, 2008, over a year later, the county court judge ordered Palik to file an inventory for the estate. Palik filed the inventory on June 25. Along with the

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[1] See Neb. Rev. Stat. § 7-104 (Reissue 2007).

[2] *State ex rel. Counsel for Dis. v. Switzer*, 280 Neb. 815, 790 N.W.2d 433 (2010); Neb. Ct. R. § 3-310(L).

inventory, he also filed a petition for the determination of an inheritance tax and a tax worksheet.

Under Blanche's will, Mary Jane Thompson was to receive $60,000. On about November 9, 2007, Olson gave Palik a check to send to Mary Jane, who lived in Texas. Inexplicably, Palik did not mail this check until June 25, 2008. And he did not tell Olson that he had not sent the check. In fact, the previously mentioned tax worksheet, filed on June 25, stated that Mary Jane had received the money from the estate, which was not true at that time.

At some point after Mary Jane received her check, Palik received a call from Mary Jane's son, Jerome Thompson. Jerome told Palik that Mary Jane, who was elderly, wished to renounce her share so that the $60,000 would pass directly to Jerome. Accordingly, Palik prepared a renunciation document and sent it to Mary Jane. Mary Jane signed the document and returned it to Palik, along with the $60,000 check. Palik, however, did not tell Olson about Mary Jane's wish to renounce her inheritance or the return of the check. Furthermore, Palik seemingly failed to realize that to be effective, Mary Jane had to renounce her share within 9 months of "the date on which the transfer creating the interest in [Mary Jane was] made."[3] Mary Jane and Jerome did not receive the check until over a year after Blanche had died and the will had been admitted to probate, so Mary Jane's renunciation was ineffective.

Nevertheless, on November 20, 2009, Palik told Jerome in an e-mail that he would be sending the new check and provided a tracking number. Palik told Jerome he would contact him on November 23 to ensure that the check had arrived. On November 24, Jerome sent an e-mail to Palik informing him that the check had not arrived and that the carrier could not verify the tracking number that Palik had provided.

The next day, Palik sent Jerome another e-mail. He said that he had just talked to that the carrier and the carrier would call him back regarding the check. Palik told Jerome he would call him back on November 28, 2009. Palik apparently did not call.

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[3] See Neb. Rev. Stat. § 30-2352(b) (Reissue 2008).

On December 3, 2009, Palik e-mailed Jerome, told him that he could pick up the check on the following day, and again provided Jerome with a tracking number. The check did not arrive. On January 13, 2010, Palik again e-mailed Jerome and told him that the carrier would pick up the check on January 14 and that he would have it on January 15. Palik again provided a tracking number.

On January 15, 2010, Palik e-mailed Jerome and told him that the carrier had failed to pick up the package but that he was taking it to the carrier himself. He stated that Jerome would receive the check on January 18. On January 19, Jerome e-mailed Palik and told him that he had not received the check and that the tracking number Palik had provided was invalid.

This routine continued. From February 15 through April 20, 2010, Palik repeatedly e-mailed Jerome with statements promising delivery of the check. On April 30, Palik again provided Jerome with yet another routing number and a delivery date of May 4. On May 25 and again on June 16, Jerome e-mailed Palik to tell him that the check had not arrived and to ask for details. On June 18, Palik responded that he had been out of the office for personal reasons and would call Jerome on June 21. On June 21, Palik e-mailed Jerome. He stated that he would call the next day with a new tracking number. On June 22, Palik e-mailed Jerome to tell him the check would be picked up on June 24 and delivered on June 25. The check never arrived.

Obviously, all of Palik's claims that "the check is in the mail" were lies. The tracking numbers for the nonexistent packages were fabrications by Palik. In fact, Palik had never told Olson that Mary Jane wished to renounce her inheritance and never told Olson of the need to issue a new check to Jerome.

Because the $60,000 that was due to Mary Jane, and later to Jerome, was never given to them, it remained in the estate's bank account. When Olson distributed this account to the residuary beneficiaries of the will, this $60,000 went to them, instead of Jerome.

On November 15, 2010, Jerome filed a grievance with the Relator regarding Palik's failure to deliver the check. Palik responded by telling the Relator that the $60,000 had apparently been distributed to the residuary beneficiaries but that he would meet with Olson. While he did twice meet with Olson, he did not tell Olson about Mary Jane's renunciation, the need to issue a check to Jerome, or Jerome's grievance.

The Relator eventually contacted Olson. Olson told the Relator that Palik had not told him about Mary Jane's renunciation or about Jerome's grievance. Olson said that because Palik had not told him that Mary Jane had not cashed the check, he had distributed her $60,000 to the residuary beneficiaries over a year before. In January 2011, Olson sent $60,000 of his own money to Jerome to cover Jerome's share.

On January 10, 2011, the Relator sent Palik a letter requesting an explanation regarding Jerome's grievance and to provide documents regarding Blanche's estate. Palik did not respond. On February 16, the Relator sent Palik the formal charges. As we have mentioned, Palik admitted them in their entirety.

At the hearing before the referee, Palik was remorseful. Palik, however, neither offered excuses nor explained his behavior. He provided no evidence of mitigating factors to the referee.

An aggravating factor, however, was established. This is not Palik's first run-in with disciplinary authorities. In 2004, Palik received a private reprimand. The reprimand stemmed from a guilty plea to a misdemeanor assault charge that arose from a domestic incident between Palik, his then-wife, and his son.

After a hearing, the referee issued his report. The referee recommended that we suspend Palik for 1 year and then, upon reinstatement, that he be subject to a 1-year term of probation that will include monitoring by a licensed attorney.

At oral argument, we learned that Palik, who was still the attorney of record for Olson and the estate, had not formally closed the estate or reimbursed Olson for the $60,000 that Olson paid to Jerome out of his own pocket. Following oral

argument, however, we granted Palik leave to supplement the record with such evidence, along with any other evidence demonstrating mitigating circumstances. Palik submitted evidence that he had closed the estate, that he had entered into agreements with Olson and Jerome to pay them restitution, and that there were personal circumstances which helped explain (and mitigated) his deceitful and unprofessional behavior.

ASSIGNMENT OF ERROR

The Relator asks that we reject the referee's recommendation of a 1-year suspension and instead impose a 2-year suspension.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record.[4]

ANALYSIS

[2] The basic issues in a disciplinary proceeding against an attorney are whether we should impose discipline and, if so, the appropriate discipline under the circumstances.[5] Palik has admitted to violating the rules and admits that some discipline should be imposed. So we consider only what sanction to impose.

[3] Under Neb. Ct. R. § 3-304, we may impose one or more of the following disciplines: (1) disbarment; (2) suspension; (3) probation in lieu of or subsequent to suspension, on such terms as we may designate; or (4) censure and reprimand.[6]

[4] To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.[7]

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[4] *State ex rel. Counsel for Dis. v. Walocha*, 283 Neb. 474, 811 N.W.2d 174 (2012).

[5] *Id.*

[6] See *id.*

[7] *Id.*

[5,6] In imposing attorney discipline, we evaluate each case in light of its particular facts and circumstances.[8] And we consider the attorney's acts both underlying the events of the case and throughout the proceeding.[9]

[7,8] When determining appropriate discipline, we consider aggravating and mitigating factors.[10] Cumulative acts of attorney misconduct are distinguishable from isolated incidents and justify more serious sanctions.[11] At this point, we note Palik's prior reprimand is an aggravating factor.

Palik's procrastination and foot-dragging occurred before he had sent the check to Mary Jane, and it continued in his dealings with Jerome. A comment to our rules of professional conduct aptly sums up the problem:

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions . . . . Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.[12]

Here, Palik's procrastination prevented Mary Jane from renouncing her share. Even more disturbing though is the months of deceit that he engaged in with Jerome. Time after time, he lied to Jerome, going so far as to fabricate tracking numbers for fictitious packages. Palik's lies were deliberate attempts to mislead Jerome. By the time Palik's smokescreen had cleared, it was too late; there was no money left in the estate to give to Jerome. So Olson paid Jerome $60,000 out of his own pocket.

There is no doubt that Palik utterly failed as an attorney, and such failure is worthy of punishment. But while Palik's actions were egregious violations of his duties as an attorney, Palik has

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[8] *Id.*

[9] See *id.*

[10] *Id.*

[11] See *id.*

[12] § 3-501.3, comment 3.

since done his best to make amends, although belatedly. Palik has also explained that he was beset with personal difficulty during the relevant time, which, while not an excuse, does offer some explanation for his actions.

Palik has entered into an agreement with Olson to repay with interest the money that Olson paid out of his own pocket to cover Jerome's share. Palik has also entered into an agreement to pay interest to Jerome for the delay in receiving Jerome's share of the estate. And Palik has expressed, we believe, genuine remorse for his conduct and has taken responsibility for his actions. These are all mitigating factors in Palik's favor.[13] We note that Palik has informally closed the estate and removed himself as the attorney of record.

Furthermore, Palik has offered as mitigating factors a number of personal problems which occurred when his misconduct took place. Palik suffered from health problems, as did his wife and mother. Palik's stepfather served Palik's mother with divorce papers, for whom Palik had previously drawn up a prenuptial agreement. This caused some conflict in the family. Palik fought with his ex-wife about planning and paying for their children's weddings, and he had strained relationships with his sons to the point where they now rarely speak. We consider these personal problems to be mitigating factors in Palik's favor.[14]

Balancing Palik's unprofessional behavior with his mitigating circumstances leads us to conclude that the referee's recommended punishment is appropriate. We therefore impose the following disciplines: (1) Palik is suspended for 1 year from the practice of law; (2) before Palik may be readmitted, he must present this court with proof that he has fulfilled his agreements with Olson and Jerome; and (3) upon readmission,

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[13] See, e.g., *Switzer, supra* note 2; *State ex rel. Counsel for Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004); *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003); *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001).

[14] See, e.g., *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000); *State ex rel. NSBA v. Simmons*, 259 Neb. 120, 608 N.W.2d 174 (2000).

Palik will be subject to a 1-year probationary term during which he will be supervised by an attorney to be selected by the Relator. In addition, Palik is to comply with Neb. Ct. R. § 3-316 and is subject to contempt of this court if he does not. Further, Palik is to pay the costs of this action in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and § 3-310(P) and Neb. Ct. R. § 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

JAVIS ARVELL JONES, APPELLANT, V.
VALENE M. JONES, APPELLEE.
821 N.W.2d 211

Filed September 21, 2012. No. S-11-668.

1. **Actions: Dismissal and Nonsuit.** Dismissal of a civil action for lack of prosecution is addressed to the discretion of a trial court, whose ruling, in the absence of an abuse of discretion, will be upheld on appeal.
2. **Courts: Dismissal and Nonsuit.** A district court has discretionary power to dismiss a case for want of prosecution, and such dismissal is also within the court's inherent power.
3. **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.
4. **Courts: Dismissal and Nonsuit.** The power to dismiss for want of prosecution is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the trial courts.
5. **Public Officers and Employees: Prisoners: Courts.** Prison officials must ensure that inmates have adequate, effective, and meaningful access to the courts.
6. **Constitutional Law: Trial: Prisoners.** Prison inmates have no constitutional right to be released from prison so that they may be present in person at the trial of a civil court action.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and PIRTLE, Judges, on appeal thereto from the District Court for Douglas County, W. MARK ASHFORD, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Javis Arvell Jones, pro se.

No appearance for appellee.

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

CASSEL, J.

INTRODUCTION

The district court gave a pro se inmate notice of the court's intent to dismiss the inmate's marital dissolution proceeding but identified two ways of avoiding dismissal. The inmate timely performed one of the court's specified actions. Despite this compliance and without explanation, the court dismissed the inmate's complaint. The Nebraska Court of Appeals affirmed, reasoning that because the prison previously had denied the inmate transportation and telephone access to the court, the inmate would be unable to attend any hearing no matter how many motions he made. We granted further review. Because (1) the district court abused its discretion in dismissing the inmate's complaint without explanation even though the inmate did what the court instructed and (2) the Court of Appeals erred in basing its decision on predictions of future events, we reverse the judgment and remand the cause with direction.

BACKGROUND

TRIAL COURT PROCEEDINGS

While imprisoned, Javis Arvell Jones sought to dissolve his marriage to Valene M. Jones. We summarize the timeline of the proceeding as follows:

- October 4, 2010: Javis files complaint for dissolution of marriage (no children).
- October 13, 2010: Summons is personally served on Valene.
- November 10, 2010: Valene writes letter to judge asking for "postponement."
- December 2, 2010: Javis writes letter to court clerk, stating that he had not heard of any response to his filing and inquiring about "what stage the process is in at this time."
- January 26, 2011: Javis writes letter to bailiff, stating that he had been unsuccessful in obtaining clearance in order to call

for hearing date and that he would not be able to get clearance to add court's telephone number "until well after the expiration date of [his] filing."
- January 28, 2011: Javis writes another letter to bailiff.
- February 4, 2011: Javis writes letter to bailiff, stating that prison will not transport him for March 4 hearing and asking that teleconference hearing be scheduled instead.
- April 28, 2011: Javis files motion for default judgment.
- April 28, 2011: Javis writes letter to bailiff asking that teleconference hearing be scheduled on his motion for default judgment.
- June 2, 2011: Court administrator issues "Notice of Intent to Dismiss," informing parties that within 30 days, they must either submit proposed scheduling order or request that scheduling conference be held in order to avoid dismissal.
- June 28, 2011: Javis files verified motion for pretrial scheduling conference, asking that his appearance for scheduling conference be by teleconference.
- July 5, 2011: District court summarily dismisses complaint for lack of prosecution.

We note that Valene's November 2010 letter was the extent of her participation in this case. We also observe that the record does not show that the district court ever conducted a hearing on Javis' motion for default judgment or expressly made a ruling disposing of the motion.

Appeal

Javis timely appealed to the Court of Appeals, assigning that the district court erred in (1) failing to schedule a hearing on and disregarding his motion for default judgment, (2) failing to schedule a hearing on and disregarding his motion for a pretrial scheduling conference, and (3) dismissing his complaint for lack of prosecution. Javis raised no constitutional argument or challenge, either before the district court or before the Court of Appeals.

The Court of Appeals affirmed via a memorandum opinion filed on May 15, 2012. The court observed that there was no bill of exceptions and limited its review to a consideration of whether the record supported the district court's judgment. In

doing so, the Court of Appeals focused on the dismissal of Javis' case. The court noted that "Javis was active in the case," but that the prison "denied Javis telephone access and transportation to the court, and thus, no matter how many motions Javis makes to the court, he will be unable to attend any hearing either in open court or via teleconference." Despite the absence of any arguments based on constitutional claims, the court extensively discussed the due process rights of prison inmates. The Court of Appeals concluded that the district court did not abuse its discretion by dismissing the complaint for lack of prosecution and declined to address Javis' other assignments of error.

We granted in part Javis' petition for further review, for the limited purpose of reviewing the dismissal for lack of prosecution, and ordered that the appeal be submitted without oral argument.[1]

ASSIGNMENTS OF ERROR

On further review, Javis assigns the following three errors:

> 1. The Court of Appeals abused its discretion by making an erroneous and unconstitutional assertion as key to its affirmance of the abuses of discretion which comprises the district court's dismissal of [Javis'] case for lack of prosecution. . . .
>
> 2. The Court of Appeals asserts erroneously that the district court did not abuse its discretion by disregarding [Javis'] motion for default judgment because "the court cannot make a finding that the marriage is irretrievably broken based upon pleadings alone." . . .
>
> 3. As excuse for its affirmance of the district court's abuses of discretion inherent to denying [Javis] any remedy by due course of law and justice administered, the Court of Appeals erroneously offers as fact that [the prison] would only have denied [Javis] telephone access to appear at any requested teleconference hearings, had such requests not been disregarded by the district court.

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[1] See Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008).

STANDARD OF REVIEW

[1] Dismissal of a civil action for lack of prosecution is addressed to the discretion of a trial court, whose ruling, in the absence of an abuse of discretion, will be upheld on appeal.[2]

ANALYSIS

[2] We limit our review to a consideration of the propriety of the dismissal of the complaint for lack of prosecution. The Court of Appeals correctly recited that a district court has discretionary power to dismiss a case for want of prosecution and that such dismissal is also within the court's inherent power.[3] The Court of Appeals also correctly recognized that Javis had been "active" in the case, that a notice of intent to dismiss sent to Javis informed him that his case would be dismissed for lack of prosecution unless he either submitted a proposed scheduling order or requested a scheduling conference, and that Javis timely filed a motion for a pretrial scheduling conference. In our view, the district court abused its discretion in dismissing Javis' complaint for lack of prosecution when Javis complied with one of the two options provided to him to avoid dismissal.

[3,4] The district court gave no explanation for its summary dismissal despite Javis' clear compliance with one of the alternatives specified in the court's notice. 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.[4] In the case before us, the court's action was untenable because it directly contradicted its own notice and was done without any attempt to explain the contradiction. We have said that the power to dismiss for want of prosecution is necessary in order to prevent undue delays in the disposition of pending

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[2] *Billups v. Jade, Inc.*, 240 Neb. 494, 482 N.W.2d 269 (1992).

[3] See, Neb. Rev. Stat. § 25-1149 (Reissue 2008); *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999).

[4] *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 799 N.W.2d 249 (2011).

cases and to avoid congestion in the trial courts.[5] And we are not here presented with a dismissal based upon a litigant's failure to obey an order of the court.[6] Rather, the district court's notice informed Javis that he could avoid dismissal by requesting a scheduling conference. He made the request, but the court dismissed his case anyway and provided no explanation why it did so. In doing so, the court abused its discretion.

[5,6] The Court of Appeals erred when it affirmed the district court's dismissal based upon its prediction that Javis would be unable to appear or participate in any hearing. The Court of Appeals should have focused on the actions of the district court contained in the record rather than on predictions about future events. As Javis points out, the record reveals no ruling by the district court on his requests for a teleconference hearing. Thus, the record does not demonstrate that the prison would deny him the ability to participate in a scheduled hearing via telephone. After all, prison officials must ensure that inmates have "adequate, effective, and meaningful" access to the courts.[7] But we again emphasize that prison inmates have no constitutional right to be released from prison so that they may be present in person at the trial of a civil court action.[8]

CONCLUSION

On further review, we reverse the Court of Appeals' affirmance of the district court's dismissal of Javis' complaint for lack of prosecution and remand the cause to the Court of Appeals with direction to reverse the district court's dismissal of the complaint.

REVERSED AND REMANDED WITH DIRECTION.

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[5] See *Talkington v. Womens Servs., supra* note 3.

[6] See, Neb. Rev. Stat. § 25-601 (Reissue 2008); *Christianson v. Educational Serv. Unit No. 16*, 243 Neb. 553, 501 N.W.2d 281 (1993).

[7] See *Bounds v. Smith*, 430 U.S. 817, 822, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977).

[8] *Wilson v. Wilson*, 238 Neb. 219, 469 N.W.2d 750 (1991).

In re Estate of Ronald E. McKillip, deceased. Cinthia S. Shields, appellee, v. Sandra K. McConville, appellant, and Laura Klaus, appellee.

820 N.W.2d 868

Filed September 21, 2012. No. S-11-822.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.
2. **Partition: Equity: Appeal and Error.** A partition action is an action in equity and is reviewable by an appellate court de novo on the record.
3. **Decedents' Estates: Appeal and Error.** Equity questions arising in appeals involving the Nebraska Probate Code are reviewed de novo.
4. **Jurisdiction: Appeal and Error.** It is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
5. **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.
6. **Decedents' Estates.** A proceeding under the Nebraska Probate Code is a special proceeding.
7. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.
8. **Final Orders: Words and Phrases.** A substantial right under Neb. Rev. Stat. § 25-1902 (Reissue 2008) is an essential legal right.
9. **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 before the order from which an appeal is taken.
10. **Final Orders.** Substantial rights under Neb. Rev. Stat. § 25-1902 (Reissue 2008) include those legal rights that a party is entitled to enforce or defend.
11. **Final Orders: Appeal and Error.** A substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment.
12. **Partition.** Under Nebraska's partition statutes, the partition of the subject property may take one of two forms: (1) partition in kind, where the property is physically divided, or (2) partition by sale, where the property is sold and the sale proceeds are divided.
13. ____. As between a partition in kind or sale of land for division, the courts will favor a partition in kind, since this does not disturb the existing form of inheritance or compel a person to sell his property against his will, which, it has been said, should not be done except in cases of imperious necessity.

14. **Partition: Presumptions: Proof.** It is generally held that until the contrary is made to appear, the presumption prevails that partition in kind is feasible and should be made, and that the burden is on those who seek a sale of the property in lieu of partition in kind to show the existence of a statutory ground for such sale.
15. **Partition.** A sale in partition cannot be decreed merely to advance the interests of one of the owners, but before ordering a sale, the court must judicially ascertain that the interests of all will be promoted.
16. ____. The generally accepted test of whether a partition in kind would result in great prejudice to the owners is whether the value of the share of each in case of a partition would be materially less than the share of the money equivalent that could probably be obtained for the whole.
17. **Jurisdiction: Appeal and Error.** Once an appellate court acquires equity jurisdiction, it can adjudicate all matters properly presented and grant complete relief to the parties.
18. **Decedents' Estates: Executors and Administrators: Appeal and Error.** An executor is not required to give bond when the executor appeals in a representative capacity, but if he or she appeals to protect his or her individual interest, a bond is required, the same as any litigant.

Appeal from the County Court for Red Willow County: ANNE PAINE, Judge. Reversed in part, and in part vacated and remanded for further proceedings.

Terrance O. Waite, David P. Broderick, and Patrick M. Heng, of Waite, McWha & Heng, and J. Bryant Brooks, of Mousel, Brooks, Garner & Schneider, P.C., L.L.C., for appellant.

G. Peter Burger, of Burger & Bennett, P.C., for appellee Cinthia S. Shields.

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

WRIGHT, J.

NATURE OF CASE

This is an action for partition of the real property in the estate of Ronald E. McKillip. At the time of his death, McKillip owned four tracts of land in Red Willow County, Nebraska. His will left the property in his estate to his three daughters, "share and share alike." The probate court confirmed ownership of the real estate to the daughters in equal shares.

One daughter brought an action to partition the real estate, and the county court appointed a referee. The referee determined

that a partition in kind of the real estate was not possible and recommended a public sale. Although the personal representative objected to the report of the referee, the court approved the report and concluded that the real estate could not be partitioned in kind "without great prejudice to the owners." The court ordered the referee to sell the real estate, and the personal representative timely appealed.

SCOPE OF REVIEW

[1] 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).

[2] A partition action is an action in equity and is reviewable by an appellate court de novo on the record. *Channer v. Cumming*, 270 Neb. 231, 699 N.W.2d 831 (2005).

[3] Equity questions arising in appeals involving the Nebraska Probate Code are reviewed de novo. *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011).

FACTS

At the time of his death, McKillip was survived by three daughters: Sandra K. McConville, Cinthia S. Shields, and Laura Klaus. McKillip's will left his estate to his daughters "share and share alike." The estate included four tracts of real estate valued at $565,000 in the amended inventory, as well as cash and certificates of deposit in excess of $720,380. McConville was named personal representative of the estate.

Tract 1 is a 5-acre rural residential property with a house on it. The property is close to McCook, Nebraska, and shares a water well with tract 2. Tract 1 was valued at $190,000 by the court. The amended inventory valued the property at $196,000, as adjusted for roof repairs.

Tract 2 consists of pastureland (62.74 acres) and cropland (19.49 acres). It was valued at $102,000. Tract 2 could be developed as a subdivision or rural lots. Tracts 1 and 2 are adjoining, and a well on tract 1 is used to water livestock on tract 2.

Tract 3 is about 6 miles from the Kansas state line. It contains mostly cropland, but also some marginal pastureland. Water for livestock is available from a neighboring property. Tract 3, which consists of approximately 161 acres, was valued at $124,000.

Tract 4 is 2 miles north of the Kansas state line and a few miles southwest of tract 3. Tract 4, which totals approximately 240 acres, consists of dryland fields and pastureland. A windmill and two dams provide water for livestock. It was valued at $143,000.

On October 14, 2010, Shields filed in Red Willow County Court a complaint for partition of the real estate. Shields alleged that she, McConville, and Klaus were owners of the real estate but could not agree on an equitable division of the property or how to collectively manage it. McConville, as both a defendant and the personal representative of the estate, filed an answer alleging that a physical partition of the estate was possible and was in the best interests of the parties.

At a hearing, the county court confirmed ownership of the real estate in the three sisters. In a written order, the court found that Shields was entitled to partition of the real estate and it appointed a referee to make the partition and report his findings to the court. In his report, the referee noted that there was a great deal of animosity among the sisters and that no division of the real estate would result in an equitable partition for reasons including the differing land values and uses.

McConville objected to the referee's report, and a hearing was held. The referee testified that an in-kind distribution could not be equitably made. He noted that Shields had requested tracts 1 and 2, but stated that granting her request would have led to an unequal distribution of the value of the real estate. A significant factor in the referee's decision to recommend a public sale was that "[t]hese people obviously can't see eye to eye on anything."

Shields testified she wanted a "fair" distribution of the real estate. Klaus testified that she wanted her share of the property in kind and that she believed the land could be equitably

divided without a sale. She did not believe that she could successfully bid on the property if it were sold.

McConville testified she wanted the land to stay in the family. To her, the land meant more than money. McConville proposed an in-kind distribution in which tract 4 would be combined with 19.49 acres of dryland crop ground from tract 2 for a total appraised value of $181,980, which would be given to one sister. Another sister would get the rest of tract 2 combined with tract 3, for a total appraised value of $187,020. The third sister would receive tract 1, which had an appraised value of $190,000. McConville claimed this distribution would keep each share of the property within a half percent of 33⅓ percent of the total value of the land based on the appraised value. She testified that a referee's sale would put undue financial burden on the estate, costing over $25,000.

The court determined that physical partition of the real estate was not possible without great prejudice to the owners. It approved the referee's report and ordered the referee to sell the land at public sale. McConville appealed, and the court set a supersedeas bond of $50,000, which McConville posted. After the appeal was perfected, the referee filed a motion for fees and costs. The court awarded referee fees and costs of $3,691.93, payable from the assets of the estate. We moved the case to our docket under our statutory authority to regulate the dockets of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

McConville assigns, summarized and restated, that the county court erred (1) in adopting the referee's report and ordering partition by sale instead of a partition in kind and failing to consider personal assets from the estate in effectuating a partition in kind; (2) in appointing a referee to conduct the partition rather than the personal representative; (3) in requiring the personal representative to post a supersedeas bond; (4) in ordering the sisters to pay referee fees, because the fees were ordered after the appeal was filed; and (5) in excluding portions of Shields' deposition.

ANALYSIS

Final Order

[4,5] It is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. See *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007). Generally, 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. *State v. Riensche*, 283 Neb. 820, 812 N.W.2d 293 (2012).

Shields asserts that this appeal may be premature. Thus, we first address whether the county court's order directing the referee to sell the real estate is a final order.

In the case at bar, we are presented with the partition of real property in an estate proceeding. All the assets of the estate were left to McKillip's daughters, "share and share alike." Thus, a partition in a probate proceeding is only one phase of the administration of the estate. It is part of the distribution of the assets in the estate.

[6,7] Our case law has established that a proceeding under the Nebraska Probate Code is a special proceeding. *In re Estate of Potthoff, supra*. Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered. *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

We review the partition action in this case pursuant to § 25-1902(2). In *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007), we considered whether a determination by the probate court regarding a family allowance and the inclusion of certain property in an augmented estate was a final order. The county court had retained jurisdiction to determine the size of the augmented estate. We concluded the court's order was made during a special proceeding but that it did not

affect a substantial right. Because the size of the augmented estate had not yet been determined, we held that the rights affected in the court's order could be considered in an appeal from the final judgment establishing the augmented estate.

We reached a different result in *In re Estate of Potthoff, supra*. In that case, the fundamental issue was the computation of the probate estate. During the probate proceedings, a question arose as to whether notices to sever joint tenancies in property held by the deceased and his estranged wife were effective to sever the joint tenancies. The court found the notices were not effective and awarded the estranged wife all property held by her and the deceased in joint tenancy. The daughter appealed from the order.

In concluding that the order was final and appealable, we distinguished our holding in *In re Estate of Rose, supra*, because the order of the probate court in *In re Estate of Potthoff, supra*, resolved the separate issue whether the deceased's interest in the property was part of the probate estate. Following the court's order, there was nothing left to decide on that issue. We recognized that the rights of the parties could not be effectively considered in an appeal from the judgment in which the probate estate was finally completed. We stated that it was not uncommon for the probate of an estate to remain open for years and that if that occurred, by the time the probate estate was finally settled, the property in question may have been disposed of or its value substantially reduced.

[8-11] In the case at bar, if the order for partition affects a substantial right of the devisees, then it is a final order. A substantial right under § 25-1902 is an essential legal right. *Big John's Billiards v. State, supra*. And 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 before the order from which an appeal is taken. *Id*. Substantial rights under § 25-1902 include those legal rights that a party is entitled to enforce or defend. *Id*. A substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment. *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007).

Deciding when an order affects a substantial right has been "a source of trouble because the substantial right requirement has never had any real content." See John P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239, 284 (2001). "[I]t is much more efficient to review orders affecting the disposition of the estate's assets before those assets leave the estate." *Id*. at 292.

> In the context of multifaceted special proceedings that are designed to administer the affairs of a person, the word "case" means a discrete phase of the proceedings. An order that ends a discrete phase of the proceedings affects a substantial right because it finally resolves the issues raised in that phase.

Id. at 295.

The county court's order directing the referee to sell the property would affect the right of the devisees to receive the real estate in kind and would force them to sell their interests in the land. The distribution of the real estate is a discrete phase of the probate proceedings and would finally resolve the issues in that phase of the probate of the estate. It could be months before an appeal from the order of confirmation would be finally resolved. In the interim, distribution of the assets of the estate would have to wait until that phase of the probate was finally resolved regarding distribution of the real estate. The sale of the real estate would diminish the right of the devisees to have the real estate distributed in kind.

While it may have been possible for the parties to appeal after a sale and confirmation, judicial economy, if nothing else, requires resolution of this issue before a sale is held. To delay review of the order of sale until after the sale and its confirmation would be a waste of judicial resources and would significantly delay completion of the probate of the estate. Distribution of the real estate is a major issue in the resolution of these proceedings. The assets of the estate belong to McKillip's three daughters. Distribution of the real estate is the major source of contention among them. Resolving the distribution of the real estate will finally settle the issues raised in this phase of the probate.

Shields relies upon *Peterson v. Damoude*, 95 Neb. 469, 145 N.W. 847 (1914), to support her argument that there is no final order in this case. In *Peterson*, the partition action was not a special proceeding but was commenced under what is now codified at chapter 25 of the Nebraska Revised Statutes. The only question related to the partition itself, and there was no final order until the sale of the property had been confirmed by the court. *Peterson* was a civil partition action not involved in a probate proceeding.

In *Trowbridge v. Donner*, 152 Neb. 206, 40 N.W.2d 655 (1950), two sisters each owned a one-half interest in certain farmland as tenants in common. It was not a probate matter. One sister alleged the property must be sold because partition in kind was not possible without great prejudice to the owners. The other sister claimed the real estate could and should be partitioned in kind without great prejudice to the owners. The partition was commenced under chapter 25 of the Nebraska Revised Statutes and was not a special proceeding.

In this special (probate) proceeding, the rights of the devisees to retain the real estate in kind is a substantial right that is affected by the order to sell the property. Therefore, the order is a final, appealable order.

Partition by Sale or In Kind

We proceed to consider the merits of the personal representative's claim that the property should be divided in kind.

A partition of property within a probate action is an equitable proceeding. See *Channer v. Cumming*, 270 Neb. 231, 699 N.W.2d 831 (2005). Equity questions arising in appeals involving the Nebraska Probate Code are reviewed de novo. *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011). Accordingly, this court conducts a de novo review of the county court's decision to partition the property by sale.

Neb. Rev. Stat. § 30-24,109 (Reissue 2008) provides:

> When two or more . . . devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more of the . . . devisees may petition the court . . . to

> make partition. [T]he court shall partition the property in the same manner as provided by the law for civil actions of partition.

[12] Under Nebraska's partition statutes, the partition of the subject property may take one of two forms: (1) partition in kind, where the property is physically divided, or (2) partition by sale, where the property is sold and the sale proceeds are divided. *Channer v. Cumming, supra*.

[13] In *Channer*, we noted that this court has long expressed a preference for partition in kind.

> "'As between a partition in kind or sale of land for division, the courts will favor a partition in kind, since this does not disturb the existing form of inheritance or compel a person to sell his property against his will, which, it has been said, should not be done except in cases of imperious necessity.'"

270 Neb. at 239, 699 N.W.2d at 837-38, quoting *Trowbridge v. Donner, supra*. See, also, *Nordhausen v. Christner*, 215 Neb. 367, 338 N.W.2d 754 (1983) (noting preference exists but stating it can be overcome).

[14,15] It is generally held that until the contrary is made to appear, the presumption prevails that partition in kind is feasible and should be made, and that the burden is on those who seek a sale of the property in lieu of partition in kind to show the existence of a statutory ground for such sale. See *Trowbridge v. Donner, supra*. A sale in partition cannot be decreed merely to advance the interests of one of the owners, but before ordering a sale, the court must judicially ascertain that the interests of all will be promoted. See *id*.

In this case, there was no dispute as to what property constituted the assets in the estate. There was no dispute as to the value of the real estate, and there was no claim that the value of the real estate as one parcel was greater than the value of the sum of the individual tracts. There was evidence that two of the devisees, McConville and Klaus, wanted to retain the real estate for personal and sentimental reasons. Shields requested a partition and testified that she wanted the distribution of the real estate to be fair.

[16] The statutory ground for a sale is a showing that partition cannot be made without great prejudice to the parties. See Neb. Rev. Stat. §§ 25-2181 and 25-2183 (Reissue 2008). The generally accepted test of whether a partition in kind would result in great prejudice to the owners is whether the value of the share of each in case of a partition would be materially less than the share of the money equivalent that could probably be obtained for the whole. *Trowbridge v. Donner*, 152 Neb. 206, 40 N.W.2d 655 (1950) (citing 40 Am. Jur. *Partition* § 83 (1942)).

Whether partition in kind will result in great prejudice to the parties requires comparing two amounts. The first is the amount an owner would receive if the property were divided in kind and the owner then sold his portion of the property. The second is the amount each owner would receive if the entire property were sold and the proceeds were divided among the owners. If the first amount is materially less than the second amount, great prejudice has been shown. See *id*.

The appraiser testified that sale of the real estate as a whole would not bring a greater amount than sale of the tracts individually. The tracts had different uses, and the value of the tracts would not be enhanced by being sold together. Only tracts 1 and 2 were contiguous. Tracts 3 and 4 were south of McCook near the Kansas border and were not contiguous. The tracts would typically be sold separately.

The referee's report was based in significant part upon his determination that the devisees could not agree about anything. The burden was on Shields to show by a preponderance of the evidence that partition in kind would result in great prejudice to the devisees. She did not prove that the land would be more valuable if the tracts were sold together. Shields testified she did not believe the land could be divided so that her father's land remained in the family, but that is not competent evidence that the real estate should be sold. She has not rebutted the presumption that the real estate should be distributed in kind.

McConville and Klaus testified it was their opinion that the land could be equitably divided in kind and that this was their

preference. They wanted a partition in kind for sentimental and personal reasons. Klaus' testimony indicates that the devisees had different financial means and that a sale would not provide her with an equal opportunity to purchase the property.

McConville presented a proposal for distribution in kind, which was rejected by the court:

> 1. Separate 19.49 acres of dryland cropground from Tract #2, at its appraised value of $2,000.00 per acre, and combine it with Tract #4 for distribution to one of the owners. Combined appraised value of Tract #4 with the 19.49 acres from Tract #2 is $181,980.00.
>
> 2. Combine Tract #2, less the 19.49 acres, with Tract #3 for distribution to one of the owners. Combined appraised value of Tract #3 and Tract #2 (less the 19.49 acres) is $187,020.00.
>
> 3. Distribution of Tract #1 to one of the owners. Appraised value of Tract #1 is $190,000.00.

McConville's proposed distribution was evidence that it was possible to convey the real estate to each sister in shares close to equal in value.

Shields failed to sustain her burden to establish that partition in kind could not be had without great prejudice to the parties. We therefore conclude that a partition in kind is feasible and that the county court erred in accepting the referee's report and ordering partition by sale.

Remedy

[17] Since the county court erred in ordering the sale of the property, this court may consider an appropriate remedy for the partition in kind of the real estate. A partition action is an action in equity. *Channer v. Cumming*, 270 Neb. 231, 699 N.W.2d 831 (2005). Equity questions arising in appeals involving the Nebraska Probate Code are reviewed de novo. *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011). Once this court acquires equity jurisdiction, it can adjudicate all matters properly presented and grant complete relief to the parties. *Mogensen v. Mogensen*, 273 Neb. 208, 729 N.W.2d 44 (2007).

We therefore proceed to apply equitable principles to the partition of the real property to resolve the dispute. The facts necessary for a partition in kind are not in dispute. The appraiser's valuation of the property is not contested, nor is his testimony that sale of the tracts as a whole would not bring a greater amount than sale of the tracts individually. All the property, both real and personal, is to be divided equally among the sisters.

We reject McConville's proposed distribution in kind for the following reasons: Tracts 1 and 2 should not be separated. Separating 19.49 acres is not practical and would create more problems than it would solve. A well on tract 1 provides water to tract 2, and separating tracts 1 and 2 would require arrangements for tract 2 to continue to utilize the well on tract 1 or would necessitate the expense of drilling a new well on tract 2, which may not be feasible.

Accordingly, tracts 1 and 2 should be awarded to one of the devisees. Tract 3 should be awarded to another devisee along with cash from the estate. Tract 4 should be awarded to the remaining devisee along with cash from the estate. The amended inventory of the estate shows that tracts 1 and 2 are valued at a total of $298,000 ($196,000 and $102,000 respectively). (We employ the figures from the amended inventory to account for $6,000 in roof repair to the house on tract 1 not covered by the appraisal.) Tract 3 is valued at $124,000, and tract 4 is valued at $143,000.

The estate contains cash assets in the amount of $720,380.42, and the will directs that the personal property be divided among the devisees. For purposes of this partition, each sister should receive $298,000 in real estate or a combination of real estate and cash from the estate to equalize the distribution. This is accomplished by awarding one sister tracts 1 and 2, one sister tract 3 and $174,000 in cash assets, and the third sister tract 4 and $155,000 in cash assets. Following these distributions, each sister will have received $298,000 from the estate, either in real estate or real estate and cash. Cash assets of $391,380.42 will remain in the estate for later distribution along with other assets of the estate.

Because the county court did not partition the property in kind, it did not consider which sister should receive which tract. Accordingly, the cause must be remanded to the county court with directions to distribute tract 1 and 2 to one sister, tract 3 and $174,000 to one sister, and tract 4 and $155,000 to one sister in order to equalize the distributions of the real estate using cash from the estate. If the parties cannot agree as to which distribution should be made to each devisee, the court is directed to have the clerk of the court number the shares and then draw the names of the future owners by lot. See Neb. Rev. Stat. §§ 25-2182 and 25-21,102 (Reissue 2008). Section 25-2182 gives a trial court the power to allot particular portions of the land to particular individuals, and unless so allotted, the shares may be drawn by lot, as provided by § 25-21,102. See *Trowbridge v. Donner*, 152 Neb. 206, 40 N.W.2d 655 (1950).

Requiring Referee to Conduct Partition

McConville claims the county court erred in appointing a referee to conduct the partition. We disagree. The county court did not err in appointing a referee to determine whether a partition was appropriate.

Partition of property can occur within a probate action under § 30-24,109. The words "partition" and "partitioned," as used in this section, mean partition in kind. Pursuant to this section, Shields was permitted to request partition of the real estate during the administration of the estate. Section 30-24,109 directs the court to follow the procedures for partition in civil actions. The court is required to appoint at least one referee. Neb. Rev. Stat. § 25-2180 (Reissue 2008). The referee is then required to report to the court if it appears to the referee that partition in kind cannot be made without great prejudice to the owners. § 25-2181.

McConville's reliance upon *In re Estate of Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980), is misplaced. That case did not prohibit the court from appointing a referee to determine whether the property should be partitioned in kind or should be sold. See § 25-2180. However, it required that if

the property were to be sold, the sale must be conducted by the personal representative. The last sentence of § 30-24,109 addresses the sale of property that cannot be partitioned in kind. Accordingly, the county court did not err in appointing a referee to determine whether the real estate could be partitioned in kind.

Referee Fees

McConville claims that the county court erred in awarding referee fees after the appeal of the court's judgment was taken to the Nebraska Court of Appeals. We agree. Once the appeal was perfected in the partition action, the county court was without jurisdiction to award attorney fees. See *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995). The county court had no jurisdiction to enter the order for referee fees, and the order is hereby vacated.

Supersedeas Bond

McConville assigns that the county court erred in requiring her to post a supersedeas bond in order to appeal the action. McConville is the personal representative of the estate. Neb. Rev. Stat. § 30-1601(3) (Reissue 2008) states: "When the appeal is by someone other than a personal representative . . . the appealing party shall, within thirty days after the entry of the judgment or final order complained of, deposit with the clerk of the county court a supersedeas bond . . . ."

[18] McConville argues that as the personal representative, she should not have been required to post bond. We conclude that under the circumstances of this case, the personal representative should not have been required to post a supersedeas bond. However, the record discloses that McConville did not obtain the bond as the personal representative but obtained the bond in her own name. An executor is not required to give bond when the executor appeals in a representative capacity, but if he or she appeals to protect his or her individual interest, a bond is required, the same as any litigant. See *In re Estate of Vetter*, 139 Neb. 307, 297 N.W. 554 (1941). Because McConville has prevailed in this action, the cost of

the supersedeas bond is taxed as an expense, and the cost is payable by Shields.

CONCLUSION

In the case at bar, the real estate should be partitioned in kind. Partition is an equitable action, and this court has the authority to grant complete relief. Accordingly, we reverse the judgment of the county court directing sale of the real estate and remand the cause with directions that the court award tracts 1 and 2 to one sister, tract 3 and $174,000 to another, and tract 4 and $155,000 to the third in accordance with our opinion.

The county court did not err in appointing a referee to determine if partition was required. However, the court did not have jurisdiction to order payment of referee fees after the appeal was perfected. Therefore, the October 14, 2011, order awarding fees is vacated.

The county court did not err in requiring McConville to post a supersedeas bond. Since McConville has prevailed in this appeal, the cost of the bond is taxed to Shields.

The judgment of the county court is reversed, and the cause is remanded thereto with directions for further proceedings consistent with this court's opinion.

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

STEPHAN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER A. EDWARDS, APPELLANT.

821 N.W.2d 680

Filed September 28, 2012. No. S-11-723.

1. **Constitutional Law: Due Process.** Whether the procedures given an individual comport with constitutional requirements for procedural due process presents a question of law.
2. **Effectiveness of Counsel: Appeal and Error.** A petitioner's claim that his or her defense counsel provided ineffective assistance presents a mixed question of law and fact. An appellate court reviews factual findings for clear error. Whether the defense counsel's performance was deficient and whether the petitioner was

prejudiced by that performance are questions of law that the appellate court reviews independently of the lower court's decision.

3. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
4. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
5. **Postconviction: Appeal and Error.** In appeals from postconviction proceedings, an appellate court independently resolves questions of law.
6. **Postconviction: Constitutional Law.** A trial court's ruling that the petitioner's allegations are refuted by the record or are too conclusory to demonstrate a violation of the petitioner's constitutional rights is not a finding of fact—it is a determination, as a matter of law, that the petitioner has failed to state a claim for postconviction relief.
7. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
8. **Effectiveness of Counsel: Appeal and Error.** When a case presents layered claims of ineffective assistance of counsel, an appellate court determines whether the petitioner was prejudiced by his or her appellate counsel's failure to raise issues related to his or her trial counsel's performance. If the trial counsel did not provide ineffective assistance, then the petitioner cannot show prejudice from the appellate counsel's alleged ineffectiveness in failing to raise the issue on appeal.
9. **Constitutional Law: Effectiveness of Counsel.** An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
10. **Effectiveness of Counsel: Proof: Appeal and Error.** 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 his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.
11. **Criminal Law: Effectiveness of Counsel.** A trial counsel's performance was deficient if it did not equal that of a lawyer with ordinary training and skill in criminal law.
12. **Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, courts give his or her acts a strong presumption of reasonableness.
13. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** When reviewing claims of ineffective assistance, an appellate court will not second-guess a trial counsel's reasonable strategic decisions. And an appellate court must

assess the trial counsel's performance from the counsel's perspective when the counsel provided the assistance.

14. **Effectiveness of Counsel: Appeal and Error.** In addressing the "prejudice" component of the test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court focuses on whether a trial counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.
15. **Effectiveness of Counsel: Proof: Words and Phrases.** To show prejudice under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the petitioner must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
16. **Venue.** Under Neb. Rev. Stat. § 29-1301 (Reissue 2008), a change of venue is mandated when a defendant cannot receive a fair and impartial trial in the county where the offense was committed.
17. **Venue: Appeal and Error.** An appellate court evaluates a court's change of venue ruling under eight factors unless the defendant claims that the pretrial publicity was so pervasive and prejudicial that the appellate court should presume the unconstitutional partiality of the prospective jurors.
18. **Venue: Juror Qualifications.** Under most circumstances, voir dire examination provides the best opportunity to determine whether a court should change venue.
19. **Venue: Juror Qualifications: Presumptions.** Two circumstances exist when the prospective jurors' claims of impartiality are presumptively unreliable. First, pervasive pretrial publicity that is sufficiently inflammatory can create a presumption of prejudice in a community and require a change of venue to a location untainted by the publicity. Second, if most of the prospective jurors admit to a disqualifying prejudice, the reliability of the others' claims of impartiality is called into question.
20. **Venue: Due Process.** Mere exposure to news accounts of a crime does not presumptively deprive a defendant of due process. Even the community's extensive knowledge about the crime or the defendant through pretrial publicity is insufficient in itself to render a trial constitutionally unfair if the media coverage consists of merely factual accounts that do not reflect animus or hostility toward the defendant.
21. **Venue: Presumptions: Courts.** In determining whether the pretrial publicity created a presumption of prejudice, a court should consider whether the media coverage was (1) invidious or inflammatory, as distinguished from factual, and (2) pervasive.
22. **Constitutional Law: Trial: Due Process.** A fair trial before a fair and impartial jury is a basic requirement of constitutional due process guaranteed by the Constitutions of the United States and the State of Nebraska.
23. **Postconviction: Constitutional Law: Trial: Due Process: Public Officers and Employees.** Short of claiming actual innocence, to establish a violation of the Due Process Clause based on the State's use of false evidence at trial, the defendant in a postconviction proceeding must allege that state action was involved. The

conduct of state officials must have rendered his or her conviction inconsistent with the due process guarantee of a fair trial in which the truth-seeking process has not been corrupted.

24. **Trial: Due Process: Police Officers and Sheriffs: Witnesses.** A due process violation occurs when a law enforcement officer who participated in the investigation or preparation of the prosecution's case fabricates evidence or gives false testimony against the defendant at trial on an issue material to guilt or innocence.
25. **Due Process: Convictions: Evidence.** The State's knowing use of false evidence to secure a conviction violates a defendant's due process rights. A conviction is tainted and must be set aside if there is any reasonable likelihood that the false evidence could have affected the jury's verdict.
26. **Jurisdiction: Appeal and Error: Words and Phrases.** "Appellate jurisdiction" is the power vested in a superior court to review and revise a decision that has been tried in an inferior court.
27. **Effectiveness of Counsel: Conflict of Interest.** A conflict of interest must be actual rather than speculative or hypothetical before a court will overturn a conviction because of ineffective assistance of counsel.
28. ____: ____. The right to effective assistance of counsel entitles the accused to his or her counsel's undivided loyalties, free from conflicting interests.
29. **Constitutional Law: Effectiveness of Counsel: Conflict of Interest: Proof.** A defendant who raised no objection at trial must show that an actual conflict of interest existed and that the conflict adversely affected his lawyer's performance. If the defendant satisfies this requirement, the defendant is not required to show that the Sixth Amendment violation had a probable effect on the outcome of the trial to obtain relief.
30. **Trial: Witnesses: Attorney and Client: Conflict of Interest.** Although not common, a defense counsel's close personal relationship with a material prosecution witness can create a conflict of interest if the evidence shows that the defense counsel's desire to protect the witness outweighed his or her duty to represent the defendant's interests.
31. **Attorneys at Law: Conflict of Interest.** Conflicts of interests resulting from successive representations can occur when a defendant's trial counsel previously represented a codefendant, trial witness, or victim.
32. **Trial: Attorney and Client: Conflict of Interest.** If a defense counsel acts or refrains from acting at trial in loyalty to a former client in a manner that is inconsistent with the defendant's interests, the defense counsel actively represents conflicting interests no less than a defense counsel who does the same during concurrent representations.
33. **Trial: Attorneys at Law.** A defense counsel is entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.
34. **Postconviction: Effectiveness of Counsel: Proof.** A petitioner's postconviction claims that his or her defense counsel was ineffective in failing to investigate possible defenses are too speculative to warrant relief if the petitioner fails to allege what exculpatory evidence that the investigation would have procured and how it would have affected the outcome of the case.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Brian S. Munnelly for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, and Miller-Lerman, JJ.

Connolly, J.

I. SUMMARY

Christopher A. Edwards appeals from the district court's order overruling his motion for postconviction relief without an evidentiary hearing. We reverse in part. We conclude that the following two claims require an evidentiary hearing: (1) that the State presented fabricated forensic evidence at his trial and (2) that his trial counsel had a conflict of interest because of his relationship with the officer accused of fabricating the evidence.

II. BACKGROUND

In March 2007, a jury convicted Edwards of second degree murder and use of a deadly weapon to commit a felony. In 2009, we affirmed his convictions in *State v. Edwards*.[1] We summarize the factual background for his convictions from *Edwards*.

1. Evidence at Edwards' Trial

Jessica O'Grady was last seen on May 10, 2006. Investigators never found her body. But they found blood matching O'Grady's DNA profile in Edwards' bedroom in many places: on his nightstand, bedding, chair, bookcase, laundry baskets, headboard, clock radio, and ceiling. They also found a large amount of her blood soaked into the underside of his mattress. In addition, investigators found her blood on a sword in

[1] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

Edwards' closet. In his vehicle, investigators found a shovel and garden shears. They found blood on the garden shears, on the underside of Edwards' trunk lid, and on a trunk gasket. The blood on the vehicle items produced full or partial DNA profiles that matched O'Grady's profile.

Investigators also found a trash bag in the garage where Edwards lived that contained bloodstained towels and a drugstore receipt. O'Grady's DNA profile matched the blood found on the towels. And on May 11, 2006, the drugstore's video camera recorded Edwards purchasing poster paint, white shoe polish, and correction fluid. The blood on his bedroom ceiling was covered over in paint that chemically matched the poster paint. An expert testified that the bloodstains on the ceiling over Edwards' bed were consistent with a "cast-off" pattern, i.e., blood splattered from seven individual swings of an object wet with blood.

In affirming the convictions, we rejected Edwards' argument that the evidence was insufficient to prove that O'Grady had been murdered because her body had not been found. We stated, "[I]t does not take much imagination to see how bloodstains on a weapon, garden shears, towels, and the trunk of a car suggest both criminal activity and an explanation for the absence of the victim's body."[2] From that evidence, we concluded that a jury could have found beyond a reasonable doubt that O'Grady had been murdered and that Edwards had killed her.

2. Postconviction Allegations

Edwards claimed that the State violated his due process rights by presenting fabricated evidence during his trial. Edwards alleged that while investigating O'Grady's murder, David Kofoed, a supervisor of Douglas County's Crime Scene Investigation (CSI) Division, planted blood evidence to be used against Edwards. Edwards' allegations and attachments set out a history of Kofoed's unlawful conduct during other murder investigations. Edwards alleged that the State's introduction of forensic evidence at his trial that had been falsified by law

[2] *Id.* at 68, 767 N.W.2d at 797.

enforcement officials constituted outrageous government conduct that violated his right to due process.

In addition to his due process claim, Edwards alleged claims of ineffective assistance of counsel. Edwards was represented by the same three attorneys at trial and on appeal. First, he alleged that although his lead attorney, Steven Lefler, should have known that Kofoed was suspected of planting evidence during the 2006 murder investigation, Lefler did not investigate this information or effectively impeach Kofoed at trial. Edwards alleged that Lefler was ineffective because he was a friend of Kofoed.

Edwards also claimed that his trial counsel was ineffective in failing to retain a DNA expert to testify at trial. He alleged that an expert could have testified that the blood on his mattress came from two contributors—neither of which was Edwards. He claimed that such testimony would have supported his theory that O'Grady had experienced a miscarriage, which would have explained the blood on his mattress. He also claimed that his counsel should have obtained additional DNA testing after learning that mixed DNA samples had been found. He alleged that this evidence could have opened the door to other possible theories about the blood on the mattress. Finally, Edwards alleged that his trial counsel failed to effectively investigate (1) calls made to O'Grady's aunt after O'Grady's disappearance, concerning the location of O'Grady's car; (2) whether O'Grady had contacted an online travel agency around the time of her disappearance; and (3) whether an "'alternate suspect'" existed.

Regarding his direct appeal, Edwards alleged that his appellate counsel was ineffective in failing to raise (1) the trial court's denial of his motion to change venue, (2) the due process violation related to his claim of falsified evidence, and (3) his other claims of his trial counsel's ineffective assistance.

3. District Court's Order

As noted, the court overruled Edwards' postconviction motion without an evidentiary hearing. Regarding Edwards' appellate counsel's failure to raise the change of venue issue, the court concluded that Edwards had alleged insufficient

facts to show that a challenge to the change of venue ruling would have been successful. It concluded that the trial record refuted this claim. It stated that the voir dire of potential jurors had taken 3 days. It concluded that prospective jurors' mere exposure to pretrial publicity is insufficient to presume that a defendant did not receive a fair trial.

On Edwards' due process claim, the court concluded that he failed to show a violation because his factual allegations of falsified evidence were insufficient and conclusory. Because the court concluded that Edwards' due process claim failed, it also concluded his claim of falsified evidence was procedurally barred. The court concluded that Edwards failed to seek a new trial for newly discovered evidence[3] within the 3-year time limit for such claims.[4] Alternatively, the court determined that even if a due process violation had occurred, Edwards' convictions were not void because other blood evidence overwhelmingly established that he committed the crimes.

The court also concluded that Edwards' allegations of his trial counsel's conflict of interest based on his friendship with Kofoed were conclusory. And it stated that Edwards did not allege how his trial counsel should have conducted the cross-examination of Kofoed or how it would have changed the outcome. So the court concluded that Edwards' conflict of interest allegations did not warrant an evidentiary hearing.

The court rejected Edwards' allegations regarding the necessity of retaining a DNA expert. It disagreed that Edwards' trial counsel was ineffective in failing to retain a DNA expert to support Edwards' claim that O'Grady could have suffered a miscarriage. Relying on a recent U.S. Supreme Court decision, it concluded that a trial counsel is entitled to balance limited resources with effective trial strategies. The court concluded that the existence of two contributors to the DNA found in the blood on the mattress would not have changed the outcome and that not presenting an expert witness may have been a deliberate trial strategy.

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[3] See Neb. Rev. Stat. § 29-2101 (Reissue 2008).

[4] See Neb. Rev. Stat. § 29-2103(4) (Reissue 2008).

Regarding Edwards' allegations that his trial counsel had not conducted a reasonable pretrial investigation, the court concluded that Edwards had failed to allege sufficient facts to warrant an evidentiary hearing. It stated that Edwards had failed to allege what evidence that his counsel's further investigation would have procured or how any of that evidence would have changed the outcome, considering the overwhelming evidence of his guilt.

III. ASSIGNMENTS OF ERROR

Edwards assigns that the court erred in failing to order an evidentiary hearing to resolve his claims for the following reasons:

(1) Edwards sufficiently alleged that his appellate counsel provided ineffective assistance in failing to argue on direct appeal that the trial court erred in denying Edwards' motion for a change of venue.

(2) Edwards sufficiently alleged that his appellate counsel was ineffective in failing to argue that his right to due process was violated when the State introduced forensic evidence at his trial that a state investigator had falsified.

(3) Edwards' other factual allegations, if proved, would constitute a violation of his Sixth Amendment right to effective assistance of counsel.

IV. STANDARD OF REVIEW

[1,2] Whether the procedures given an individual comport with constitutional requirements for procedural due process presents a question of law, which we independently review.[5] A petitioner's claim that his or her defense counsel provided ineffective assistance presents a mixed question of law and fact.[6] We review factual findings for clear error.[7] Whether the defense counsel's performance was deficient and whether the petitioner was prejudiced by that performance are

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[5] See *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

[6] *State v. Reinhart*, 283 Neb. 710, 811 N.W.2d 258 (2012).

[7] See *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

questions of law that we review independently of the lower court's decision.[8]

[3,4] We pause here to clarify our standard for reviewing a trial court's determination that a defendant's allegations in a postconviction motion are refuted by the record or too conclusory to warrant an evidentiary hearing. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.[9] But if a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.[10]

[5,6] In appeals from postconviction proceedings, we independently resolve questions of law.[11] A trial court's ruling that the petitioner's allegations are refuted by the record or are too conclusory to demonstrate a violation of the petitioner's constitutional rights is not a finding of fact—it is a determination, as a matter of law, that the petitioner has failed to state a claim for postconviction relief.

[7] This conclusion is implied by our adoption of de novo standards of review in postconviction appeals for claims of ineffective assistance of counsel and due process violations.[12] It is also consistent with the way that we actually review postconviction appeals. Most notably, in postconviction appeals raising ineffective assistance claims, we have independently reviewed whether the facts alleged presented a constitutional violation and whether the record affirmatively refuted the defendant's claim.[13] So to clarify our review procedures in postconviction appeals, we expressly state the standard that

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[8] See *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012).

[9] See *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

[10] See *id.*

[11] See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

[12] See, e.g., *Boppre, supra* note 5.

[13] See, e.g., *Iromuanya, supra* note 9.

we have implicitly applied: In appeals from postconviction proceedings, we review de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.

V. ANALYSIS

[8] Except for his due process claim based on the State's alleged presentation of fabricated evidence, Edwards' postconviction claims all rest on an alleged violation of his constitutional right to effective assistance of counsel. Because Edwards' trial counsel was also his appellate counsel, this is his first opportunity to assert claims that his trial counsel provided ineffective assistance.[14] Most of these claims are layered ineffective claims—i.e., a claim that his appellate counsel was ineffective in failing to raise claims of his trial counsel's ineffective assistance. When a case presents layered claims of ineffective assistance of counsel, we determine whether the petitioner was prejudiced by his or her appellate counsel's failure to raise issues related to his or her trial counsel's performance. If the trial counsel did not provide ineffective assistance, then the petitioner cannot show prejudice from the appellate counsel's alleged ineffectiveness in failing to raise the issue on appeal.[15]

1. Governing Principles for Ineffective Assistance Claims

[9,10] An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.[16] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[17] the defendant must show that his or her counsel's performance was deficient and that this deficient

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[14] See *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011).

[15] See *Iromuanya, supra* note 9.

[16] *Id.*

[17] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

performance actually prejudiced the defendant's defense.[18] An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.[19]

[11-13] A trial counsel's performance was deficient if it did not equal that of a lawyer with ordinary training and skill in criminal law.[20] In determining whether a trial counsel's performance was deficient, courts give his or her acts a strong presumption of reasonableness.[21] When reviewing claims of ineffective assistance, we will not second-guess a trial counsel's reasonable strategic decisions.[22] And we must assess the trial counsel's performance from the counsel's perspective when the counsel provided the assistance.[23]

[14,15] In addressing the "prejudice" component of the *Strickland* test, we focus on whether a trial counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.[24] To show prejudice, the petitioner must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different.[25] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[26]

2. Change of Venue Claim Did Not Merit Postconviction Relief

Edwards contends that his appellate counsel was ineffective in failing to raise the trial court's overruling of his motion for a change of venue. He argues that it was impossible for him to obtain a fair trial in Douglas County because of pervasive and

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[18] *Reinhart, supra* note 6.

[19] See *id.*

[20] *Iromuanya, supra* note 9.

[21] *Id.*

[22] *Id.*

[23] See *id.*

[24] *Id.*

[25] See *Reinhart, supra* note 6.

[26] *Id.*

inflammatory pretrial publicity. The State argues that Edwards pleaded no facts that supported his claim that his appellate counsel was ineffective.

Edwards alleged that a barrage of inflammatory media coverage before his trial created a presumption of impartiality among prospective jurors. He mentioned two television broadcasts as examples of the inflammatory coverage. He also alleged that the answers to the questionnaires sent to the prospective jurors showed a public passion against him. He alleged that 31 of the 62 prospective jurors reported that they could not set aside their opinion of Edwards' guilt. But the State contends that the alleged facts were nonetheless insufficient to show an inflammatory courtroom atmosphere, so that the change of venue argument on direct appeal would not have been successful. We conclude that the record refutes Edwards' allegations.

[16,17] Under Neb. Rev. Stat. § 29-1301 (Reissue 2008), a change of venue is mandated when a defendant cannot receive a fair and impartial trial in the county where the offense was committed.[27] We evaluate a court's change of venue ruling under eight factors unless the defendant claims that we should presume the unconstitutional partiality of the prospective jurors.[28] Although Edwards cites the eight factors in his brief, he does not argue their application. Instead, his argument is that we should presume the prejudice of the prospective jurors.

[18,19] Under most circumstances, voir dire examination provides the best opportunity to determine whether a court should change venue.[29] But we have recognized two circumstances when the prospective jurors' claims of impartiality are presumptively unreliable.[30] First, under the U.S. Supreme Court's decision in *Irvin v. Dowd*,[31] pervasive pretrial publicity

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[27] *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

[28] See, *id.*; *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009).

[29] *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

[30] See, e.g., *Galindo, supra* note 28.

[31] *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

that is sufficiently inflammatory can create a presumption of prejudice in a community and require a change of venue to a location untainted by the publicity.[32] Second, under the U.S. Supreme Court's decision in *Murphy v. Florida*,[33] if most of the prospective jurors admit to a disqualifying prejudice, the reliability of the others' claims of impartiality is called into question. But neither of these circumstances was present here.

(a) Pretrial Publicity

[20,21] Mere exposure to news accounts of a crime does not presumptively deprive a defendant of due process.[34] Even the community's extensive knowledge about the crime or the defendant through pretrial publicity is insufficient in itself to render a trial constitutionally unfair if the media coverage consists of merely factual accounts that do not reflect animus or hostility toward the defendant.[35] And a court will not presume unconstitutional partiality because of media coverage unless the record shows a barrage of inflammatory publicity immediately before trial. The pretrial publicity must amount to a huge wave of public passion or result in a trial atmosphere utterly corrupted by press coverage.[36] In sum, in determining whether the pretrial publicity created a presumption of prejudice, a court should consider whether the media coverage was (1) "'invidious or inflammatory,'" as distinguished from factual, and (2) pervasive.[37]

Edwards focuses on two "inflammatory" televised news stories. First, he alleged that 4 months before trial, a television station broadcasted a news segment featuring Kofoed. Kofoed used a dummy to demonstrate how blood splatters occur when a victim is shot in the head or hit in the head with a blunt instrument. The demonstration showed how CSI investigators could

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[32] See *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

[33] *Murphy v. Florida*, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).

[34] *Dixon, supra* note 27.

[35] *Galindo, supra* note 28.

[36] *Schroeder, supra* note 32.

[37] *Id.* at 209, 777 N.W.2d at 803, quoting *Murphy, supra* note 33.

determine from blood splatters that O'Grady had been murdered even if her body was missing. Second, Edwards argues that 3 months before trial, the same station broadcasted a news story reporting that a private investigator claimed Edwards had confessed to a cellmate that he had killed O'Grady and dumped her body along a creek. Edwards argues that this claim was false, inflammatory, and slanted toward a conviction.

As for the news segment featuring Kofoed's show-and-tell demonstration, we obviously do not condone investigators demonstrating to the public why or how they believe a victim has been murdered before the suspect's trial. But our concern is with media coverage that renders a trial fundamentally unfair under the Constitution. We need not determine whether this publicity was invidious or inflammatory because Edwards has not alleged facts showing that the reports were pervasive. Instead, the record shows that Kofoed's demonstration was broadcast on a single television station at 10 p.m. on November 6, 2006, and at 5 a.m. and 6 a.m. on November 7. During voir dire, none of the prospective jurors reported seeing this news segment, and Edwards did not offer into evidence their questionnaires, which asked them to describe any reports in the media that they had seen. We conclude that the record refutes any claim that the news report featuring Kofoed was pervasive.

Second, we disagree that the news story about the private investigator's claim was inflammatory. The evidence presented at Edwards' trial to support his change of venue motion shows that the television station reported the investigator's claim to explain why investigators were searching the same pond for O'Grady's body after several months. Reporting the source of a tip did not constitute a false statement when presented to explain why a new search was taking place. More important, standing alone, it did not reflect an animus or hostility toward Edwards.

The vast majority of evidence submitted at Edwards' trial shows only that the media broadcasted or printed extensive factual accounts of the searches for O'Grady's body, the murder investigation, and the trial proceedings. But this is not

surprising for a murder of this nature. We conclude that the record refutes Edwards' claim that a barrage of inflammatory publicity immediately before his trial amounted to a wave of public passion against him.

(b) Jurors' Statements on Questionnaires and During Voir Dire Did Not Show That the Majority Were Biased

Edwards argues that the prospective jurors' pretrial questionnaires showed that 39 percent of them could not be impartial jurors. The record shows that pretrial questionnaires were sent to "approximately 100 prospective jurors" who had been summoned by the court for the venire. Ninety-eight of them returned the questionnaires. According to his trial counsel's affidavit, 37 percent of them "indicated" that they believed Edwards was guilty and that they could not set aside their opinion. His trial counsel believed an additional 5 percent of them had made conflicting statements whether they could set aside an initial opinion of guilt. He concluded that the questionnaires showed 39 percent of the prospective jurors could not be impartial.

Edwards repeated this claim in the postconviction proceeding, but the record shows that the jurors were not asked about their ability to be impartial. A sample questionnaire in the record shows that the jurors were asked to report (1) what they had heard about the case in the media, (2) whether they had formed an opinion as to Edwards' guilt or innocence based on the media coverage, and (3) what they had heard that had caused them to form an opinion. The questionnaires did not ask the jurors whether they could set aside any opinions that they had formed or whether they could be impartial jurors. As stated, the completed questionnaires are not part of the record, and the court disagreed with Edwards' trial counsel's characterization of the prospective jurors' responses. We conclude that the record refutes Edwards' claim that the questionnaires showed the prospective jurors' bias.

We have reviewed the voir dire proceedings and disagree with Edwards that the record shows widespread bias among

the prospective jurors. The parties conducted individual, sequestered interviews of 66 prospective jurors to obtain 42 venire members, upon which each party could exercise peremptory challenges. Each prospective juror was asked (1) what they knew about the case; (2) the source of their information; (3) whether they had formed an opinion of Edwards' guilt; (4) whether they could set aside their opinion, if they had formed any, and give Edwards a presumption of innocence; and (5) whether they could set aside any information that they had heard and base their decision solely upon the evidence presented at trial.

Of the 66 prospective jurors, half had (1) heard little about the case and formed no opinion of Edwards' guilt or (2) heard about the case but formed no opinion. The other half had formed an initial opinion of Edwards' guilt based on media coverage or what they had heard from people in the community, or they were leaning toward an opinion of guilt if what the media reported was true. But 13 of those prospective jurors with an initial opinion (39 percent) stated that they could set aside their initial opinion and what they had heard and base their decision solely upon the trial evidence. In total, the court dismissed 22 of the prospective jurors (33 percent) because they could not set aside their opinion of Edwards' guilt or had doubts about their ability to do so.

To summarize, the record refutes Edwards' claim that so many of the prospective jurors were biased that the court should have presumed that all the prospective jurors could not be impartial and set aside their initial opinion. The 33 percent of prospective jurors who stated that they could not be impartial is considerably less than the 62 percent of prospective jurors who were dismissed for cause in *Irvin*.[38] And we have rejected due process arguments under similar facts.[39] So the court did not err in finding that Edwards was not entitled to postconviction relief based on his venue claim.

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[38] See *Murphy, supra* note 33 (distinguishing *Irvin, supra* note 31).

[39] See, *Erickson, supra* note 29; *Galindo, supra* note 28.

3. Due Process Claim Based on Falsified Evidence Requires an Evidentiary Hearing

As explained, the court rejected Edwards' allegations that Kofoed had fabricated evidence during the investigation as conclusory: Because Kofoed had falsified evidence in other investigations, he did so while investigating O'Grady's murder. It also concluded that even if a due process violation occurred, Edwards' convictions were not void because other blood evidence overwhelmingly established that he committed the crimes.

(a) Additional Background

As mentioned, in dismissing Edwards' allegations of a due process violation, the court primarily reasoned that the allegations were conclusory. Edwards generally alleged that Kofoed planted blood evidence to be used against Edwards. But Edwards' allegations and attachments set out a detailed history of Kofoed's unlawful conduct during two other murder investigations.

In April 2009, a U.S. Attorney and a Nebraska special prosecutor separately charged Kofoed with planting false evidence in late April or early May 2006 during an investigation into the murders of Wayne and Sharmon Stock. In June 2010, the Cass County District Court convicted Kofoed of tampering with evidence during that 2006 investigation. Specifically, he planted Wayne Stock's blood in a suspect's vehicle. We affirmed Kofoed's tampering conviction.[40] As part of the prosecution, the State also proved that in a separate 2003 murder investigation, Kofoed similarly planted a victim's blood in a trash container to corroborate the suspect's confession that he had placed the victim's body in the container.[41]

Edwards alleged that because of Kofoed's proven history of falsifying evidence, his involvement in Edwards' case rendered the State's forensic evidence against him inherently suspect

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[40] See *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012).

[41] See *id.*

and presumptively inadmissible. And he alleged that Kofoed's previous activities were strikingly similar to what had occurred in his case.

Specifically, he alleged that like the earlier investigations, investigators collected O'Grady's blood at the crime scene and stored it at the CSI facility. After investigators had searched Edwards' car and failed to find blood evidence, Kofoed conducted a second search in which O'Grady's blood was found in an obscure part of the vehicle. Edwards attached copies of CSI reports supporting his claim that Kofoed ordered a different CSI investigator to assist him in a "follow-up" search of Edwards' car.

Additionally, Edwards alleged that after analysts swabbed the garden shears for blood tests at a separate DNA laboratory, Kofoed took the shears back to the CSI facility. Two days later, Kofoed requested that the DNA laboratory test the shears again. About a week later, Kofoed took additional swabs of the shears into the DNA laboratory for testing. Finally, Edwards alleged that 5 days after the initial search of his apartment, investigators returned to look for a sword in a sheath, which they found. He alleged that a CSI investigator found a speck of blood on the tip of the sword 9 days after it was transported to the CSI facility despite not finding any blood on the inside of the sheath.

The court determined that Edwards' allegations were conclusory because he pled no facts that established Kofoed had planted evidence. It stated that the record refuted Edwards' claim that blood on the sword had been falsified. It determined that the record affirmatively showed that Kofoed was not involved in the recovery or the processing of the sword and that the trial evidence failed to establish that the sword was even the murder weapon.

The court concluded that the issue was whether a jury would have found Edwards innocent but for Kofoed's alleged fabrication of blood evidence on the sword, the garden shears, and the trunk gasket. It concluded that because of the overwhelming evidence against Edwards, an evidentiary hearing was not required even if Kofoed had fabricated evidence as Edwards alleged.

(b) Analysis

Edwards argues that the State's presentation of, and the jury's reliance on, evidence that a state agent has fabricated violates the Due Process Clause of the 14th Amendment—regardless whether the prosecutor knew that the evidence was fabricated. The State contends that the claim is pure conjecture and that Edwards cannot show that the result would have been different even if this evidence had not been presented.

(i) Due Process Right to a Fair Trial

[22] A fair trial before a fair and impartial jury is a basic requirement of constitutional due process guaranteed by the Constitutions of the United States and the State of Nebraska.[42] We have left open the possibility that even if the State did not violate the petitioner's right to a fair trial, a persuasive claim of actual innocence in a postconviction proceeding might show a constitutional violation: i.e., that the State's continued incarceration of such a petitioner without an opportunity to present newly discovered evidence is a denial of procedural or substantive due process.[43] A strong demonstration of actual innocence is required because after a fair trial and conviction, a defendant's presumption of innocence disappears.[44]

[23] But Edwards does not claim actual innocence. And the Due Process Clause generally restricts unfair *state* action.[45] So, short of claiming actual innocence, to establish a violation of the Due Process Clause based on the State's use of false evidence at trial, the defendant in a postconviction proceeding must allege that *state* action was involved. The conduct of state officials must have rendered his or her conviction inconsistent with the due process guarantee of a fair trial in which the truth-seeking process has not been corrupted.[46]

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[42] *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

[43] See *id.*

[44] See *id.*, citing *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).

[45] See, U.S. Const. amend. XIV, § 1; *Brown v. Mississippi*, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936).

[46] See *Lotter, supra* note 42.

[24] The U.S. Supreme Court has long held that the Due Process Clause will not tolerate a criminal conviction obtained through the prosecutor's knowing use of false evidence or perjured testimony.[47] It has also held that a due process violation occurs if other state officers involved in a prosecution deliberately violated the defendant's right to a fair trial without the prosecutor's knowledge.[48] Thus, a due process violation occurs when a law enforcement officer who participated in the investigation or preparation of the prosecution's case fabricates evidence or gives false testimony against the defendant at trial on an issue material to guilt or innocence. Such conduct passes "the line of tolerable imperfection and fall[s] into the field of fundamental unfairness."[49] That is exactly the police conduct that Edwards claims occurred.

(ii) Court Applied Wrong Standard of Materiality in Rejecting Edwards' Due Process Claim

As mentioned, the court concluded that even if Edwards' allegations were true, he could not show prejudice from Kofoed's fabrication of evidence. The court reasoned that during the other murder investigations in which Kofoed planted DNA evidence, the fabricated evidence was the only evidence linking the suspect to the crime. In contrast, it concluded that in Edwards' case, there was overwhelming evidence—the collection of which did not involve Kofoed—that supported Edwards' convictions.

To the extent the court reasoned that Kofoed would not have fabricated evidence in Edwards' case because he had

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[47] See, *Miller v. Pate*, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959); *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935).

[48] See *Pyle v. Kansas*, 317 U.S. 213, 63 S. Ct. 177, 87 L. Ed. 214 (1942). See, also, *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

[49] *Curran v. State of Delaware*, 259 F.2d 707, 713 (3d Cir. 1958). Accord, *United States v. Rosner*, 516 F.2d 269 (2d Cir. 1975); *Smith v. State of Florida*, 410 F.2d 1349 (5th Cir. 1969); *Rivers v. Martin*, 484 F. Supp. 162 (W.D. Va. 1980); *Chamberlain v. Mantello*, No. 95-CV-1050, 1996 WL 521062 (N.D.N.Y. Sept. 11, 1996) (unpublished judgment).

previously done so only when the State was desperate for evidence, we disagree. Particularly in the 2003 investigation, other evidence connected the suspect to the crime. The suspect confessed to the murder and led investigators to the place where he had disposed of the body.

More important, the court incorrectly required Edwards to show that a jury would have acquitted him without the fabricated evidence. The court stated the issue as whether a jury would have found Edwards innocent but for Kofoed's alleged falsification of blood evidence found on the sword, the garden shears, and the trunk gasket. It concluded that Edwards could not satisfy that standard. But this standard of materiality is incorrect.

[25] The State's knowing use of false evidence to secure a conviction violates a defendant's due process rights.[50] At an evidentiary hearing, it is Edwards' burden to establish that state officers involved in the investigation or prosecution knowingly used false evidence to secure his conviction.[51] But contrary to the materiality standard that the court applied, a conviction is tainted and must be set aside if there is any reasonable likelihood that the false evidence could have affected the jury's verdict.[52]

Under this standard, we disagree with the court that even if Edwards proved his allegations, he could not show that the fabricated evidence prejudiced him. The evidence that Kofoed allegedly fabricated would have strengthened the State's case by explaining why O'Grady had been murdered even though her body had not been found. As noted, in Edwards' direct appeal, we specifically relied on this evidence in rejecting his claim that the evidence was insufficient to show that he had murdered O'Grady. So the court incorrectly dismissed Edwards' petition because he could not show prejudice even if his allegations were true.

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[50] See *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003).

[51] See *id.*

[52] See, *Giglio, supra* note 48; *Napue, supra* note 47; *Brooks v. Tennessee*, 626 F.3d 878 (6th Cir. 2010), *cert. denied* 563 U.S. 976, 131 S. Ct. 2876, 179 L. Ed. 2d 1191 (2011); *Bonin v. Calderon*, 59 F.3d 815 (9th Cir. 1995).

(iii) Claims Warranted an Evidentiary Hearing

We also disagree with the court's ruling that Edwards' allegations were too conclusory to warrant an evidentiary hearing. Under the district court's reasoning, Edwards' claim would be sufficient only if he could allege specific acts of Kofoed's fabricating evidence in the O'Grady investigation. We conclude that this pleading requirement is an unreasonable burden for alleging a crime of deceit. Such crimes are usually proved by circumstantial evidence.

We agree that Edwards' allegations would be too conclusory if he had simply alleged in a vacuum that a law enforcement officer fabricated evidence to be used against him at trial without any factual allegations upon which to base such a claim. But Edwards alleged that Kofoed had fabricated specific evidence and that the circumstances under which Kofoed found this evidence were very similar to his unlawful conduct in the two other investigations.

To recap, Edwards alleged that as in the 2006 investigation of the Stocks' murders, Kofoed found blood in an obscure part of Edwards' car after other CSI investigators had examined the car and failed to find this evidence. The facts alleged in Edwards' petition also appear similar to the 2003 investigation in that Kofoed allegedly submitted swabs of evidence for DNA testing instead of submitting the evidence itself. And the allegations suggest that Kofoed may have held physical evidence for several days before having another investigator test it, a pattern that is similar to his conduct during the 2006 investigation in which he fabricated evidence.

Reasonable explanations for these actions may exist. But we believe that Edwards has alleged Kofoed's finding of evidence under circumstances similar enough to those in the earlier investigations when Kofoed fabricated evidence to raise concerns of fabricated evidence here. Although the court concluded that the record showed that Kofoed was not involved in the discovery or processing of the murder weapon, this record cannot rule out Kofoed's participation in the processing of any evidence during the investigation. And we cannot require Edwards to produce evidence that Kofoed was in fact involved

or that the evidence was fabricated before he has had an opportunity to gather evidence.

Given Kofoed's history of fabricating evidence during the same time that he was involved in investigating O'Grady's murder, we conclude that Edwards' allegations are specific enough that we cannot assume that they are without merit. To affirm the court's dismissal of Edwards' petition without a hearing would erode public confidence in the impartiality and fairness of the judicial process.[53] We conclude that the court erred in denying Edwards' request for an evidentiary hearing on his due process claim.

[26] We note that Edwards requests that we direct the formation of an independent committee to investigate the actions of Kofoed and the CSI in other criminal investigations. But "appellate jurisdiction" is the power vested in a superior court to review and revise a decision that has been tried in an inferior court.[54] Edwards' request that we initiate investigative action in other criminal cases is beyond the scope of our appellate jurisdiction in deciding his appeal.

4. Edwards' Allegations of His Trial Counsel's Conflict of Interest Require an Evidentiary Hearing

Edwards alleged that by the time of his trial, his trial counsel, Lefler, knew that Kofoed was suspected of planting blood evidence during the investigation of the Stocks' murders. He alleged that Lefler nonetheless failed to investigate the information and failed to attack Kofoed's credibility at Edwards' trial. He alleged that Lefler failed to provide a meaningful defense because of his friendship with Kofoed, which created a conflict of interest in his representation of Edwards.

The court concluded that Edwards had alleged nothing but a speculative conflict of interest: "Any allegation arising against Kofoed involving evidence [of] tampering or fabrication occurred well after the trial in this case." It concluded

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[53] See *State v. Gookins*, 135 N.J. 42, 637 A.2d 1255 (1994).

[54] See *In re Application of Burlington Northern RR. Co.*, 249 Neb. 821, 545 N.W.2d 749 (1996).

that Edwards' allegations were conclusory because he had not specified how Lefler should have cross-examined Kofoed and how effective cross-examination would have affected the trial. The court also concluded that Edwards had not specified how or when Lefler had learned of allegations against Kofoed.

[27] It is true that a conflict of interest must be actual rather than speculative or hypothetical before a court will overturn a conviction because of ineffective assistance of counsel.[55] But before addressing the court's conclusion that the allegations were too speculative to warrant an evidentiary hearing, we set out the relevant rules for resolving this claim.

(a) Governing Principles for Conflict of Interest Claims

[28,29] The right to effective assistance of counsel entitles the accused to his or her counsel's undivided loyalties, free from conflicting interests.[56] But a defendant who raised no objection at trial must show that an actual conflict of interest existed and that the conflict adversely affected his lawyer's performance.[57] If the defendant satisfies this requirement, the defendant is not required to show that the Sixth Amendment violation had a probable effect on the outcome of the trial to obtain relief.[58]

In 2002, in *Mickens v. Taylor*,[59] the U.S Supreme Court stated that the "actual conflict" inquiry is not separate from a performance inquiry: "An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." Thus, we have stated that when an actual conflict exists, there is no need to show that the conflict resulted in actual prejudice to the defendant (meaning no need

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[55] See *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

[56] See, *id.*; *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008); *State v. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000).

[57] See, *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *Narcisse, supra* note 56.

[58] See, *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). Accord, *Cuyler, supra* note 57; *Jackson, supra* note 56.

[59] See *Mickens, supra* note 58, 535 U.S. at 172 n.5 (quoted in *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006)).

to show the outcome of the proceeding was affected).[60] But the substantive analysis is the same.[61] If the defendant shows that his or her defense counsel faced a situation in which conflicting loyalties pointed in opposite directions and that his or her counsel acted for the other client's interests and against the defendant's interests, prejudice is presumed.[62]

(b) Sufficiency of the Allegations

[30] Although not common, a defense counsel's close personal relationship with a material prosecution witness can create a conflict of interest if the evidence shows that the defense counsel's desire to protect the witness outweighed his or her duty to represent the defendant's interests.[63] Here, the issue is complicated by Lefler's representation of Kofoed in the State prosecution.[64]

Edwards alleged that by September 2006, it was clear that Kofoed had planted blood evidence while investigating the Stocks' murders. He alleged that a reasonably diligent defense attorney would have known Kofoed was suspected of planting evidence while investigating the Stocks' murders. And he alleged that Lefler knew of these allegations because of his friendship with Kofoed. He claimed that Lefler repeatedly cited his friendship with Kofoed during his representation of Kofoed in the federal and state trials.

In fact, this record supports Edwards' contention that Lefler had a personal relationship with Kofoed. Before trial, Edwards moved to exclude Kofoed's testimony because of his televised demonstration of blood splatters. In arguing for the motion, Lefler referred to his friendship with Kofoed:

> I'm going to ask the Court to prevent Dave Kofoed, who's a friend of mine and I like him a ton . . . I'm going

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[60] See *Jackson, supra* note 56.

[61] See *U.S. v. Infante*, 404 F.3d 376 (5th Cir. 2005), citing *McFarland v. Yukins*, 356 F.3d 688 (6th Cir. 2004).

[62] See, *Jackson, supra* note 56; 3 Wayne R. LaFave et al., Criminal Procedure § 11.9(d) (3d ed. 2007).

[63] See, e.g., *Com. v. Mosher*, 455 Mass. 811, 920 N.E.2d 285 (2010); 3 LaFave et al., *supra* note 62, § 11.9(a). Compare *Sandoval, supra* note 55.

[64] See *Kofoed, supra* note 40.

> to ask you to prevent him from testifying in this particular case as a consequence of the TV demonstration that he gave. . . .
>
> . . . .
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> . . . [W]hat we are worried about for . . . Edwards is that there's going to be some juror who halfway through the trial is going to remember seeing this TV clip.
>
> And Dave Kofoed's a great — a nice man, smart guy. And so I'm just worried that halfway through the trial it clicks in some juror's mind.

The court implicitly reasoned that Edwards' allegations were without merit, in part, because Lefler did not represent Kofoed until April 2009 when Kofoed was charged with fabricating evidence. But the date that the State charged Kofoed does not resolve this issue.

We cannot know from this record whether before Edwards' trial, Kofoed had asked Lefler to represent him if he was later charged with a crime. Given allegations of their friendship and Lefler's undisputed representation of Kofoed against fabrication charges in 2009, Kofoed's possible request of representation is a prospect that the court should have considered. In addition, we cannot know from this record whether before Edwards' trial, law enforcement officers conducted an internal investigation of Kofoed's conduct in which Lefler had already represented or advised Kofoed. Finally, because of their friendship, Lefler may have learned of the allegations against Kofoed even without agreeing to represent him.

[31] Conflicts of interests resulting from successive representations can occur when a defendant's trial counsel previously represented a codefendant, trial witness, or victim.[65] "[T]he most common example of an actual conflict of interest arising from successive representation occurs where an attorney's former client serves as a government witness against the attorney's current client at trial."[66] A primary concern in this scenario is that a defense counsel will fail to cross-examine the witness in the defendant's trial about privileged information.

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[65] See, *Mickens, supra* note 58; *Moss v. U.S.*, 323 F.3d 445 (6th Cir. 2003).

[66] *Moss, supra* note 65, 323 F.3d at 460.

> In the successive representation situation, privileged information obtained from the former client might be relevant to cross-examination, thus affecting advocacy in one of two ways:
>
> (a) the attorney may be tempted to use that confidential information to impeach the former client; or
>
> (b) counsel may fail to conduct a rigorous cross-examination for fear of misusing his confidential information.
>
> . . . The second major possibility of conflict in the successive representation situation is that the attorney's pecuniary interest in possible future business may cause him to make trial decisions with a view toward avoiding prejudice to the client he formerly represented.[67]

Thus, "[w]hen an attorney attempts to represent his client free of compromising loyalties, and at the same time preserve the confidences communicated by a present or former client during representation in the same or a substantially related matter, a conflict arises."[68]

[32] We have broadly defined the phrase "actual conflict" to include any situation in which a defense attorney faces divided loyalties such that regard for one duty tends to lead to disregard of another.[69] So we conclude that if a defense counsel acts or refrains from acting at trial in loyalty to a former client in a manner that is inconsistent with the defendant's interests, the defense counsel "'actively represent[s] conflicting interests'"[70] no less than a defense counsel who does the same during concurrent representations.[71]

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[67] *United States v. Agosto*, 675 F.2d 965, 971 (8th Cir. 1982) (citation omitted), *abrogated on other grounds, Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984).

[68] *Id.*

[69] See *Jackson, supra* note 56.

[70] *Strickland, supra* note 17, 466 U.S. at 692, quoting *Cuyler, supra* note 57.

[71] See, e.g., *Alberni v. McDaniel*, 458 F.3d 860 (9th Cir. 2006); *Infante, supra* note 61; *Hall v. U.S.*, 371 F.3d 969 (7th Cir. 2004); *People v. Miera*, 183 P.3d 672 (Colo. App. 2008); *Acosta v. State*, 233 S.W.3d 349 (Tex. Crim. App. 2007).

If, as Edwards alleged, Lefler knew of the allegations against Kofoed, we believe that a reasonably diligent defense counsel, without a conflict, would have determined whether Kofoed was under investigation and questioned him about any pending investigation at trial. Such information would have obviously been relevant to Kofoed's credibility.

We have previously reversed postconviction orders and remanded the cause for an evidentiary hearing when the allegations were sufficient to raise factual issues whether a defense counsel labored under a conflict of interest that adversely affected his performance.[72] As in those cases, we cannot know, without an evidentiary hearing, whether Lefler knew of the allegations against Kofoed before Edwards' trial or whether a conflict of interest prevented him from cross-examining Kofoed about any pending investigation. But Edwards' allegations are sufficient to raise a factual issue whether a Sixth Amendment violation occurred. We conclude that the court erred in denying Edwards' request for an evidentiary hearing on his conflict of interest claim.

5. Edwards' Claim That His Trial Counsel Was Ineffective in Failing to Retain a DNA Expert Did Not Merit Postconviction Relief

[33] Edwards alleged that a reasonable defense attorney would have obtained additional DNA testing and retained a DNA expert. That expert would have allegedly testified about the two different sources of blood found on Edwards' mattress, to support his theory that O'Grady could have suffered a miscarriage or to develop new theories. The court concluded that these allegations were insufficient to show that his trial counsel was ineffective. The court relied on the U.S. Supreme Court's holding in *Harrington v. Richter*[73] that a defense counsel is entitled to "formulate a strategy that was reasonable at the time and to balance limited resources in

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[72] See, *Narcisse, supra* note 56; *State v. Marchese*, 245 Neb. 975, 515 N.W.2d 670 (1994).

[73] *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

accord with effective trial tactics and strategies."[74] We agree. The record refutes Edwards' claim that his counsel could have retained an expert to support his defense theory. It affirmatively shows that his counsel's trial strategies were reasonable under the circumstances.

At trial, Edwards' counsel asked the State's two forensic experts whether any test could determine that the contributor to a bloodstain was pregnant or that the blood had been discharged from a woman's body during menstruation or a miscarriage. The experts could not say that the blood on the mattress was consistent with the characteristics of blood that had been discharged from a woman's body. They also did not know of any currently available tests that would determine that the blood sample contained vaginal cells, was menstrual blood, or showed that the contributor was pregnant. One of the experts had even asked a colleague to perform an experimental test for menstrual blood collected from a mattress, but the test was unsuccessful.

In addition, a State expert testified that in a couple of the blood samples taken from the mattress, she had found alleles (DNA variations between individuals) that suggested another person, besides O'Grady or Edwards, had contributed DNA to sample. But she stated that the samples did not contain enough alleles to draw any conclusions about another contributor.

Edwards has not specified what evidence that he believes an expert could have presented to rebut this evidence or to provide any additional information about the blood samples. But given these experts' testimony that the information Edwards now seeks was unavailable, his claim that an expert was necessary to present a meaningful defense is speculative.

Equally important, absent blood tests that could show the blood was discharged from O'Grady's body, his defense counsel used the limitations of blood testing to bolster Edwards' defense to the extent possible. The record shows that Edwards' trial counsel had previously deposed the two experts, so he likely knew the limitations of their testing. But by asking experts on cross-examination whether they could make these

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[74] *Id.*, 562 U.S. at 107.

determinations, he showed the jury that their testing could not rule out the possibility that the blood had been discharged during menstruation or a miscarriage. Nonetheless, his counsel reasonably chose not to put too much emphasis on this theory. Menstruation or a miscarriage could not account for investigators finding O'Grady's blood all over the room, including the ceiling.

Edwards' trial counsel also extensively questioned the experts about inconsistencies in their DNA test results, the subjective nature of interpreting the results, and DNA material found in the tests that suggested another person's DNA was in the blood samples. Because of the strength of the State's evidence against Edwards, planting doubts in jurors' minds about the reliability of the State's evidence—and not retaining an expert to present an improbable theory to explain O'Grady's blood on the mattress—was not an unreasonable trial strategy.

Finally, even if a defense expert had presented testimony that another person's DNA was present in a couple of the blood samples from the mattress, this evidence would not have changed the result. As stated, the State's experts conceded this possibility at trial. But because of substantial other evidence pointing to Edwards' guilt, it obviously did not persuade the jurors. The court correctly concluded that Edwards' allegations regarding the necessity of an expert did not warrant postconviction relief.

6. Edwards' Remaining Claims of Ineffective Assistance Did Not Merit Postconviction Relief

[34] As stated, Edwards also alleged that his trial counsel failed to effectively investigate (1) calls made to O'Grady's aunt after O'Grady's disappearance, concerning the location of O'Grady's car; (2) whether O'Grady had contacted an online travel agency around the time of her disappearance; and (3) whether an "'alternate suspect'" existed. But a petitioner's postconviction claims that his or her defense counsel was ineffective in failing to investigate possible defenses are too speculative to warrant relief if the petitioner fails to allege

what exculpatory evidence that the investigation would have procured and how it would have affected the outcome of the case.[75] Edwards did not allege these facts. Thus, the court correctly concluded that these allegations did not entitle Edwards to postconviction relief.

VI. CONCLUSION

We conclude that the court properly denied postconviction relief on Edwards' claim that his appellate counsel was ineffective for failing to raise on appeal that the trial court erred in overruling his motion for a change of venue. The record refutes his claim that the court should have presumed the prospective jurors were biased. Edwards also failed to allege facts showing that his trial counsel was ineffective for not retaining an expert to support his defense theory of a miscarriage causing the blood found on the mattress or to assist in developing new theories. Finally, Edwards' allegations failed to show that his trial counsel unreasonably failed to investigate (1) calls made to O'Grady's aunt after O'Grady's disappearance, concerning the location of O'Grady's car; (2) whether O'Grady had contacted an online travel agency around the time of her disappearance; and (3) whether an "'alternate suspect'" existed. These allegations were too speculative to require postconviction relief.

But we conclude that Edwards' allegations require an evidentiary hearing on two claims: (1) that he was denied due process by the State's knowing use of fabricated evidence to obtain his conviction and (2) that his trial counsel labored under an actual conflict of interest. We reverse the court's ruling on these two claims and remand the cause for an evidentiary hearing.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[75] See, e.g., *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010); *State v. Whiteley*, 234 Neb. 693, 452 N.W.2d 290 (1990), *disapproved on other grounds, State v. Pieper*, 274 Neb. 768, 743 N.W.2d 360 (2008).

JEFFREY BECERRA, APPELLEE, V. UNITED PARCEL SERVICE, APPELLANT.

822 N.W.2d 327

Filed September 28, 2012. No. S-11-1098.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' 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. **Workers' Compensation: Wages.** The determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law.
3. **Workers' Compensation: Appeal and Error.** Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.
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. **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.
6. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.
7. **Workers' Compensation.** Workers' compensation cases are special proceedings.
8. **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 before the order from which an appeal is taken.
9. **Actions: Words and Phrases.** An "independent special proceeding" is one that is separate from the issues raised in any underlying dispute and is not a phase in a protracted special proceeding with interrelated phases.
10. **Final Orders: Appeal and Error.** When multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of fewer than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.
11. **Workers' Compensation: Wages.** For employees who are paid by the hour, the average weekly wage for workers' compensation purposes is determined pursuant to Neb. Rev. Stat. §§ 48-121 and 48-126 (Reissue 2010).

12. **Statutes: Appeal and Error.** An appellate court gives statutory language its plain and ordinary meaning.
13. **Workers' Compensation.** As a general rule, the Nebraska Workers' Compensation Act should be construed to accomplish its beneficent purposes.
14. ____. An injured employee is entitled to vocational rehabilitation services as may be reasonably necessary to restore him or her to suitable employment when the employee is unable to perform suitable work for which he or she has previous training or experience as a result of the injury.
15. **Workers' Compensation: Wages: Words and Phrases.** Accepting a job paying minimum wage does not automatically restore a claimant to suitable or gainful employment pursuant to Neb. Rev. Stat. § 48-162.01 (Reissue 2010), where the claimant's previous employment was at a significantly higher wage.
16. **Workers' Compensation.** The goal of any average income test is to produce an honest approximation of a workers' compensation claimant's probable future earning capacity.

Appeal from the Workers' Compensation Court. Affirmed.

Charles L. Kuper, of Larson, Kuper & Wenninghoff, P.C., L.L.O., for appellant.

M.H. Weinberg, of Weinberg & Weinberg, P.C., for appellee.

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

CASSEL, J.

INTRODUCTION

An hourly employee who worked part time while attending college sustained a work-related injury. We must decide how to calculate his average weekly wage in order to determine the appropriate vocational rehabilitation priority—using his part-time wages, as the employer contends, or wages calculated using a 40-hour workweek, as the court below ruled. Under the circumstances of this case, a vocational rehabilitation plan seeking an average weekly wage based on a 40-hour week—the calculation used for purposes of permanent disability—best restores the employee to suitable employment. We affirm the award of the compensation court.

BACKGROUND

In July 2010, Jeffrey Becerra injured his lower back in an accident arising out of and in the course of his employment

with United Parcel Service (UPS). As a result, he suffered a 15-percent loss of earning capacity and is limited by permanent work restrictions. The compensability of Becerra's injury is not at issue, and there is no dispute that UPS paid all temporary total disability and permanent partial disability benefits owed.

At the time of the accident, Becerra earned $12.60 an hour and worked approximately 17 hours per week while attending college. The parties stipulated that Becerra had an average weekly wage of $217.86 for purposes of temporary disability and of $504 for purposes of permanent disability. Becerra testified that UPS had not offered him his former position or any alternative position. He desired formal retraining to lead him into a career other than loading or unloading parcels at UPS. Becerra testified that prior to the accident, he could have worked 40 hours per week on a regular basis if he had not been attending college. He stopped attending classes in the fall of 2010, but he wished to go back to school for an education in engineering. Becerra testified that there was nothing keeping him from working 40 hours per week at the time of trial.

The agreed-upon vocational rehabilitation counselor met with Becerra to develop a loss of earning capacity analysis and to discuss vocational rehabilitation options, but had not developed a vocational plan at the time of trial because he was unable to provide the compensation court with an agreed-upon or court-ordered average weekly wage. The counselor testified that the determination of the proper wage would affect the vocational priority that he would select: The vocational rehabilitation plan would more than likely be for retraining if the average weekly wage were determined to be $504 or be for job placement if the wage were determined to be $217.86 per week.

The compensation court framed the issue as whether a vocational rehabilitation plan should be aimed toward finding Becerra a job "at the $217.86 temporary total average weekly wage" or "at $504 per week for the permanent injury wage rate." The court found that Becerra was unable to obtain suitable employment at or near his preinjury wage rate and that a formal plan of retraining was the appropriate priority under

Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010). The court observed that Becerra's restrictions were permanent and reasoned that Becerra should not be limited to the average weekly wage for temporary disability. The court therefore determined that Becerra was entitled to a vocational rehabilitation plan of formal training and that the permanent wage rate calculation of $504 should be used to develop the formal plan.

UPS timely appealed, and we moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

UPS assigns two errors. First, UPS alleges that the compensation court erred as a matter of law in finding the appropriate average weekly wage to use in formulating a plan of vocational rehabilitation should be the permanent injury wage rate. Second, UPS contends that the court erred in finding Becerra was entitled to a vocational rehabilitation plan consisting of formal training.

STANDARD OF REVIEW

[1] A judgment, order, or award of the Workers' 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]

[2,3] The determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law.[3] Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.[4]

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

[2] *Sellers v. Reefer Systems*, 283 Neb. 760, 811 N.W.2d 293 (2012).

[3] *Mueller v. Lincoln Public Schools*, 282 Neb. 25, 803 N.W.2d 408 (2011).

[4] *Id.*

ANALYSIS

Jurisdiction.

[4,5] 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] 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.[6]

[6-8] The compensation court's award was a final order. Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.[7] Workers' compensation cases are special proceedings.[8] 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 before the order from which an appeal is taken.[9] The award of vocational rehabilitation in the form of formal training eliminated UPS' claim that Becerra was not entitled to vocational rehabilitation. Thus, the order falls under the second category of final orders listed in § 25-1902 because it was made in a special proceeding and affected a substantial right.

[9] Becerra asserts that we lack jurisdiction because the compensation court decided some, but not all, of the issues before it. Specifically, he identifies the undecided issues as the type and the length of the retraining program. Becerra cites

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[5] *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

[6] *Id.*

[7] *Id.*

[8] See *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.

[9] *Big John's Billiards v. State, supra* note 5.

Big John's Billiards v. State,[10] where we iterated that an order resolving all the issues raised in an independent special proceeding is a final, appealable order. An "independent special proceeding" is one that is separate from the issues raised in any underlying dispute and is not a phase in a protracted special proceeding with interrelated phases.[11] While the proceeding in the instant case was a special proceeding, it was not an independent special proceeding.

[10] A more apt rule is that when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of fewer than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.[12] Here, the petition identified "rehabilitation" as an issue in dispute and the court determined that Becerra was entitled to vocational rehabilitation in the form of formal training. The court did not expressly reserve anything for later determination. Further, we find no authority—and Becerra points us to none—requiring that an award of vocational rehabilitation specify the length and type of retraining program.

Average Weekly Wage.

The compensation court found that the appropriate average weekly wage to use in formulating a plan of vocational rehabilitation should be the permanent injury wage rate under Neb. Rev. Stat. § 48-121 (Reissue 2010). UPS argues that § 48-121(4) is a schedule of compensation and is not applicable to the determination of what is suitable and gainful employment under § 48-162.01. UPS asserts that § 48-121 applies only to the payment of benefits and not to the calculation of wages. We disagree.

[11,12] For employees who are paid by the hour, the average weekly wage is determined pursuant to § 48-121 and Neb. Rev.

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[10] *Id.*

[11] See *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010).

[12] See *Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008).

Stat. § 48-126 (Reissue 2010).[13] If an employee's rate of wages is fixed by the hour,

> his or her weekly wages shall be taken to be his or her average weekly income for the period of time ordinarily constituting his or her week's work, and using as the basis of calculation his or her earnings during as much of the preceding six months as he or she worked for the same employer, *except as provided in sections 48-121 and 48-122*.[14]

Consequently, an employee's weekly wages must be computed by averaging his or her earnings over the 6 months preceding the injury unless § 48-121 or Neb. Rev. Stat. § 48-122 (Reissue 2010) provides differently. Both § 48-121(4), regarding disability resulting from permanent disability, and § 48-122(2), concerning injuries resulting in death, provide that the weekly wages shall be computed upon the basis of a workweek of a minimum of 40 hours if the rate of wages was fixed by the hour. We give statutory language its plain and ordinary meaning.[15] Thus, when an employee paid by the hour suffers a work-related injury that results in permanent disability or death, the employee's average weekly wage is calculated by multiplying the rate of wages by a 40-hour workweek rather than by averaging that employee's actual wages over the 6 months before the accident. As this court explained:

> As to hourly employees, § 48-121(4) alters the computation of the average weekly wage under § 48-126 only to the extent that it requires that a minimum of 40 hours per week be utilized in making the computation, which would result in part-time hourly employees with permanent disabilities being treated as though they had worked a 40-hour workweek.[16]

Because Becerra was an hourly employee who suffered a permanent disability, his average weekly wage must be

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[13] *Mueller v. Lincoln Public Schools, supra* note 3.

[14] § 48-126 (emphasis supplied).

[15] *Rosberg v. Vap*, 284 Neb. 104, 815 N.W.2d 867 (2012).

[16] *Ramsey v. State*, 259 Neb. 176, 182, 609 N.W.2d 18, 22 (2000).

calculated based upon a 40-hour workweek under § 48-121(4). We conclude that the compensation court correctly calculated Becerra's average weekly wage based on a 40-hour workweek, or $504 for 40 hours at $12.60 per hour.

Vocational Rehabilitation.

The dispute in this case centers on the appropriate calculation of an employee's average weekly wage for the purpose of determining the lowest vocational rehabilitation priority that will result in gainful employment. Becerra testified that UPS had not offered him any position, and counsel for UPS offered to stipulate that UPS had not offered Becerra a job. Thus, as the parties acknowledge, the only possible priorities for a vocational rehabilitation plan are "[a] job with a new employer" or "[a] period of formal training which is designed to lead to employment in another career field."[17] The vocational rehabilitation counselor testified that his recommendation as to the vocational rehabilitation priority depended upon a determination of the average weekly wage. If the wage was determined to be $504 a week, the plan would be for formal training, but if the average weekly wage was determined to be $217.86, the plan would be for job placement with a new employer.

UPS asserts that the average weekly wage of $217.86 under § 48-126 should be used because it is based on the average hours Becerra worked as a part-time employee. On the other hand, Becerra contends that the vocational rehabilitation plan should use the permanent disability rate of $504, which is based on a minimum of a 40-hour workweek under § 48-121(4).

[13,14] As a general rule, the Nebraska Workers' Compensation Act should be construed to accomplish its beneficent purposes.[18] A primary purpose of the act is "restoration of the injured employee to gainful employment."[19] An injured employee is entitled to vocational rehabilitation services "as

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[17] § 48-162.01(3).

[18] See *Hofferber v. Hastings Utilities*, 282 Neb. 215, 803 N.W.2d 1 (2011).

[19] § 48-162.01(1).

may be reasonably necessary to restore him or her to suitable employment" when the employee "is unable to perform suitable work for which he or she has previous training or experience" as a result of the injury.[20]

Section 48-162.01(3) contains priorities for use in developing a vocational rehabilitation plan, and no higher priority may be selected unless all lower priorities have been determined to be unlikely to result in suitable employment for the injured employee. Because the stipulation eliminated three lower statutory priorities, only two priorities remained: a job with a new employer—the lower of the two priorities—or a period of formal training designed to lead to employment in another career field. In this case, we are concerned with determining which average weekly wage will best restore Becerra to gainful employment.

[15] This court previously considered what was meant by the terms "restore," "suitable employment," and "gainful employment" as used in § 48-162.01(1) and (3). In *Yager v. Bellco Midwest*,[21] an employee earned $220 per week and his hourly wage had increased to $5.85 at the time of injury. At the time of rehearing, the employee worked elsewhere, earning $3.35 per hour and working 31 hours per week. The employer argued that because the employee had obtained a minimum-wage job with a different employer, the employee was not entitled to vocational rehabilitation. We disagreed, stating:

> It is inappropriate to hold, from the mere fact that the injured worker has accepted a job resulting in a $104 weekly wage, that, by that act alone, he has foreclosed himself from some training that would enable him to return to the approximate level of the salary he was earning when he was injured.[22]

We accordingly held that "accepting a job paying minimum wage does not automatically 'restore' a claimant to 'suitable' or 'gainful' employment pursuant to § 48-162.01, where the claimant's previous employment was at a significantly higher

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[20] § 48-162.01(3).

[21] *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991).

[22] *Id.* at 897, 464 N.W.2d at 341.

wage."[23] We observed that the statutory goal is to return the worker to comparable employment.[24]

[16] In certain situations, an employee's actual earnings may not be a predictable measure of future earning capacity. We are mindful that Becerra was working only part time at UPS and that part-time employment with a different employer which paid an average weekly wage of $217.86 would arguably restore him to comparable employment. But the goal of any average income test is to produce an honest approximation of the claimant's probable future earning capacity.[25] As a treatise explains:

> [W]hen a high school or college student works on a full-time job during summer vacation, since he or she presumably expects to be a full-time worker eventually it is logical to calculate the earnings on a full-time basis. By the same token, for temporary benefits there is no reason to go beyond the part-time earnings, since they more accurately reflect actual loss during the period covered by the temporary disability.[26]

Here, Becerra was working part time while attending school, but there was no barrier to his working 40 hours per week at the time of trial and there is no indication that he wished to remain a part-time employee in the future.

Returning Becerra to employment paying an average weekly wage of $217.86 would not restore him to comparable employment. Becerra is not prevented from working 40 hours per week, but a 40-hour workweek yielding an average weekly wage of $217.86 would mean that Becerra would need to be placed in a job paying only $5.45 an hour—less than minimum wage and far less than the $12.60 hourly wage he was earning at UPS. As in *Yager v. Bellco Midwest*,[27] we determine that such employment would not restore an injured worker to

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[23] *Id.* at 896, 464 N.W.2d at 340.

[24] See *id.*

[25] *Mueller v. Lincoln Public Schools, supra* note 3.

[26] 5 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 93.02[2][d] at 93-38 (2011).

[27] *Yager v. Bellco Midwest, supra* note 21.

suitable employment. We conclude that the compensation court did not err in finding Becerra was entitled to a vocational rehabilitation plan consisting of formal training.

CONCLUSION

Because Becerra was a part-time hourly employee who suffered a permanent impairment, the compensation court properly calculated his average weekly wage for vocational rehabilitation purposes under § 48-121(4). We agree with the compensation court that seeking to place Becerra in employment where he would earn wages similar to those based upon the calculation used for permanent disability purposes would best achieve the goal of restoring him to suitable employment. Accordingly, we affirm the court's award of vocational rehabilitation consisting of formal training.

AFFIRMED.

IN RE INTEREST OF ASHLEY W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ASHLEY W., APPELLANT.

821 N.W.2d 706

Filed October 5, 2012. No. S-11-535.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. **Trial: Investigative Stops: Warrantless Searches: Appeal and Error.** The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
3. **Constitutional Law: Evidence: Appeal and Error.** When the State seeks to submit evidence as sufficiently attenuated from a previous Fourth Amendment violation, an appellate court reviews the trial court's findings of historical facts for clear error but reviews de novo the court's ultimate attenuation determination based on those facts.

4. **Juvenile Courts: Rules of Evidence.** The Nebraska Evidence Rules control adduction of evidence at an adjudication hearing under the Nebraska Juvenile Code.
5. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** The failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.
6. **Trial: Rules of Evidence: Appeal and Error.** Under Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103 (Reissue 2008), an error may not be predicated upon a ruling which admits evidence unless a timely objection or motion to strike appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context.
7. **Trial: Evidence.** An objection to the admission of evidence is generally not timely unless it is made at the earliest opportunity after the ground for the objection becomes apparent.
8. **Constitutional Law: Search and Seizure: Motor Vehicles.** Even though the purpose of a stop is limited and the resulting detention quite brief, stopping a vehicle and detaining its occupants constitute a seizure within the meaning of the 4th and 14th Amendments.
9. ____: ____: ____. An occupant of a vehicle ordinarily has a legitimate expectation to be free of unreasonable governmental intrusion so as to give the occupant standing to challenge a stop as violative of his or her Fourth Amendment rights.
10. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Investigative Stops.** Pursuant to the 4th and 14th Amendments to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, a law enforcement officer may legally conduct an investigatory stop of a person suspected of criminal activity only when the officer has a reasonable suspicion based upon articulable facts that the person has been, is, or is about to be involved in criminal activity.
11. **Criminal Law: Investigative Stops.** Generalized suspicions or unparticularized hunches that a person has been or is engaged in criminal activity do not suffice to justify a detention.
12. **Police Officers and Sheriffs: Probable Cause.** Reasonable suspicion depends upon both the content of information possessed by police and its degree of reliability.
13. **Investigative Stops.** Finding the necessary quantum of individualized suspicion only after a stop occurs cannot justify the stop.
14. **Search and Seizure: Evidence: Trial.** Evidence obtained as the direct or indirect "fruit" of an illegal search or seizure, "the poisonous tree," is inadmissible in a state prosecution and must be excluded.
15. **Constitutional Law: Evidence: Appeal and Error.** In addressing whether the connection between a prior illegality and challenged evidence has become so attenuated as to dissipate the taint, courts must take into account considerations relating to the exclusionary rule and the constitutional principles which it is designed to protect.
16. **Evidence.** The relevant factors for attenuation will depend upon the facts of a particular case but include (1) the proximity between the actual illegality and the

evidence sought to be suppressed, (2) the presence of intervening factors, and (3) the flagrancy of the governmental misconduct involved in the case.

17. **Search and Seizure: Police Officers and Sheriffs.** Consent to search given in very close temporal proximity to the official illegality is often a mere submission or resignation to police authority.
18. **Evidence: Words and Phrases.** Intervening circumstances are intervening events of significance that render inapplicable the deterrence and judicial integrity purposes which justify excluding tainted evidence.
19. **Search and Seizure: Evidence: Confessions: Appeal and Error.** Where a confession follows confrontation of the defendant with illegally seized evidence, the Nebraska Supreme Court has repeatedly said there has been an exploitation of that illegality.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and CASSEL and PIRTLE, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, ELIZABETH CRNKOVICH, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Thomas C. Riley, Douglas County Public Defender, and Melinda S. Currans for appellant.

Donald W. Kleine, Douglas County Attorney, and Cortney Wiresinger for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

The juvenile court adjudicated Ashley W. as a child within the meaning of Neb. Rev. Stat. § 43-247(1) (Reissue 2008) for possession of marijuana. Ashley appealed, and the Nebraska Court of Appeals affirmed in a memorandum opinion filed on December 15, 2011. The Court of Appeals declined to address issues previously raised by Ashley in a motion to suppress, concluding that she had failed to preserve the alleged errors. We granted further review.

II. BACKGROUND

In June 2010, police officers Dan Wootton and Josiah Warren investigated a fireworks complaint in Omaha, Nebraska. In the process of their investigation, they issued Ashley, a minor

child, a citation for possession of less than 1 ounce of marijuana. The county attorney filed a petition to have Ashley adjudicated as a child as defined by § 43-247(1). Ashley's attorney made a motion to suppress the evidence relating to the citation. The juvenile court scheduled the hearing on Ashley's motion to suppress on the same day as the adjudication hearing.

1. Wootton and Warren Testimony

At the hearing on the motion to suppress, held January 26, 2011, the State offered the testimony of Wootton and Warren. No other testimony or evidence was presented.

Wootton and Warren testified that about 5 minutes after receiving the call relating to the fireworks complaint, they were "[w]ithin 50 feet" of the area where the complaint came from. There, the officers noticed a vehicle parked on the street with its headlights on and two occupants inside. Many other unoccupied cars were similarly parked along the street. The officers did not observe anyone else in the area. The officers did not see any fireworks or fireworks debris in the area.

As the officers drove by, the individuals in the vehicle reportedly "looked" at the officers. After the cruiser passed, the vehicle's driver pulled away from the curb and started to drive down the street.

The officers turned around, engaged their cruiser's flashing lights, and pulled the vehicle over. Wootton explained that the vehicle aroused suspicion because, "[w]ell, the lights on, sitting in the area."

The officers told the individuals in the vehicle that they were investigating a fireworks complaint and asked for identification. During this initial contact, Warren stood by the driver's side, where he conversed with the driver. Wootton stood by the passenger side of the vehicle, where the window was rolled up. Ashley was the passenger. Ashley and the driver denied any involvement with or knowledge of the fireworks.

Warren testified that he had smelled marijuana upon their initial approach to the vehicle after it was stopped. The officers returned to their cruiser to process identification and discussed searching the vehicle. It took 10 to 15 minutes to process the driver's and Ashley's identifications.

Wootton then asked the driver whether they could search the vehicle. Wootton did not tell the driver that he had a right to refuse, and the driver gave his permission.

The officers removed the driver and Ashley from the vehicle to conduct the search. Warren conducted a pat-down of the driver for weapons and escorted him to the front of the cruiser. Ashley was also directed to stand in front of the cruiser. Wootton searched the area inside the vehicle, while Warren stood watch over Ashley and the driver. Wootton testified that Ashley was not free to go while the search was conducted.

Wootton testified that he found a baggie of marijuana on the passenger side of the vehicle. He approached the driver and Ashley, held up the baggie, and asked, "Who does this belong to?" Wootton testified that Ashley "said it was mine." After issuing a citation to Ashley, the officers drove her home. The officers estimated that approximately 25 minutes passed from the time they initiated the stop to the time they issued the citation. The officers did not give *Miranda* warnings.

The officers had been employed by the Omaha Police Department approximately 2 years. Both had received field training and classes involving narcotics. The officers did not, however, elaborate on such training or how it related to their ability to identify the substance seized as marijuana. Nor did the officers provide a detailed explanation as to how or why they concluded that the substance they found in the vehicle was marijuana.

2. Adjudication Postponed

After hearing testimony from the two officers, the juvenile court denied Ashley's motion to suppress. Following confirmation that both parties were ready to proceed to trial, the following dialog occurred between the juvenile court, the State, and Ashley's counsel:

> THE COURT: All right. Let me ask this of you. Will the evidence presented by the State be any different than the evidence that was just heard?
>
> [State]: No, Your Honor.
>
> THE COURT: Would you have any other witnesses?
>
> [State]: No, Your Honor.

THE COURT: Would there be any agreement to stipulating that that would be the State's case in chief rather than sit for 30 minutes and hear the precise same evidence, given the fact that we just heard the evidence and you did have an opportunity to cross-examine. Do you want to ask your client whether that would be all right?

. . . .

[Ashley's counsel]: Judge, I do not have an objection to the Court taking judicial notice of the testimony as long — I would like to renew my objections to the evidence of the statements that I put forth in the motion to suppress.

THE COURT: Okay. You would have done that at trial, so you — and so I will note that. And then I will — as I would have at trial, will further indicate that that has been ruled on.

[Ashley's counsel]: (Nods head.)

THE COURT: All right. So does the State rest then?

[State]: Well, Your Honor, I would briefly call Officer Wootton to the stand.

THE COURT: Okay. Well, now we're going — now we're in a different place, because here's what I asked the State. Would your evidence be any different? You said no. Do you have any other witnesses? You said no. So I was trying to address the interest of time and [Ashley's] right and insistence on maintaining that right. We'll have to continue it to a later date. We will set this for trial at a later date.

(Wherein, the bailiff was called.)

THE COURT: May I have a trial date, please? Half an hour. Soon.

[State]: Your Honor, we would only need 15 minutes.

THE COURT: No, madam, because I gave you an opportunity, respectfully. I was respecting the State. But we can't do it both ways. And that's fine. That's fine. But we will adjudicate it. You will recall your witnesses and present the same testimony.

[To Ashley] And who will you be calling as a witness?

[Ashley's counsel]: Ashley.

THE COURT: Unless you wish to accept the previous deal and just have Ashley come to the stand?

[State]: I didn't know she was going to call her, so —

THE COURT: Well, we would — all right . . . . I would have — I'm going to suggest that that might have occurred to you given what has transpired in the last ten minutes and/or with a question to counsel.

We're adjourned. Date and time will be provided at a later date.

3. Adjudication Hearing

The adjudication hearing was held on March 25, 2011. The hearing began with Ashley's attorney's request "as a preliminary matter, in reading over the transcript and the order, I believe we are requesting the Court make specific findings of facts and conclusions of law as to the motion to suppress before we proceed to trial." The court stated, "Okay. We are going to proceed to trial today." The dialog continued:

[Ashley's counsel]: Okay.

THE COURT: Go ahead. I am not continuing the trial.

[Ashley's counsel]: I'm not asking that. I'm just asking for specific findings of facts and conclusions of law.

THE COURT: Okay. I can do that in the order that I issue today.

[Ashley's counsel]: As to the motion to suppress?

THE COURT: Yes.

[Ashley's counsel]: Okay. All right.

[State]: At this time, Your Honor, the State would offer what has been marked as Exhibit No. 2. It is a certified copy of a certificate of live birth for Ashley . . . , and her date of birth is March . . . 1994; Exhibit No. 3, which is a transcript of the motion to suppress hearing that was set and heard before this Court on January 26, 2011. The transcript was typed by . . . the court reporter.

THE COURT: Okay. Any objection?

[Ashley's counsel]: No objections.

THE COURT: All right. They will be received.

. . . .

THE COURT: Any other evidence?

[State]: No other evidence at this time, Your Honor.

THE COURT: All right. Counsel, are you presenting evidence?

[Ashley's counsel]: Yes, Judge. But I would like to make a preliminary motion. I would move to dismiss the case, being that the State has failed to prove their prima facie case; specifically due to the inconsistencies in the officers' statements and also due to the fact that there was no evidence establishing that what was found was actually marijuana.

THE COURT: Overruled.

[Ashley's counsel]: Okay. And can I ask for a reasoning on that, Judge?

THE COURT: Because the Court finds that the State presented a prima facie case and your motion to dismiss for failure to state a prima facie case is overruled.

[Ashley's counsel]: Specifically, Judge, I am objecting — I'm sorry — to the State — the testimony of the State's witnesses subject to my motion to suppress.

THE COURT: Now, just a moment.

[Ashley's counsel]: Yes.

THE COURT: You just —

[Ashley's counsel]: I know.

THE COURT: — said no objection. That has been ruled on. You may not go back, Counsel.

[Ashley's counsel]: Okay.

THE COURT: You have passed the moment when that would have been an appropriate motion. You raised no objection. The evidence is presented. The State has rested. You — you appropriately made a motion to dismiss for failure to state a prima facie case. I have overruled it. The next step is, do you have evidence to present?

[Ashley's counsel]: I do.

THE COURT: You may proceed then.

Ashley presented her defense, which consisted of her testimony. Ashley denied that the marijuana was hers or that she had ever said it was hers. According to Ashley, she had said, "It's not mine." Ashley also testified that she had no knowledge there was marijuana in the vehicle until they were pulled

over and the driver told her. She said that she had only been in the car less than 2 minutes. She explained that the driver had pulled to the curb a couple of houses down from her house in order to pick up a compact disc and look for change to buy food.

On May 26, 2011, the court issued a written order adjudicating Ashley as a child under § 43-247(1). The court also set forth its findings of fact and conclusions of law "regarding the Motion to Suppress held on January 26, 2011." The findings reiterated the undisputed portions of the officers' testimony, and the court found that Ashley had admitted to the officers that the baggie of marijuana was hers. The court concluded that (1) the initial stop was based on a reasonable and articulable suspicion of criminal activity, (2) there was probable cause for the stop, (3) a rights advisory was not required as the child in interest was not in a custodial situation or under arrest, (4) the officers were conducting a voluntary search of the vehicle, and (5) the statements were spontaneous and were freely and voluntarily given.

The Court of Appeals affirmed in a memorandum opinion. The Court of Appeals reasoned that Ashley's trial counsel did not object at trial to the evidence that was the subject of her motion to suppress and thus failed to preserve the issue for appellate review. The Court of Appeals also concluded that the circumstantial evidence was sufficient for the trier of fact to conclude the substance seized was marijuana. We granted Ashley's petition for further review.

III. ASSIGNMENTS OF ERROR

Ashley asserted in her appellate brief that the juvenile court erred in denying her motion to suppress, because she was illegally seized without reasonable, articulable suspicion and the statements and evidence obtained were fruit of the poisonous tree. Ashley further asserted that the court erred in failing to suppress her statements to the officers, because she was in custody and was not advised of her *Miranda* rights. Finally, she asserted that the juvenile court erred in concluding there was sufficient evidence that the substance in question was marijuana.

Ashley asserts in her petition for further review that the Court of Appeals erred in (1) concluding that she failed to object at trial and thus preserve for appellate review the evidence that was the subject of the motion to suppress and (2) finding that the evidence in the record was sufficient to establish beyond a reasonable doubt that the substance in question was marijuana.

IV. STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.[1]

[2] The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.[2]

[3] When the State seeks to submit evidence as sufficiently attenuated from a previous Fourth Amendment violation, we review the trial court's findings of historical facts for clear error but review de novo the court's ultimate attenuation determination based on those facts.[3]

V. ANALYSIS

1. The Objection

The Court of Appeals determined that Ashley failed to timely object to the introduction of evidence at trial which was the subject of her previous motion to suppress. Therefore, Ashley had not preserved the issue for appellate review and the court did not address the underlying merits. We agree with Ashley that this was error. The record shows that Ashley made the necessary objection.

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[1] See *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008).

[2] See *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003).

[3] *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010).

[4-6] The Nebraska Evidence Rules control adduction of evidence at an adjudication hearing under the Nebraska Juvenile Code.[4] We have said that the failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.[5] Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103 (Reissue 2008), provides that an error may not be predicated upon a ruling which admits evidence unless "a timely objection or motion to strike appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context." Thus, an untimely renewal of an objection, even though the subject of a previous motion to suppress, will waive the objection.

[7] An objection to the admission of evidence is generally not timely unless it is made at the earliest opportunity after the ground for the objection becomes apparent.[6] Thus, an objection to testimony is not usually considered timely when the testimony has already been adduced without objection and where the grounds for the motion should have been apparent at the time of the testimony.[7] And, in *State v. Rodgers*,[8] and *State v. DiBaise*,[9] we said that an objection made at trial after the close of the State's case in chief fails to preserve the question of the admissibility of exhibits which were the subjects of previous motions to suppress. In both *Rodgers* and *DiBaise*, defense counsel stated during the State's case in chief that there was no objection to the introduction of the exhibits, but then tried to renew the motion to suppress those same exhibits after the close of the State's case.

However, we have excused an attorney's failure to object in circumstances where the need to object was not reasonably

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[4] *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990).

[5] *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

[6] *State v. Rodgers*, 237 Neb. 506, 446 N.W.2d 537 (1991).

[7] See *State v. Giessinger*, 235 Neb. 140, 454 N.W.2d 289 (1990).

[8] *State v. Rodgers, supra* note 6.

[9] *State v. DiBaise*, 232 Neb. 217, 440 N.W.2d 223 (1989).

apparent. In *State v. Giessinger*,[10] we determined that because of the confusing nature of the proceedings, we would address the defendant's alleged error despite counsel's failure to object at trial. Prior to the suppression hearing in *Giessinger*, the judge had told defense counsel it was the judge's usual practice to handle the motion to suppress and the trial "'collectively, at the same time.'"[11] This was incorrect insofar as the motion to suppress must be ruled on and finally determined before trial.[12] Counsel had made an objection to the disputed evidence during that portion of the proceedings relating to the motion to suppress. We concluded counsel may have failed to renew that objection "because of the confusion introduced into the proceedings by the county court judge's suggestion that the suppression hearing and the trial be combined."[13]

Because of the unique nature of the proceedings, the grounds for Ashley's objection were not apparent before the State concluded its case in chief. Cases such as *Rodgers* and *DiBaise*, which are relied upon by the State, are not dispositive.

First, Ashley's counsel was asked whether she had any objection to exhibit 3, the transcript of the hearing on the motion to suppress, almost immediately after Ashley's counsel concluded a discussion with the juvenile court regarding her request for specific findings on her motion to suppress. The admission of exhibit 3 was arguably necessary in order for the court to comply with Ashley's request for specific findings on her motion to suppress. Furthermore, we can find no case where we have deemed an objection waived when the objection was being discussed almost at the same moment as the alleged waiver of the objection.

Second, the January 26, 2011, adjudication hearing was postponed only because the State changed its mind and wanted to call witnesses. Given this history, it is unclear whether, at the March 25 continuation of the adjudication hearing,

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[10] *State v. Giessinger, supra* note 7.

[11] See *id.* at 143, 454 N.W.2d at 292.

[12] See *State v. Harms*, 233 Neb. 882, 449 N.W.2d 1 (1989).

[13] See *State v. Giessinger, supra* note 7, 235 Neb. at 144, 454 N.W.2d at 292.

Ashley's counsel could have expected that the entirety of the State's evidence would be a birth certificate and the transcript of the suppression hearing. Ashley's counsel was arguably taken by surprise that the State's case in chief began and ended almost instantaneously.

This is distinguishable from circumstances where defense counsel sits idly by while the State presents a more lengthy presentation of its case. We have never found an objection to an exhibit untimely when made within seconds of its being offered and received. Likewise, we have not found an objection to come too late because it was made after the State's case in chief, when the State's entire case in chief lasted a matter of seconds. Especially in a bench trial, the rules of evidence should not devolve into a game of "gotcha."

Lastly, the need to object to the transcript of the suppression hearing would not be apparent, because Ashley's objection to the officers' testimony is embedded within it. The evidence offered and received in other waiver cases was not the entire transcript of the suppression hearing.[14]

Not only is exhibit 3 a "transcript of the motion to suppress hearing," but that transcript contains counsel's express renewal of Ashley's objection to the officers' testimony. At the beginning of the adjudication hearing on March 25, 2011, when Ashley's counsel believed the parties were proceeding to a stipulated trial on the suppression hearing record, Ashley's counsel diligently renewed her objection to the evidence. If an exhibit implicitly and explicitly containing an objection is entered into evidence, then the objection itself has arguably been reasserted with the admission of the exhibit.

It was an abuse of discretion for the juvenile court to consider Ashley's objection untimely. Ashley moved to suppress the evidence, discussed her previous motion to suppress, and then stated she did not object to a transcript of the hearing on that motion. All parties and the juvenile court understood that Ashley objected to the disputed evidence contained within that objection. As soon as Ashley's counsel realized what had

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[14] *State v. Rodgers, supra* note 6; *State v. DiBaise, supra* note 9. See, also, e.g., *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002).

occurred, she renewed her motion to suppress. This was almost immediately after the admission of exhibit 3.

At the very least, the stop-start nature of these proceedings and the presentation of the exhibit as a "transcript of the motion to suppress hearing" rendered the need for an objection unapparent. Ashley's counsel objected to the officers' testimony at the earliest opportunity after the ground for the objection became apparent. The Court of Appeals erred in holding otherwise. We therefore address the merits of Ashley's motion to suppress.

2. The Stop

Ashley asserts that the stop of the vehicle was unconstitutional because the officers lacked a reasonable, articulable suspicion that the occupants were engaged in criminal activity. She asserts that Warren's subsequent observation of a suspicious odor, the driver's acquiescence to Wootton's request to search the vehicle, the marijuana found as a result of the search, and Ashley's statements when confronted with the marijuana were all obtained through exploitation of the illegal stop. We agree that the officers lacked reasonable suspicion for the stop and that the State has failed to prove the evidence obtained during the stop was sufficiently attenuated from the primary illegality to be "purged" of its unconstitutional "taint." Accordingly, the juvenile court erred in denying Ashley's motion to suppress.

(a) Reasonable Suspicion

[8-10] Even though the purpose of a stop is limited and the resulting detention quite brief, stopping a vehicle and detaining its occupants constitute a seizure within the meaning of the 4th and 14th Amendments.[15] An occupant of a vehicle ordinarily has a legitimate expectation to be free of unreasonable governmental intrusion so as to give the occupant standing to challenge the stop as violative of his or her Fourth Amendment rights.[16] Pursuant to the 4th and 14th

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[15] See *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).

[16] *State v. Giessinger, supra* note 7.

Amendments to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, a law enforcement officer may legally conduct such an investigatory stop only when the officer has a reasonable suspicion based upon articulable facts that the person has been, is, or is about to be involved in criminal activity.[17]

[11,12] The police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.[18] Generalized suspicions or unparticularized hunches that a person has been or is engaged in criminal activity do not suffice to justify a detention.[19] Reasonable suspicion therefore depends upon both the content of information possessed by police and its degree of reliability.[20]

Geographical proximity of a suspect to a recently perpetrated offense[21] and the number of people in that area[22] can be factors supporting reasonable suspicion. However, time of day and reports of crime in the area will not, in and of themselves, justify a *Terry* stop.[23] The U.S. Supreme Court has said that "presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime."[24]

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[17] See *In re Interest of Jabreco G.*, 12 Neb. App. 667, 683 N.W.2d 386 (2004). See, also, *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[18] *Terry v. Ohio, supra* note 17.

[19] See *id.*

[20] See *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999).

[21] See, e.g., *U.S. v. Goodrich*, 450 F.3d 552 (3d Cir. 2006); *U.S. v. Wimbush*, 337 F.3d 947 (7th Cir. 2003); *U.S. v. Brown*, 334 F.3d 1161 (D.C. Cir. 2003); *U.S. v. Brown*, 159 F.3d 147 (3d Cir. 1998); *U.S. v. Raino*, 980 F.2d 1148 (8th Cir. 1992).

[22] See, *U.S. v. Goodrich, supra* note 21; *U.S. v. Moore*, 817 F.2d 1105 (4th Cir. 1987).

[23] *State v. Maybin*, 27 Kan. App. 2d 189, 2 P.3d 179 (2000). See, also, *State v. Lee, supra* note 2.

[24] *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). See, also, e.g., *State v. Eric K.*, 148 N.M. 469, 237 P.3d 771 (N.M. App. 2010).

Thus, in *M.M. v. State*,[25] the court found insufficient evidence to justify a stop after a caller reported a fight between a group of juveniles and the officers encountered four dishevelled juveniles in the area of the report. Similarly, in *U.S. v. Massenburg*,[26] the court concluded that the officers lacked reasonable suspicion when the stop was based on a report of possible gunshots fired in a high-crime area and the officers' observation of a group of four men alone four blocks from the reported shots. The court noted that the report provided no physical description of the perpetrators and that the only link between the report and the group of men was their general proximity to the alleged gunshots.

The court in *Massenburg* reasoned that a lone group of individuals present in a high-crime area and in the general vicinity of reported gunshots was a state of affairs simply "'too generic and susceptible to innocent explanation to satisfy the reasonable suspicion inquiry.'"[27] The court expressed concern about "'the way in which the Government attempts to spin . . . mundane acts into a web of deception.'"[28]

At the time of the stop at issue in this case, the officers were apparently aware only that someone in the area had heard fireworks. There is no evidence that the caller provided any description of the alleged perpetrators. There is no evidence that the caller knew where these fireworks were being set off. In other words, there is no evidence the caller indicated with any specificity from what direction the caller heard the noise of the fireworks or how loud it was. The officers did not indicate that they knew, in their experience, what the potential radius might be from the location of a caller hearing fireworks noise to the site where the fireworks are being set off.

Close to the house of the caller who reported hearing fireworks, the officers saw a vehicle legally parked alongside the

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[25] *M.M. v. State*, 72 So. 3d 328 (Fla. App. 2011).

[26] *U.S. v. Massenburg*, 654 F.3d 480 (4th Cir. 2011).

[27] *Id.* at 488, quoting *Illinois v. Wardlow, supra* note 24 (Stevens, J., concurring in part and in part dissenting; Souter, Ginsburg, and Breyer, JJ., join)).

[28] *Id.* at 489, quoting *U.S. v. Foster*, 634 F.3d 243 (4th Cir. 2011).

curb. Other vehicles were similarly parked. It was night, and the vehicle had its lights on. Unlike other vehicles along the street, the vehicle was occupied. But there was no evidence that the officers knew how long the occupants had been in the vehicle.

The officers observed no particular suspicious behavior from the occupants of the vehicle. There was no evidence that the officers had seen fireworks residue in or around the vehicle—or even in that general area. When the officers passed the vehicle, the occupants "looked" at them. The occupants then pulled onto the street and proceeded in a normal fashion.

Wootton explained they suspected the occupants of the vehicle because, "[w]ell, the lights on, sitting in the area." That is not enough. Intentionally or not, the State is doing nothing more than "'spin[ning] . . . mundane acts.'"[29] The demand for specificity in the information upon which police action is predicated is the central teaching of the U.S. Supreme Court's Fourth Amendment jurisprudence.[30] At the time of the stop, Wootton and Warren lacked even a minimal quantum of specific information that the occupants of the vehicle had been, were, or were about to be involved in criminal activity.

[13] While the State points to the fact that Warren thought he smelled marijuana, this was only after the vehicle was stopped. Finding the necessary quantum of individualized suspicion only after a stop occurs cannot justify the stop.[31] Because Wootton and Warren lacked reasonable suspicion to stop the vehicle, the stop was illegal, in violation of Ashley's Fourth Amendment rights.

(b) "Fruit of the Poisonous Tree"

[14] Evidence obtained as the direct or indirect "fruit" of an illegal search or seizure, "the poisonous tree," is inadmissible in a state prosecution and must be excluded.[32] To determine

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[29] *Id.*

[30] *Terry v. Ohio*, *supra* note 17.

[31] See *U.S. v. Yousif*, 308 F.3d 820 (8th Cir. 2002).

[32] See, e.g., *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003); *State v. Fitch*, 255 Neb. 108, 582 N.W.2d 342 (1998).

whether the evidence is a "fruit" of the illegal search or seizure, the question is not as simple as whether the evidence would have come to light but for the warrantless apprehension.[33] The question is whether the evidence has been come at by exploitation of the primary illegality or whether it has instead been come at by means sufficiently distinguishable to be purged of the primary taint.[34]

The juvenile court concluded that any taint of an illegal stop was purged by the driver's voluntary consent to search and the voluntary nature of Ashley's statement to the officers when confronted with the fruits of that search. When a consensual search is preceded by a Fourth Amendment violation, the prosecution must prove two things in order to avoid the exclusionary rule: (1) that the consent was voluntary and (2) that there was sufficient attenuation, or a break in the causal connection, between the illegal conduct and the consent to search.[35] The same two-part analysis is conducted for allegedly voluntary and spontaneous statements following a Fourth Amendment violation.[36]

When the State seeks to submit evidence as sufficiently attenuated from a previous Fourth Amendment violation, we review the trial court's findings of historical facts for clear error but review de novo the court's ultimate attenuation determination based on those facts.[37] We find, in our de novo review, that the driver's consent to search and Ashley's statement were not sufficiently attenuated from the primary violation so as to purge its taint.

[15,16] In addressing whether the connection between a prior illegality and challenged evidence has become so

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[33] *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

[34] See *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

[35] See *State v. Gorup, supra* note 3.

[36] See, *Brown v. Illinois, supra* note 33; *Kaupp v. Texas*, 538 U.S. 626, 123 S. Ct. 1843, 155 L. Ed. 2d 814 (2003); *U.S. v. Yousif, supra* note 31; *People v. Lewis*, 975 P.2d 160 (Colo. 1999); *State v. Towai*, 234 Or. App. 292, 228 P.3d 601 (2010); *U.S. v. Khamsouk*, 57 M.J. 282 (C.A.A.F. 2002).

[37] See *State v. Gorup, supra* note 3.

attenuated as to dissipate the taint, courts must take into account considerations relating to the exclusionary rule and the constitutional principles which it is designed to protect.[38] The relevant factors for attenuation will depend upon the facts of a particular case[39] but include (1) the proximity between the actual illegality and the evidence sought to be suppressed, (2) the presence of intervening factors, and (3) the flagrancy of the governmental misconduct involved in the case.[40]

[17] Consent to search given in very close temporal proximity to the official illegality is often a mere submission or resignation to police authority.[41] If only a short period of time has passed, a court is more likely to consider the consent or statement as a "poisonous fruit" of the illegal act.[42] The officers testified that they asked to search the vehicle as soon as they were done running the occupants' identification, which took 10 to 15 minutes. In total, the stop lasted approximately 25 minutes. The factor of temporal proximity weighs against attenuation and in favor of suppression of the evidence in this case.

[18] Intervening circumstances are intervening events of significance that render inapplicable the deterrence and judicial integrity purposes which justify excluding tainted evidence.[43] These can include representation of counsel, termination of illegal custody, and intervening lawful arrest.[44] In the case of allegedly voluntary statements, whether *Miranda* warnings were given is also a factor that may be considered with other evidence indicating that the defendant has acted independently

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[38] See *United States v. Ceccolini*, 435 U.S. 268, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978).

[39] See *State v. Gorup*, 275 Neb. 280, 745 N.W.2d 912 (2008).

[40] See *Brown v. Illinois, supra* note 33.

[41] See *State v. Gorup, supra* note 3.

[42] See *id.*

[43] See *U.S. v. Washington*, 387 F.3d 1060 (9th Cir. 2004).

[44] See 6 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 11.4(b) (4th ed. 2004).

of the unlawful inducement.[45] Similarly, advisements of the right to refuse a request to search may be a relevant factor—although one of limited significance.[46] *Miranda* warnings and right-to-refuse advisements are not a cure-all and will not, by themselves, purge the taint.[47]

[19] In this case, there were no advisements which the State could argue made these acts independent of the initial illegality. Indeed, the State points to no intervening circumstances at all. Where a confession follows confrontation of the defendant with illegally seized evidence, we have repeatedly said there has been an "'"exploitation of that illegality."'"[48] "'This is because "the realization that the 'cat is out of the bag' plays a significant role in encouraging the suspect to speak."'"[49] There are no intervening circumstances attenuating the consent to search from the illegality of the stop in this case, and Ashley's statement when confronted with the marijuana was certainly not independent of the officers' finding it.

The third factor, purposeful and flagrant conduct, includes instances when the officer knew the conduct was likely unconstitutional or should have known the conduct was an obvious violation of the Fourth Amendment, but engaged in it nonetheless.[50] It also includes "'fishing expeditions'" conducted in the hope that "'"something might turn up."'"[51] Given the obvious dearth of particularized information pointing toward the occupants of the vehicle, this factor also weighs in favor of exclusion.

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[45] See, *U.S. v. Paradis*, 351 F.3d 21 (1st Cir. 2003); *U.S. v. Patzer*, 277 F.3d 1080 (9th Cir. 2002). See, also, *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989).

[46] See, e.g., *U.S. v. Perry*, 437 F.3d 782 (8th Cir. 2006). See, also, *State v. Gorup, supra* note 3.

[47] See *State v. Abdouch, supra* note 45.

[48] See *id.* at 945, 434 N.W.2d at 327, quoting 4 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 11.4(c) (2d ed. 1987).

[49] *Id.*

[50] See *State v. Gorup, supra* note 3.

[51] See *id.* at 863, 782 N.W.2d at 33.

Even assuming that the consent to search and Ashley's statements met the constitutional standards for voluntariness under the Fifth Amendment, the Fourth Amendment standard that this evidence be purged of the taint of the illegality of the original stop has not been met. All the evidence derived from the officers' testimony was obtained through exploitation of the illegality of the stop made without reasonable, articulable suspicion. Therefore, the juvenile court erred in overruling Ashley's motion to suppress.

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.[52] But in this case, the only evidence presented against Ashley was the evidence we now deem inadmissible. Accordingly, we reverse the Court of Appeals' decision affirming the adjudication and we remand the matter to that court with directions to remand the cause to the juvenile court with directions to vacate and dismiss.

VI. CONCLUSION

The juvenile court erred in denying Ashley's motion to suppress and in finding that she had waived her objection to the evidence at the adjudication hearing. The Court of Appeals erred in finding Ashley's objection was waived and in affirming the order of adjudication.

REVERSED AND REMANDED WITH DIRECTIONS.

CASSEL, J., not participating.

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[52] *State v. Lujano*, 251 Neb. 256, 557 N.W.2d 217 (1996).

Sean M. Olson and Michelle L. Olson, husband and wife, appellants, v. Lucile Wrenshall, M.D., and University of Nebraska Medical Center Physicians, a Nebraska professional corporation, appellees.

822 N.W.2d 336

Filed October 5, 2012. No. S-11-1030.

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 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 judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
4. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.
5. **Summary Judgment: Appeal and Error.** The grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon.
6. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.
7. **Negligence.** The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.
8. **Negligence: Words and Phrases.** A "duty" is an obligation, to which the law gives recognition and effect, to conform to a particular standard of conduct toward another.
9. **Negligence.** If there is no duty owed, there can be no negligence.
10. **Malpractice: Physician and Patient: Proof: Proximate Cause.** To make a prima facie case of medical malpractice, a plaintiff must show (1) the applicable standard of care, (2) that the defendant deviated from that standard of care, and (3) that this deviation was the proximate cause of the plaintiff's harm.
11. **Physician and Patient.** Traditionally, a physician's duty to exercise the applicable standard of care arises out of the physician-patient relationship.
12. **Negligence: Public Policy: Legislature.** The determination of a legal duty is fundamentally based in public policy considerations, and it is generally the function of the Legislature to declare what is the law and public policy of Nebraska.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

John M. Lingelbach, Gregory C. Scaglione, and Patrice D. Ott, of Koley Jessen, P.C., L.L.O., for appellants.

Joseph S. Daly and Mary M. Schott, of Sodoro, Daly & Sodoro, P.C., for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, and MCCORMACK, JJ., and IRWIN, SIEVERS, and PIRTLE, JUDGES.

MCCORMACK, J.

NATURE OF CASE

This is an appeal after summary judgment in a medical malpractice action. A kidney donor brought suit after his donated kidney was rendered useless by allegedly negligent medical treatment provided to the donee. At issue is whether a duty of care is owed to a kidney donor by the physicians providing posttransplant treatment to the donee.

BACKGROUND

Daniel Olson was in need of a kidney, and his son, Sean M. Olson, volunteered to be the donor. Dr. Lucile Wrenshall performed the surgery to remove Sean's kidney. The surgery was successful, and there were no reported complications. That same day, in a separate surgery, Dr. Michael Morris transplanted Sean's donated kidney into the body of Daniel. In the weeks following the surgery, Daniel experienced complications with the donated kidney and additional surgical procedures were required.

Two weeks later, Wrenshall performed an exploratory surgery on Daniel. During that surgery, it is alleged, Wrenshall mistakenly stitched the renal artery, which supplied blood to the donated kidney.

Shortly thereafter, Morris performed a third surgery. In his operative report, Morris noted that two surgical sutures transgressed the renal artery. At that time, Morris determined the donated kidney could not be saved and ordered it to be removed.

Sean and his wife, Michelle L. Olson, brought suit for medical malpractice against Wrenshall and Morris for negligence in the performance of their professional services for Daniel. The complaint did not allege negligent care was provided to Sean. Rather, it alleged that Wrenshall was negligent in erroneously stitching Daniel's renal artery during the exploratory surgery. It also alleged that both Wrenshall and Morris were negligent in failing to monitor and supervise Daniel and properly detect the decreased blood flow to his transplanted kidney after the exploratory surgery. Further, the plaintiffs sought relief from University of Nebraska Medical Center Physicians (UNMCP), the employer of Wrenshall and Morris, under a theory of respondeat superior.

On July 15, 2011, a hearing was held concerning three relevant motions: Morris' motion for summary judgment, Wrenshall and UNMCP's joint motion for summary judgment, and the plaintiffs' motion for continuance of the summary judgment hearing. At the hearing, the defendants contended that neither Wrenshall nor Morris owed a duty of care to Sean during the care of Daniel. Furthermore, the defendants argued that Sean did not suffer any legally cognizable damages.

The plaintiffs' motion to continue the hearing date for summary judgment was heard first. The motion sought a continuance to conduct further discovery on whether a physician-patient relationship existed between Sean and the defendants. Counsel stated that such evidence would establish a duty of care that the defendants owed Sean. According to counsel, this duty of care to Sean would extend to include Daniel's treatment.

The defendants responded that such discovery was irrelevant to the court's determination of whether there was a cause of action. The defendants contended that regardless of whether Sean had a preexisting physician-patient relationship with the defendants, no duty existed to Sean during the care and treatment of Daniel. The court agreed, and the motion to continue was denied.

In support of summary judgment, the defendants jointly offered into evidence the consent form signed by Sean for his kidney removal surgery. The defendants also requested

that the district court take judicial notice that the complaint was devoid of any claim of personal injury suffered by Sean. Finally, Morris offered his own affidavit into evidence to establish that he did not perform Sean's surgery to remove the donated kidney.

In opposition to the motions, the affidavit of a medical expert was offered. The affidavit proposed the standard of care allegedly breached by Wrenshall. The medical records of Sean were also offered to demonstrate that physician-patient relationships existed between the defendants and Sean.

The district court granted Morris' motion for summary judgment. In its order, the district court stated that Morris had a physician-patient relationship solely with Daniel and thus did not owe a duty to Sean. Further, the order stated that the plaintiffs had failed to demonstrate legally cognizable damages because Sean had donated the kidney prior to any alleged negligence.

The district court soon realized it failed to rule on Wrenshall and UNMCP's motion for summary judgment. On November 7, 2011, the district court entered an order nunc pro tunc, wherein it found that Wrenshall and UNMCP's motion for summary judgment should also be sustained because the plaintiffs had failed to present an issue of fact as to any damages Sean suffered.

Prior to this appeal, the plaintiffs dismissed Morris from this action.

ASSIGNMENTS OF ERROR

The plaintiffs assign that the district court erred in granting summary judgment for four reasons: (1) A duty of care did arise from the physician-patient relationship between Sean and Wrenshall, and such duty was breached by Wrenshall's allegedly negligent treatment of Daniel; (2) Sean suffered damages that are or should be recognized under Nebraska law; (3) opposing expert opinions on the standard of care and breach of that standard of care created fact issues that were inappropriate for disposition on summary judgment; and (4) a continuance of the summary judgment hearing should have been granted to conduct further discovery.

STANDARD OF REVIEW

[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 the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[2]

[3-5] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.[3] When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.[4] The grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon.[5]

ANALYSIS

Duty of Care

This appeal requires us to decide whether a physician owes a duty of care to a kidney donor during the posttransplant treatment and care of the donee. We hold that in this instance such a duty does not exist.

[6-9] In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages

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[1] *Feloney v. Baye*, 283 Neb. 972, 815 N.W.2d 160 (2012).

[2] *Westin Hills v. Federal Nat. Mortgage Assn.*, 283 Neb. 960, 814 N.W.2d 378 (2012).

[3] *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

[4] See *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007).

[5] *Continental Cas. Co. v. Calinger*, 265 Neb. 557, 657 N.W.2d 925 (2003).

proximately caused by the failure to discharge that duty.[6] Thus, the threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.[7] A "duty" is an obligation, to which the law gives recognition and effect, to conform to a particular standard of conduct toward another.[8] If there is no duty owed, there can be no negligence.[9]

[10,11] To make a prima facie case of medical malpractice, a plaintiff must show (1) the applicable standard of care, (2) that the defendant deviated from that standard of care, and (3) that this deviation was the proximate cause of the plaintiff's harm.[10] Traditionally, a physician's duty to exercise the applicable standard of care arises out of the physician-patient relationship.[11] This relationship is said to arise when the physician undertakes treatment of the patient.[12]

Here, the plaintiffs present two arguments as to why Wrenshall owed a duty of care to Sean. First, Sean and Wrenshall's physician-patient relationship from Sean's kidney removal surgery created a duty of care owed by Wrenshall to Sean during the treatment of Daniel. And second, Wrenshall owed a general duty of care to Sean because Sean was subject to serious risks associated with Daniel's surgery. As a matter of law, we reject both arguments and find that Wrenshall did not owe a duty of care to Sean during her posttransplant treatment of Daniel.

Duty of Care Arising From Physician-Patient Relationship

We hold that Sean and Wrenshall's physician-patient relationship did not create a duty of care to Sean during the

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[6] *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004).

[7] *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

[8] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 3.

[9] *Turner v. Fehrs Neb. Tractor & Equip.*, 259 Neb. 313, 609 N.W.2d 652 (2000).

[10] *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008).

[11] See *Flynn v. Bausch*, 238 Neb. 61, 469 N.W.2d 125 (1991).

[12] *Id.*

posttransplant treatment of Daniel. In the only two appellate opinions in the country confronted with similar facts, each court began its analysis with the threshold question of duty.[13] In both instances, the court rejected the donor's medical malpractice claim because the donee's treating physicians did not owe a duty of care to the donor.[14]

In *Malik v Beaumont Hosp*[15] and *Ornelas v. Fry*,[16] medical malpractice suits were brought by the donor for the loss of a donated kidney against the donee's treating physicians for negligent conduct during the donee's treatment. The Michigan Court of Appeals in *Malik* found no duty because the donor's physician-patient relationship with the treating physicians did not arise during the donee's surgery. Likewise, in *Ornelas*, the Arizona Court of Appeals rejected the donor's claim because the donor failed to prove the existence of a physician-patient relationship. The court explained that without the relationship, the anesthesiologist owed no legal duty to the donor and thus the claimed injury was not redressable.[17]

In opposition to *Malik* and *Ornelas*, the plaintiffs erroneously rely on *Siebe v. University of Cincinnati*,[18] an Ohio trial court decision. This is the only opinion cited by the plaintiffs that recognized a donor's medical malpractice cause of action against the donee's negligent physician. However, we find *Siebe* to be unpersuasive because it fails to address the threshold question of duty.

Although there is not a Nebraska case on point, we have held that a physician's duty to exercise the applicable standard of care arises during the physician's treatment of the patient.[19]

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[13] *Malik v Beaumont Hosp*, 168 Mich. App. 159, 423 N.W.2d 920 (1988); *Ornelas v. Fry*, 151 Ariz. 324, 727 P.2d 819 (Ariz. App. 1986).

[14] *Malik v Beaumont Hosp, supra* note 13; *Ornelas v. Fry, supra* note 13.

[15] *Malik v Beaumont Hosp, supra* note 13.

[16] *Ornelas v. Fry, supra* note 13.

[17] *Id.*

[18] *Siebe v. University of Cincinnati*, 117 Ohio Misc. 2d 46, 766 N.E.2d 1070 (2001).

[19] See, *Regier v. Good Samaritan Hosp.*, 264 Neb. 660, 651 N.W.2d 210 (2002); *Flynn v. Bausch, supra* note 11.

To establish that Wrenshall owed him a duty of care, Sean must allege that during the medical treatment he received from Wrenshall, Wrenshall's conduct was negligent.[20]

The complaint clearly alleges that all of Wrenshall's negligent conduct occurred during her treatment of Daniel, not Sean. Specifically, the complaint states that "Wrenshall was negligent in the performance of her professional services for Daniel." Furthermore, each alleged instance of Wrenshall's negligence occurred exclusively during the posttransplant treatment of Daniel. In fact, the complaint is devoid of any allegation that Wrenshall's negligent conduct was part of the treatment received by Sean.

There are no genuine issues of material fact that all of Wrenshall's alleged deviations from the standard of care occurred during the treatment of Daniel, not Sean. Thus, as a matter of law, Wrenshall did not owe a duty of care arising from the physician-patient relationship to Sean during her posttransplant treatment of Daniel.

General Duty of Care to Third Party

Further, we hold that Wrenshall did not owe a general third-party duty of care to Sean during Daniel's allegedly negligent treatment. In their brief, the plaintiffs invite us to create a new legal duty under *Flynn v. Bausch*,[21] where we suggested that in certain cases the physician-patient relationship may engender a duty to third parties who are subject to serious risks associated with a patient's treatment or condition. We decline their invitation.

[12] We are mindful of the fact that the determination of a legal duty is fundamentally based in public policy considerations and that it is generally the function of the legislature to declare what is the law and public policy of this state.[22] Given that no relevant statute establishing this state's public policy

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[20] See *Ornelas v. Fry, supra* note 13.

[21] *Flynn v. Bausch, supra* note 11.

[22] *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006).

has been brought to our attention, we are reluctant to create or define a new legal duty.[23]

In *A.W. v. Lancaster Cty. Sch. Dist. 0001*,[24] we abandoned the risk-utility test to determine whether a duty exists and adopted the duty analysis set forth in the Restatement (Third) of Torts.[25] The Restatement (Third) of Torts § 7 states that an actor owes a duty when the actor's conduct creates a risk of physical harm. The proposed final draft of Section 37 states the obverse of this rule and explains that an actor whose conduct has not created a risk of physical harm to another has no duty of care to the other.[26] Because *Flynn* preceded *A.W.* by almost 20 years, we apply the Restatement (Third) of Torts approach to determine whether a duty existed.

Here, we find that Wrenshall's allegedly negligent treatment of Daniel did not subject Sean to any risk of physical harm. Sean's surgery was on May 19, 2009, and he was discharged 4 days later on May 23. The exploratory surgery in which the renal artery was erroneously stitched occurred 2 weeks later.

At the time of Daniel's exploratory surgery and subsequent treatment, Sean was not at risk of physical harm associated with Daniel's treatment. Whether Wrenshall was negligent or not, Wrenshall's posttransplant treatment of Daniel could not and did not cause Sean to suffer physical injury.[27] Sean's kidney had already been removed, and he was not subject to any further surgeries or treatment because of the alleged negligence.

Therefore, there is no genuine issue of material fact that Sean was not subject to a risk of physical harm during Wrenshall's

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[23] See *id.*

[24] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 3.

[25] Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (2010). See, also, *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011).

[26] Restatement, *supra* note 25, § 37 (Proposed Final Draft No. 1, 2005). See *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012).

[27] See *Malik v Beaumont Hosp, supra* note 13.

allegedly negligent treatment of Daniel. Thus, again, as a matter of law, Wrenshall did not owe a duty of care to Sean during her posttransplant treatment of Daniel.

Remaining Assignments of Error

The plaintiffs have three remaining assignments of error, regarding (1) whether Sean suffered legally cognizable damages, (2) whether competing experts on the standard of care make summary judgment inappropriate, and (3) whether the court erred in denying the motion to continue the summary judgment hearing. Because Wrenshall did not owe a duty of care to Sean during her posttransplant treatment of Daniel, we conclude that the remaining assignments of error are without merit.

CONCLUSION

Wrenshall did not owe a duty of care to Sean, the donor, during the posttransplant treatment of Daniel, the donee. Therefore, we hold that the district court did not err in granting summary judgment in favor of Wrenshall and UNMCP.

Affirmed.

Stephan, Miller-Lerman, and Cassel, JJ., not participating.

Bryan S. Behrens, an individual, et al., appellants, v. Christian R. Blunk, an individual, et al., appellees.

822 N.W.2d 344

Filed October 5, 2012. No. S-12-093.

1. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
2. **Limitations of Actions.** The period of limitations begins to run upon the violation of a legal right, that is, when an aggrieved party has the right to institute and maintain suit.
3. **Limitations of Actions: Negligence.** If a claim for professional negligence is not to be considered time barred, the plaintiff must either file within 2 years of the alleged act or omission or show that its action falls within an exception to

Neb. Rev. Stat. § 25-222 (Reissue 2008). The language of § 25-222 provides for a discovery exception to the statute of limitations; additionally, under certain circumstances, a continuous relationship can toll the running of § 25-222.

4. **Limitations of Actions.** The 1-year discovery exception of Neb. Rev. Stat. § 25-222 (Reissue 2008) is a tolling provision, but it applies only in those cases in which the plaintiff did not discover and could not have reasonably discovered the existence of the cause of action within the applicable statute of limitations.
5. ____. Under the discovery principle, a cause of action accrues and the discovery provision begins to run when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed.
6. **Limitations of Actions: Malpractice.** In order for a continuous relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence. Continuity does not mean the mere continuity of the general professional relationship.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

David A. Domina, of Domina Law Group, P.C., L.L.O., for appellants.

Mark C. Laughlin and Patrick S. Cooper, of Fraser Stryker, P.C., L.L.O., for appellees Christian R. Blunk and Berkshire & Blunk.

William R. Johnson and John M. Walker, of Lamson, Dugan & Murray, L.L.P., for appellees Christian R. Blunk and Abrahams, Kaslow & Cassman, L.L.P.

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

HEAVICAN, C.J.

INTRODUCTION

The district court granted summary judgment in favor of Christian R. Blunk, Berkshire and Blunk, and Abrahams Kaslow & Cassman LLP (collectively defendants) and dismissed the complaint filed by Bryan S. Behrens; Bryan Behrens Co., Inc.; National Investments, Inc.; and Thomas Stalnaker (collectively

plaintiffs), who filed this appeal. We conclude that plaintiffs' suit is barred by the applicable statute of limitations and accordingly affirm the decision of the district court.

BACKGROUND

This is the second appearance of this case before this court.[1] In January 2008, the U.S. Securities and Exchange Commission filed a civil enforcement action against all plaintiffs except Stalnaker. On July 28, Stalnaker was appointed receiver of all funds and assets of Behrens, National Investments, and other Behrens-related companies.

In April 2009, the federal government indicted Behrens on charges of securities fraud, mail fraud, wire fraud, and money laundering. We explained the criminal allegations in our prior opinion:

> The criminal allegations give context to the civil action. The indictment alleged a Ponzi scheme. Behrens owned a company that provided financial planning advice and offered insurance products to clients. He was registered to sell securities. In 2002, he purchased [National Investments], which was a Nevada real estate investment company. Behrens defrauded 25 [National Investments] investors out of $8.2 million. He induced some of his insurance and securities clients to cash out their annuities or investment accounts and invest in [National Investments]. He told investors that (1) they were investing in [National Investments]; (2) their investments would produce a 7- to 9-percent rate of return, with little to no risk; and (3) they would receive back their principal in 5 to 10 years. Behrens would normally issue a promissory note to investors with these promises. Instead of investing their money in real estate, he used it to support an extravagant personal lifestyle and other businesses that he acquired. He deposited the investors' money into bank accounts that he controlled and then transferred the money to other bank accounts to conceal its source. He

[1] See *Behrens v. Blunk*, 280 Neb. 984, 792 N.W.2d 159 (2010), *modified* 281 Neb. 228, 796 N.W.2d 579 (2011).

> used the investment money from later investors to make monthly payments to earlier investors.[2]

Prior to the filing of the indictment, in December 2008, plaintiffs originally filed their complaint alleging that Blunk had committed legal malpractice. In addition to Blunk, plaintiffs sued Blunk's former partnership, Berkshire and Blunk, and the firm that later employed Blunk, Abrahams Kaslow & Cassman, contending that Blunk's negligent acts occurred when he was employed at both firms.

As we discussed in our prior opinion, both the civil and criminal cases were proceeding at roughly the same time. During the course of the civil case, certain discovery requests were made of Behrens by the various defendants. Behrens declined to respond to those requests, citing his Fifth Amendment right against compulsory self-incrimination. As a result of Behrens' claim, the district court dismissed the legal malpractice action. This court reversed the dismissal, concluding that the district court erred in applying a rule of automatic dismissal when a plaintiff invoked his or her right against self-incrimination during discovery. We remanded the cause to the district court with instructions to "balance the parties' interests and consider whether a less drastic remedy would suffice."[3]

In April 2010, Behrens pled guilty to securities fraud in federal court and was later sentenced to 60 months' imprisonment and ordered to pay restitution of $6,841,921.90. In September 2010, plaintiffs filed an amended complaint. In that complaint, plaintiffs alleged that if they had been

> properly, correctly and responsibly advised about the promissory notes, their status as securities, registration requirements, issuance requirements, and requirements necessarily complied with to promote the promissory notes under state and federal securities law, the business model recommended, supported, and maintained as proper by Blunk from 1996 until recent months, could not have come into existence, grown, expanded, eventually borrowed approximately $7.5 million, and, when it failed,

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[2] *Id.* at 986-87, 792 N.W.2d at 162.

[3] *Id.* at 997, 792 N.W.2d at 168.

> incur debt it could not pay, which debt was deemed by investigative authorities to be the joint and several debt of all Plaintiffs.

Discovery was then conducted. A motion for summary judgment was filed by defendants, arguing that the action was barred by the statute of limitations, the doctrine of in pari delicto, and by defendants' lack of negligence. Blunk additionally filed a motion for judgment on the pleadings, arguing that he was not a proper party to the action because plaintiffs' claims against him had been discharged in bankruptcy. The district court granted the motions and dismissed the complaint as to all defendants. The district court found that the action was barred by both the applicable statute of limitations and by the doctrine of in pari delicto and found for defendants.

ASSIGNMENTS OF ERROR

On appeal, plaintiffs assign, restated and consolidated, that the district court erred in finding their claims were barred by (1) the statute of limitations and (2) the doctrine of in pari delicto.

STANDARD OF REVIEW

[1] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.[4]

ANALYSIS

[2] In plaintiffs' first assignment of error, they argue the district court erred in finding that its legal malpractice claim was barred by the applicable statute of limitations. This action is one for professional negligence and is therefore governed by the statute of limitations set forth in Neb. Rev. Stat. § 25-222 (Reissue 2008):

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services

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[4] *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007).

> shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . . .

The period of limitations begins to run upon the violation of a legal right, that is, when an aggrieved party has the right to institute and maintain suit.[5]

[3] If a claim for professional negligence is not to be considered time barred, the plaintiff must either file within 2 years of the alleged act or omission or show that its action falls within an exception to § 25-222. The language of § 25-222 provides for a discovery exception to the statute of limitations; we have additionally recognized that under certain circumstances, a continuous relationship can toll the running of § 25-222.[6]

Plaintiffs contend first that they could not and did not discover Blunk's malpractice until December 7, 2007, and that this suit, brought on December 4, 2008, was timely under the discovery exception to § 25-222. But defendants argue that Behrens should have discovered any alleged malpractice years earlier, in October 2001.

Alternatively, plaintiffs assert that Behrens' and Blunk's relationship was continuous from 1996 until 2008 and that the statute of limitations was tolled until the end of that relationship. As such, their suit, brought within 2 years of the end of that relationship, was timely. Defendants, however, contend that under the facts presented, the continuous relationship rule is inapplicable.

Generally, a receiver is held to stand in the shoes of the entity in receivership and holds the property by the same legal right and title as the person for whose property he or she is

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[5] *Egan v. Stoler*, 265 Neb. 1, 653 N.W.2d 855 (2002).

[6] See, e.g., *Bellino v. McGrath North, supra* note 4.

receiver.[7] Thus Stalknaker, as receiver, stands in Behrens' shoes and is subject to the same defenses to which Behrens is subject.

Discovery Exception to § 25-222.

[4] This court has said that the 1-year discovery exception of § 25-222 is a tolling provision, but that it applies only in those cases in which the plaintiff did not discover and could not have reasonably discovered the existence of the cause of action within the applicable statute of limitations.[8] The district court assumed that the initial 2-year statute of limitations set forth in § 25-222 had expired in 1998 and that Behrens did not and could not have discovered the malpractice within that period. As such, the discovery exception was triggered. On appeal, neither party takes issue with these assumptions. And for the purposes of our analysis, we likewise assume that the discovery exception was triggered.

[5] Under the discovery principle,

> a cause of action accrues and the . . . discovery provision . . . begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. . . . It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed.[9]

Before the district court, and now on appeal, plaintiffs contend that Behrens could not have discovered the malpractice until December 7, 2007, when Behrens sought other counsel after learning that the Securities and Exchange Commission had opened an investigation into his business

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[7] 65 Am. Jur. 2d *Receivers* § 116 (2011). Cf., *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007); *State, ex rel. Spillman, v. Security State Bank*, 116 Neb. 521, 218 N.W. 405 (1928); *State, ex. rel. Davis, v. American State Bank*, 114 Neb. 740, 209 N.W. 621 (1926).

[8] See *Egan v. Stoler, supra* note 5.

[9] *Board of Regents v. Wilscam Mullins Birge*, 230 Neb. 675, 684, 433 N.W.2d 478, 484 (1988).

dealings. But defendants argue, and the district court agreed, that Behrens should have discovered the alleged malpractice years earlier, in October 2001. In October 2001, both Behrens and Blunk were notified by the Nebraska Department of Banking that the department was investigating Behrens' use of promissory notes and was questioning whether that use might qualify as a security and constitute a violation of the Securities Act of Nebraska. At that time, Behrens was informed that a violation of the act could subject Behrens to criminal and civil liability.

This investigation was ongoing until at least April 2003. During that investigation, the department was in contact with Blunk, who was acting on Behrens' behalf. The record contains evidence that Behrens not only received notice of the investigation, but that Behrens participated in responding to requests from the department in the course of the investigation and was copied on most, if not all, of Blunk's responses to the department's requests for information. Behrens appears to concede that he was aware of the investigation beginning in 2001, but contends that he thought Blunk had dealt with the matter and that it was no longer an issue.

This case is factually similar to *Sass v. Hanson*.[10] In *Sass*, a client was informed by the Internal Revenue Service that an investigation had begun regarding whether the client's use of a particular tax election was permissible. The Court of Appeals concluded that for statute of limitations purposes, the client's "knowledge was very complete" based upon the letter received by the Internal Revenue Service and other correspondence that he had received on the topic.[11] The Court of Appeals rejected the argument that the client was not on notice because he was expressly told that he was not entitled to the election in question, concluding that he "had knowledge which, if not actual knowledge of his potential claim, was certainly sufficient, if pursued, to lead to the discovery of the alleged malpractice."[12]

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[10] *Sass v. Hanson*, 5 Neb. App. 28, 554 N.W.2d 642 (1996).

[11] *Id.* at 36, 554 N.W.2d at 647.

[12] *Id.*

Plaintiffs offered at the summary judgment hearing Behrens' testimony that he did not learn of the alleged malpractice until December 2007 and that he had no idea that promissory notes could be treated as securities. But we disagree and conclude that the 2001 incident started the clock on the discovery exception to the statute of limitations. The department's investigation was sufficient under Nebraska law to put Behrens on notice that promissory notes could be securities and to provide Behrens with knowledge which, if pursued, would have led to the discovery of Blunk's alleged negligence. As such, the discovery exception to § 25-222 began running in October 2001 and had expired by October 2002, more than 6 years prior to the filing of the malpractice action in this case.

Continuous Relationship Rule.

[6] This court has also, upon occasion, considered whether a continuous relationship might operate to toll the statute of limitations set out in § 25-222. In order for such a relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence.[13] Continuity does not mean the mere continuity of the general professional relationship.[14]

Behrens alleges that his professional relationship with Blunk began sometime in 1996 and ended no earlier than December 7, 2007, and might have continued until at least April 2008, and that thus, his time to file suit was tolled for 2 years beyond the end of the relationship. Blunk contests this assertion, arguing that the relationship was not continuous within the meaning of Nebraska law and that, even if it had been, under the facts of this case, Behrens' suit was still untimely.

We reject plaintiffs' contention that Behrens' and Blunk's professional relationship was continuous within the meaning of Nebraska law from 1996 until late 2007 or early 2008. A review of the record does not support the conclusion that there was a continuity of relationship for the same or related subject

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[13] *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999).

[14] *Id.*

matter following the malpractice. At most, the record shows that during this time Behrens and Blunk had a general professional relationship, which is not considered continuous for the purposes of this exception.

We note that Behrens' and Blunk's relationship might be considered continuous from October 2001, when Behrens was notified of the department's investigation, until April 2003, when that investigation was complete, because the relationship dealt with that specific investigation. But assuming without deciding that this relationship was continuous for that period of time, and also assuming without deciding that this continuous relationship could toll not the statute of limitations but the running of Behrens' discovery period under the statute, we nevertheless conclude that Behrens' suit, brought more than 5 years after the termination of this relationship, was untimely.

Because we conclude that Behrens' suit was untimely, we need not decide whether it was also barred by the doctrine of in pari delicto.

CONCLUSION

Behrens' suit is barred by the 2-year statute of limitations set forth in § 25-222. The decision of the district court in favor of Blunk and his codefendants is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

BUCKEYE STATE MUTUAL INSURANCE COMPANY, APPELLANT, v. RICHARD HUMLICEK, APPELLEE.

822 N.W.2d 351

Filed October 12, 2012. No. S-11-796.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
2. **Subrogation: Words and Phrases.** Generally, subrogation is the right of one, who has paid the obligation which another should have paid, to be indemnified by the other.
3. **Subrogation: Equity.** Subrogation is an equitable principle applied not as a legal right but to subserve the ends of justice and do equity.

4. **Contracts: Subrogation.** In terms of the exercise of the right of subrogation, no general rule can be laid down which will afford a test for its application in all cases. The facts and circumstances of each case determine whether the doctrine is applicable.
5. **Contracts: Insurance: Subrogation: Equity: Tort-feasors.** In the context of insurance, the right to equitable subrogation is generally based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured, and (2) an insured should not be allowed to recover twice from the insured's insurer and the tort-feasor.
6. **Contracts: Insurance: Subrogation.** Under the so-called antisubrogation rule, no right of subrogation can arise in favor of an insurer against its own insured or coinsured for a risk covered by the policy, even if the insured is a negligent wrongdoer.
7. **Contracts: Insurance: Subrogation: Presumptions.** Absent an express subrogation agreement to the contrary, a tenant is conclusively presumed to be an implied coinsured of the landlord's insurance policy.

Appeal from the District Court for Butler County: MARY C. GILBRIDE, Judge. Affirmed.

Jarrod P. Crouse and Colin A. Mues, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Thomas A. Grennan and John A. Svoboda, of Gross & Welch, P.C., L.L.O., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The owners of a duplex insured a building through two concurrently issued, identical policies—one for each unit. A fire damaged the entire structure, and the insurer paid the owners' claims under both policies. The insurer then brought this action to determine its subrogation rights against the tenant of one of the duplex units, who was allegedly negligent in starting the fire. The insurer concedes that pursuant to *Tri-Par Investments v. Sousa*,[1] the tenant was an implied coinsured under the policy covering the unit he lived in. Therefore, the insurer seeks to

[1] *Tri-Par Investments v. Sousa*, 268 Neb. 119, 680 N.W.2d 190 (2004).

recoup payments made for the damage only to the unit the tenant did not live in.

BACKGROUND

Bryan Hilderbrand and Ryan Hilderbrand own a duplex rental property. Richard Humlicek and Betty Humlicek were the tenants of unit 1292 of the duplex. The tenants of the other unit, unit 1282, are not parties to this action. The lease agreements between the Hilderbrands and the Humliceks provided that the tenants would obtain and keep in full force and effect renter's insurance covering their personal property, but that the Hilderbrands would obtain and keep in full force and effect fire and "all risk" coverage for the property. Specifically, the lease agreement stated that the Hilderbrands "shall obtain and keep in full force and effect . . . fire and 'all risk' extended coverage insurance for the full replacement value of the improvements located on the Leased Premises with a responsible insurance company or companies."

The Hilderbrands obtained insurance coverage for the duplex building through Buckeye State Mutual Insurance Company (Buckeye). The two units of the duplex were covered by separate but identical policies. The policies were issued concurrently with the notation that the coverage was for "½ of duplex." The coverage in the policies was described as a "Dwelling Fire Special" and included general property damage and injury liability coverage for the unit covered, as well as coverage for personal property, related private structures, and loss of rent.

In May 2009, a fire damaged both units of the duplex. The fire originated in unit 1292. Richard allegedly caused the fire by negligently disposing of smoking materials in the garage attached to unit 1292.

Buckeye paid the Hilderbrands' claims for damages resulting from the fire to both units. Those damages included the damage to the building, damage to the Hilderbrands' personal property, and loss of rent.

Buckeye brought suit against Richard, seeking a declaration that Buckeye was entitled to pursue a subrogation claim against Richard for payments made in relation to unit 1282.

Buckeye did not pursue a subrogation claim against Richard for payments made in relation to unit 1292.

The district court granted Richard's motion for summary judgment and dismissed the action. The court reasoned that under *Tri-Par Investments*,[2] Richard was an implied coinsured with the Hilderbrands under both policies covering the two units of the single duplex structure. An insurer cannot subrogate against its own insured. The court also noted that, given the terms of the lease, it was Richard's reasonable expectation that the Hilderbrands would obtain fire insurance for the entire structure. Buckeye appeals.

ASSIGNMENTS OF ERROR

Buckeye asserts that the district court erred in (1) failing to overrule Richard's motion for summary judgment, (2) ruling that Richard is a coinsured with the Hilderbrands under Nebraska law, (3) failing to rule that Buckeye is allowed to subrogate against Richard, and (4) denying Buckeye's request for declaratory judgment.

STANDARD OF REVIEW

[1] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.[3]

ANALYSIS

[2-4] Buckeye asserts that it should have a right of subrogation against Richard for the payment made to the Hilderbrands for fire damage to unit 1282. Generally, subrogation is the right of one, who has paid the obligation which another should have paid, to be indemnified by the other.[4] Subrogation is an equitable principle applied not as a legal right but to subserve the ends of justice and do equity.[5] In terms of the exercise of the

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[2] *Id.*

[3] *State v. Kibbee, ante* p. 72, 815 N.W.2d 872 (2012).

[4] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

[5] See *id.*

right of subrogation, no general rule can be laid down which will afford a test for its application in all cases.[6] The facts and circumstances of each case determine whether the doctrine is applicable.[7]

[5,6] In the context of insurance, the right to equitable subrogation is generally based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured, and (2) an insured should not be allowed to recover twice from the insured's insurer and the tortfeasor.[8] But under the so-called antisubrogation rule, no right of subrogation can arise in favor of an insurer against its own insured or coinsured for a risk covered by the policy, even if the insured is a negligent wrongdoer.[9] To allow subrogation under such circumstances would permit an insurer, in effect, to avoid the very coverage which its insured purchased.[10] In addition, the insurer should not be in a situation where there exists a potential conflict of interest which could affect the insurer's incentive to provide its insured with a vigorous defense.[11]

The antisubrogation rule has been extended to "implied coinsureds."[12] In *Jindra v. Clayton*,[13] we held that closely related family members who owned the property in joint tenancy were implied coinsureds under one family member's policy with the insurer covering the property. In *Reeder v. Reeder*,[14] we held that the brother of the homeowner who

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[6] *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995).

[7] See *id.*

[8] See *Countryside Co-op v. Harry A. Koch Co., supra* note 4.

[9] See *Hans v. Lucas*, 270 Neb. 421, 703 N.W.2d 880 (2005).

[10] See, *Control Specialists v. State Farm Mut. Auto. Ins. Co.*, 228 Neb. 642, 423 N.W.2d 775 (1988); *Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984).

[11] See *Allstate Ins. Co. v. LaRandeau*, 261 Neb. 242, 622 N.W.2d 646 (2001).

[12] *Hans v. Lucas, supra* note 9, 270 Neb. at 427, 703 N.W.2d at 885. Accord *Tri-Par Investments v. Sousa, supra* note 1.

[13] *Jindra v. Clayton, supra* note 6.

[14] *Reeder v. Reeder, supra* note 10.

insured the property was an implied coinsured while residing as a guest in the property until it sold and his own house was built.

We explained in *Reeder* that whether the insurer could subrogate did not necessarily depend on categorizing the legal relationship of the wrongdoer to the named insured. Nor did it depend on whether the homeowner could sue the wrongdoer for negligent destruction of the property.[15] The question was instead whether, under all the circumstances, recovery by the insurer against the wrongdoer would be "in effect" recovery from the insured for the very risk that the insurer agreed to take upon payment of the premium.[16]

[7] But in *Tri-Par Investments*,[17] we adopted a per se rule governing the relationship of a tenant to the landlord's insurer. In *Tri-Par Investments*, we held that absent an express subrogation agreement to the contrary, a tenant is conclusively presumed to be an implied coinsured of the landlord's insurance policy.[18] We specifically rejected a case-by-case approach adopted by some other jurisdictions which would examine the landlord and tenant's intentions as shown by the lease agreement and the surrounding circumstances. Thus, we held that the tenant of a single-family home was an implied coinsured of his landlord's fire insurance policy and that the insurer could not subrogate against the tenant even if he were negligent in starting the fire.

We explained in *Tri-Par Investments* that the per se rule represents the better public policy for the landlord-tenant relationship. First, a per se rule provides legal certainty for tenants.[19] If there is a clear subrogation provision in the lease, tenants will be on notice that they must obtain insurance coverage for the realty if they wish to protect themselves from personal liability

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[15] *Id.*

[16] *Id.* at 126, 348 N.W.2d at 836.

[17] *Tri-Par Investments v. Sousa, supra* note 1.

[18] *Id.*

[19] *Id.*

in the event they negligently start a fire.[20] On the other hand, if there is not such a provision in the lease, then tenants do not need to obtain separate insurance coverage and can rely on the fire insurance obtained by the landlord.[21]

Second, the per se rule comports with the reasonable expectations of the parties and the current commercial reality. We explained that tenants reasonably expect that the owner of the building will provide fire insurance protection for the realty on both of their behalves. As stated in *Sutton v. Jondahl*,[22] the case usually cited as the progenitor of the per se rule,

> "it would not likely occur to a reasonably prudent tenant that the premises were without fire insurance protection or if there was such protection it did not inure to his benefit and that he would need to take out another fire policy to protect himself from any loss during his occupancy."[23]

The court in *Sutton* further observed that the insurance companies implicitly acknowledge this reality: "'Otherwise their insurance salesmen would have long ago made such need a matter of common knowledge by promoting the sale to tenants of a second fire insurance policy to cover the real estate.'"[24]

Third, we reasoned that the per se rule comports with the commercial reality that landlords will likely pass on at least part of the cost of the insurance premiums to the tenant in the form of rent.[25] And if the tenant is effectively paying part of the premiums, then it is equitable that the tenant shares in some of the protection that coverage affords.[26]

Fourth, we reasoned that a per se rule prevents "economic waste that will undoubtedly occur if each tenant in a multiunit

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[20] *Id.*

[21] *Id.*

[22] *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975).

[23] *Tri-Par Investments v. Sousa, supra* note 1, 268 Neb. at 125, 268 N.W.2d at 196, quoting *Sutton v. Jondahl, supra* note 22.

[24] *Id.*

[25] See *Tri-Par Investments v. Sousa, supra* note 1.

[26] See *id.*

dwelling or multiunit rental complex is required to insure the entire building against his or her own negligence."[27] We cited the reasoning of a Connecticut Supreme Court opinion that

> a rule which allocated to the tenant the responsibility of maintaining sufficient insurance to cover a claim for subrogation by the landlord's insurer would create a strong incentive for tenants to carry liability insurance for the value or replacement cost of the entire building, irrespective of the portion of the building they occupied.[28]

We concluded, "'[I]t surely is not in the public interest to require all the tenants to insure the building which they share, thus causing the building to be fully insured by each tenancy.'"[29]

Buckeye argues that the per se rule we adopted in *Tri-Par Investments* does not apply to the facts of this case. Specifically, Buckeye argues that the per se rule does not apply to the side of a duplex which is not rented by the tenant—at least when the insurer has crafted separate policies for each duplex unit.

Buckeye gives four fundamental reasons it believes the rule in *Tri-Par Investments* is inapplicable to unit 1282. First, Buckeye points out that Richard lacks an insurable interest in unit 1282. In *Tri-Par Investments*, we quoted *Sutton* at length. In that quotation, the *Sutton* court said the per se rule was "'derived from a recognition of a relational reality, namely, that both landlord and tenant have an insurable interest in the rented premises.'"[30]

Second, because each unit is covered by separate policies, Buckeye argues Richard is not in privity of contract with the Hilderbrands as to unit 1282. In cases before *Tri-Par Investments*, we expressed, in dicta, approval of the per se rule

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[27] *Id.* at 131, 680 N.W.2d at 199.

[28] *Id.* at 126, 680 N.W.2d at 196, citing *DiLullo v. Joseph*, 259 Conn. 847, 792 A.2d 819 (2002).

[29] *Id.* at 127, 680 N.W.2d at 196, quoting *Peterson v. Silva*, 428 Mass. 751, 704 N.E.2d 1163 (1999).

[30] *Id.* at 125, 680 N.W.2d at 195, quoting *Sutton v. Jondahl, supra* note 22.

and observed the concept of privity as a reason for the rule. In *Reeder*, we stated:

> "[I]nsurance companies expect to pay their insureds for negligently caused fire, and they adjust their rates accordingly. In this context, an insurer should not be allowed to treat a tenant, *who is in privity with the insured landlord*, as a negligent third party when it could not collect against its own insured had the insured negligently caused the fire."[31]

In *Jindra*, we similarly quoted the opinion of a secondary authority that landlord-tenants are coinsureds for subrogation purposes at least partially "'because of the reasonable expectations they derive from their privity under the lease.'"[32]

Third, Buckeye argues Richard could not have had "a reasonable expectation that the Hilderbrands would insure [unit] 1282 . . . for his benefit, or that his rent included payment for the separate insurance policy" on unit 1282.[33] On this point, Buckeye argues at length that the completely separate and distinct living units of a duplex are distinguishable from the distinct units of an apartment building. Buckeye points out that there are no common areas for a duplex. Buckeye concludes that the two units of a duplex are more like two adjacent separate homes on separate tracts of land.

Buckeye assumes it would be patently unreasonable for a tenant to expect that he or she would be protected from a subrogation action to recover damages paid under fire insurance covering the landlord's house next door. Buckeye argues that for the same reasons, it is patently unreasonable for the tenant of a duplex to expect protection under the other unit's fire protection policy. Relatedly, it would be patently unreasonable for the tenant of one side of a duplex to expect that any portion of

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[31] *Reeder v. Reeder, supra* note 10, 217 Neb. at 129, 348 N.W.2d at 837 (emphasis supplied), quoting *Rizzuto v. Morris*, 22 Wash. App. 951, 592 P.2d 688 (1979).

[32] *Jindra v. Clayton, supra* note 6, 247 Neb. at 604, 529 N.W.2d at 527, quoting 6A John Alan & Jean Appleman, Insurance Law and Practice § 4055 (Supp. 1994).

[33] Brief for appellant at 10.

his rent payment goes toward premiums paid for fire insurance coverage for the other side.

Fourth, Buckeye asserts that duplex tenants insuring the unit they do not rent do not present the concerns of economic waste present in the single family home in *Tri-Par Investments* or in apartment buildings—which Buckeye recognizes would be subject to the per se rule. The reasoning behind this assertion is somewhat unclear. Buckeye again points to the separateness of the policies covering each unit and the lack of common areas. Buckeye states that in a duplex, the tenants share only "one wall and a small band of roof."[34]

We find Buckeye's reasons unavailing. We can find no other case in which a court has been asked to address whether a tenant of a duplex is an implied coinsured of a separate, but closely related, fire insurance policy with the same landlord covering the other side. Indeed, cases involving duplexes are few and far between. Those that have been decided are in jurisdictions adopting a different subrogation test altogether[35] or a modified per se rule which excludes application to single-family homes.[36] We do not find these cases, or the unpublished decision discussed by Buckeye, particularly useful to our analysis.

We agree with the district court that the rule in *Tri-Par Investments* applies to bar subrogation against a duplex tenant as to both sides of the building. A shared insurable interest and privity between the landlord and tenant are part of the backdrop to the development of the per se rule in *Sutton* and similar cases, but those concepts do not form a bright line for the rule's applicability. In fact, in *Tri-Par Investments*, we mentioned neither privity nor shared possessory interests when summarizing our four reasons for adopting the per se rule.

Lack of privity or lack of possessory interest does not preclude application of the per se rule in other jurisdictions when

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[34] *Id.* at 13.

[35] See, *American Fam. Mut. Ins. v. Auto-Owners Ins.*, 757 N.W.2d 584 (S.D. 2008); *Koch v. Spann*, 193 Or. App. 608, 92 P.3d 146 (2004).

[36] See *Hartford Fire Ins. Co. v. Warner*, 91 Conn. App. 685, 881 A.2d 1065 (2005).

the fire damage is to another apartment unit in a multiunit building.[37] The tenant of one apartment unit never is in privity with the landlord as to the lease of another apartment. And the tenant of one apartment does not have a possessory interest in the unit leased by another. In *Tri-Par Investments*, we explicitly referred to the per se rule as applicable to a "multiunit dwelling or multiunit rental complex."[38] Thus, we have indicated that lack of privity or possessory interest will not preclude the operation of the per se rule.

Buckeye also focuses on the concept of privity more narrowly in relation to the insurance contract. Buckeye seems to concede that if there is a single policy covering the building, then a tenant who is in privity with the landlord for one unit is in privity with respect to that single policy covering all units. If an insurer crafts separate policies for each unit, however, Buckeye believes privity as to other units is destroyed and the per se rule is no longer applicable.

As already stated, our decision in *Tri-Par Investments* does not support the conclusion that privity is even a particularly pertinent element to the per se rule. It certainly does not support Buckeye's view of privity as a bright line limiting the applicability of the per se rule. Furthermore, it would be against sound public policy to permit the insurer's crafting of simultaneous and identical, but "separate," policies to change the ultimate equities under consideration. To do so would encourage precisely the kind of gamesmanship and unpredictability the per se rule was adopted to avoid. A tenant who is not involved in securing the insurance coverage and who has not clearly been advised of a subrogation right in the lease will not know how the landlord and the insurance company have agreed

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[37] See, e.g., *Federal Ins. Co. v. Commerce Ins. Co.*, 597 F.3d 68 (1st Cir. 2010); *Trinity Universal Ins. Co. v. Cook*, 168 Wash. App. 431, 276 P.3d 372 (2012); *Dattel Family Ltd. Partnership v. Wintz*, 250 S.W.3d 883 (Tenn. App. 2007); *Middlesex Mut. Assur. Co. v. Vaszil*, 279 Conn. 28, 900 A.2d 513 (2006); *McEwan v. Mountain Land Support Corp.*, 116 P.3d 955 (Utah App. 2005); *Cambridge Mut. Fire Ins. Co. v. Crete*, 150 N.H. 673, 846 A.2d 521 (2004).

[38] *Tri-Par Investments v. Sousa, supra* note 1, 268 Neb. at 131, 680 N.W.2d at 199.

to insure the building. The tenant will not know whether it is one policy for the whole building or multiple policies for multiple units. Thus, in the event the landlord and insurer craft the coverage under two policies instead of one, the tenant would not be put on notice of the need to secure his or her own fire insurance coverage.

In arguing that reasonable expectations for a duplex—as opposed to other tenements—make the per se rule inapplicable, Buckeye again unduly narrows a reason behind the per se rule and misses the point. In *Tri-Par Investments*, we did not examine whether the tenant reasonably expected his rent payments to go toward insurance premiums or reasonably expected that the landlord intended a benefit to the tenant when obtaining insurance coverage for the building. The question was instead whether the average tenant would reasonably expect to be covered by the landlord's insurance.

Buckeye agrees that *Tri-Par Investments* clearly mandates that the duplex tenant, absent a clear provision to the contrary, does not have to buy fire protection for his or her own unit. The tenant is an implied coinsured as to the landlord's insurance coverage for that unit. It would be odd that a tenant who does not have to purchase fire insurance for the unit leased should have to purchase coverage for the unit not leased.

In fact, based on the tenant's reasonable expectations, at least one court has found under the case-by-case approach that the antisubrogation rule precludes liability as to another unit, even when it permits subrogation as to the negligent tenant's unit. The Supreme Court of Maryland, in *Rausch v. Allstate*,[39] adopted a case-by-case approach and concluded under the surrounding circumstances that the insurance company had a right of subrogation against the tenant for the damages to the tenant's unit. Yet, without examination of the totality of the circumstances, the court denied subrogation as to any of the other units where the fire had spread. The court thus seemed to adopt a per se rule *only for those units not leased by the tenant*. The court reasoned that unless faced with a very clear contractual provision to the contrary, it is unlikely

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[39] *Rausch v. Allstate*, 388 Md. 690, 882 A.2d 801 (2005).

that "the tenant is thinking beyond the leased premises or, as a practical matter, would be able to afford, or possibly even obtain, sufficient liability insurance to protect against such an extended loss."[40]

We find that to be equally true whether there is one other unit or many other units. The tenant is not thinking beyond the leased premises unless the lease agreement alerts the tenant otherwise. The right to subrogation does not depend on the number of walls separating the units or whether there are common areas. The pertinent fact is that there is one building in which the fire from one unit within that building can easily spread to another. It is reasonable for the tenant to presume that the landlord has fire protection for that building. And it is reasonable for a tenant to expect that if he negligently starts a fire, the insurance company will not sue him to recoup payments made under a policy which was purchased by the landlord precisely for such an occurrence. A reasonable duplex tenant is not on notice, absent clear language in the rental agreement to the contrary, of the need to purchase separate fire insurance.

Finally, while Buckeye is correct that the more units involved, the more economic waste, the relatively small amount of economic waste in *Tri-Par Investments* did not preclude application of the per se rule. The only difference between the tenant's duplicative insurance in *Tri-Par Investments* and the duplicative insurance that would result if we adopted Buckeye's position here is that the duplex tenants would split the burden to insure the building in half—insuring each other's unit, but not their own.

In the end, Buckeye can only be granted the right to subrogation where necessary to subserve the ends of justice and do equity.[41] Such ends are not present when the insurer is attempting to recoup payments for the very risk purchased by the insured. Especially since our decision in *Tri-Par Investments*, insurers understand that absent an express agreement otherwise, they have no subrogation rights against unnamed tenants

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[40] *Id.* at 716, 882 A.2d at 816.

[41] See *Countryside Co-op v. Harry A. Koch Co., supra* note 4.

who negligently start a fire. Such tenants will be considered implied coinsureds. It is the commercial reality that insurers, being aware of our decision in *Tri-Par Investments*, will charge premiums sufficient to cover that risk. It is equally true that landlords will charge rent in some measure based on their expenses. Those expenses include insurance premiums. And especially since our decision in *Tri-Par Investments*, it is reasonable for tenants to concern themselves only with the unit they rent and to assume they are protected through insurance procured by the landlord for the realty, unless there is a provision in the lease clearly stating otherwise.

All of this is true regardless of the size of the building or how it is divided. The equitable factors which led our court to adopt the per se rule for the tenant of a single house is equally applicable whether that house is divided into two, three, or four or more units, and it is equally applicable whether the insurer divides the policies to correspond to each unit or issues a single policy for the building. We will not adopt a rule which would protect the tenant of a duplex unit from the damages caused in the unit occupied, while leaving the tenant open to subrogation for damage to the other side if the fire spreads beyond the single wall which divides them.

Because there was no express subrogation agreement in this case, the per se rule makes Richard an implied coinsured under the Hilderbrands' policies with Buckeye. Accordingly, the court was correct in denying Buckeye's right to subrogation.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT B. NAVE, APPELLANT.

821 N.W.2d 723

Filed October 12, 2012. No. S-11-798.

1. **Juries: Discrimination: Appeal and Error.** An appellate court reviews de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law.
2. **Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews for clear error a trial court's factual determinations whether a prosecutor's race-neutral explanation is persuasive and whether the prosecutor's use of a peremptory challenge was purposefully discriminatory.
3. **Juries: Discrimination: Equal Protection: Prosecuting Attorneys.** A prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, if that reason is related to his view concerning the outcome of the case. But the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely because of their race.
4. **Juries: Discrimination: Prosecuting Attorneys: Proof.** Determining whether a prosecutor impermissibly struck a prospective juror based on race is a three-step process. First, a defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge because of race. Second, assuming the defendant made such a showing, the prosecutor must offer a race-neutral basis for striking the juror. And third, the trial court must then determine whether the defendant has carried his or her burden of proving purposeful discrimination. The third step requires the trial court to evaluate the persuasiveness of the justification proffered by the prosecutor.
5. **Juries: Discrimination.** In evaluating a challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
6. **Juries: Discrimination: Prosecuting Attorneys: Moot Question.** Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has decided the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing is moot.
7. **Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** In determining whether the prosecutor's stated reasons were race neutral, an appellate court does not consider whether the prosecutor's reasons are persuasive. Indeed, while the prosecutor's reasons must be comprehensible, they need not be persuasive or even plausible, if they are not inherently discriminatory.
8. **Juries: Discrimination: Prosecuting Attorneys.** The third step of the inquiry under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), involves evaluating the prosecutor's credibility, and the best evidence of discriminatory intent often will be the demeanor of the attorney who exercised the challenge.

9. ____: ____: ____. The relative number or percentage of African-American jurors peremptorily struck is relevant in determining whether a prosecutor's stated reasons for a strike were pretextual.
10. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a statement based on its claimed involuntariness—including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)—an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
11. **Miranda Rights: Self-Incrimination.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), requires law enforcement to give a particular set of warnings to a person in custody before interrogation: that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has the right to an attorney, either retained or appointed.
12. ____: ____. While the particular rights delineated under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), are absolute, the language used to apprise suspects of those rights is not.
13. ____: ____. Although a suspect can exercise his *Miranda* rights at any point during custodial interrogation, a warning to that effect is not required.
14. **Evidence: Appeal and Error.** When reviewing the sufficiency of the evidence to support a 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.
15. **Criminal Law: Conspiracy.** A person is guilty of criminal conspiracy if the person intends to promote or facilitate the commission of a felony, agrees with one or more persons to commit that felony, and then the person, or a coconspirator, commits an overt act furthering the conspiracy.
16. **Controlled Substances: Intent: Evidence.** The quantity of drugs possessed is a relevant factor in determining whether a suspect planned on distributing the drugs.

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

Thomas C. Riley, Douglas County Public Defender, for appellant.

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

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

CONNOLLY, J.

I. SUMMARY

The State charged Robert B. Nave with numerous crimes, including first degree murder, criminal conspiracy, and two weapons charges. A jury found Nave guilty on all counts. The district court sentenced Nave to life in prison on the murder conviction and to 75 additional years for the other convictions. Nave argues we must reverse his convictions and sentences because: (1) The prosecutor improperly removed a prospective juror from the jury pool because of the juror's race, and (2) the police did not properly advise Nave of his *Miranda* rights. Nave also argues that the evidence was insufficient to sustain his criminal conspiracy conviction.

We conclude, however, that the prosecutor's reasons for striking the prospective juror were race neutral and, overall, persuasive. And although the *Miranda* warnings did not expressly state that Nave was entitled to appointed counsel before questioning, that information was obviously implied from the warnings which the police read to him. Finally, our review of the record also shows that a rational jury could properly find beyond a reasonable doubt all the essential elements of criminal conspiracy. We affirm Nave's convictions and sentences.

II. BACKGROUND

1. OPERATION "SHEEPDOG"

In major cities across the country, the Federal Bureau of Investigation (FBI) teamed up with local law enforcement agencies to combat gang activity and sales of illegal drugs and weapons. In Omaha, Nebraska, the FBI and the Omaha Police Department, with other agencies, formed the Greater Omaha Safe Streets Task Force (task force). The task force primarily targeted violent gangs and their members. This led to investigations of the gang members' activities, such as robberies and drug sales. This case involved an investigation, known as Operation "Sheepdog," and a failed drug buy on October 22, 2010.

Operation Sheepdog targeted several violent gangs in Omaha in an attempt to discover and shut down their drug suppliers.

FBI Special Agent Gregory Beninato was in charge of the overall strategy for the operation. FBI Special Agent Paris Capalupo assisted Beninato in planning the operation. One part of the operation focused on drug buys at an automotive repair shop (auto shop), located at 24th and I Streets in Omaha. A confidential informant, Cesar Sanchez, owned the auto shop and allowed law enforcement to use it to conduct controlled drug buys. The FBI used another confidential informant, Jorge Palacios, to purchase drugs and weapons, sometimes together with Sanchez. Sanchez and Palacios were both used in the October 22, 2010, incident.

The record shows that surveillance of the auto shop, most notably on September 28, 2010, revealed one of the operation's primary targets, Abdul Vann, and several vehicles (and their occupants) which law enforcement suspected were linked to drug sales. These vehicles included a gray Chevrolet Impala, a white Chrysler Sebring, and a white Yukon Denali. Cesar Ayala-Martinez, a drug courier for a Mexican drug supplier, drove the Denali. Ayala-Martinez had previously sold Sanchez half a kilogram of cocaine, and Palacios, Vann, and Shawn McGuire, another law enforcement target, were present during that buy. The record showed that Ayala-Martinez planned to bring another 1½ kilograms of cocaine to Sanchez on October 22.

2. The Failed Drug Buy

The task force was aware of the October 22, 2010, buy and planned to apprehend the individuals involved. Beninato held a briefing at 9 a.m. the day of the buy with task force members. The briefing provided the task force members with the essential information for the operation; for example, the targets, the overall plan, whether deadly force was authorized, and the proper medical response in case of emergency.

Following the briefing, Beninato and Capalupo met with their confidential informant, Palacios, sometime after 11 a.m., gave him money to purchase cocaine, and placed recording devices on his person. Then the task force members set up surveillance at different locations, with the majority of the members eventually ending up in the area around the auto shop at 24th and I Streets.

Beninato and Capalupo were watching the area from a van. Capalupo was driving, and Beninato was monitoring the radio traffic from other task force members and taking notes regarding their observations. The task force members were looking for the vehicles they had seen earlier in September—the Impala, Sebring, and Denali.

Capalupo testified that on October 22, 2010, he saw four African-American men "in proximity" to the Sebring. Capalupo saw McGuire, the driver of the Sebring, get out of the vehicle wearing all black and a baseball hat. Capalupo saw another man, Kim Thomas, get out of the back seat of the Sebring wearing a black, hooded sweatshirt with multicolored spots. Capalupo saw a third man nearby wearing a white, long-sleeved T-shirt with a khaki-colored shirt over it. Presumably, this man was Vann. And finally, both Beninato and Capalupo testified to seeing a fourth man, Nave, wearing a gray, hooded sweatshirt near the Sebring.

Capalupo testified that at about 1 p.m., he saw Nave pull his hood up, cinch it tight, and draw a pistol out of his waistband. Beninato saw Nave enter the auto shop. The agents broadcast this information over the radio and started to move toward the auto shop.

The only direct evidence as to what occurred inside the auto shop during the drug buy, both before and after Nave entered, was the testimony of Ayala-Martinez. He testified that Sanchez, Vann, and Palacios were all inside Sanchez' office during the drug buy. Ayala-Martinez gave the drugs to Sanchez, who then handed them to Vann. Vann made a telephone call, and 20 minutes later, McGuire entered the office. Vann gave the drugs to McGuire, and Vann and Palacios left. McGuire then left, but left the drugs on a nearby table. At this point, no money had been exchanged. Presumably, the men had left the office under the pretense of bringing back money to complete the sale.

About a minute later, Ayala-Martinez heard the front door of the shop open again. Sanchez apparently glanced out of his office window and then opened a desk drawer to get a gun. At that point, an African-American man in a "gray sweater" came into the office, with his hood drawn tight over his head.

The hooded man saw Sanchez with a gun and immediately shot him two or three times. The hooded man then turned the gun toward Ayala-Martinez and asked where the drugs were. Ayala-Martinez pointed toward the drugs and told him to take them. The hooded man opened the bag, took out the kilogram of cocaine, and left. Ayala-Martinez grabbed the remaining half kilogram and left.

Beninato then saw Nave exit the shop, with his hood down and gun in hand. Beninato believed that Nave was running toward the Sebring. At that point, Nave began firing his weapon, apparently in the direction of Palacios, who was outside. Beninato broadcast a "shots fired" call over the radio and told everyone to close in on the auto shop. Nave, McGuire, and Thomas all got into the Sebring and fled, with task force members in pursuit.

But the suspects' flight was cut short when they crashed into a pickup truck at the intersection of 20th and I Streets. The police apprehended all three suspects and also arrested Ayala-Martinez. Following the arrests, Beninato learned that Sanchez had been shot. Sanchez later died from his wounds.

3. Nave Interrogated, Charged, and Convicted

After Nave's arrest, law enforcement took him to a hospital because he had an elevated heart rate. Police then took Nave to the police station and placed him in an interview room around 8:30 or 9:30 p.m. About 5 or 6 hours later, at about 2:30 a.m., Officer Scott Warner began interviewing Nave. Warner read Nave his rights verbatim from the Omaha Police Department's prepared rights advisory form. Nave stated that he understood those rights and would speak with Warner. Warner then questioned Nave about his reasons for being in Omaha and how he came to be involved in the incident.

Nave attempted to answer those questions, but his answers served only to incriminate himself. Nave stated that he had nothing to do with the crime but that he had gone to a fast-food restaurant in the area around 8 or 8:30 that morning. Nave said that he ate at the restaurant, read the paper, and then was

waiting for a bus to return home when he heard gunshots, saw his friend McGuire, and got into McGuire's car.

The record shows the fast-food restaurant that Nave said he went to was about 87 blocks south and 46 blocks east of where Nave was staying in Omaha. Nave also said he arrived at the restaurant around 8:30 a.m., but the record shows that the shooting occurred around 1 p.m. Nave said he just happened to see his friend McGuire and "dove" into his car when he heard gunshots. Nave denied knowing McGuire's full name and denied there being any conversation in the vehicle after he "dove" in. The State suggested in its case in chief and in closing arguments, persuasively, that this story was incredible and could not be believed.

Following its investigation, the State charged Nave with first degree murder, criminal conspiracy, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. Before trial, Nave moved to suppress evidence of his interrogation. Among other things, Nave alleged that Warner failed to fully advise him of his *Miranda* rights. The district court overruled the motion.

During jury selection, Nave made a *Batson* challenge, claiming that the prosecutor had impermissibly struck a prospective juror from the jury pool because of the juror's race. The prosecutor disagreed and set forth his reasons for striking the juror. The trial court found those reasons both persuasive and race neutral. Moreover, the court did not find a pattern of strikes by the prosecutor that indicated any racial discrimination. The court overruled Nave's *Batson* challenge.

Following trial, the jury found Nave guilty on all counts. The court sentenced Nave to life in prison on the murder conviction and an additional 75 years on the other convictions, to be served consecutively.

III. ASSIGNMENTS OF ERROR

Nave assigns, renumbered and restated, that the district court erred as follows:

(1) Overruling Nave's *Batson* challenge because the prosecutor peremptorily struck a prospective juror because of the juror's race;

(2) overruling Nave's motion to suppress his interrogation because the State did not fully advise Nave of his *Miranda* rights; and

(3) accepting the jury verdict on the criminal conspiracy charge because the evidence was insufficient to support the conviction.

IV. ANALYSIS

1. *Batson* Challenge

Nave argues that the prosecutor peremptorily struck a juror because he was African-American and that this action violated the Equal Protection Clause. But our review of the record shows that the prosecutor had valid nondiscriminatory reasons for the strike. We therefore find no merit to this assigned error.

(a) Standard of Review

[1,2] We review de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law.[1] We review for clear error a trial court's factual determinations whether a prosecutor's race-neutral explanation is persuasive and whether the prosecutor's use of a peremptory challenge was purposefully discriminatory.[2]

(b) Analysis

[3] In *Batson v. Kentucky*,[3] the U.S. Supreme Court held that a prosecutor's privilege to strike individual jurors through peremptory challenges was subject to the commands of the Equal Protection Clause. A prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, if that reason is related to his view concerning the outcome of the case.[4] But the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely because of their race.[5]

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[1] See *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

[2] See *id.*

[3] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[4] See *id.*

[5] See *id.*

[4,5] Determining whether a prosecutor impermissibly struck a prospective juror based on race is a three-step process.[6] First, a defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge because of race. Second, assuming the defendant made such a showing, the prosecutor must offer a race-neutral basis for striking the juror. And third, the trial court must then determine whether the defendant has carried his or her burden of proving purposeful discrimination.[7] The third step requires the trial court to evaluate the persuasiveness of the justification proffered by the prosecutor.[8] But the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.[9]

Here, the trial court determined that Nave had presented a prima facie case that the prosecutor had exercised the State's peremptory challenge because of the juror's race. The prosecutor then offered his reasons for the strike, which the trial court determined were race neutral and persuasive. On this basis, the trial court overruled Nave's *Batson* challenge.

[6] Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has decided the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing is moot.[10] Thus, we must determine only whether the prosecutor's reasons were race neutral and whether the trial court's final determination regarding purposeful discrimination was clearly erroneous.[11]

[7] The initial question whether the prosecutor's reasons were race neutral is a question of law that we review de novo.[12]

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[6] See, generally, *id*. See, also, *Snyder v. Louisiana*, 552 U.S. 472, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008).

[7] See *Snyder, supra* note 6. See, also, *Thorpe, supra* note 1.

[8] See *Thorpe, supra* note 1.

[9] See *id*.

[10] See, *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); *Thorpe, supra* note 1.

[11] See *id*.

[12] See *Thorpe, supra* note 1.

Put another way, the question is whether the stated reasons, on their face, were inherently discriminatory. In making that determination, we do not consider whether the prosecutor's reasons are persuasive. Indeed, while the prosecutor's reasons must be comprehensible, they need not be persuasive or even plausible, if they are not inherently discriminatory.[13]

The prosecutor offered five reasons, restated, for his strike:

- The juror indicated that he did not trust news reports and that such reports were inaccurate and meant to keep people scared.
- The juror explained that he had a previous run-in with law enforcement when he was falsely accused of possession of marijuana. While the juror did not harbor distrust toward all law enforcement, the juror felt that some law enforcement officers abused their power.
- The juror had a family vacation planned during the trial which he would have to cancel if selected. Although the juror indicated that he was willing to do so, the prosecutor explained that he did not want someone on the jury who was missing a family vacation.
- The juror approached the prosecutor during a break in the jury selection to let him know that he wanted to serve on the jury. The prosecutor had never had a juror ask to serve on a 2-week jury trial and was concerned about the juror's motivation for the request.
- The juror had made a couple of comments during jury selection which made it seem (at least to the prosecutor) that the juror was not taking the proceedings as seriously as he should have.

We conclude that these reasons, on their face, are racially neutral.

Moving on to the third and final step of the analysis, Nave must prove that the trial court clearly erred in finding no purposeful discrimination by the prosecutor. In support of that position, Nave argues that the prosecutor's reasons were not

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[13] See *id*. See, also, *Jacox v. Pegler*, 266 Neb. 410, 665 N.W.2d 607 (2003), quoting *Purkett v. Elem*, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).

persuasive and were simply a pretext to hide the prosecutor's discriminatory intent to strike the juror because he was African-American.

[8] The trial court, however, found that the prosecutor's reasons "form[ed] a persuasive basis for exercising [the State's] peremptory challenge, independent of race." And although the trial court did not go into great depth regarding *why* it found the prosecutor's reasons persuasive, we review its determination for clear error.[14] This is because of the pivotal role that the trial court plays in evaluating *Batson* claims.[15] The U.S. Supreme Court has explained that the third step of a *Batson* inquiry involves evaluating the prosecutor's credibility and that the best evidence of discriminatory intent "'often will be the demeanor of the attorney who exercise[d] the challenge.'"[16] Such credibility determinations lie within the peculiar province of the trial judge and, "'in the absence of exceptional circumstances,'" require deference to the trial court.[17] And this deference is reflected in our standard of review.[18]

Our review of the record and evaluation of the prosecutor's reasons do not provide the "exceptional circumstances" necessary to reverse the trial court's determination. To be sure, not all of the prosecutor's reasons are particularly persuasive—why the juror's distrust of the media merits being stricken from the jury is unclear, considering that there was no evidence or testimony related to the news in any way. And we do not agree with the prosecutor that the juror's responses indicated that he did not give the proceedings the solemnity they deserved. On the contrary, the juror's responses and overall active participation in the jury selection process show that he took his civic duty seriously.

But we find the prosecutor's other stated reasons persuasive. The prosecutor indicated that he was concerned that the

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[14] See *id*.

[15] See *Snyder, supra* note 6.

[16] *Id*., 552 U.S. at 477.

[17] *Id*.

[18] See *Thorpe, supra* note 1.

juror might distrust law enforcement which, of course, could be detrimental to the prosecutor's case because so many of his witnesses were law enforcement personnel. This concern stemmed from the juror's answer to a question during jury selection regarding feelings toward law enforcement. The juror explained, "Well, I think they, you know, protect and serve, but also I think there are some who, you know, abuse their own power so things can get twisted and turned around all the time. I mean, that's happened to me before." The juror explained further that he had been falsely accused and penalized for possession of marijuana and that he had to go through a diversion program.

The trial court, in restating the prosecutor's reasons for the strike, characterized the juror's responses as indicating a "heightened distrust of law enforcement personnel." This implicit finding of fact was not clearly wrong. Although the juror later explained that he would not hold it against law enforcement in general and that he was an open-minded individual, the prosecutor remained skeptical. And where law enforcement personnel played such a critical role in the prosecution's case, it would be a risk for the prosecution not to exercise a peremptory strike on a juror who showed some mistrust in law enforcement personnel. The trial court was not clearly wrong in finding this reason for striking the juror to be persuasive.

We also find the prosecutor's other stated reasons persuasive. At the beginning of jury selection, the juror stated that he had a family vacation planned during the time of the trial, but that he could probably reschedule it to allow for jury duty. Even so, the prosecutor explained that he did not "want someone here who [was] going to be missing a family vacation just to sit on this jury." Contrary to Nave's assertion, we do not find this reason to be pretextual. The record shows that the prosecutor focused on already-planned events with other non-African-American prospective jurors, and whether it would work a hardship on the juror to miss them, or whether they could be rescheduled. In fact, the prosecutor originally moved to dismiss some of the jurors for cause because of planned events scheduled during the expected 2½-week trial. It appears from

the record that the prosecutor did not move to strike the juror involved here for cause because he was amenable to rescheduling his vacation. But this does not mean that the prosecutor could not later peremptorily strike him for fear that missing his vacation could be a distraction during trial. The court was not clearly wrong in finding this reason persuasive.

The prosecutor was also concerned about the juror's approaching him during a break in jury selection, indicating he had something to say. The record shows that the judge, attorneys, and the juror met in the judge's chambers where the juror explained that he wanted to serve on the jury and that he wanted his voice to be heard. The juror noted that he was the only African-American male in the jury pool and that he thought a jury should include a multitude of races. The prosecutor explained that he had "never had a juror actually approach [him] to let [him] know that they [sic] wanted to serve on a long jury case" and, essentially, that it made the prosecutor uneasy and concerned that the juror might have some hidden agenda. The prosecutor's concern was plausible, and the burden rests on Nave to show a discriminatory purpose.[19] He has not done so.

[9] We also note that both the U.S. Supreme Court and this court have considered the relative number or percentage of African-American jurors peremptorily struck to evaluate whether a prosecutor's stated reasons for a strike were pretextual. For example, in *Miller-El v. Dretke*,[20] the Court concluded:

> If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection, as shown by their notes of the race of each potential juror. *By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.*

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[19] See *id.*

[20] *Miller-El v. Dretke*, 545 U.S. 231, 266, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (emphasis supplied).

And in *State v. Gutierrez*,[21] we recognized some factors which courts had considered in evaluating the third step of the *Batson* analysis. These included (1) whether members of the relevant racial or ethnic group served unchallenged on the jury and whether the striking party struck as many of the relevant racial or ethnic group from the venire as it could, (2) whether there is a substantial disparity between the percentage of a particular race or ethnicity struck and the percentage of its representation in the venire, and (3) whether there was a substantial disparity between the percentage of its representation on the jury.[22]

Here, the prosecutor peremptorily challenged only two of the four prospective African-American jurors—one of which Nave admitted was proper. Additionally, one African-American individual served on the jury, and Nave struck the other prospective African-American juror. These facts indicate that the prosecutor's reasons for striking the juror were not pretextual.

We conclude that the district court did not clearly err in overruling Nave's *Batson* challenge.

2. The *Miranda* Warnings Were Sufficient

Warner interrogated Nave after his arrest. Warner asked Nave his name and address and then read Nave his *Miranda* rights from the Omaha Police Department's printed "Rights Advisory Form," which consisted of six separate statements:

> Q. I would like to advise you that I am a Police Officer. Do you understand that?
>
> . . . .
>
> Q. You have a right to remain silent and not make any statements or answer any of my questions. Do you understand that?
>
> . . . .
>
> Q. Anything that you may say can and will be used against you in court. Do you understand that?

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[21] *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

[22] See *id.*

. . . .

Q. You have the right to consult with a lawyer and have the lawyer with you during the questioning. Do you understand that?

. . . .

Q. If you cannot afford a lawyer, the court will appoint one to represent you. Do you understand that?

. . . .

Q. Knowing your rights in this matter, are you willing to talk to me now?

Warner read these rights to Nave verbatim from the form. Nave responded that he understood each statement, and Warner recorded his responses on the form.

Nave argues that the above warnings were deficient because they failed to fully advise him of his *Miranda* rights and that therefore the court should have suppressed his statements made during the subsequent interrogation. Specifically, Nave claims that the police did not inform him that he had a right to appointed counsel both *before* and *during* interrogation and that the police did not inform him that he could exercise that right at any time. But because the warnings provided are sufficient under *Miranda v. Arizona*,[23] we find no merit to this assigned error.

(a) Standard of Review

[10] In reviewing a motion to suppress a statement based on its claimed involuntariness—including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda*—we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which we review independently of the trial court's determination.[24]

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[23] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[24] *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012). See *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004).

(b) Analysis

[11] In *Miranda*, the U.S. Supreme Court sought to ensure that the Fifth Amendment privilege against compelled self-incrimination was protected from the inherently compelling pressures of custodial interrogation.[25] To do so, the Court required law enforcement to give a particular set of warnings to a person in custody before interrogation: that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has the right to an attorney, either retained or appointed.[26]

We recognize that *Miranda* contains language to support Nave's argument. For example, at one point the Court explains that "if police propose to interrogate a person *they must make known to him* that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him *prior to any interrogation*."[27] But *Miranda* also contains language that does not support Nave's argument. For example, the Court explicitly held that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today."[28] That holding does not include any "before" or "prior to" type language. Thus, this issue is not resolved just by examining the language of the *Miranda* opinion.

[12] Since *Miranda*, though, the Court has repeatedly emphasized that while the particular rights delineated under that decision are absolute, the language used to apprise suspects of those rights is not. In *California v. Prysock*,[29] the Court explained that it had "never indicated that the 'rigidity' of *Miranda* extend[ed] to the precise formulation of the warnings given." The Court emphasized that "no talismanic incantation

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[25] See, *Miranda, supra* note 23; *Bauldwin, supra* note 24.

[26] See *id*.

[27] *Miranda, supra* note 23, 384 U.S. at 474 (emphasis supplied).

[28] *Id*., 384 U.S. at 471.

[29] *California v. Prysock*, 453 U.S. 355, 359, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981).

was required to satisfy [the] strictures [of *Miranda*].'"[30] Similarly, in *Duckworth v. Eagan*[31] the Court said that "[r]eviewing courts . . . need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" And most recently, in *Florida v. Powell*,[32] the Court reaffirmed these principles, explaining that while "[t]he four warnings *Miranda* requires are invariable, [the] Court has not dictated the words in which the essential information must be conveyed."

Nonetheless, Nave argues that the warning must expressly indicate that an indigent's right to counsel applies both before and during interrogation. Nave cites to two Arkansas cases for support, but neither is on point. In *Wilkerson v. State*,[33] the issue was not whether "before" or "prior to" type language must be expressly included, but only whether the given warnings advised the suspect that he would be appointed counsel if he could not afford an attorney. The Arkansas Supreme Court found the warning sufficient because it advised the suspect that if he were "'unable to employ a lawyer,'" then one would be appointed for him.[34] Similarly, in *Mayfield v. State*,[35] the Arkansas Supreme Court found only that "[t]he warning . . . did not convey to the appellant the fact that he could have a lawyer free of charge" and was therefore deficient. The *Mayfield* court did not address the issue Nave presents here.

Our research, however, reveals some support, though slight, for Nave's position. For example, in *U.S. v. Wysinger*,[36] the 11th Circuit stated:

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[30] *Id.*

[31] *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989) (citation omitted).

[32] *Florida v. Powell*, 559 U.S. 50, 130 S. Ct. 1195, 1204, 175 L. Ed. 2d 1009 (2010).

[33] *Wilkerson v. State*, 365 Ark. 349, 229 S.W.3d 896 (2006).

[34] *Id.* at 354, 229 S.W.3d at 900.

[35] *Mayfield v. State*, 293 Ark. 216, 222, 736 S.W.2d 12, 15 (1987).

[36] *U.S. v. Wysinger*, 683 F.3d 784, 799 (11th Cir. 2012) (emphasis supplied).

> The agent's divergence from the familiar script would put a suspect to a false choice between talking to a lawyer before questioning or having a lawyer present during questioning, when *Miranda clearly requires that a suspect be advised that he has the right to an attorney both before and during questioning*.

And as stated earlier, there is some support for Nave's position in the language of *Miranda* itself.[37]

But we are not persuaded. Other courts which have addressed this exact issue under similar factual circumstances have found the warnings to be sufficient.[38] For example, in *People of Territory of Guam v. Snaer*,[39] law enforcement officers gave this advisement: "'You have a right to consult with a lawyer and to have a lawyer present with you while you are being questioned. If you want a lawyer but are unable to pay for one, a lawyer will be appointed to represent you free of any cost to you.'" The appellant contended that although the warnings clearly conveyed his right to an attorney during questioning, they did not convey his right to an attorney *before* questioning. Citing *Prysock*,[40] the Ninth Circuit held that no specific words were required and noted that the warnings explicitly advised the suspect that he had a right to consult with a lawyer and to have a lawyer present while being questioned.[41] The court concluded that "the first part of that sentence read in the context of the latter half of the sentence . . . adequately convey[ed] notice of the right to consult with an attorney before questioning."[42]

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[37] See *Miranda, supra* note 23.

[38] See *People of Territory of Guam v. Snaer*, 758 F.2d 1341 (9th Cir. 1985). See, also, *State v. Moorman*, 154 Ariz. 578, 744 P.2d 679 (1987); *State v. Renfro*, No. CA2011-07-142, 2012 Ohio App. LEXIS 2479 (Ohio App. June 25, 2012).

[39] *Snaer, supra* note 38, 758 F.2d at 1342.

[40] *Prysock, supra* note 29.

[41] See *Snaer, supra* note 38.

[42] *Id*. at 1343.

In addition, our case law supports the conclusion that these warnings were adequate. In *State v. Bauldwin*,[43] we explained that *Miranda* required police officers to notify a suspect that "he has a right to an attorney, either retained or appointed," but made no mention of any required temporal element. In *State v. Williams*,[44] we similarly explained that police officers must tell suspects who are interrogated while in police custody that "they are entitled to the presence of an attorney, either retained or appointed, at the interrogation." Again, we did not require officers to make an express statement that an indigent has a right to an attorney before interrogation. And we further stated that there was "nothing magic about the particular words" used to inform the suspect of the *Miranda* rights.[45]

We conclude that the officer's failure to expressly state that Nave was entitled to appointed counsel before questioning was immaterial. When police told Nave that he had "the right to consult with a lawyer and have the lawyer with [him] during the questioning," that statement impliedly included the right to consult with the lawyer before the questioning. And that is enough under *Miranda*.

[13] Finally, Nave also apparently argues that the warnings were defective for failing to inform Nave that he could exercise his right to counsel at any time. Although a suspect can exercise his *Miranda* rights at any point during custodial interrogation,[46] Nave cites to no authority requiring a warning to that effect. *Miranda* contains no language requiring such a warning,[47] and other courts have rejected similar positions.[48] We likewise reject it. The warnings in this case were sufficient under *Miranda*.

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[43] *Bauldwin, supra* note 24, 283 Neb. at 688, 811 N.W.2d at 279.

[44] *State v. Williams*, 269 Neb. 917, 922, 697 N.W.2d 273, 278 (2005).

[45] *Id*.

[46] See, generally, *Miranda, supra* note 23.

[47] See *id*.

[48] See, e.g., *United States v. Davis*, 459 F.2d 167 (6th Cir. 1972); *U.S. v. Ellis*, 125 F. Appx. 691 (6th Cir. 2005). See, also, 2 Wayne R. LaFave et al., Criminal Procedure § 6.8(d) (2007).

3. Sufficiency of the Evidence

Nave argues that there is insufficient evidence to support his conviction for criminal conspiracy. Specifically, Nave argues that outside of Nave's admitting he knew McGuire, there was no evidence linking Nave to the other actors involved in these events. But our review of the record shows otherwise, and a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. This assigned error has no merit.

(a) Standard of Review

[14] When reviewing the sufficiency of the evidence to support a 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.[49]

(b) Analysis

[15] The State charged Nave with criminal conspiracy; specifically, that he conspired to commit the crime of unlawful possession with intent to distribute a controlled substance. A person is guilty of criminal conspiracy if the person intends to promote or facilitate the commission of a felony, agrees with one or more persons to commit that felony, and then the person, or a coconspirator, commits an overt act furthering the conspiracy.[50]

The State claimed that Nave conspired to possess and then distribute cocaine. In relevant part, Neb. Rev. Stat. § 28-416 (Cum. Supp. 2010) makes it unlawful "for any person knowingly or intentionally . . . [t]o manufacture, distribute, deliver, dispense, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance." Cocaine is a controlled substance.[51] So we must affirm Nave's conviction if

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[49] See *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012).

[50] See Neb. Rev. Stat. § 28-202 (Reissue 2008).

[51] See Neb. Rev. Stat. §§ 28-405(a)(4) [Schedule II] (Supp. 2011) and 28-416(7) and (8).

there is evidence from which a rational jury could find beyond a reasonable doubt that he intended to promote or facilitate the crime of possession with intent to distribute cocaine, that he agreed with others to commit that crime, and that he or another coconspirator committed an overt act in furtherance of the conspiracy.

A rational jury could conclude beyond a reasonable doubt that Nave intended to promote or facilitate the crime. Nave stipulated that chemical tests of his hands on October 22, 2010, came back positive for cocaine. Ayala-Martinez testified that Nave came into the auto shop, shot Sanchez, and then asked where the drugs were. Ayala-Martinez testified that Nave grabbed the kilogram of cocaine and left. Beninato testified that as Nave ran out of the auto shop, a white powder, later identified as cocaine, was found in a trail from the shop to where he saw Nave get in the Sebring. Law enforcement later searched the Sebring and found a brick of cocaine, weighing about 900 grams, in the back seat. From these facts, a rational jury could conclude that Nave had possessed cocaine.

[16] A rational jury could also find beyond a reasonable doubt that Nave not only possessed the cocaine, but that he intended to distribute it. The quantity of drugs possessed is relevant to this inquiry.[52] The brick of cocaine weighed about 900 grams. Testimony showed that an ordinary drug buy was for much less, typically 14 or 28 grams per buy. Testimony also showed that a drug user would inject or snort a half gram or less of cocaine per use. At the time, a kilogram of cocaine cost $20,000 to $27,000. A rational jury could find that such a large amount of cocaine was not just for personal use, but that Nave intended to distribute the drug.

But Nave argues that there is no evidence to show that he agreed with others to commit the crime and that therefore, he could not be guilty of conspiracy. But the record contradicts that assertion. Nave got into the same car as McGuire and Thomas, immediately after the crime took place. Before the theft of the cocaine, law enforcement surveillance described

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

the four individuals—Nave, Vann, McGuire, and Thomas—as being "in proximity" to each other and the Sebring. One witness also testified that Vann and Thomas had been whispering back and forth near the auto shop and that they "met" with Nave before he entered the shop.

Furthermore, the fact that Nave entered the auto shop specifically demanding the drugs indicates that he was working with the other individuals. Although McGuire and Vann had purchased drugs from Sanchez through Ayala-Martinez before, there is no evidence that Nave was involved in the prior deal. If Nave had not been conspiring with the others to steal and eventually distribute the cocaine, then he likely would not have known that the October 22, 2010, drug buy was going to take place. These facts presented sufficient evidence for a jury to conclude beyond a reasonable doubt that Nave worked with others to commit the crime.

Finally, a rational jury could obviously conclude beyond a reasonable doubt that Nave's actions constituted an "overt act" in furtherance of the conspiracy. As such, the evidence is sufficient to uphold Nave's conviction for criminal conspiracy.

We affirm Nave's convictions and sentences.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
DANIEL C. MILLER, APPELLANT.
822 N.W.2d 360

Filed October 12, 2012. No. S-12-019.

1. **Sentences: Due Process: Appeal and Error.** Whether the district court's resentencing of a defendant following a successful appeal violates the defendant's due process rights presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
3. **Due Process: New Trial: Convictions: Sentences.** Due process of law requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.
4. **Constitutional Law: Due Process: Convictions: Sentences: Appeal and Error.** Since the fear of vindictiveness may unconstitutionally deter a defendant's

exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

5. **New Trial: Judges: Sentences.** In order to ensure the absence of a retaliatory motivation, whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.
6. **Judges: Juries: Sentences: Presumptions.** Since its holding in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), the U.S. Supreme Court has limited the presumption of vindictiveness to cases that involve the same judge or jury handing down both the initial sentence and the second, harsher sentence.
7. **Trial: Sentences.** The possibility of a higher sentence is a legitimate concomitant of the retrial process.
8. **Sentences: Presumptions: Proof.** When the presumption of vindictiveness is not applied, the burden remains with the defendant to prove actual vindictiveness.
9. **Courts: Sentences.** Traditionally, a sentencing court is accorded very wide discretion in determining an appropriate sentence.
10. **Sentences.** When imposing a sentence, a sentencing judge can 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 amount of violence involved in the commission of the crime.
11. ____. Ultimately, the appropriateness of a sentence is necessarily a subjective judgment.
12. **Judges: Sentences: Presumptions: Appeal and Error.** The vindictiveness presumption does not apply when a judge, different from the original sentencing judge, sentences a defendant to a harsher sentence after a successful appeal.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Kevin A. Ryan for appellant.

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

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

MCCORMACK, J.

NATURE OF CASE

After successfully appealing his conviction for first degree murder and use of a weapon to commit a felony, Daniel C.

Miller pled guilty upon remand to manslaughter and use of a weapon to commit a felony. Miller asserts that the second judge was vindictive because of Miller's successful appeal and, thus, imposed a harsher sentence for the weapons conviction in violation of Miller's due process rights. At issue is whether the presumption of vindictiveness applies when a different judge gives a greater sentence after the defendant successfully appeals. We hold that such a presumption does not apply when there is a different sentencing judge after a successful appeal.

BACKGROUND

A jury convicted Miller of first degree murder and use of a weapon to commit a felony. The district court sentenced Miller to life in prison on the murder conviction and 10 years in prison on the weapons conviction, to be served consecutively. On appeal, we overturned Miller's convictions because of an error in the jury instructions.[1]

The cause was remanded and assigned to a different district court judge. After plea bargain negotiations, Miller pled guilty to the lesser count of manslaughter and use of a weapon to commit a felony. Prior to sentencing, the district court reviewed the probation file, the police reports, the presentence investigation report, and the briefs and pleadings of the case. Based on its findings, the district court sentenced Miller to the maximum of 20 years in prison for manslaughter and 30 to 50 years in prison for the weapons conviction.

ASSIGNMENTS OF ERROR

Miller assigns that his sentence for the weapons conviction should be overturned for two reasons: (1) The district court's reasoning fails to overcome the presumption of vindictiveness that arises when the second sentence is significantly harsher than the original sentence and (2) the lack of affirmative explanation supporting the harsher sentence demonstrates actual vindictiveness.

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[1] See *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

STANDARD OF REVIEW

[1,2] Whether the district court's resentencing of a defendant following a successful appeal violates the defendant's due process rights presents a question of law.[2] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.[3]

ANALYSIS

Miller contends that the increased sentence on the weapons conviction violated his right to due process of law because it was vindictive. In support, Miller points to the U.S. Supreme Court opinion in *North Carolina v. Pearce*,[4] which gives a defendant the presumption of vindictiveness when a defendant's sentence is increased after a successful appeal.

[3-5] In *Pearce*, the U.S. Supreme Court overturned a harsher sentence because the sentence was the product of the judge's vindictiveness for the defendant's successful appeal of the first conviction.[5] The Court stated:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> In order to [en]sure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial,

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[2] See, *State v. King*, 275 Neb. 899, 750 N.W.2d 674 (2008); *State v. Bruna*, 14 Neb. App. 408, 710 N.W.2d 329 (2006), *affirmed* 272 Neb. 313, 721 N.W.2d 362.

[3] *State v. Kibbee, ante* p. 72, 815 N.W.2d 872 (2012).

[4] *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).

[5] *Id.*

> the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.[6]

Since *Pearce*, the U.S. Supreme Court has applied the presumption of vindictiveness to sentences increased after a successful appeal of the prior conviction.[7] However, the presumption has been limited since *Pearce* to cases which pose a reasonable likelihood that the increased sentence is the product of actual vindictiveness.[8] Without the presumption, the defendant is burdened with showing actual vindictiveness.[9]

Presumption of Vindictiveness

[6] Miller contends the presumption of vindictiveness is applicable because he received a harsher sentence for his conviction of use of a weapon to commit a felony. We disagree. Since its holding in *Pearce*, the U.S. Supreme Court has limited the presumption of vindictiveness to cases that involve the same judge or jury handing down both the initial sentence and the second, harsher sentence.[10]

In *Colten v. Kentucky*,[11] the U.S. Supreme Court refused to apply the presumption of vindictiveness to a two-tiered criminal court. In the State of Kentucky, a defendant accused of a misdemeanor is tried in an inferior court. If convicted, the defendant has an absolute right to a trial de novo in the superior court of general criminal jurisdiction. In *Colten*, the

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[6] *Id.*, 395 U.S. at 725-26.

[7] *Wasman v. United States*, 468 U.S. 559, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984).

[8] *Alabama v. Smith, supra* note 4.

[9] *Id.*

[10] *Alabama v. Smith, supra* note 4; *Texas v. McCullough*, 475 U.S. 134, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986); *Wasman v. United States, supra* note 7; *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973); *Colten v. Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972).

[11] *Colten v. Kentucky, supra* note 10.

defendant was sentenced to a greater punishment after his new trial in the superior court. The U.S. Supreme Court found that the possibility of vindictiveness is not inherent in the Kentucky two-tiered system. Rather, "[i]t may often be that the superior court will impose a punishment more severe . . . . But it no more follows that such a sentence is a vindictive penalty for seeking a superior court trial than that the inferior court imposed a lenient penalty."[12]

[7] In *Chaffin v. Stynchcombe*,[13] the presumption was held inapplicable when the sentences were determined by two different juries. The U.S. Supreme Court stated that the second jury will have no personal stake and no motivation to engage in self-vindication after a defendant's successful appeal.[14] Rather, the possibility of a higher sentence is a legitimate concomitant of the retrial process.[15]

In *Texas v. McCullough*,[16] a jury originally sentenced the defendant, but after a successful appeal and retrial, the trial judge imposed a harsher sentence on the defendant. The U.S. Supreme Court found the presumption too speculative because different sentencers, a judge and a jury, assessed the varying sentences and thus, a sentence increase cannot truly be said to have been given.[17]

The U.S. Supreme Court in *McCullough* indicated in dicta that it would not extend the presumption to cases when there were two different sentencing judges.[18] The Court stated:

> *Pearce* itself apparently involved different judges presiding over the two trials, a fact that has led some courts to conclude by implication that the presumption of vindictiveness applies even where different sentencing judges are involved. That fact, however, may not have been

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[12] *Id.*, 407 U.S. at 117.

[13] *Chaffin v. Stynchcombe, supra* note 10.

[14] *Id.*

[15] *Id.*

[16] *Texas v. McCullough, supra* note 10.

[17] *Id.*

[18] *Id.*

> drawn to the Court's attention and does not appear anywhere in the Court's opinion in *Pearce*. Clearly the Court did not focus on it as a consideration for its holding. . . . Subsequent opinions have also elucidated the basis for the *Pearce* presumption. We held in *Chaffin v. Stynchcombe*, 412 U. S. 17 (1973), for instance, that the presumption derives from the judge's "personal stake in the prior conviction," . . . a statement clearly at odds with reading *Pearce* to answer the two-sentencer issue. We therefore decline to read *Pearce* as governing this issue.[19]

The Court's refusal to read *Pearce* to govern the two-sentencer issue, along with the policy reasons for the presumption, casts a strong argument against extending the presumption to sentences handed down by a different judge after appeal.

Here, the procedural history does not support Miller's position that his successful appeal was the motivation for the greater sentence. After his appeal, a different district court judge handled the plea bargain and sentencing. There is no reason to presume the second judge had a personal stake in the prior conviction. Simply put, the possibility of vindictiveness is not inherent.[20] Absent evidence to the contrary, a harsher sentence is not presumed to be vindictive, because the sentence could be the product of the second judge's differing judicial philosophy. Such is a natural consequence when judges are allowed to use their discretion in sentencing.[21]

Therefore, we conclude that the presumption of vindictiveness does not apply when there are two different sentencers.

Actual Vindictiveness

[8] When the presumption of vindictiveness is not applied, the burden remains with the defendant to prove actual vindictiveness.[22] Miller gives four reasons to demonstrate that his weapons sentence was actually vindictive. We reject each

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[19] *Id.*, 475 U.S. at 140-41 n.3 (citations omitted).

[20] See *Colten v. Kentucky, supra* note 10.

[21] *State v. Bruna, supra* note 2, citing *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005).

[22] *Alabama v. Smith, supra* note 4.

reason and find that Miller has failed to meet his burden of demonstrating actual vindictiveness.

[9-11] In *Wasman v. United States*,[23] the U.S. Supreme Court held that due process does not forbid enhanced sentences. Rather, it only forbids enhancement motivated by actual vindictiveness toward the defendant for having exercised a guaranteed right.[24] Traditionally, a sentencing court is accorded very wide discretion in determining an appropriate sentence.[25] When imposing a sentence, a sentencing judge can 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 amount of violence involved in the commission of the crime.[26] Ultimately, the appropriateness of a sentence is necessarily a subjective judgment.[27]

For his first argument, Miller asserts that the increased sentence on the weapons conviction from 10 years to 30 to 50 years in prison demonstrates vindictiveness. We disagree. The increased sentence alone is not sufficient evidence of actual vindictiveness.[28]

Second, according to Miller, the district court judge demonstrated actual vindictiveness when she stated, "as the state said, he did get a benefit of that, a huge benefit, by pleading to manslaughter." However, such a conclusion by Miller is grounded in pure speculation. Prior to sentencing, the district court judge had reviewed the probation file, the police reports, the presentence investigation report, and the briefs and pleadings of the case. The district court judge understood the seriousness of the crime, and her statement could merely indicate the belief that Miller received leniency by pleading guilty to manslaughter.

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[23] *Wasman v. United States, supra* note 7.

[24] *Id.*

[25] *Id.*

[26] *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007).

[27] See *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

[28] See *North Carolina v. Pearce, supra* note 4.

Nothing about that statement, in and of itself, indicates actual vindictiveness for Miller's successful appeal of his first degree murder conviction.

Third, Miller alleges that the sentence for the conviction of use of a weapon to commit a felony should not increase when its companion conviction of first degree murder is reduced to manslaughter. We reject this argument as legally irrelevant. The crime of using a deadly weapon to commit a felony, as enacted under Neb. Rev. Stat. § 28-1205 (Cum. Supp. 2010), is an independent offense from the underlying felony.[29] The Legislature's purpose in enacting § 28-1205 was to discourage individuals from employing deadly weapons in order to facilitate or effectuate the commission of felonies and to discourage persons from carrying deadly weapons while they commit felonies.[30]

Based on the district court's review of the available record for sentencing, the second district court judge could quite readily find that Miller's use of a firearm to kill another man justified a severe punishment under § 28-1205. Contrary to Miller's assertion, pleading guilty to the lesser charge of manslaughter does not demand leniency on the sentence for using a weapon to commit a felony.

And finally, Miller asserts the district court failed to sufficiently explain the drastic increase in the sentence. Such an argument presupposes that the burden is on the district court to justify the increased sentence. The burden shifts to the district court only after the presumption of vindictiveness is applied.[31] Absent the presumption, the burden is on the defendant to show actual vindictiveness.[32]

Nothing in our review of the record demonstrates that the district court based the second sentences on impermissible considerations or vindictiveness. In light of the evidence provided for the guilty plea, the second judge apparently viewed

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[29] *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997).

[30] *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

[31] *North Carolina v. Pearce, supra* note 4.

[32] *Alabama v. Smith, supra* note 4.

the proper sentence for the weapons conviction differently than the original sentencing judge. The possibility of a higher sentence is a legitimate risk of resentencing[33] and is a natural consequence when judges are allowed to use their discretion in sentencing.[34] Therefore, we conclude that Miller has failed to meet his burden of proving actual vindictiveness by the second district court judge.

CONCLUSION

[12] We conclude that the vindictiveness presumption does not apply when a judge, different from the original sentencing judge, sentences a defendant to a harsher sentence after a successful appeal. Furthermore, we reject Miller's contention that the second district court judge acted with actual vindictiveness.

AFFIRMED.

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[33] *Chaffin v. Stynchcombe, supra* note 10.

[34] *State v. Bruna, supra* note 2.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JEREMY C. JORGENSON, RESPONDENT.

822 N.W.2d 367

Filed October 12, 2012. No. S-12-269.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

Respondent, Jeremy C. Jorgenson, was admitted to the practice of law in the State of Nebraska on April 15, 2008. At all relevant times, he was engaged in the private practice of law in Omaha, Nebraska. On April 3, 2012, the Counsel for Discipline of the Nebraska Supreme Court filed

formal charges consisting of three counts against respondent. In the three counts, it was alleged that by his conduct, respondent had violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2007), and Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.5 (fees), 3-501.16 (declining or terminating representation), and 3-508.4 (misconduct).

On September 17, 2012, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313 of the disciplinary rules, in which he knowingly chose not to challenge or contest the truth of the matters set forth in the formal charges and waived all proceedings against him in connection therewith in exchange for a judgment of public reprimand and 1 year of probation, including monitoring. If accepted, the monitoring shall be by an attorney licensed to practice law in the State of Nebraska and who shall be approved by the Counsel for Discipline. Respondent shall provide the name of the monitor within 30 days of this order. The monitoring plan shall include, but not be limited to, the following: During the first 6 months of probation, respondent will meet with and provide the monitor a weekly list of cases for which respondent is currently responsible, which list shall include the date the attorney-client relationship began, the general type of case, the date of last contact with the client, last type and date of work completed on file (pleading, correspondence, document preparation, discovery, court hearing), the next type of work and date that work should be completed on the case, any applicable statutes of limitation and their dates, and the financial terms of the relationship (hourly, contingency, et cetera), and respondent shall provide the monitor with copies of all fee agreements entered into during the previous week. After the first 6 months through the end of the probation, respondent shall meet with the monitor on a monthly basis and provide the monitor with a list containing the same information set forth above; respondent shall reconcile his trust account within 10 days of receipt of the monthly bank statement and provide the monitor with a copy within 5 days; and respondent shall submit a quarterly compliance report to the Counsel for Discipline demonstrating that respondent is adhering to the foregoing terms of probation.

The quarterly report shall include a certification by the monitor that the monitor has reviewed the report and that respondent continues to abide by the terms of the probation. Finally, respondent shall pay all the costs in this case, including the fees and expenses of the monitor, if any.

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's request for public reprimand and the proposed probation plan "appears to be appropriate under the facts of this case."

Upon due consideration, we approve the conditional admission, and we order a public reprimand and 1 year of probation and monitoring.

FACTS

Count I.

With respect to count I, the formal charges state that in November 2008, Gabriel Albanese, with the assistance of counsel other than respondent, filed suit against an individual in the district court for Douglas County seeking to recover damages for injuries that he received in an automobile accident in December 2004. On June 16, 2009, Albanese was indicted for selling methamphetamine. Albanese entered a guilty plea, was sentenced to 37 months in prison, and began serving his sentence on May 27, 2010.

During the summer of 2010, respondent had discussions with Albanese's brother and a friend, John Blaiotta, who had introduced Albanese to respondent, regarding the possibility of respondent's representing Albanese in the personal injury case set forth above and a wrongful employment termination case. Respondent obtained the files from Albanese's former counsel on or before September 3, 2010.

On September 3, 2010, respondent wrote to Albanese to advise him that respondent had been unable to contact Albanese by telephone and that respondent did not intend to represent Albanese until they had the opportunity to speak. The September 3 communication further advised Albanese that a deposition in the personal injury case was scheduled for September 9 and that it would be necessary for Albanese to make arrangements with the prison for Albanese to participate

by telephone. On September 9, respondent did attend the scheduled deposition, but Albanese did not participate.

On September 23, 2010, respondent sent a letter to Albanese advising Albanese that respondent was concerned because he had not received any communications from Albanese directly. The letter further advised that the defendant in the personal injury case had filed a motion to dismiss based upon Albanese's repeated failure to attend his scheduled depositions. The letter further stated that respondent would like some sort of retainer before delving into the files.

A hearing on the motion to dismiss was conducted on October 4, 2010, and respondent did not resist the motion nor attend the hearing. The personal injury case was dismissed on October 4. The formal charges state that a cursory review of the pleadings would have put respondent on notice that if the motion to dismiss was granted, Albanese's personal injury claim would be barred by the statute of limitations.

On October 5, 2010, respondent entered an agreement with Albanese's brother as power of attorney for Albanese to represent Albanese on both the personal injury claim and the wrongful termination claim. The agreement called for a $1,500 nonrefundable retainer to investigate both cases in addition to a one-third contingency fee of any sums collected. The formal charges state that by October 5, respondent knew, or with minimal review of the pleadings should have known, that the personal injury claim was now barred by the statute of limitations and that, therefore, there was nothing to investigate regarding the personal injury case. The formal charges further state that even a cursory review of the wrongful termination claim by a competent attorney would have likewise disclosed that the statute of limitations had long passed by the time respondent received the file.

The formal charges allege that respondent's actions constitute violations of his oath of office as an attorney as provided by § 7-104 and professional conduct rules §§ 3-501.1, 3-501.3, 3-501.5, 3-501.16, and 3-508.4.

Count II.

With respect to count II, the formal charges state that on or about December 30, 2009, Blaiotta (the friend mentioned

in count I) was injured in an automobile and motorcycle accident in San Francisco, California. Shortly thereafter, Blaiotta hired respondent to represent him regarding his claims for damages, both personal injury and property damage. At the time of hiring respondent, Blaiotta knew that respondent was not admitted to practice law in California and that respondent would have to associate with a California attorney or seek admission to the California Bar, which could be a costly and timely proposition.

The agreement between Blaiotta and respondent was not committed to writing, and the exact terms are unclear. However, it is agreed that respondent was doing the work on a contingency fee basis. A settlement was reached. It is the portion of the settlement that respondent would be entitled to as his fee that is in dispute. Further, there was nothing in writing as to how costs would be paid or reimbursed.

With respect to respondent's handling of the engagement, he began investigating Bliaotta's claim and contacting various insurance carriers in attempts to settle the matter. Over the next year, respondent was corresponding with various insurance companies. The other driver in the accident had the statutory minimum coverage, which did not cover Blaiotta's damages, so, at the urging of Blaiotta, respondent was seeking out other possible issuers that could be liable for the loss, including the other driver's parents' insurer even though the driver was not on their policy.

During 2010, respondent, Blaiotta, and Blaiotta's wife traveled together to San Francisco. Their trip was partly for pleasure and partly for examining the scene of the accident.

Blaiotta was not happy with the way negotiations were going with the insurance companies or with his inability to contact respondent whenever he wanted. After some disputes regarding the Blaiotta matter and other matters that had been referred to respondent by Blaiotta, respondent withdrew from representing Blaiotta on January 25, 2011. At the time respondent withdrew, Blaiotta still had roughly 11 months to file suit under California law. Respondent had previously forwarded the Blaiotta file to California counsel at Blaiotta's direction.

The formal charges allege that respondent's actions constitute violations of his oath of office as an attorney as provided by § 7-104 and professional conduct rule § 3-501.5.

Count III.

With respect to count III, the formal charges state that, as stated above, Blaiotta referred a number of other clients to respondent. One of these clients was Chelsey Foulk, who was injured in a motor vehicle accident. The respondent agreed to represent Foulk, commenced investigation of her claim, and began negotiations with the insurance companies. There was never a written fee agreement between Foulk and respondent, although it was understood that respondent was working on a contingency fee basis. Eventually, Foulk and her boyfriend became dissatisfied with respondent's efforts and terminated his services.

The formal charges allege that respondent's actions constitute violations of his oath of office as an attorney as provided by § 7-104 and professional conduct rule § 3-501.5.

ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above

provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters set forth in the formal charges. We further determine that by his conduct with respect to count I, respondent violated professional conduct rules §§ 3-501.1, 3-501.3, 3-501.5, 3-501.16, and 3-508.4, as well as his oath of office as an attorney licensed to practice law in the State of Nebraska. We further determine that by his conduct with respect to counts II and III of the formal charges, respondent violated professional conduct rule § 3-501.5, as well as his oath of office as an attorney. Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Respondent is publicly reprimanded and is placed on probation for a period of 1 year, including monitoring subject to the terms agreed to by respondent in the conditional admission and outlined above. Respondent is directed to pay costs and expenses in accordance with Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after the order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

STATE OF NEBRASKA, APPELLEE, V. MOHAMMED NADEEM, APPELLANT.

822 N.W.2d 372

Filed October 19, 2012. No. S-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. **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.

3. **Courts: Appeal and Error.** Regarding a question of law, the Nebraska Supreme Court reaches a conclusion independent of the determination reached by the Nebraska Court of Appeals.
4. **Juries: Words and Phrases.** Generally, the term "anonymous jury" describes a situation where juror identification information is withheld from both the public and the parties.
5. ____: ____. If only the jurors' names are kept from the parties and the jurors are referred to by number, the jury may be called a numbers jury.
6. **Juries: Appeal and Error.** 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.
7. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
8. **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.
9. **Trial: Waiver: Appeal and Error.** One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
10. **Trial: Appeal and Error.** An issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal.
11. **Appeal and Error: Words and Phrases.** 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.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and PIRTLE, Judges, on appeal thereto from the District Court for Lancaster County, STEVEN D. BURNS, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Dennis R. Keefe, Lancaster County Public Defender, and Elizabeth D. Elliott for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Mohammed Nadeem was convicted in a jury trial of one count of attempted first degree sexual assault and one count

of attempted third degree sexual assault of a child. During the proceedings, the jurors were addressed by juror number instead of by name, with a few exceptions. Nadeem appealed his convictions and sentences. Noting plain error, the Nebraska Court of Appeals reversed the convictions and remanded the cause for a new trial, after determining that the district court abused its discretion in impaneling an "anonymous jury." See *State v. Nadeem*, 19 Neb. App. 565, 809 N.W.2d 825 (2012) (*Nadeem II*). This court granted the State's petition for further review.

SCOPE 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).

[2] 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. *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999).

[3] Regarding a question of law, the Nebraska Supreme Court reaches a conclusion independent of the determination reached by the Nebraska Court of Appeals. *State v. Moore*, 276 Neb. 1, 751 N.W.2d 631 (2008).

FACTS

Background

On August 6, 2009, 14-year-old H.K. went to a library in Lincoln, Nebraska, to research places to visit during an upcoming vacation to South Dakota. She went to a reading room in the library to use her laptop computer and sat at a table next to a magazine rack. After about 20 minutes, H.K. saw a man, later identified as Nadeem, standing a few feet from her with a newspaper in his hands. Nadeem occasionally glanced over the newspaper at H.K.

Nadeem began a conversation with H.K., asking where she went to school, her name, her age, and whether she had a boyfriend. Nadeem also asked for H.K.'s telephone number, which H.K. refused to give him. Nadeem left the room for

several minutes, but he later returned, handed H.K. a piece of paper with a telephone number on it, and said he expected a call. When Nadeem left the room, he said he hoped to see H.K. again.

H.K. reported the incident to her mother, who had her report it to the library branch manager. H.K.'s mother also filed a police report. H.K. was interviewed by police, who asked if she would make a controlled call to Nadeem. H.K. and her mother agreed.

The next day, H.K. called the telephone number Nadeem gave to her at the library and eventually spoke to Nadeem. She and Nadeem had a 20-minute conversation that became sexually explicit. At the direction of police, H.K. arranged to meet Nadeem at the library around 2:30 p.m. At about 2:15 p.m., police saw Nadeem heading toward the library. Upon his arrival at the library, Nadeem was arrested.

Trial Proceedings

On October 2, 2009, Nadeem was charged by information in Lancaster County District Court with one count of attempted first degree sexual assault and one count of attempted third degree sexual assault of a child. The case was tried to a jury. Before trial, the jurors completed questionnaires. The State presumably had access to the questionnaires, because it specifically noted in voir dire that juror No. 5 "reported on [the] questionnaire that [the juror knew] the attorney general." No questionnaires are included in the record.

Throughout most of the proceedings, the jurors were referred to by number instead of name, though there were a few exceptions. One juror was called by name for a sidebar with the court and counsel. Juror No. 23 reported knowing a juror, whom he named, and whom the court identified as juror No. 21. Similarly, juror No. 11 stated that he was acquainted with a juror, whom he named, and whom the court identified as juror No. 34. At the end of the case, the court excused juror No. 34 by name.

During voir dire, both attorneys questioned jurors by number and jurors were excused by number. Defense counsel asked if juror No. 6 was familiar with him, and the juror claimed he

was not. However, defense counsel correctly suggested that juror No. 6 graduated from "Benson" in 1968. Finally, the court referred to "prospective jurors whose number ha[d] not yet been called."

On June 30, 2010, the jury found Nadeem guilty of attempted first degree sexual assault and attempted third degree sexual assault of a child. On August 18, he moved to release juror information so he could investigate if "the jurors were manipulated or influenced by the defendant['s] religious and national origins, or whether any other factor may have play[ed] a part in their decision making." Nadeem requested "the jurors' names and information." The motion was overruled.

Nadeem was sentenced on September 16, 2010. He received 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, with the sentences to run concurrently, and credit for 162 days served. Nadeem was also required to register under Nebraska's Sex Offender Registration Act. Nadeem appealed.

In an opinion filed January 17, 2012, the Court of Appeals concluded that the district court abused its discretion by impaneling an anonymous jury. See *State v. Nadeem*, 19 Neb. App. 466, 808 N.W.2d 95 (2012). On March 6, the Court of Appeals sustained the State's motion for rehearing, withdrew its initial opinion, and filed a second opinion reaching the same result on different reasoning. See *Nadeem II*. The Court of Appeals determined that the district court abused its discretion in impaneling an anonymous jury and that this constituted plain error. Because the evidence presented by the State was sufficient to sustain Nadeem's convictions, the court reversed, and remanded for a new trial. *Id*. The State petitioned for further review, which this court granted.

ASSIGNMENTS OF ERROR

In its petition for further review, the State assigns, restated, that the Court of Appeals erred in (1) finding on plain error review that the district court abused its discretion in impaneling an anonymous jury, despite a silent record; (2) reversing,

and remanding for a new trial rather than remanding for further proceedings; (3) finding that the district court impaneled an anonymous jury; and (4) applying the two-part test from *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), to a "numbers jury."

ANALYSIS

Anonymous Jury

[4,5] This court addressed anonymous juries for the first time in *State v. Sandoval, supra*. Generally, the term "anonymous jury" describes a situation where juror identification information is withheld from both the public and the parties. See *id*. If only the jurors' names are kept from the parties and the jurors are referred to by number, the jury may be called a numbers jury. See *id*.

In *Sandoval*, 280 Neb. at 326-27, 788 N.W.2d at 195, this court determined that "[g]enerally, 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 [defendant]."

We explained that juror anonymity can prejudice a defendant in two ways. First, during voir dire, a lack of knowledge about the jurors' biographical information could prevent the defense counsel from making intelligent decisions regarding peremptory strikes. See *State v. Sandoval, supra*. We have recognized that voir dire plays a critical function in ensuring that the defendant's right to an impartial jury is honored. See, *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011); *State v. Sandoval, supra* (stating that other courts have recognized that defendant's fundamental right to unbiased jury is adequately protected by court's conduct of voir dire designed to uncover bias as to issues in cases and as to defendant himself). Second, prospective jurors could interpret the anonymity as an indication that the court believes that the defendant is guilty or dangerous, thus implicating the defendant's presumption of innocence. See *id*.

[6] *Sandoval* laid out a two-part test for the use of an anonymous jury: "[A] court should not impanel such a 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." 280 Neb. at 327, 788 N.W.2d at 195-96. To guide trial courts, we set out five factors for determining whether a jury needs protection.

The jury announced its verdict in Nadeem's case on June 30, 2010. The opinion in *Sandoval* was filed on July 30. Thus, when the verdict in Nadeem's case was announced, neither the district court nor the parties could rely on *Sandoval* as precedent.

On August 18, 2010, Nadeem moved to release the "jurors' names and information." In his motion, Nadeem did not allege that using an anonymous jury was improper. Instead, he sought release of information under "Neb. Rev. Stat. §25-1638," a statute which was repealed by 1979 Neb. Laws, L.B. 234, § 18. At the hearing on the motion, Nadeem did not raise a claim that the district court erred by impaneling an anonymous jury. The court overruled the motion, and Nadeem was sentenced on September 16. Nadeem timely appealed.

Waiver of Anonymous Jury

On appeal, Nadeem asserts error, claiming the district court erred by using an anonymous jury. Nadeem did not object to the impaneling of the jury and passed the jury for cause. No claim was made to the district court regarding the jury that was impaneled. He has waived this claim of error by his failure to object.

[7-10] We have often said 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); *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008). 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. *State v. Collins, supra*; *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010). One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *State v. Collins, supra*; *State v. Harms*, 263 Neb. 814, 643

N.W.2d 359 (2002). For that reason, an issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal. *State v. Collins, supra*. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

We have applied the above principles to find waiver of both statutory and constitutional rights when a defendant fails to raise them. For example, the failure of a defendant to raise the unconstitutionality of the charging statute has been held to be waived by the failure of the defendant to raise such objection. *State v. Collins, supra*. This court has also held that alleged violations of procedural due process and confrontation were waived by the defendant's failure to object. *Id*. See, also, *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009) (confrontation). A district court's consideration of lesser-included offenses was waived when the defendant failed to object. *State v. Collins, supra*, citing *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

This court has also held that a defendant waived his objection to the voir dire procedure utilized by the trial court by his failure to object to it. *State v. Collins, supra*. See *State v. Anderson*, 269 Neb. 365, 693 N.W.2d 267 (2005). We have held that defendants who failed to object or use peremptory challenges regarding the selection of their juries have waived their complaints regarding jury selection. *State v. Collins, supra*. See *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990), *overruled on other grounds, State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991). Defendants have been found, by their failure to object, to have waived any argument regarding the trial court's procedure for handling jury questions after submission of the case and regarding the court's trial management. *State v. Collins, supra*. See, *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008) (trial management); *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007) (procedure for addressing jury questions after submission), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

Nadeem did not object to the type of jury impaneled during voir dire, at trial, or in his motion to release juror information. He did not file any action or motion on the basis that use of an anonymous jury was an abuse of discretion that denied him a fair trial. Even after this court's opinion in *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), was filed on July 30, 2010, Nadeem did not seek relief based on our decision in *Sandoval*. The first time he claimed error in the use of an anonymous jury was on appeal.

A similar issue was decided in *State v. Sundberg*, 349 Or. 608, 247 P.3d 1213 (2011). Defense counsel was told that juror numbers would be used instead of names. When counsel found out he would not be given the names of the potential jurors, he objected, fearing he would be unable to gather sufficient juror information. The trial court overruled the objection. The defendant also objected to the jury selection process in his motion for new trial.

The Oregon Supreme Court concluded that "defendant preserved his core claim—that he was entitled to have access to juror names during jury selection—by putting the trial court on notice when that purported error occurred and providing the court an opportunity to correct it." *Id.* at 614, 247 P.3d at 1216. The defendant did not suppress facts he knew hoping for a favorable verdict and raise those facts after the verdict went against him. Rather, his "objections prior to *voir dire* and in his new trial motion sufficiently preserved for appeal his argument that the trial court's use of an anonymous jury violated his [state constitutional] rights." *Id.* at 615, 247 P.3d at 1217.

In contrast, Nadeem did not preserve his core claim, if any existed, that he was entitled to have the names of the jurors during jury selection. He did not object to the type of jury, anonymous or otherwise, either before or during voir dire, or in any posttrial motion. At the time of voir dire, Nadeem had to have been aware of facts bearing on whether his jury was anonymous. As noted below, the record strongly suggests that trial counsel had access to the jurors' biographical information on their questionnaires.

Even before *Sandoval*, there were cases from other jurisdictions concluding that impaneling an anonymous jury was trial error. See *State v. Sandoval, supra*. Yet, Nadeem did not object to the court's referring to the jurors by number. He did not object to impaneling the jury. In fact, he passed the jury panel for cause. The record does not show that Nadeem was tried by an anonymous jury or that defense counsel was hindered in his ability to conduct effective voir dire. Now that he is dissatisfied with the verdict, Nadeem cannot claim the court erred by impaneling an anonymous jury.

Nadeem was required to alert the district court to its error of impaneling an anonymous jury, if indeed that was the type of jury the court impaneled. Because Nadeem did not object, the district court had no opportunity to determine if the impaneling of the jury was improper. Nadeem may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. See *id*. The impaneling of an anonymous jury was not presented to the district court, and we will not consider it on appeal.

Plain Error

We next consider the Court of Appeals' opinion that found plain error regarding the impaneling of the jury, which the Court of Appeals determined was an anonymous jury. It pointed out the State's arguments that Nadeem had waived any error because he did not object to the use of an anonymous jury and raised the issue for the first time on appeal. It briefly discussed the rationale 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. See *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011). The Court of Appeals concluded that Nadeem clearly had an opportunity to object. That said, the court then turned to the "well-established exception to the waiver rule," that an appellate court may consider an issue not raised to the trial court if such issue amounts to plain error. See *Nadeem II*, 19 Neb. App. at 572, 809 N.W.2d at 831.

The Court of Appeals noted there was an absence of information in the record to explain why the court impaneled a numbers jury or an anonymous jury. It recognized that the district court did not have the benefit of our decision in *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010). But it concluded that the record failed to show the existence of any substantive prerequisites that justified impaneling an anonymous jury, "a drastic measure that should only be undertaken in limited circumstances." *Nadeem II*, 19 Neb. App. at 569, 809 N.W.2d at 829. It found plain error because the record showed neither a compelling need to protect the jurors nor that the court took precautions against an anonymous jury's having an adverse impact on Nadeem's presumption of innocence.

The Court of Appeals assumed prejudice occurs if a trial court fails to follow our two-part test in *Sandoval*, and we clearly did not hold that. Instead, to ensure that jury anonymity did not impact the constitutionality of the trial, an appellate court must closely scrutinize the record and evaluate it in the light of reason, principle, and common sense. See *State v. Sandoval, supra*. First, an appellate court must determine whether the record shows that the defendant's counsel lacked sufficient information to make intelligent decisions regarding peremptory strikes during voir dire. Second, an appellate court must ask whether the record shows that the trial court took any steps to protect the defendant's presumption of innocence.

[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. *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999). 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. See *id*.

The Court of Appeals determined that the district court abused its discretion in impaneling an anonymous jury and that such was plain error. See *Nadeem II*. It concluded that a hearing on Nadeem's postverdict motion to release juror

information suggested that the court had withheld the jurors' names from Nadeem's counsel.

We disagree. At the hearing, the following exchange occurred among the court, defense counsel, and the prosecutor:

> THE COURT: [Defense counsel], you want a release of juror information?
>
> [Defense counsel]: Right, your Honor.
>
> The second motion 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.
>
> . . . .
>
> [Prosecutor]: There is no statutory basis to allow [defense counsel] to contact the jurors and ask about their deliberations.
>
> If the Court allows that fishing expedition in this case they would have to do it in every single case. That's a problem solely for the juries, the deliberations.
>
> Unless information has been brought to [defense counsel's] attention that a juror or jurors used extraneous prejudicial information, there is nothing that allows him to conduct his own investigation or any investigation into the jury deliberations.
>
> THE COURT: Anything further?
>
> [Defense counsel]: Well, your Honor, I understand what the State — I understand what the State's position is. I think the problem is, like a lot of things when a decision is made and one doesn't have a full clear understanding how people reached that decision, I think it's beneficial — I think it's beneficial to just to have some idea and I think that's the investigation of contacts necessary.
>
> THE COURT: I'm going to deny the request.

This exchange does not show that Nadeem was denied access to the names of the jurors at trial and was therefore convicted by an anonymous jury. It does not show that Nadeem had the names of the jurors. It shows only that defense counsel wanted permission to talk to the jurors to find out why they convicted his client. Neither defense counsel's motion nor his colloquy establishes that the jury was anonymous.

Contrary to the Court of Appeals' opinion, the record strongly supports a conclusion that defense counsel had access to the jurors' biographical information on their questionnaires. During voir dire, the State asked six prospective jurors about their occupations based upon their responses in the questionnaires and asked another prospective juror about his relationship with the Attorney General. Obviously, Nadeem's defense counsel would have objected at this point if he did not have access to the same biographical information. Juror No. 23 reported knowing juror No. 21, who was identified by name. Juror No. 11 stated that he was acquainted with juror No. 34, who was also identified by name.

The Court of Appeals found that the record failed to show whether the district court took steps to protect Nadeem's presumption of innocence. But in *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), we concluded that the defendant was not prejudiced by the court's impaneling of a numbers jury when the trial court did not draw attention to the fact that juror numbers were used instead of names and there was no indication that the jurors considered the practice to be unusual. We also noted that (1) all jurors had stated that they could be impartial and were not biased and (2) the court had instructed the jurors that the defendant was presumed innocent and that the State must prove the charges beyond a reasonable doubt.

We conclude that the Court of Appeals erred in finding the record shows the district court impaneled an anonymous jury. Instead, the record strongly supports a conclusion that the court impaneled a numbers jury. It erred in determining that the district court abused its discretion by impaneling an anonymous jury and that such was plain error. Plain error review was inappropriate because the error was not plainly evident from the

record. As stated above, the record does not clearly establish that the district court impaneled an anonymous jury. It may be inferred that the court impaneled a numbers jury and that at the hearing on the motion to release juror information, defense counsel was not asking for the names of the jurors but simply wanted an opportunity to talk with the jurors and wanted the court's permission to release the names of the jurors. Thus, the record does not support a plain error review.

CONCLUSION

In the case at bar, Nadeem waived any objection to the jury that was impaneled. Plain error review was improper because the record does not plainly show that the district court impaneled an anonymous jury. Therefore, we reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals for further proceedings regarding Nadeem's remaining assignments of error.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CASSEL, J., not participating.

JERRY A. MARTIN AND LEONARD G. MARTIN, APPELLANTS, V. ANNA B. ULLSPERGER, INDIVIDUALLY, AND LONNIE A. MARTIN, INDIVIDUALLY, APPELLEES.

822 N.W.2d 382

Filed October 19, 2012. No. S-11-1066.

1. **Decedents' Estates: Wills.** An action seeking to revoke a beneficiary's interest under a no contest provision of a will requires a court to construe the will and consider any governing statutes.
2. **Wills: Trusts.** The interpretation of the words in a will or a trust presents a question of law.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
5. **Decedents' Estates: Wills: Partition: Time.** After a probate court enters its final decree closing an estate, a devisee cannot affect a testator's restriction against a partition. So a devisee's partition action after the estate has been closed cannot be a will contest that attacks the testator's will.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Affirmed.

James R. Welsh and Christopher Welsh, of Welsh & Welsh, P.C., L.L.O., for appellants.

Richard H. Hoch, of Hoch, Partsch & Noerrlinger, for appellees.

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

CONNOLLY, J.

SUMMARY

The parties are the surviving children of Lewis Martin, who died in 1986. Under Lewis' will, they are beneficiaries of a joint life estate interest in farmland. The last surviving child will inherit the remainder interest. The will provided that no life tenant or remainderman could partition the property during the existence of any life tenancy. Through a codicil, Lewis later added a no contest provision, which disinherited any child who contested his will.

After the probate court entered the final order in the probate proceeding, the appellees, Anna B. Ullsperger (Anna) and Lonnie A. Martin, brought a partition action in district court to divide the property. The court dismissed that action, concluding that Anna and Lonnie were bound by the will's restriction against a partition because they had not contested the will during the probate proceeding. The appellants, Jerry A. Martin and Leonard G. Martin, then filed this declaratory judgment. They claimed that Anna and Lonnie had forfeited their inheritance by contesting the will through the partition action. The court concluded that Anna and Lonnie's partition action was not a will contest because the will had already been probated. It dismissed Jerry and Leonard's declaratory judgment action. We agree with the court and affirm. After an estate is closed, a partition action cannot contest a will's restriction against partitions.

BACKGROUND

In 1970, Lewis executed his original will and first codicil. Lewis devised to his wife a life estate interest in the farmland. He also devised to any child who survived his death a life estate interest in the farmland, subject to his wife's interest. He devised the remainder interest in the farmland to his last surviving child, who would become the sole owner. The surviving children's interests were subject to a partition restriction in paragraph 7. It provided that the farmland "shall not be subject to partition by any life tenant or remaindermen named in this Will during the existence of any life tenancy in said real estate."

In 1980, Lewis executed a second codicil to his will. It added the following no contest provision:

> [I]f any of my eight children that I have provided for in my Will contest the validity of said will, . . . his or her share of my estate shall lapse and shall pass to my other remaining children, share and share alike as their interests are designated in my said will.

Two of Lewis' eight children predeceased him. In 1987, the county court issued the final order in the formal testacy proceeding to distribute the estate's assets and discharge the personal representative.

In 2004, Anna, Lonnie, and Russel Martin (another surviving child) filed an action for an accounting against Jerry and Leonard. They alleged that after the court admitted Lewis' will to probate, Jerry served as the landlord of the property, and that he turned over the farming operations to Leonard. They alleged that Leonard never consulted them or accounted to them for farm expenses and income. They asked the court to determine each cotenant's interest in the net farm income or to order a sale of the property and divide the proceeds. Jerry and Leonard's answer showed that Jerry had kept the farm records since his discharge as the personal representative of Lewis' estate and that Leonard had farmed the property as a "crop share tenant" since Lewis' death.

In 2006, the court approved a settlement of the accounting action. In the settlement, the parties agreed to enter a

lease between Leonard as the farm tenant and the other three siblings as landlords. Among other things, Jerry agreed to maintain a separate bank account for the farm, to timely provide records of income and expenses to Anna and Lonnie, and to pay them their share of farm income by a specified date each year.

In 2008, Anna and Lonnie filed the partition action. In that action, they stipulated that Lewis' wife and two of his surviving children had already died. So Lewis' only surviving children are his four children named as parties in the partition action and the declaratory judgment action. The court dismissed Anna and Lonnie's partition action in 2009. Jerry and Leonard filed their declaratory judgment action in 2011.

Jerry and Leonard alleged that Anna and Lonnie's partition action was a will contest that challenged the partition restriction in paragraph 7. They claimed that because Anna and Lonnie had contested the will without probable cause, they had forfeited their share of the estate under the no contest provision. Jerry and Leonard sought a declaration that they owned undivided life estates in the farmland unencumbered by the lapsed interests of Anna and Lonnie.

Both sides moved for summary judgment. The court received the records of the accounting action and the partition action and took judicial notice of these proceedings. After reviewing the evidence, the court determined that the partition action was not a will contest:

> [Anna and Lonnie] in the partition action forfeited their right to contest the provisions of the Will by allowing the Will to be probated. Once probated, the issues regarding the contingent remainder interest of the parties became indestructible and could not be partitioned and, in fact, there was also a valid testamentary restriction on partition existing which was enforceable as a result of the probate of [Lewis'] Will. Essentially, Anna . . . and Lonnie . . . had become bound by the terms of the Will in that they had not contested the Will. Their partition action . . . did not act as a contest of the Will, but was a separate legal proceeding initiated by them which was dismissed by the

> court for the reason in part that they were precluded from now raising such issues which could have been raised in the probate proceeding.

Accordingly, the court concluded that Anna and Lonnie had not forfeited their inheritance by filing the partition action and dismissed Jerry and Leonard's declaratory judgment action. The court overruled Jerry and Leonard's subsequent motion for a new trial or to alter or amend the order.

ASSIGNMENTS OF ERROR

Jerry and Leonard assign that the court erred in concluding that the partition action was not a will contest, granting summary judgment for Anna and Lonnie, and overruling their motion for a new trial or to alter or amend the order.

STANDARD OF REVIEW

[1-4] An action seeking to revoke a beneficiary's interest under a no contest provision of a will requires a court to construe the will and consider any governing statutes. The interpretation of the words in a will or a trust presents a question of law.[1] Statutory interpretation presents a question of law.[2] We independently review questions of law decided by a lower court.[3]

ANALYSIS

Jerry and Leonard contend, for various reasons, that Anna and Lonnie contested the will through their partition action and therefore forfeited their inheritance. Anna and Lonnie argue that the partition action cannot be a will contest because the probate court had already closed the estate. We agree.

Generally, courts have held that the following types of claims constitute will contests: "lack of testamentary capacity, fraud, undue influence, improper execution, forgery, or a subsequent revocation of the will by a later document."[4] These

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[1] *Channer v. Cumming*, 270 Neb. 231, 699 N.W.2d 831 (2005).

[2] See *Connelly v. City of Omaha, ante* p. 131, 816 N.W.2d 742 (2012).

[3] *Bock v. Dalbey*, 283 Neb. 994, 815 N.W.2d 530 (2012).

[4] See Annot., 3 A.L.R.5th 590, 590 (1992).

claims can all be characterized as a direct attack on the validity of a will. We need not decide here whether a partition action could ever be an indirect attack on a will that constitutes a will contest because we conclude that Anna and Lonnie could not attack the will after a court issued an order that closed the estate.

We note that Neb. Rev. Stat. § 30-24,109 (Reissue 2008) permits heirs to an undivided interest in property to seek a partition before the formal or informal closing of an estate. But here, Anna and Lonnie did not commence their partition action until long after the county court had entered the final order in the probate proceeding.

A contestant generally contests a will by filing a petition objecting to the informal probate of the will or by asking the court to set aside an informal probate. Either petition will result in a formal testacy proceeding.[5] "A formal testacy proceeding is litigation to determine whether a decedent left a valid will."[6] In addition, if the proponent of a will petitions for a formal testacy proceeding, any party who opposes the probate may file objections.[7]

Lewis' will was probated through a formal testacy proceeding. But no one contested Lewis' will before the county court issued its final order closing the estate. And subject to appeal and vacation, a formal testacy order "is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs."[8]

[5] Under these statutory provisions, the district court correctly concluded that Anna and Lonnie were bound by the terms of the will because they had not contested it. After a probate court enters its final order closing an estate, a devisee cannot affect a testator's restriction against a partition. So a

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[5] See Neb. Rev. Stat. §§ 30-2425, 30-2426, and 30-2429.01 (Reissue 2008).

[6] § 30-2425.

[7] Neb. Rev. Stat. § 30-2428 (Reissue 2008).

[8] Neb. Rev. Stat. § 30-2436 (Reissue 2008).

devisee's partition action after the estate has been closed cannot be a will contest that attacks the testator's will. Instead, Lewis' no contest provision had the effect of foreclosing such actions and protecting his intent that the last heir standing would inherit the farmland.

CONCLUSION

We conclude that the district court correctly determined that Anna and Lonnie's partition action was not a will contest because it was filed after the estate was closed.

AFFIRMED.

FLORAL LAWNS MEMORIAL GARDENS ASSOCIATION, A NEBRASKA CORPORATION, APPELLEE, V. BRUCE C. BECKER, APPELLANT, AND LINDA BECKER, APPELLEE.

822 N.W.2d 692

Filed October 19, 2012. No. S-11-1077.

1. **Accounting: Equity.** An action for accounting may be one in law or one 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. **Receivers: Corporations.** Appointing a receiver for a corporation is a harsh and drastic remedy, and is not one to be implemented lightly.
4. **Receivers: Statutes: Notice.** Under Nebraska law, a court's ability to appoint a receiver is governed by statute. The court can appoint a receiver only in specific situations, and the court must provide notice to all interested parties.
5. **Receivers: Notice.** An order appointing a receiver must provide notice to all interested parties, or the order is void.
6. **Receivers: Final Orders.** An order appointing a receiver is a final, appealable order.
7. **Corporations: Statutes.** Corporations are creatures of statute, and they may be dissolved only according to statute.
8. **Receivers: Corporations.** The general nature of a receiver's task, unless appointed in an action for corporate dissolution, is to preserve and protect the property under his or her control.
9. ____: ____. Where there is no proper action for corporate dissolution, a court does not have the power to bypass that requirement and effectively dissolve the

corporation by having the receiver wind up the business and sell all of the corporation's assets.

10. **Equity.** Equity strives to do justice. Equity is not a rigid concept but, instead, is determined on a case-by-case basis according to concepts of justice and fairness.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS, Judge. Affirmed as modified.

Gregory C. Damman, of Blevens & Damman, for appellant.

Larry R. Baumann and Angela R. Shute, of Kelley, Scritsmier & Byrne, P.C., for appellee Floral Lawns Memorial Gardens Association.

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

CONNOLLY, J.

NATURE OF THE CASE

The district court placed Bruce C. Becker's corporation, Floral Lawns Memorial Gardens Association (Floral Lawns), a cemetery association, into receivership and approved the winding up of the business and its dissolution. The court then fashioned an equitable remedy for distribution of the resulting funds, which Bruce challenged on appeal. The issue is whether the court had the power to take these actions.

BACKGROUND

Several events in this case occurred under older versions of the relevant statutes. But because those versions are not substantively different for our purposes, for convenience we will refer to the most current reissue of the statutes.

PROCEDURAL HISTORY

Bruce was the sole shareholder of Floral Lawns, a cemetery association. At some point in the early 2000's, Bruce's wife, Linda Becker, filed for divorce. During the divorce proceedings, the district court declined to address issues related to Floral Lawns, placed it in receivership in 2003, and directed that those issues be resolved in a separate action. The record does not contain the district court's order appointing the

receiver or detail the court's reasons for doing so. But from the record, it appears that Floral Lawns' finances and accounting records were quite muddled, and the court probably appointed a receiver to sort them out.

In January 2005 (while the divorce was still pending), the receiver, on behalf of Floral Lawns, filed an accounting action against the Beckers. In essence, the complaint requested the court to order them to account for Floral Lawns' income and expenses, and for the funds used to purchase certain real estate. The complaint stated:

> Based upon the reports that [the receiver] filed with the Court, the books and records of [Floral Lawns] are confusing and create doubt as to whether the funds have been properly managed and that the [Beckers] have used funds belonging to [Floral Lawns] for their personal use without regard to proper accounting.

The complaint also asked the court to appoint trustees to operate Floral Lawns, and to approve fees for the receiver and a couple of individuals who assisted in various other capacities.

In May 2005, the court dissolved the Beckers' marriage. The order indicated that the distribution of the marital estate was based on, in significant part, the receiver's findings in the separate accounting action. The decree awarded Bruce "all accounts in his name or in the name of Floral Lawns," along with "any assets of Floral Lawns . . . that remain[ed] after the receiver ha[d] completed his report."

In April 2010, the receiver moved the court to approve its sale of Floral Lawns' assets to another cemetery association. The court approved the sale and entered an order to that effect. Following Bruce's objection to the order, the court clarified that Bruce would still receive the balance of the proceeds deposited by the receiver following the payment of costs associated with Floral Lawns' receivership.

The Receiver's Report

In January 2011, the receiver filed his final report with the court. Although Floral Lawns' initial complaint asked for an accounting, at some point a decision was made to dissolve

Floral Lawns once the receivership ended. In the report, the receiver explained that he had sold all of Floral Lawns' assets, paid its expenses, filed its income tax returns, and canceled its insurance policies. The report also stated that the receiver had "wound up all of the day to day business operations" of Floral Lawns. And the report requested the district court to terminate the receivership and dissolve Floral Lawns.

According to the report, there were only two issues that had to be resolved before terminating the receivership and dissolving the corporation. The first was the payment of the receiver's fees and the fees of other individuals who had been involved in various other capacities. The second issue related to the "improprieties of how Bruce . . . dealt with pre-need sales, and his failure to deposit funds into the trust account as required by law."

A "pre-need sale" refers to a purchase of cemetery products before a person's death.[1] Nebraska's Burial Pre-Need Sale Act regulates these transactions.[2] The act requires pre-need sellers like Bruce to deposit the proceeds into a trust account and maintain detailed records.[3] The record shows that Bruce did not keep proper records and failed to deposit pre-need sales proceeds into a trust account as required by the act.

The receiver stated that Bruce admitted that he wrongfully failed to deposit about $115,000 of pre-need sales into Floral Lawns' pre-need trust account. The receiver thought that estimate was fairly accurate. The receiver concluded that the missing money from the pre-need sales "create[d] a large and unresolved liability for Floral Lawns." It appears that "liability" was used in the accounting sense; in other words, the receiver meant that Floral Lawns had unresolved financial obligations. And because of the incomplete records and lack of funds, the receiver was unable to meet those obligations.

The receiver saw two ways of resolving this problem. One was to hire a forensic accountant to go through Floral Lawns'

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[1] See Neb. Rev. Stat. § 12-1102 (Reissue 2007).

[2] See Neb. Rev. Stat. §§ 12-1101 to 12-1121 (Reissue 2007).

[3] See §§ 12-1103 and 12-1105.

financial records, determine the exact amount of money that Bruce had misappropriated, and then sue and obtain a judgment against Bruce. The receiver argued against this approach because it would extend the receivership and delay Floral Lawns' dissolution and it would be unlikely to recover funds sufficient to pay for the cost of such an endeavor. Furthermore, the receiver believed it would be impossible to recover on any judgment against Bruce.

The other way, and the one which the receiver recommended, was to take any leftover funds from Floral Lawns and place them into the pre-need trust account. Quail Creek Cemetery Services & Association (Quail Creek), the cemetery association that purchased Floral Lawns' assets, could then use those funds to bury individuals upon their death whose pre-need money Bruce had failed to place into the pre-need trust account. The receiver advocated for this approach because it would close the receivership sooner and would not require a forensic accountant's services. And to make this approach "more acceptable to" Bruce, the receiver proposed a one-time payment of $4,000 to Bruce from the receivership.

The court adopted the findings and recommendations of the receiver's report, but made a few changes. The court ordered a one-time $4,000 payment to Bruce and then ordered that

> all remaining funds shall be deposited into a trust account . . . to be paid out over the course of time to those individuals who purchased preneed accounts and whose monies where [sic] not deposited into the trust account . . . for such purpose. After the passage of ten years from today's date, if those funds still remain, they shall be paid over to [Bruce].

Bruce appealed this order, but the Nebraska Court of Appeals found some issues left unresolved by the district court's order and dismissed for lack of jurisdiction on June 14, 2011, in case No. A-11-138. The district court then entered a final order in November 2011, which order Bruce appealed.

ASSIGNMENT OF ERROR

Bruce assigns, restated, that the district court erred in ordering Floral Lawns' remaining funds be placed into a trust

account for 10 years, rather than be given to him immediately under the divorce decree.

STANDARD OF REVIEW

[1,2] An action for accounting may be one in law or one in equity.[4] Because of the unique circumstances of this case, there is no adequate remedy at law and equity jurisdiction is proper.[5] 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.[6]

ANALYSIS

Although Bruce assigns as error only the district court's handling of the leftover funds from the sale of Floral Lawns' assets, our de novo review on the record reveals a labyrinth of legal problems that was apparently not recognized by the parties. These issues, combined with the late stage of these proceedings, present a difficult case—one for which there is no easy answer.

[3,4] The first issue that arises is whether the district court properly appointed the receiver. It is well established that appointing a receiver for a corporation is a harsh and drastic remedy, and is not one to be implemented lightly.[7] And under Nebraska law, a court's ability to appoint a receiver is governed by statute.[8] The court can appoint a receiver only in specific situations,[9] and the court must provide notice to all interested

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[4] See, e.g., *Arizona Motor Speedway v. Hoppe*, 244 Neb. 316, 506 N.W.2d 699 (1993). See, also, 1 Am. Jur. 2d *Accounts and Accounting* § 54 (2005).

[5] See, e.g., *Hoppe, supra* note 4; *Trump, Inc. v. Sapp Bros. Ford Center, Inc.*, 210 Neb. 824, 317 N.W.2d 372 (1982).

[6] *Newman v. Liebig*, 282 Neb. 609, 810 N.W.2d 408 (2011).

[7] See, e.g., *Furrer v. Nebraska Building & Investment Co.*, 108 Neb. 698, 189 N.W. 359 (1922); 12 Zolman Cavitch, Business Organizations With Tax Planning § 155.01[2] (2007).

[8] See Neb. Rev. Stat. § 25-1081 (Reissue 2008).

[9] See *id.*

parties.[10] The initial question is whether those requirements were met here.

The record does not show why the district court appointed a receiver in the underlying divorce action, because we have no record of the testimony or hearings in that case. Nor do we have the court's order appointing the receiver. From our reading of the divorce decree, it appears that the trial court initially appointed the receiver to hold Floral Lawns' assets until Floral Lawns' finances could be sorted out. The main goal, presumably, was to get an accurate valuation for Floral Lawns and thereby obtain a fair division of the marital estate.

Under § 25-1081, obtaining a valuation of a corporation does not fall under any of the specifically enumerated grounds for appointing a receiver. But § 25-1081 also includes a catchall ground for situations where, historically, "receivers have heretofore been appointed by the usages of courts of equity."[11] That catchall provision arguably applies here. There exists some support for appointing a receiver to manage a corporation's assets when the corporation is included in the marital estate in a divorce action.[12] As such, there appear to be statutory grounds to support the court's appointing a receiver to assess and manage Floral Lawns' assets pending the divorce.

[5] An order appointing a receiver must also provide notice to all interested parties, or the order is void.[13] At oral argument, the parties conceded that either Bruce was the sole shareholder or Bruce and his ex-wife were the only shareholders. Both Bruce and his ex-wife presumably received notice of the order to appoint the receiver, because both were parties to the divorce action. We conclude that the notice requirement was met.

[6] We also note that the court appointed the receiver in 2003 and that neither party appealed the appointment. An order

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[10] See Neb. Rev. Stat. § 25-1082 (Reissue 2008).

[11] See § 25-1081(8).

[12] See, e.g., *Mayhue v. Mayhue*, 336 Pa. Super. 188, 485 A.2d 494 (1984). See, also, 24 Am. Jur. 2d *Divorce and Separation* § 569 (2008).

[13] See § 25-1082 and Neb. Rev. Stat. § 25-1089 (Reissue 2008).

appointing a receiver is a final, appealable order,[14] and so the time for appeal has long passed.[15] Bruce did not assign the order appointing a receiver as error. And neither party claimed such error at oral argument. We conclude that the court did not err in appointing a receiver for Floral Lawns.

[7] But we do find error in the receiver's and court's actions following the appointment. We first address the court's attempted dissolution of Floral Lawns. In short, the court did not have the power to dissolve Floral Lawns. Corporations are creatures of statute, and they may be dissolved only according to statute.[16] No statutory grounds for dissolution existed here.

Which statutes apply depends on whether the corporation is a nonprofit or for-profit company. There is some question as to how to characterize Floral Lawns, but testimony and answers at oral argument indicated that Floral Lawns was a for-profit corporation, and this was not questioned by either party. Under the for-profit corporate statutes, a corporation may be dissolved voluntarily, administratively, or judicially.[17] There is no evidence to show that this was a voluntary or an administrative dissolution. And although Bruce suggested that the trial court could have ordered him to dissolve the corporation, this was not done, and we therefore have no reason to address this contention.

This leaves only the possibility of judicial dissolution under § 21-20,162. Section 21-20,162 says that a court may dissolve a corporation only when the action is brought by the Attorney General, a shareholder, or a creditor, on various grounds, or when the corporation asks the court to continue its already ongoing voluntary dissolution. None of those requirements are met here, because it was the receiver who brought this

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[14] See, *Robertson v. Southwood*, 233 Neb. 685, 447 N.W.2d 616 (1989); Neb. Rev. Stat. § 25-1090 (Reissue 2008).

[15] See Neb. Rev. Stat. § 25-1912 (Reissue 2008).

[16] See, *Furrer, supra* note 7; 19 Am. Jur. 2d *Corporations* § 2350 (2004); 19 C.J.S. *Corporations* § 916 (2007); 14 Zolman Cavitch, Business Organizations With Tax Planning § 186.01[1] (2006).

[17] See Neb. Rev. Stat. §§ 21-20,151 to 21-20,166 (Reissue 2007).

action and there was no evidence of a voluntary dissolution. As such, the court had no power to dissolve the corporation under Nebraska law and its attempt to do so was error.

[8,9] Because the statutory requirements for judicial dissolution were not met, the receiver's actions in winding up Floral Lawns and selling its assets were also improper and outside the power of the court to approve. We recognize that a receiver's powers have been described by some commentators as allowing the receiver "to do whatever is appropriate and equitable, if approved by the receivership court."[18] But the general nature of a receiver's task, unless appointed in an action for corporate dissolution, is to preserve and protect the property under his or her control.[19] And where there is no proper action for corporate dissolution, a court does not have the power to bypass that requirement and effectively dissolve the corporation by having the receiver wind up the business and sell all of the corporation's assets.[20] This is what happened here, and this was error.

In sum, the court had the power to place Floral Lawns in receivership. But the court did not have the power to dissolve the corporation. And because there was no proper action for dissolution, the court did not have the power to approve the receiver's winding up the business and selling the business' assets.

Our ability to correct these errors is restricted by several factors. The receiver has already wound up the business and sold all of its assets. Practically speaking, it would be impossible to undo these actions. Moreover, both parties seemingly accept that the business is ended; they just dispute what should happen to the remaining proceeds from the sale of the assets. We also note that the remaining funds are a relatively small amount ($10,000 to $17,000 by the parties' estimations), so it does not make sense to remand the cause for further

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[18] 12 Cavitch, *supra* note 7, § 155.04[1] at 155-42.

[19] See *id.*, §§ 155.01[1] and [2] and 155.04[1] through [4].

[20] See *Furrer, supra* note 7.

proceedings, which would simply exhaust the funds through fees and other costs.

[10] But this action sounds in equity, and we may craft a remedy according to equitable principles.[21] Equity strives to do justice.[22] Equity is not a rigid concept but, instead, is determined on a case-by-case basis according to concepts of justice and fairness.[23]

Here, the divorce decree awarded Bruce any funds remaining after Floral Lawns' receivership. But the record also shows that he did not deposit money from pre-need sales into a trust account as required by Nebraska law. In essence, Bruce misappropriated those funds, to the tune of about $115,000, for his own personal use.

Justice may be blind, but it is not stupid. Bruce already received a one-time $4,000 payment from the receivership, and we reject Bruce's claim for the remaining funds. Though the remaining funds are less than the total amount Bruce failed to deposit in the pre-need trust account, placing the funds in the trust account can help mitigate the loss.

If Bruce had properly deposited the pre-need sales' funds into the trust account, then Floral Lawns would have been entitled to receive those funds once it provided the funeral products to the pre-need purchaser upon his or her death.[24] In other words, the funds would have been deferred compensation for the cemetery once it provided the purchased products. The record shows that Quail Creek has assumed many of Floral Lawns' financial obligations, including providing burial arrangements to individuals who made pre-need purchases from Floral Lawns but whose money Bruce did not properly

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[21] See, e.g., *State ex rel. Stenberg v. Moore*, 253 Neb. 535, 571 N.W.2d 317 (1997); *Synacek v. Omaha Cold Storage*, 247 Neb. 244, 526 N.W.2d 91 (1995), *overruled on other grounds, Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000).

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

[23] See, e.g., *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006); *Trieweiler, supra* note 22.

[24] See § 12-1113.

deposit in the trust account. We believe the equitable remedy is to place the remaining money in the existing pre-need trust account, give Quail Creek all existing records which document the pre-need sales, and allow Quail Creek to withdraw the money as it renders services. And unlike the district court, we conclude that the money should not revert to Bruce no matter how much time has passed. Accordingly, we affirm the district court's judgment as modified by this opinion.

AFFIRMED AS MODIFIED.

PAUL OBERMILLER AND BETTY LOU OBERMILLER, HUSBAND AND WIFE, APPELLEES, V. GARY BAASCH AND DENNIS BAASCH, APPELLANTS.

823 N.W.2d 162

Filed October 26, 2012. No. S-11-1042.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Injunction: Equity.** An action for injunction 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. **Vendor and Vendee: Words and Phrases.** A merchantable title is a title which a person of reasonable prudence, familiar with the facts and the questions of law involved, would accept as a title which could be sold to a reasonable purchaser.
5. **Waters: Boundaries: Title.** Title to riparian lands runs to the thread of the contiguous stream.
6. **Waters: Boundaries: Words and Phrases.** The thread, or center, of a channel is the line which would give the landowners on either side access to the water, whatever its stage might be and particularly at its lowest flow.
7. **Waters: Boundaries: Title.** Where title to an island bounded by the waters of a nonnavigable stream is in one owner and title to the land on the other shores opposite the island is in other owners, the same riparian rights appertain to the island as to the mainland.
8. **Waters: Words and Phrases.** The thread of a stream is that portion of a waterway which would be the last to dry up.
9. **Trespass: Title.** To bring an action in trespass, the complaining party must have had title to or legal possession of the land when the acts complained of were committed.
10. **Trespass: Liability.** Liability for trespass exists if an actor intentionally enters land in the possession of another, or causes a thing or third person to do so.

11. **Trespass.** A trespass can be committed on, above, or beneath the surface of the land.
12. **Injunction: Equity.** Where an injury committed by one against another is continuous or is being constantly repeated, so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and that injury will be prevented by injunction. In such cases, equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief.

Appeal from the District Court for Howard County: KARIN L. NOAKES, Judge. Affirmed.

Patrick J. Nelson, of Law Office of Patrick J. Nelson, L.L.C., for appellants.

Roger G. Steele and Liana Steele, of Steele Law Office, for appellees.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

This appeal, filed by brothers Gary Baasch and Dennis Baasch, the appellants, concerns disputed land located in Howard County, Nebraska, in and near the Middle Loup River. After a bench trial, the district court for Howard County denied Gary Baasch's counterclaim for quiet title. The district court found that husband and wife Paul Obermiller and Betty Lou Obermiller, the appellees, owned all the land they claimed to own, that the fence constructed by the appellants was on the appellees' land, and that Gary Baasch does not own any of the disputed land. The court found that the appellants had trespassed and ordered the appellants to remove the fence and enjoined them from blocking access to the land owned by the appellees. Gary Baasch and Dennis Baasch appeal. Although our reasoning differs from that of the district court, we affirm.

STATEMENT OF FACTS

To summarize, this case involves entitlement to land in the Middle Loup River and whether there was a trespass thereon

by nonowners warranting an injunction. The appellees filed a trespass action occasioned by the appellants' putting up a fence on certain accreted land contiguous to the appellants' property and sought injunctive relief. However, due to the comprehensive relief sought by Gary Baasch, an appellant, in his counterclaim, the case was tried initially as a quiet title action, and after resolution of the ownership issue, the court considered the trespass claim and whether the appellees were entitled to injunctive relief.

The appellees allege they own part of an island referred to as "Lot 9" on island No. 1 and claim ownership of land that has accreted thereto on the east and south sides of Lot 9 down to the centerline of the remaining channel or stream to the south. In this case, the channel to the south is sometimes referred to as the "slough." Over time, the channel to the south has narrowed and produced accreted land. The main body of the Middle Loup River runs roughly west to east on the north side of Lot 9. The appellees claimed that the appellants had built a fence and otherwise trespassed on the appellees' property. Throughout this case, it appears that the appellees have maintained that they are entitled to land north of the centerline of the slough and that Gary Baasch is entitled to accretion south of the centerline of the slough.

Gary Baasch, an appellant, owns land on the mainland which is located to the south of Lot 9 and south of the slough; he claims ownership of all the accretion. Gary Baasch alleged that due to a defect in title concerning Lot 9, the appellees were not entitled to accretion to Lot 9, and sought to quiet title to the accretion in his name. For completeness, we note that Gary Baasch suggests on appeal that the evidence at trial would show that he is also entitled to Lot 9, but there is no allegation or claim to this effect in the controlling pleadings, and in view of the evidence and our disposition, we reject this assertion, as did the district court.

The property at issue on appeal is located in and near the Middle Loup River in the southwest quarter of Section 22, Township 13 North, Range 11 of the 6th P.M., Howard County. According to a survey conducted by Timothy Aitken in February 2010, the land at issue is composed of two

contiguous areas of land. One area, Lot 9, is historically said to consist of approximately 27 acres, although some land has been eroded. The other area is to the east and south of Lot 9 and consists of land which has accreted to Lot 9 and is located north of the centerline of the slough. These two areas were depicted and described on an exhibit attached to the complaint. After trial, the district court quieted title in these two areas in the appellees and incorporated this description in its judgment.

In his answer and counterclaim, Gary Baasch alleged, inter alia, that the appellants did not own Lot 9 and that he owned the accretion thereto. In their answer to the counterclaim, the appellees alleged that they owned Lot 9 and certain accretion thereto and denied that Gary Baasch owned their property and accretion thereto.

The record indicates that when Lot 9 was originally platted, it was part of an island in the Middle Loup River surrounded by a channel to the north and a channel to the south. The south channel separated the island, including Lot 9, from the mainland to the south of the island. Gary Baasch claims ownership of Lot 5 on the mainland situated to the south side of the island, and the record contains no challenge to his claim of ownership of Lot 5.

Aerial maps and testimony indicate that over time, the channel to the south of Lot 9 has narrowed and, as noted above, is now what the parties refer to as the "slough." Witnesses for all parties testified that water from the slough still empties into the Middle Loup River. Because of the narrowing of the south channel, land now exists between Lot 9 and Lot 5 which was not evident on some earlier surveys. Lot 9, as well as accretion thereto north of the centerline of the slough, is the land at issue on appeal. It seems there is no dispute that the accretion was not platted by the U.S. government, and it appears from the record that no one pays taxes on this land. At trial, all parties testified that they have used the accretion for recreational purposes and have granted permission to others to use the property.

The record contains numerous recorded documents regarding the title to Lot 9. Although the record does not contain

evidence showing that Lot 9 was conveyed to a private individual by the U.S. government, the evidence shows that in 1894, Robert Harvey, a surveyor, surveyed the area and designated Lot 9 as part of an island. Harvey indicated that the eastern part of the island, Lot 9, was in Section 22 and was an approximately 27-acre tract.

A certified land patent from the U.S. Bureau of Land Management, dated May 25, 1885, indicates that Johan Nordquist was the owner of Lot 4 in the southwest quarter of the northwest quarter of Section 22. Lot 4 lies north of Lot 9 and is located on the mainland on the north side of the Middle Loup River. In April 1904, Johan Nordquist and his wife, Carolina Nordquist, quitclaimed any interest they had in Lot 9 to Alex Sandberg by a handwritten document. By a handwritten quitclaim deed dated September 12, 1904, Alex Sandberg and Lizzie Sandberg conveyed their interest in Lot 9 on island No. 1 in Section 22 to Anna Carolina Granlund. By a warranty deed filed October 12, 1923, Anna Granlund conveyed her interest in Lot 9 on island No. 1 in Section 22 to Albin Granlund. The language of this warranty deed indicated that it is intended as a conveyance of the land.

On April 20, 1973, Paul Obermiller purchased Lot 9 at public auction from the heirs of Albin Granlund. Paul Obermiller received a quitclaim deed from the Granlund heirs filed July 2, 1973, and an executor's quit claim deed on behalf of the estate of William Granlund, filed July 2, 1973. Dennis Baasch testified that he was present at the auction and further testified that he did not dispute that Paul Obermiller purchased Lot 9 at the auction. On March 6, 1995, Paul Obermiller conveyed his interest in Lot 9 to himself and his wife, Betty Lou Obermiller, by a joint tenancy warranty deed.

In 1974, the appellees installed a trailer on Lot 9 and have maintained it since then. They have also maintained roads and trails on Lot 9, paid taxes on Lot 9, and used Lot 9 for recreational purposes. From 1973 to 2009, Dennis Baasch and his family rented Lot 9 from the appellees for grazing cattle.

In 2008, the appellants hired Casey Sherlock, the Hall County surveyor, to conduct a retracement survey of the survey done by Harvey in 1894 to determine the boundary line

between Gary Baasch's property and the appellees' property. Sherlock testified that a retracement survey is the retracement of an existing survey performed by another surveyor and that it is the duty of a retracement surveyor to locate on the ground the boundary lines and corners established by the original survey.

The Sherlock survey is dated December 31, 2008, and shows a 27.73-acre tract, which is the retracement of Lot 9 surveyed by Harvey. Rather than treating the 27.73 acres as Lot 9, the Sherlock survey labels the 27.73 acre tract as "Accretion" to Lot 5 and under the "Legal Description" states:

> A tract of land being part of accretion to Gov't Lot Five (5) located in the West Half of Section 22, Township Thirteen (13) North, Range Eleven (11) West of the Sixth Principal Meridian, Howard County, Nebraska, also referred to as Lot No. 9 by Robert Harvey on a survey dated January 29, 30, and 31, 1894, said tract being more particularly described as follows . . . .

The Sherlock survey indicates that Lot 5 is located to the south of the 27.73-acre tract. The Sherlock survey also labeled the accreted land as "Accretion." Sherlock did not survey Lot 5.

In April 2009, members of the Baasch family claiming to own all the accreted land informed Paul Obermiller that they intended to install a fence on the accreted land along the eastern boundary of the 27.73 acres identified in the Sherlock survey. Paul Obermiller objected. Nevertheless, in May 2009, the appellants installed the fence. The fence blocked access to some roads and trails that the appellees used to access the land contiguous to Lot 9 which had been created by accretion.

In the fall of 2009, the appellees hired Aitken, a Howard County surveyor and a senior surveyor with Olsson Associates, to survey the land the appellees claimed to own. The Aitken survey, dated February 25, 2010, depicts an area of land with the Middle Loup River as the northern boundary and the centerline of the slough as the southern boundary. This area of land is composed of Lot 9 and the accretion thereto north of the centerline of the slough. The Aitken survey also shows a line indicating the fence installed by the appellants. This survey is attached to the amended complaint. A later Aitken

survey, dated June 2010, shows the survey line for Lot 9 and states that Lot 9 is approximately 27 acres. Another Aitken survey, also dated June 2010, shows the accretion to the east and south of Lot 9. The Aitken survey attached to the amended complaint depicts the totality of the land which is claimed by the appellees, namely Lot 9 and the accretion thereto north of the centerline of the slough.

On February 26, 2010, the appellees filed their amended complaint and alleged that the fence constructed by the appellants was installed on their property and that the installation was a trespass, invasion, and encroachment on their land. The appellees sought injunctive relief and damages.

In their amended answer and counterclaim filed June 21, 2010, the appellants denied the trespass claim, and Gary Baasch alleged a counterclaim seeking quiet title to the accretion. Gary Baasch alleged that the accreted land cannot be owned by the appellees because the appellees are not the legal owners of Lot 9. Gary Baasch further alleged that he owns Lot 5 and that by virtue of this ownership interest, he also owns the accretion because such land has accreted to Lot 5.

After a trial, the district court entered its judgment on November 2, 2011. The court first analyzed the quiet title claim and determined that the appellees are the legal owners of Lot 9 and that they were entitled to the accretion lying north of the centerline of the slough because it is accretion to Lot 9. Therefore, the court rejected Gary Baasch's claim for quiet title and quieted title in the appellees to the land composed of Lot 9 and the accretion thereto "north of the centerline of the slough." In its judgment, the court incorporated by reference the legal description found on the February 2010 Aitken survey and proposed by the appellees and attached to their amended complaint. This award of land is challenged by the appellants on appeal.

In making its determination, as a preliminary matter, the court rejected the argument that any of the parties owned the accreted land at issue by adverse possession, because no party could prove exclusive possession of the property.

In determining that the appellees are the legal owners of Lot 9, the district court cited *United States v. Fullard-Leo*,

331 U.S. 256, 67 S. Ct. 1287, 91 L. Ed. 1474 (1947), for its application of the theory of the "lost grant." The district court explained that the theory of the lost grant

> recognizes that lapse of time may cure the neglect or failure to secure the proper muniments of title to government land, even though the lost grant may not have been in fact executed. In order for this doctrine to be applicable, the possession must be under a claim of right, actual, open and exclusive.

The district court stated "the presumption of a lost grant to land is an appropriate means to quiet long possession." The district court noted although the government had the authority to convey Lot 9, there are no patents or other documents suggesting that the government did so. However, the court went on to state "the property [Lot 9] has been possessed and transferred to private individuals for over a century without objection from the government or anyone else." The court reasoned that because the appellees purchased their interest in Lot 9 at a public auction in 1973 and their possession has been actual, open, and exclusive since that time, the appellees are the equitable owners of Lot 9, and that, applying Nebraska law, the appellees own the contiguous accretion north of the centerline of the slough.

Because the district court found that the appellees are the owners of Lot 9 and also the owners of the identified accretion thereto, the court found that the appellants' installation of the fence on this property was a trespass on the appellees' land. The court ordered the appellants to remove the fence and enjoined them from blocking or denying access to the appellees' property. The court denied the appellees' request for monetary damages, stating that it was not supported by the evidence.

The appellants appealed.

ASSIGNMENTS OF ERROR

The appellants assign, restated and rephrased, that the district court erred when it (1) determined that the appellees own the approximately 27-acre area known as Lot 9 and the accretion thereto north of the centerline of the slough and

(2) determined that the appellants' installation of the fence is a trespass on the appellees' land, entitling the appellees to an injunction.

STANDARDS OF REVIEW

[1] A quiet title action sounds in equity. *Newman v. Liebig*, 282 Neb. 609, 810 N.W.2d 408 (2011).

[2] An action for injunction sounds in equity. *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 809 N.W.2d 751 (2012).

[3] 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. *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011).

ANALYSIS

The appellants claim that the district court erred when it found that the appellees are the owners of Lot 9 and the accretion thereto north of the centerline of the slough. The appellants assert that because the appellees failed to demonstrate that they are the owners of Lot 9, the appellees cannot be the owners of the accretion they were awarded. The appellants argue that because the appellees do not own the land on which the fence was installed, the appellees cannot properly claim that installation of the fence was a trespass. Gary Baasch contends that he is the owner of the accretion awarded to the appellees and that title should be quieted in him. For the reasons explained below, we reject the appellants' arguments.

Quiet Title.

The district court determined that the appellees are the owners of Lot 9 on the basis of the theory of the lost grant. The appellees have also asserted that they are the rightful owners of Lot 9 under the Marketable Title Act. Although we agree with the district court that the appellees are the legal owners of Lot 9, we affirm for different reasons.

Neb. Rev. Stat. § 76-288 (Reissue 2009) of the Marketable Title Act provides:

> Any person having the legal capacity to own real estate in this state, who has an unbroken chain of title to any interest in real estate by such person and his or her immediate or remote grantors under a deed of conveyance which has been recorded for a period of twenty-two years or longer, and is in possession of such real estate, shall be deemed to have a marketable record title to such interest, subject only to such claims thereto and defects of title as are not extinguished or barred by the application of the Uniform Environmental Covenants Act and sections 25-207, 25-213, 40-104, and 76-288 to 76-298, instruments which have been recorded less than twenty-two years, and any encumbrances of record not barred by the statute of limitations.

Neb. Rev. Stat. § 76-289 (Reissue 2009) provides:

> A person shall be deemed to have the unbroken chain of title to an interest in real estate as such terms are used in sections 25-207, 25-213, 40-104, and 76-288 to 76-298 when the official public records of the county wherein such land is situated disclose a conveyance or other title transaction dated and recorded twenty-two years or more prior thereto, which conveyance or other title transaction purports to create such interest in such person or his immediate or remote grantors, with nothing appearing of record purporting to divest such person and his immediate or remote grantors of such purported interest.
>
> Title transaction as used in sections 25-207, 25-213, 40-104, and 76-288 to 76-298, means any transaction affecting title to real estate, including title by will or descent from any person who held title of record at the date of his death, title by a decree or order of any court, title by tax deed or by trustee's, referee's, guardian's, executor's, master's in chancery, or sheriff's deed, as well as by direct conveyance.

Neb. Rev. Stat. § 76-290 (Reissue 2009) provides:

> Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of all interest, claims, and charges whatever, the existence

> of which depends in whole or in part upon any act, transaction, event, or omission that occurred twenty-two years or more prior thereto, whether such claim or charge be evidenced by a recorded instrument or otherwise, and all such interests, claims, and charges affecting such interest in real estate shall be barred and not enforceable at law or equity, unless any person making such claim or asserting such interest or charge shall, on or before twenty-three years from the date of recording of deed of conveyance under which title is claimed, or within one year from April 8, 1947, whichever event is the latest in point of time, file for record a notice in writing, duly verified by oath, setting forth the nature of his claim, interest or charge; and no disability nor lack of knowledge of any kind on the part of anyone shall operate to extend the time for filing such claims after the expiration of twenty-three years from the recording of such deed of conveyance or one year after April 8, 1947, whichever event is the latest in point of time.

Enacted in 1947, § 76-288 has been described as setting "forth the criteria which must be satisfied in order for a person to be deemed to have a marketable record title." Gregory B. Bartles, Comment, *The Nebraska Marketable Title Act: Another Tool in the Bag*, 63 Neb. L. Rev. 124, 145-46 (1984). The purpose of the Marketable Title Act was to set a time behind which people examining title to land would not have "to look for discrepancies in title in order to determine whether or [not] it is a good marketable title" and thus "protect the public against the overmeticulous title examiner." Judiciary Committee Hearing, L.B. 175, 60th Leg. (Feb. 12, 1947).

It has been observed that marketable title acts are designed to work in conjunction with the recording acts, and not to supplant them. Bartles, *supra*. Thus, it remains appropriate to refer to the recorded documents relative to the land at issue and it is logical to do so in order to determine the "root of title" which is a conveyance of land which serves as the foundation upon which a person currently claiming a chain of title relies. *Id.* at 136.

The "root of title" concept has been explained as

> "that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date [twenty-three] years prior to the time when marketability is being determined. The effective date of the 'root of title' is the date on which it is recorded."

Id. (quoting Model Marketable Title Act § 8(e), reprinted in Lewis M. Simes & Clarence B. Taylor, The Improvement of Conveyancing by Legislation (1960)). The "root of title" concept is embodied in the Marketable Title Act at §§ 76-288 and 76-290.

Subject to certain exceptions in the Marketable Title Act, persons who satisfy four requirements for invoking the aid of the act are deemed to have marketable record title. In particular, it has been observed:

> In order to invoke the aid of the [Marketable Title] Act, persons must: (1) have the legal capacity to own real estate in Nebraska; (2) have an unbroken chain of title to any interest in real estate by the person and the person's immediate or remote grantors; (3) have the unbroken chain of title trace through a deed of conveyance which has been of record for twenty-three years or longer; and (4) be in possession of such real estate.

Bartles, *supra* at 137.

We considered the act in *Smith v. Berberich*, 168 Neb. 142, 95 N.W.2d 325 (1959). In *Smith*, we determined that a quitclaim deed did not serve as a satisfactory root of title document and that the appellees in that case could not invoke the aid of the Marketable Title Act to sustain their claim of ownership of the land by absolute title. In *Smith*, a patent to land was issued in 1911, naming the heirs of Lewis E. Smith, 10 brothers and sisters, as patentees. One of these heirs, Francis L. Smith, executed and delivered a quitclaim deed to Lizzie M. Smith, his wife. In 1946, after Lizzie Smith had died intestate in 1935, the county court assigned the entire tract of land to Lizzie Smith's heirs, the appellees. Relying on the quitclaim

deed and the Marketable Title Act, the county court quieted title in the appellees. The county court reasoned that because the appellees were the successors in interest of a grantee of the land by a quitclaim deed from a tenant in common, which had been recorded for more than 22 years, the appellees were entitled to the land.

We reversed the award of land in the appellees in *Smith*. We noted initially that the patent, the quitclaim deed, and the decree of heirship constituted the entire chain of title. In reversing, we determined that a quitclaim deed was not the kind of conveyance that could have created, under the Marketable Title Act, an entire title to the land in the grantee.

In *Smith*, we explained, "This court has consistently adhered to the doctrine that the distinguishing characteristic of a quitclaim deed is that it is a conveyance of any interest or title of the grantor in and to the land described rather than of the land itself." 168 Neb. at 146, 95 N.W.2d at 327. The quitclaim deed from Francis Smith to Lizzie Smith purported to create in Lizzie Smith nothing more than the interest that her grantor, Francis Smith, had in the land, which the record suggested was an undivided one-tenth interest as a tenant in common. The quitclaim deed did not purport to create in Lizzie Smith an entire title to the land nor to convey the land itself. We stated in *Smith* that the appellees were claiming an interest in the land that was more extensive than that which the quitclaim deed purported to create in the grantee, Lizzie Smith.

We noted in *Smith* that if the conveyance from Francis Smith to Lizzie Smith had purported to create an entire title to the land in the grantee, Lizzie Smith, then it would have served as a conveyance which satisfied the provisions of the Marketable Title Act, and the appellees in that case would have been able to invoke the aid of the act to sustain their claim of title to the land. We determined that the quitclaim deed at issue was not the type of conveyance that could serve as the root of title under the Marketable Title Act.

Unlike *Smith*, the evidence in this case includes a document which conveyed the land, Lot 9, and can serve as the proper root of title foundation under the Marketable Title Act. On the record before us, the warranty deed from Anna Granlund to

Albin Granlund, filed October 12, 1923, can serve as the root in the chain of title. That warranty deed provided that in consideration for $3,000, Anna Granlund granted and conveyed to Albin Granlund the real estate in Howard County described in part as follows:

> Lot Numbered Nine (9) on Island Numbered One (1) in Section Twenty Two (22), in Township Thirteen (13) North,of Range Eleven (11) West,of the Sixth Principal Meridian,located in the Loup River, according to Survey thereof made by Robert Harvey,County Surveyor,on the 29″,30″ and 31″ days of January,1894, and recorded in Surveyors Record No.1, at Page 405.

The warranty deed further provided:

> *And* I [Anna Granlund] *do hereby covenant with the said Grantee , and with* his *heirs and assigns that* I am *lawfully seized of said premises; that they are free from encumbrance*[;] *that* I *have good right lawful authority to sell the same; and* I *do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever*.
>
> *And the said* Anna Carolina Granlund *hereby relinquishes all* her right,title and ownership whatsoever *in and to the above described premises*.

Unlike the quitclaim deed in *Smith v. Berberich*, 168 Neb. 142, 95 N.W.2d 325 (1959), this warranty deed conveys the land and all interests to the land that is described, not just the mere interest in the land of the grantor.

[4] If a title is merchantable, it is marketable, and we have stated that a "'merchantable title is a title which a man of reasonable prudence, familiar with the facts and the questions of law involved, would accept as a title which could be sold to a reasonable purchaser.'" *Podewitz v. Gering Nat. Bank*, 171 Neb. 380, 389, 106 N.W.2d 497, 504 (1960) (quoting *Northouse v. Torstenson*, 146 Neb. 187, 19 N.W.2d 34 (1945)). The warranty deed from Anna Granlund to Albin Granlund has the hallmarks of merchantable title, and we treat it as a marketable title.

After Anna Granlund conveyed Lot 9 to Albin Granlund by warranty deed in 1923, Paul Obermiller purchased Lot 9

at an auction in 1973. Incidentally, Dennis Baasch testified that he was present at this auction. Paul Obermiller received a quitclaim deed from Albin Granlund's heirs and an executor's quitclaim deed on behalf of the estate of William Granlund. In 1995, Paul Obermiller conveyed Lot 9 to himself and Betty Lou Obermiller, his wife, by a joint tenancy warranty deed.

The recorded document which serves as the root of title in this case is the warranty deed from Anna Granlund to Albin Granlund in 1923. Being recorded in 1923, it has been recorded for longer than 22 years prior to the time when marketability is being determined in this case, and there has been a recorded chain of title since that time. There is no evidence purporting to divest the appellees of their interest. See § 76-289. And the appellees established possession of Lot 9. See § 76-288. Therefore, under the Marketable Title Act, the appellees own Lot 9.

[5-8] Under Nebraska law, because the appellees own Lot 9, which is part of an island, they also own the accretion to Lot 9 to the thread of the slough. In *Babel v. Schmidt*, 17 Neb. App. 400, 765 N.W.2d 227 (2009), the Nebraska Court of Appeals explained the law of accretion in Nebraska. The court stated:

> Under Nebraska law, title to riparian lands runs to the thread of the contiguous stream. *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000). The thread, or center, of a channel is the line which would give the landowners on either side access to the water, whatever its stage might be and particularly at its lowest flow. *Id.* The same principles in setting the boundary at the thread of the stream are applicable to islands within the river. Where title to an island bounded by the waters of a non-navigable stream is in one owner and title to the land on the other shores opposite the island is in other owners, the same riparian rights appertain to the island as to the mainland. *Winkle v. Mitera*, 195 Neb. 821, 241 N.W.2d 329 (1976).

Babel, 17 Neb. App. at 417, 765 N.W.2d at 240. The thread of the stream is that portion of a waterway which would be the last to dry up. *Madson v. TBT Ltd. Liability Co.*, 12 Neb. App.

773, 686 N.W.2d 85 (2004) (citing *Ziemba v. Zeller*, 165 Neb. 419, 86 N.W.2d 190 (1957)).

Here, the evidence shows that Lot 9 was originally part of an island located in the Middle Loup River, with a channel of the river running on the north of the island and a channel running on the south. The record shows that over time, the channel along the south of Lot 9 has narrowed, and it is now the slough. Witnesses for all parties testified that the slough still empties into the Middle Loup River. Because of the narrowing of the south channel, there is now land between Lot 9 and Lot 5 which was not evident on earlier surveys. Because we have determined that the appellees own Lot 9, under Nebraska riparian law, they are also the owners of the accretion thereto situated north of the thread of the stream, which is the centerline of the slough. This is the determination reached by the district court. Accordingly, although for reasons different from those of the district court, we determine that the district court properly quieted title in Lot 9, and the accretion thereto north of the thread of the slough, in the appellees and denied Gary Baasch's claim for quiet title.

Trespass and Injunction.

The district court found that the installation of a fence by the appellants on the property of the appellees was a trespass on the appellees' land. The court ordered the appellants to remove the fence and enjoined them from blocking or denying access to the appellees' property. For the reasons which follow, we affirm.

An action for injunction sounds in equity. *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006). On appeal from an equity action, we try factual questions de novo on the record and, as to questions of both fact and law, we are obligated to reach a conclusion independent from the conclusion reached by the trial court. *Id.*

[9] To bring an action in trespass, the complaining party must have had title to or legal possession of the land when the acts complained of were committed. *Id.* As explained above, we have affirmed the determination that the appellees own both Lot 9 and the accretion north of the centerline of the slough

upon which the appellees constructed a fence. Accordingly, the appellees may bring an action in trespass.

[10,11] Liability for trespass exists if an actor intentionally enters land in the possession of another, or causes a thing or third person to do so. *Id*. A trespass can be committed on, above, or beneath the surface of the land. *Id*. In the present case, the appellants intentionally constructed a fence along the boundary of Lot 9 on the appellees' land. As explained above, Lot 9 and the accreted land at issue are owned by the appellees; therefore, the appellants constructed this fence on land owned by the appellees. This fence blocks trails and access from Lot 9 to the appellees' accreted property. Because the appellants' construction of a fence on the appellees' land prevents the enjoyment of the appellees' rights of possession and property in the land, see *id*., it constitutes a trespass.

[12] Although where simple acts of trespass are involved, equity will not act, *Harders v. Odvody*, 261 Neb. 887, 626 N.W.2d 568 (2001), given the evidence in this case, an injunction is necessary because the fence constructed by the appellants constitutes a continuous and repeated trespass. See *Lambert v. Holmberg, supra*. In *Lambert*, we stated:

> Where an injury committed by one against another is continuous or is being constantly repeated, so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and that injury will be prevented by injunction. . . . In such cases, equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief.

271 Neb. at 450, 712 N.W.2d at 275.

Here, the appellants' act of installing the fence on the appellees' land impaired the appellees' access to and enjoyment of their land. Because the fence on the appellees' land constituted a continuous trespass, in equity, injunctive relief was appropriate. Other jurisdictions have similarly granted injunctive relief directing the removal of fences constructed on another's land. See *Brandao v. DoCanto*, 80 Mass. App. 151, 951 N.E.2d 979 (2011) (determining grant of injunction ordering removal of

portions of new building and fence encroaching on owner's land was not inequitable); *Seminary v. DuPont*, 41 So. 3d 1182 (La. App. 2010) (finding that neighbor's fence encroached upon homeowner's property, supporting issuance of mandatory injunction); *Crow v. Batchelor*, 456 S.W.2d 241 (Tex. Civ. App. 1970) (determining trial court's grant of mandatory injunction requiring defendant to remove fence was not abuse of discretion).

The district court properly enjoined the appellants. Therefore, we affirm the order of the district court.

CONCLUSION

The appellees are the rightful owners of both Lot 9 and the accretion north of the centerline of the slough, as the district court correctly determined. Because the appellees own the land, the appellants' intentional installation of a fence on the land constituted a continuous trespass, and the appellees were entitled to an injunction, as the district court ordered. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JUSTIN D. HOWELL, APPELLANT.
822 N.W.2d 391

Filed October 26, 2012. No. S-12-115.

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, the 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 the appellate court reviews independently of the trial court's determination.
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. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?
4. **Search and Seizure: Police Officers and Sheriffs: Intent.** The permissible scope of a search is not to be determined on the basis of the subjective intentions of the consenting party or the subjective interpretation of the searching officer.
5. **Search and Seizure.** Consensual searches generally cannot be destructive.
6. **Search and Seizure: Police Officers and Sheriffs: Evidence.** Before an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search, the officer must obtain explicit authorization, or have some other, lawful, basis upon which to proceed.
7. **Search and Seizure.** The scope of a search is generally defined by its expressed object.
8. **Search and Seizure: Motor Vehicles: Police Officers and Sheriffs.** The general rule is that when a suspect does not limit the scope of a search, and does not object when the search exceeds what he later claims was a more limited consent, an officer is justified in searching the entire vehicle.
9. **Appeal and Error.** Consideration of plain error occurs at the discretion of an appellate court.
10. ____. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
11. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed in part, and in part reversed and remanded with direction.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

CASSEL, J.

INTRODUCTION

The principal issue in this appeal is whether a reasonable person would understand that a general consent to search

a vehicle for illegal drugs authorized the opening of a gift-wrapped box in the vehicle's storage area. Because (1) the object of the search was clearly disclosed, (2) the container was not equivalent to a locked container and was not destroyed, and (3) the consent was not withdrawn after the officer's interest in the container was communicated to its owner, the search did not exceed the scope of the consent. Thus, we affirm the conviction for possession of a controlled substance with intent to distribute. However, because the record contains no evidence of the absence of a drug tax stamp, we find plain error and reverse the judgment of conviction for that offense.

BACKGROUND

The State charged Justin D. Howell with possession of a controlled substance with intent to distribute and no drug tax stamp. Howell moved to suppress the evidence obtained from within a gift-wrapped box because he did not specifically consent to its search.

Trooper Russell Lewis provided the sole testimony at the hearing on the motion to suppress. He stopped Howell's vehicle for speeding and had Howell sit in the patrol car while he completed a warning ticket.

Lewis asked Howell if there were drugs or weapons in the vehicle, and Howell answered, "No." Lewis then obtained Howell's consent to search the vehicle. Lewis moved to the rear cargo area of the vehicle and observed luggage and a gift-wrapped box. Lewis asked Howell, who remained in the patrol car, about the ownership of the gift-wrapped box. Howell stated that his aunt had given it to him to give to his brother as a birthday gift.

Lewis decided to search the box, but he did not ask for specific authorization to do so. At the suppression hearing, he agreed that Howell would not have been able to see what he was doing inside of the vehicle as he opened the box. Lewis used a knife to cut the tape on the wrapping paper and unwrapped one side of the box. The box tore as he opened it to look inside. Lewis observed two packages of marijuana. In response to Lewis' question about the ownership of the box, Howell stated that it was his. Howell told Lewis that the box

contained approximately 2 pounds of marijuana and that he sold the drug in addition to personally using it.

The district court overruled Howell's motion to suppress. The court determined that Howell gave Lewis general consent to search, that Howell did not limit or revoke his consent or say that Lewis could not search the box, and that Howell did not object to the search of the box. The court further reasoned that a person "could reasonably expect illegal substances to be transported in such packaging" and that "[c]utting the package did not destroy the contents and caused only minimal damage to a cardboard box of nominal value."

At a trial to the bench, the only evidence offered was a six-page exhibit consisting of the "police report from the officer" and a "copy of the lab[oratory] report for the marijuana that was seized by the officer." The police report synopsis states that Howell "was arrested and charged with Possession of Marijuana with Intent and No Drug Tax Stamp." However, neither the police report narrative nor the laboratory report contains any fact regarding the absence of a drug tax stamp. There were no verbal or written stipulations that would otherwise expand the evidence. The court was not asked to take judicial notice of the evidence adduced at the suppression hearing. After the trial, the district court found Howell guilty of possession of a controlled substance with intent to distribute and no drug tax stamp. The court subsequently sentenced Howell.

Howell timely appealed, and we moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

Howell assigns that the court erred in (1) denying his motion to suppress after determining that his general consent to the search of his vehicle authorized the cutting open of the gift-wrapped box located inside the vehicle and (2) finding him guilty of possession of a controlled substance with intent to distribute and no drug tax stamp.

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

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination.[2]

[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.[3]

ANALYSIS

Consent to Search.

The issue in this case is narrow: Did Howell's general consent to search his vehicle authorize Lewis to open the gift-wrapped box? At oral argument, the State conceded that the validity of the search depended solely upon Howell's consent.

[3,4] The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?[4] The permissible scope of a search "is *not* to be determined on the basis of the subjective intentions of the consenting party or the subjective interpretation of the searching officer."[5]

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[2] *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

[3] *State v. Ross*, 283 Neb. 742, 811 N.W.2d 298 (2012).

[4] *Florida v. Jimeno*, 500 U.S. 248, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991).

[5] 4 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 8.1(c) at 19 (4th ed. 2004) (emphasis in original).

We begin our analysis with the seminal case of *Florida v. Jimeno*.[6] In that case, the officer informed the defendant that he believed the defendant was carrying narcotics in the car and asked for permission to search the car. After receiving consent to search, the officer saw a folded, brown paper bag on the car's floorboard. The officer opened the bag and found cocaine. The U.S. Supreme Court upheld the search, stating that it was objectively reasonable for the officer to conclude that the general consent to search the car included consent to search closed containers within the car which might hold drugs. The Court explained, "A reasonable person may be expected to know that narcotics are generally carried in some form of container" and that they "'rarely are strewn across the trunk or floor of a car.'"[7] Significantly, the Court specifically declined to add to the basic test of objective reasonableness a requirement that police must separately request permission to search each closed container within a car. The Court cautioned, however, that "[i]t is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk . . . ."[8] As the *Jimeno* opinion demonstrates, there is no bright-line rule prohibiting the opening of closed containers during a search of a vehicle conducted pursuant to general consent.

The Nebraska Court of Appeals has considered whether, post-*Jimeno*, general consent to search a vehicle extended to closed containers located therein. In *State v. Claus*,[9] the officer asked the suspect if he had any drugs or weapons and obtained general consent to search the vehicle. The officer observed a "'small blue safety glasses bag'"[10] on the front seat of the vehicle and asked the suspect if the bag was his. After the suspect said that it was, the officer unzipped the bag—without specific permission to do so—and found drugs and drug paraphernalia.

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[6] *Florida v. Jimeno, supra* note 4.

[7] *Id.*, 500 U.S. at 251.

[8] *Id.*, 500 U.S. at 251-52.

[9] *State v. Claus*, 8 Neb. App. 430, 594 N.W.2d 685 (1999).

[10] *Id.* at 432, 594 N.W.2d at 687.

In upholding the search, the Court of Appeals noted that the suspect did not object to the scope of the search or otherwise protest it. More recently, in *State v. Rathjen*,[11] the Court of Appeals was confronted with the search of a locked toolbox in the bed of a pickup truck. The driver gave the officer consent to search his truck, and the officer searched the toolbox by using a key he found on the keyring hanging from the key in the ignition. The officer discovered methamphetamine inside a black bag located in the toolbox. The officer did not ask for additional consent before searching the toolbox, and the driver was not present or within earshot at the time of the search. The Court of Appeals viewed the locked toolbox as being analogous to the trunk of an automobile and determined that the driver's general consent authorized the search. The Court of Appeals emphasized the fact that the driver did not object when the search extended to the toolbox.

[5] Howell relies principally upon precedent from the Eighth Circuit. In *U.S. v. Alverez*,[12] troopers received consent to search a car. During the search, they unbolted a spare tire, shook it, heard several thudding noises, and tried to break the tire loose from the rim. Ultimately, the troopers cut through the tire's sidewall and discovered methamphetamine. The Eighth Circuit determined that cutting the spare tire "likely exceeded the scope of the consensual search,"[13] but that the troopers had probable cause to examine the tire more closely. A later case, *U.S. v. Santana-Aguirre*,[14] involved a search at a bus terminal where the defendant consented to a search of his suitcase. A drug interdiction investigator found two large wax candles, cut into them, and discovered methamphetamine. The Eighth Circuit reasoned that consensual searches generally cannot be destructive and stated that "[c]utting or destroying an object during a search requires either explicit consent for the destructive search or articulable suspicion that supports a finding

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[11] *State v. Rathjen*, 16 Neb. App. 799, 751 N.W.2d 668 (2008).

[12] *U.S. v. Alverez*, 235 F.3d 1086 (8th Cir. 2000).

[13] *Id.* at 1089.

[14] *U.S. v. Santana-Aguirre*, 537 F.3d 929 (8th Cir. 2008).

that probable cause exists to do the destructive search."[15] The Eighth Circuit ultimately did not reach the issue of consent because it concluded that there was probable cause to support the search. Both of these cases involved the destruction of a closed container in such a manner that the container could no longer be used for its intended purpose.

[6] The damage to or destruction of a closed container is a factor in the objective reasonableness analysis. In *U.S. v. Osage*,[16] during a search on a train, the defendant gave an officer permission to search his suitcases and produced a key to open the locked suitcase. The officer observed four cans labeled "'tamales in gravy'"[17] inside the locked suitcase and noticed that the label on one of the cans appeared to have been tampered with. When he shook the can, it did not feel and sound like it contained tamales in liquid, but, rather, felt like a container of salt. The officer opened the can and discovered methamphetamine. The 10th Circuit determined that the defendant's failure to object to the search of the sealed container did not permit the officer to destroy the can. The court analogized the opening of a sealed can—which made the can useless and incapable of performing its intended function—to breaking open a locked briefcase and contrasted it with the opening of a folded paper bag. The court held: "[B]efore an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search, the officer must obtain explicit authorization, or have some other, lawful, basis upon which to proceed."[18] In a later case from the 10th Circuit, *U.S. v. Jackson*,[19] an agent used a knife to take off the top of a baby powder container located within a bag. The 10th Circuit reasoned that removing the lid of the container did not exceed the scope of consent because it did not destroy or render the

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[15] *Id.* at 932.

[16] *U.S. v. Osage*, 235 F.3d 518 (10th Cir. 2000).

[17] *Id.* at 519.

[18] *Id.* at 522.

[19] *U.S. v. Jackson*, 381 F.3d 984 (10th Cir. 2004).

container useless and the container could still perform its designated function.

Several courts have considered the opening of a taped box during a general consent search. In *U.S. v. Mendoza-Gonzalez*,[20] border patrol agents obtained permission to look inside a trailer and saw a few brown cardboard boxes which were sealed with a piece of tape over the top. An agent used a pocketknife to slice the tape on one of the boxes and discovered bricks of marijuana. The defendant argued that the search of the cardboard box exceeded the scope of his consent, but the Fifth Circuit upheld the search. The court reasoned that because the defendant knew the boxes contained marijuana, he should have limited his consent if he deemed it necessary to do so, which would have clarified any ambiguity about whether the agent had consent to search the boxes. The Fifth Circuit noted that it had previously placed the responsibility to limit the scope of consent on the defendant because it is the defendant who knows the contents of the vehicle. In analyzing the reasonableness of a search of a closed container, the Fifth Circuit looked at "the varying impact that such a search has upon two interests: (1) the owner's expectation of privacy as demonstrated by his attempt to lock or otherwise secure the container; and (2) the owner's interest in preserving the physical integrity of the container and the functionality of its contents."[21] The Fifth Circuit rationalized that the defendant's expectation of privacy in the box did not rise to the level of that of a locked container, particularly where the box could be opened by merely removing or cutting through a piece of tape. The court pointed out that the agent did not "damage the box, render it useless, or endanger its contents during the course of the search" and that "cardboard boxes that were once taped, glued, or closed in some other manner are just as capable of performing their function on subsequent occasions with the help of a brand new piece of tape."[22]

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[20] *U.S. v. Mendoza-Gonzalez*, 318 F.3d 663 (5th Cir. 2003).

[21] *Id.* at 671.

[22] *Id.* at 672.

In *U.S. v. Maldonado*,[23] which involved a search on a train, agents obtained consent to search the defendant's luggage and located two boxes marked "'juicer'"[24] inside. The defendant testified that he told one of the agents he did not want to open the juicer boxes—which were taped shut—because the items inside were gift wrapped and that he again expressed concern about the gift wrap when one of the agents offered to open the boxes. An agent opened the boxes and found packages of cocaine. The defendant argued that the search of the boxes exceeded the scope of his consent, but the Seventh Circuit determined that a reasonable person would have understood the defendant's consent for the search of his luggage to include permission to search any items inside his luggage which might reasonably contain drugs. In *U.S. v. Jones*,[25] a trooper opened a gift-wrapped package found in the trunk of a car, and the defendants argued that it exceeded their general consent to search the car for anything illegal. The court determined that the search was reasonable and within the scope of the consent to search, stating:

> The defendants were aware that [the trooper] was searching the trunk of the vehicle and that he was interested in the contents of the gift-wrapped package, as they were asked repeatedly about its contents. The defendants had ample opportunity to instruct [the trooper] not to search the trunk or the package. However, the defendants never objected to [the trooper's] search of the package or placed any limitation on the scope of the consent. Therefore, it was reasonable for [the trooper] to believe that the defendants' consent extended to the gift-wrapped package found in the trunk.[26]

[7,8] These cases guide our resolution of the instant case. Lewis asked Howell if there were drugs or weapons in the vehicle immediately prior to obtaining consent to search. Thus,

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[23] *U.S. v. Maldonado*, 38 F.3d 936 (7th Cir. 1994).

[24] *Id.* at 938.

[25] *U.S. v. Jones*, 501 F. Supp. 2d 1284 (D. Kan. 2007).

[26] *Id.* at 1301-02.

a reasonable person would have been on notice that Lewis was looking for drugs or weapons. The scope of a search is generally defined by its expressed object.[27] One could reasonably expect drugs to be hidden in a closed container such as the gift-wrapped box. "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search."[28] When Howell consented to a search of the vehicle, he did not place any limitation on the search. After Lewis observed the gift-wrapped box, he asked Howell to whom it belonged and whether it was "basically" Howell's. Despite Lewis' interest in the box, Howell did not revoke or limit his consent to search. The general rule is that when a suspect does not limit the scope of a search, and does not object when the search exceeds what he later claims was a more limited consent, an officer is justified in searching the entire vehicle.[29] In the instant case, Lewis used a knife to cut the tape on the gift wrap and created a tear in the box as he tried to peer inside. However, the box and gift wrap were not rendered useless by the search. The tear in the generic cardboard box could be fixed with a piece of tape, and the wrapping paper could be secured to the box with another piece of tape. Under the circumstances, we conclude that the search of the box was within the scope of Howell's consent. Thus, the district court did not err in overruling Howell's motion to suppress the evidence.

Plain Error on Drug Tax Stamp Conviction.

On appeal, Howell assigned that the court erred in finding him guilty of both crimes, but his argument was premised solely upon the court's failure to sustain his motion to suppress.

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[27] *Florida v. Jimeno, supra* note 4.

[28] *United States v. Ross*, 456 U.S. 798, 820-21, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982).

[29] *U.S. v. Contreras*, 506 F.3d 1031 (10th Cir. 2007). Cf. *State v. Brown*, 294 S.W.3d 553 (Tenn. 2009) (stating that silence alone cannot expand scope of initial consent).

He did not argue that the evidence at trial—which included the evidence he had sought to suppress—nonetheless failed to establish that there was no drug tax stamp on the marijuana. However, our review of the record reveals no evidence regarding the absence of a drug tax stamp.

Because this aspect of the evidence was not argued on appeal, it may be considered only as a matter of plain error. After oral argument in this case, we issued an order directing the parties to address whether plain error exists on the record because of insufficient evidence to sustain the conviction for no drug tax stamp, and we specifically asked them to address the existence of evidence in the record sufficient to show the absence of a drug tax stamp.

The parties arrive at opposite conclusions regarding the sufficiency of the evidence. Howell asserts that the State failed to present evidence with respect to whether a drug tax stamp was affixed to the marijuana. The State, on the other hand, admits that the record does not contain any testimony about the presence or absence of a drug tax stamp, but contends that it met its burden of proof through circumstantial evidence. The State directs our attention to the patrol car's video recording of the stop and search and to two photographs of the box—one showing the box in wrapping paper and the other showing part of the unwrapped box. The State points to a regulation from the Nebraska Department of Revenue which provides that "drug tax stamps must be physically affixed, using their adhesive backing, to a container holding the taxable drugs."[30] Relying on the regulation, the State argues that the evidence does not show any sign of a tax stamp affixed to the box or wrapping paper or any remark by Lewis on the presence of a tax stamp. Further, the State asserts that the presence of a drug tax stamp would have eliminated the need for caution exercised by Lewis in opening the package because the presence of the drug tax stamp would have declared the contents of the box. The State suggests that Lewis' carefully cutting off part of the gift wrap

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[30] 316 Neb. Admin. Code, ch. 94, § 005.01 (1992). See, also, 316 Neb. Admin. Code, ch. 94, § 003.02A (1992) ("[d]rug stamps must be affixed to a container holding threshold amounts of marijuana").

"is an unequivocal inference that there was no drug tax stamp which would have readily and openly identified the contents as contraband."[31]

The fundamental problem with the State's argument is that the evidence from which it seeks to draw these inferences was not offered or received at the trial. At trial, the court received only a single exhibit combining a copy of Lewis' written report with a copy of the laboratory report. There was no testimony or any other physical or documentary evidence. The sole exhibit did not memorialize any observations regarding the absence of a drug tax stamp. The evidence from the suppression hearing was not offered at trial, nor was the court requested to judicially notice the evidence from the suppression hearing. Thus, the only evidence actually received at trial failed to show the absence of the drug tax stamp. There was simply a total failure of evidence at trial on this element of the offense.

[9-11] Thus, we note plain error. Consideration of plain error occurs at the discretion of an appellate court.[32] Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.[33] Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.[34] No drug tax stamp is a Class IV felony.[35] The crime is committed when a "dealer distribut[es] or possess[es] marijuana or a controlled substance without affixing the official stamp, label, or other indicium."[36] Thus, an essential element of the crime is the failure to affix the official stamp or label. Because there was no evidence to show the absence of a drug

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[31] Supplemental brief for appellee at 4.

[32] *State v. Britt*, 283 Neb. 600, 813 N.W.2d 434 (2012).

[33] *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

[34] *State v. Ross, supra* note 3.

[35] Neb. Rev. Stat. § 77-4309 (Reissue 2009).

[36] *Id.*

tax stamp, we cannot allow Howell's conviction for that charge to stand.

CONCLUSION

We conclude that Howell's general consent to search his vehicle extended to the gift-wrapped box. Howell did not withdraw or otherwise limit his consent when Lewis inquired about the box, and the search of the box caused only minimal, cosmetic damage to it. We therefore affirm the conviction and sentence for possession of a controlled substance with intent to distribute.

Because the record contained no evidence regarding the absence of a drug tax stamp, we reverse the judgment of conviction and sentence for that charge and remand the cause with direction to dismiss the charge for no drug tax stamp.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V.
SHERRIE L. MCCARTHY, APPELLANT.
822 N.W.2d 386

Filed October 26, 2012. No. S-12-478.

1. **Collateral Estoppel: Appeal and Error.** The applicability of the doctrine of collateral estoppel constitutes a question of law. With regard to such a question, an appellate court is obligated to reach a conclusion independent from the lower court's conclusion.
2. **Statutes.** The interpretation of a statute presents a question of law.
3. **Collateral Estoppel: Words and Phrases.** "Collateral estoppel" means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit.
4. **Collateral Estoppel.** There are four conditions that 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.
5. **Criminal Law: Statutes: Words and Phrases.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed, and it is not

for the courts to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

Chad J. Wythers, of Berry Law Firm, for appellant.

Jon Bruning, Attorney General, George R. Love, and Dain J. Johnson, Senior Certified Law Student, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

INTRODUCTION

Sherrie L. McCarthy was convicted of theft by shoplifting, $200 or less.[1] The district court relied on two prior county court convictions to enhance the crime for punishment as a Class IV felony.[2] In the second of these two prior proceedings, the county court had refused to enhance the conviction and had treated it as a first offense. McCarthy argues that the doctrine of collateral estoppel required the district court to treat the instant conviction as only a second offense and, thus, as a Class I misdemeanor.[3] Because we reject the statutory interpretation underlying McCarthy's argument, we affirm.

BACKGROUND

As the issue on appeal is limited to the matter of enhancement of the conviction, and thus the instant penalty, because of prior convictions, we omit unnecessary details regarding the underlying offense.

In the case before us, the State charged McCarthy with theft by shoplifting of goods having a value of $200 or less, but the information also alleged that the offense should be enhanced for punishment as a Class IV felony because of two prior convictions. In due course, McCarthy pled guilty to the

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[1] See Neb. Rev. Stat. §§ 28-511.01 and 28-518(4) (Cum. Supp. 2010).

[2] See § 28-518(6).

[3] See *id*.

underlying offense. The case proceeded to an enhancement hearing, and the State offered evidence of two prior convictions. McCarthy later offered additional evidence regarding the second conviction.

The first prior conviction was on October 23, 2003, in the county court for Lancaster County, Nebraska, in case No. CR03-17867 (the 2003 conviction). Exhibit 1, the record of the 2003 conviction, shows that McCarthy was convicted of theft by shoplifting, $200 or less. Exhibit 1 does not show that McCarthy either was represented by counsel or waived her right to counsel. Upon conviction of a Class II misdemeanor, McCarthy was sentenced to pay a fine of $200 and the costs of the proceeding.

The State also relied upon a prior conviction from November 17, 2006, in Lancaster County Court, case No. CR06-8811 (the 2006 conviction). Exhibit 2, the record of the 2006 conviction, shows that McCarthy was convicted pursuant to § 28-511.01 (Reissue 2008) of theft by shoplifting of property valued at $200 or less. Relying on the 2003 conviction, the 2006 complaint also alleged that the incident constituted a second offense. The record of the 2006 proceeding shows that, at all relevant times, McCarthy was represented by counsel. McCarthy pled no contest to the charge and was convicted of the underlying offense.

The record also shows that the county court judge in the 2006 proceeding declined to enhance the 2006 conviction for punishment as a second offense and instead determined that it would be considered a first offense. Exhibit 3, a verbatim transcript of the proceedings before the county court judge at the time of the plea and the enhancement hearing, was received by the district court in the instant proceeding. The transcript shows that after the county court had accepted McCarthy's plea to the 2006 underlying offense, the following colloquy occurred:

> THE COURT: . . . You've got yourself charged with a shoplift on September 18th, 2003, about, by golly, 7 o'clock in the morning, at HyVee, 2345 North 48th Street, on September 18th, 2003. You appeared in front of me on October 23, 2003, don't know what courtroom, but we

were probably going pretty fast, and you were without any counsel.

[Deputy county attorney], what do you think?

[Deputy county attorney]: The State's position is that it is a Constitutionally valid conviction, because she only received a fine, and there was no jail involved.

THE COURT: There was a jail potential, wasn't there? I mean, there [sic] a potential jail sentence?

[Deputy county attorney]: Yes.

THE COURT: [Defense counsel], what do you think?

[Defense counsel]: No additional comments, Your Honor.

THE COURT: I'm going to find her guilty of a first offense, but we're going to do — Is this the second time around?

[Deputy county attorney]: I'm sorry?

THE COURT: How many times has she been convicted of a theft?

[Deputy county attorney]: Oh, of a theft?

THE COURT: Yeah.

[Deputy county attorney]: Numerous.

THE COURT: We'll do a presentence investigation. I will find her guilty of a first offense.

After considering this evidence regarding the prior convictions, the district court found McCarthy guilty of the underlying offense and determined that both the 2003 conviction and the 2006 conviction were valid for purposes of enhancement. The court accordingly adjudged McCarthy guilty of theft by shoplifting—$200 or less, third or subsequent offense—and, pursuant to § 28-518(6), enhanced the offense for punishment as a Class IV felony. The court later sentenced McCarthy to 300 days in jail and to pay the costs of prosecution.

McCarthy timely appeals. Pursuant to statutory authority,[4] we moved this case to our docket. Because McCarthy pled guilty to the offense, the appeal was automatically submitted without oral argument.[5]

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

[5] See Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008).

ASSIGNMENT OF ERROR

McCarthy assigns that the district court erred by holding that her 2006 conviction was a "second offense despite [a] prior finding by the [c]ounty [c]ourt that the 2006 offense was a first offense."

STANDARD OF REVIEW

[1] The applicability of the doctrine of collateral estoppel constitutes a question of law. With regard to such a question, an appellate court is obligated to reach a conclusion independent from the lower court's conclusion.[6]

[2] The interpretation of a statute presents a question of law.[7]

ANALYSIS

[3,4] McCarthy's argument relies upon the legal doctrine of collateral estoppel. "Collateral estoppel" means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit.[8] There are four conditions that 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.[9]

McCarthy asserts that all four conditions were satisfied in regard to the 2006 conviction and relies on the decision in *State v. Keen*[10] to support her argument that collateral estoppel barred the district court from treating the 2006 conviction as a second offense. In *Keen*, this court held that the defendant

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[6] *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994), *overruled in part on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[7] *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

[8] *State v. Secret, supra* note 6.

[9] *Id.*

[10] *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006).

could not collaterally attack his prior conviction for driving under the influence. The defendant claimed that the prior conviction could not be used for enhancement because it was obtained pursuant to a municipal ordinance which was later declared to be unenforceable as inconsistent with a state statute. We reasoned that collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter and that although the defendant's prior conviction may have been voidable and subject to reversal upon appeal, it was not void. In the case before us, McCarthy argues that because of the earlier county court determination, she had two prior convictions for first offense, and that those convictions did not satisfy the requirement of § 28-518(6) for enhancement of the instant conviction as a third offense.

The State responds that McCarthy's argument is based on a faulty premise—that a person must be progressively convicted from first offense to second offense before he or she can be found guilty of an enhanced third or subsequent offense. The correct rule for a third or subsequent offense, the State urges, requires only that the person have at least two prior valid convictions for theft by shoplifting, $200 or less. We agree with the State.

[5] The plain language of § 28-518 supports the State's argument. The statute initially declares that "[t]heft constitutes a Class II misdemeanor when the value of the thing involved is two hundred dollars or less."[11] It then states: "For any second conviction under subsection (4) of this section, any person so offending shall be guilty of a Class I misdemeanor, and for any third or subsequent conviction under subsection (4) of this section, the person so offending shall be guilty of a Class IV felony."[12] It is a fundamental principle of statutory construction that penal statutes are to be strictly construed, and it is not for the courts to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not

[11] § 28-518(4).

[12] § 28-518(6).

there.[13] The statute does not say, as McCarthy would have us read it, that a person who has previously been convicted of a second offense shall, upon another conviction, be guilty of a third offense.

The Nebraska Court of Appeals has previously stated that the meaning of § 28-518(6) is plain and unambiguous and that it specifically provides that if an individual has two or more Class II misdemeanor convictions under subsection (4), then a third or subsequent conviction pursuant to subsection (4) will be enhanced to a Class IV felony.[14] We agree with the Court of Appeals' reading of § 28-518.

This reading is consistent with the analogous situation of enhancement in cases involving driving under the influence of alcohol or drugs. We have adhered to this interpretation in two instances. First, we held that for a defendant to be punished as a third offender, it is necessary only that the defendant be charged and found to have been twice previously convicted of driving while under the influence of intoxicating liquor.[15] In the second case, we stated that to constitute a third-offense violation of the then-existing statute, it was necessary only that a violator be properly convicted of two previous violations of the statute, whether the earlier convictions be called first offense or second offense.[16] McCarthy has not cited any authority that persuades us that this reading is not correct or that it should not be applied in the present context.

CONCLUSION

We adhere to the principles of statutory interpretation and conclude that for enhancement as a third or subsequent offense, the plain language of the statute requires only that McCarthy have been previously convicted of two instances of theft by shoplifting under § 28-518(4), whether the earlier convictions

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[13] *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996*), overruled on other grounds, State v. Burlison, supra* note 6.

[14] *State v. Long*, 4 Neb. App. 126, 539 N.W.2d 443 (1995).

[15] *State v. Orosco*, 199 Neb. 532, 260 N.W.2d 303 (1977), *overruled on other grounds, State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983).

[16] *State v. Donaldson*, 234 Neb. 683, 452 N.W.2d 531 (1990).

were called first offense or second offense. Because McCarthy's two prior convictions clearly satisfy this requirement and because she makes no other challenge to the use of these convictions for purposes of enhancement, we affirm the judgment of the district court.

AFFIRMED.

RONALD "TIM" BACON, APPELLANT, V. DBI/SALA, ALSO KNOWN AS DB INDUSTRIES, INC., APPELLEE, AND DAVIS ERECTION CO., INC., EMPLOYER, AND LIBERTY MUTUAL GROUP, ITS WORKERS' COMPENSATION CARRIER, SUBROGEES, APPELLEES.

822 N.W.2d 14

Filed November 2, 2012. No. S-11-194.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
2. **Workers' Compensation: Subrogation.** The employer's right to a future credit does not depend upon who brought the action which led to the employee's recovery or who happens to "recover" first.
3. ____: ____. Neb. Rev. Stat. § 48-118 (Reissue 2010) was enacted for the benefit of the employer.
4. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.
5. **Statutes: Appeal and Error.** When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.
6. **Statutes: Judicial Construction: Legislature: Presumptions.** It is presumed that when a statute has been construed by the Nebraska Supreme Court and the same statute is substantially reenacted, the Legislature gave to the language the significance previously accorded to it by the Supreme Court.
7. **Workers' Compensation: Subrogation: Words and Phrases.** "Third person" under the Nebraska Workers' Compensation Act includes any person other than the employer or those whom the act makes an employer.
8. **Corporations: Stock.** Two separate corporations are generally regarded as distinct legal entities even if the stock of one is owned wholly by the other.
9. **Corporations: Presumptions.** There is a strong presumption that a parent company is not the employer of its subsidiary's employees.
10. **Insurance: Subrogation.** Under the antisubrogation rule, an insurer has no right of subrogation against its own insured or coinsured for a claim arising from the very risk for which the insured was covered.

11. ____: ____. The antisubrogation rule does not prohibit subrogation against any third party who is neither a named nor an implied coinsured, but who has some kind of duty relationship with the insured.
12. ____: ____. The prohibition of insurers' subrogation against their own insureds applies only to claims arising from the very risk for which the insured was covered by that insurer.
13. **Workers' Compensation: Subrogation.** An employer may waive its subrogation protections under applicable workers' compensation laws.
14. **Subrogation: Waiver.** Waivers of subrogation are strictly construed.
15. **Workers' Compensation: Subrogation.** A claimant is entitled to deduct the reasonable expenses incurred in reaching settlement from the portion of the settlement subject to subrogation claims.
16. **Workers' Compensation.** The portion of a settlement which is not actually recovered by the employee—because of a prior apportionment agreement—should not be treated as advance payment by the employer on account of any future installments of compensation.
17. **Rules of the Supreme Court: Appeal and Error.** A cross-appeal must be properly designated under Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2008) if affirmative relief is to be obtained.
18. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed in part, and in part reversed and remanded.

James E. Harris and Britany S. Shotkoski, of Harris Kuhn Law Firm, L.L.P., and Robert G. Pahlke, of Robert Pahlke Law Group, for appellant.

Julie A. Martin, of Nolan, Olson & Stryker, P.C., L.L.O., for appellees Davis Erection Co., Inc., and Liberty Mutual Group.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, and MCCORMACK, JJ., and INBODY, Chief Judge, and SIEVERS, Judge.

MCCORMACK, J.

NATURE OF CASE

Ronald "Tim" Bacon was severely injured while working on a construction project as an employee of Davis Erection Co., Inc. (Davis). Davis and its insurer, Liberty Mutual Group (Liberty), began paying lifetime workers' compensation benefits. Bacon brought a separate negligence action against Davis' parent company, Ridgetop Holdings, Inc. (Ridgetop),

and joined Davis and Liberty for workers' compensation subrogation purposes. Ridgetop's safety director had worked on the project under the supervision of Davis' project manager, and Bacon alleged Ridgetop was independently liable for the safety director's negligent acts which contributed to his injury. Bacon reached a settlement agreement with Ridgetop, after which the trial court granted Davis and Liberty's motion, pursuant to Neb. Rev. Stat. § 48-118 (Reissue 2010), for a future credit in the amount of Bacon's settlement with Ridgetop against its continuing workers' compensation obligations. Bacon appeals the order granting the future credit. At issue is whether Ridgetop is a "third person" under § 48-118 and whether Liberty waived its right to a future credit through a waiver clause in the policy or statements during settlement negotiations.

BACKGROUND

Metropolitan Entertainment & Convention Authority (MECA) contracted with Kiewit Construction Co. (Kiewit) to build the Omaha Convention Center and Arena (the Arena). Pursuant to their agreement, MECA was required to purchase, maintain, and administer an "Owner Controlled Insurance Program" (OCIP), which would provide comprehensive builder's liability insurance, including workers' compensation coverage, for all the contractors working on the Arena. The agreement stated that the OCIP was to fully insure the risk of Kiewit, as construction manager, and those subcontractors and suppliers performing "the Work." Kiewit was specifically required to name itself, its subcontractors, and its suppliers as "additional insureds." The agreement also specified that the insurance coverage was to contain waivers of subrogation.

Kiewit contracted with Liberty to provide the OCIP. The policies to the various subcontractors apparently bore separate policy numbers.[1] However, the senior technical claims specialist for Liberty described an OCIP as a single policy written for a given construction contract, insuring all of the subcontractors under that program. In this manner, Kiewit was insured by

[1] See *RSUI Indemnity Co. v. Bacon*, 282 Neb. 436, 810 N.W.2d 666 (2011).

Liberty under a commercial liability and workers' compensation policy for the duration of its work on the Arena. Kiewit had additional liability coverage through a policy with RSUI Indemnity Company (RSUI). The specific policy between Kiewit and Liberty is not in the record.

Contract and Policy With Davis

Kiewit hired Davis as a subcontractor to perform work on the Arena. The agreement is not in the record. Bacon instead entered into evidence two pages of what appears to be a subcontract agreement between Kiewit and another subcontractor for the Arena project. Liberty does not contest that the agreement is representative of Kiewit's other subcontractor agreements. The agreement contained the following waiver of subrogation:

> *Subcontractor hereby waives all rights of recovery under subrogation because of deductible clauses, inadequacy of limits of any insurance policy, limitations or exclusions of coverage, or any other reason against Owner, Contractor, the OCIP Administrator, its or their officers, agents, or employees, and any other contractor or sub-subcontractor performing Work or rendering services on behalf of Owner or Contractor in connection with the planning, development and construction of the Project*. Subcontractor shall also require that all Subcontractor maintained insurance coverage related to the Work include clauses providing that each insurer shall waive all of its rights of recovery by subrogation against Owner and Contractor together with the same parties referenced immediately above in this Section. Subcontractor shall require similar written express waivers and insurance clauses from each of its sub-subcontractors. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, (b) did not pay the insurance premium directly or indirectly, and (c) whether or not such individual or entity has an insurable interest in the property damaged.

(Emphasis supplied.)

Davis was an enrollee in the OCIP, pursuant to which Liberty issued a workers' compensation and employers' liability policy. A four-page excerpt of the policy between Davis and Liberty is in evidence. It contains a "Waiver of Our Right to Recover From Others Endorsement," which provides:

> We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule. (This agreement applies only to the extent that you perform work under a written contract that requires you to obtain this agreement from us.)
>
> This agreement shall not operate directly or indirectly to benefit any one not named in the Schedule.

Under the title "Schedule," on the same page of the waiver, the policy states, "Where required by written contract."

Parent Company Ridgetop

Davis is a wholly owned subsidiary of Ridgetop. Ridgetop was not a named enrollee of the OCIP. It does not appear from the record that there was any contract between Ridgetop and MECA or between Ridgetop and Kiewit to perform work on the Arena. Ridgetop has several wholly owned subsidiary companies, including Davis Rebar, Inc.; Northwest Steel Erection; Crane Sales & Service; and Crane Rental & Rigging Co.

Ridgetop's employee David Sowl is a safety director. Sowl is regularly loaned out to work as the safety director for each of Ridgetop's subsidiaries, under the supervision and control of their division managers. In accordance with this custom, Sowl provided certain safety services for the Arena project, and he worked under the direction of Davis' project manager.

Workers' Compensation and Bacon's Lawsuit

Bacon was an employee of Davis and was injured in an accident while working on the Arena. Liberty, on behalf of Davis, promptly began paying lifetime workers' compensation benefits pursuant to the OCIP policy.

Bacon sued Ridgetop and Kiewit for negligence. He joined Davis and Liberty for "workers' compensation subrogation

purposes only." Bacon asserted that under the doctrine of respondeat superior, Ridgetop was liable for the negligence of Sowl. Bacon asserted that Kiewit's negligent planning, supervising, and sequencing of the construction project also contributed to his injury. Bacon joined DBI/SALA, also known as DB Industries, Inc. (DBI), as a codefendant under various theories of liability. DBI is the manufacturer of the "Self-Retracting Lifeline" Bacon was wearing at the time of the work-related accident. DBI is the subject of the companion appeal, case No. S-11-541, and is not a party to the present appeal.

Settlement With Kiewit and Ridgetop

Prior to trial, Bacon entered into settlement negotiations with Kiewit and Ridgetop. In correspondence with Bacon's counsel, Liberty agreed that it had no "'recovery' rights as to any settlement monies from Kiewit or Ridgetop." But Liberty explained that it "would still have a claim to Statutory Credit/offset against any net to . . . Bacon from those entities."

Bacon settled with Kiewit for $2.25 million, and Liberty paid $2 million of the settlement pursuant to its general liability coverage of Kiewit under the OCIP. RSUI paid the remainder. Under the terms of the settlement, Bacon agreed that if he later settled with Ridgetop, he would pay Kiewit and/or its insurer a percentage of the Ridgetop settlement.[2] Thereafter, Bacon settled with Ridgetop for $1.25 million, from which Bacon paid $437,500 to Liberty and RSUI pursuant to the agreement with Kiewit. In a prior appeal brought by Bacon, we affirmed his obligation to pay Liberty and RSUI $437,500 from the Ridgetop settlement.[3]

Liberty consented to the settlement with Ridgetop, stipulating that it made no claim against the settlement proceeds and "forever and completely releases, discharges, and waives any and all claims it may have for subrogation or otherwise against Ridgetop . . . and its insurors and subsidiaries." Liberty

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[2] See *id.*

[3] *Id.*

also stated in the stipulation that it "specifically and expressly preserves and reserves any claim it may have to a statutory credit for the funds netted by [Bacon] through the settlement agreement."

Davis/Liberty Motion for Future Credit

Davis and Liberty moved for a credit against the proceeds of the settlements with Kiewit and Ridgetop pursuant to § 48-118. The trial court granted the motion as to the Ridgetop settlement proceeds, but denied it as to the Kiewit settlement proceeds. The trial court stated that the future credit issue depended on whether Kiewit and Ridgetop were "employers" or "third persons." Section 48-118 allows a future credit for any recovery by the employer against a "third person." The court found that Kiewit, as a contractor, had failed to sustain its burden to demonstrate it was not a statutory employer by virtue of Neb. Rev. Stat. § 48-116 (Reissue 2010). The court found, however, that Ridgetop was a "third person," because Bacon failed to overcome the presumption that a parent company is not the employer of its subsidiary's employees. The court ordered that the entirety of the $1.25 million settlement with Ridgetop be credited toward Davis' and Liberty's future obligations to make workers' compensation payments.

Bacon's claims against DBI went to trial and ultimately resulted in a jury verdict of $21,131,633, minus the $3.5 million representing the settlements with Kiewit and Ridgetop and $8,718.89 in attorney fees and costs in obtaining the verdict. That verdict is the subject of the appeal in case No. S-11-541.

ASSIGNMENTS OF ERROR

Bacon asserts, summarized and restated, that the trial court erred in (1) granting the motion for credit against the settlement proceeds Bacon received from Ridgetop; (2) failing to deduct from the credit Bacon's attorney fees and costs in obtaining the settlement; and (3) failing to deduct from the credit the $437,500 previously granted Liberty, as subrogee to Kiewit, against the settlement with Ridgetop.

STANDARD OF REVIEW

[1] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[4]

ANALYSIS

Bacon asserts that the trial court erred in allowing the settlement proceeds from Ridgetop to be treated as a future credit for purposes of Davis' ongoing workers' compensation obligations. He argues that under a plain reading of § 48-118, future credit rights exist only when the underlying action is brought by the employer. He also argues that the term "third person" should be interpreted in light of common-law antisubrogation principles and that such principles prevent Ridgetop from being a "third person" with respect to Davis. Alternatively, Bacon argues that Liberty expressly waived any rights to a future credit through the waiver provisions of the OCIP policies, through communications during the settlement negotiations, and through Liberty's stipulation to the Ridgetop settlement. Finally, Bacon argues that if the credit must stand, the trial court erred in including in the credit the attorney fees and costs associated with obtaining the settlement and the $437,500 paid to Liberty and RSUI out of the settlement. For the following reasons, we affirm the judgment that Ridgetop is a "third person" and that Liberty did not waive its right to a future credit as to Ridgetop. But we remand the matter for further proceedings to determine attorney fees and costs associated with obtaining the Ridgetop settlement and for a deduction of $437,500 from the future credit amount.

Who Must Bring Action

We first address whether the future credit pursuant to § 48-118 is limited to recovery in actions instituted by employers, as opposed to actions instituted by employees. Section 48-118 states in full:

> When a third person is liable to the employee or to the dependents for the injury or death of the employee, the employer shall be subrogated to the right of the employee

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[4] *In re Application of City of Minden*, 282 Neb. 926, 811 N.W.2d 659 (2011).

> or to the dependents against such third person. The recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his or her dependents should have been entitled to recover.
>
> Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents and shall be treated as an advance payment by the employer on account of any future installments of compensation.
>
> Nothing in the Nebraska Workers' Compensation Act shall be construed to deny the right of an injured employee or of his or her personal representative to bring suit against such third person in his or her own name or in the name of the personal representative based upon such liability, but in such event an employer having paid or paying compensation to such employee or his or her dependents shall be made a party to the suit for the purpose of reimbursement, under the right of subrogation, of any compensation paid.

Bacon relies on the fact that the sentence which refers to the future credit mentions only "[a]ny recovery *by the employer*." (Emphasis supplied.)

In *Turner v. Metro Area Transit*,[5] a dissenting justice argued that § 48-118 distinguishes between recovery by the employer and recovery by the employee. The majority opinion implicitly rejected that viewpoint. The action had been brought by the injured employee against a negligent third party. And we affirmed the judgment allowing the employer a future credit in the amount of the worker's settlement with the third-party tort-feasor.

In *Nekuda v. Waspi Trucking, Inc.*,[6] we again affirmed a judgment of future credit representing the amount obtained

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[5] *Turner v. Metro Area Transit*, 220 Neb. 189, 368 N.W.2d 809 (1985).

[6] *Nekuda v. Waspi Trucking, Inc.*, 222 Neb. 806, 388 N.W.2d 438 (1986).

in settlement in an action brought by the employee's widow against a third-party tort-feasor. No case has denied the right to a future credit based on the identity of the originator of the underlying suit.

[2] We decline to revisit the *Turner* decision, which has stood as good law for more than two decades. The employer's right to a future credit does not depend upon who brought the action which led to the employee's recovery or who happens to "recover" first. This is not a race to the courthouse.

Bacon argues we are to construe the Nebraska Workers' Compensation Act (the Act) in light of its beneficent purposes. But those beneficent purposes are to provide an injured worker with prompt relief from the adverse economic effects caused by a work-related injury or occupational disease.[7] In other words, the beneficent purposes of the Act concern the employee's ability to promptly obtain workers' compensation benefits—not the employee's ability to additionally retain recovery against negligent third parties in tort actions. We find no reason to conclude that the beneficent purposes of the Act require us to narrowly interpret the employer's statutory subrogation rights.

To the contrary, the policies behind the Act favor a liberal construction in favor of the employer's statutory right to subrogate against culpable third parties. Workers' compensation acts generally seek to balance the rights of injured workers against the costs to the businesses that provide employment.[8] To reach this balance, most acts liberally allow employers to shift liability onto third parties whenever possible.[9]

[3] We have specifically said that § 48-118 was enacted "for the benefit of the employer."[10] We have explained that "[i]nnocent employers who are required to compensate employees for injuries are intentionally granted a measure of relief equivalent to the compensation paid and the expenses incurred, where a

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[7] See *Risor v. Nebraska Boiler*, 274 Neb. 906, 744 N.W.2d 693 (2008).

[8] See 28 Causes of Action 2d 523 § 2 (2005).

[9] *Id.*

[10] *Oliver v. Nelson*, 128 Neb. 160, 162, 258 N.W. 69, 70 (1934).

third person negligently causes the loss and responds in damages to that extent."[11] It would not be "wise public policy" to bar an employer from asserting its subrogation interest under the Act.[12] This, we have explained, might discourage the prompt payment of benefits to the employee, which, again, is the underlying beneficent purpose of the Act.[13]

Section 48-118, which retains much of the original language from its original enactment in 1913, is admittedly not the most carefully crafted provision of the Act. The first paragraph of § 48-118 refers generally to the fact that the employer "shall" be "subrogated to the right of the employee . . . against [a] third person." But the second paragraph specifies only that recovery "by the employer against such third person, in excess of the compensation paid by the employer . . . , shall be paid . . . to the employee . . . and shall be treated as an advance payment by the employer on account of any future installments of compensation." Then the last paragraph mandates that "[n]othing in the . . . Act shall be construed to deny the right of an injured employee . . . to bring suit," provided the employer "be made a party to the suit for the purpose of reimbursement, under the right of subrogation, of any compensation paid."

It has been said that a right of subrogation includes recovery for both past and future benefits for which the insurer is liable.[14] "Future benefits are a part of the carrier's subrogation interest because they act as an advance against future payments."[15] Thus, the focus on the "recovery by the employer" in the sentence at issue seems inconsistent with the statute's more general mandate that the employer "shall" be subrogated to the rights of the employee against third parties.

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[11] *Bronder v. Otis Elevator Co.*, 121 Neb. 581, 586, 237 N.W. 671, 673 (1931).

[12] *Burns v. Nielsen*, 273 Neb. 724, 733, 732 N.W.2d 640, 649 (2007).

[13] *Id.*

[14] See 16 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 225:203 (2005).

[15] *Hartford Acc. & Indem. Co. v. Buckland*, 882 S.W.2d 440, 445 (Tex. App. 1994).

[4,5] In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.[16] And when possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.[17]

Reading § 48-118 as a whole, we affirm that it was not intended to draw a distinction which would grant the right to a future credit in recovery from actions brought by the employer, but deny that right in actions brought by the employee. Such a distinction would be arbitrary insofar as it would depend on who first brought suit. It would also be arbitrary insofar as the timing of the suit would change the amount of recovery. Even under Bacon's reading of the statute, an employer in an action brought by the employee would retain the right to be reimbursed for payments made up to the time of the employee's recovery in the employee's action.

There is, in fact, a simple explanation for the focus on "recovery by the employer." When this language was originally enacted, the right to an action against the third party rested almost exclusively with the employer, until such time as the employee could allege and prove that his employer had neglected or refused to institute the action.[18] It was only later that the last paragraph was added, which was intended to expand the rights of the employee to bring an action against third parties.[19] That amendment was careful not to diminish the employer's subrogation rights, however, and thus stated that the employee bringing his or her own action must join the employer as a party to the suit "for the purpose of reimbursement, under the right of subrogation, of any compensation paid."

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[16] *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012).

[17] *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

[18] See *Oliver v. Nelson, supra* note 10.

[19] *Id.*

[6] In many cases before and since *Turner*,[20] we have held that § 48-118 was enacted for the benefit of the employer and that there are policy reasons favoring broad subrogation rights for a statutorily liable employer against negligent third parties. And while § 48-118 has been amended several times since *Turner*, the relevant language pertaining to the right to a future credit has remained substantially the same. It is presumed that when a statute has been construed by the Nebraska Supreme Court and the same statute is substantially reenacted, the Legislature gave to the language the significance previously accorded to it by the Supreme Court.[21] We find no merit to Bacon's argument that Liberty cannot pursue future credit against Ridgetop, because it was Bacon who brought the underlying action and who obtained recovery from Ridgetop.

Who Is Third Person

[7] Bacon next argues that Davis/Liberty cannot have a future credit for the amount of the Ridgetop settlement, because Ridgetop is not a "third person" under § 48-118. "Third person" is not defined by the Act. However, we have said that "third person" includes "any person other than the employer or those whom the Workmen's Compensation Act makes an employer."[22] It is an entity with which there is no employer-employee relationship.[23] A third person is "'"any person other than the master, or those whom the act makes master, and the employee who is seeking compensation under their [workers' compensation] agreement."'"[24]

We have noted that "'"[t]he act is careful to preserve the status of a third person by not defining the term; so the presumption must be that the law as to third persons in every respect stands as it was before the act."'"[25] As to any entity the Act

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[20] *Turner v. Metro Area Transit, supra* note 5.

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

[22] *Rehn v. Bingaman*, 151 Neb. 196, 197, 36 N.W.2d 856, 857 (1949) (syllabus of court).

[23] See *id.*

[24] *Id.* at 202, 36 N.W.2d at 860.

[25] *Id.*

does not confer a contractual relation upon, the common-law rights of action are preserved.[26]

[8,9] Bacon does not assert that the Act conferred a contractual relation upon Ridgetop as a statutory "employer." To the contrary, two separate corporations are generally regarded as distinct legal entities even if the stock of one is owned wholly by the other.[27] Accordingly, as the trial court noted, there is a strong presumption that a parent company is not the employer of its subsidiary's employees.[28]

Bacon does not appeal to concepts of alter ego or piercing the corporate veil which might overcome this presumption. Indeed, to pierce the corporate veil between a parent and a subsidiary, a plaintiff must show more than the mere sharing of services between two corporations.[29] Moreover, the types of equity rationales for piercing the corporate veil or treating one corporation as the alter ego of another generally do not arise in the workers' compensation context.[30] And, if Ridgetop and Davis were to be treated as the same entity, then Ridgetop would have been entitled to protection under the exclusivity provisions of the Act and Bacon would not have been able to obtain the settlement from which Liberty now seeks its future credit.[31] Bacon instead sued Ridgetop under the theory that Ridgetop was an independent entity not governed by the

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[26] See *id*.

[27] See *Roos v. KFS BD, Inc.*, 280 Neb. 930, 799 N.W.2d 43 (2010).

[28] See, e.g., *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773 (5th Cir. 1997); *Laird v. Capital Cities/ABC, Inc.*, 68 Cal. App. 4th 727, 80 Cal. Rptr. 2d 454 (1998); *Croxton v. Crowley Maritime Corp.*, 817 P.2d 460 (Alaska 1991).

[29] *Global Credit Servs. v. AMISUB*, 244 Neb. 681, 508 N.W.2d 836 (1993).

[30] See *Kranich v. TCAC, LLC*, No. CV065000476S, 2009 WL 941973 (Conn. Super. Mar. 16, 2009) (unpublished opinion). See, also, e.g., 1 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 43.80 (perm. ed., rev. vol. 2006).

[31] See, Neb. Rev. Stat. §§ 48-111 and 48-112 (Reissue 2010); *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008); 1 John P. Ludington et al., Modern Workers Compensation § 103:14 (Matthew J. Canavan & Donna T. Rogers eds., 1993).

workers' compensation statutes, independently liable for its direct participation in the wrong complained of.[32]

[10] Bacon's theory is that the common-law antisubrogation rule precludes Ridgetop from being a "third person" under the Act. Under the antisubrogation rule, an insurer has no right of subrogation against its own insured or coinsured for a claim arising from the very risk for which the insured was covered.[33] Bacon claims that the question of whether an entity is a "third person" versus an "employer" for purposes of § 48-118 must be strictly construed in light of this rule.

We find several flaws in Bacon's argument. First, it is undisputed that Ridgetop is neither an insured nor coinsured under the closely related policies issued by Liberty pursuant to the OCIP. While "implied coinsureds"[34] are sometimes found with regard to integrally related policies[35] or intended beneficiaries,[36] Liberty has no policy with Ridgetop, closely related or otherwise.

Nevertheless, Bacon attempts to piece together several general concepts of insurance law to make Ridgetop a "coinsured" under the antisubrogation rule. Bacon asserts "Ridgetop is not a 'third person' to whom no duty is owed . . . ."[37] It has often been explained that subrogation exists only with respect to rights of the insurer against "'third persons to whom the insurer owes no duty.'"[38]

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[32] See, e.g., *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 864 N.E.2d 227, 309 Ill. Dec. 361 (2007).

[33] See 46A C.J.S. *Insurance* § 1997 (2007). See, also, *Hans v. Lucas*, 270 Neb. 421, 703 N.W.2d 880 (2005); *Tri-Par Investments v. Sousa*, 268 Neb. 119, 680 N.W.2d 190 (2004).

[34] *Tri-Par Investments v. Sousa, supra* note 33, 268 Neb. at 130, 680 N.W.2d at 199.

[35] See, e.g., *North Star Reinsurance v. Continental Ins.*, 82 N.Y.2d 281, 624 N.E.2d 647, 604 N.Y.S.2d 510 (1993).

[36] See *Hans v. Lucas, supra* note 33.

[37] Brief for appellant at 22.

[38] *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 451, 243 N.W.2d 341, 346 (1976). See, also, e.g., 16 Russ & Segalla, *supra* note 14, § 224:1.

Bacon asserts, without citation to pertinent case law, that Davis, as a wholly owned subsidiary, owed "a duty" to its parent company, Ridgetop. And since Liberty, as the insurer of Davis, "steps into the shoes"[39] of its insured for subrogation purposes,[40] Bacon surmises that Liberty owed a duty to Ridgetop. Therefore, according to Bacon, Liberty cannot subrogate against Bacon's recovery from Ridgetop.

[11] Directors of a wholly owned subsidiary may be obligated to manage the affairs of the subsidiary in the best interests of the parent and its shareholders.[41] But we can find no support for the idea that it thus follows that the subsidiary's insurer can never subrogate against the parent's insurer. In fact, we find little support for Bacon's overarching premise concerning the interplay between the antisubrogation rule and the concept of insurers "stepping into the shoes" of their insureds for purposes of subrogation. An insurer "steps into the shoes" of its insured insofar as the insurer's subrogation rights can be no greater than the rights of an insured against a third party.[42] The antisubrogation rule states that an insurer may not "step into the shoes" of its insured to sue a third-party tort-feasor who also qualifies as an insured under the same policy for damages arising from the same risk covered by the policy.[43] But we can find no support for the conclusion that the insurer "steps into the shoes" of its insured for purposes of the antisubrogation rule. In other words, we have found no law which states that the antisubrogation rule prohibits subrogation against third parties who are neither named nor implied coinsureds, but who have some kind of duty relationship with the insured.

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[39] Brief for appellant at 10.

[40] See, e.g., *First American Title Ins. v. Western Sur.*, 283 Va. 389, 722 S.E.2d 637 (2012); *Jones v. Nationwide Property and Cas. Ins.*, 32 A.3d 1261 (Pa. 2011).

[41] See *Anadarko Petro. v. Panhandle Eastern*, 545 A.2d 1171 (Del. 1988).

[42] See *Thrower v. Anson*, 276 Neb. 102, 752 N.W.2d 555 (2008).

[43] *ELRAC, Inc. v. Ward*, 96 N.Y.2d 58, 748 N.E.2d 1, 724 N.Y.S.2d 692 (2001).

[12] We have, in fact, repeatedly rejected attempts by litigants to expand the traditional scope of the antisubrogation rule through broad "duty" arguments. In *Allstate Ins. Co. v. LaRandeau*,[44] we rejected the insured arsonist's argument that his insurer could not subrogate against him, because he was a person to whom the insurer owed a duty. Despite the fact that the arsonist was a named insured, we explained: "The problem with this argument is that [his] intentional act of arson was not covered under the homeowner's insurance policy. Therefore, [the insurer] owed him no duty *under the policy*."[45] And in *Control Specialists v. State Farm Mut. Auto. Ins. Co.*,[46] we held that the antisubrogation rule did not preclude an insurance company from subrogating its payment on behalf of one of its named insureds against another named insured under a different policy. Despite the fact that the insured, whom the insurer sought to subrogate against, was one to whom the insurer owed a duty, it was a duty under a different contract from the one under which it asserted its subrogation rights.[47] As noted by Couch on Insurance 3d, broad statements of the antisubrogation rule "tend to leave out a crucial boundary of the rule: the prohibition of insurers' subrogation against their own insureds applies to claims arising from the very risk for which the insured was covered by that insurer."[48]

Bacon also discusses the fact that Ridgetop's employee, Sowl, is regularly loaned out to work on jobsites for Ridgetop's subsidiary companies. His argument on this point is unclear. Bacon emphasizes that Sowl regularly acts under the direction of the subsidiary companies' division managers when he is on loan to them and that Sowl, accordingly, acted as the safety director for the Arena, under the direction of Davis' division manager. Bacon asserts that Sowl's negligence is really Davis'

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[44] *Allstate Ins. Co. v. LaRandeau*, 261 Neb. 242, 622 N.W.2d 646 (2001).

[45] *Id.* at 246, 622 N.W.2d at 650 (emphasis supplied).

[46] *Control Specialists v. State Farm Mut. Auto. Ins. Co.*, 228 Neb. 642, 423 N.W.2d 775 (1988).

[47] See *id.*

[48] 16 Russ & Segalla, *supra* note 14, § 224:1 at 224-15.

negligence and that, therefore, Ridgetop's negligence is really Davis' negligence. Bacon then concludes, again without citation to pertinent case law, that "[s]ubrogation does not lie against an agent of an employer performing work under the employer's direction and control."[49] Bacon overlooks that the settlement in question was not with the "agent," Sowl, but with Ridgetop. But regardless, we find that Sowl's involvement in the work makes no difference to Davis/Liberty's right to subrogation.

As much as Bacon tries to make the antisubrogation rule fit, the reasons for the rule fundamentally do not apply to Davis/Liberty's relationship with Ridgetop. There are two public policy considerations behind the antisubrogation rule.[50] First, the insurer should not be able to pass the incidence of the loss, either partially or totally, from itself to its own insured and thus avoid the coverage which its insured purchased.[51] Second, the insurer should not be placed in a situation where there exists a potential conflict of interest, thereby possibly affecting the insurer's incentive to provide a vigorous defense for one of its insureds.[52]

Liberty would not be avoiding coverage which its insureds purchased, and it would not be placed in a conflict of interest. Whatever duty there may be between Ridgetop and Davis, Liberty does not have that same duty to Ridgetop, making it a "coinsured"—let alone a "coinsured" under the same policy for the same covered risk. There is no policy of insurance between Ridgetop and Liberty, and Ridgetop did not contribute to the premiums for the workers' compensation insurance coverage which Liberty paid on Davis' behalf. The Ridgetop settlement with Bacon was paid under general liability coverage through another insurer.

Finally, while it is not necessary to decide the question here, we note that it is questionable whether the common-law

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[49] Brief for appellant at 22.

[50] *Allstate Ins. Co. v. LaRandeau, supra* note 44.

[51] *Id.*

[52] *Id.*

remedy of antisubrogation can ever be pertinent to subrogation rights granted employers through § 48-118. It has been suggested that common-law subrogation principles, including the antisubrogation rule, are inapplicable to claims made under the workers' compensation scheme.[53] And in *Jackson v. Branick Indus.*,[54] we pointed out that "we have never employed a hybrid of statutory and equitable subrogation without direction from the Legislature to do so." More specifically, we explained that the employer's statutory right to subrogation has never been modified or diminished by equitable subrogation.[55] We have repeatedly rejected attempts by litigants to interject equitable doctrines to prevent insurers from exercising their statutory rights to subrogation under the Act.[56] In doing so, we have reasoned that subrogation in workers' compensation is based on statute, not equity.[57] The antisubrogation rule is fundamentally an equitable concept.[58]

For all the preceding reasons, we find no merit to Bacon's assertion that Ridgetop is not a "third person" within the meaning of § 48-118.

Waiver of Subrogation Rights

[13] However, most jurisdictions permit an employer to waive its subrogation protections under applicable workers' compensation laws.[59] Bacon argues that even if Liberty is a "third person" under § 48-118, Liberty explicitly waived its rights under that section.

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[53] See 16 Russ & Segalla, *supra* note 14, § 225:230. See, also, *Threshermens Mut. Ins. Co. v. Page*, 217 Wis. 2d 451, 577 N.W.2d 335 (1998); *Dahlbeck v. New London Concrete*, 400 N.W.2d 736 (Minn. 1987).

[54] *Jackson v. Branick Indus.*, 254 Neb. 950, 960, 581 N.W.2d 53, 59 (1998).

[55] *Id.*

[56] See, *Burns v. Nielsen, supra* note 12; *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006).

[57] See *Burns v. Nielsen, supra* note 12.

[58] *Petta v. ABC Ins. Co.*, 278 Wis. 2d 251, 692 N.W.2d 639 (2005). See, also, e.g., *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

[59] 3 Philip L. Bruner & Patrick J. O'Connor, Jr., Bruner and O'Connor on Construction Law § 10:55 (2002).

Bacon first argues that Liberty waived the right to future credit through communications with Bacon's counsel during the settlement negotiations and through Liberty's stipulation to the settlement with Ridgetop. The carrier's right to have the excess of a third-party recovery credited against future compensation liability is a right that can be waived as part of a settlement.[60]

In correspondence with Bacon's counsel, Liberty agreed that it had no "'recovery' rights as to any settlement monies from Kiewit or Ridgetop." And Liberty stated in its stipulation to the Ridgetop settlement that it "hereby forever and completely releases, discharges, and waives any and all claims it may have for subrogation or otherwise against Ridgetop." Standing alone, those statements provide support for Bacon's argument.

But Liberty points out that in both instances, and within the same documents, it also expressly reserved its right to a future credit from any waiver of subrogation. Liberty stated in its correspondence pertaining to the imminent settlement with Ridgetop, that it "would still have a claim to Statutory Credit/offset against any net to . . . Bacon from those entities." Liberty stated in the stipulation that it "specifically and expressly preserves and reserves any claim it may have to a statutory credit for the funds netted by [Bacon] through the settlement agreement."

Bacon believes these reservations of rights to a future credit were ineffective because they were "incongruous" with Liberty's waiver of its claims for subrogation.[61] Bacon argues that without a "subrogation interest," there can be no basis for a future credit.[62] He claims that the reservations of the right to future credit were attempts to make a "back door claim" when Liberty waived subrogation through the "front door."[63]

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[60] See *Turner v. Metro Area Transit, supra* note 5. See, also, 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 117.01[7] (2011).

[61] Brief for appellant at 17.

[62] *Id.*

[63] *Id.*

Whether or not it is theoretically congruous to retain a right to a future credit when "subrogation" has been waived is of no consequence. The "back door" and the "front door" were always clearly visible to the parties. There was no ambiguity in Liberty's repeated expression that it reserved its rights to a future credit under § 48-118. We will not engage in semantics to conclude otherwise. Liberty "specifically and expressly preserve[d] and reserve[d] any claim it may have to statutory credit for the funds netted by [Bacon] through the settlement agreement."

Bacon next argues that Liberty waived its right to future credit through a waiver provision in its policy with Davis. According to Bacon, the waiver encompassed rights to recover against all who performed work or rendered services on the Arena. We find this argument equally without merit.

We note at the outset that as evidence of this waiver, Bacon presents to us a four-page excerpt from the policy between Davis and Liberty; a two-page excerpt purportedly of Davis' construction contract, but which lists only Kiewit and another subcontractor for the project; a two-page excerpt from a policy between Liberty and MECA; and a five-page excerpt of a "Standard Form of Agreement Between Owner and Construction Manager where the Construction Manager is also the Constructor," between MECA and Kiewit. We hesitate to construe the terms of the policy upon such a sparse record. However, because Liberty does not contest this point, we will address what is before us.

Bacon's focus is the four-page excerpt from the Davis/Liberty policy and the five-page excerpt of the "Standard Form of Agreement Between Owner and Construction Manager where the Construction Manager is also the Constructor." The policy between Davis and Liberty contained a "Waiver of Our Right to Recover From Others Endorsement," stating:

> We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule. (This agreement applies only to the extent that you perform work under a written contract that requires you to obtain this agreement from us.)

> This agreement shall not operate directly or indirectly to benefit any one not named in the Schedule.

Under "Schedule," the policy states, "Where required by written contract."

Thus, Bacon ties in the "written contract" between MECA and Kiewit and the waiver of subrogation contained in Kiewit's subcontract or agreement:

> Subcontractor hereby waives all rights of recovery under subrogation because of deductible clauses, inadequacy of limits of any insurance policy, limitations or exclusions of coverage, *or any other reason* against Owner, Contractor, the OCIP Administrator, its or their officers, agents, or employees, *and any other contractor or sub-subcontractor performing Work or rendering services on behalf of Owner or Contractor in connection with the planning, development and construction of the Project*. Subcontractor shall also require that all Subcontractor maintained insurance coverage related to the Work include clauses providing that each insurer shall waive all of its rights of recovery by subrogation against Owner and Contractor together with the same parties referenced immediately above in this Section. Subcontractor shall require similar written express waivers and insurance clauses from each of its sub-subcontractors. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, (b) did not pay the insurance premium directly or indirectly, and (c) whether or not such individual or entity has an insurable interest in the property damaged.

(Emphasis supplied.) Bacon concludes that, reading together the excerpts from the Davis/Liberty policy and the MECA/Kiewit contract, Liberty waived its right "to recover [its] payments from anyone liable for an injury covered by this policy," for "any . . . reason" against "any . . . contractor or sub-subcontractor performing Work or rendering services on behalf of Owner or Contractor in connection with the planning, development and construction of the [Arena] Project."

As mentioned, the policy in question is part of an owner-controlled "wrap-up" insurance program.[64] Wrap-up insurance programs are designed to prevent the plethora of third-party claims usually associated with lawsuits in large construction projects, wherein various parties associated with the project seek indemnification or contribution from each other.[65] Such claims interfere with construction and result in higher costs.[66] So, pursuant to a waiver of subrogation clause, the contractors and subcontractors, all in relatively equal bargaining positions, exculpate each other and shift the ultimate risk of losses pertaining to the project to the owner.[67] That risk is then transferred to the owner's insurer for valuable consideration.[68]

[14] Courts have found these waivers operative as to the right to statutory credit against future workers' compensation obligations, when the employee obtains recovery from a named insured under the OCIP.[69] But the waivers are generally

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[64] 4 Steven G.M. Stein, Construction Law ¶ 13.08 (2009).

[65] *Id.* See, also, e.g., *Tokio Marine & Fire v. Employers Ins. of Wausau*, 786 F.2d 101 (2d Cir. 1986); *Behr v. Hook*, 173 Vt. 122, 787 A.2d 499 (2001); *IRMA v. O'Donnell, Wicklund, Pigozzi*, 295 Ill. App. 3d 784, 692 N.E.2d 739, 229 Ill. Dec. 750 (1998); *Industrial Risk v. Garlock Equipment*, 576 So. 2d 652 (Ala. 1991); *U.S. Fid. & Guar. v. Farrar's Plumbing*, 158 Ariz. 354, 762 P.2d 641 (Ariz. App. 1988); *Tuxedo Plumbing &c. Co. v. Lie-Nielsen*, 245 Ga. 27, 262 S.E.2d 794 (1980).

[66] See, *Tokio Marine & Fire v. Employers Ins. of Wausau, supra* note 65; *Behr v. Hook, supra* note 65; *IRMA v. O'Donnell, Wicklund, Pigozzi, supra* note 65; *Industrial Risk v. Garlock Equipment, supra* note 65; *U.S. Fid. & Guar. v. Farrar's Plumbing, supra* note 65; *Tuxedo Plumbing &c. Co. v. Lie-Nielsen, supra* note 65; *Home Ins. Co. v. Pinski Brothers*, 160 Mont. 219, 500 P.2d 945 (1972).

[67] See *Behr v. Hook, supra* note 65. See, also, *IRMA v. O'Donnell, Wicklund, Pigozzi, supra* note 65.

[68] 4 Stein, *supra* note 64, ¶ 13.12[7][c]. See, also, e.g., *Colonial Properties Realty v. Lowder Const.*, 256 Ga. App. 106, 567 S.E.2d 389 (2002); *SAIF v. Fama Const. Co.*, 353 N.J. Super. 1, 801 A.2d 334 (2002); *Behr v. Hook, supra* note 65.

[69] See *Hartford Acc. & Indem. Co. v. Buckland, supra* note 15. See, also, *Allen v. Texaco, Inc.*, 510 F.2d 977 (5th Cir. 1975); *Olivas v. United States*, 506 F.2d 1158 (9th Cir. 1974).

limited and operate only to the extent that each party is covered by the builder's risk policy.[70] Waivers of subrogation are strictly construed,[71] and waivers of statutorily conferred rights under the workers' compensation act must be clear and unequivocal.[72]

Ridgetop was not a "person or organization named" in any schedule or elsewhere in any of the policies under the OCIP. There is no evidence that Ridgetop entered into any contract with Kiewit or MECA to perform work on the Arena as a "contractor" or "subcontractor." But because Ridgetop loaned one of its employees to its subsidiary to work on the Arena, Bacon concludes that Ridgetop was a "sub-subcontractor performing Work or rendering services on behalf of Owner or Contractor in connection with the planning, development and construction of the Project."

We disagree. We will not construe a waiver which was limited to persons or organizations "named in the Schedule," and which "shall not operate directly or indirectly to benefit any one not named in the Schedule," to encompass unnamed persons in a broadly worded contractual waiver between a contractor and subcontractor to which the insurer was not a party. Furthermore, strictly construing such a waiver, we conclude that Ridgetop was not a "contractor" or "sub-subcontractor" for the project. A "contractor" is a party to a contract.[73] A "subcontractor" is one who is awarded a portion of an existing contract by a contractor.[74] As far as the record reflects, Ridgetop was not a party to any contract with a contractor or subcontractor to perform work on the Arena.

Our reading of the waiver is consistent with the purposes behind OCIP's. OCIP waivers shift the risk from those individuals insured by the OCIP to the insurer, and the contractors' and subcontractors' premiums are calculated accordingly.

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[70] See 44A Am. Jur. 2d *Insurance* § 1784 (2003).

[71] 16 Russ & Segalla, *supra* note 14, § 224:90.

[72] See 3 Bruner & O'Connor, *supra* note 59.

[73] See Black's Law Dictionary 375 (9th ed. 2009).

[74] *Id.* at 1560.

OCIP waivers are not generally intended to exculpate those parties who have no contractual relationship to the project and whose acts are not insured under the OCIP.

Liberty did not waive its right to a future credit as to Bacon's recovery against Ridgetop. It did not waive the right during settlement negotiations, and it did not waive it in its OCIP policies. We turn now to Bacon's last assignment of error.

Attorney Fees and Costs

[15,16] We find merit to Bacon's assertion that the trial court erred in granting the credit for the entire amount of the settlement. Even Liberty appears to concede that the case should be remanded for further proceedings to determine the extent of the credit. A claimant is entitled to deduct the reasonable expenses incurred in reaching settlement from the portion of the settlement subject to subrogation claims.[75] And the future credit described in § 48-118 is based on the "recovery." While this precise issue does not seem to have arisen before, it stands to reason that the portion of a settlement which is not actually recovered by the employee—because of a prior apportionment agreement—should not be treated as advance payment by the employer on account of any future installments of compensation. Therefore, the $437,500 of the Ridgetop settlement that Bacon was obliged to pay Liberty and RSUI as part of the Kiewit settlement should be deducted from Davis/Liberty's future credit. Since the amount of attorney fees and costs associated with Bacon's recovery against Ridgetop are not in the record, we remand that matter for further proceedings.

Davis/Liberty's Attempted Cross-Appeal

Finally, we note that Davis and Liberty attempted to cross-appeal the trial court's denial of their motion for future credit

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[75] See *Austin v. Scharp*, 258 Neb. 410, 604 N.W.2d 807 (1999). See, also, *Turney v. Werner Enters.*, 260 Neb. 440, 618 N.W.2d 437 (2000); *Gillotte v. Omaha Public Power Dist.*, 189 Neb. 444, 203 N.W.2d 163 (1973), *disapproved in part on other grounds, Nekuda v. Waspi Trucking, Inc.*, *supra* note 6.

against Bacon's settlement with Kiewit. However, the cross-appeal is not noted on the cover of their brief and it does not contain an assignments of error section. In fact, the only section of the brief on cross-appeal is the argument section.

[17,18] Appellate courts of this state have repeatedly held that a cross-appeal must be properly designated under Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2008) if affirmative relief is to be obtained.[76] Section 2-109(D)(4) states that the cross-appeal shall be noted on the cover of the brief and shall be set forth in a separate division of the brief, headed "Brief on Cross-Appeal." Section 2-109(D)(4) further states that the "Brief on Cross-Appeal" shall be prepared in the same manner and under the same rules as the brief of appellant. Errors argued but not assigned will not be considered on appeal.[77] We accordingly decline to consider Davis/Liberty's arguments concerning the order as pertained to the amount of the Kiewit settlement.

CONCLUSION

We reverse, and remand the trial court's order of future credit for the limited purpose of deducting $437,500 and for determining the amount of reasonable attorney fees and costs which should additionally be deducted from the amount of the credit. As to all other matters before us from the final judgment entered pursuant to Neb. Rev. Stat. § 25-1315 (Reissue 2008), we affirm.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STEPHAN, J., participating on briefs.

MILLER-LERMAN and CASSEL, JJ., not participating.

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[76] *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003).

[77] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY GASKILL, APPELLANT.

824 N.W.2d 655

Filed November 9, 2012. No. S-11-528.

1. **Appeal and Error.** Consideration of plain error occurs at the discretion of an appellate court.
2. ____. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
3. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Motion for rehearing sustained. See 284 Neb. 236, 817 N.W.2d 754 (2012), for original opinion. Original opinion withdrawn. Judgment reversed and vacated, and cause remanded with directions to dismiss.

Joshua W. Weir, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

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

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

PER CURIAM.

In an opinion filed on July 27, 2012,[1] we affirmed Timothy Gaskill's Class IV felony conviction[2] based on his failure to comply with certain registration provisions of the Sex Offender Registration Act (SORA).[3] We subsequently sustained Gaskill's motion for rehearing and ordered the case submitted without further oral argument. We now withdraw

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[1] *State v. Gaskill, ante* p. 236, 817 N.W.2d 754 (2012).

[2] See Neb. Rev. Stat. § 29-4011(1) (Cum. Supp. 2012).

[3] Neb. Rev. Stat. §§ 29-4001 through 29-4014 (Reissue 2008 & Cum. Supp. 2012).

our prior opinion, reverse and vacate Gaskill's conviction and sentence, and remand the cause to the district court with directions to dismiss.

BACKGROUND

In April 1995, at the age of 18, Gaskill was convicted of attempted first degree sexual assault. He was sentenced to probation for a period of 2 years. He was still on probation on January 1, 1997, when the original SORA was enacted.[4] SORA applied to Gaskill because he had been convicted of a registrable offense prior to January 1, 1997, and remained "under probation or parole" as a result of that conviction.[5] SORA required Gaskill to register for 10 years from the date he was released from probation,[6] which occurred in April 1997. Pursuant to the risk assessment instrument then utilized by the Nebraska State Patrol, Gaskill was determined to be at low risk to reoffend and was classified as a "Level 1 offender," which meant that his registration was not publicly disseminated on the Nebraska sex offender registry Web site.

In late October 2009, Gaskill received a letter from the sex offender registry advising him that under 2009 amendments to SORA, which would become effective on January 1, 2010, he would be considered a "lifetime registrant." Pursuant to these 2009 SORA amendments, Gaskill's name, address, and photograph were disseminated on the sex offender registry Web site on January 1, 2010. At that time, Gaskill was living with his wife and children at a Lincoln apartment while pursuing graduate studies. On April 1, he received a notice to vacate the apartment. The apartment manager explained that Gaskill was being evicted because other tenants complained after learning he was on the Nebraska sex offender registry.

After spending several nights in motels, Gaskill and his family found another residence in Lincoln and began residing there on April 10, 2010. On May 1, Gaskill was contacted by the Lancaster County sheriff's office and informed that he had not

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[4] 1996 Neb. Laws, L.B. 645.

[5] See § 29-4003(c) (Supp. 2000).

[6] See § 29-4005(1) (Supp. 2000).

updated his registration. He immediately went to the sheriff's office to do so. After being interviewed, he was arrested and later charged in the district court for Lancaster County with failing to report his change of address as required by SORA,[7] a Class IV felony.[8]

Gaskill filed a motion to quash the information, asserting that the 2009 amendments to SORA as applied retroactively to him violated his right to due process and constituted ex post facto legislation. During a hearing on the motion, counsel for Gaskill and the State stipulated that Gaskill was subject to SORA. The district court overruled the motion to quash, and Gaskill entered a plea of not guilty. After a stipulated bench trial at which he preserved his constitutional challenges, Gaskill was found guilty and sentenced to pay a fine of $250 and costs of the action and to serve 200 hours of community service. He filed a timely appeal.

In his brief on appeal, Gaskill assigned that the district court erred in rejecting his constitutional challenges to SORA as amended in 2009. He made no contention that he was not subject to SORA at the time of the charged offense. But in its brief, the State advised the court as follows:

> This Court should be aware that Gaskill is no longer required to register as a sex offender. See http://www.nsp.state.ne.us/sor/find.cfm. Because his conviction for violating SORA is at issue, the State will address his arguments. However, any as applied arguments that Gaskill makes as to *future* registration obligations should be rendered moot.[9]

When questioned about this statement during oral argument, counsel for the State replied that she had confirmed with the Nebraska State Patrol that Gaskill was no longer required to register. When asked why this was so, counsel indicated that there had been a "miscalculation" by the State Patrol. She did not indicate the precise nature of the miscalculation, when

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[7] § 29-4004(9) (Cum. Supp. 2012).

[8] § 29-4011(1) (Cum. Supp. 2012).

[9] Brief for appellee at 12.

it had been discovered, or when Gaskill was notified that he was no longer required to register. In our original opinion, we rejected Gaskill's constitutional challenges and affirmed his conviction.[10]

Gaskill moved for rehearing. In his brief in support of the motion, he argued for the first time that his obligation to register under SORA ended in 2007 at the expiration of his original 10-year registration requirement. He contended that "[t]his explains why the State informed the Court that Gaskill was no longer on the Sex Offender Registry in [the State's] Brief."[11] He concluded that because he "was not required to register pursuant to SORA" on May 1, 2010, the date of the alleged offense, "his conviction should be vacated."[12]

When the State elected not to file a response to the motion for rehearing, we ordered it to do so. We directed that the response should include a representation by the State as to (1) the date on which the Nebraska State Patrol determined that Gaskill was "no longer required to register as a sex offender" under SORA and the date that the Attorney General's office was first advised of this determination; (2) the specific reason for that determination, including an explanation of why Gaskill was no longer considered to be a "lifetime registrant"; and (3) whether, according to the State's most recent calculation, Gaskill was subject to SORA as of May 1, 2010, the date of the offense underlying the conviction which is the subject of this appeal. In addition, we directed the State to address the issue of whether its most recent calculation of the duration of SORA's application to Gaskill requires that his conviction be vacated.

In its response, the State advised this court that the Nebraska State Patrol determined that Gaskill was no longer required to register as a sex offender on December 23, 2011, and that the State Patrol "voluntarily removed Gaskill from the registry in late December 2011 due to a miscalculation of willful noncompliance time." The State further represented:

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[10] *State v. Gaskill, supra* note 1.

[11] Brief for appellant in support of motion for rehearing at 2.

[12] *Id.*

> Because the amount of willful noncompliance time was not raised below and because the parties actually stipulated at the hearing on the motion to quash that Gaskill was subject to SORA, there was no reason for the State to question that it was the properly calculated amount of willful noncompliance time that required Gaskill to register as of May 1, 2010, the date of the offense underlying the conviction which is the subject of this appeal. However, in the interest of full disclosure, the State advised this Court in brief and at oral argument that Gaskill was no longer required to register as a sex offender not knowing when that requirement ceased. It was *not* because the State knew that Gaskill was not subject to SORA's registration requirements after 2007 that it "informed the Court that Gaskill was no longer on the Sex Offender Registry."

The State further represented that it was not until preparing its response to the motion for rehearing, as directed by this court, that it determined from the State Patrol that "the ten-year registration period for Gaskill, beginning April of 1997, should not have been tolled and should have ended in April of 2007." Further, the State represented that "Gaskill was not subject to SORA on May 1, 2010."

Because the State's response did not address the question of whether Gaskill's conviction should be vacated as a result of this information, we entered an order directing the State to show cause why that should not occur. The State responded that it had "no additional response to the order to show cause beyond the comments made at oral argument and the prior response to the Court's questions."

STANDARD OF REVIEW

[1-3] Consideration of plain error occurs at the discretion of an appellate court.[13] Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a

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[13] *State v. Britt*, 283 Neb. 600, 813 N.W.2d 434 (2012); *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.[14] Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.[15]

ANALYSIS

This case presents the rather unusual circumstance of a reversible error which is plainly evident from a record made not in the trial court but on appeal. But it is plain error nonetheless. Based upon the information which the State has provided in the course of this appeal, it was impossible for Gaskill to have committed the offense for which he was charged and convicted, because he was not subject to SORA on May 1, 2010, and therefore had no legal obligation to report his change of address to the Nebraska sex offender registry. Thus, it is apparent as a matter of law that Gaskill did not commit the charged offense.

It is regrettable that the State Patrol miscalculated the time period that Gaskill was subject to SORA. It is unfortunate that neither counsel discovered the full nature and significance of the miscalculation sooner. But based upon the record now before us, it would be untenable for this court to permit Gaskill's conviction to stand. To do so would have an obvious prejudicial effect upon his substantial right in the presumption of innocence and would result in even greater damage to the integrity, reputation, and fairness of the judicial process. Accordingly, we exercise our discretionary authority to note plain error and reverse and vacate Gaskill's conviction and sentence.

CONCLUSION

For the reasons discussed, we withdraw our opinion filed on July 27, 2012. We reverse and vacate the judgment of

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[14] *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011); *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010).

[15] *State v. Ross*, 283 Neb. 742, 811 N.W.2d 298 (2012); *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

conviction and sentence, and we remand the cause to the district court with directions to dismiss.

JUDGMENT REVERSED AND VACATED, AND CAUSE REMANDED WITH DIRECTIONS TO DISMISS.

CASSEL, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
WESLEY E. KITT, APPELLANT.
823 N.W.2d 175

Filed November 9, 2012. No. S-11-629.

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. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
4. **Constitutional Law: Witnesses: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and reviews the underlying factual determinations for clear error.
5. **Criminal Law: Convictions: 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.
6. **Rules of Evidence.** When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.
7. **Rules of Evidence: Hearsay: Witnesses: Proof.** For purposes of hearsay analysis, it is within the discretion of the trial court to determine whether the unavailability of a witness under Neb. Evid. R. 804, Neb. Rev. Stat. § 27-804 (Reissue 2008), has been shown.

8. **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 the evidence.
9. **Trial: Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
10. **Aiding and Abetting: Jury Instructions.** An aiding and abetting instruction is usually proper where two or more parties are charged with commission of the offense, and an aiding and abetting instruction is proper when warranted by the evidence.
11. **Aiding and Abetting.** Neb. Rev. Stat. § 28-206 (Reissue 2008) does not define aiding and abetting as a separate crime. Instead, aiding and abetting is simply another basis for holding one liable for the underlying crime.
12. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Mere encouragement or assistance is sufficient.
13. **Aiding and Abetting: Indictments and Informations: Notice.** An information charging a defendant with a specific crime gives the defendant adequate notice that he or she may be prosecuted for the crime specified or as having aided and abetted the commission of the crime specified.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and MOORE and PIRTLE, Judges, on appeal thereto from the District Court for Douglas County, JAMES T. GLEASON, Judge. Judgment of Court of Appeals affirmed.

Gregory A. Pivovar for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF THE CASE

After a jury trial, at which the jury was instructed on aiding and abetting, Wesley E. Kitt was convicted of robbery, attempted robbery, two counts of use of a weapon to commit a felony, and second degree assault. The district court for

Douglas County sentenced him to imprisonment for a total of 10 to 14 years. As postconviction relief, Kitt was granted a new direct appeal. The matter before us involves the direct appeal. In a memorandum opinion, the Nebraska Court of Appeals affirmed Kitt's convictions and sentences. See *State v. Kitt*, No. A-11-629, 2012 WL 1349905 (Neb. App. Apr. 17, 2012) (selected for posting to court Web site).

We granted Kitt's petition for further review. On further review, Kitt claims that the Court of Appeals erred when it affirmed the district court's determination that a witness, Joshua Harrington, was an unavailable witness and also determined that the record showed there was sufficient evidence to find Kitt guilty of all five charges. Unlike the Court of Appeals, we determine that the district court erred when it declared Harrington was unavailable and when it allowed his deposition testimony to be read into the record. However, because we conclude that this error was harmless, it does not require reversal of Kitt's convictions or the Court of Appeals' decision. Finally, we determine that the Court of Appeals did not err when it determined that the evidence supports the convictions. Although our reasoning differs from that of the Court of Appeals, we affirm.

II. FACTS

The Court of Appeals stated the facts, for which there is support in the record, as follows:

> After a jury trial, Kitt was convicted of robbery, attempted robbery, two counts of use of a deadly weapon to commit a felony, and second degree assault. The district court sentenced him to imprisonment for a total period of 10 to 14 years. After postconviction relief was granted to Kitt, he was given a new direct appeal.
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> The evidence developed at trial showed that Jamie Hann, formerly known as Jamie Hansen, and her boyfriend, now husband, Jacob Hann, had returned to Jamie's apartment in Omaha, Nebraska, shortly after 1:30 a.m. on June 9, 2007, after going out to a bar. Jamie was driving. The parking lot for the apartment complex in which Jamie lived was full, and Jamie had to park the car in an

area that was less well lit than the rest of the parking lot. After Jamie exited the car, a man ran out from a garage area across from where Jamie had parked, stuck a gun in Jamie's face, and told her he wanted money. Jamie was unable to describe her assailant, but she saw a handgun that looked silver to her. She gave him her wallet and identified an exhibit at trial as the wallet that had been taken from her.

After Jamie handed over her wallet, she saw another person run from the middle part of the garages and demand money from Jacob. She could tell this person was male and that he had a black handgun. Jacob appeared confused, and the man who demanded money from Jacob struck him in the head. Jacob fell to the ground, and a few moments later, Jamie observed another vehicle approach and stop very quickly. The driver got out of the vehicle and said, "[P]olice." Jamie observed that he was in uniform, had a "bag," and was carrying a firearm. This individual yelled, "[F]reeze," and the person who had held Jamie at gunpoint swung around and pointed his gun at the officer. The officer started firing, and the two assailants took off running with the officer in pursuit. Jamie ran after them as well and saw the assailants jump into a midsized white car. The officer ran back to his vehicle and pursued the assailants, but he returned a short time later. Other police officers arrived on the scene as well.

Jacob testified that as he was getting out of the car, he saw that someone had Jamie at gunpoint. A moment later, he found himself in the same situation. Jacob was able to see that the man assailing Jamie was black and had most of his face covered by a dark-colored bandanna. Jacob's assailant was slightly shorter than Jamie's assailant and perhaps shorter than Jacob himself. Jacob's assailant was wearing a mask and demanded money from Jacob, who refused. The assailant then hit Jacob in the mouth. Jacob pulled out his money clip to show the man that he had no money, which prompted the man to hit him with the pistol. Jacob described the gun carried by his assailant as

a black handgun. As a result of the blow, Jacob needed to have eight stitches in his head.

After Jacob fell to the ground, he heard a vehicle stop and then the sound of gunshots. Jacob observed the two assailants run away, so he checked on Jamie to see if she was all right. Jacob said he was intoxicated that night but was not so drunk that he could not get himself out of the car. He did state that parts of the night were hazy because of the time of the assault, the fact that he had been drinking, and the fact that the situation itself felt like a bad dream.

Officer Robert Singley with the Omaha Police Department testified that he was on special assignment detail in the early morning hours of June 9, 2007, because of a rash of strong-armed robberies at some of the larger apartment complexes in northwest Omaha. Singley conducted a traffic stop at a particular intersection at about 1 a.m., where he observed a white Pontiac Grand Am sitting in the left turn lane with its blinker on, but not moving, despite the fact that there was no traffic. Upon contacting the occupants of the car, Singley learned that the driver was . . . Harrington and the passenger was Kitt. The men told Singley they were looking for a particular apartment complex to visit a friend and were not sure how to get there. Singley ran a background check on the men, and after finding no warrants, he gave them a verbal warning for impeding traffic, gave them directions, and let them go. We note that the apartment complex the men were seeking directions to was the same complex where Jamie lived and the robbery occurred. Singley identified an exhibit as a photograph of the car he had contacted that night.

Omaha police officer Kevin Vodicka was working off duty as security for the apartment complex in June 2007. Pursuant to police department policy, he was in full uniform, but was driving his own car. His usual schedule was from 10 or 11 p.m. to 12 or 2 a.m. The complex is laid out roughly in a circular pattern, and there is only one entry to the complex. Vodicka would patrol the apartment

complex in his car in a counterclockwise direction, watching for signs of criminal activity.

Around 1:30 a.m. on June 9, 2007, Vodicka was patrolling the apartment complex when he observed an older white Grand Am being driven around the parking lot. Initially, he thought that the car might have been trying to get through the parking lot to another apartment complex. According to Vodicka, a lot of people try to do this, not realizing that the road does not go through. Vodicka watched the car for 20 to 25 minutes while continuing to patrol. He observed the car go to all of the dead ends, back up, drive around, park, and back up. Vodicka found the car's activity to be very suspicious.

Vodicka was able to see two individuals in the car and saw the passenger clearly. As Vodicka passed the car, the passenger had the car window rolled down about three-fourths of the way, and he stuck his head out, trying to get a look through Vodicka's car windows. Vodicka testified that he got a pretty good view of the passenger's face from a distance of about 5 to 7 feet and that the passenger gave Vodicka a look "kind of like the evil eye" as he passed the car. Vodicka identified the passenger as Kitt. Vodicka testified that he paid particular attention to Kitt's face when he stuck his head out of the car because of his observations of the car's suspicious activity.

Not long after Vodicka observed the passenger stick his head out of the car window, Vodicka saw the car parked and no one inside the car. On his next lap of the parking lot, Vodicka saw a black man dressed in black clothing hit a white man. Vodicka also observed a woman and third man. Vodicka accelerated to their location to try and stop the assault. He got out of his vehicle, yelled "Omaha Police," and observed one of the assailants holding a silver revolver and wearing a bandanna. The other assailant, the one who had struck the white man, was wearing a bandanna as well but held a black [semiautomatic] handgun. Vodicka drew his weapon as soon as he got out of his car and told the assailants to drop their weapons. Both

assailants ran, and Vodicka pursued the suspect closest to him. Vodicka testified that this individual, the man with the silver revolver, pointed his gun at Vodicka and that Vodicka fired four or five times. Vodicka stopped pursuit, because the individual went around a corner, and returned to check on the male victim who was bleeding profusely from the head. Vodicka heard a car start its engine and ran back around the corner in time to observe the white Grand Am back out and drive off at a high rate of speed. According to Vodicka, he knew that this was the same vehicle he had observed earlier because he saw it leave the same parking spot where he had last observed it. He also recognized the hubcaps on the car, which he had previously observed.

Harrington was called to testify [by the State] and stated that he resided at "OCC" for a crime he committed involving the robbery and assault of Jamie and Jacob, which he believed occurred on June 9, 2007. When asked if there was an individual with him on that occasion, Harrington stated he was advised not to testify by his attorney. Harrington stated that he was refusing to answer any questions regarding allegations against Kitt. The district court then asked Harrington whether he would refuse to testify if the State asked him any questions relating to what happened on June 9 or any events that related to Kitt. Harrington responded affirmatively. The court dismissed Harrington and told the jury that when an incarcerated witness refused to testify, that witness' prior testimony which had been recorded could be read[,] and that the court believed the State intended to proceed by reading into evidence Harrington's prior recorded testimony.

At this point, Kitt's counsel objected [first] to Harrington's being declared unavailable as a witness and to the State's being allowed to read Harrington's deposition into the record. [Second, Kitt] based his objections on Kitt's constitutional right to confront his accusers as well as the constitutional right to cross-examine witnesses testifying against him. The district court overruled

Kitt's objection[s], stated that Harrington had been found unavailable based on his refusal to testify, and stated that Harrington's prior recorded testimony would be allowed because case law specifically permitted such testimony to be read into the record without running afoul of the hearsay rule.

The district court explained to the jury that Kitt's attorney had taken Harrington's deposition prior to trial and that this deposition would now be read to the jury. Harrington's deposition testimony was then read into the record.

At the time of his deposition, Harrington had already pled guilty to attempted robbery and assault of an officer. He stated that he had known Kitt for several years as an acquaintance and that they had played basketball together on youth teams. On the day before the incident, Kitt called Harrington sometime after 11 p.m. Kitt wanted to hang out. Harrington drove his white Pontiac Grand Am to pick up Kitt, which car he described as having tinted windows . . . that were "legal." Harrington and Kitt stopped at a convenience store to get cigars and/or alcohol and drove around until Kitt said he needed some money. Kitt made it clear that he was not interested in working for money and told Harrington he knew an easy way to get some money, which was to rob someone. According to Harrington, after they decided to do this, Kitt pulled out a ski mask, a bandanna, and a small silver handgun. Kitt gave either the ski mask or the bandanna to Harrington to wear and told Harrington he had stolen the handgun from his grandfather. Later in his deposition, Harrington denied that Kitt had given him either a mask or a bandanna to cover his face. Harrington and Kitt were sitting in the car at an apartment complex in west Omaha when Harrington saw a couple get out of another car. Kitt ran over to the couple, and Harrington followed, knowing that they were there to rob someone. Harrington stated that he and Kitt had been drinking and were not "in the right state of mind."

Harrington did not know whether he spoke to the couple after Kitt approached them and essentially refused to say that Kitt was in the process of robbing the couple. Harrington heard Kitt say something to the person he was robbing but he did not remember what Kitt said. Harrington insisted that both he and Kitt were yelling at the couple they were robbing and demanding money from them. Harrington did not get any money, but Kitt got a wallet. Harrington stated that Kitt hit the person he was robbing, but did not know if it was with his hand or his gun. When asked whether it could have been Harrington who hit the person, he replied that he was really drunk, that he probably did not hit the person, and that if he did so, it was only a chance. When it was suggested to Harrington that he was the primary person responsible for the robbery, he adamantly denied that that was the case as he had a job and did not need the money. Harrington stated that the police arrived, and he and Kitt ran in different directions. After Harrington ran, a police officer started shooting, and Harrington was shot in the back of his leg. Harrington stated he was running with his "fake gun" in his hand but denied pointing this gun at the officer. Harrington stated that he returned to his car, drove off, and did not see Kitt after that.

Harrington called a friend and had her take him to the hospital. Harrington was questioned by police officers at the hospital, but he lied, telling them he had been shot at a different location. Later, after medical personnel finished attending to him, Harrington told the truth and was taken to the police station and arrested.

Harrington denied owning a real gun and stated that if a real gun was found in his car, he did not know how it got there, although he knows people who carry guns and that they have left them in his car before. Eventually, Harrington admitted that there was a real gun in his car but claimed that it was not his and that he did not use it during the robbery. Harrington insisted that during the robbery, he had a black fake gun and Kitt had his silver

> one. Harrington claimed that he threw the fake gun away and that later, when he had a friend remove a gun from his car, she removed the real gun that had been left in his car.
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> Toward the end of his deposition, when Harrington was clearly getting frustrated with the process, he asked whether he could "plead the Fifth" and Kitt's counsel promptly and firmly told him, "No. There is no Fifth Amendment, sir. You have already been convicted of that crime."
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> . . . [A] crime laboratory technician with the Omaha Police Department . . . testified that he collected evidence from the scene of the robbery, including a revolver, a dark green bandanna, a blue knit ski mask which was found on the ground in the parking lot of the apartment complex, and a wallet with $4.12 cash and a driver's license belonging to Jamie.
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> Kitt rested without presenting any evidence. The district court denied Kitt's motion to dismiss at the close of all the evidence. Kitt was then convicted and sentenced as set forth above.

State v. Kitt, No. A-11-629, 2012 WL 1349905 at *1-5 (Neb. App. Apr. 17, 2012) (selected for posting to court Web site).

As noted above, the present appeal to the Court of Appeals is a new direct appeal granted as relief in a related postconviction action. Kitt claimed that the district court erred when it found that Harrington was unavailable as a witness and therefore admitted Harrington's prior deposition testimony. Kitt also asserted that the evidence was insufficient to support his convictions, that he received ineffective assistance of counsel, and that the court imposed excessive sentences. The Court of Appeals rejected Kitt's assignments of error and affirmed his convictions and sentences.

As a general statement, under the hearsay rules in the Nebraska rules of evidence, if a witness is unavailable, the witness' prior deposition may be admitted as testimony. See Neb. Evid. R. 804(2)(a), Neb. Rev. Stat. § 27-804(2)(a) (Reissue 2008). With respect to its unavailability discussion and the admission of Harrington's deposition, the Court of Appeals

noted that rule 804(1)(b) defines "[u]navailability as a witness" to include situations in which the declarant "[p]ersists in refusing to testify concerning the subject matter of his [or her] statement despite an order of the judge to do so." The Court of Appeals relied on *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996), in which this court determined on the specific facts of that case that the district court's failure to specifically order the witness to testify was not relevant when the witness' persistent refusal to testify was evident from the record. The Court of Appeals concluded that Harrington was unavailable under rule 804(1)(b). The Court of Appeals reasoned that under rule 804(2)(a), his testimony could be presented by the deposition, at which Kitt had had the opportunity to develop Harrington's testimony by direct, cross, or redirect examination.

As general matter, under Confrontation Clause analysis where a witness is unavailable, the deposition of the witness is testimonial evidence which can be received in evidence where the nonproponent has had an opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Court of Appeals cited *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007), for this proposition. The Court of Appeals concluded that the admission of Harrington's deposition was not a Confrontation Clause violation, because the Court of Appeals had determined that Harrington was unavailable under hearsay rule 804(1)(b) and Kitt had had a prior opportunity for cross-examination.

The Court of Appeals also rejected Kitt's assignments of error that he received ineffective assistance of counsel, that there was insufficient evidence to support his convictions, and that the district court abused its discretion by imposing excessive sentences. The Court of Appeals affirmed Kitt's convictions and sentences.

We granted Kitt's petition for further review.

III. ASSIGNMENTS OF ERROR

On further review, Kitt claims that the Court of Appeals erred when it affirmed the district court's rulings in which it

had (1) determined that Harrington was an unavailable witness and admitted Harrington's deposition into evidence and (2) determined that there was sufficient evidence for Kitt's convictions. For completeness, we note that Kitt does not assign as error the Court of Appeals' decisions on ineffective assistance of counsel and excessive sentences.

IV. STANDARDS OF REVIEW

[1-3] 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. Vigil*, 283 Neb. 129, 810 N.W.2d 687 (2012). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *Id*. A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011).

[4] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and reviews the underlying factual determinations for clear error. See *State v. Sorensen*, 283 Neb. 932, 814 N.W.2d 371 (2012).

[5] 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. *State v. Freemont, ante* p. 179, 817 N.W.2d 277 (2012). 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. *Id*.

V. ANALYSIS

1. Admission of Harrington's Deposition: Unavailability of the Witness

Kitt claims generally that the Court of Appeals erred when it affirmed the district court's determination that Harrington was unavailable for trial and admitted Harrington's prior deposition testimony. Kitt specifically claims that the determination that Harrington was unavailable and the admission of Harrington's deposition were an abuse of discretion under the exception to the hearsay rule found at rule 804(2)(a). Kitt also specifically claims that the admission of Harrington's deposition is of constitutional magnitude as a violation of the Confrontation Clause. The Confrontation Clause, U.S. Const. amend. VI, provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Article I, § 11, of the Nebraska Constitution provides in relevant part: "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ."

We find merit to Kitt's argument to the effect that the district court erred when it determined Harrington was unavailable under rule 804(1)(b) and admitted Harrington's deposition and that thus, the Court of Appeals erred when it endorsed this ruling. However, as explained below, we find that the error was harmless. Further, given the necessity of our harmless error review, we determine that although the Confrontation Clause analysis differs from the hearsay analysis, it is not necessary to engage in the Confrontation Clause analysis in this case because an error for Confrontation Clause purposes would likewise be subject to a harmless error review.

(a) Hearsay

Generally, a hearsay statement is not admissible at trial. See Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2008). However, rule 804(2)(a) provides an exception to the hearsay rule if the declarant is unavailable as a witness at trial. In such a case, the declarant's prior statement can be used at trial. Rule 804(2)(a) provides in part that if the declarant is

unavailable as a witness, the hearsay rule does not exclude testimony given

> in a deposition taken in compliance with law in the course of the same or a different proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

[6] Nebraska's rule 804(2)(a) is similar to rule 804(b)(1)(A) of the Federal Rules of Evidence. At the time of Kitt's trial, Fed. R. Evid. 804(b)(1) provided that if the declarant was unavailable as a witness, the rule against hearsay did not exclude former testimony that was "given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding." When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule. *State v. Kibbee, ante* p. 72, 815 N.W.2d 872 (2012).

Nebraska's rule 804(1)(b) sets forth the applicable definition of unavailability, stating that a witness is unavailable if he or she "[p]ersists in refusing to testify concerning the subject matter of his [or her] statement despite an order of the judge to do so." Similarly, at the time of Kitt's trial, federal rule 804 provided in relevant part: "**(a) Definition of Unavailability.** 'Unavailability as a witness' includes situations in which the declarant . . . **(2)** persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so . . . ." The advisory committee note to federal rule 804, as proposed in 1972, provides some guidance on the issue of unavailability, and specifically a declarant's refusal to testify: "**Note to Subdivision (a).** . . . **(2)** A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality."

[7,8] For purposes of hearsay analysis, it is within the discretion of the trial court to determine whether the unavailability of a witness under Nebraska's rule 804 has been shown. See *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998). 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 the evidence. *State v. Payne-McCoy, ante* p. 302, 818 N.W.2d 608 (2012).

As set forth in rule 804(1)(b), unavailability is a term of art. See *People v. Bueno*, 358 Ill. App. 3d 143, 829 N.E.2d 402, 293 Ill. Dec. 819 (2005) (commenting on comparable Illinois rule language). Applying the language of rule 804(1)(b), the record shows that Harrington was not unavailable in this case because the judge did not order Harrington to testify before declaring him an unavailable witness. See *Gregory v. Shelby County, Tenn.*, 220 F.3d 433 (6th Cir. 2000). One court has stated: "It is clear . . . that the Rule's requirement of a court order is a necessary prerequisite to a finding of unavailability of a recalcitrant witness under Rule 804. *See United States v. Zappola*, 646 F.2d 48, 54 (2d Cir.1981) (court order essential component in declaration of unavailability) . . . ." *Fowler v. State*, 829 N.E.2d 459, 468 (Ind. 2005), *abrogated in part on other grounds, Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008). It has been observed that where a witness "appears at trial but refuses to respond, [the witness] does not become unavailable until the court orders the witness to answer and the refusal persists." *Id.* at 469.

The unavailability of a witness under rule 804 cannot be fully assessed until the judge orders the witness to testify, because in the absence of an order, it is not known what the witness will do. One court identified the obvious possibilities as follows: "1) [T]he witness decides to avoid contempt and repeats the earlier version; 2) the witness claims loss of memory; 3) the witness comes up with a new version; and 4) the witness persists in refusing to answer." *Fowler v. State*, 829 N.E.2d at 470. In this case, there is no way of knowing how Harrington may have responded to an order to testify. Because

the district court did not order Harrington to testify, Harrington was not unavailable under rule 804(1)(b).

The Court of Appeals relied largely upon *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996), when it determined that the district court did not err when it found Harrington unavailable. However, the finding of unavailability in *McHenry* was specific to the facts of that case. In *McHenry*, the district court determined that Frank Ladig, a witness in a murder trial who refused to testify, was unavailable. We affirmed.

The district court in *McHenry* requested Ladig to testify on three separate occasions, but Ladig persistently refused. The district court also asked Ladig if there was any physical safeguard or anything that the court could provide that would change Ladig's mind, and Ladig replied there was not. Furthermore, Ladig refused to take an oath, so he was not competent and could not testify. See Neb. Evid. R. 603, Neb. Rev. Stat. § 27-603 (Reissue 2008). Had the district court threatened to hold Ladig in contempt for refusing to testify, it would have been unavailing because Ladig was already serving a life sentence. See *State v. Ladig*, 248 Neb. 737, 539 N.W.2d 38 (1995). See, also, *Gregory v. Shelby County, Tenn.*, 220 F.3d at 449 (stating that "any pressure of threat applied to the witness by the trial court would undoubtedly have been unavailing as the witness [was] already serving a life sentence"). The specific facts in *McHenry* were tantamount to the district court's ordering Ladig to testify before finding him unavailable, and we affirmed the rule 804 unavailability ruling.

In the present case, however, the district court did not order Harrington to testify before determining he was unavailable; nor are the facts of this case tantamount to an order. Harrington was present in the courtroom, and unlike Ladig, he took the oath and answered a few questions before he stopped answering questions. After Harrington stated upon examination by the State that he would not answer further questions, the judge asked Harrington once if he was going to refuse to testify before allowing Harrington to step down and excusing him as a witness. We agree with the observation that "the unavailability requirement in Rule 804 contemplates more than a brief or minimal examination by the trial court." *State v. Finney*, 358

N.C. 79, 87, 591 S.E.2d 863, 868 (2004). Furthermore, we cannot say that a threat of contempt would have been unavailing, because unlike Ladig, who was serving a life sentence in the *McHenry* case, Harrington, according to his deposition, was serving an 8- to 12-year sentence.

Because there was no district court order for Harrington to testify followed by persistent refusals, we determine the district court erred under rule 804 when it determined that Harrington was unavailable and when it admitted Harrington's deposition. An incorrect unavailability determination and the consequent admission of improper evidence under rule 804 are subject to a harmless error analysis. See, *Gregory v. Shelby County, Tenn.*, 220 F.3d 433 (6th Cir. 2000) (stating that error in finding witness unavailable under rule 804 was harmless); *State v. Perry*, 144 Idaho 266, 159 P.3d 903 (Idaho App. 2007) (stating that incorrect finding of unavailability under rule 804 is subject to harmless error analysis). Accordingly, later in this opinion, we will conduct a harmless error analysis.

(b) Confrontation Clause

In addition to his claim that the Court of Appeals erred under the statutory rules of evidence relating to hearsay when it approved the district court's order permitting Harrington's deposition to be read to the jury, Kitt also claims that the Court of Appeals erred as a constitutional matter when it concluded that the reading of the deposition was not a violation of the Confrontation Clause. Having found that Harrington was unavailable under the hearsay-related rules of evidence, rule 804(1)(b), the Court of Appeals then considered Kitt's challenge under the Confrontation Clause. The entirety of the Court of Appeals' constitutional analysis was as follows:

> Likewise, we do not find a violation of Kitt's rights under the Confrontation Clause. Where "testimonial" statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination. *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007) [summarizing *Crawford v. Washington*, 541 U.S. 36, 124

> S. Ct. 1354, 158 L. Ed. 2d 177 (2004)]. Kitt had and took advantage of his opportunity to examine Harrington during the course of Harrington's deposition. Kitt's assignment of error is without merit.

The foregoing analysis appears to assume that "unavailability" under the hearsay evidence rules equates with "unavailability" under Confrontation Clause constitutional principles. To the extent such equation was made, we caution against it.

It is well settled that "cases involving the admission of [an unavailable declarant's prior] out-of-court statements [give] rise to Confrontation Clause issues 'because hearsay evidence was admitted as substantive evidence against the defendant[].'" *Delaware v. Fensterer*, 474 U.S. 15, 18, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985) (quoting *Tennessee v. Street*, 471 U.S. 409, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)). The U.S. Supreme Court has observed that the "hearsay rules and the Confrontation Clause are generally designed to protect similar values" but has cautioned that the prohibitions of the Confrontation Clause do not "equate . . . with the general rule prohibiting the admission of hearsay statements." *Idaho v. Wright*, 497 U.S. 805, 814, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). The Court in *California v. Green*, 399 U.S. 149, 155-56, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970), stated:

> [W]e have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. See *Barber* v. *Page,* 390 U. S. 719[, 88 S. Ct. 1318, 20 L. Ed. 2d 255] (1968); *Pointer* v. *Texas,* 380 U. S. 400[, 85 S. Ct. 1065, 13 L. Ed. 2d 923] (1965). The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.

Finally, we note that one court has observed that an unavailability determination may not yield the same result under hearsay analysis as distinguished from Confrontation Clause analysis, stating, in reference to *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004): "We therefore cannot import the availability doctrine of [federal] Rule

804(a) wholesale into *Crawford*." *Fowler v. State*, 829 N.E.2d 459, 469 (Ind. 2005), *abrogated in part on other grounds, Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008).

We are aware that the contours of the post-*Crawford* jurisprudence regarding unavailability for Confrontation Clause purposes—especially as unavailability relates to refusal to testify—are emerging. In one post-*Crawford* case involving a witness who refused to testify, the court observed that "interpretation of the confrontation clause has been anything but consistent since the 2004 *Crawford* decision." *State v. Duncan*, 796 N.W.2d 672, 676 (N.D. 2011). However, we need not resolve the Confrontation Clause unavailability issue herein because resolution will not affect the outcome of this case.

If we determined that the Court of Appeals and district court erred when they determined that Harrington was unavailable for Confrontation Clause purposes, we would need to determine if the admission of the deposition constituted harmless error because of the constitutional error. See *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (stating that Confrontation Clause violations are subject to harmless error analysis). See, also, *Crawford v. Washington*, 541 U.S. at 76 (Rehnquist, C.J., concurring in the judgment) (reading the opinion to "implicit[ly] recogni[ze]" that Confrontation Clause violations continue to be subject to harmless error analysis); *Hernandez v. State*, 124 Nev. 639, 188 P.3d 1126 (2008) (performing harmless error analysis on incorrect finding of unavailability under Confrontation Clause and incorrect admission of prior testimony).

If we determined that the Court of Appeals and the district court were correct that Harrington was unavailable for Confrontation Clause purposes, thus approving of the admission of Harrington's deposition testimony, no action would be required of us based on such determination. However, we are nevertheless required to perform a harmless error analysis because, as explained above, we have determined that it was error to find Harrington unavailable for rule 804 hearsay analysis purposes and to admit his deposition on that basis.

By virtue of our earlier determination, we are already required to perform a harmless error analysis. Therefore, although we have noted that as it relates to a refusal to testify, an unavailability analysis under the hearsay rule of evidence differs from an unavailability analysis under the Confrontation Clause, under the circumstances of this case, it is not necessary for us to perform a Confrontation Clause analysis of availability and consider whether the Court of Appeals erred in relation thereto.

2. Harmless Error: Analysis

[9] We have determined above that it was error to admit Harrington's deposition based on an erroneous determination that Harrington was unavailable under rule 804(1)(b), and we are therefore required to perform a harmless error analysis. Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Freemont, ante* p. 179, 817 N.W.2d 277 (2012). We determine that the jury's verdicts were surely unattributable to the erroneous admission of Harrington's deposition testimony.

At trial, Jamie Hann testified that when she and Jacob Hann returned to Jamie's apartment complex the night of the incident at issue, she exited the car and a man approached her, pointed a silver handgun at her head, and told her to give him her money. Jamie testified that she gave the man her wallet, which she identified as an exhibit at trial. Jamie testified that she then saw a second man, with a black handgun, approach Jacob, demand money from him, and then hit Jacob in the head with the gun. Jamie testified that a black vehicle then quickly approached the scene and that a man in uniform exited the vehicle and said, "'[P]olice.'" The uniformed man had his gun pulled out and next yelled, "'[F]reeze.'" Then the assailant who had the silver gun pointed at Jamie turned and pointed his gun at the uniformed man, and the uniformed man started firing. Jamie testified that the two assailants then ran in the same direction.

The uniformed man chased the two assailants, and Jamie followed. She testified she saw the two men get into a midsized white vehicle and leave the scene.

Jacob testified at trial that on the night in question, he and Jamie returned to Jamie's apartment complex. When Jacob exited the car, he saw that an African-American man wearing a bandanna was pointing a gun at Jamie. Then a second man pointed a black handgun at Jacob's face. Jacob described his assailant as an African-American man wearing a bandanna who was a little shorter than Jamie's assailant and perhaps shorter than Jacob himself. Jacob testified the man demanded money from Jacob, who refused. The man then hit Jacob in the mouth. Jacob pulled out his money clip to show the man that he did not have any money, and the man then hit Jacob with the pistol. Jacob later received eight stitches as a result of the blow. Jacob testified that after he fell to the ground as a result of being hit, he heard a vehicle stop and then heard the sound of gunshots. Jacob observed the two assailants run away and then checked on Jamie to see if she was all right.

Officer Kevin Vodicka testified that on the night of the incident at issue, he was working as an off-duty security person for the apartment complex. He was in full uniform, but driving his own vehicle. Vodicka testified that the apartment complex was laid out in a circle and that he would drive in a counterclockwise direction watching for signs of suspicious activity. Vodicka testified that at approximately 1:30 a.m., he observed an older white Pontiac Grand Am driving around the parking lot. He watched the car for 20 or 25 minutes while he continued to patrol. Vodicka testified that the Grand Am would go to all the dead ends, back up, drive around, park, and back up again. Vodicka testified he thought the activity of the Grand Am was suspicious.

Vodicka testified that he saw two individuals in the Grand Am. As Vodicka passed the Grand Am, the passenger had the window rolled down approximately three-fourths of the way, and the passenger stuck his head out a couple of inches, trying to look through Vodicka's windows. Vodicka testified that he got a pretty good view of the passenger's face and that the passenger gave him a look "kind of like the evil eye." Vodicka

identified the passenger as Kitt. Vodicka testified that he paid attention to the passenger because of the vehicle's suspicious activity.

Vodicka testified that soon after seeing the passenger in the Grand Am, whom at trial he identified as Kitt, he saw the Grand Am parked with no one inside. On his next lap around the parking lot, Vodicka saw a black man dressed in black clothing hit a white man. He also saw a woman and a third man. Vodicka testified that he sped up, trying to stop the assault. He exited his car and announced, "'Omaha Police.'" Vodicka testified that he observed one of the assailants holding a silver revolver and wearing a bandanna. Vodicka described the other assailant, who struck the white man, as wearing a bandanna and holding a black semiautomatic handgun.

Vodicka testified that he drew his weapon as he exited his car and told the two men to drop their weapons. The assailants ran, and Vodicka pursued one of them. Vodicka stated that the assailant he pursued pointed the silver revolver at Vodicka, at which point Vodicka fired his weapon four or five times. After the assailant went around a corner, Vodicka stopped his pursuit and went to check on the male victim. Vodicka testified that he then heard a car start its engine, so he ran around a corner in time to observe the white Grand Am back out and drive off at a high rate of speed. Vodicka testified that he knew it was the same white Grand Am he had seen earlier because he recognized the vehicle's hubcaps and because the vehicle was parked in the same spot where he had last observed it.

Furthermore, Officer Robert Singley testified that he conducted a traffic stop at approximately 1 a.m. because he had observed a white Grand Am sitting in the left-turn lane of an intersection with its turn signal on, but not moving despite the fact that there was no traffic. After contacting the occupants of the vehicle, Singley learned that the driver was Harrington and the passenger was Kitt. Singley testified Harrington and Kitt told him that they were looking for a particular apartment complex to visit a friend and that they were not sure how to get there. The apartment complex Harrington and Kitt stated they were looking for is the same complex where Jamie lived and the crimes occurred. Singley ran a background check on

Harrington and Kitt and, after finding no warrants, gave them a verbal warning and directions and let them go.

This testimony and other evidence adduced at trial indicate that Jamie was robbed by a man with a silver gun and that a man with a black gun assaulted and attempted to rob Jacob. Singley placed Kitt near the scene prior to the crimes and directed him to the apartment complex. Vodicka's testimony placed Kitt at the apartment complex moments before the time the crimes occurred and placed Kitt in the white Grand Am which later sped away from the area of the crimes. Jamie watched one assailant get into a midsized white vehicle. The foregoing evidence supports the convictions, without reference to the content of Harrington's deposition testimony.

In his deposition read to the jury, Harrington testified that he knew Kitt through basketball and socially. He testified that the idea to rob people originated with Kitt and that Harrington had a job and did not need to rob anyone. Harrington stated that Kitt supplied a ski mask and bandanna, and he placed himself and Kitt at the scene of the crimes.

Harrington stated that Kitt had a silver gun. Harrington initially stated that he had only a fake black gun. Harrington stated that he had told people he had bought a real gun, but that that was a lie. However, later in his testimony, Harrington stated that after the incident, he called a friend to remove a real gun from his car. Harrington stated that Kitt hit a victim but later testified that he might have hit the victim.

Harrington testified that both he and Kitt had been drinking the night of the crimes and that he had also smoked marijuana that day. He indicated that as a result, his memory of June 9, 2007, was not good but his "drunkenness and . . . highness kind of left when [he] got shot." Harrington stated that when he was interviewed by the police at the hospital, he did not tell the truth. He stated that he later told the truth to the police but that his recollection of the incident at the time of the deposition was not good.

[10] In this case, the jury was instructed that it could convict Kitt of the crimes with which he was charged either as the principal offender or as an aider and abettor. Under Neb. Rev. Stat. § 28-206 (Reissue 2008), "[a] person who aids, abets, procures,

or causes another to commit any offense may be prosecuted and punished as if he [or she] were the principal offender." We have stated that an aiding and abetting instruction "'is usually proper where two or more parties are charged with commission of the offense'" and that an aiding and abetting instruction is proper when warranted by the evidence. *State v. Contreras*, 268 Neb. 797, 802, 688 N.W.2d 580, 584 (2004) (quoting *State v. Marco*, 230 Neb. 355, 432 N.W.2d 1 (1988)).

[11,12] Section 28-206 does not define aiding and abetting as a separate crime. See *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011). We have stated that "aiding and abetting is simply another basis for holding one liable for the underlying crime." *Id.* at 295, 802 N.W.2d at 886. By its terms, § 28-206 provides that a person who aids or abets may be prosecuted and punished as if he or she were the principal offender. We have stated that aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. *State v. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011). No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. *Id.* Mere encouragement or assistance is sufficient. *Id.*

[13] An information charging a defendant with a specific crime gives the defendant adequate notice that he or she may be prosecuted for the crime specified or as having aided and abetted the commission of the crime specified. *State v. Contreras, supra*. In the present case, the amended information charged Kitt with six crimes: robbery of Jamie and associated use of a weapon, attempted robbery of Jacob and associated use of a weapon, assault in the second degree of Jacob, and attempted assault of Vodicka, of which Kitt was acquitted. We have stated that one can be convicted of aiding and abetting use of a deadly weapon even if the jury believed that the defendant was unarmed. *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002). We have also stated that one can be convicted of aiding and abetting an attempted crime. See *State v. Contreras, supra*. The district court provided the jury with an aiding and abetting instruction.

Based on the foregoing law and the evidence we have summarized above, we determine that the jury's verdicts in this case convicting Kitt either as the principal offender or as an aider and abettor were surely unattributable to the erroneous admission of Harrington's deposition testimony. Although we recognize that Harrington placed Kitt at the area of the crime, the testimony of Vodicka did likewise. Harrington's deposition testimony summarized above contains numerous confusing and internally inconsistent statements such that a rational trier of fact would not be particularly inclined to rely on it as he or she evaluated all the evidence. Therefore, the district court's error in declaring Harrington unavailable as a witness under rule 804 and admitting his deposition testimony was harmless. Accordingly, neither the Court of Appeals' affirmance of the district court's ruling nor Kitt's convictions require reversal.

3. Sufficiency of the Evidence

Kitt claims that there was not sufficient evidence to support his convictions. 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. *State v. Freemont, ante* p. 179, 817 N.W.2d 277 (2012). 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. *Id*. Our review of the evidence for harmless error recited above shows there is sufficient evidence to support Kitt's convictions under the law applicable to this case. The Court of Appeals did not err when it so determined.

VI. CONCLUSION

Although the district court erred when it declared Harrington unavailable as a witness under rule 804 and admitted Harrington's deposition testimony, we conclude that this was harmless error and does not require reversal of Kitt's

convictions or of the Court of Appeals' affirmance of the district court's rulings. Given the aiding and abetting instruction and the facts, the evidence is sufficient to support the convictions. Although for reasons which differ from the Court of Appeals' reasoning, we affirm.

AFFIRMED.

CASSEL, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM E. SMITH, APPELLANT.
822 N.W.2d 401

Filed November 16, 2012. No. S-10-442.

1. **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.
2. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
3. **Homicide: Words and Phrases.** A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.
4. ____: ____. A sudden quarrel does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim.
5. **Homicide: Intent.** It is not the provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements necessary to constitute murder are absent.
6. ____: ____. In determining whether a killing constitutes murder or sudden quarrel manslaughter, the question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment. The test is an objective one. Qualities peculiar to the defendant which render him or her particularly excitable, such as intoxication, are not considered.
7. **Lesser-Included Offenses: Jury Instructions: Evidence.** The rule in a nonhomicide case is that a trial court must instruct on a lesser-included offense only if requested to do so and the evidence supports the giving of the lesser-included instruction. However, a court may give a lesser-included instruction over a defendant's objection.

8. **Homicide: Lesser-Included Offenses: Jury Instructions.** Where murder is charged, a court is required to instruct the jury on all lesser degrees of criminal homicide for which there is proper evidence before the jury, whether requested to do so or not.
9. **Trial: Lesser-Included Offenses: Jury Instructions: Case Disapproved.** In a nonhomicide case, a trial court has no duty to instruct on lesser-included offenses in the absence of a request for such an instruction; disapproving *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997), and *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2002).
10. **Criminal Law: Time: Appeal and Error.** A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.
11. **Appeal and Error: Words and Phrases.** Plain error exists where there is 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.
12. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge. Judgment of Court of Appeals affirmed.

Peter K. Blakeslee for appellant.

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

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

STEPHAN, J.

William E. Smith was convicted by a jury of attempted second degree murder, first degree assault, and use of a weapon to commit a felony. The Nebraska Court of Appeals affirmed the assault and weapon convictions and found that the trial court did not err in failing to give a self-defense instruction.[1] But it reversed, and remanded for a new trial on the attempted

[1] *State v. Smith*, 19 Neb. App. 708, 811 N.W.2d 720 (2012).

second degree murder conviction, finding the jury should have been instructed on both attempted second degree murder and attempted sudden quarrel manslaughter.[2] Both the State and Smith filed petitions for further review, which we granted. Although our reasoning differs in some respects from that of the Court of Appeals, we reach the same conclusion.

I. BACKGROUND

1. Facts

The following facts are taken from the published opinion of the Court of Appeals. Additional facts will be discussed as pertinent to our consideration of the specific issues presented for further review.

> On November 12, 2008, a surprise 21st birthday party was thrown for Lorenzo Gaskins. [A] large group of 15 to 20 people—including Tyrone Gaskins, Matthew Weston, Winston Sanniola, Lorenzo, and [LeMarcus Gaskins (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.
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> 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. [S]ome of the individuals [from the birthday group,] including

[2] *Id.*

> 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 [as Marcus ran away]. 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.
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> . . . .
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> 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.
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> . . . .
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> . . . 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.[3]

2. Court of Appeals

In his appeal from these convictions, Smith argued that our opinion in *State v. Jones*[4] should be overruled to the extent it held that manslaughter was always an unintentional crime. He

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[3] *Id.* at 710-14, 811 N.W.2d at 727-29.

[4] *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), *overruled, State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

further argued that because manslaughter can be committed intentionally, the jury should have been instructed that if his intent to kill was a result of a sudden quarrel, he should be convicted of attempted voluntary manslaughter. He also assigned and argued that the jury should have been instructed that he acted in self-defense.

Smith acknowledged in his appeal that his trial counsel did not request instructions on either attempted manslaughter or self-defense. But his new appellate counsel contended the instructions were nevertheless warranted based on two theories: (1) The trial court had a duty to sua sponte instruct on the law applicable to the case and/or (2) his trial counsel provided ineffective assistance when he failed to request the instructions.

After this case was briefed but before it was decided by the Court of Appeals, we decided *State v. Smith*,[5] an unrelated case involving a different defendant with the same surname. In that case, we overruled *Jones*[6] and reaffirmed our holding in *State v. Pettit*[7] that "an intentional killing committed without malice upon a 'sudden quarrel,' as that term is defined by our jurisprudence, constitutes the offense of manslaughter."[8] The Court of Appeals was thus faced with applying our decision in *Smith* to this case.

In doing so, the Court of Appeals determined that a self-defense instruction was not warranted by the evidence. It further determined that Smith's trial counsel could not have been deficient in failing to request an instruction on attempted sudden quarrel manslaughter, because at the time of the trial, that crime did not exist in Nebraska. The court reasoned that trial counsel could not have been ineffective "for not anticipating how the courts would rule."[9] But the Court of

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[5] *State v. Smith, supra* note 4.

[6] *State v. Jones, supra* note 4.

[7] *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989).

[8] *State v. Smith, supra* note 4, 282 Neb. at 734, 806 N.W.2d at 394.

[9] *State v. Smith, supra* note 1, 19 Neb. App. at 728, 811 N.W.2d at 738.

Appeals concluded that under our decision in *Smith*, the trial court had a sua sponte duty to instruct on attempted sudden quarrel manslaughter because it was a lesser-included offense of attempted second degree murder and there was some evidence of a sudden quarrel occurring immediately before the shooting. We granted petitions for further review filed by each party.

II. ASSIGNMENTS OF ERROR

In the State's petition for further review, it assigns that the Court of Appeals erred in determining that (1) the district court had a sua sponte duty to instruct the jury on attempted sudden quarrel manslaughter, (2) Smith was prejudiced by the lack of an instruction on attempted sudden quarrel manslaughter, and (3) there was evidence of a sudden quarrel.

In Smith's petition for further review, he assigns that the Court of Appeals erred in determining that (1) a self-defense instruction was not warranted by the evidence, (2) trial counsel was not ineffective in failing to request a self-defense instruction, and (3) the district court had no sua sponte duty to give a self-defense instruction.

III. STANDARD OF REVIEW

[1,2] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[10] Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.[11]

IV. ANALYSIS

1. Evidence of Sudden Quarrel

[3-6] The offense of manslaughter is defined by Neb. Rev. Stat. § 28-305(1) (Reissue 2008) as follows: "A person commits

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[10] *State v. Freemont, ante* p. 179, 817 N.W.2d 277 (2012); *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011).

[11] *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.[12] It does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim.[13] It is not the provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements necessary to constitute murder are absent.[14] The question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment.[15] The test is an objective one.[16] Qualities peculiar to the defendant which render him or her particularly excitable, such as intoxication, are not considered.[17]

In this case, the Court of Appeals summarized the evidence relevant to the existence of a sudden quarrel as follows:

> 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

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[12] *State v. Smith, supra* note 4; *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

[13] *State v. Smith, supra* note 4*; State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *State v. Smith, supra* note 4; *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992).

> 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.[18]

The court concluded that "[w]hether 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."[19]

The State argues that this was error because Smith had sufficient time between the end of the fistfight and the shooting to reflect on his intended course of action. It relies on *State v. Lyle*[20] and *State v. Davis*[21] as support for this argument. In *Lyle*, following a bench trial, a defendant convicted of first degree murder argued on appeal that the judge erred in not convicting him of sudden quarrel manslaughter. The evidence

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[18] *State v. Smith, supra* note 1, 19 Neb. App. at 725-26, 811 N.W.2d at 736.

[19] *Id.* at 726, 811 N.W.2d at 736.

[20] *State v. Lyle, supra* note 13.

[21] *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008).

established that after the defendant and his brother fought, the defendant left the scene in his vehicle. He returned 20 minutes later and fatally shot his brother. We determined that by leaving the scene of the altercation and then returning 20 minutes later to shoot the victim five times, aiming the weapon up and down the victim's body, the defendant acted deliberately and with premeditation, not in the heat of passion. The operative facts in *Lyle* are clearly distinguishable from this case.

Davis is likewise distinguishable. The defendant in that case was convicted of second degree murder following a bench trial. He argued on appeal that the evidence was insufficient to sustain the conviction and that he should have been convicted of sudden quarrel manslaughter instead. The evidence established that the defendant loaded a handgun and placed it in his coat before leaving his home to go to a mall with several friends. At the mall, the defendant's group and another group of people engaged in a verbal confrontation. When a member of the defendant's group suggested that a member of the other group had a weapon, the defendant stated, "'I'll shoot him'" and fired a shot, which did not hit anyone.[22] Then, 5 to 30 seconds later, the defendant walked over to a member of the second group, placed the gun against the back of his head, and fired the fatal shot. Characterizing this as an "execution-style" killing, we concluded that the evidence showed no sudden quarrel or adequate provocation that hindered the defendant's ability to act rationally and reasonably.[23]

The evidence in this case was that Smith found himself in a lopsided fistfight with LeMarcus Gaskins (Marcus) and several others in the Save-Mart parking lot. There is conflicting evidence as to whether the fight ended immediately when Carlos Helmstadter fired the weapon into the air. One witness testified that after Helmstadter fired the shots, "[i]t wasn't like everybody just broke up, but you could tell that Marcus kind

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[22] *Id.* at 757, 757 N.W.2d at 371.

[23] *Id.* at 760, 757 N.W.2d at 373.

of stopped throwing blows, you know, there — it wasn't as intense as it was before, I guess." Helmstadter testified that after he fired the shots into the air, he approached Smith, who was 5 yards from his vehicle. Smith grabbed the gun from Helmstadter's hand and began shooting. From this evidence, a finder of fact could conclude that Smith was provoked when he was "jumped" by several persons in the parking lot and that as a result of this sudden occurrence, he acted rashly and from passion, without due deliberation and reflection, rather than from judgment. Certainly this conclusion is not compelled by the evidence, but it is at least fairly inferable.

2. Entitlement to Sudden Quarrel Manslaughter Instruction

The State argues that even if the evidence would have supported an instruction on attempted sudden quarrel manslaughter, Smith was not entitled to the instruction because his counsel did not request it and in fact expressly waived it.

(a) Waiver

Smith made a pretrial motion proposing that certain preliminary instructions be given to the jury prior to the introduction of evidence. Included in these proposed instructions was preliminary instruction No. 2. In relevant part, this instructed the jury that it could find him guilty of attempted second degree murder, guilty of attempted manslaughter, or not guilty. One of the "elements" of attempted second degree murder, as explained in this instruction, was that the intent to kill was not "the result of a sudden quarrel." An "element" of attempted manslaughter was that the conduct was done intentionally "as the result of a sudden quarrel." The district court informed Smith that it would not give such an instruction before hearing all the evidence. Smith replied that he understood, and the requested preliminary instruction was not given to the jury.

Instead, the jury was instructed at the close of evidence that it could find Smith guilty of attempted second degree murder or not guilty. The elements of attempted second degree murder given to the jury made no mention of a sudden quarrel. At the

final jury instruction conference, Smith withdrew his request or an instruction on attempted manslaughter and offered no objection to the attempted second degree murder instruction that was given.

The State contends that Smith's actions amount to an express waiver of a jury instruction on attempted sudden quarrel manslaughter. This argument is based on language in *State v. Pribil*[24] providing that "no error can be claimed for failure to instruct on a lesser-included offense where that instruction has been expressly waived by the defendant." But an express waiver occurs when a defendant specifically informs the court that he or she does not want an instruction on a specific offense.[25] Because Smith did not do so here, he has not waived his argument on the attempted manslaughter instruction.

(b) Failure to Request

In its opinion, the Court of Appeals noted that "[a] party who does not request a desired jury instruction cannot complain on appeal about incomplete instructions."[26] But it then stated that "[w]hether 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."[27] Also, the court stated the proposition that "[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."[28] The State contends that there is inconsistency between these propositions and the following language in *Pribil*[29]:

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[24] *State v. Pribil*, 224 Neb. 28, 36, 395 N.W.2d 543, 549 (1986).

[25] See *State v. Brock*, 245 Neb. 315, 512 N.W.2d 389 (1994).

[26] *State v. Smith, supra* note 1, 19 Neb. App. at 720, 811 N.W.2d at 733, citing *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

[27] *Id.*, citing *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004).

[28] *Id.*, citing *State v. James*, 265 Neb. 243, 655 N.W.2d 891 (2003).

[29] *State v. Pribil, supra* note 24, 224 Neb. at 36, 395 N.W.2d at 549.

> Either the State or the defendant may request a lesser-included offense instruction where it is supported by the pleadings and the evidence. However, absent such a request, it is not error for the trial court to fail to give such instruction even though warranted. The rationale for this conclusion is based on the rule that where the general charge as contained in the instructions fairly presents the case to the jury, error cannot be predicated on a failure to instruct on some particular phase of the case unless a proper instruction has been requested by the party complaining.

We agree that clarification of the law in this area is in order.

Our starting point is this court's 1895 decision in *Carleton v. State*,[30] which addressed the issue of when error in a criminal case can be predicated on the trial court's failure to give a jury instruction which the defendant did not request. After examining prior case law, this court stated:

> [W]e deduce the rule that it is error for the trial court to fail entirely to instruct the jury on the law of the case, whether requested so to do or not; that it is likewise error to partially instruct the jury, but by the omission of certain elements impliedly to withdraw from the attention of the jury an issue or element in the case necessary to determine the rights of the parties, and that an exception to instructions so partially stating the case covers the error of omission; but that when the jury is instructed, and when the instructions given do not impliedly withhold from the jury some of the issues or elements proper for [its] consideration, error cannot be predicated upon the fact that the court failed to charge upon some particular phase of the evidence, or some particular feature of the case, unless a proper instruction was offered by the party complaining.[31]

Carleton thus announced a three-part rule. First, it is always error for the trial court to fail to instruct the jury at all, and

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[30] *Carleton v. State*, 43 Neb. 373, 61 N.W. 699 (1895).

[31] *Id.* at 403-04, 61 N.W. at 709.

a defendant can raise such failure as error whether or not he or she requested instructions. Second, it is error to omit from the jury instructions an issue or element in the case necessary to determine the rights of the parties, and a defendant can raise such error whether other instructions were requested or not. Third, when the instructions given are somehow lacking but do not withhold from the jury an issue or element, a defendant cannot assign error unless he or she requested a proper instruction on the matter. The question presented in the instant case is whether the failure to instruct on a lesser-included offense is subject to the second or third part of the *Carleton* rule.

Our early case law on this question is inconsistent. In *Dolan v. State*,[32] the defendant was charged with assault with intent to murder. The jury was not instructed on lesser grades of assault, and the defendant did not request such an instruction. Relying in part on *Vollmer v. State*,[33] the court held that the second part of the rule announced in *Carleton* applied and that because the "issue of the defendant's guilt of the lesser grades of assault was not in fact submitted to the jury," there was reversible error, even though no lesser instructions were requested.[34] But *Vollmer* was a murder case in which this court specifically noted that there was a statutory duty to instruct on all forms of homicide.

The holding of *Dolan* was essentially repeated the next year in *Pjarrou v. State*.[35] In that case, the defendant was charged with robbery. He contended the trial court erred because it failed to instruct the jury on lesser crimes of larceny and assault, even though he did not request such an instruction. We reasoned that

> [b]y the plea of not guilty the charge of the information was traversed and put in issue in all its constituent elements, and to the extent that the lesser crimes

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[32] *Dolan v. State*, 44 Neb. 643, 62 N.W. 1090 (1895), *disapproved in part, McIntyre v. State*, 116 Neb. 600, 218 N.W. 401 (1928).

[33] *Vollmer v. State*, 24 Neb. 838, 40 N.W. 420 (1888).

[34] *Dolan v. State, supra* note 32, 44 Neb. at 646, 62 N.W. at 1091.

[35] *Pjarrou v. State*, 47 Neb. 294, 66 N.W. 422 (1896).

> were included and entered into the charge of the greater they became the subjects in the case for necessary and strict proof.[36]

We thus held that the court should have instructed the jury on the lesser-included offenses despite the fact that it was not requested to do so.

But in *Barr v. State*,[37] we adopted a different approach. In that case, the defendant was charged with mayhem. In its instruction to the jury, the court defined mayhem and informed the jury that if it were not convinced of his guilt of that crime beyond a reasonable doubt, it could find him guilty of assault and battery. The instruction, however, did not define the elements of assault and battery. The jury convicted him of assault and battery, and he appealed, arguing the instruction was improper. We held that the "omission" of failing to define assault and battery was not error because the defendant had not requested the court to instruct the jury on the definition of those terms.[38]

Although *Barr* differed from *Dolan* and *Pjarrou* in that it did not completely remove a lesser-included offense from the jury, its holding, and not the holdings of either *Dolan* or *Pjarrou*, was extended in *McConnell v. State*.[39] There, the defendant was charged with and convicted of assault with intent to commit rape. On appeal, he argued that the court erred in failing to instruct the jury on lesser-included offenses such as assault and battery or simple assault. He had not requested the jury be so instructed. After concluding that the requested charges were indeed lesser-included offenses, this court noted that "authorities are divided on" the issue of whether a request must be made for lesser-included offense instructions and that the "weight of authority favors the defendant's contention."[40]

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[36] *Id.* at 297, 66 N.W. at 423.

[37] *Barr v. State*, 45 Neb. 458, 63 N.W. 856 (1895).

[38] *Id.* at 462, 63 N.W. at 857.

[39] *McConnell v. State*, 77 Neb. 773, 110 N.W. 666 (1906), *disapproved, State v. Pribil, supra* note 24.

[40] *Id.* at 775, 110 N.W. at 667.

Nevertheless, citing *Barr*, we held that "we are already committed to the rule that the failure of the court to give such an instruction is not reversible error, unless such request is tendered and refused."[41] The opinion makes no reference to *Dolan* or *Pjarrou*.

Dolan was expressly disapproved in *McIntyre v. State*.[42] There, the defendant was charged with and convicted of stabbing with intent to wound. On appeal, he alleged the trial court erred in failing to instruct on lesser-included offenses, even though no request was made. We held that the failure to request instructions waived any error and expressly disapproved the language in *Dolan* to the contrary.

In 1993, we readopted the statutory elements test for determining lesser-included offenses in *State v. Williams*.[43] In that case, we articulated the rule to be:

> [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.[44]

In later cases in which we have stated this rule, we have sometimes omitted the italicized language regarding a request for a lesser-included offense instruction.[45] In other cases, we have included it.[46]

[7] But although there is inconsistency in the language we have used over the years, the holdings of our cases since

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[41] *Id*.

[42] *McIntyre v. State, supra* note 32.

[43] *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993).

[44] *Id*. at 965, 503 N.W.2d at 566 (emphasis supplied).

[45] See, *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009); *State v. Weaver, supra* note 27.

[46] See, *State v. Erickson, supra* note 11; *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010); *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009); *State v. Sinica*, 277 Neb. 629, 764 N.W.2d 111 (2009); *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

the 1928 *McIntyre* decision have been consistent. The rule in a nonhomicide case is that a trial court must instruct on a lesser-included offense only if requested to do so and the evidence supports the giving of the lesser-included instruction.[47] However, a court may give a lesser-included instruction over a defendant's objection.[48] Thus, failure to instruct on lesser-included offenses in a nonhomicide case falls within the third part of the *Carleton* rule; because it does not "impliedly withhold from the jury some of the issues or elements proper for [its] consideration,"[49] it cannot be considered error if the defendant did not request the instruction. This rule is solely one of common law.

[8] But in a prosecution for murder, both the substance and the source of the rule are different. Neb. Rev. Stat. § 29-2027 (Reissue 2008) provides in relevant part: "In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it is murder in the first or second degree or manslaughter . . . ." This statute, although modified slightly over the years, has been in effect since the late 1800's. We have interpreted it to impose a mandatory rule that where murder is charged, a court is required to instruct the jury on all lesser degrees of criminal homicide for which there is proper evidence before the jury, whether requested to do so or not.[50]

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[47] See *State v. Pribil, supra* note 24. See, also, *State v. James, supra* note 28; *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988); *State v. Sotelo*, 197 Neb. 334, 248 N.W.2d 767 (1977); *State v. Bell*, 194 Neb. 554, 233 N.W.2d 920 (1975); *State v. Maxwell*, 193 Neb. 807, 229 N.W.2d 195 (1975); *State v. Warner*, 187 Neb. 335, 190 N.W.2d 786 (1971); *State v. Caha*, 184 Neb. 70, 165 N.W.2d 362 (1969); *Guerin v. State*, 138 Neb. 724, 295 N.W. 274 (1940); *Haynes v. State*, 137 Neb. 69, 288 N.W. 382 (1939); *McIntyre v. State, supra* note 32; *State v. Butler*, 10 Neb. App. 537, 634 N.W.2d 46 (2001); *State v. Britt*, 1 Neb. App. 245, 493 N.W.2d 631 (1992).

[48] See *State v. Pribil, supra* note 24.

[49] *Carleton v. State, supra* note 30, 43 Neb. at. 404, 61 N.W. at 709.

[50] See, *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984).

Here, where the charge is attempted murder, we must decide whether to apply the common-law rule applicable to nonhomicide cases or the statutory rule applicable to murder cases. The answer is quite simple, as the plain language of § 29-2027 applies only to trials "for murder." Criminal attempt is a codified crime in Nebraska and is punished in a manner different from the fully accomplished crime.[51] Specific to this case, second degree murder is a Class IB felony codified at Neb. Rev. Stat. § 28-304 (Reissue 2008), while attempted second degree murder is a Class II felony codified at § 28-201. Had the Legislature meant § 29-2027 to apply to trials for *attempted* murder, it could have easily so provided. We therefore find the plain language of the statute applies only to murder trials.

We acknowledge that two prior cases appear to adopt a different interpretation of § 29-2027. In *State v. Al-Zubaidy*,[52] an appeal from a conviction of attempted first degree murder, we held that the trial court erred in not giving a lesser-included offense instruction on attempted second degree murder, despite the fact that the defendant had not requested the instruction. We did so in reliance on the rule stated in *State v. Rowe*[53] that where murder is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable. *Rowe* was an appeal from a second degree murder conviction which we reversed because there was evidence that the killing resulted from a sudden quarrel, but the trial court failed to instruct on manslaughter. As we have noted above, a court's duty to instruct on lesser degrees of homicide supported by the evidence in a murder trial derives from § 29-2027. Our opinion in *Al-Zubaidy* did not recognize this distinction, nor did it explain how the statutory rule could apply in a trial for attempted murder.

[9] In *State v. Dixon*,[54] an appeal from a conviction for attempted first degree murder, we relied on *Al-Zubaidy* in

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[51] See Neb. Rev. Stat. § 28-201 (Cum. Supp. 2012).

[52] *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997).

[53] *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982).

[54] *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000).

concluding that the trial court erred in not instructing on attempted second degree murder despite the fact that the defendant had not requested this instruction. *Dixon* also relied on the principle that

> [i]t is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.[55]

But that principle is derived from the second part of the *Carleton* rule, and as we have discussed, failure to instruct on lesser-included offenses in a nonhomicide case is governed by the third part of the *Carleton* rule, which precludes a finding of error in the absence of a request for the instruction. We therefore conclude that our decisions in *Al-Zubaidy* and *Dixon* were incorrect on this point, and insofar as they hold that in a nonhomicide case, a trial court has a duty to instruct on lesser-included offenses in the absence of a request for such an instruction, we disapprove them.

Here, Smith did not request an instruction on attempted sudden quarrel manslaughter. Because he was charged with attempted murder, a nonhomicide charge, the district court had no duty to instruct on any lesser-included offenses in the absence of such a request. Smith has not preserved this issue for appellate review, and the Court of Appeals erred in relying on the court's sua sponte duty to instruct as a basis for remanding the cause for a new trial.

(c) Ineffective Assistance of Counsel

For the sake of completeness, we note that the Court of Appeals also addressed whether Smith's trial counsel was ineffective for failing to request an instruction on attempted sudden quarrel manslaughter. It concluded that his counsel could not have been deficient in failing to request the instruction, because at the time of the trial, the crime of attempted

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[55] *Id.* at 982, 614 N.W.2d at 294, citing *State v. Brown*, 258 Neb. 346, 603 N.W.2d 456 (1999).

voluntary manslaughter did not exist in Nebraska. The court reasoned that trial counsel could not have been ineffective "for not anticipating" how this court would rule in *Smith*.[56]

We agree with this rationale and holding. Therefore, because (1) the trial court had no duty to instruct on attempted sudden quarrel manslaughter in the absence of a request to do so and (2) Smith's trial counsel was not ineffective in failing to request such an instruction, we must conclude that Smith has presented no error which would entitle him to a new trial.

3. Prejudice and Plain Error

But notwithstanding this conclusion, we cannot ignore the fact that our decision in *Smith* brought about a significant change in the law after this case was tried and while it was pending on appeal. At the time this case was tried, voluntary manslaughter was an unintentional crime and the crime of attempted voluntary manslaughter did not exist.[57] There was thus no reason for Smith to request an instruction on attempted voluntary manslaughter, even though there was evidence of a sudden quarrel. Given the intervening change in the law, we conclude that Smith is entitled to a new trial.

[10] In *Griffith v. Kentucky*,[58] the U.S. Supreme Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." The Court reasoned that after it decides a new rule in a particular case, the "integrity of judicial review requires" that the new rule be applied "to all similar cases pending on direct review."[59] The Court further reasoned that "selective application of new rules violates the principle of treating similarly situated defendants the same."[60] The Court noted that the ideal

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[56] *State v. Smith, supra* note 1, 19 Neb. App. at 728, 811 N.W.2d at 738.

[57] See *State v. Jones, supra* note 4.

[58] *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). See, also, *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

[59] *Griffith v. Kentucky, supra* note 58, 479 U.S. at 323.

[60] *Id.*

of even-handed administration of justice would not be served if only the defendant in the case announcing the new rule could receive its benefit and other similarly situated defendants could not.

We applied these principles in *State v. Mata*.[61] There, we held that the new constitutional rule requiring a jury to determine aggravating factors in a capital sentencing proceeding announced by the U.S. Supreme Court in *Ring v. Arizona*[62] required resentencing of a defendant whose death sentence was pending on appeal at the time that *Ring* was decided, notwithstanding the fact that he had not raised at his sentencing hearing the substantive issue which was decided in *Ring*. Invoking the doctrine of plain error, we reasoned that the error was plainly evident from the record, that it affected a substantial right of the defendant, and that to ignore the error would "result in damage to the integrity, reputation, and fairness of the judicial process."[63] We agreed with the U.S. Supreme Court that "'where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be "plain" at the time of appellate consideration.'"[64]

[11] Although our decision in *Smith* did not announce a new constitutional rule, we conclude that the reasoning of *Griffith* and *Mata* applies. Plain error exists where there is 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.[65] Accordingly, although our reasoning differs in some respects from that of the Court of Appeals, we agree with its determination that Smith

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[61] *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated in part on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[62] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[63] *State v. Mata, supra* note 61, 266 Neb. at 699, 668 N.W.2d at 477.

[64] *Id.*, quoting *Johnson v. United States*, 520 U.S. 461, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997).

[65] *State v. Mata, supra* note 61.

is entitled to a new trial at which the jury can be instructed on the distinction between second degree murder and voluntary manslaughter under our holding in *Smith*[66] for the purpose of determining whether Smith committed the charged offense of attempted second degree murder.

We emphasize, however, that the Court of Appeals misinterpreted our opinion in *Smith* to require a step instruction under which the jury would consider the "alternative possibility" of voluntary manslaughter only if it acquitted the defendant of second degree murder.[67] Although voluntary manslaughter is a lesser degree of homicide, it is not a lesser-included offense of second degree murder under the elements test, because it is possible to commit second degree murder without committing voluntary manslaughter; one who intentionally kills another without premeditation and without the provocation of a sudden quarrel commits second degree murder, but does not simultaneously commit manslaughter. Necessarily implicit in the Court of Appeals' reference to a "step" instruction is that if a jury concludes a defendant killed another intentionally and without premeditation, thereby determining his guilt of second degree murder, it could never consider voluntary manslaughter. That is incorrect because under our holding in *Smith*, both second degree murder and voluntary manslaughter involve intentional killing; they are differentiated only by the presence or absence of the sudden quarrel provocation. If the provocation exists, it lessens the degree of the homicide from murder to manslaughter. Thus, where there is evidence that (1) a killing occurred intentionally without premeditation and (2) the defendant was acting under the provocation of a sudden quarrel, a jury must be given the option of convicting of either second degree murder or voluntary manslaughter depending upon its resolution of the fact issue regarding provocation.

4. Self-Defense

[12] Because we are reversing Smith's conviction and remanding for a new trial, it is not necessary that we resolve

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[66] See *State v. Moore*, 276 Neb. 1, 751 N.W.2d 631 (2008).

[67] *State v. Smith, supra* note 1, 19 Neb. App. at 722, 811 N.W.2d at 734.

his argument that the Court of Appeals erred in finding he was not entitled to a self-defense instruction in the first trial. However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.[68]

Obviously, we cannot predict whether Smith will assert self-defense at his second trial or what evidence there might be to support this defense. But we reject his argument that because the evidence at his first trial was sufficient to raise an inference of sudden quarrel, it was necessarily sufficient to support an inference of self-defense. Self-defense is a statutorily defined affirmative defense in Nebraska.[69] Section 28-1409 provides:

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

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[68] *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011); *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011).

[69] Neb. Rev. Stat. § 28-1409 (Reissue 2008); *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

Deadly force is 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.[70] Purposely firing a weapon in the direction of another person constitutes deadly force.[71] To successfully assert a claim of self-defense, one must have a reasonable and good faith belief in the necessity of using such force.[72] In addition, the force used in self-defense must be immediately necessary and must be justified under the circumstances.[73]

The Court of Appeals found there was "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."[74] It noted that after Helmstadter fired shots in the air, "the fight broke up," and Smith then "grabbed" the gun and fired at Marcus, "who was running away from him."[75] It also noted Smith had two opportunities to retreat because he could have chosen not to follow Marcus to Save-Mart and/or could have chosen to get in the vehicle and leave after the fight ended.

In his petition for further review, Smith contends that there was evidence that the fight did not end after Helmstadter fired the shots in the air. Specifically, he points to the testimony of a witness who said that after the shots, the fighting "wasn't as intense." Smith argues that on this evidence, the jury "could easily have found [that] he was attempting to protect himself from a severe and perhaps life-threatening beating, and met that threat with force that was immediately necessary for that self-protection."[76] He further argues that the fact that the Court of Appeals found sufficient evidence of a sudden quarrel at the

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[70] Neb. Rev. Stat. § 28-1406(3) (Reissue 2008).

[71] *State v. Iromuanya, supra* note 69.

[72] *Id.*

[73] *Id.*

[74] *State v. Smith, supra* note 1, 19 Neb. App. at 729, 811 N.W.2d at 738.

[75] *Id.*

[76] Memorandum brief for appellant in support of petition for further review at 8.

time of the shooting "undermines its finding that [Smith] could have retreated rather than fire the weapon."[77]

We disagree. Even if Smith was *provoked* by a sudden quarrel to fire the shot which hit Marcus, it does not necessarily follow that he was *justified* in using deadly force by a belief that it was necessary to protect himself against death or serious bodily harm. We agree with the Court of Appeals that on this record, 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 at the moment that he fired the shots. Whether he was provoked by a sudden quarrel to fire the shots is a separate and distinct inquiry which is not dependent upon a reasonable and good faith belief in the necessity of using deadly force for self-protection.

V. CONCLUSION

For the reasons discussed, we affirm the judgment of the Nebraska Court of Appeals which affirmed in part and in part reversed the judgment of the district court and remanded the cause for a new trial.

AFFIRMED.

CASSEL, J., not participating.

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[77] *Id.* at 9.

MIKE BLAKELY, APPELLANT, V. LANCASTER COUNTY, NEBRASKA, AND THE LANCASTER COUNTY PERSONNEL POLICY BOARD, APPELLEES.

825 N.W.2d 149

Filed November 16, 2012. No. S-11-686.

1. **Administrative Law: Words and Phrases.** An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.
2. **Civil Service: Administrative Law: Words and Phrases.** Under the County Civil Service Act, Neb. Rev. Stat. §§ 23-2517 to 23-2533 (Reissue 2012), a "personnel policy board" is an administrative agency performing quasi-judicial functions when it reviews a grievance of, or disciplinary action against, a classified service employee.

3. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency.
4. **Administrative Law: Evidence: Appeal and Error.** The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did from the testimony and exhibits contained in the record before it.
5. **Administrative Law.** An administrative agency decision must not be arbitrary or capricious.
6. ____. Agency action is arbitrary and capricious if it is taken in disregard of the facts or circumstances of the case, without some basis that would lead a reasonable and honest person to the same conclusion.
7. ____. Agency action taken in disregard of the agency's own substantive rules is also arbitrary and capricious.
8. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
9. **Statutes.** The interpretation of statutes and regulations presents questions of law.
10. **Contracts.** Contract interpretation presents a question of law.
11. **Administrative Law: Judgments.** Whether an agency decision conforms to the law is by definition a question of law.
12. **Judgments: Justiciable Issues.** Justiciability issues that do not involve a factual dispute present a question of law.
13. **Moot Question: Jurisdiction: Appeal and Error.** Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.
14. **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.
15. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive.
16. **Moot Question.** The central question in a mootness analysis is whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.
17. ____. A case is not moot if a court can fashion some meaningful form of relief, even if that relief only partially redresses the prevailing party's grievances.
18. **Civil Service: Administrative Law: Statutes.** Statutory requirements under a civil service act regarding appointments and promotions are mandatory. Appointing authorities must comply with them for an appointment or promotion to be valid.
19. **Civil Service: Words and Phrases.** An "appointment" under the County Civil Service Act, Neb. Rev. Stat. §§ 23-2517 to 23-2533 (Reissue 2012), refers to an appointing authority's designation of a person to fill a vacant classified service position.

20. **Civil Service.** Properly conducted examinations provide the cornerstone of a merit-based civil service system.
21. **Civil Service: Administrative Law.** Neb. Rev. Stat. § 23-2525(13) (Reissue 2012) does not preclude a county from defining a transfer to include transfers within the same department.
22. **Administrative Law: Statutes.** A county is not free to promulgate rules that directly violate statutory requirements.
23. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. A court must then reasonably or liberally construe the statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose.
24. **Statutes: Appeal and Error.** An appellate court will not read into a statute a meaning that is not there.
25. **Civil Service: Administrative Law: Legislature: Intent.** Under Neb. Rev. Stat. § 23-2525(3) (Reissue 2012), the Legislature intended a county to conduct competitive examinations to fill all open positions in the classified service, unless an exception applies.
26. **Civil Service: Administrative Law: Labor and Labor Relations: Contracts.** Under the County Civil Service Act, Neb. Rev. Stat. §§ 23-2517 to 23-2533 (Reissue 2012), a county cannot implement any provision of the county employees' collective bargaining agreement that would violate a provision of the act.
27. **Civil Service: Administrative Law: Legislature: Intent.** Under Neb. Rev. Stat. § 23-2525(4) (Reissue 2012), the Legislature intended a county to conduct promotional examinations. And appointing authorities must consider records of performance, seniority, and conduct when making promotions.
28. **Civil Service: Administrative Law.** When a vacancy in the classified service is not filled by a transfer or under a statutory exception, Neb. Rev. Stat. § 23-2525(3) and (4) (Reissue 2012) required the county to fill it through one of two types of examinations: open competitive examinations or promotional examinations.
29. ____: ____. When a civil service statute requires an appointing authority to consider seniority in making a promotion, that requirement must be respected.
30. ____: ____. Under Neb. Rev. Stat. § 23-2525(4) (Reissue 2012), a county is not conducting promotional examinations when it posts a position as available to all county employees and fails to consider seniority.
31. **Civil Service: Administrative Law: Legislature: Intent.** Under Neb. Rev. Stat. § 23-2525(3) (Reissue 2012), the Legislature intended to limit an appointing authority's selection of an applicant to one of the applicants who scored highest on the final score of the examination process.
32. **Civil Service.** Under Neb. Rev. Stat. § 23-2525(3) (Reissue 2012), when oral interviews are part of the examination process for an appointment to the civil service, an applicant's score on an oral interview must be included in the final score.
33. **Civil Service: Administrative Law.** Under Neb. Rev. Stat. § 23-2525(3) (Reissue 2012), a county must devise objective standards to test the fitness of applicants as far as possible. When oral examinations are used to test an applicant's subjective

> traits, the scoring must be guided by measurable standards. That is, the examinations must provide some reasonable means of judicial review.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Reversed and remanded with directions.

Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Joe Kelly, Lancaster County Attorney, and Thomas W. Fox for appellees.

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

CONNOLLY, J.

I. SUMMARY

The appellant, Mike Blakely, appeals from a district court order that affirmed the Lancaster County Personnel Policy Board's[1] decision that denied Blakely's grievance. Blakely's grievance alleged that the county denied him an opportunity to fairly compete for job vacancies because county officials did not follow the county's personnel rules or the employees' collective bargaining agreement (CBA).

There are two vacancies at issue. The first was a vacancy at the county's mental health center. For that vacancy, the county reassigned one of its employees to that position without conducting competitive examinations. The second vacancy was a grounds maintenance position left open after the county reassigned the first employee to the mental health center.

Regarding the first vacancy at the mental health center, the crux of the issue is the county's claim, and the court's implicit ruling, that a department head's decision to place a current department employee in a newly created vacancy is a "reassignment"—not an appointment subject to competitive examinations. Regarding the second vacancy, the court affirmed the county's promotion of a department employee to the vacancy although the department did not consider the applicants' seniority. Finally, the court ruled Blakely's claim

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[1] See Neb. Rev. Stat. § 23-2520 (Reissue 2012).

moot because he no longer worked for the county after being laid off in December 2009.

We reverse. We will explain our holding with specificity in the following pages, but briefly stated, it is this:

- Blakely's claim is not moot. Blakely worked for the county when the new positions became available and when he filed his grievance. Because we conclude that his procedural challenges have merit, the county must consider him in new competitive examinations for the vacancies that comply with the county's statutory and contractual duties.
- The court erred in affirming the personnel policy board's denial of Blakely's grievance. The County Civil Service Act[2] required county officials to comply with its provisions. In filling the first vacancy, the county failed to post notice of, and conduct, competitive examinations. In filling the second vacancy, it failed to properly conduct competitive examinations. Thus, its hiring and promotion decisions were arbitrary and capricious, and therefore void.

II. BACKGROUND

In 2009, when Blakely filed his grievance, he worked for the county at Lancaster Manor. He had worked for the county for 17 years, and his position was classified as a maintenance repair worker II (MRW-II). The county had long treated Lancaster Manor as a separate department. All other maintenance repair workers were employed by the county's department of property management (the department). At Lancaster Manor, Blakely maintained the heating and cooling systems and the kitchen equipment and performed general maintenance duties. He had extensive experience working with boilers, water systems, laundry equipment, and other types of equipment. He had obtained a certificate of completion for a 14-month masonry program and had always received good evaluations. In November 2008, Blakely was Lancaster Manor's employee of the month, and in March 2009, he received the "Commissioner's Award of Excellence" for his speedy handling of a water pipe break that caused emergency flooding at Lancaster Manor.

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[2] See Neb. Rev. Stat. §§ 23-2517 to 23-2533 (Reissue 2012).

This dispute arises out of the county's actions in April and May 2009. On April 2, the county's board of commissioners approved a request from the department for an additional maintenance employee at the mental health center. Don Killeen, the department's director, stated in a letter to Blakely's attorney that when he asked for the new position, he intended to fill it through "assignment" of a current employee.

On April 13, 2009, Fred Little, the department's facilities manager, posted the vacancy. The posting stated the position was open only to county employees. It stated that the position required an applicant to perform grounds maintenance; operate, maintain, and repair heating, ventilating, and air conditioning systems; install, maintain, and repair plumbing fixtures and equipment; perform general carpentry work; and perform interior and exterior painting of buildings.

After posting the position, and at Killeen's direction, Little asked the people in the department whether anyone was interested in the vacancy. One department employee, Jim Kohmetsher, expressed interest but said that he needed time to think about it. Before the county hired him, Kohmetsher had experience working with heating, air conditioning, and plumbing systems. But as a county employee, Kohmetsher worked with a grounds maintenance crew, and he had worked only 1½ years for the county. The county assigned an MRW-II classification to his grounds maintenance position. Later, Kohmetsher told Little that he wanted the job at the mental health center, and Little "reassigned" him to that vacancy. Kohmetsher did not formally apply for the position, nor did Little conduct competitive examinations before filling the vacancy.

After Little reassigned Kohmetsher to the new position, the department determined that it would fill Kohmetsher's former grounds maintenance position through the same previous posting. In other words, because the posting did not specify a worksite for the MRW-II position, the department concluded that it could change the new vacancy without issuing a new posting. Little said that when he posted the position, he was not sure where the successful applicant would work because he did not know whether a department employee would take the position at the mental health center.

Blakely had learned about the MRW-II position and applied for it the same week that the county posted it. The county was considering selling Lancaster Manor, and Blakely was concerned that if it were sold, he might lose his job. Blakely's supervisor supported his decision to apply for the new position. Blakely also spoke to Little at Lancaster Manor about the position during the week of April 13, 2009. Little told Blakely that the MRW-II position was for a vacancy at the mental health center. But Little also told Blakely that another employee was interested in the vacancy and that Blakely should wait and apply for the other employee's position. Blakely, however, had already applied for the posted vacancy at the mental health center. Although the county later changed the vacancy to be filled, Blakely believed, from speaking to Little, that the MRW-II vacancy was for the mental health center.

Before Little "reassigned" Kohmetsher to the mental health center vacancy, he had received a list of five county employees who had applied for the position and met the minimum eligibility requirements. The list included Blakely. As Kohmetsher had not applied, Blakely was the only applicant who held a position with an MRW-II classification. But Little did not interview these applicants for the mental health center vacancy because he had already assigned Kohmetsher to the vacancy; the county had determined that it was not required to fill the vacancy through competitive examinations because Kohmetsher's reassignment was not an "original appointment" open to the public under its personnel rules.

Instead, at the interview, Little informed each applicant that the vacancy was for a grounds maintenance and snow removal position—the position that became available when Little reassigned Kohmetsher. He stated that Blakely was the only applicant who knew that the vacancy was originally for the mental health center.

In selecting an applicant for the grounds maintenance vacancy, Little did not consider the seniority of any applicant. He also said that an MRW-II classification did not denote a higher qualified employee than a maintenance repair worker I (MRW-I) classification. Little did not ask the applicants about

their duties or performance appraisals in their current positions or attempt to obtain this information from the applicants' managers.

At his interview, Blakely was surprised when he learned that the interview was not for the position at the mental health center. He expressed, however, that he was interested in any position that would allow him to keep his employment with the county. Little stated that Blakely performed well in the interview, but he promoted another applicant, Mark Bartusek, an MRW-I employee in the department.

Bartusek had worked for the county for 3 years, and Little said he believed that Bartusek was more qualified than Blakely. Little said that he had worked with Bartusek for 4 to 5 months during a remodeling project and that he knew from his observations that Bartusek had a good work ethic and worked well with others. Little said that he had not worked with Blakely, yet he admitted that he did not inquire about Blakely's conduct or performance appraisals: "[N]othing against [Blakely], but I don't know how he works with the other people at the manor. I just know him in casual conversation."

1. The County's Hiring and Promotion Procedures

Pat Kant, the manager of the county's employment office, said that although the rules permit department heads to agree on a current employee's transfer without posting the position, it rarely happens and only when it is in the county's best interests to move a person. She cited disciplinary concerns as a typical example of when such a transfer would occur. She said that county employees usually must compete for the position.

But Kant denied that the county's personnel rules required the county to conduct, or post notice of, competitive examinations for the vacancy at the mental health center. She said that the CBA, instead of the personnel rules, governed the filling of the new vacancy because it was a bargaining unit position. Kant claimed that the CBA did not require the county to inform the public or any classified service employees of the new position at the mental health center.

Additionally, Kant explained the county's examination and scoring of applicants. She said that applicants had to complete an electronic application and a supplemental questionnaire, which permitted an employment technician to evaluate the applicants' training and experience. The employment technician verifies that the applicants' computer scores based on their answers is accurate. The ones who scored the highest points were the most desirable applicants. Kant said that the employment office does not review the performance appraisals of current employees or check references about their conduct. She said that a department head could check those items.

Kant admitted that the technician would normally factor in the applicant's seniority: An applicant would normally receive one point for each year that he or she had worked for the county. But Kant testified that here, the technician failed to consider seniority. She claimed that the mistake was irrelevant, however, because the county would have selected the same five applicants for interviews.

Kant explained that the employment office tries to select at least five people for interviews. She said that if there had been a large pool of applicants, Blakely's seniority points might have made a difference in whether he was a top applicant whom the county selected for an interview. But because there were only five applicants remaining after the employment office determined that some were ineligible, Kant said that producing a point score was unnecessary. That is, the county would have selected the same five applicants for oral interviews even if the employment office had considered seniority. Kant said that the employment office does not rank the applicants by their scores or provide the manager who interviews the applicants with their scores. The manager knows only that the applicants were the top five applicants in the pool, but he or she can see their questionnaire responses.

Little testified that he received each applicant's supplemental questionnaire and asked each applicant a list of questions that he had developed for an MRW-II vacancy. He said that he used the same questions regardless of the position's duties.

Yet, he did not keep notes of the applicants' answers or rank the applicants based on their seniority, previous job performance, or answers in the oral interviews. In May 2009, the county informed Blakely by letter that he was not selected for the MRW-II position.

2. Procedural History

In May 2009, Blakely filed his grievance, alleging that the county had violated its personnel rules and the CBA. In September, the county's personnel policy board voted unanimously to deny Blakely's grievance. In October, Blakely filed a petition for review in district court. He alleged that the county had violated the County Civil Service Act. He specifically alleged that the county had not complied with the following personnel rules: 5.1(a) and (b), 5.2, 5.5, 5.6, 5.7, 5.9, and 9.1. In addition, he alleged that the county had not complied with the following provisions of the CBA: article 16, § 9, and article 17, §§ 1 and 2.

The county moved to dismiss the petition for lack of jurisdiction and failure to state a claim for which relief could be granted. The court treated the petition as a petition in error. But it concluded that Blakely had not timely filed a transcript of the county proceedings—a jurisdictional requirement. The Nebraska Court of Appeals, in case No. A-10-125, on February 11, 2011, remanded the cause with directions.

After remand, the county filed an answer. It affirmatively alleged that Blakely's grievance was moot. It alleged that because the county had terminated Blakely's employment in December 2009, he no longer had any rights under the CBA or under the County Civil Service Act. In its brief, the county states that all county employees who worked at Lancaster Manor were laid off on December 31, 2009, when the county sold the facility to a private party. In Blakely's reply, he denied that his grievance was moot, but he did not deny that the county had terminated his employment.

After an evidentiary hearing, the district court affirmed the personnel policy board's decision. It further concluded that Blakely's grievance was moot because the county no longer employed him, and it dismissed his petition.

III. ASSIGNMENTS OF ERROR

Blakely assigns that the court erred in affirming the personnel policy board's denial of his grievance because the decision violated the county's personnel policies and the CBA. In addition, he assigns that the court erred in concluding that the issue was moot.

IV. STANDARD OF REVIEW

[1,2] An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.[3] Under the County Civil Service Act, a "personnel policy board" is an administrative agency performing quasi-judicial functions when it reviews a grievance of, or disciplinary action against, a classified service employee.[4]

[3,4] In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency.[5] The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.[6] The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did from the testimony and exhibits contained in the record before it.[7]

[5-7] In addition, an administrative agency decision must not be arbitrary or capricious.[8] Agency action is arbitrary and capricious if it is taken in disregard of the facts or circumstances of the case, without some basis that would lead a

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[3] *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004) (superseded by statute as stated in *In re Application of Olmer*, 275 Neb. 852, 752 N.W.2d 124 (2008)).

[4] See, § 23-2522(5); *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008); 15A Am. Jur. 2d *Civil Service* § 8 (2011).

[5] *Pierce, supra* note 4.

[6] *Id.*

[7] *Id.*

[8] See *id.*

reasonable and honest person to the same conclusion.[9] Agency action taken in disregard of the agency's own substantive rules is also arbitrary and capricious.[10]

[8-12] We independently review questions of law decided by a lower court.[11] The interpretation of statutes and regulations presents questions of law.[12] Contract interpretation also presents a question of law.[13] Whether an agency decision conforms to the law is by definition a question of law.[14] And justiciability issues that do not involve a factual dispute present a question of law.[15]

V. ANALYSIS

1. Mootness

[13] We first address the county's mootness claim. Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.[16] The county contends that the court properly determined that the issues in Blakely's grievance are moot. It contends that because Blakely no longer has any rights to enforce under the county's personnel rules or the CBA, this court cannot provide any meaningful relief.

Blakely contends that the court erred in determining that the case is moot, because he is entitled to a judgment placing him in one of the positions for which he applied and those positions still exist. He argues that by analogy, a plaintiff's wrongful

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[9] *Middle Niobrara NRD v. Department of Nat. Resources*, 281 Neb. 634, 799 N.W.2d 305 (2011).

[10] *Id.*

[11] See *Fleming v. Civil Serv. Comm. of Douglas Cty.*, 280 Neb. 1014, 792 N.W.2d 871 (2011).

[12] See *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012).

[13] *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011).

[14] See *Robbins v. Neth*, 273 Neb. 115, 728 N.W.2d 109 (2007).

[15] See *In re Interest of Shaleia M.*, 283 Neb. 609, 812 N.W.2d 277 (2012).

[16] *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011); *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

termination claim is not moot because the plaintiff no longer works for the defendant.

[14,15] 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.[17] A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive.[18]

[16,17] The central question in a mootness analysis is whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.[19] A case is not moot if a court can fashion some meaningful form of relief, even if that relief only partially redresses the prevailing party's grievances.[20]

We disagree with the county's argument and the court's reasoning that because the county laid Blakely off, the case is moot. We agree with Blakely that under this reasoning, wrongful termination claims would be moot if an employee claimed procedural violations. But that is not correct.[21] Similarly, the county cannot evade review of unlawful hiring or promotion decisions by discharging affected employees and claiming that they no longer have any rights to enforce.

Blakely filed his grievance when he still worked for the county and had statutory and contractual rights to enforce. The personnel policy board issued its decision while the county still employed him. And the county does not argue that the disputed positions have been eliminated or that Blakely voluntarily left his employment.[22]

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[17] *Professional Firefighters Assn. v. City of Omaha*, 282 Neb. 200, 803 N.W.2d 17 (2011).

[18] *Id.*

[19] *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009).

[20] *Id.*

[21] See *Simpson v. City of Grand Island*, 166 Neb. 393, 89 N.W.2d 117 (1958).

[22] See *State ex rel. Schaub v. City of Scottsbluff*, 169 Neb. 525, 100 N.W.2d 202 (1960).

[18] So a judgment in Blakely's favor would provide meaningful relief. This appeal is about the county's hiring and promotion procedures for classified service positions. Statutory requirements under a civil service act regarding appointments and promotions are mandatory. Other courts have held that appointing authorities must comply with them for an appointment or promotion to be valid. In other words, appointments and promotions that do not comply with the statutory requirements are void.[23] We agree. As discussed below, this court has also held that the county must comply with the County Civil Service Act.[24] If, as Blakely alleged, the county's procedures for making an appointment and promotion were invalid, then the decisions rendered under those procedures were also invalid. This conclusion would obviously provide relief to Blakely: The county would have to allow him to compete in new competitive examinations for these vacancies because he properly contested the invalid procedures.[25] We conclude that the issues raised by Blakely's grievance are not moot.

2. The County's Appointment Procedures for the Vacancy at the Mental Health Center Were Unlawful and Void

Blakely contends that the county's appointments violated the County Civil Service Act's provisions under §§ 23-2517 and 23-2525(3) and (4). Section 23-2517 sets out the act's purpose, and § 23-2525 sets out mandatory requirements for the county's classified service rules, which are stated in the county's personnel rules. Blakely argues that the county's appointments

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[23] See, e.g., *City of Tuscaloosa v. Marcum*, 283 Ala. 440, 218 So. 2d 254 (1969); *State ex rel. Gaski v. Basile*, 174 Conn. 36, 381 A.2d 547 (1977); *Stovall v. City of Scottsville*, 605 S.W.2d 767 (Ky. App. 1980); *State, ex rel., v. Hainen*, 150 Ohio St. 371, 82 N.E.2d 734 (1948); *State ex rel. Mulkey v. Auburn*, 60 Wash. 2d 728, 375 P.2d 499 (1962); *Martin v. Pugh*, 175 W. Va. 495, 334 S.E.2d 633 (1985). Compare *Simpson, supra* note 21.

[24] See *American Fed. S., C. & M. Emp. v. County of Lancaster*, 200 Neb. 301, 263 N.W.2d 471 (1978).

[25] See, *Ziomek v. Bartimole*, 156 Conn. 604, 244 A.2d 380 (1968); *Jensen v. State Dept. of Labor and Industry*, 213 Mont. 84, 689 P.2d 1231 (1984); *Matter of Oliver v. Levitt*, 158 A.D.2d 429, 551 N.Y.S.2d 528 (1990).

failed to comply with these rules. He contends that in failing to post the vacancy at the mental health center and conduct open examinations for the vacancy, the county violated multiple personnel rules and CBA provisions.

The county contends that neither the personnel policy board nor this court has the authority "to sit as a super personnel department reviewing the business judgments made by Lancaster County managers when hiring personnel."[26] But by passing the County Civil Service Act, the Legislature has limited those "business judgments." And it is a court's duty to enforce those statutory requirements.

(a) Statutory Requirements

[19] Under § 23-2517, "[a]ll appointments and promotions under the County Civil Service Act shall be made based on merit and fitness." Although the act does not define the term "appointment," an appointment under a civil service act refers to an appointing authority's designation of a person to fill a vacant classified service position.[27] And rule 1 of the county's personnel rules specifically defines "[a]ppointment" to mean "the designation to a position in the classified service of a person who has qualified for the appointment through appropriate examination or determination of fitness." The parties do not dispute that the positions at issue were classified service positions.[28]

Generally, civil service acts promote effective public service. They do this by establishing a personnel administration system that provides equal opportunity for public employment and advancement based on merit and fitness principles.[29]

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[26] Brief for appellees at 12.

[27] See, Neb. Rev. Stat. § 19-1826(3) (Reissue 2012); *Snygg v. City of Scottsbluff Police Dept.*, 201 Neb. 16, 266 N.W.2d 76 (1978). See, also, Black's Law Dictionary 116 (9th ed. 2009).

[28] See § 23-2519.

[29] See, Neb. Rev. Stat. § 23-2501 (Reissue 2012) and § 23-2525; *Ziomek, supra* note 25; *City of Cambridge v. Civil Service Com'n*, 43 Mass. App. 300, 682 N.E.2d 923 (1997); 3 Eugene McQuillin, The Law of Municipal Corporations § 12.124 (rev. 3d ed. 2012); 15A Am. Jur. 2d, *supra* note 4, §§ 1 and 6.

By requiring the county to incorporate these principles, the Legislature intended to prohibit the county, as much as practical, from making these decisions based on political control, partisanship, and personal favoritism.[30]

[20] Section 23-2525 of the act accomplishes this purpose by requiring appointing authorities to conduct open competitive examinations to fill vacancies or promotional examinations to fill vacancies by promotion of current employees. Properly conducted examinations provide the cornerstone of a merit-based civil service system.[31] And § 23-2525 sets forth the duties of the county personnel officer and personnel policy board to develop specific classified service rules for approval by the board of commissioners. Regarding appointments to vacancies, § 23-2525(3) provides that those rules must include the following requirements:

> [O]pen competitive examinations to test the relative fitness of applicants for the respective positions. . . . *The rules and regulations shall provide for the public announcement of the holding of examinations* and shall authorize the personnel officer to prescribe examination procedures and to place the names of successful candidates on eligible lists in accordance with their respective ratings. . . . *Certification of eligibility for appointment to vacancies* shall be in accordance with a formula which limits selection by the hiring department from among the highest ranking available and eligible candidates, but which also permits selective certification under appropriate conditions as prescribed in the rules and regulations.

(Emphasis supplied.)

As stated, this court has held that the county's board of commissioners must comply with the act's fitness and merit requirements.[32] We held that the county can bargain with county employees over rules for employees' compensation and

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[30] See, e.g., *City of Cambridge, supra* note 29.

[31] See, § 23-2517; *Kelly v. City of New Haven*, 275 Conn. 580, 881 A.2d 978 (2005).

[32] See *American Fed. S., C. & M. Emp., supra* note 24.

working conditions to the extent that the terms of the county employees' CBA do not violate a direct statutory directive.[33] But the "county board has no power or authority to bargain or agree that any appointment or promotion shall be based upon anything other than merit and fitness except as provided in the act."[34]

(b) The County's Personnel Rules

The county's personnel rules 5.1 and 5.2 fulfill § 23-2525(3)'s requirement to conduct open competitive examinations for vacancies and to give notice of those examinations. Rule 5.1 provides the following notice and competitive examination requirements:

> (a) Original appointment to the classified service shall be conducted on an open-competitive basis. The Personnel Officer shall give public notice of all original appointment examinations . . . . Notice of examination shall be posted and shall be distributed . . . . *The public notice examination shall specify*: the title and salary of the class of position; *typical duties to be performed; the minimum qualifications required*; and all other pertinent information and requirements. . . .
>
> (b) *Examinations* may be limited to probationary and status employees [those who have successfully completed a probationary period] in the classified service or within a single department where the Personnel Officer, after consultation with the Department Head concerned, determines that there are a sufficient number of qualified candidates within the classified service to provide competition. *The Personnel Officer shall make distribution and post notice of such examination. This notice shall specify that information set forth in Rule 5.1(a).*

(Emphasis supplied.)

Rule 5.2 provides that "[o]pen-competitive examinations shall be open to all applicants . . . ." It requires the personnel

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[33] *Id.*, citing *Pennsylvania Lab. Rel. Bd. v. State Col. A. Sch. Dist.*, 461 Pa. 494, 337 A.2d 262 (1975).

[34] *Id.* at 305, 263 N.W.2d at 474.

officer to set forth the standards and requirements of the position for examinations. Rule 7.1 sets out the types of assignments, or the means of filling a vacancy, that the county is permitted to make. As relevant here, rule 7.1 requires "all vacancies in the classified service which are not filled by transfer, promotion or demotion" to "be filled by probationary, emergency, temporary, seasonal or on-call appointment."

(c) The County Did Not Comply With Its Rules for Filling the Vacancy at the Mental Health Center

Obviously, the county did not appoint Kohmetsher to the vacancy on a temporary, seasonal, or on-call basis, or because of a government emergency. Moreover, the county had previously assigned an MRW-II classification to Kohmetsher's grounds maintenance position, which was the same as the classification for the new position at the mental health center. So Little's assignment of Kohmetsher to the new position was not a demotion or a promotion. The CBA and personnel rules define those actions, respectively, as an employee's move to a lesser or higher pay grade. So under rule 7.1, the assignment could have only been a transfer or a probationary appointment.

(i) Assignment Was Not a Valid Transfer

[21] Section 23-2525(13) provides that the county's classified service rules must provide "[f]or transfer from a position in one department to a similar position in another department involving similar qualifications, duties, responsibilities, and salary ranges." It does not preclude the county from defining a transfer to include transfers within the same department. So such a definition does not violate a statutory directive.

The personnel rules and the CBA permit department heads, under specified circumstances, to transfer an employee to a different position *of the same class* in the same department or to a position of the same class in a different department. As mentioned, the county had assigned an MRW-II classification to both Kohmetsher's previous grounds maintenance

position and his new position at the mental health center, and both positions were in the same department. But the county did not treat Little's assignment of Kohmetsher as an interdepartment transfer because it did not comply with its transfer rules.

Specifically, rule 9.2(c) of the personnel rules and article 17, § 2, of the CBA permit a transfer only if "the classes involved are so related that *the experience in*, and entrance qualification requirements of one class, are such as to qualify the employee in a reasonable manner for the other class." (Emphasis supplied.) By requiring the employee's current experience to qualify the employee for the new position, the personnel rules ensure that appointing authorities make transfers based on merit and fitness considerations even though they are not conducting open competitive examinations.

Here, the county arbitrarily ignored its own unwritten protocol for not permitting employees to transfer to a position after it has posted notice of competitive examinations for the position. One of Blakely's coworkers at Lancaster Manor testified that after he learned about an MRW-I vacancy at the city-county building, he called the personnel office to ask if he could transfer. The coworker was told that he could apply for the job but could not transfer into the position because once a job is posted, an employee cannot transfer into it. Kant confirmed that if a vacancy has already been posted, the county does not allow transfers outside of the application process: "It wouldn't be good faith to take applications and then transfer someone that didn't apply." But the "good faith" rule was not followed here.

Even though the county's posting of the MRW-II position did not specify a worksite, the stated work requirements for the position could not reasonably be described as giving notice of examinations for a grounds maintenance position. Most of the specified requirements for the vacancy called for different skills that are needed for maintaining facilities—such as experience working with plumbing fixtures and equipment; general carpentry; and operating and maintaining heating, ventilating, and air conditioning systems. And although the department purported to change the position to be filled by its posting, the

mental health center vacancy was clearly posted before Little assigned Kohmetsher to the position. Under the county's personnel rules and unwritten protocol, the county did not validly transfer Kohmetsher. Under rule 7.1, that leaves only a probationary appointment as a permissible means of transferring Kohmetsher to the vacancy.

(ii) Assignment Was Not a Valid Probationary Appointment

The county denies that Little's assignment of Kohmetsher to the vacancy was a probationary appointment. Rule 7.1 defines a probationary appointment as an appointment to the classified service through certification from an open competitive list. Stated otherwise, a probationary appointment is an appointment to a civil service position, on a probationary basis, made from an eligibility list, which is compiled after competitive examinations; the position will ripen into a permanent position after a period of testing.[35] Because Little assigned Kohmetsher to a newly created vacancy, the assignment was an appointment under § 23-2525(3). But the county did not comply with rule 5.1(a).

As stated, rule 5.1(a) required the county to conduct open competitive examinations of applicants for original appointments to the classified service and to give notice of the examinations. Rule 5.1(b) arguably permitted the county to limit notice and competitive examinations to only county employees or only county employees in a single department. The county, however, purported to withdraw its notice of the vacancy at the mental health center, and it did not fill the vacancy on a competitive basis as required by rule 5.1.

Nonetheless, the county claims that it did not violate the requirement in rule 5.1(a) that "[o]riginal appointment to the classified service shall be conducted on an open-competitive basis." It argues that this rule did not apply because it did not choose to make the vacancy open to the general public for an "[o]riginal appointment" to a classified service position. We disagree.

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[35] See 3 McQuillin, *supra* note 29, § 12.134.

The term "original appointment" usually refers to an individual's first appointment to public service.[36] But depending on the governing rules, the term can also refer to any regular appointment to a classified service position.[37]

[22] Here, the term "[o]riginal appointment" in the county's personnel rules must be construed in a manner that is consistent with § 23-2525(3). That section requires the county to conduct open competitive examinations for *vacancies* in the classified service. A county is not free to promulgate rules that directly violate statutory requirements.[38]

[23] In construing a statute, we look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. A court must then reasonably or liberally construe the statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose.[39]

Under the county's interpretation of rule 5.1, it will fill vacancies by competitive examinations only when and if it decides to give notice of a vacancy to the general public. But its interpretation of the term "original appointment" is contrary to the Legislature's intent that the county fill *vacancies* by competitive examinations.

[24] We will not read into a statute a meaning that is not there.[40] Nor will we interpret § 23-2525 in a manner that defeats the Legislature's intent to promote fair opportunities for public employment and effective public service. Neither § 23-2525 nor the personnel rules permitted a department head to assign a current department employee to fill a new position outside of its transfer rules or the competitive examination process. And neither § 23-2525 nor the personnel rules mention

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[36] See *Somerville v. Somerville Mun. Employees*, 80 Mass. App. 686, 955 N.E.2d 924 (2011).

[37] See *Cleveland Civil Service Employees v. City of Cleveland*, No. 79593, 2002 WL 226863 (Ohio App. Feb. 14, 2002) (unpublished opinion).

[38] See *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010).

[39] See *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012).

[40] *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012).

a "reassignment" or distinguish between a reassignment and an appointment to a vacancy.

[25] Instead, by using a broad term like "vacancies" in § 23-2525(3), the Legislature intended the county to conduct competitive examinations to fill all open positions in the classified service, unless an exception applies. And if the Legislature had intended to give appointing authorities the prerogative to fill new positions with current employees in their department without complying with rules for transfers, promotions, or competitive examinations, it would have created this exception.

The county admitted that the vacancy at the mental health center was a new position approved by the county board of commissioners. And it admitted that when the department initially posted the position to only classified service employees, the vacancy was for the mental health center position. We need not consider whether notice to only county employees is a "public announcement" of examinations under § 23-2525(3). By withdrawing its notice of the position, the county obviously did not even comply with its lesser requirement to give notice to current employees. Nor did it conduct any competitive examinations to fill the vacancy.

This case illustrates the soundness of requiring competitive examinations. By "reassigning" a department employee to the new position without complying with its transfer rules or competitive examination rules, the department shielded Kohmetsher from (1) the merit and fitness requirements within the transfer rules and (2) competition from potential applicants like Blakely who had extensive qualifications for the position. The department's wink-and-a-nod "reassignment" obviously defeated the merit and fitness requirements that the Legislature intended to promote. We conclude that the county's attempt to characterize its appointment of Kohmetsher as a "reassignment" is contrary to both the act and its personnel rules.

(d) The CBA Did Not Authorize Noncompetitive "Reassignments"

Because the county did not comply with its personnel rules, it claimed that the CBA authorized the reassignment. As

stated, the county assignment of Kohmetsher was not a valid appointment because the county did not conduct competitive examinations. So the county denied that Little's assignment of Kohmetsher was an appointment. Similarly, the assignment was not a valid transfer because the county failed to follow its "good faith" rule for transfers. So Kant claimed that the good faith rule only applied to an employee seeking a transfer from a different department. She distinguished transfers or promotions for employees from another department from "reassignments" of employees in the same department. She stated that although reassignments within a department were loosely called transfers, reassignments were not treated the same as an employee's lateral transfer or promotion to a different department.

But the county's claim that Little's assignment of Kohmetsher was not a transfer and not a probationary appointment most obviously means that under rule 7.1, Little did not fill the vacancy through any permissible assignment. In an attempt to avoid these clear violations of the governing statutes and personnel rules, the county advanced a creative contract interpretation. It argued that under the CBA, it could fill the vacancy without complying with competitive examination rules or transfer rules.

Kant claimed that because the vacancy was a bargaining unit position under the CBA, the CBA superseded the county's personnel rules. The CBA, however, required the county to post any bargaining unit vacancy to all county employees before the general public *unless* it was filled through a transfer or demotion. But Kant relied on a management rights provision in article 6, § 2(E), of the CBA that gave management the right to "hire, examine, classify, promote, train, transfer, *assign*, and retain employees." Kant characterized Little's assignment of Kohmetsher to the vacancy as a "reassignment."

Kant said that when the department reassigns an employee within the department to a new worksite, the department head is not required to file anything with her office or to post the vacancy. Kant and Killeen both claimed that under the CBA, the county could fill the vacancy by reassigning a

department employee without conducting competitive examinations. We disagree.

[26] The county's argument is not a reasonable construction of the CBA when read consistently. More important, even if the county's interpretation of the CBA were plausible, we would reject it. Under the County Civil Service Act, a county cannot implement any provision of the county employees' CBA that would violate § 23-2525(3) or any other provision of the act.[41] We have already concluded that the county's attempt to characterize its appointment of Kohmetsher as a "reassignment" is contrary to both the act and its personnel rules.

Summed up, we agree that management had the right to transfer a current employee to the vacancy or to appoint an applicant—if it complied with its own rules and its contractual duties. But it did not. Section § 23-2525 and the county's personnel rules required the county to comply with its transfer rules or announce examinations and solicit applicants for the vacancy at the mental health center. In the latter case, § 23-2525 and rule 5.1 required the county to conduct competitive examinations before appointing a person to fill that vacancy. The county followed none of these procedures. Therefore, Little's appointment of Kohmetsher to the vacancy was unlawful and void.

3. The County's Promotion Procedures for the Grounds Maintenance Vacancy Were Unlawful and Void

Blakely contends that the county failed to consider seniority in conducting examinations for the grounds maintenance position and failed to base its hiring decision on merit and fitness. He argues that the county filled the position with an employee who was less qualified, had less experience, and had less seniority. He contends that the business judgment rule does not permit county officials to determine that an applicant is the most qualified for a classified service position without any record of the relevant merit and fitness criteria.

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[41] See *American Fed. S., C. & M. Emp., supra* note 24.

To recap, after Little reassigned Kohmetsher to the vacancy at the mental health center, the department determined that notice of examinations would be for a different vacancy: Kohmetsher's former grounds maintenance position. Little then filled the position by promoting Bartusek, an employee in the department. Compared to Blakely, Bartusek had less experience in facilities maintenance and less seniority with the county.

Section 23-2525(4) requires vacancies to be filled by promotion whenever practical and sets out specific elements that must be considered in a promotion decision: "[P]romotions which shall give appropriate consideration *to examinations* and to record of performance, seniority, and conduct. Vacancies shall be filled by promotion whenever practicable and in the best interest of the service, and preference may be given to employees within the department in which the vacancy occurs." (Emphasis supplied.)

[27] By requiring appointing authorities to consider examinations, the Legislature clearly contemplated that the county would conduct promotional examinations. And § 23-2525(4) specifically requires appointing authorities to consider records of "performance, seniority, and conduct" when making promotions. But the county argues that Little "had the authority to determine whether examinations, record of performance, seniority and conduct of the candidates he interviewed were relevant and what level of consideration was appropriate to be given to each of said items."[42] The county also argues that because Bartusek was a department employee, Little had the authority to determine that "it was in the best interest of the [department] to promote . . . Bartusek and to give preference to [him] when making the promotional decision."[43]

We disagree that Little had authority to disregard the statutory criteria for promoting an employee. Furthermore, the county's posting and procedures for filling the grounds maintenance position showed that it did not conduct promotional examinations.

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[42] Brief for appellees at 24-25.

[43] *Id.* at 25.

Much of the confusion here stems from the county's treatment of internal vacancies. Kant stated that the employment office treats all internal vacancies in a different department as promotional internal positions, even though for the successful applicant, the position could be a promotion, lateral transfer, or demotion. This treatment of all internal vacancies as promotions is contrary to the act's requirements.

[28] When a vacancy in the classified service is not filled by a transfer or under a statutory exception, § 23-2525(3) and (4) required the county to fill it through one of two types of examinations. Under subsection (3), the county could conduct open competitive examinations. Under subsection (4), it could fill the vacancy through promotional examinations. Section 23-2525 states these procedures in the alternative. And under a similar civil service act, we have held that absent statutory restrictions, an appointing authority has discretion to choose between examinations for promotion and open competitive examinations.[44] It is true that in conducting promotional examinations, § 23-2525(4) permits an appointing authority to give preference to an employee in the same department. But we conclude that the county did not conduct promotional examinations.

[29] First, § 23-2525(4) requires the county to fill a vacancy by promotion when practical, and the record fails to show that the county made this determination. Second, because the posting of this vacancy permitted any county employee to apply, obtaining the position would not have been a promotion for many applicants like Blakely. Although the county has referred to "promotional applicants,"[45] nothing in the county's posting alerted county employees that the department would fill the position through promotion, with its attendant preference for department employees. Third, not only did the posting fail to give applicants like Blakely notice that the county would fill the position by promotion—if the county had actually intended to do this—Blakely should have been disqualified because he would not have been promoted by obtaining

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[44] *Short v. Kissinger*, 184 Neb. 491, 168 N.W.2d 917 (1969).

[45] See brief for appellees at 21.

the position. Fourth, and most important, Little admitted that in promoting Bartusek, he did not consider the seniority of any applicant, and he did not inquire about their performance appraisals or their conduct in their current position with the county. When a civil service statute requires an appointing authority to consider seniority in making a promotion, that requirement must be respected.[46] So if we were to treat the county's procedures as promotional examinations, the promotion would be invalid.

[30] But we conclude that under § 23-2525(4), a county is not conducting promotional examinations when it posts a position as available to all county employees and fails to consider seniority. And when we analyze the county's procedures under the rules for open competitive examinations, the county obviously violated many of those rules in both letter and spirit.

First, rule 5.1 required the county's notice of open competitive examinations to specify the position's minimum qualifications and the typical duties to be performed. But because the county's notice was originally intended to fill the MRW-II position at the mental health center, the position's requirements, when applied to the grounds maintenance position, were incorrectly stated. Nothing in the posting alerted county employees that the position was only for grounds maintenance and snow removal. This incorrect statement of the requirements likely resulted in many county employees concluding that they were not qualified to apply. The county's equivalent classifications for grounds maintenance positions and facilities maintenance positions may be justified for determining pay schedules,[47] but the duties for these positions are considerably different for giving notice of a position's work requirements.

Second, many of the standards under which the county evaluated the applicants were not related to the position. Rule 5.2 of the personnel rules required the personnel officer to set forth the standards and requirements of the position that

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[46] See *Hainen, supra* note 23.

[47] See § 23-2525(1).

an appointing authority will apply to the examinations. The county's supplemental questionnaire was intended to broadly discern whether the applicants had training or experience in a wide range of work related to facilities maintenance, carpentry, and maintaining facilities equipment and grounds maintenance equipment. Little also asked the applicants about their experience in these areas, and his questions were designed to more clearly determine the depth of their knowledge and skills.

But leaving aside whether oral interviews were the best way to objectively evaluate the applicants' knowledge of grounds maintenance, snow removal, and equipment maintenance,[48] many of these questions were related to facilities maintenance instead of grounds maintenance and snow removal operations. In short, many of Little's interview questions were geared toward the wrong position.

[31,32] Third, the county did not treat the oral interviews as part of the examination process. Section 23-2525(3) specifically provides that examinations may include oral interviews as an examining technique. But it also provides that "[e]xaminations shall be scored objectively and employment registers shall be established in the order of *final score*."[49] In addition, the formula for certification to the eligibility list must limit the department head's selection to the highest ranking of the available and eligible candidates.[50] The Legislature intended the requirements in § 23-2525(3) to limit an appointing authority's selection of an applicant to one of the applicants who scored highest *on the final score* of the examination process. So when oral interviews are part of the examination process for an appointment to the civil service, an applicant's score on an oral interview must be included in the final score.[51] But that is not what happened here.

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[48] See 5 Sandra M. Stevenson, Antieau on Local Government Law § 76A.08[5] (2010).

[49] § 23-2525(3) (emphasis supplied).

[50] See *id*.

[51] See, e.g., *Bennett v. Blytheville Civil Service Com'n*, 293 Ark. 136, 733 S.W.2d 414 (1987).

Little asked the applicants about their knowledge and skills; he also asked them about their physical abilities and their ability to work with others and to take instructions. But he did not take notes of their answers or rate their performance. Instead, after the county evaluated the applicants based on their applications and answers to the supplemental questions, it treated this initial score as the only relevant score for determining the top applicants for the position. The county specifically argues that Little was free to choose whichever one of these employees he preferred. But because oral interviews were part of the examination process, the county could not determine an applicant's final score until the entire examination was complete.

[33] In addition, neither the employment office nor Little considered the applicants' past performance or conduct in their current positions or in any previous positions that they had held. As stated, § 23-2525(3) requires objective scoring of examinations. This requirement means that the county must devise objective standards to test the fitness of applicants as far as possible.[52] Section 23-2525(3) does not prohibit examiners from evaluating subjective traits if those traits are relevant to an applicant's fitness for a position. But when oral examinations are used to test an applicant's subjective traits, the scoring must be guided by measurable standards. That is, the examinations must provide some reasonable means of judicial review.[53] Otherwise, oral interviews could be used to render hiring and promotion decisions unchallengeable and unreviewable.

Here, Little's testimony showed that he gave preference to Bartusek because he knew him and had worked with him. But that standard meant that the examinations were a farce because Little's selection of Bartusek was based on nothing more than his personal preference for his own employee.

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[52] See 5 Stevenson, *supra* note 48, § 76A.08[4] and [5].

[53] See, e.g., *Bennett, supra* note 51; *Almassy v. L. A. County Civil Service Com.*, 34 Cal. 2d 387, 210 P.2d 503 (1949); *Ziomek, supra* note 25, citing *Matter of Fink v. Finegan*, 270 N.Y. 356, 1 N.E.2d 462 (1936).

Because the county was conducting open competitive examinations and not promotional examinations, Little's preference for an employee in his own department was an invalid basis for the hiring decision. By purporting to conduct open competitive examinations for the grounds maintenance position, but giving preference to a junior department employee, the department created arbitrary and capricious appointing procedures that were not based on the applicants' merits and fitness. Accordingly, Little's appointment of Bartusek to the grounds maintenance position was unlawful and void.

The dissent asserts that Kohmetsher and Bartusek arguably have a property interest in their current positions and that our decision could penalize innocent employees. This assertion is incorrect. Kohmetsher and Bartusek have no right to continued employment in these positions because the county did not comply with the statutory and contractual requirements that would have created that right. An unlawful and void appointment cannot create rights to a civil service position.[54] Courts have specifically held:

> Employees may be removed without compliance with the legal requirements for the filing of charges and the holding of a hearing where their certification or appointment is void ab initio, e.g., where they are guilty of fraud in procuring the appointment, where they have made false representations in their employment application, or *where their employment is not in compliance with civil service or veterans' preference laws*.[55]

Furthermore, we cannot know how the county will respond to our decision. We are not requiring the county to discharge or demote Kohmetsher and Bartusek because of its unlawful conduct. Instead, we hold that the appointments were void and that Blakely is entitled to compete in lawful examinations. If

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[54] See, e.g., *People ex rel. Betts v. Village of Maywood*, 298 Ill. App. 160, 18 N.E.2d 459 (1938); *Wiltshire v. Callis, Mayor*, 289 Ky. 753, 160 S.W.2d 173 (1942); *Snizaski v. Zaleski*, 410 Pa. 548, 189 A.2d 284 (1963).

[55] See 4 Eugene McQuillin, The Law of Municipal Corporations § 12.351 at 733-34 (rev. 3d ed. 2011) (citing cases) (emphasis supplied). See, also, *id.*, § 12:376.

Kohmetsher and Bartusek are not appointed to these positions after the county conducts lawful examinations, they may be entitled to their former positions, or the county may create other positions for them at the same rate of pay. But how the county resolves the consequences of its actions is not part of this appeal, which raises only the validity of its actions.

As in any appeal, an appellate court cannot resolve an issue that could arise as a result of its decision. As the dissent well knows, absent plain error, the scope of our appellate review is normally limited by the issues properly raised. New issues must frequently be resolved after a decision is issued. If, as the dissent hypothesizes, Blakely no longer wants to compete for one of these positions, his grievance will obviously be dismissed as moot on remand. And how much of Kohmetsher's or Bartusek's experience the county should consider in new examinations is an issue that the parties can resolve or litigate later. But those potential issues do not present a valid reason to withhold a decision in this appeal or to remand the cause to the district court to "craft an appropriate remedy."

The lawfulness of the county's employment actions was squarely before this court. Whether the county complied with the civil service statutes and its personnel rules is a question of law. Whether its appointment and promotion are void for failing to comply with those rules is also a question of law. There are no facts that the court could consider on remand that would render the county's employment actions lawful. And the court could not conclude on remand that despite our holding that these appointments were void, Kohmetsher and Bartusek are entitled to keep their positions without competing for them in lawful examinations. Finally, whatever solution or compromise that the county reaches with the employees affected by this judgment is beyond the scope of our review.

VI. CONCLUSION

The county failed to comply with statutory requirements and its own personnel rules in assigning department employees to the mental health center and the grounds maintenance vacancies. The assignments were therefore invalid.

We remand the cause to the district court with directions to reverse the personnel policy board's denial of Blakely's grievance and to order new competitive examinations for the disputed positions.

REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., concurring in part, and in part dissenting.

I concur with the majority insofar as it concludes that the county failed to comply with the statutory requirements and its own personnel rules. But I dissent from the remedy fashioned by the majority. Instead, I would remand this cause to the district court for further proceedings not inconsistent with our opinion.

This court's disposition ordering new competitive examinations does not take into account certain considerations which are relevant when crafting a remedy in this case. To begin, under Lancaster County's personnel rules, an employee can be dismissed only for cause[1] and, as such, has a likely property interest in his or her employment.[2] Where an employee has a property interest in his or her employment, that employee has a right to due process.[3]

While Blakely's rights under the County Civil Service Act and the county's personnel rules were violated, his are not the only rights that are at issue under the majority's remedy. Kohmetsher and Bartusek, both innocent parties who had been hired instead of Blakely, now arguably have a property interest in their respective employment. Such an interest entitles each to due process in connection with the employment.

Nor does the remedy take into account the current circumstances of these individuals or provide guidance for the county in conducting these examinations. For example, we do not know whether Blakely needs or wants county employment.

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[1] See County of Lancaster, Personnel Rules 1 and 11.2(b) through (h) (rev. 2001).

[2] See, *Scott v. County of Richardson*, 280 Neb. 694, 789 N.W.2d 44 (2010); *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995). See, also, *Abraham v. Pekarski*, 728 F.2d 167 (3d Cir. 1984). Cf. *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987).

[3] *Id.*

And assuming that Kohmetsher and Bartusek reapply for their positions during these new competitive examinations, should the county consider these individuals' qualifications based upon their original date of hire or can it consider the additional years of experience each presumably has gained?

It may be that the new examinations ordered by this court provide a proper resolution to this case. But the remedy as ordered could result in penalizing innocent employees, and it is not dictated by law. As such, I would leave it to the district court to craft an appropriate remedy upon a consideration of all the facts and circumstances.

STEPHAN, J., joins in this concurrence and dissent.

MELISSA AMEN, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, K.L.A., PLAINTIFF, V. MICHAEL J. ASTRUE, COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION, DEFENDANT.

822 N.W.2d 419

Filed November 16, 2012. No. S-11-1094.

1. **Statutes: Appeal and Error.** The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible.
2. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
3. ____: ____. In construing statutory language, an appellate court attempts to give effect to all parts of a statute and avoid rejecting as superfluous or meaningless any word, clause, or sentence.
4. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
5. **Decedents' Estates.** In order for a lineal descendant to inherit from an intestate estate, a descendant must survive the decedent.
6. **Decedents' Estates: Minors.** A child, conceived after his or her biological father's death through intrauterine insemination using his sperm and born within 9 months of his death cannot inherit from his or her father as his surviving issue under current Nebraska intestacy law.
7. **Courts: Legislature: Public Policy.** A court cannot contradict the Legislature on matters of public policy.

8. **Constitutional Law: Legislature: Public Policy.** The Nebraska Constitution obliges the Nebraska Supreme Court to leave reformation of this state's public policy to the Legislature.
9. **Courts: Questions of Law.** Neb. Rev. Stat. § 24-219 (Reissue 2008), which grants the Nebraska Supreme Court the authority to answer certified questions, limits those answers to questions of law which are certified.

Certified Question from the U.S. District Court for the District of Nebraska. Judgment entered.

Maureen McBrien, of Brick & Sugarman, L.L.P., and Susan K. Sapp, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for plaintiff.

Karen P. Seifert, of U.S. Department of Justice, Civil Division, Federal Programs Branch, for defendant.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ., and RIEDMANN, Judge.

MCCORMACK, J.

NATURE OF CASE

Pursuant to Neb. Rev. Stat. § 24-219 et seq. (Reissue 2008), the U.S. District Court for the District of Nebraska certified the following question to this court: "Can a child, conceived after her biological father's death through intrauterine insemination using his sperm, and born within nine months of his death, inherit from him as his surviving issue under Nebraska intestacy law?"

BACKGROUND

In accordance with § 24-221, the following facts were provided by the U.S. District Court in its certification request: Joshua Amen and Melissa Amen married on June 5, 2004. Prior to their wedding, Joshua was diagnosed with cancer. Before beginning cancer treatment, Joshua cryogenically preserved his sperm at a sperm bank. In October 2006, during Joshua's ongoing cancer treatment, Melissa underwent a fertility treatment cycle with Joshua's consent and support. Joshua passed away on November 24, 2006, while domiciled in Nebraska.

Seven days after Joshua's death, Melissa underwent intrauterine insemination using Joshua's cryopreserved sperm.

The procedure was successful, and Melissa gave birth to a child, K.L.A., in August 2007. Joshua is K.L.A.'s biological father.

On August 31, 2007, Melissa applied to the Social Security Administration (SSA) for mother's insurance benefits and surviving child's insurance benefits, on behalf of K.L.A., based on Joshua's earnings record. SSA denied the application initially and upon reconsideration.

After the initial determination, Melissa filed a request for rehearing on April 13, 2009. On February 26, 2010, an administrative law judge (ALJ) decided that K.L.A. was entitled to child's insurance benefits on Joshua's Social Security record.

SSA's Appeals Council chose to review the ALJ's hearing decision upon its own motion, pursuant to 20 C.F.R. § 404.969 (2010). The Appeals Council reversed the ALJ's decision. The council found that because K.L.A. does not have inheritance rights in the wage earner's estate under the laws of the State of Nebraska, she is not a "child" of the wage earner, Joshua, under the Social Security Act, 42 U.S.C. § 416(h)(2)(A) and (B) or (3)(C) (2006),[1] and therefore is not entitled to child's insurance benefits.

On November 8, 2010, Melissa filed an appeal of the final decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g) (2006) in the U.S. District Court.

ANALYSIS

Our Answer to Certified Question

We are asked to determine whether, under Nebraska intestacy law, a child conceived after her biological father's death through intrauterine insemination can inherit from her father's intestate estate. To begin, Neb. Rev. Stat. § 30-2301 (Reissue 2008) states: "Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed in the following sections of this code."

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[1] See *Astrue v. Capato ex rel. B.N.C.*, ___ U.S. ___, 132 S. Ct. 2021, 182 L. Ed. 2d 887 (2012).

Neb. Rev. Stat. § 30-2303 (Reissue 2008) provides in relevant part:

> The part of the intestate estate not passing to the surviving spouse under section 30-2302, or the entire intestate estate if there is no surviving spouse, passes as follows:
>
> (1) to the issue of the decedent . . . .
>
> (2) if there is no surviving issue, to his parent or parents equally.

Under Neb. Rev. Stat. § 30-2209(23) (Reissue 2008), "[i]ssue" is statutorily defined as "all his or her lineal descendants of all generations."

Neb. Rev. Stat. § 30-2304 (Reissue 2008) states in part: "Any person who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property and intestate succession, and the decedent's heirs are determined accordingly." Lastly, Neb. Rev. Stat. § 30-2308 (Reissue 2008), the afterborn heirs statute, states: "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent." The remaining intestacy statutes are irrelevant to our answer.

[1-4] The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible.[2] Statutory language is to be given its plain and ordinary meaning, and this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[3] The court attempts to give effect to all parts of a statute and avoid rejecting as superfluous or meaningless any word, clause, or sentence.[4] It is not within the province of this court to read

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[2] *Republic Bank v. Lincoln Cty. Bd. of Equal.*, 283 Neb. 721, 811 N.W.2d 682 (2012).

[3] *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

[4] *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012).

a meaning into a statute that is not warranted by the legislative language.[5]

[5] With our fundamental rules of statutory interpretation as guidance, we begin our analysis by examining § 30-2303. It establishes that the issue of the decedent, including lineal descendants, can inherit from a decedent's intestate estate.[6] K.L.A. is a lineal descendant of Joshua. However, Nebraska intestacy law includes an important limitation. Section 30-2303(2) states that "if there is no surviving issue," then the intestate estate passes to the decedent's parents. This plainly means that in order for the lineal descendant to inherit from the intestate estate, a descendant must survive the decedent.

This plain meaning is reaffirmed statutorily by § 30-2304, which requires any heir to survive the decedent by "one hundred twenty hours." Nebraska statutes have not defined "survive." But, the afterborn heirs statute was clearly intended as an exception to the survival requirement.[7] Section 30-2308 allows an heir, who is not *born* at the time of the decedent's death, to inherit "as if [he or she] had been *born* in the lifetime of the decedent." (Emphasis supplied.) Thus, the Legislature conveys that being born in the lifetime of the decedent is otherwise a requirement for the child to be considered "surviving issue."

[6] Section 30-2308 contains a plain, direct, and unambiguous limiting clause to the afterborn heirs exception. The heir must be conceived before the father's death. Therefore, our answer to the certified question is no. A child, conceived after her biological father's death through intrauterine insemination using his sperm and born within 9 months of his death cannot inherit from her father as his surviving issue under current Nebraska intestacy law. A child conceived after her biological father's death does not "survive" her father as required under § 30-2304. Further, such a child is unambiguously excluded from inheriting under § 30-2308 because she was not

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

[6] § 30-2303(1).

[7] See § 30-2308.

conceived prior to her father's death. Our answer is consistent with at least four other courts that have interpreted the same, or similar, afterborn heirs statutes to exclude posthumously conceived children.[8]

[7,8] Although the result is unfortunate for K.L.A., we are bound to the ordinary meaning of the relevant statutes. The plain, direct, and unambiguous language of the survival requirement under § 30-2304 and the afterborn heirs exception under § 30-2308 represent Nebraska's public policy on this issue. We have previously stated that this court cannot contradict the Legislature on matters of public policy.[9] Therefore, we will not resort to statutory interpretation when the ordinary meaning of the statute is plain and obvious.[10] Unlike the New Jersey trial court decision[11] cited in Melissa's brief, we cannot ignore the statute's literal meaning to create a favorable result for K.L.A.[12] The Nebraska Constitution obliges this court to leave reformation of this state's public policy to the Legislature.[13]

Therefore, the plain and ordinary meaning of §§ 30-2304 and 30-2308 is that under current Nebraska law, a child conceived after her biological father's death cannot inherit from her father as surviving issue for purposes of intestacy.

Melissa's Constitutional Challenge

In Melissa's brief, she argues that if we apply Nebraska intestacy laws to deny posthumously conceived children rights in an intestator's estate, the statute as applied would violate the

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[8] See, e.g., *Vernoff v. Astrue*, 568 F.3d 1102 (9th Cir. 2009); *Beeler v. Astrue*, 651 F.3d 954 (8th Cir. 2011), *cert. denied* ___ U.S. ___, 132 S. Ct. 2679, 183 L. Ed. 2d 62 (2012); *Stephen v. Commissioner of Social Sec.*, 386 F. Supp. 2d 1257 (M.D. Fla. 2005); *Finley v. Astrue*, 372 Ark. 103, 270 S.W.3d 849 (2008).

[9] *Murray v. UNMC Physicians*, 282 Neb. 260, 806 N.W.2d 118 (2011).

[10] *Woodhouse Ford v. Laflan, supra* note 3.

[11] *In re Estate of Kolacy*, 332 N.J. Super. 593, 753 A.2d 1257 (2000).

[12] See *Metropolitan Comm. College Area v. City of Omaha, supra* note 5.

[13] See, *Alsidez v. American Family Mut. Ins. Co.*, 282 Neb. 890, 807 N.W.2d 184 (2011); *Nebraska P.P. Dist. v. City of York*, 212 Neb. 747, 326 N.W.2d 22 (1982).

Equal Protection Clause of the Nebraska Constitution. Without addressing the merits of Melissa's equal protection challenge, we find the constitutional question is not properly before this court.

[9] As we did in *Givens v. Anchor Packing*,[14] we refuse to address the merits of the constitutional challenge raised by Melissa. Section 24-219, which grants this court the authority to answer certified questions, limits our answers to questions of law which are certified.[15] There was no constitutional question within the question certified to us by the U.S. District Court. For this reason, we will not substantively address Melissa's constitutional challenge.

CONCLUSION

The answer to the certified question is no, a child conceived after her biological father's death through intrauterine insemination using the father's sperm and born within 9 months of his death cannot inherit from the father as his surviving issue under Nebraska intestacy law. Further, Melissa's constitutional challenge is not properly before this court and therefore cannot be substantively answered.

JUDGMENT ENTERED.

WRIGHT, J., not participating.

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[14] *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771 (1991).

[15] See *id*.

STATE OF NEBRASKA, APPELLEE, V.
AREVALO RAMIREZ, APPELLANT.
823 N.W.2d 193

Filed November 16, 2012. No. S-12-178.

1. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.
2. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.

3. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
4. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.
5. **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 amount of violence involved in the commission of the crime.
6. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
7. ____. 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 Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Sean M. Conway, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Arevalo Ramirez pled no contest to first degree sexual assault. He was sentenced to 25 to 30 years' imprisonment with credit for 224 days served. The two issues presented for review in this appeal are whether Ramirez' trial counsel was ineffective and whether Ramirez received an excessive sentence.

SCOPE OF REVIEW

[1] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is

sufficient to adequately review the question. *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

[2] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *State v. Freemont, ante* p. 179, 817 N.W.2d 277 (2012).

[3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

FACTS

On July 11, 2011, Ramirez was charged by information in Douglas County District Court with one count of first degree sexual assault, a Class II felony, and one count of first degree false imprisonment, a Class IIIA felony. On November 21, he pled no contest to the first degree sexual assault charge and the remaining charge was dismissed by the State.

As a factual basis for the plea, the State advised the district court that on June 22, 2011, Ramirez agreed to pick up the victim, J.F., and give her a ride home. Rather than driving J.F. home, Ramirez drove to a park and sexually assaulted J.F. in the back seat of his vehicle. J.F. later escaped.

In announcing Ramirez' sentence on January 31, 2012, the district court noted that J.F. was Ramirez' niece, that she was 16 years old at the time of the crime, and that according to the presentence investigation report, Ramirez also had sexual contact with J.F. when she was 13 years old. Ramirez was sentenced to 25 to 30 years' imprisonment with credit for 224 days served. He was also required to register under Nebraska's Sex Offender Registration Act, Neb. Rev. Stat. §§ 29-4001 to 29-4014 (Reissue 2008 & Cum. Supp. 2012).

At sentencing, the district court inquired as to Ramirez' citizenship status. Defense counsel replied: "Judge, he is a legal permanent resident. However, with the conviction of such a serious felony, it will be at the discretion of Immigration whether or not to proceed with removal once he's done with his sentence. And normally on a case like this they would do that."

Ramirez timely filed his notice of appeal on February 29, 2012. The State moved for summary affirmance on May 23,

but the motion was overruled. This court moved the case to its docket pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008). Pursuant to Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008), the case was submitted without oral argument.

ASSIGNMENTS OF ERROR

Ramirez assigns as error that he received ineffective assistance of counsel and that his sentence is excessive.

ANALYSIS

Ineffective Assistance of Counsel

In this appeal, Ramirez contends that his trial counsel was ineffective in failing to inform him prior to his plea that a sexual assault conviction would result in mandatory deportation.

[4] Ramirez is represented by different counsel on appeal than he was in the district court. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred. *State v. Molina*, 279 Neb. 405, 778 N.W.2d 713 (2010). Therefore, as he has done, Ramirez was required to raise his ineffective assistance of counsel claim on direct appeal.

The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question. *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011). An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *State v. Freemont*, *ante* p. 179, 817 N.W.2d 277 (2012).

The evidence in the record of defense counsel's alleged ineffectiveness is a statement by counsel to the district court: "Judge, he is a legal permanent resident. However, with the

conviction of such a serious felony, it will be at the discretion of Immigration whether or not to proceed with removal once he's done with his sentence. And normally on a case like this they would do that." This statement was made at the sentencing hearing, after Ramirez' plea had been entered. Thus, it is not possible to evaluate whether defense counsel was ineffective, because the record contains insufficient evidence of what defense counsel told Ramirez before the plea was entered. Because the record is insufficient to address this assignment of error, we decline to address it on direct appeal. See, *id.*; *State v. Sidzyik, supra*.

Excessive Sentence

[5] Ramirez argues that the district court did not properly consider all the sentencing factors set forth in *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). These factors were reiterated in *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012). 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 amount of violence involved in the commission of the crime. *Id.*

[6,7] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *Id.* 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.* An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *Id.*

Ramirez was found guilty of a Class II felony, which carries a sentence of 1 to 50 years' imprisonment. See Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2012). He was sentenced to 25 to 30 years' imprisonment. Ramirez' sentence falls well within the statutory range. As such, we review the district court's decision for an abuse of discretion. See *State v. Bauldwin, supra*. 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. *Id*.

In announcing Ramirez' sentence, the district court noted that the victim was Ramirez' niece and that she was 16 years old when the crime occurred. The court further noted that the presentence investigation report indicated Ramirez also had sexual contact with J.F. when she was 13. The court agreed with a probation officer's assessment that Ramirez was a high-risk candidate for community supervision and that a substantial sentence was required.

The presentence investigation report contains several evaluation scores. Ramirez scored in the "very high risk" range for "procriminal attitude/orientation" and in the "high risk" range for "leisure/recreation." Additionally, the presentence investigation report indicated that Ramirez was at a high risk for rearrest. It also included a victim impact statement addressing the fears and changed family relationships J.F. has experienced as a result of the incident.

In *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007), the defendant, who was convicted of first degree sexual assault on a child and incest, alleged he received excessive sentences. He claimed the trial court failed to properly consider that he had no sexual offenses on his record and that a test indicated he did not have an established pattern of sexual interest in children. This court noted that the defendant had a propensity for violence and that he inflicted pain and fear on his victim. We further noted that "[s]exual assault on a child is a serious and deplorable crime, and the injury that results from this type of assault is well established." *Id*. at 646, 733 N.W.2d at 539. This court concluded that the defendant's concurrent sentences of 25 to 30 years in prison for first degree sexual assault on a child and 10 to 20 years in prison for incest were not an abuse of discretion.

Ramirez sexually assaulted his 16-year-old niece. This was a serious and deplorable crime, see *id*., and the sentence Ramirez received was well within the statutory range. We cannot say that the district court abused its discretion in imposing this sentence.

CONCLUSION

The record is insufficient to review on direct appeal Ramirez' claim of ineffective assistance of counsel, and accordingly, we decline to address it. The district court did not abuse its discretion in sentencing Ramirez to 25 to 30 years' imprisonment for first degree sexual assault. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
STEVEN D. SCOTT, APPELLANT.
824 N.W.2d 668

Filed November 30, 2012. No. S-11-894.

1. **Constitutional Law: Statutes: Judgments: Appeal and Error.** The constitutionality and construction of a statute are questions of law, regarding which the Nebraska Supreme Court is obligated to reach conclusions independent of those reached by the court below.
2. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
3. **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.
4. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
5. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
6. **Judges: Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.
7. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.
8. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and

unless an abuse of discretion is shown, the trial court's determination will not be disturbed.

9. **Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 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. Those matters are for the finder of fact.
10. **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.
11. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of constitutionality.
12. **Constitutional Law: Statutes: Appeal and Error.** As a general rule, in a challenge to the overbreadth and vagueness of a law, a court's first task is to analyze overbreadth.
13. **Constitutional Law: Statutes.** A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech. A statute may be invalidated on its face, however, only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies. Stated another way, in order to prevail upon a First Amendment facial attack to the constitutionality of a statute, the challenger must show either that every application of the statute creates an impermissible risk of suppression of ideas or that the statute is "substantially" overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court.
14. **Criminal Law: Intent.** Mens rea should apply to each of the statutory elements which criminalize otherwise innocent conduct.
15. ____: ____. Neb. Rev. Stat. § 28-1351 (Cum. Supp. 2012) requires that at the time of an alleged violation, the defendant had actual knowledge that members of a group engage in or have engaged in any of the specified criminal activities for the benefit of, at the direction of, or on behalf of the organization, group, enterprise, or association or any of its members.
16. **Constitutional Law: Criminal Law: Statutes.** Neb. Rev. Stat. § 28-1351 (Cum. Supp. 2012) is not so overbroad as to infringe First Amendment rights of association.
17. ____: ____: ____. The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
18. **Constitutional Law: Statutes: Standing.** To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and furthermore cannot maintain that the statute

is vague when applied to the conduct of others. A court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court. The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied.

19. **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 created only the possibility of prejudice.
20. **Trial: Due Process: Evidence.** Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith or the prosecution.
21. **Evidence: Words and Phrases.** Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
22. **Trial: Evidence: Juries: Appeal and Error.** Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant.
23. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
24. **Judges: Trial.** As a general rule, a judge is required to be present at all stages of a trial.
25. ____: ____. The temporary absence of the trial judge is not reversible error unless the defendant shows prejudice resulting from the absence.
26. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal.
27. **Appeal and Error: Words and Phrases.** Plain error is error of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed in part, and in part vacated and remanded with directions for resentencing.

Steve Lefler, of Lefler & Kuehl Law, for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Steven D. Scott appeals his convictions for second degree assault, use of a deadly weapon to commit a felony, and unlawful membership recruitment into an organization or association, a Class IV felony under Neb. Rev. Stat. § 28-1351 (Cum. Supp. 2012). Scott claims that the district court for Douglas County erred with respect to numerous evidentiary and other trial rulings and when it rejected his constitutional challenges to § 28-1351. We affirm Scott's convictions. We reject Scott's argument that the district court imposed excessive sentences, but we note plain error in Scott's sentencing, wherein the sentencing court erroneously ordered the sentence for use of a deadly weapon to be served concurrently with the sentence for unlawful recruitment. We therefore vacate Scott's sentences and remand the cause to the district court to resentence so that the sentence for use of a deadly weapon is ordered to run consecutively to the other sentences imposed.

STATEMENT OF FACTS

The charges against Scott arose from allegations that he assaulted Samuel Kelley on November 20, 2010. Kelley testified at trial that he met Scott when they were both middle school students. Kelley and Scott were friends through middle school and high school.

Kelley testified that he was "kicked out" of his parents' house in October or November 2009 when he was 20 years old. Scott offered to let Kelley stay at his apartment. Kelley knew that in high school, Scott and three of his friends called themselves "the White Rider Clique." Scott was still involved with the group when Kelley moved into Scott's apartment in 2009. While staying with Scott, Kelley came to realize that the group was involved in criminal activities. Scott referred to the group as the "family," and the group would have "family meetings" where they would "talk about family business." Scott was one of the "bosses," and Scott described the group to Kelley as a criminal organization whose hierarchy was based on the characters from the television series the "Sopranos." The goals of the group were to "start small and get big and recruit." Scott

told Kelley that if he were to become part of the group, he "would need to watch a good amount of the Sopranos' seasons so [he] could get a better feel for what the family was like by watching the TV show."

Kelley testified that Scott asked Kelley to sell marijuana for him. Kelley agreed to do so because he was short on cash. Their arrangement was that Scott would front Kelley an ounce of marijuana and that Kelley would pay Scott $90 after he had sold the ounce, keeping any additional money from the sale. Scott obtained the marijuana from one of the other members of the "family." Kelley sold marijuana for Scott three or four times during the month that he lived with Scott.

Kelley testified that Scott also asked him to get close to two known drug dealers they had met at a party in order to determine their whereabouts so that Kelley and Scott "could jump them and steal their drugs or cash or whatever they had on them." Kelley said "yes" to Scott, but instead of carrying out the plan, Kelley warned the targets of Scott's intent.

On November 20, 2009, Kelley signed up to join the U.S. Army Reserve. Kelley told Scott that because he had joined the Army, he would no longer sell marijuana. Scott told Kelley that he still had to sell one last ounce that Scott had obtained for him but that whether or not he sold the ounce, he still owed Scott $90. Kelley moved back to his parents' home and left the ounce of marijuana at Scott's apartment. Kelley did not answer Scott's calls over the next 2 weeks because he knew Scott wanted him to sell the ounce of marijuana. Scott and another member of the "family" came to see Kelley at his parents' house. Scott told Kelley that because he did not join the "family," in addition to the $90 Kelley owed for the ounce of marijuana, he owed Scott rent for the time he stayed in the apartment. Scott told Kelley to pay $300 "or bad things are going to happen." Kelley did not pay, and he avoided contact with Scott until he left for basic training in South Carolina in February 2010.

Kelley returned to Omaha in August 2010. Kelley did not see Scott again until a night in November when he was leaving a party at his friend Nate Chalupa's house and, as he got into his car, Scott "ran up behind [Kelley], hit [him] with a

hammer a couple of times." Kelley testified that when getting into his car, he dropped his key. As he reached down for the key, he heard a voice say, "what the fuck is up?" Kelley recognized the voice as Scott's and said the phrase was one that Scott commonly used. Kelley was hit in the head two or three times before he turned around and grabbed the wrist of the person hitting him. The person was wearing black clothes and a black ski mask and was holding a small ball peen hammer. Jacob Novacek, a friend of Kelley's, tackled the attacker to the ground. As Kelley kicked the attacker, the ski mask was pulled off and Kelley recognized him as Scott. Kelley and Novacek backed off. Scott got up and came after Kelley with the hammer and hit him in the forehead and once or twice in the head. Chalupa had come out of his house and punched Scott once or twice before Scott ran off. As he was running, Scott stopped and said to Kelley, "don't get the cops involved, your family is next." Novacek ran after Scott but did not catch him. Friends took Kelley to a hospital where he got six stitches in his forehead and four staples in the top of his head.

The State charged Scott with second degree assault, use of a deadly weapon to commit a felony, and terroristic threats. The State amended the information to add a count of unlawful membership recruitment into an organization or association in violation of § 28-1351. Scott filed a motion to quash in which he asserted that § 28-1351 was unconstitutional because it was unconstitutionally vague and overbroad and violated his rights of free speech and assembly. After a hearing, the court rejected Scott's constitutional challenges to § 28-1351, finding that the statute was not vague or overbroad and did not infringe Scott's rights to free speech and assembly, because it did not criminalize his association with a group but instead criminalized unlawful recruitment of others into the group through prohibited means.

At trial, the State presented Kelley's testimony as described above. During Kelley's testimony, the State asked about the police investigation of his allegations against Scott. Kelley testified that after he talked to police at the hospital, officers came to his house to question him about the assault. The State asked, "And did they show you a photo line-up?" to which

Kelley replied, "They did." The State then asked, "And were you able to pick someone out of that photo line-up?" to which Kelley replied, "I was." At that point, Scott objected based on hearsay, and after the court overruled the objection, Scott's counsel approached the bench and moved for a mistrial based on testimony regarding an out-of-court identification by use of a photographic array. The court did not immediately rule on the motion and recessed the trial for the day.

The next day, outside the presence of the jury, the court stated that it would sustain Scott's hearsay objection to the questioning regarding the photographic identification and would instruct the jury to disregard it. The court overruled the motion for a mistrial, reasoning that the witness had already identified the defendant and that an instruction to the jury to disregard the questioning would be adequate.

When the jury returned to the courtroom, the court instructed as follows: "Yesterday right when we finished, there was a back and forth about a photo array and an objection was made regarding that exchange. The objection is sustained, and you will please disregard the exchange having to do with the photo array." The State continued its direct examination of Kelley. The court did not give, and Scott did not request, a written instruction on the matter.

Later in the trial, the State called Novacek, the friend who was with Kelley at the time of the assault, as a witness. During Novacek's direct examination, the State asked Novacek whether he recognized anyone in the courtroom as the person who assaulted Kelley, and Novacek identified Scott. The court overruled Scott's objection based on foundation and improper discovery. The State twice asked Novacek whether police had asked him to identify the assailant or had shown him a photographic lineup. The court twice overruled an objection by Scott, and Novacek twice replied, "No."

After Novacek's testimony, the court called a recess, during which Scott moved for a mistrial on the basis that the State had not disclosed prior to trial that Novacek would identify Scott as the assailant. Scott's counsel stated that he had been told that Kelley and Chalupa were the only witnesses who would identify Scott. Scott's counsel argued that if he had

known Novacek would identify Scott, he would have deposed Novacek in order to more effectively cross-examine him at trial. The State argued in response that it had provided all the evidence it was required to provide Scott prior to trial but that the State itself did not know prior to Novacek's testimony that he was able to identify Scott. The court denied Scott's motion for mistrial.

During the State's redirect examination of one of the police detectives, the State asked the detective whether photographic lineups, if they had been done, would have been done by other detectives. The court overruled Scott's objection, and the detective replied that if lineups were done, they would have been done by others.

At the beginning of the trial, Scott filed a motion in limine to prevent admission of evidence that the police had found firearms during searches of Scott's vehicle and his home. The court reserved ruling on the motion in order to consider the evidence in the context in which it was offered. An officer who searched Scott's home and vehicle testified at trial that he found an assault rifle in Scott's home and firearms in the glove box and trunk of his vehicle. The court overruled Scott's relevance objections.

In his defense, Scott presented testimony of witnesses, including Grant Arbaugh, who testified that he was at the party the night Kelley was assaulted. Arbaugh witnessed the assault and saw the attacker after the ski mask came off. Arbaugh stated that he knew Scott and that the attacker was not Scott. During cross-examination, the State asked Arbaugh where on his body he had tattoos. The court overruled Scott's objection based on relevance. Arbaugh testified that he had tattoos on his knees and back and in response to further questioning testified that the tattoo on his back said "Family above all." On redirect examination by Scott, Arbaugh testified that the tattoo referred to his actual family rather than to his friends.

After deliberations, the jury found Scott guilty of second degree assault, use of a deadly weapon to commit a felony, and unlawful membership recruitment into an organization or association. The jury found him not guilty of terroristic threats. The court entered judgment based on the verdicts.

Scott filed a motion for new trial or to vacate the judgment on various bases. He amended the motion to include an assertion that the trial judge "repeatedly left the courtroom during testimony." The judge who had presided over the trial retired after the judgment was entered, and the motion was randomly assigned to a new judge. At a hearing on the motion, the court received into evidence five affidavits offered by Scott. The affidavits were of friends and family of Scott who had attended the trial. Each affiant stated that he or she "was present for the entirety" of the trial and "saw the Trial Court repeatedly leave the courtroom during various phases of the trial." Scott's counsel stated at the hearing that four of the affiants were present and could testify further if the court wished. The State told the court that it could obtain and provide affidavits of the judge who presided over the trial, the bailiff, and another person who was present at the trial "to further delineate the allegations of the judge leaving the courtroom." Scott's counsel conceded that the judge's absences were not made a part of the record and stated that he did not think that the judge had absented himself during objections or anything counsel "would consider to be important to the unfolding of the trial." Scott's counsel further stated that the judge left the bench "four or five times," that the "longest period of time [the judge] would have been gone was . . . two or three minutes," and that most times "would have been shorter than that." The State's counsel said that the judge "got up and left the bench . . . four or five times" but had gone out a door 15 feet from the bench and returned after being gone "a few seconds at most." The court overruled Scott's motion for new trial.

The court sentenced Scott to imprisonment for 4 to 5 years for second degree assault, 4 to 5 years for use of a deadly weapon, and 1 to 2 years for unlawful membership recruitment. The court ordered the sentences on the assault and use of a deadly weapon convictions to be served consecutively to one another and ordered the sentence on the unlawful recruitment conviction to be served concurrently to the other two sentences.

Scott appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

Scott claims that the court erred when it (1) rejected his constitutional challenges to § 28-1351, (2) overruled his motion for mistrial based on Kelley's testimony regarding an out-of-court identification based on a photographic array, (3) allowed Novacek's identification of Scott at trial, (4) overruled his objections to evidence regarding firearms found during searches of his home and vehicle, (5) overruled various hearsay objections, (6) allowed evidence regarding Arbaugh's tattoo, and (7) overruled his motion for new trial based on the trial judge's absences from the courtroom. Scott also asserts that there was not sufficient evidence to find that he was part of a "gang," that the cumulative errors resulted in an unfair trial, that the court erred when it overruled his motion for new trial based on various issues, and that the court imposed excessive sentences.

STANDARDS OF REVIEW

[1] The constitutionality and construction of a statute are questions of law, regarding which we are obligated to reach conclusions independent of those reached by the court below. *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011).

[2] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[3-5] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Vigil*, 283 Neb. 129, 810 N.W.2d 687 (2012). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Vigil, supra*. A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011).

[6] The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion. *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

[7] Apart from rulings under the residual hearsay exception, we will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds. *State v. Vigil, supra*.

[8] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

[9] 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. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). And in our review, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact. *Id*.

[10] 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

The District Court Did Not Err When It Rejected Scott's Claim That § 28-1351 Is Constitutionally Vague or Overbroad or That It Violates First Amendment Rights.

Scott first claims that the district court erred when it rejected his constitutional challenges to § 28-1351. Scott asserts that the statute is unconstitutionally vague and overbroad because

it violates the First Amendment by infringing his rights of free association. The First Amendment in part prohibits laws that "abridg[e] the freedom of speech . . . or the right of the people peaceably to assemble." We conclude that the district court did not err when it rejected Scott's constitutional challenges to § 28-1351.

The statute challenged by Scott, § 28-1351(1), provides in part:

> A person commits the offense of unlawful membership recruitment into an organization or association when he or she knowingly and intentionally coerces, intimidates, threatens, or inflicts bodily harm upon another person in order to entice that other person to join or prevent that other person from leaving any organization, group, enterprise, or association whose members, individually or collectively, engage in or have engaged in any of the following criminal acts for the benefit of, at the direction of, or on behalf of the organization, group, enterprise, or association or any of its members[.]

The statute thereafter lists various criminal acts, including, inter alia, robbery, assault, theft, and violations of the Uniform Controlled Substances Act involving possession with intent to deliver, distribution, delivery, or manufacture of a controlled substance.

[11] We note first that a statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of constitutionality. *Sarpy Cty. Farm Bureau v. Learning Community*, 283 Neb. 212, 808 N.W.2d 598 (2012). We further note that the wisdom of a statute is not at issue in a constitutional challenge and that it is not this court's duty to determine whether the statute should have been enacted. See *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 545-46, 731 N.W.2d 164, 176 (2007) (this court "'does not sit as a superlegislature to review the wisdom of legislative acts'") (quoting *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003)).

Scott's First Amendment arguments are interwoven with his overbreadth arguments. In effect, he argues that § 28-1351 is overbroad because it punishes conduct that is protected by the

First Amendment. Therefore, Scott's First Amendment challenge will be analyzed in connection with his argument that § 28-1351 is overbroad.

[12,13] As a general rule, in a challenge to the overbreadth and vagueness of a law, a court's first task is to analyze overbreadth. *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009). A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech. *Id.* A statute may be invalidated on its face, however, only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies. *Id.* Stated another way, in order to prevail upon a First Amendment facial attack to the constitutionality of a statute, the challenger must show either that every application of the statute creates an impermissible risk of suppression of ideas or that the statute is "substantially" overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court. See *id.*

As support for his argument that § 28-1351 is overbroad and infringes First Amendment rights, Scott refers us to *State v. Manzanares*, 152 Idaho 410, 272 P.3d 382 (2012), in which the Idaho Supreme Court rejected a constitutional challenge to a statute criminalizing recruitment into a "criminal gang." See Idaho Code Ann. § 18-8504(1)(a) (Cum. Supp. 2009). Scott maintains that the reasoning of the partial dissent in that case was more persuasive than that of the majority. The dissent in *Manzanares* reasoned that the statute's definition of "criminal gang" was broad enough to include intimate or expressive associations that were entitled to First Amendment protection and, in addition, that the statute required no intent on the part of the defendant that the recruit engage in criminal activity. *Id.* (Horton, J., specially concurring in part, and in part dissenting).

We do not believe the rationale of the partial dissent in *Manzanares* controls the outcome of the current challenge. As an initial matter, the Idaho statute at issue in *Manzanares*

differs from § 28-1351 in significant respects. The Idaho statute makes it a crime merely to recruit a member regardless of the methods used and, at least in the view of the dissent, regardless of whether the defendant intends for the recruit to engage in criminal activity. Nebraska's statute, however, does not criminalize every method a person might use to recruit or retain members; instead, it is a crime only when the accused "coerces, intimidates, threatens, or inflicts bodily harm" on the target. The focus of § 28-1351 is on the methods used to recruit or retain members.

Furthermore, § 28-1351 does not use the problematic "criminal gang" language of the Idaho statute; instead, it refers to an "organization, group, enterprise, or association whose members, individually or collectively, engage in or have engaged in any of" the specific listed criminal acts "for the benefit of, at the direction of, or on behalf of the organization, group, enterprise, or association or any of its members." The Nebraska statute defines the type of associations at issue as being limited to those whose members engage in criminal activity, which activity is at least part of the purpose of the association. Such definition narrows the statute such that it is not so broad as to encompass constitutionally protected association.

[14,15] We further note that § 28-1351 includes a requirement that the defendant "knowingly and intentionally" commit the act. Such mens rea should be applied to all the elements of the crime. See *State v. Ryan*, 249 Neb. 218, 226, 543 N.W.2d 128, 137 (1996) ("[m]ens rea should apply to each of the statutory elements which criminalize otherwise innocent conduct"), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). As we read the statute, in order to convict a person charged with violating § 28-1351(1), the State must prove that at the time of the alleged violation, the defendant had actual knowledge that members of the group "engage in or have engaged in" any of the specified criminal activities "for the benefit of, at the direction of, or on behalf of the organization, group, enterprise, or association or any of its members."

[16] With this reading of the statute, we conclude that § 28-1351 is not so overbroad as to infringe First Amendment

rights of association. It does not criminalize mere recruitment by any means; instead, it criminalizes specific behaviors used to recruit or retain members. Simply asking or peacefully encouraging a person to join a group would not constitute coercion, intimidation, threats, or the infliction of bodily harm. Furthermore, the statute does not target intimate or expressive associations but instead focuses on associations for which members engage in specified criminal activities, and the statute requires that an individual charged under the statute must be aware of such activities.

[17,18] With regard to Scott's vagueness challenge, we note that the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. See *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009). To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and furthermore cannot maintain that the statute is vague when applied to the conduct of others. *Id*. A court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court. *Id*. The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied. *Id*.

Scott's argument with regard to vagueness is not entirely clear. He argues that the statute does not clearly define a "criminal gang." However, § 28-1351 does not use the words "criminal gang" and instead refers to recruitment into an "organization, group, enterprise, or association whose members, individually or collectively, engage in or have engaged in" specific criminal acts "for the benefit of, at the direction of, or on behalf of the organization, group, enterprise, or association or any of its members." The acts for which Scott was charged were clearly prohibited by the statute. He was accused of using coercion, intimidation, threats, and the infliction of bodily harm to prevent Kelley from discontinuing his relationship with the "family," at least until Kelley completed the final marijuana sale by paying Scott. Scott knew of the criminal acts

of the group. Because the acts for which Scott was charged clearly fall within the prohibition of § 28-1351, we conclude that he does not have standing to assert a claim of unconstitutional vagueness.

Having concluded that Scott has not shown that § 28-1351 is unconstitutionally vague, overbroad, or violative of First Amendment rights, we find no merit to his claim that the district court erred when it rejected his challenges.

Testimony Regarding Photographic Array Identification Did Not Merit a Mistrial.

Scott claims that the district court erred when it overruled his motion for mistrial based on Kelley's testimony that the police had shown him a photographic array and that he was able to pick someone out of the array. We conclude that such testimony did not warrant a mistrial.

Although we have held that testimony regarding an out-of-court identification is hearsay, see *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992), in this case, Kelley did not testify that he identified Scott in a photographic lineup, only that he was shown the lineup and that he was able to identify "someone." To the extent it could be inferred that he identified Scott, we note that the trial court ruled the testimony inadmissible and instructed the jury to disregard it. Furthermore, the instructions at the end of the trial included an instruction that the jury was not to consider any evidence the judge had told them to disregard.

[19] 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 created only the possibility of prejudice. *Id.*

Scott argues that despite the court's instruction, there was prejudice because the State "reintroduced" the evidence when

it asked other witnesses about photographic lineups. Brief for appellant at 32. However, in the incidents to which Scott refers, no witness testified that anyone had identified Scott in a photographic lineup. Instead, Novacek testified that he had not been shown a photographic lineup, and a police detective testified that if a photographic lineup had been conducted in this case, it would have been conducted by another detective. Nothing in these exchanges would have caused the jury to consider the evidence in connection with Kelley's photographic lineup testimony that the court had told the jury to disregard.

We conclude that the district court did not abuse its discretion when it overruled Scott's motion for mistrial based on testimony related to any photographic array.

The District Court Did Not Err When It Allowed Novacek to Identify Scott at Trial.

Scott claims that the district court erred when it rejected his challenge based on *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), to Novacek's in-court identification of Scott. He asserts that the State had not told him prior to trial that Novacek would identify him. Scott argues that if he had known Novacek was going to identify him, he would have prepared differently for his cross-examination of Novacek and would have deposed Novacek prior to trial. We conclude that *Brady* was not applicable to this evidence and that the court did not err when it allowed the evidence.

[20] In *Brady*, the U.S. Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith or the prosecution." 373 U.S. at 87. We have stated that there are three components of a true *Brady* violation: "'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'" *State v. McGee*, 282 Neb. 387, 394, 803 N.W.2d 497, 504 (2011) (quoting *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)).

We determine that there was not a *Brady* violation in this instance and that this assignment of error is without merit. The testimony at issue is Novacek's identification of Scott as the person who attacked Kelley. This evidence was not favorable or exculpatory to Scott but was instead inculpatory. It is not the type of evidence to which *Brady* is directed. For completeness, we note that to the extent Scott's argument is that the State acted improperly in some other way, the record shows the State informed the district court that it did not know prior to trial that Novacek could identify Scott and therefore could not have taken steps to suppress such evidence.

We conclude that there was not a *Brady* violation, because the evidence was not exculpatory. The district court did not err when it rejected Scott's challenge to the testimony.

The District Court Did Not Err When It Admitted Evidence That Firearms Were Found During Searches of Scott's Home and Vehicle.

Scott claims that the district court erred when it overruled his objections to evidence that police found firearms when they searched his home and his vehicle. We conclude that the court did not err.

Scott argues that his ownership of guns was not relevant to the charges against him because he was not accused of using a firearm to assault Kelley. He asserts that unfair prejudice outweighed the probative value of the evidence. As the State notes, Scott's objection at trial was based only on relevance. He did not assert an objection based on Neb. Evid. R. 403, which generally provides for the exclusion of evidence where the risk of prejudice outweighs its probative value.

[21] 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. *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011). The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion. *Id.*

We determine that the evidence was relevant to the unlawful recruitment charge under § 28-1351 in that the jury could see it as further circumstantial evidence that Scott and the "family" were involved in one or more of the criminal activities listed in the statute, which might be accomplished by use of firearms. The firearms would support Kelley's testimony that the group members saw themselves as a "Sopranos"-style group, and not as an innocent association of individuals.

We conclude that the trial court did not abuse its discretion when it determined that the firearms evidence was relevant and allowed its admission.

The District Court Did Not Commit Reversible Error When It Rejected Scott's Hearsay Objections.

Scott claims that the district court erred when it overruled his hearsay objections to various pieces of testimony. We conclude that such instances either were not error or were harmless error. Furthermore, the admission of such items of evidence did not deny Scott due process.

Scott notes various points in the trial when he raised a hearsay objection to testimony and the court overruled the objection. He makes little argument regarding any specific evidence. An example of the evidence claimed to have been prejudicial was the admission of Kelley's testimony regarding Scott's efforts to find Kelley after he moved out of Scott's apartment by asking Kelley's friends. Scott argues that he was denied due process because the court overruled numerous hearsay objections.

[22,23] Having reviewed the objections noted by Scott, we conclude that to the extent the court's overruling any of the objections was error, it was harmless error. Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant. *State v. Freemont, ante* p. 179, 817 N.W.2d 277 (2012). Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether

the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *Id*.

The pieces of testimony noted by Scott were not of great import in the context of the trial and in light of other evidence supporting the charges against Scott. A rational trier of fact would not have accorded much weight to the items complained of, and the outcome was surely not attributable to their admission. To the extent any of the testimony cited by Scott was inadmissible hearsay, we conclude that its admission was harmless error. Scott was not denied due process.

The District Court Did Not Err When It Admitted Evidence Regarding Grant Arbaugh's Tattoos.

Scott claims that the district court erred when it overruled his relevance objections to questions during the State's cross-examination of Arbaugh. We reject this argument.

Arbaugh was a witness for the defense. In its cross-examination of Arbaugh, the State asked questions regarding Arbaugh's tattoos, which included a tattoo that read "Family Above All." Scott argues the testimony was unfairly prejudicial because it indicated that Arbaugh was in a gang with Scott and that it was improperly used to damage Arbaugh's credibility.

The testimony was only that Arbaugh had the tattoo and what it said. There was no testimony to the effect that the tattoo meant he was part of a gang, and to the contrary, Arbaugh testified on redirect that it referred to his actual family, not to his group of friends. To the extent the State was asking the questions in an attempt to show that Arbaugh was a member of the "family" about which Kelley testified, such evidence was relevant to the jury's assessment of Arbaugh's credibility. Such evidence would show the nature of his association with Scott. Any prejudice which might result was not unfair prejudice, because it was relevant and Scott had the opportunity on redirect to let Arbaugh explain the meaning of the tattoo.

We conclude that the district court did not abuse its discretion by allowing this evidence, and we reject this assignment of error.

Scott Has Not Shown Prejudice as a Result of the Judge's Absences During Trial, and the District Court Did Not Err When It Denied the Motion for New Trial on This Basis.

Scott claims that the district court erred when it overruled his motion for new trial based on several brief instances in which the trial judge absented himself from the courtroom. Although we disapprove of the judge's practice, we conclude that Scott did not establish prejudice resulting from the judge's absences and that the district court did not err when it overruled the motion for new trial on this basis.

[24,25] In *State v. Smith*, 256 Neb. 705, 710, 592 N.W.2d 143, 147 (1999), we stated that "[a]s a general rule, a judge is required to be present at all stages of a trial." However, we have recognized that "the absence of the trial judge from the courtroom is not always prejudicial." *Id.* In both *Smith* and *Shaffer v. State*, 124 Neb. 7, 244 N.W. 921 (1932), this court concluded that under the circumstances of those particular cases, the record did not show that any prejudicial error resulted from the temporary absence of the judge and that therefore, the absence did not amount to reversible error. In *Smith*, we cited with favor cases from other jurisdictions holding that the temporary absence of the trial judge is not reversible error unless the defendant shows prejudice resulting from the absence.

In the present case, Scott has not shown prejudice resulting from the trial judge's conduct. He argues that the absences sent a message to the jury that those portions of the trial when the judge left were not important. However, Scott made no objection to the judge's absences during the trial and made no record of such absences or how such absences correlated to particular testimony. The affidavits that Scott submitted in support of his motion for new trial were not specific regarding the number of absences or the points in the trial when such absences occurred. Scott has not shown with any specificity the number, duration, or timing of the absences and has not shown any prejudice that resulted from the absences.

As we noted in the above-cited cases, we again emphasize that a judge should be present at all stages of the trial and

should avoid absences for any length of time while proceedings are underway. However, because Scott did not show prejudice resulting from the judge's admittedly brief absences, we conclude that the district court did not abuse its discretion when it rejected these assertions as a basis for a new trial.

There Was Sufficient Evidence To Support Scott's Conviction for Violating § 28-1351.

Scott asserts that there was insufficient evidence to establish that Scott was part of a "gang" under § 28-1351. We note that "gang" is not an element of § 28-1351, and we conclude that there was sufficient evidence to support the conviction under § 28-1351 as written.

Scott's argument regarding sufficiency of the evidence relates only to his conviction under § 28-1351; he asserts that other than Kelley's testimony regarding the "family," there was no evidence to establish that Scott was in a "gang." However, § 28-1351 does not refer to a "gang," and therefore, the State was not required to prove that Scott was in a "gang." Instead, the statute refers to an "organization, group, enterprise, or association whose members, individually or collectively, engage in or have engaged in" specific criminal acts "for the benefit of, at the direction of, or on behalf of the organization, group, enterprise, or association or any of its members." Kelley's testimony in itself was sufficient to show that Scott and his friends were an "organization, group, enterprise, or association." He testified that Scott described the group as a criminal organization that styled itself after the "Sopranos." His testimony also established that Scott involved Kelley in selling marijuana, a violation of the Uniform Controlled Substances Act, which is one of the criminal acts listed in § 28-1351. Kelley's testimony also indicated that Scott at least planned to carry out a theft of drugs, another crime. Kelley testified that at least one other member of the group provided marijuana for Scott and Kelley to sell, and it therefore can be inferred that the crimes in which Scott got Kelley involved were for the benefit of the group. The evidence was sufficient to establish the required elements of § 28-1351.

Given the language of § 28-1351, we also consider whether there was sufficient evidence that Scott's actions were intended to entice Kelley to join or prevent him from leaving the association. There is no direct evidence of Scott's intent, but circumstantial evidence can be sufficient to infer intent. See *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007) (perpetrator's state of mind is question of fact, and such fact may be proved by circumstantial evidence).

We acknowledge first that the assault on November 20, 2010, might not be evidence to support the conviction under § 28-1351 because, by that time, it is probable that Scott no longer intended to recruit Kelley or keep him in the organization, and it is more probable that the motive for the assault was to carry through on earlier threats. However, the charge under § 28-1351 in the information and the court's instruction to the jury regarding the charge referred to events occurring from November 1, 2009, through November 20, 2010. Actions by Scott during that timeframe, particularly in the early part of the timeframe, could reasonably have been found to be intended to recruit or retain Kelley as a member of the "family." There was evidence that in November or December 2009, Scott told Kelley that he had to pay for the last ounce of marijuana that Scott had obtained for Kelley to sell "or bad things are going to happen." Scott also told Kelley that he owed Scott money for rent because Kelley did not join or wish to retain membership in the family. To the extent that the sale of marijuana was part of the activity of the "family," Scott's threats to Kelley could be seen by the jury as an attempt to keep Kelley in the "family," at least to the extent of completing one final sale. In the words of § 28-1351, Scott's actions in late 2009 could be seen as coercing, intimidating, or threatening Kelley with the intent to entice him to join or to prevent him from leaving the organization. This evidence was sufficient to support the conviction under § 28-1351.

We conclude that there was sufficient evidence to support Scott's conviction under § 28-1351.

Scott Was Not Denied a Fair Trial, and the District Court Did Not Err When It Denied His Motion for New Trial.

Scott asserts that the cumulative impact of all errors of which he complains resulted in an unfair trial. He also claims that the district court erred when it overruled his motion for new trial based on various errors during trial. Scott's argument in this regard is dependent upon the arguments we have already rejected with respect to his other assignments of error. Therefore, we also find these assignments of error to be without merit. See *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

The District Court Did Not Impose Excessive Sentences.

Finally, Scott asserts that the district court imposed excessive sentences. 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). Although we conclude below that the district court committed plain error when it failed to make the use of a deadly weapon sentence consecutive to all other sentences, we conclude that the length of the sentences as to each count was not an abuse of discretion.

In the sentencing order filed October 17, 2011, the district court ordered the following sentences: assault count, 4 to 5 years, consecutive to the use of a deadly weapon count and concurrent with the unlawful recruitment count; use of a deadly weapon count, 4 to 5 years, consecutive to the assault count and concurrent with the unlawful recruitment count; and unlawful recruitment count, 1 to 2 years, concurrent to the assault count and concurrent to the use of a deadly weapon count.

Scott acknowledges that the sentences were within statutory limits, but he argues that they were "excessive and disproportionate to the severity of the offense when considered with his background and lack of prior record." Brief for appellant at 43. He notes that for the three convictions, he was sentenced to imprisonment for a total of 8 to 10 years. Scott gives little

specific argument to support the assertion that the sentences were excessive.

The State refers us to the record where the sentencing court stated that the crime was a serious crime of violence with no rational motivation. The State notes the violent nature of the offense, Scott's unwillingness to take responsibility, and the probation officer's recommendation for substantial periods of incarceration. The State concedes Scott's lack of criminal history, but notes that he scored in the very high risk range for procriminal attitude/orientation and the high risk range for antisocial behavior.

In light of the considerations noted by the sentencing court and the State, we conclude that Scott has not shown that the sentencing court abused its discretion with respect to the amount of time imposed on each count. We reject Scott's argument that the court imposed excessive sentences.

The District Court Committed Plain Error When It Failed to Order That Scott's Sentence for Use of a Deadly Weapon Be Served Consecutively to All Other Sentences.

Although we reject Scott's argument that the district court imposed excessive sentences, we note plain error because the court explicitly ordered Scott's sentence for use of a deadly weapon to be served concurrently with his sentence for unlawful recruitment. The sentence for use of a deadly weapon should have been ordered to run consecutively to any other sentence imposed. We therefore vacate that portion of the sentence and remand the cause to the district court with directions to enter a new sentencing order in which the sentence for use of a deadly weapon is ordered served consecutively to all other sentences.

[26,27] An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal. *State v. Hilding*, 278 Neb. 115, 769 N.W.2d 326 (2009). Plain error is error of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

Under Neb. Rev. Stat. § 28-1205(3) (Cum. Supp. 2012), the sentence for a conviction for use of a deadly weapon "shall be consecutive to any other sentence imposed." Our appellate courts have accorded plain meaning to this statute and have held that a sentence for use of a deadly weapon must be served consecutively to other sentences and not concurrently with any sentence. *State v. Al-Sayagh*, 268 Neb. 913, 689 N.W.2d 587 (2004); *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995); *State v. Tucker*, 17 Neb. App. 487, 764 N.W.2d 137 (2009). Therefore, in the instant case, the district court committed plain error when it explicitly ordered that the sentence for use of a deadly weapon would run concurrently with the sentence for unlawful recruitment. Instead, the court should have ordered that the sentence for use of a deadly weapon should run consecutively to both the sentence for assault and the sentence for unlawful recruitment and that the sentence for use of a deadly weapon not be served concurrently with any other sentence.

Furthermore, by making the use of deadly weapon sentence concurrent with the unlawful recruitment sentence, which in turn was ordered to run concurrently with the assault sentence, the court also implicitly ordered the use of a deadly weapon sentence to run concurrently with the assault sentence. Such result would also violate § 28-1205(3) and would be inconsistent with the court's proper order that the assault sentence and the use of a deadly weapon sentence be served consecutively to one another. The order that the use of a deadly weapon sentence and the unlawful recruitment sentence be concurrent was plain error, and a new order wherein the use of a deadly weapon sentence and the unlawful recruitment sentence be consecutive will resolve this sentencing issue.

We therefore vacate the portion of the sentencing order in which the court stated that Scott's sentence for use of a deadly weapon should run concurrently with his sentence for unlawful recruitment. We remand the cause to the district court with directions to enter a new sentencing order in which the sentence for use of a deadly weapon is ordered to run consecutively to both the sentence for assault and the sentence for unlawful recruitment. The sentence for use of a deadly weapon shall not

be ordered to run concurrently with any other sentence, either explicitly or implicitly.

CONCLUSION

We conclude that the district court did not err when it rejected the constitutional challenges to § 28-1351. We further reject Scott's remaining assignments of error. We therefore affirm Scott's convictions. However, we note plain error in that the court ordered the sentence for use of a deadly weapon to run concurrently with the sentence for unlawful recruitment. We vacate the sentences because the sentence for use of a deadly weapon was erroneously ordered to run concurrently with the sentence for unlawful recruitment, and we remand the cause to the district court with directions to resentence so that the sentence for use of a deadly weapon shall run consecutively to all other sentences imposed.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED WITH DIRECTIONS FOR RESENTENCING.

GREG KRZYCKI, AS TRUSTEE OF THE SHIRLEY M. KRZYCKI TRUST, APPELLEE, V. ROBIN KRZYCKI, APPELLANT.

824 N.W.2d 659

Filed November 30, 2012. No. S-11-1080.

1. **Decedents' Estates: Banks and Banking.** All personal accounts in Nebraska are subject to Neb. Rev. Stat. §§ 30-2715 through 30-2746 (Reissue 2008), concerning nonprobate transfers of accounts.
2. **Decedents' Estates: Banks and Banking: Contracts.** Pursuant to Neb. Rev. Stat. § 30-2719(a) (Reissue 2008), a contract of deposit that contains provisions in substantially the form provided in this subsection establishes the type of account provided, and the account is governed by the provisions of Neb. Rev. Stat. §§ 30-2716 to 30-2733 (Reissue 2008) applicable to an account of that type.
3. **Decedents' Estates: Banks and Banking: Contracts: Evidence: Intent.** Only if a contract of deposit does not conform to the statutory forms provided in Neb. Rev. Stat. § 30-2719(a) (Reissue 2008) may evidence be presented on the issue of the intent of the depositor.
4. **Decedents' Estates: Banks and Banking: Contracts: Intent.** Neb. Rev. Stat. § 30-2719(b) (Reissue 2008) provides that when a contract of deposit does

not conform to any of the statutory forms, it is governed by the provisions of Neb. Rev. Stat. §§ 30-2716 to 30-2733 (Reissue 2008) applicable to the type of account that most nearly conforms to the depositor's intent.

5. **Decedents' Estates: Banks and Banking: Presumptions: Proof.** Neb. Rev. Stat. § 30-2719(b) (Reissue 2008) creates no presumption in favor of a type of account and does not set any standards related to burdens of proof.
6. ____: ____: ____: ____. When a dispute exists regarding the proportional ownership of multiple-party accounts during the lifetime of the parties, not a dispute regarding who owns the account, the statutes provide that certain statutory presumptions may be overcome only by clear and convincing evidence.
7. **Decedents' Estates: Banks and Banking: Proof: Intent.** Neb. Rev. Stat. § 30-2719(b) (Reissue 2008) does not provide a certain burden of proof with which a movant must move forward. Thus, in order to succeed in proving intent, pursuant to § 30-2719(b), a movant must prove his or her case by a greater weight of the evidence only.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Clark J. Grant, of Grant & Grant, for appellant.

Wayne E. Janssen for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

Shirley M. Krzycki was the sole settlor, trustee, and beneficiary of the Shirley M. Krzycki Trust (Trust) established to hold annual payments from an insurance settlement. Shirley died unexpectedly on August 19, 2009. She was survived by her four children: Greg Krzycki, appellee; Dawn Vogt; Robin Krzycki, appellant; and Zachary Krzycki. Upon Shirley's death, Greg was named successor trustee of the Trust. Greg filed suit in Lancaster County District Court claiming that sums on deposit in a Wells Fargo Bank (Wells Fargo) account, formerly owned by Shirley as "Primary Joint Owner," were property of the Trust. Shirley's daughter Robin was originally named "Secondary Joint Owner" on this account, and Robin refused to give to the Trust the sums on deposit in this account. After a bench trial, the district court held that the balance of the Wells Fargo account belonged to the Trust. Robin

appeals. We affirm, but for reasons different from those of the district court.

FACTUAL BACKGROUND

On September 5, 1982, Shirley and her husband, Ronald Krzycki, were involved in an automobile collision. Ronald was seriously injured in the collision, leaving him incapacitated. On December 27, 1984, Shirley entered into a settlement agreement related to this accident on behalf of herself individually, on behalf of her husband Ronald, and as guardian for their three minor children—Dawn, Robin, and Zachary (Greg was an adult at this time). Pursuant to the terms of the settlement, Shirley was to be paid $20,000 each November 1 for a period of 50 years, with the first payment due November 1, 1985. The settlement called for the payments to be made to Shirley during her life, and then to Shirley's estate upon her death.

On October 29, 1985, Shirley executed a will that was admitted to probate in Shirley's estate after her death. In the second paragraph, Shirley's will provides: "All of the rest, residue and remainder of my estate, both real, personal and mixed, . . . I leave to my children, share and share alike." In the third paragraph, the will provides:

> I intend to have in existence, at the time of my death, a bank account through which the settlement proceeds of a lawsuit which was filed in the year 1983 . . . . shall pass. . . . I direct that as those payments are received into said banking account, my children, or their issue by right of representation . . . , share equally in such payments. I intend to have one or more of my children listed on said account so as to enable them to obtain the funds for distribution according to this paragraph in any manner which may be convenient. I would recommend that my children consult with an accountant or an attorney in regard to the tax consequences, if any, of such payments to them, so that they can make the necessary arrangements in regard to the same.

In 1992, Shirley and Ronald divorced. A decree nunc pro tunc was filed on September 3, 1992. It contained the following language regarding the settlement payments:

> [S]ubsequent to and a [sic] result of said automobile accident a settlement was made to the benefit of the family of Ronald . . . , respondent herein; that said settlement results in a payment of $20,000.00 to [Shirley] on each and every November 1st with the final payment due on November 1, 2034; the settlement further requires that in the event petitioner, Shirley . . . die [sic] before November 1, 2034, any remaining payments set forth herein shall instead be paid, as they become due, to her estate.
>
> All remaining payments resulting from said insurance settlement, beginning with the payment due November 1, 1992, shall be paid to the . . . Trust.

The Trust was executed on August 31, 1992, as a part of the divorce settlement. Shirley was the sole settlor, trustee, and beneficiary of the Trust. According to the Trust document, the Trust was irrevocable. The Trust document provided that during her life, Shirley could pay all net income of the Trust to herself and could expend the principal of the Trust as she determined. Upon Shirley's death, after payment of expenses, the remainder of the Trust was to be paid to her four children, share and share alike. The Trust prohibited a beneficiary from anticipating, transferring, selling, assigning, or encumbering any payment or distribution of either principal or income. Paragraph VI of the Trust document provided that the trustee's powers did not include the power to gift the proceeds of the Trust.

The Trust document further provided that the property to be deposited into the Trust was contained in "Exhibit 'A'" attached to the Trust. The evidence submitted at trial did not contain an "Exhibit A." A quitclaim deed to certain farmland in Platte County, Nebraska, however, shows Shirley moved the family residence into the Trust. There is no disagreement between the parties that a valid Trust was created and still exists. There was no evidence presented at trial indicating Shirley sought legal advice or was given legal advice to assist her in establishing a separate trust account in the name of the Trust to hold the annual settlement payments. Ultimately, Shirley never established a separate trust account within the legal framework contemplated in the divorce decree.

Sometime between 2003 and 2005, Robin was out of work and needed a place to live, so she moved in with Shirley. Robin lived with Shirley until Shirley's death in 2009.

Beyond Shirley's will, the divorce decree, and the Trust document, no other writings were presented at trial expressing Shirley's intent behind her various financial transactions. The evidence does reference, however, several different bank accounts used during the last years of Shirley's life.

On September 28, 2001, Shirley completed a "Direct Deposit/Bank By Mail Enrollment Form" instructing the insurance company which was making the annual payments for the settlement at that time to deposit the annual payments into a Commercial Federal Bank (Commercial Federal) account she owned that also bore the names of Greg and Dawn. For some period prior to February 6, 2007, the annual settlement payments were deposited into this account.

The record shows that on October 28, 2005, a check for $20,000, which derived from the settlement, was deposited into the Commercial Federal account. This check was made payable to said account "FBO Shirley Krzycki, Trust." On November 1, 2006, another check for $20,000, which derived from the settlement, was deposited into the Commercial Federal account. This check was also made payable to said account "FBO Shirley Krzycki, Trust." Shirley withdrew funds from this account as needed to pay bills through a separate checking account she held with Commercial Federal, which also bore the names of Greg and Dawn.

In March 2006, Robin's name first appeared on an account with Shirley at Commercial Federal. Two of Shirley's certificates of deposit matured at this time, and she placed those funds, together with $4,649.84 from her Commercial Federal checking account, into this new account. One month later, most of the $4,649.84 was returned to Shirley's Commercial Federal checking account.

On February 6, 2007, Shirley engaged in a transfer of funds from accounts she owned with Commercial Federal to new accounts she opened with Wells Fargo. The following represents the facts of such transfer as relevant to this appeal. Shirley closed one Commercial Federal account, which bore

the names of Greg and Dawn, and transferred $31,493.87, all remaining funds, to her Commercial Federal checking account. Shirley then transferred substantially all of the funds in her Commercial Federal checking account into two new accounts she opened with Wells Fargo.

From the checking account, Shirley transferred $23,000 to open the Wells Fargo account that is the subject of this appeal. Shirley signed the documents necessary to open the account as "Primary Joint Owner." Robin was present when Shirley opened the account, and Robin signed the documents as "Secondary Joint Owner." Robin testified that she did not know why Shirley opened the account and that Shirley never indicated to Robin her intent in opening the account.

From the Commercial Federal checking account, Shirley also transferred $7,000 to a new checking account with Wells Fargo that also bore Robin's name. On the same day, Shirley's Commercial Federal account, which bore Robin's name, was also closed. Those proceeds, $42,222.82, were also moved to the new Wells Fargo account that is the subject of this appeal.

On February 22, 2007, $4,000 of the $7,000 deposited into Shirley's new Wells Fargo checking account was transferred to Shirley's Wells Fargo account that is the subject of this appeal. Such transactions show Wells Fargo became the primary bank used by Shirley at this time.

On July 26, 2007, Shirley completed a "Direct Deposit Enrollment Form" instructing the insurance company making the settlement payments to thereafter deposit the payments into the new Wells Fargo account that is the subject of this appeal. On November 1, a check for $20,000 deriving from the settlement was deposited into the Wells Fargo account. Such check was made payable to said account "FBO Shirley Krzycki, Trust." On November 1, 2008, another check for $20,000 deriving from the settlement was deposited into the Wells Fargo account. Such check was also made payable to said account "FBO Shirley Krzycki, Trust."

Shirley managed the subject Wells Fargo account on her own. Robin did not assist Shirley with the management of this account or make any action on behalf of the account. It is uncontested that beyond the annual settlement payments,

Shirley did not have any other large source of income during her life. Shirley's other sources of income included a small pension payment of $22.25 per month and a Social Security payment of approximately $1,249 per month. The monthly Social Security payments were deposited into her checking accounts.

Shirley died unexpectedly of cardiac arrest on August 19, 2009. After Shirley died, Robin presented to Wells Fargo and had the account which bore her name as "Secondary Joint Owner" transferred to her name only.

On January 28, 2011, Greg, as trustee of the Trust, filed a complaint claiming that the funds in the Wells Fargo account in the approximate amount of $77,937.09 were funds of the Trust. Greg alleged in his first cause of action that Robin had converted the funds of the Trust to her own use and asked for judgment against Robin in the amount of $77,937.09, plus interest and costs. Greg alleged in his second cause of action that Robin had come into possession of such funds subject to a constructive trust on behalf of the Trust and should be required to account for such funds and to turn such funds over to the Trust for administration according to the terms of the Trust.

Robin filed an answer alleging that when Shirley opened the Wells Fargo account, said account was owned by Shirley and Robin as joint tenants with rights of survivorship, that the Trust had no ownership interest in such account, and that Shirley intended the result at the time. After a bench trial, the district court found in favor of Greg, finding he had succeeded on both of his claims.

Specifically, the district court held that all of the funds in the Wells Fargo account were trust funds because they could be "traced" as originating from settlement payments and that to the extent Robin is the owner of that account, she owned it in constructive trust for the benefit of the Trust.[1] The district court held Robin correctly argued that the creation of a joint tenancy account establishes a presumption that Shirley intended Robin

[1] See *In re Estate of Redpath*, 224 Neb. 845, 847, 402 N.W.2d 648, 650 (1987).

to receive the funds in the account upon Shirley's death. The district court found, however, that Greg had overcome that presumption based upon the clear and convincing evidence he presented at trial.[2]

ASSIGNMENTS OF ERROR

On appeal, Robin assigns that the district court erred in (1) determining that the funds in the Wells Fargo account are trust funds belonging to the Trust, (2) determining that Greg adduced clear and convincing evidence to overcome the presumption that Shirley intended to create a joint tenancy account at Wells Fargo, and (3) imposing a constructive trust on the Wells Fargo account without any evidence that Robin obtained title to the account by fraud, misrepresentation, or an abuse of an influential or confidential relationship.

STANDARD OF REVIEW

An action for conversion sounds in law. A district court's factual determination in a bench trial in an action at law has the same effect as a jury verdict and will not be set aside unless clearly wrong.[3]

ANALYSIS

Whether Funds in Wells Fargo Account Are Trust Funds.

Robin assigns that the district court erred in finding the sums remaining on deposit in the Wells Fargo account are "trust" funds and that such funds belong to the Trust. We find the district court did not err in finding that the sums on deposit in the account are "trust" funds, because in signing her divorce decree, Shirley agreed to have the remaining settlement payments be paid to the Trust. Although Shirley never created a designated trust account within the legal framework contemplated in the divorce decree, the evidence shows the subject

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[2] See *In re Estate of Lienemann*, 222 Neb. 169, 382 N.W.2d 595 (1986) (superseded by statute as stated in *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007)).

[3] *Imperial Empire Trading Co. v. City of Omaha*, 246 Neb. 919, 524 N.W.2d 314 (1994).

account was clearly designated as the account to receive the settlement payments for the benefit of the Trust.

Shirley never created a separate trust account with any banking institution to receive the annual settlement payments. There is no evidence in the record that Shirley sought legal advice or was given legal advice as to how to do so upon signing her divorce decree. The evidence shows that from at least 2001 until her death, Shirley simply directed the annual settlement payments be deposited into regular bank accounts.

Significantly, the last four annual settlement payments for a total of $80,000 were deposited into Shirley's designated accounts "FBO Shirley Krzycki, Trust." A portion of the first two of these four payments, $27,000 of $40,000, was transferred to the subject Wells Fargo account by Shirley, while the final two of these four payments were deposited into the Wells Fargo account upon Shirley's direction, for a total of $67,000 of settlement proceeds deposited into the account "for the benefit" of the Trust. The only other deposit made into this account was a transfer in the amount of $42,222.82 from the account Shirley opened with Commercial Federal when two of her certificates of deposit matured. Because it is uncontested that Shirley had no other large source of income, it is likely this money originated from two annual settlement payments and gained interest through Shirley's various deposits. Thus, we find the district court did not err in finding that the remaining $77,937.09 on deposit in the Wells Fargo account "for the benefit" of the Trust are trust proceeds belonging to the Trust, because no other separate trust account was created.

Whether Shirley Created Joint Tenancy Account at Wells Fargo.

We next address Robin's second assignment of error on appeal. Robin asserts that she has survivorship rights to the funds on deposit in the Wells Fargo account because Shirley named her as "Secondary Joint Owner" of the account. Robin argues that in doing so, Shirley created a joint tenancy account with rights of survivorship. Robin argues the district court correctly held, pursuant to this court's holding in *In re Estate of*

Lienemann,[4] that Shirley's creation of an account with Robin produces a presumption that Shirley intended for Robin to have the remainder of the account upon her death, and that such presumption can be overcome only by clear and convincing evidence. Robin asserts the district court erred in finding that Greg overcame this presumption based upon the evidence he presented at trial.

[1] Prior to 1993, in *In re Estate of Lienemann*, this court held that if a party opens a joint bank account, there is a presumption that the depositor intended the joint owner to own the funds upon the depositor's death, but that that presumption may be overcome by clear and convincing evidence.[5] In 1993, the relevant statutory provision upon which the *In re Estate of Lienemann* holding was based was repealed and the Nebraska Legislature passed Neb. Rev. Stat. §§ 30-2715 through 30-2746 (Reissue 2008), concerning nonprobate transfers of accounts. All personal accounts are subject to these statutes,[6] and the statutes are based upon §§ 6-201 through 6-227 of the Uniform Probate Code.[7] Thus, the *In re Estate of Lienemann* case, to the extent it addresses legal presumptions related to ownership of joint bank accounts, is no longer good law, and the district court erred in relying upon it.

[2,3] Pursuant to § 30-2719(a) of the new statutes, "[a] contract of deposit that contains provisions in substantially the form provided in this subsection establishes the type of account provided, and the account is governed by the provisions of sections 30-2716 to 20-2733 applicable to an account of that type." Thus, as this court held in *Eggleston v. Kovacich*,[8] even with clear and convincing evidence of intent, the provisions of a contract of deposit cannot be altered. Only if the contract of deposit does not conform to the statutory forms provided in

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[4] *In re Estate of Lienemann, supra* note 2.

[5] *Id.*

[6] See § 30-2718(b).

[7] Unif. Probate Code, rev. art. VI, §§ 6-201 through 6-227, 8 (part II) U.L.A. 433-48 (1998).

[8] *Eggleston v. Kovacich, supra* note 2. See § 30-2719(a).

§ 30-2719(a) may evidence be presented on the issue of the intent of the depositor.[9]

[4,5] The parties do not dispute that the contract establishing the Wells Fargo account does not conform to any of the statutory forms provided in § 30-2719(a). The Wells Fargo contract named Shirley as "Primary Joint Owner" and Robin as "Secondary Joint Owner." These titles are not listed or defined in § 30-2719(a). Pursuant to § 30-2719(a), an account may be a single-party account, a single-party account with a pay-on-death designation, a multiple-party account with a right of survivorship, a multiple-party account with a right of survivorship and a pay-on-death designation, a multiple-party account without a right of survivorship, or a single-party or multiple-party account with an agency designation. The agency designation may survive the disability or incapacity of the party or parties or terminate upon the disability or incapacity of the party or parties.[10] An agent "may make account transactions for parties but [has] no ownership or rights at death unless named as [a pay-on-death beneficiary]."[11] Section 30-2719(b) provides that when a contract does not conform to any of the statutory forms, it "is governed by the provisions of sections 30-2716 to 30-2733 applicable to the type of account that most nearly conforms to the depositor's intent." Section 30-2719(b) creates no presumption in favor of a type of account and does not set any standards related to burdens of proof.

[6,7] Accordingly, this court may look to the evidence beyond the contract of deposit establishing Shirley's intent in forming the Wells Fargo account. The court must then make a finding as to what kind of statutory account "most nearly conforms" to the account Shirley intended to create.[12] Because the proceeds of the account in dispute are in the hands of Robin, Greg has the burden to move forward with evidence

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[9] *Eggleston v. Kovacich, supra* note 2. See § 30-2719(b).

[10] § 30-2719(a).

[11] *Id.*

[12] § 30-2719(b). See, e.g., *In re Carstens*, No. BK10-83693-TJM, 2011 WL 869748 (Bankr. D. Neb. 2011).

on Shirley's intent. The court notes that when a dispute exists regarding the proportional ownership of multiple-party accounts during the lifetime of the parties, not a dispute regarding who owns the account as in this case, the statutes provide that certain statutory presumptions may be overcome only by "clear and convincing evidence."[13] However, § 30-2719(b) does not provide a certain burden of proof with which Greg must move forward.[14] Thus, the court will not write in a heightened burden of proof. We find that in order to succeed, Greg must prove his case as to Shirley's intent in creating the subject account by a greater weight of the evidence only. This appears to be the procedure Nebraska's federal bankruptcy court followed in *In re Carstens*.[15]

We find that based upon the evidence Greg provided through Shirley's will, the divorce decree, and the Trust document at trial, Shirley did not intend to create a survivorship account as Robin asserts. In her will, Shirley declared: "I intend to have in existence, at the time of my death, a bank account through which the settlement proceeds of a lawsuit which was filed in the year 1983 . . . shall pass." The parties do not dispute that the last 4 years of annual settlement payments were either directly deposited into the subject account or transferred to the account by Shirley. Shirley further expressed in her will:

> I direct that as those payments are received into said banking account, my children, or their issue by right of representation . . . , share equally in such payments. I intend to have one or more of my children listed on said account so as to enable them to obtain the funds for distribution according to this paragraph in any manner which may be convenient.

In keeping with these documents, Shirley named Robin, one of her children, on this account. Subject to the will, it is Robin's duty as one of Shirley's children "listed" on the designated account to receive the settlement payments in order

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[13] See § 30-2722(b).

[14] See *id*.

[15] *In re Carstens, supra* note 12.

to obtain the funds for equal distribution between herself and her siblings.

In signing the divorce decree to which the Trust document was attached, Shirley did not change her intent regarding the settlement funds as described in her will. The Trust document reiterates Shirley's intent that the funds from the settlement payments remaining upon her death are to be divided among her four children equally, not given solely to Robin.

We reject Robin's assertion that she had survivorship rights to the funds on deposit in the subject account. The statutes speak in terms of single-party or multiple-party accounts.[16] Based upon all the evidence presented, we find the subject account most nearly conforms to a single-party account with an agency designation. And under § 30-2720(c), the "[d]eath of the sole party or last surviving party terminates the authority of an agent." Thus, Shirley's death terminated Robin's authority as an agent. Hence, we conclude that Robin did not have survivorship rights to the funds upon Shirley's death.

Constructive Trust Claim.

Finally, Robin assigns that the district court erred in imposing a constructive trust on the Wells Fargo account without any finding that Robin obtained ownership of the account by fraud, misrepresentation, or abuse of an influential or confidential relationship. Greg sued Robin under the theories of both conversion and constructive trust. The district court found Greg succeeded on both claims. Because we have affirmed the district court's order finding Greg succeeded on his conversion claim, it is unnecessary for the court to address Robin's assignment of error related to Greg's alternate theory of recovery sounding in constructive trust.[17]

CONCLUSION

We conclude that the remaining sums on deposit in the subject Wells Fargo account "for the benefit" of the Trust are

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[16] See, e.g., §§ 30-2718(a) and 30-2719(a).

[17] See *Monahan v. School Dist. No. 1*, 229 Neb. 139, 425 N.W.2d 624 (1988).

trust funds belonging to the Trust. In creating the account, Shirley did not intend for Robin to have survivorship rights to the remaining balance of $77,937.09, and the account most nearly conforms to an agency or convenience account. Robin converted the funds in the account for her own use by refusing to turn them over to the Trust. Accordingly, we affirm the decision of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DAMIEN D. WATKINS, APPELLANT.
825 N.W.2d 403

Filed November 30, 2012. No. S-11-1105.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
3. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
4. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
5. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
6. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
7. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
8. **Postconviction: Appeal and Error.** It is fundamental that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
9. ____: ____. An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the

basis relied upon for relief was not available at the time the movant filed the prior motion.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

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

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

CASSEL, J.

INTRODUCTION

In a second postconviction proceeding, the appellant attempted to raise the issue of his competence to enter a guilty plea but he alleged no reason why the issue could not have been asserted in his direct appeal or his first postconviction proceeding. Because the need for finality in the judicial process demands application of a procedural bar rule, we affirm the district court's judgment.

BACKGROUND

In 2004, while represented by counsel, Damien D. Watkins pled guilty to second degree murder. The district court sentenced him to 40 years to life in prison.

Through appellate counsel different from trial counsel, Watkins filed a direct appeal. Watkins assigned only that the district court erred in denying his motion to withdraw his guilty plea without holding an evidentiary hearing. On November 16, 2005, in case No. S-05-271, this court sustained the State's motion for summary affirmance.

In 2006, Watkins filed a motion for postconviction relief. He alleged the denial of a fair trial and due process when the trial court accepted his guilty plea without first advising him of his right to the assistance of counsel at trial and receiving acknowledgment of that right. Watkins asserted that he was denied the effective assistance of trial counsel concerning an alleged breach of the plea agreement by the State. He also

claimed a denial of the effective assistance of appellate counsel by counsel's failure to raise the above issues on appeal. The district court appointed counsel different from trial and appellate counsel to represent Watkins. Following an evidentiary hearing, the court denied the motion. Upon Watkins' appeal assisted by yet another attorney, this court found no error and affirmed the district court's judgment.[1]

In 2011, Watkins filed a pro se second verified motion for postconviction relief and request for an evidentiary hearing. He again asserted that he was denied his constitutional rights to a fair trial, to due process of law, and to effective assistance of counsel. More specifically, Watkins alleged that his rights were violated when the trial court accepted his guilty plea without first advising him of his right to the assistance of counsel at trial and receiving an acknowledgment from Watkins, which Watkins claimed made his plea not knowingly, intelligently, voluntarily, understandingly, and freely made. Watkins alleged that he was denied the effective assistance of counsel when trial counsel (1) advised Watkins not to alert the court concerning Watkins' mental health history, (2) failed to move to suppress Watkins' confession, (3) failed to investigate the facts and merits of the case, and (4) failed to inform the court that Watkins was on a mind-altering medication. Watkins also alleged that appellate counsel failed to effectively communicate with him prior to filing the appeal and that counsel failed to raise all appealable issues. Watkins attached exhibits to his postconviction motion relating to his May 2003 admission to a mental health center.

The State moved to dismiss Watkins' motion without an evidentiary hearing, contending that Watkins was asserting arguments that could have been raised in the previous postconviction motion. The district court granted the State's motion and dismissed Watkins' motion for postconviction relief without an evidentiary hearing. The court reasoned that Watkins' "mental situation" had been known to him since he entered his plea in October 2004 and that the other issues raised in the motion had already been litigated.

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[1] See *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009).

Watkins timely appealed. The State filed a motion for summary affirmance, which we overruled.

ASSIGNMENT OF ERROR

Watkins assigns the following error: "Because Nebraska law states there is no 'procedural bar in postconviction proceedings of issues relating to competency to stand trial,' the district court erred when, based solely on its finding that the issues were procedurally barred, it dismissed . . . Watkins' competency issues without an evidentiary hearing."

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.[2]

[2-4] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.[3] If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.[4] In appeals from postconviction proceedings, we review de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[5]

[5,6] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.[6] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.[7]

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[2] *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011).

[3] *State v. Edwards, ante* p. 382, 821 N.W.2d 680 (2012).

[4] *Id.*

[5] *Id.*

[6] *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

[7] *Id.*

ANALYSIS

[7-9] The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.[8] Therefore, it is fundamental that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.[9] Similarly, an appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.[10]

Watkins had two previous opportunities to raise his competency-related claims: (1) his direct appeal and (2) his first motion for postconviction relief. His second motion for postconviction relief does not show on its face that the competency issues were unknown or unavailable to him at those earlier opportunities. Further, the motion does not attempt to state any reason why the competency issues were not raised in the prior proceedings. The record shows that no issue relating to competency was raised despite Watkins' having been represented by four different attorneys: his initial counsel at the time of his guilty plea, a second attorney on direct appeal, a third attorney during the first postconviction proceedings at the trial court level, and yet another attorney on the first postconviction appeal.

In the second postconviction proceeding, the district court concluded that the competency issues were procedurally barred because Watkins did not raise them in his first motion for postconviction relief. We agree.

Nearly 40 years ago, this court applied a procedural bar to a claim challenging competency to stand trial.[11] In *State v. Fincher*,[12] the defendant had originally filed a direct appeal challenging the excessiveness of his sentence, which was

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[8] *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

[9] *Id.*

[10] *Id.*

[11] See *State v. Fincher*, 191 Neb. 446, 216 N.W.2d 172 (1974).

[12] *Id.*

affirmed.[13] He subsequently lost on appeal from the denial of postconviction relief, where he alleged incompetence, ineffective assistance of counsel, error involving jury instructions, and a failure of proof.[14] The defendant then filed a petition for a writ of habeas corpus in federal court challenging the propriety of jury instructions on an insanity defense, the effectiveness of counsel, and the failure of the trial court to hold a hearing on the defendant's competency to stand trial. But the federal court dismissed the petition without prejudice because the defendant had not exhausted his state remedies as to the trial court's failure to hold a competency hearing. The defendant filed a second postconviction motion, which was summarily overruled. In affirming the district court's judgment on appeal, this court stated: "'There ought to be some final end to litigation in a criminal case. . . . There is no justification for allowing a prisoner to continue litigation endlessly by piecemeal [postconviction] attacks on his conviction and sentence.'"[15]

Watkins asserts that where issues relating to competency to stand trial are involved, Nebraska law does not allow a procedural bar in postconviction proceedings. He relies upon *State v. Johnson*.[16] In that case, the defendant did not file a direct appeal. In a postconviction motion, the defendant alleged that trial counsel was ineffective for failing to raise the issue of competency. The Nebraska Court of Appeals determined that the record failed to demonstrate that counsel was ineffective, but found that there was plain error due to the trial court's failure to hold a full hearing on the defendant's competency when the court was faced with reasonable doubt regarding competency. The *Johnson* court noted that *Fincher*[17] was procedurally distinguishable and stated, in dicta, "[T]he continued viability of the rule used to deny relief in *Fincher* has to be very much

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[13] See *State v. Fincher*, 188 Neb. 376, 196 N.W.2d 909 (1972).

[14] See *State v. Fincher*, 189 Neb. 746, 204 N.W.2d 927 (1973).

[15] *State v. Fincher, supra* note 11, 191 Neb. at 447, 216 N.W.2d at 173, quoting *State v. Reichel*, 187 Neb. 464, 191 N.W.2d 826 (1971).

[16] *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996).

[17] *State v. Fincher, supra* note 11.

in doubt at this point."[18] The *Johnson* court discussed two decisions from this court which suggested a procedural bar in postconviction proceedings when competency to stand trial was not raised on direct appeal: *State v. Painter*[19] and *State v. Rehbein*.[20] However, the *Johnson* court concluded that there should not be a procedural bar, stating:

> [D]espite the suggestions in *Painter* and *Rehbein*, we do not believe the law is that there is a procedural bar in postconviction proceedings of issues relating to competency to stand trial, and we decline to impose such a procedural bar for these issues in this postconviction proceeding. In reaching this conclusion, we bear in mind the sanctity of constitutional protections and the need to guard against constitutionally infirm convictions.[21]

Approximately 3 years after *Johnson*,[22] this court again applied a procedural bar to a competency claim raised for the first time in a second motion for postconviction relief.[23] In *State v. Ryan*,[24] the defendant did not raise any issues regarding competency to stand trial on direct appeal or in his first motion for postconviction relief. The trial court determined that the competency claims were procedurally barred but that even if not barred, the defendant was not entitled to relief because he was clearly competent during his trial. This court agreed, stating that because the defendant failed to raise the competency issue on direct appeal or in his first postconviction proceeding, the claim was procedurally barred unless the defendant could show that the basis for relief was unavailable when the prior motions were filed. This court reasoned that the reports on the defendant's mental condition, which were prepared before his trial, were available to the defendant and his counsel at all times. We stated, "Allowing [the defendant]

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[18] *State v. Johnson, supra* note 16, 4 Neb. App. at 800, 551 N.W.2d at 758.

[19] *State v. Painter*, 229 Neb. 278, 426 N.W.2d 513 (1988).

[20] *State v. Rehbein*, 235 Neb. 536, 455 N.W.2d 821 (1990).

[21] *State v. Johnson, supra* note 16, 4 Neb. App. at 801, 551 N.W.2d at 758.

[22] *State v. Johnson, supra* note 16.

[23] See *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

[24] *Id.*

to first raise the issue of competency after more than 10 years of appellate litigation during which [the defendant] chose not to raise the issue would make a mockery of the finality of the judicial process."[25]

Watkins points out that *Ryan*[26] did not overrule *Johnson*.[27] He contends that the *Ryan* court did not hold that the procedural bar must be imposed on every defendant who fails to raise a constitutional issue at the first opportunity and then upon subsequently raising it, fails to show that it was previously unavailable. Thus, he contends that we should not apply the procedural bar rule. We disagree.

We reaffirm our holdings in *Fincher*[28] and *Ryan*.[29] As in those cases, the instant case involves a successive motion for postconviction relief. In contrast, the competency issue was raised in *Johnson*[30] in a first postconviction proceeding after no direct appeal had been taken. While the trial court's colloquy with the defendant in *Johnson* at the time of the plea raised an obvious issue of competence, the district court's colloquy with Watkins at the time of his guilty plea does not suggest any such problem. Watkins' admission to a mental health center predated his guilty plea, and he has not alleged that his mental health records were not available to his attorneys in any of the prior proceedings. Watkins essentially asks for a rule establishing that an issue related to competency to stand trial or to enter a plea is never procedurally barred. While we recognize the constitutional imperative of an accused's competence to enter a guilty plea,[31] we reject the argument that a procedural bar can never apply to an issue of competence. Because of the need for finality, we decline to establish such a rule.

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[25] *Id*. at 662, 601 N.W.2d at 493.

[26] *State v. Ryan, supra* note 23.

[27] *State v. Johnson, supra* note 16.

[28] *State v. Fincher, supra* note 11.

[29] *State v. Ryan, supra* note 23.

[30] *State v. Johnson, supra* note 16.

[31] See *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966).

CONCLUSION

Because Watkins did not allege that the competency-related issues he raised in his second motion for postconviction relief were not available previously or could not have been raised either on direct appeal or in his first postconviction proceeding, the claims are procedurally barred. We affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RYAN L. POE, APPELLANT.

822 N.W.2d 831

Filed November 30, 2012. No. S-12-141.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
3. ____: ____. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
4. ____: ____. 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.
5. **Postconviction: Constitutional Law: Judgments: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.
6. **Postconviction.** An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law.
7. **Postconviction: Constitutional Law: Judgments: Proof.** If a defendant makes sufficient allegations of a constitutional violation which would render a judgment void or voidable, an evidentiary hearing on a motion for postconviction relief may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.
8. **Constitutional Law: Trial: Due Process.** The Due Process Clause of the U.S. Constitution guarantees every defendant the right to a trial comporting with basic tenets of fundamental fairness.

9. **Trial: Prosecuting Attorneys: Due Process.** Prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process.
10. ____: ____: ____. To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of a defendant's right to a fair trial.
11. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance test, deficient performance and prejudice, may be addressed in either order.
12. **Effectiveness of Counsel: Presumptions.** When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
13. **Trial: Attorneys at Law.** Trial counsel is afforded due deference to formulate trial strategy and tactics.
14. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** An appellate court will not second-guess reasonable strategic decisions by counsel.
15. **Effectiveness of Counsel: Proof.** To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
16. **Proof: Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed in part, and in part reversed and remanded with directions.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

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

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ., and MOORE, Judge.

MCCORMACK, J.

NATURE OF CASE

Ryan L. Poe was convicted of first degree felony murder and use of a deadly weapon to commit a felony. His convictions were affirmed on direct appeal to this court.[1] He now appeals from the dismissal of his motion for postconviction relief without an evidentiary hearing. Poe claims he was prejudiced by prosecutorial misconduct stemming from the presentation of inconsistent theories as to a key witness' involvement

[1] *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008).

in the crimes. He also claims that he was deprived of his right to effective assistance of counsel because counsel did not present certain evidence concerning Poe's financial situation, a telephone call made near the time of the crimes, a leg injury affecting his ability to carry out the crimes, and an inconsistent statement allegedly made by the State's key witness. We affirm as to all matters except the alleged inconsistent statement.

BACKGROUND

Poe was charged with first degree felony murder and use of a deadly weapon in connection with the killing of Trever Lee during a robbery of Lee's townhouse on November 11, 2004. Lee lived with two roommates who survived, one of whom called the 911 emergency dispatch service at 10:57 a.m. They testified that the robbery was committed by three masked individuals.

One of the roommates, Jeff Connely, supplied marijuana to a friend of Poe's, Antwine Harper. Harper was a key witness against Poe at trial. Harper testified that Poe had asked him for permission to rob Connely and that Poe had confessed to the crimes in great detail a few days after they were committed. There was no physical evidence linking Poe to the crime.

Opening Statements

During opening statements, defense counsel introduced the theory that Harper, not Poe, was one of the perpetrators of the robbery and murder. Defense counsel also pointed out that Harper implicated Poe only after the investigators interrogated him for hours and threatened him with criminal charges of conspiracy to deliver marijuana.

The State emphasized for the jury that Harper was not the robber. When Poe suggested the robbery to Harper, Harper had told Poe it was "completely out of the question." Harper relied on his supplier for his livelihood. Several weeks after that conversation, Poe called Harper and told him he had "sent your boy to Texas." Harper had been at the hospital all day for the birth of his child. The State explained to the jury that "Harper will tell you he immediately doesn't recognize what that means

until he sees the news later that day and sees there's been a shooting in the area [where his supplier lives]."

Antwine Harper

Harper testified at trial that Poe had once driven him to Lee's townhouse and waited in the car while he purchased marijuana from Connely. Thus, Poe became aware of the location of a potential robbery victim. Several weeks before the robbery and murder, Poe asked Harper if he could rob Connely. Harper testified that he emphatically told Poe he could not, because Harper paid his bills and supported his family by selling the marijuana he obtained from Connely.

Harper testified that the morning of the robbery and murder, he was at the hospital with his wife for the birth of their second child. Harper's wife had been scheduled to be induced the morning of November 11, 2004, but she went into labor the night before. While at the hospital on November 11, shortly before noon, Poe called Harper and said, "I just sent your dude to Texas." Harper testified that that was a street term for having killed somebody. Harper testified that he was not "fully aware," however, that a homicide had occurred until he saw it on the 5 o'clock news.

According to Harper, 2 or 3 days later, when he and his wife arrived home from the hospital, Poe visited Harper and described how Poe, Kashaun Lockett, and Donte Reed, who is Harper's cousin, had carried out the robbery. Poe said that he had kicked in the front door of the townhouse and that they went directly upstairs, where Poe kicked open the first bedroom door they encountered. After asking the resident of that bedroom where "the bud" was at, they moved on to another bedroom where Lee was sleeping. A struggle ensued with Lee in the hallway. In the course of that struggle, Poe, Lockett, and Reed all fired shots at Lee, killing him. During the struggle, Lockett lost a shoe and Poe dropped a magazine clip from his gun.

On cross-examination, defense counsel emphasized Harper's familiarity with the layout of the townhouse and with the schedule of its tenants—a familiarity Poe, Lockett, and Reed lacked. Defense counsel also questioned how Harper could

know certain details about the crime that were not released to the public.

Harper's wife confirmed Harper's alibi that Harper was at the hospital at the time of the robbery. Their child was born at approximately 7 a.m. On cross-examination, however, Harper's wife admitted that Harper was not in the room at all times; he would occasionally leave to go down to the cafeteria or talk on the telephone.

Evidence From Scene

Police officers discovered a shoe at the townhouse that matched the DNA profile of Lockett. They also found a discarded magazine clip, but the guns used in the robbery were never found. The witnesses' descriptions of each robber's height, weight, and skin color generally matched the physical characteristics of Poe, Lockett, and Reed.

Motive

The State adduced evidence that Poe did not have a job at the time of the robbery and was experiencing some financial difficulty. Harper testified that Poe did not own his own vehicle. Other evidence demonstrated that the apartment where Poe lived was sparsely furnished. The State introduced receipts showing that Poe pawned and repawned several items from October 18 to December 14, 2004.

Michelle Hayes

Michelle Hayes was Poe's live-in girlfriend and the mother of his child. She testified that when she woke up around 11 or 12 o'clock on the morning of November 11, 2004, she saw Poe walking in. On cross-examination, Hayes confirmed her and Poe's home telephone number and the number of Poe's father and explained that Poe often spoke with his father on the telephone. Telephone records demonstrated that at 10:19 a.m., a call approximately 3 minutes in duration was made from Poe and Hayes' landline to Poe's father's landline. Other evidence showed it took about 20 minutes to drive from Poe and Hayes' residence to the townhouse where Lee was killed. Hayes also testified on cross-examination that Poe received Social Security benefits because of an injury to his leg.

Interview Videotape and Cross-Examination

The trial court denied defense counsel's motion to introduce the videotaped portion of Harper's interview with investigators wherein he implicated Poe. The videotape was not transcribed. In his direct appeal to this court, Poe asserted that the trial court denied his right to a complete defense by refusing to allow him to play the 2-hour videotape for the jury.[2] Poe further asserted that the trial court violated his right to confrontation by limiting defense counsel's cross-examination of Harper and of the police officers who interviewed him.

We rejected both arguments. We explained that defense counsel had viewed the videotape and repeatedly asked the witnesses about its contents. We said that defense counsel was permitted "extensive cross-examination of all witnesses concerning the police interview of Harper"[3] and that the jury heard the evidence concerning "all aspects of Harper's interview with the officers."[4]

For example, Harper admitted on cross-examination that he implicated Poe only after the officers told him he had an arrest warrant for marijuana charges. In previous communications with the police and during the first few hours of the last interview, Harper had said he knew nothing about the robbery. But when threatened with arrest, Harper broke down and cried because the officers "'tried to take me away from my family.'"[5]

Harper testified he believed he was only being threatened with drug-related charges. But Harper admitted on cross-examination that he was getting the feeling the officers were putting him "'in the mix'"[6] for the robbery and murder. One of the interviewing officers told Harper that Lee's murder could have the death penalty associated with it and that people can get 50 years in prison on drug charges. Defense counsel was

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[2] *Id.*

[3] *Id.* at 268, 754 N.W.2d at 402.

[4] *Id.* at 270, 754 N.W.2d at 403.

[5] *Id.* at 265, 754 N.W.2d at 400.

[6] *Id.* at 265, 754 N.W.2d at 399.

even able to elicit Harper's interview statement that he would tell the officers "'what [they] want[ed] to hear.'"[7]

Defense counsel again obtained Harper's admission that he "'told [the officers] what they wanted to hear so [he] wouldn't have to go to jail.'"[8] And one of the interviewing officers testified on cross-examination that they told Harper they would "'go to bat'" for Harper if he cooperated.[9] Harper testified it was his understanding that the charges against him would be dismissed if he cooperated.

Closing Arguments

During closing arguments, the State told the jury that it "boil[ed] down to" whether the jury believed Harper was "being honest about his involvement and what he knows and how he knows it." The State spoke about Harper's lack of motive to rob his only supplier and the fact that Harper did not remotely fit the weight and height descriptions of the assailants. The State argued that the idea that Harper planned a robbery the same day his wife was scheduled to deliver their baby was "ridiculous." The State argued instead that this was that "exceptional" gang-related case where someone "despite his fears, his trepidation, [came] forward, helped officers to solve this crime."

Defense counsel in closing arguments suggested that Harper was the perpetrator and pointed out "the irony" that "the person who is responsible is [the State's] witness." Defense counsel also argued that Harper's testimony could not be trusted because it was obtained by threats and as a "trad[e]" for dropping charges that could have resulted in 50 years in prison and even the death penalty.

Defense counsel pointed out that Poe, because of his injured leg, would not be able to efficiently kick through doors. Finally, defense counsel argued it was almost impossible for Poe to have rushed to the townhouse to commit the robbery and murder right after speaking with his father on the telephone from

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[7] *Id.* at 266, 754 N.W.2d at 400.

[8] *Id.* at 269, 754 N.W.2d at 402.

[9] *Id.*

his landline. Defense counsel explained that it had to have been Poe on the telephone shortly before the robbery because Hayes could not have been speaking with Poe's father while she was asleep. The jury found Poe guilty.

Harper as Coconspirator?

Before Poe's trial, the parties had discussed whether Poe and Lockett would be tried jointly. Both Poe's attorney and Lockett's attorney opposed joinder, and the court ultimately ruled against joinder. One of the issues discussed in the pretrial hearing was whether Harper's testimony concerning Poe's hearsay statements would be admissible in Lockett's trial. The State indicated it would attempt to show the statements by Poe were in furtherance of a conspiracy and thus would be allowed as nonhearsay.

After Poe's trial, during pretrial proceedings for the State's case against Lockett, the State filed a brief in opposition to Lockett's motion to suppress Poe's statements to Harper as inadmissible hearsay. The State asserted that the statements should be allowed under Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 2008). The State argued that Harper participated in a conspiracy with Poe, Lockett, and Reed. It explained Harper had numerous contacts with the perpetrators and knew what was being planned. The State explained that a person who acts in "'confederation'" with others to violate the law "may be liable as a principal under the theory of conspiracy." And "Harper's involvement in the robbery and murder in question is more than a passive observer." The State also emphasized that Harper did nothing to stop the robbery. Then, after the robbery, when Poe called Harper at the hospital and said he "sent your dude to Texas," Harper knew that meant they had killed someone. But Harper did nothing to report the crime, and he initially "aided in the cover-up by not being forthright with the police." Lockett's case was dismissed before trial.

Motion for Postconviction Relief

Poe filed a petition for postconviction relief. Simultaneously, Poe filed a 57-page "Verified Motion to Vacate and Set Aside Judgment of Conviction and Sentence," elaborating on his postconviction claims. Poe alleged that the State had engaged

in prosecutorial misconduct by presenting inconsistent and irreconcilable theories as to Harper's involvement in the crimes. Poe focused on inconsistencies as to whether Harper was involved in planning the robbery or instead tried to stop it, whether Harper immediately understood what Poe meant when he said he "sent your dude to Texas," and whether Harper was an innocent and cooperative witness versus a coconspirator in a coverup. Poe argued, among other things, that our decision on direct appeal concerning the admissibility of the videotape and the confrontation of witnesses against him should be reconsidered in light of this newly discovered evidence of prosecutorial misconduct. Poe further alleged that the State's successful objections to defense counsel's cross-examination of Harper and to the admission of the videotape constituted a manipulation of the evidence in furtherance of its inconsistent theories.

Poe alleged that his trial counsel was ineffective in failing to contact and interview witnesses, investigate all the facts, fully develop proper trial strategy, and call Poe as a witness. In support of these allegations, Poe attached the affidavit of Hayes, wherein she stated that Harper had told her Poe did not commit the robbery and murder. Hayes stated that Harper told her he was being pressured to lie at Poe's trial. Hayes averred that she relayed this conversation to Poe's trial counsel.

Poe also presented the affidavit of Poe's father, who averred that Poe was not in need of money at the time of the robbery because he provided Poe with money whenever Poe needed it. Poe's father further stated that he was willing to testify at Poe's trial and would have testified that he spoke with Poe on the telephone shortly before the robbery.

Finally, Poe submitted his own affidavit in which he asserted that trial counsel failed to sufficiently consult with him. Poe claimed, among other things, that trial counsel was ineffective in advising Poe not to testify. If Poe would have testified, Poe would have told the jury that he spoke with his father on the telephone from his landline shortly before the robbery and murder. He would have also testified that the injury to his right leg made it impossible for him to kick open a locked door. Finally, Poe averred he would have testified

that his father gave him all that he needed financially and that his father had purchased furniture which had not yet been moved into Poe and Hayes' apartment at the time of the robbery and murder.

The trial court granted the State's motion to dismiss Poe's motion for postconviction relief without an evidentiary hearing. Poe appeals.

ASSIGNMENTS OF ERROR

Poe asserts that the trial court erred in dismissing his motion for postconviction relief without an evidentiary hearing because Poe alleged facts that, if proved, would show (1) prosecutorial misconduct, (2) a violation of his right to present a complete defense, and (3) ineffective assistance of counsel.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.[10]

[2-4] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.[11] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[12] an appellate court reviews such legal determinations independently of the lower court's decision.[13]

ANALYSIS

[5-7] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution,

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[10] *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

[11] *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009).

[12] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[13] *State v. Davlin, supra* note 11.

causing the judgment against the defendant to be void or voidable.[14] An evidentiary hearing is not required when the motion alleges only conclusions of fact or law.[15] If the defendant makes sufficient allegations of a constitutional violation which would render the judgment void or voidable, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.[16]

Prosecutorial Misconduct

Poe first alleges that the trial court erred in dismissing his claim for postconviction relief because he raised sufficient allegations of prosecutorial misconduct stemming from the use of inconsistent theories in two different proceedings for different defendants charged with the same crimes.

[8-10] The Due Process Clause of the U.S. Constitution guarantees every defendant the right to a trial comporting with basic tenets of fundamental fairness.[17] The U.S. Supreme Court has recognized that prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process.[18] To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial.[19]

Thus, the U.S. Supreme Court has said that the prosecution violates due process by knowingly or recklessly presenting false testimony.[20] The prosecution also violates due process by failing to disclose evidence favorable to the accused.[21] But

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[14] See, *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005); *State v. Dean, supra* note 10.

[15] *State v. Dean, supra* note 10.

[16] See *State v. Marshall, supra* note 14.

[17] *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

[18] *Greer v. Miller*, 483 U.S. 756, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987).

[19] *Id.*

[20] *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

[21] *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

the U.S. Supreme Court has declined to squarely address the issue of whether a prosecutor's use of inconsistent theories can violate due process. We likewise have never addressed this issue.

In *Calderon v. Thompson* (*Thompson II*),[22] the U.S. Supreme Court reversed a Ninth Circuit opinion, *Thompson v. Calderon* (*Thompson I*),[23] that had recalled its previous mandate denying habeas relief. In a plurality opinion, the court in *Thompson I* had concluded that the prosecutor pursued "fundamentally inconsistent theories"[24] which violated Thomas Martin Thompson's due process rights and prejudiced Thompson because the inconsistent theory formed the basis for the special circumstance justifying the imposition of the death penalty.[25]

The prosecution had presented different witnesses in each trial of separately convicted accomplices concerning the extent of each defendant's involvement in the murder. In the trial of Thompson, the prosecution argued that Thompson alone committed the murder, which he committed to cover up a rape, and that his accomplice only assisted in hiding the body when he discovered the murder thereafter. The prosecution called two jailhouse informants who testified as to Thompson's confession consistent with that theory. But in a subsequent trial of the codefendant, the prosecution argued that the codefendant, not Thompson, was the mastermind of the murder. The victim was getting in the way of the codefendant's efforts to reconcile with his ex-wife. Thompson had merely assisted in carrying out the murder. In support of this new theory in the trial of the codefendant, the prosecution called numerous *defense* witnesses from Thompson's trial, including jailhouse informants who testified as to entirely different confessions than the confessions testified to by the jailhouse informants in Thompson's trial. When defense counsel in the codefendant's

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[22] *Calderon v. Thompson*, 523 U.S. 538, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998).

[23] *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997).

[24] *Id.* at 1056.

[25] *Thompson I, supra* note 23.

trial attempted to argue Thompson had murdered the victim by himself, the prosecution characterized this theory as "absurd and incredible."[26]

The Ninth Circuit concluded that the prosecution's manipulation of evidence and witnesses and its argument of inconsistent motives, which essentially ridiculed the prosecution's theory used to obtain a conviction and death sentence at Thompson's trial, violated due process.[27] The U.S. Supreme Court reversed, holding that the Ninth Circuit abused its discretion in recalling the mandate in which it had previously denied habeas relief.[28] The Court explained that finality is essential to the law. Absent clerical error, fraud, or a stay, a court that sua sponte recalls its mandate abuses its direction unless there has been a miscarriage of justice concerning "'actual as compared to legal innocence.'"[29] In terms of a petitioner who challenges his death sentence, the petitioner must show by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty in light of the new evidence.[30] This standard was not met by Thompson.[31]

In *Bradshaw v. Stumpf* (*Stumpf II*),[32] the U.S. Supreme Court came a bit closer to opining on the viability of prosecutorial misconduct claims based on inconsistent theories. The Court granted certiorari to address a claim that was primarily concerned with whether the defendant's plea was knowing, voluntary, and intelligent.[33] After reversing habeas relief on that issue, the Court stated it would be "premature" to resolve the merits of the defendant's sentencing claim based

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[26] *Id.* at 1057.

[27] *Thompson I, supra* note 23.

[28] *Thompson II, supra* note 22.

[29] *Id.*, 523 U.S. at 559.

[30] *Thompson II, supra* note 22.

[31] *Id.*

[32] *Bradshaw v. Stumpf*, 545 U.S. 175, 125 S. Ct. 2398, 162 L. Ed. 2d 143 (2005).

[33] See *Stumpf v. Mitchell*, 367 F.3d 594 (6th Cir. 2004).

on prosecutorial misconduct.[34] It remanded that claim to the lower court.

The prosecutorial misconduct claim was premised on the fact that the panel which sentenced John David Stumpf to death specifically found that he was the "'principal offender'" in the aggravated murder.[35] This was founded on the prosecution's argument during the penalty phase of Stumpf's trial that Stumpf had shot and killed the victim. In the subsequent trial of the accomplice, however, the prosecution argued the opposite—that it was the accomplice who fired the fatal shots. Apparently, a new jailhouse informant had come forward. After the accomplice's trial, the State went back to its original theory and argued in a hearing on Stumpf's motion to withdraw his plea that Stumpf was the primary shooter. At that hearing, the prosecution discredited the very testimony which the prosecution had presented in the accomplice's trial. Throughout these three proceedings, the prosecution argued as an alternative basis for the death penalty that the defendants acted as accomplices with a specific intent to cause death.

The U.S. Supreme Court explained that the Court of Appeals' opinion had been unclear as to whether it had addressed this prosecutorial misconduct claim. The Court of Appeals should have the opportunity to consider the question in the first instance before the U.S. Supreme Court considered it.[36] Justice Souter concurred, with Justice Ginsburg joining, to clarify that the matter remanded was the question of whether Stumpf's "death sentence may not be allowed to stand when it was imposed in response to a factual claim that the State necessarily contradicted in subsequently arguing for a death sentence in the case of a codefendant."[37] Justice Souter summarized that "[a]t the end of the day, the State was on record as maintaining that Stumpf and [the accomplice] should both be executed on the ground that each was the triggerman, when it was undisputed

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[34] *Stumpf II, supra* note 32, 545 U.S. at 187.

[35] *Id.*, 545 U.S. at 180.

[36] *Stumpf II, supra* note 32.

[37] *Id.*, 545 U.S. at 189 (Souter, J., concurring; Ginsburg, J., joins).

that only one of them could have been."[38] Justice Souter noted "'[t]he heightened need for reliability in capital cases.'"[39] He wrote that at some point in a given case, the state's interest is transcended by its interest that justice shall be done.[40] Thus, Stumpf's argument to be considered on remand was whether "sustaining a death sentence in circumstances like those here results in a sentencing system that invites the death penalty 'to be . . . wantonly and . . . freakishly imposed.'"[41]

Justice Thomas wrote a concurring opinion, joined by Justice Scalia, questioning whether a due process claim can arise from inconsistent theories as opposed to the use of evidence known to be false. Justice Thomas opined that the U.S. Supreme Court "has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories."[42] Rather, the guarantee of "vigorous adversarial testing of guilt and innocence" and the requirement of "conviction only by proof beyond a reasonable doubt" "are more than sufficient to deter the State from taking inconsistent positions; a prosecutor who argues inconsistently risks undermining his case, for opposing counsel will bring the conflict to the factfinder's attention."[43]

On remand, the Sixth Circuit held in *Stumpf v. Houk* (*Stumpf III*)[44] that the defendant's due process rights were violated and that the sentencing panel likely would not have sentenced the defendant to death "had the state not persisted in its efforts at duplicity." The court said:

> If we are to take seriously the responsibility of ensuring reliable sentencing determinations in capital cases, we cannot allow the prosecution to play so fast and

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[38] *Id.*

[39] *Id.*

[40] *Stumpf II*, *supra* note 32, citing *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

[41] *Id.*, 545 U.S. at 190.

[42] *Id.*, 545 U.S. at 190 (Thomas J., concurring; Scalia, J., joins).

[43] *Id.*, 545 U.S. at 191-92.

[44] *Stumpf v. Houk*, 653 F.3d 426, 439 (6th Cir. 2011).

> loose with the facts and with its theories. To allow a prosecutor to advance irreconcilable theories without adequate explanation undermines confidence in the fairness and reliability of the trial and the punishment imposed and thus infringes upon the petitioner's right to due process.[45]

The court concluded that the prosecutor had played "a flippant, macabre game of chance with people's lives."[46] And while a prosecutor must prosecute with "'earnestness and vigor and "may strike hard blows, he is not at liberty to strike foul ones."'"[47] The dissent in *Stumpf III* argued, however, that the substantive right relied on by the majority was one "of [its] own invention."[48]

In addition to the Sixth Circuit and Ninth Circuit decisions in *Stumpf III* and *Thompson I*, other state and federal courts have recognized that inconsistent prosecutorial theories can, in certain circumstances, violate due process. Those cases almost exclusively involve the death penalty, although at least one involves a sentence of life imprisonment.[49] The kind of inconsistencies courts have found in violation of due process concern "the core of the State's case"[50] and often are "essential in order to prosecute the individual in question."[51] "In other words, the Government in those subsequent cases could not have prosecuted the remaining individual for the same crime had the Government maintained the theory or facts argued in the earlier trial."[52] In addition, inconsistencies which courts have found to rise to the level of the denial of a fundamentally

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[45] *Id.* at 437.

[46] *Id.* at 438.

[47] *Id.* at 439. See, also, *Berger v. United States, supra* note 40; *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

[48] *Stumpf III, supra* note 44, 653 F.3d at 440 (Boggs, Judge, dissenting).

[49] See *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000).

[50] *E. Sifrit v. State*, 383 Md. 77, 106, 857 A.2d 65, 82 (2004). See, also, *Clay v. Bowersox*, 367 F.3d 993 (8th Cir. 2004).

[51] *U.S. v. Dickerson*, 248 F.3d 1036, 1043-44 (11th Cir. 2001).

[52] *Id.* at 1044.

fair trial have involved a manipulation of the evidence in order to support the different theories.

For instance, in *In re Sakarias*,[53] the prosecution argued in two separate trials that each defendant struck all the particularly gruesome hatchet blows to the victim's head and that the other used a knife. Apparently, the scenario "best supported by all the evidence"[54] was that Peter Sakarias used the knife in the initial attack and only struck the victim with the hatchet after the victim was already dead and had been dragged into another room. Each defendant was sentenced to death. In order to support the theory in Sakarias' trial that Sakarias struck all the hatchet blows, including the fatal one, the prosecution intentionally avoided eliciting certain testimony which the prosecution had presented in the accomplice's trial.

The court held that the prosecution violated Sakarias' due process rights by "intentionally and without good faith justification arguing inconsistent and irreconcilable factual theories in the two trials, attributing to each [defendant] in turn culpable acts that could have been committed by only one person."[55] The court reasoned that, when prejudicial, the prosecution achieves through such tactics a false conviction or increased punishment on a "false factual basis" for one of the accused.[56]

For similar reasons, in *Smith v. Groose*,[57] the Eighth Circuit granted habeas relief by vacating the conviction and sentence of five life terms of imprisonment for Jon Keith Smith, who had been a juvenile at the time of the alleged crimes. The case involved the unfortunate and unusual circumstance in which the victims' home was the object of two different gangs of robbers that had entered the home at separate, but overlapping times. Smith's gang had arrived while the robbery of the other gang was in progress. A member of Smith's

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[53] *In re Sakarias*, 35 Cal. 4th 140, 106 P.3d 931, 25 Cal. Rptr. 3d 265 (2005).

[54] *Id.* at 147, 106 P.3d at 936, 25 Cal. Rptr. 3d at 272.

[55] *Id.* at 145, 106 P.3d at 934, 25 Cal. Rptr. 3d at 270.

[56] *Id.* at 156, 106 P.3d at 942, 25 Cal. Rptr. 3d at 278.

[57] *Smith v. Groose, supra* note 49.

gang had told police that the victims were already dead when they arrived. But he had briefly changed his story to the police and later said he saw a member of Smith's gang killing the victims.

The prosecution asserted in Smith's trial that a member of Smith's gang had killed the victims. The witness from Smith's gang testified for the defense that the victims had been killed by the other gang before they arrived. The prosecution successfully impeached this testimony and obtained a conviction against Smith for felony murder by using the witness' second statement to the police. In the subsequent trial of a robber from the other gang, however, the prosecution relied on the witness' first statement to police that the other gang had killed the victims before Smith's gang arrived.

The Eighth Circuit explained, "In short, what the State claimed to be true in Smith's case it rejected in [the other] case, and vice versa," successfully proving beyond a reasonable doubt in two different trials that the victims were murdered at two different times.[58] The court said that prosecutors are not bound to present precisely the same evidence and theories in trials for different defendants.[59] But "diametrically opposed testimony" "at the core of the prosecutor's cases against defendants for the same crime," renders the convictions infirm.[60]

In contrast to diametrically opposed inconsistencies at the core of the case accompanied by manipulation of the evidence, courts have found that "[d]iscrepancies based on rational inferences from ambiguous evidence will not support a due process violation provided the two theories are supported by consistent underlying facts."[61] Courts have also held that the use of inconsistent theories will not rise to a due process violation when those theories concern a tangential issue.[62] It is acceptable that

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[58] *Id.* at 1050.

[59] *Smith v. Groose, supra* note 49.

[60] *Id.* at 1052.

[61] *E. Sifrit v. State, supra* note 50, 383 Md. at 106, 857 A.2d at 82.

[62] *State v. Bodden*, 190 N.C. App. 505, 661 S.E.2d 23 (2008).

"evidence presented at multiple trials is going to change to an extent based on relevancy to the particular defendant and other practical matters."[63]

Courts have accordingly found no due process violation stemming from inconsistent arguments as to who was the killer in the relatively common circumstance where each defendant can be held equally guilty as an aider and abettor upon the same inconclusive evidence.[64] In a case decided the same year as *Smith*, the Eighth Circuit found no due process violation when, at two separate trials, the prosecution argued that the death penalty was appropriate for each defendant because each was the killer in the jointly executed armed robbery.[65] Although the prosecution made inconsistent arguments, the court noted that the evidence presented to the trier of fact was the same. It was impossible to determine from the evidence which gun caused the fatal wound. The prosecution thus did not use evidence that was "factually inconsistent and irreconcilable."[66]

Similarly, in *State v. Bodden*,[67] where the underlying theory of guilt remained the same, the court held that the prosecution did not violate the defendant's due process rights by arguing in the defendant's trial that the victim knew he was dying when he identified the defendant, and in the accomplice's trial arguing that the victim did not know he was dying. The court noted that the evidence of the victim's hearsay statements was admitted and was identical in both trials. The prosecution merely adopted differing "permissible inferences interpreting the same evidence."[68] The court observed that in each case, whatever the prosecution's theory, the trial court would have

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[63] *E. Sifrit v. State, supra* note 50, 383 Md. at 106, 857 A.2d at 82.

[64] See, *Drake v. Francis*, 727 F.2d 990 (11th Cir. 1984); *Council v. Commissioner of Correction*, 114 Conn. App. 99, 968 A.2d 483 (2009). See, also, *Nguyen v. Lindsey*, 232 F.3d 1236 (9th Cir. 2000).

[65] *U.S. v. Paul*, 217 F.3d 989 (8th Cir. 2000).

[66] *Id.* at 998.

[67] *State v. Bodden, supra* note 62.

[68] *Id.* at 516, 661 S.E.2d at 30.

been free, upon that same evidence, to make a different inference.[69] Furthermore, a due process violation would not stem from inconsistencies pertaining to "a tangential issue such as admission of a hearsay statement."[70]

In *State v. Pearce*,[71] the court found no due process violation after the prosecution changed its position about the credibility of a key witness when the underlying factual allegations remained the same. The witness was one of a group of three men and one woman who kidnapped, robbed, and attempted to kill the victim. In the first trial, the witness identified the defendant, who was another of the three men, as one of the perpetrators and stated that Sarah Kathleen Pearce was not the woman involved. In a retrial of that defendant, the witness again incriminated the defendant, but this time said he did not know whether Pearce was the woman involved. At both trials, the prosecution vouched for the witness' credibility and discredited defense counsel's attempt to impeach the witness due to his inconsistent testimony.

But at Pearce's trial, when the witness testified that he did not think Pearce was the woman involved, the prosecution impeached the witness' credibility. In doing so, the prosecution used essentially the same instances of dishonesty relied on by the defense in the other defendant's trial.

The court explained that not every prosecutorial variance amounts to a due process violation.[72] Merely changing position about the credibility of a witness—even a key witness—is fundamentally distinct from inconsistencies which rise to a due process violation. The underlying theory of guilt in the trial of Pearce and her coconspirators remained the same. The court said that forcing the prosecution to accept the witness' testimony at Pearce's trial "and abstain from impeachment, simply because it had bolstered his credibility when it previously used a different portion of his testimony,

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[69] See *id*.

[70] *Id*. at 517, 661 S.E.2d at 30.

[71] *State v. Pearce*, 146 Idaho 241, 192 P.3d 1065 (2008).

[72] *Id*.

would essentially strip the State of an important tool in its trial arsenal."[73]

The Supreme Court of Iowa has said that there is only a "narrow exception to the right of the prosecution to rely on alternative theories in criminal prosecutions albeit that they may be inconsistent."[74] That narrow exception it limited to the "selective use of evidence by the prosecution in order to establish inconsistent factual contentions in separate criminal prosecutions for the same crime [which is] so egregious and lacking in good faith as to constitute a denial of due process."[75] The court explained: "There is, after all, a safeguard against abuse as a result of the prosecution's burden to prove any theory it asserts by evidence beyond a reasonable doubt."[76]

In this appeal from Poe's denial of postconviction relief, we find it unnecessary to precisely define the kind of inconsistencies that perhaps could, in different circumstances, violate the defendant's right to a fundamentally fair trial. The inconsistencies alleged in Poe's motion for postconviction relief clearly do not give rise to a due process claim.

Poe and the State seem to disagree as to what level of coconspirator involvement the State actually alleged in the Lockett brief. The State argues that it only asserted Harper was part of the coverup, while Poe reads the Lockett brief as alleging more. Regardless, the State does not fundamentally contradict the *evidence* it presented in Poe's trial. And, because the Lockett prosecution never went to trial, there could be no manipulation of the underlying evidence presented to support the inconsistent theories.

Harper testified at Poe's trial that he asked Poe not to rob his supplier. The State did not later argue this was untrue. Harper testified at Poe's trial that he did not otherwise try to stop the robbery and did not report the crime. The State said in Poe's trial this was because Harper was scared for his family's safety.

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[73] *Id.* at 249, 192 P.2d at 1073.

[74] *State v. Watkins*, 659 N.W.2d 526, 532 (Iowa 2003).

[75] *Id.*

[76] *Id.*

In the Lockett proceedings, however, this failure to act was evidence of a conspiracy.

Harper testified at Poe's trial that he knew that "sen[ding] your dude to Texas" was street talk for having killed someone, but that he did not fully understand what had happened until he saw the news. The State in Poe's trial emphasized that Harper was surprised and confused when he received that message, thereby emphasizing his innocence. In the Lockett brief this was instead further evidence of Harper's "collaboration, cooperation, and failure to act on the information that he had."

The State drew different inferences from the evidence and emphasized the same evidence in different ways. But either view of Harper's involvement as innocent or somewhat less so is consistent with the evidence and may be reasonably inferred therefrom. These are not irreconcilable or diametrically opposed theories. Furthermore, the extent of Harper's involvement in the crime is tangential to the underlying theory of Poe's involvement in the crime. The State did not take an inconsistent view as to Harper's credibility and did not contest the core facts of Poe's alleged confession to Harper.

We also note that before Poe's trial, the prosecution had told defense counsel it would be pursuing a coconspirator exception to the hearsay rule if Lockett were tried separately. Although the details of the conspiracy theory were not entirely clear, to that extent, the prosecution did not change its theory at all.

Poe argues that, like in *Thompson I*,[77] the prosecution ridiculed the very theory the prosecution later used in the Lockett hearing. The State said in closing arguments that it would be "ridiculous" for Harper to have planned the robbery the same day his wife was scheduled to give birth. But the State was attempting to address Poe's theory of defense that Harper, not Poe, was one of the robbers. It was not ridiculing the idea later proposed in the Lockett proceeding that Harper was acting in "confederation" with Poe from the safety of his wife's hospital room. And the State's critique of Poe's theory of defense was

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[77] *Thompson I, supra* note 23.

professional in tone. Standing alone, such critique will not form the basis for a due process claim.

In conclusion, the prosecution did not strike "foul blows"[78] in its pursuit of Poe's convictions. The State did not present different evidence and theories in order to wantonly manipulate the criminal justice system. The prosecution merely presented different permissible inferences based on the same evidence. It did so in order to account for the different circumstances of the different proceedings—in this case, for different evidentiary hurdles. Such a change in arguments and strategy "based on relevancy to the particular defendant and other practical matters"[79] is permissible and does not violate due process. Whatever inconsistencies the State pursued in the short-lived proceedings against Lockett, they certainly do not call into question the truth or falsity of the core facts upon which Poe's convictions rest.

The facts alleged by Poe's motion for postconviction relief pertaining to prosecutorial misconduct do not undermine our confidence in the fairness and reliability of Poe's trial or the punishment imposed. We therefore affirm the trial court's denial of Poe's motion for postconviction relief relating to those allegations.

Ineffective Assistance of Counsel

We next address Poe's ineffective assistance of counsel claims. Poe alleged trial counsel failed to present testimony that counsel was aware of before trial and which would have strengthened Poe's defense in several respects. Poe alleged that but for this deficient performance, the result of the trial would have been different.

First, Poe asserts that had he and his father been called to testify, they would have undermined the State's case for motive. The State presented evidence that the apartment was sparsely furnished and that Poe was in need of cash. Poe and his father allegedly would have testified that Poe had furniture

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[78] See *Stumpf III, supra* note 44, 653 F.3d at 439. See, also, *Berger v. United States, supra* note 40; *United States v. Agurs, supra* note 47.

[79] *E. Sifrit v. State, supra* note 50, 383 Md. at 106, 857 A.2d at 82.

ready to be transported to the apartment and that Poe's father provided for all of Poe's financial needs.

Second, Poe asserts that had he and his father been called to testify, they would have lent more concrete support to the theory that Poe was on the telephone with his father shortly before the murder, by testifying as such. Otherwise, the telephone records and Hayes' testimony that she was asleep at the time was the only evidence that Poe and his father were speaking from their respective landlines at the time reflected in the telephone records.

Third, had Poe been advised to testify, he would have explained that he was physically incapable of kicking in the front door and the bedroom door, as Harper claimed Poe described in his confession. Without Poe's testimony, there was only Hayes' testimony that Poe was receiving disability benefits for an injury to his leg. Hayes did not describe with specificity the nature of that injury.

Finally, Poe asserts that trial counsel failed to impeach Harper's testimony by presenting him with his prior statement to Hayes that Poe did not commit the crimes. Harper also had allegedly told Hayes that "the police were trying to get him to say something that was not true."

The trial court reviewed the files and records of Poe's case and denied Poe's motion without conducting an evidentiary hearing. Under the postconviction statutes, a court is not obligated to hold an evidentiary hearing if the files and records of the case affirmatively show that the prisoner is entitled to no relief.[80] While we agree with the trial court with respect to most of Poe's allegations, we conclude that the trial court erred in denying Poe an evidentiary hearing concerning Harper's alleged statement to Hayes.

[11] To prevail on a claim of ineffective assistance of counsel under *Strickland*,[81] the defendant must first show that counsel's performance was deficient and second, that this deficient performance actually prejudiced his or her

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[80] *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011).

[81] *Strickland v. Washington, supra* note 12.

defense.[82] The two prongs of the ineffective assistance test, deficient performance and prejudice, may be addressed in either order.[83]

[12-14] When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.[84] Trial counsel is afforded due deference to formulate trial strategy and tactics.[85] An appellate court will not second-guess reasonable strategic decisions by counsel.[86] But, in this case, there was no evidentiary hearing. We have no evidence concerning trial counsel's strategy. Under these circumstances, trial counsel's strategy is a matter of conjecture. We conclude that the records and files in this case are insufficient to determine whether trial counsel's performance was deficient.

[15,16] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[87] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[88] We follow the approach to the prejudice inquiry outlined by the U.S. Supreme Court in *Strickland*:

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion

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[82] *State v. Nelson*, 274 Neb. 304, 739 N.W.2d 199 (2007).

[83] *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002).

[84] *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011).

[85] See *id.*

[86] See *id.*

[87] See *State v. Davlin, supra* note 11.

[88] *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

> only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.[89]

The testimony of Poe and his father would have had, at most, an isolated effect on relatively trivial matters. The averred statements do not involve facts negating Poe's guilt or culpability.

As to the proposed testimony that Poe's father provided for Poe's financial needs, robberies are not necessarily motivated by financial need. Furthermore, financial need is emphasized rather than minimized by showing financial dependence on someone else. Thus, the evidence would have done little to negate the State's case for motive.

As to the proposed testimony that Poe's father was talking to Poe on the telephone shortly before the murder, defense counsel emphasized at closing arguments the reasons why this must have been the case. The proposed testimony would have added little to that argument. More importantly, the telephone call was indisputably ended with ample time to reach the townhouse before the robbery and murder occurred. The call ended 38 minutes before the 911 call from the townhouse, and officers testified it took about 20 minutes to get from Poe's house to the townhouse. The State did attempt to argue Poe was not on the telephone, but rested its case instead on the fact that Poe had time to reach the townhouse after the call. The telephone call was a relatively trivial matter.

Either of the other two accomplices could have kicked down the doors instead of Poe. Defense counsel adequately argued that because of the injury to Poe's leg, it would have been difficult for Poe to have kicked down the doors. And, again, the State did not dispute that point. Thus, additional evidence of

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[89] *Strickland v. Washington*, *supra* note 12, 466 U.S. at 695-96. Accord *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

whether Poe could kick down doors would have had a trivial effect on any conclusion as to this issue, and the question of who kicked down the doors was of trivial significance to the outcome of the trial.

But the allegations concerning the unrealized impeachment of Harper are neither of trivial effect nor of a trivial matter. In denying postconviction relief without an evidentiary hearing, the trial court focused on the fact that Harper had been heavily cross-examined. The court also concluded that the hearsay statement would have been inadmissible. While Poe did not address the hearsay rule as such, Poe asserted that the statement could have come in for impeachment purposes. We agree that it would have been admissible as a prior, inconsistent statement.[90] And, although Harper may have been heavily cross-examined, he was not confronted with an inconsistent statement of this nature. Harper's alleged prior statement was that Poe did not commit the crimes and that Harper was being coerced to lie and say otherwise.

It bears repeating that the State's case against Poe was entirely based on circumstantial evidence. As the State indicated in closing arguments, its case against Poe depended on whether the jury believed Harper was telling the truth. Harper explained how Poe had once driven Harper to the townhouse and thereby knew of its location. Harper testified that Poe asked him if he could rob his "plug." Harper testified as to Poe's statement that he had "sent [his] dude to Texas." Harper gave the details of Poe's alleged confession to him. We cannot say, as a matter of law, that had defense counsel confronted Harper with his inconsistent assertion that Poe was completely innocent of the crimes and Harper was being asked to lie, the result would not have been different.

It is, of course, entirely possible that defense counsel had a reason for not pursuing this avenue of impeachment of Harper's testimony. As stated, trial strategy is given great deference. We therefore remand the matter for the limited purpose of conducting an evidentiary hearing on Poe's claim of

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[90] See Neb. Rev. Stat. § 27-806 (Reissue 2008). See, also, e.g., *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

ineffective assistance of trial counsel relating to the allegation that counsel failed to utilize Harper's alleged inconsistent statement to Hayes that Poe was innocent.

CONCLUSION

We affirm the judgment of the trial court in all respects except for the denial of an evidentiary hearing on the issue of whether defense counsel was ineffective for failing to pursue impeachment of Harper with his alleged inconsistent statement. We reverse in part, and remand with directions to conduct an evidentiary hearing on this issue.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., not participating.

PROFESSIONAL MANAGEMENT MIDWEST, INC., ET AL., APPELLANTS, V. LUND COMPANY, APPELLEE.

826 N.W.2d 225

Filed December 7, 2012. No. S-11-948.

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 was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Actions: Torts: Negligence.** Whether a statute includes an implied right of action is distinct and separate from the issue whether a statute creates a duty in tort which can be enforced via a negligence action.
4. **Statutes: Actions: Legislature: Intent.** Whether a statute creates a private right of action depends on the statute's purpose and whether the Legislature intended to create a private right of action.
5. **Actions: Legislature: Intent.** Without legislative intent to create not just a private right but also a private remedy, courts cannot create an implied cause of action, no matter how desirable that might be as a policy matter or how compatible with the statute.
6. **Appeal and Error.** The party appealing must point out the factual and legal bases that show the error in the lower court's decision.

7. ____. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.
8. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
9. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, 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.
10. **Torts: Intent: Proof.** To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.
11. **Summary Judgment.** In the summary judgment context, a fact is material only if it would affect the outcome of the case.
12. **Brokers: Real Estate: Words and Phrases.** Broadly speaking, a broker is any person who (1) negotiates or attempts to negotiate the listing, sale, purchase, exchange, rent, lease, or option for any real estate or improvements thereon; (2) assists in procuring prospects or holds himself or herself out as a referral agent for the purpose of securing prospects for these purposes; (3) collects rents or attempts to collect rents; (4) gives a broker's price opinion or comparative market analysis; or (5) holds himself or herself out as engaged in any of the foregoing.
13. ____: ____: ____. A designated broker is an individual holding a broker's license who has full authority to conduct the real estate activities of a real estate business.
14. **Brokers: Words and Phrases.** An associate broker is a person who has a broker's license and who is employed by another broker to participate in any activity in which a broker engages.
15. ____: ____. A salesperson is anyone employed by a broker who is not himself or herself a licensed broker.
16. ____: ____. Associate brokers and salespersons under the supervision of a designated broker are called affiliated licensees.
17. ____: ____. Once engaged in a brokerage relationship with a client, the designated broker and affiliated licensees are called licensees.
18. **Brokers: Agents: Words and Phrases.** Within the context of a brokerage relationship, which is an agency relationship, a licensee is the limited agent of the client.
19. **Real Estate: Agents: Words and Phrases.** A single agent represents only one party in a real estate transaction.

20. **Real Estate: Agents.** Unless there is an agreement specifically designating a limited agent as a seller's agent, a landlord's agent, a subagent, or a dual agent, the limited agent is considered a buyer's or tenant's agent.
21. **Brokers: Agents: Words and Phrases.** A dual agent has entered into a brokerage relationship with and therefore represents both the seller and buyer or both the landlord and tenant.
22. **Brokers: Agents.** A designated broker is not considered to be a dual agent even though his or her affiliated licensees represent parties on both sides of the transaction so long as the broker exercises his or her powers to appoint in writing those affiliated licensees who will be acting as limited agents of the client to the exclusion of all other affiliated licensees.
23. **Brokers: Agents: Words and Phrases.** A subagent is a designated broker, together with his or her affiliated licensees, engaged by another designated broker to act as a limited agent for a client.
24. **Brokers.** According to Neb. Rev. Stat. § 76-2423(1) (Reissue 2009), the fiduciary relationship between a broker and client shall commence at the time that the licensee begins representing a client and continue until performance or completion of the representation.
25. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
26. **Brokers: Agency.** A brokerage relationship is a limited agency relationship.
27. **Brokers: Statutes.** With certain exceptions, the statutes governing brokerage relationships supersede any common-law duties and responsibilities of brokers, including those of a fiduciary nature.
28. **Brokers.** A broker's commission generally becomes payable on completion of the transaction which the broker was employed to negotiate, unless there is a stipulation in the contract of employment to the contrary.

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

Theodore R. Boecker, Jr., of Boecker Law, P.C., L.L.O., for appellants.

Jennifer D. Tricker and Robert A. Stark, of Baird Holm, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, and CASSEL, JJ.

CASSEL, J.

I. INTRODUCTION

Professional Management Midwest, Inc. (PMMI), and two of its officers brought suit against Lund Company (Lund), a

brokerage firm, to recover damages that allegedly resulted when the president of PMMI independently engaged Lund's services to locate and lease new office space while PMMI was still liable under a previous lease, which PMMI later breached. The district court granted summary judgment in favor of Lund after concluding, for various reasons, that the brokerage company was not liable to PMMI for engaging in such actions under the theories of inducement, tortious interference, or negligence. Finding no error in the district court's judgment, we affirm.

II. BACKGROUND

PMMI is a corporation that provides health care management consulting in Nebraska and neighboring states. At all times relevant to this case, Donald Pedersen, James W. Huntington, and Tony C. Clark were the sole officers and shareholders of PMMI. For several years, Pedersen served as president of the corporation.

In 2005, PMMI leased office space at 4905 South 107th Avenue, Omaha, Nebraska (107th Avenue property), from William and Mary Doucette, the landlords of the 107th Avenue property. Alvin Shipps and Mark Thurber served as real estate agents for PMMI in the transaction. Both Shipps and Thurber were affiliated with Lund. Mark Covert, also an agent at Lund, served as both listing agent and property manager for the Doucettes. Pedersen, as PMMI's president, initially signed a "Standard Intent to Lease Agreement," which set forth the terms of the proposed lease. On behalf of PMMI, Pedersen later signed a business property lease for the 107th Avenue property (107th Avenue lease). The lease was for a term of 5 years 1 month, to begin on September 15, 2005. The lease provided that PMMI would be held in default or breach of the lease if, among other things, it failed to pay rent when due or vacated or abandoned the premises. Upon default, the Doucettes would be allowed to retake the premises, terminate the lease, and recover from the tenant all damages proximately resulting from the breach. Pedersen, Huntington, and Clark signed personal guarantees as part of the 107th Avenue lease.

Sometime in late 2006, PMMI began having trouble making timely rent payments under the 107th Avenue lease. These financial troubles ultimately motivated Pedersen to contact Shipps for help in finding cheaper office space, and on January 17, 2007, Pedersen signed a lease, in his personal capacity, for office space at 11711 Arbor Street, Suite 215, in Omaha (Arbor Street property). Immediately upon signing the lease, Pedersen moved PMMI's equipment and staff from the 107th Avenue property to the Arbor Street property.

Once Covert learned that PMMI had vacated the 107th Avenue property, he sent a letter to Pedersen to "remind" him that PMMI was obligated under the lease until October 15, 2010. Covert had previously sent Pedersen a notice of default on January 22, 2007. On February 7, Covert prepared a "Commercial Tenant's Notice to Vacate" and sent the notice to his superiors at Lund, informing them that PMMI had vacated the 107th Avenue property effective February 1. At some point around this time, Pedersen tendered his 107th Avenue property keys to Covert. However, in a February 20 letter, Covert stated: "Landlord has not accepted surrender of the Premises. The payment of your rental obligations shall be required for the remaining term of the lease."

Soon thereafter, the Doucettes filed a complaint against PMMI, Pedersen, Huntington, and Clark to collect damages for breach of the 107th Avenue lease. In the district court's ultimate ruling on the Doucettes' complaint, it found that PMMI breached the lease and that Pedersen, Huntington, and Clark were joint and several guarantors but entered judgment against Pedersen alone in the amount of $96,971.50. The court dismissed the Doucettes' claim against Huntington and Clark with prejudice. Nevertheless, in April or May 2007, Huntington and Clark each individually paid $20,000 to the Doucettes.

Following the district court's June 2008 finding that PMMI breached the 107th Avenue lease but prior to the judgment against Pedersen in April 2010, PMMI, Huntington, and Clark (collectively appellants) initiated the instant case against Lund for inducement to breach a lease, tortious interference with a business relationship, and negligence.

Lund filed a motion for summary judgment in February 2011, and both parties adduced evidence at a hearing on March 18.

On October 18, 2011, the district court granted the motion for summary judgment. The court made findings related to the scope of Lund's liability, whether there was inducement to breach a lease, whether there was tortious interference, and Lund's duty to appellants for purposes of negligence. We summarize only those findings of the court with which appellants take issue.

The district court first considered whether there was a private right of action for inducement to breach. Appellants alleged that such a right of action was created by Neb. Rev. Stat. § 81-885.24(13) (Reissue 2008), which gives the State Real Estate Commission power to censure, suspend the license of, or impose a civil fine on a licensed broker if he or she has been found guilty of "[i]nducing any party to a contract of sale or lease to break such contract for the purpose of substituting, in lieu thereof, a new contract with another principal." Appellants had argued to the court that a violation of this licensure statute could be used to prove breach in the same manner that violation of a traffic law could be used to establish negligence of the driver. The court did not accept this reasoning. It stated:

> First, with regard to the alleged "inducement," this case does not involve a claim of negligence. Both cases cited by [appellants] are negligence cases. Second, this is a code of conduct established by the [State] Real Estate Commission for real estate agents and brokers. Violation can lead to discipline, but there is nothing in Nebraska law that would allow an individual to bring a private civil action against an agent or broker for violation of this prohibition.

Despite having found that there was no private right of action for inducement to breach, the district court engaged in a factual analysis of this claim and concluded that Lund did not engage in any actions which would constitute inducement.

The district court similarly found that Lund did not engage in actions which would constitute tortious interference, because

there was no "unjustified intentional act on the part of Lund and/or any of its agents." The court concluded that there was "no evidence to support this allegation."

Finally, the district court discussed whether Lund owed a duty to appellants at the time of PMMI's breach in 2007. The court determined that Lund owed no duty to Huntington or Clark, because they were guarantors. Neither did Lund owe a duty to PMMI, according to the court, because "the agency relationship between PMMI and Lund terminated when the 107th Avenue Lease began" in 2005. As such, "[t]hat Pedersen chose to contact Lund to secure the Arbor Street property in 2007 and negotiate a lease that Pedersen signed in his personal capacity, not on behalf of PMMI, is clearly not a breach of duty, if such a duty even exists, that Lund may have to PMMI."

Despite this conclusion, the district court again undertook a factual analysis of appellants' negligence claim. It reasoned that "expert testimony is necessary to support a claim of breach of the standard of care in this case because the alleged negligence cannot be presumed to be within the comprehension of laypersons." Appellants had not offered any expert testimony, so the court concluded that "[e]ven if, *arguendo*, such a duty did exist, there is absolutely no evidence in the record as to the standard of care that is owed by a real estate agent to PMMI, Clark or Huntington." (Emphasis in original.)

Because the district court found that appellants' claims of inducement to breach a lease, tortious interference, and negligence had no merit, it granted summary judgment in favor of Lund.

Appellants timely appealed, and pursuant to statutory authority,[1] we moved the case to our docket.

III. ASSIGNMENTS OF ERROR

Appellants allege, restated and reordered, that the district court erred in (1) concluding that (a) there is no private cause of action under § 81-885.24(13) against a real estate broker for

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

inducement to breach a contract of sale or lease and (b) there was insufficient evidence to find that Lund induced a breach of the 107th Avenue lease, (2) concluding that there was insufficient evidence to find that Lund tortiously interfered with PMMI's lease agreement with the Doucettes, (3) concluding that PMMI's agency relationship with Lund terminated when the 107th Avenue lease began, (4) concluding that there was insufficient evidence to find that Lund breached its fiduciary duties, (5) concluding that appellants needed expert testimony to establish the standard of care owed by Lund, and (6) granting Lund's motion for summary judgment because there were no material issues of fact.

IV. STANDARD OF REVIEW

[1] 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]

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[3]

V. ANALYSIS

1. Inducement to Breach Lease

Appellants argue that the district court erred both in determining that § 81-885.24(13) did not create a private cause of action for inducement to breach a lease and in finding that even if there were a private cause of action, there was insufficient evidence to find inducement. We discuss each of these assignments of error in turn.

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[2] *Heritage Bank v. Bruha*, 283 Neb. 263, 812 N.W.2d 260 (2012).

[3] *Westin Hills v. Federal Nat. Mortgage Assn.*, 283 Neb. 960, 814 N.W.2d 378 (2012).

(a) Private Cause of Action Under § 81-885.24(13)

Appellants assign error to the district court's conclusion that § 81-885.24(13) did not create a private right of action against a real estate broker for inducement to breach a contract of sale or lease. Section 81-885.24(13) is part of the Nebraska Real Estate License Act[4] and gives the State Real Estate Commission power to censure, suspend the license of, or impose a civil fine on a licensed agent or broker if he or she has been found guilty of the unfair trade practice of "[i]nducing any party to a contract of sale or lease to break such contract for the purpose of substituting, in lieu thereof, a new contract with another principal."[5]

Before the district court and on appeal, appellants' argument for this private right of action is based in negligence. They argue that a violation of § 81-885.24(13) could be used to prove breach of a duty for purposes of negligence in the same manner as "violations [of a traffic law] can be utilized to establish negligence [of] a driver."[6]

[3] But as the Restatement (Third) of Torts explains, "[t]he body of law addressing [whether an implied right of action should be found in a statute] is robust, is distinct from tort law, and entails an assessment of legislative action."[7] Nevertheless, "[c]ourts frequently have not made a clear distinction between implied rights of action and statutorily supported tort duties when addressing whether a private claim can be maintained."[8] On occasion, we have not made this distinction clear. For example, in *Strauel v. Peterson*,[9]

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[4] See Neb. Rev. Stat. §§ 81-885 to 81-885.55 (Reissue 2008 & Cum. Supp. 2012).

[5] § 81-885.24(13).

[6] See brief for appellants at 15.

[7] Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 38, Reporter's Note comment *c*. at 736 (Proposed Final Draft No. 1, 2005) (approved in 2011).

[8] *Id*.

[9] *Strauel v. Peterson*, 155 Neb. 448, 52 N.W.2d 307 (1952).

this court responded to an argument that a statute created a duty in tort by considering whether an implied right of action accrued from the statute. In that case, we held that there was no private right of action despite the fact that the question on appeal was framed by the parties as one of statutorily created duties in tort. In the face of this blurred distinction, we now recognize that whether a statute includes an implied right of action is distinct and separate from the issue whether a statute creates a duty in tort which can be enforced via a negligence action.

[4,5] This distinction exposes the problem in appellants' argument for a private cause of action for inducement under § 81-885.24(13). Although claiming to argue for recognition of a private right of action, the substance of appellants' argument in no way supports such a finding. Whether a statute creates a private right of action depends on the statute's purpose and whether the Legislature intended to create a private right of action.[10] Without legislative intent "to create not just a private right but also a private remedy," courts cannot create an implied cause of action, "no matter how desirable that might be as a policy matter or how compatible with the statute."[11] Appellants argue neither that the Legislature intended to create a private right of action against offending licensees under § 81-885.24(13) nor that the purposes of the statute would support implying such a right. In making their argument for a private right of action, appellants address solely the question whether § 81-885.24(13) creates a duty in tort, the violation of which is evidence of negligence. This is a distinct issue that is irrelevant to the question whether § 81-885.24(13) creates an implied right of action.

[6] In their reply brief, appellants seem to acknowledge that legislative purpose and intent are the sole factors relevant to the implied right of action inquiry, but push the burden of presenting evidence of such intent or purpose onto Lund. In effect, appellants argue that Lund has the burden on appeal of

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[10] See, e.g., *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011), *cert. denied* 565 U.S. 967, 132 S. Ct. 463, 181 L. Ed. 2d 302.

[11] *Id.* at 604, 799 N.W.2d at 296.

proving that the district court ruled correctly. Such an argument is wholly incorrect and ignores the basic proposition that the party appealing "must point out the factual and legal bases that show the error" in the lower court's decision.[12]

Because appellants fail to address the factors relevant to deciding whether a private right of action exists, we do not reach this assignment of error.

(b) Insufficient Evidence of Inducement

[7] Given that we do not reach the previous assignment of error regarding § 81-885.24(13), we need not review the district court's finding that appellants adduced insufficient evidence to find that Lund induced a breach of the 107th Avenue lease. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[13]

2. Tortious Interference

(a) Insufficient Evidence of Tortious Interference

Appellants allege that the district court erred in concluding that there was insufficient evidence to find tortious interference with the 107th Avenue lease, arguing that on this issue and others, the court's order was "drafted as if the [c]ourt reviewed evidence, made factual determinations and entered an [o]rder after a trial."[14] Because (1) appellants misconstrue the court's finding, ignoring that it was a finding of sufficiency as a matter of law, and (2) it is not improper to consider whether a party adduced sufficient evidence to meet its evidentiary burden in summary judgment, this assignment of error lacks merit.

First, appellants' argument that the district court erred in concluding that there was insufficient evidence misconstrues the court's finding. The court neither employed the phrase

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[12] *Mandolfo v. Mandolfo*, 281 Neb. 443, 452, 796 N.W.2d 603, 612 (2011).

[13] *In re Trust Created by Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011).

[14] Brief for appellants at 11.

"insufficient evidence" nor spoke in terms of sufficiency of evidence. Rather, the court stated that it "can find no evidence to support this allegation" of tortious interference. In making this finding, the court was not weighing conflicting evidence. As the court's subsequent analysis revealed, it was addressing whether appellants' evidence was satisfactory legal proof of tortious interference. In other words, the court was weighing the sufficiency of the evidence *as a matter of law*.

[8,9] Second, the district court's analysis was proper because consideration of a motion for summary judgment also requires a court to consider the quantitative sufficiency of the evidence. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.[15] This standard explicitly invokes the idea of sufficiency of evidence. Furthermore,

> [a]fter the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, 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.[16]

Courts also speak in terms of "sufficiency" when considering whether the nonmoving party met this burden. In fact, this court has defined the decisive question on appeal from summary judgment as "whether [the nonmoving party] produced sufficient evidence to present a genuine issue of material fact."[17] Indeed, any burden of proof necessarily requires a court to determine whether the party with the burden of proof adduced sufficient evidence to meet that burden. In claiming that the district court erred in finding that there was insufficient evidence to find that Lund tortiously interfered with the

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[15] *In re Estate of Cushing*, 283 Neb. 571, 810 N.W.2d 741 (2012).

[16] *Id.* at 578, 810 N.W.2d at 747.

[17] *Deviney v. Union Pacific RR. Co.*, 280 Neb. 450, 455, 786 N.W.2d 902, 907 (2010).

107th Avenue lease, appellants overlook the evidentiary burdens applicable in the summary judgment procedure.

In the instant case, appellants were in the position of the nonmoving party, and thus, once Lund adduced sufficient evidence to show that it was entitled to judgment as a matter of law if Lund's evidence remained uncontroverted at trial, they had the burden of showing the existence of material issues of fact that would have precluded judgment as a matter of law in favor of Lund, the moving party. Because appellants had a burden of proof in the summary judgment hearing, the district court did not err in considering whether appellants produced sufficient evidence to meet that burden of proof.

(b) Existence of Material Issue of Fact

Lund was the moving party and carried the initial burden of showing its entitlement to judgment on the tortious interference claim. As the original plaintiffs, appellants would have had the burden of proving the elements of tortious interference at trial. Failure to meet this burden would have resulted in judgment for Lund. Consequently, Lund was entitled to judgment as a matter of law at the summary judgment stage if it affirmatively showed that appellants would be unable to prove one or more of the elements of tortious interference at trial.

[10] To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.[18]

Although the procedural history is slightly different from that of the instant appeal, the case of *Aon Consulting v. Midlands Fin. Benefits*[19] is instructive in considering whether

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[18] *Recio v. Evers*, 278 Neb. 405, 771 N.W.2d 121 (2009).

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

appellants could prove the elements of tortious interference. In *Aon Consulting*, William Pearson left his position with Aon Consulting, Inc. (Aon), to take a similar position with Midlands Financial Benefits, Inc. (Midlands), whereupon he proceeded to breach a nonsolicitation agreement he had with Aon. Aon brought suit against Midlands for tortious interference, but the action was dismissed on Midlands' motion for directed verdict. On appeal, this court agreed with the district court that Aon failed to prove an unjustified intentional act of interference on the part of Midlands. In so concluding, this court highlighted three pertinent facts: (1) "Pearson contacted Midlands about employment and . . . Midlands neither solicited nor recruited Pearson," (2) Pearson "told Midlands that . . . the agreement was unenforceable," and (3) "Midlands did not expect or require Pearson to solicit customers he had served while employed by Aon," which was the action that breached the nonsolicitation agreement.[20] Given these facts, this court reasoned that "the most that can be said is that Midlands hired an experienced individual who sought employment and relied in good faith upon his representation that, according to his attorney, his nonsolicitation agreement with a prior employer was unenforceable."[21] Consequently, this court held that "the district court did not err in determining that Aon presented no evidence to support a reasonable inference that Midlands intentionally and unjustifiably interfered with its contractual relationship with Pearson."[22]

For purposes of the instant appeal, it is important to note that Aon's case for tortious interference failed because of the existence of three facts: (1) Pearson established contact with Midlands, the party who allegedly interfered with Aon's contractual relationship with Pearson; (2) Pearson represented to Midlands that the nonsolicitation agreement was not enforceable, which agreement was the contract with which Midlands supposedly interfered; and (3) Midlands did not require Pearson

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[20] *Id.* at 664, 748 N.W.2d at 645.

[21] *Id.*

[22] *Id.*

to engage in the actions which ultimately breached the agreement. Together, these three facts combined to show that there was no unjustified intentional act of interference on the part of Midlands.[23]

These same three facts in the instant case establish that there was no unjustified intentional act of interference by Lund. First, it is significant that Lund did not initiate the communication with Pedersen, a fact that is not disputed by appellants. Rather, Pedersen telephoned Shipps of his own volition and requested assistance in finding cheaper office space. Second, Lund's evidence showed that Pedersen represented to Shipps, prior to viewing any property or signing the Arbor Street lease, that "he had made arrangements" with the Doucettes. Lund also produced evidence that Shipps "was of the understanding" that any liability under the 107th Avenue lease "had been taken care of." Such an understanding disproves any intent by Lund to interfere with the 107th Avenue lease, a lease Lund believed had been terminated. Third, in showing Pedersen the Arbor Street property and ultimately negotiating the Arbor Street lease, Shipps did not require Pedersen to breach the 107th Avenue lease or terminate business relations with the Doucettes. Although appellants argue that "looking for additional office space" would "necessarily" cause PMMI to stop paying rent under the 107th Avenue lease,[24] Pedersen incurred no obligation to cease making other rent payments or to withdraw from other leases by viewing the Arbor Street property or even by signing the Arbor Street lease. Thus, as in *Aon Consulting*,[25] the party that allegedly interfered did not expect or require breach of the prior business relationship.

Because Pedersen initiated contact with Shipps and represented to him that liability under the 107th Avenue lease was terminated and because the new lease negotiated by Shipps did not require Pedersen to breach the 107th Avenue lease, we

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[23] See *id*.

[24] Brief for appellants at 14.

[25] *Aon Consulting v. Midlands Fin. Benefits, supra* note 19.

find that Lund adduced sufficient evidence to disprove that it engaged in an unjustified intentional act of interference. Thus, Lund established a prima facie case for summary judgment.

[11] At this point in the summary judgment proceedings, the burden shifted to appellants to produce sufficient evidence to establish the existence of a material issue of fact that prevented judgment for Lund.[26] We recognize that appellants' evidence did call into question Lund's evidence on certain factual matters, such as how much Pedersen disclosed to Lund about his plans to vacate the 107th Avenue property and when such disclosures were made. However, not all issues of fact preclude summary judgment, but only those that are material. In the summary judgment context, a fact is material only if it would affect the outcome of the case.[27] Accordingly, because Lund showed that appellants could not prove an unjustified intentional act of interference under the precedent of *Aon Consulting*, the only way for appellants to establish a material issue of fact would have been to contradict Lund's evidence on one of the three facts identified in *Aon Consulting*.

In reviewing the record, we find no evidence to contradict that Pedersen established contact with Shipps, that Pedersen told Shipps that he had made arrangements with the Doucettes to prevent liability under the 107th Avenue lease, and that the Arbor Street lease did not require Pedersen to breach the 107th Avenue lease. Because appellants did not show the existence of material issues of fact on these issues, the district court did not err in holding that appellants' evidence failed to support a finding of tortious interference.

3. Negligence

Three of appellants' assignments of error relate to their negligence claim against Lund. The first challenges the district court's finding that the agency relationship arising from Lund's representation of PMMI in leasing the 107th Avenue property terminated prior to Lund's supposed breach of its duties under that relationship. The second addresses the sufficiency of

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[26] See *In re Estate of Cushing, supra* note 15.

[27] *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008).

appellants' evidence of breach. And the third finds error with the court's holding that appellants were required to adduce expert testimony to establish the appropriate standard of care. Because of the result we reach, we discuss only the first of these assignments of error.

(a) Duration of Agency Relationship Between PMMI and Lund

Appellants' negligence claim against Lund depended upon a finding that Lund owed fiduciary duties to PMMI at the time of the alleged breach. The relationship between Lund and PMMI began when Pedersen engaged Lund's services to find new office space in 2005. The district court determined that this relationship concluded when the 107th Avenue lease was signed and that Lund owed no continuing duties to PMMI when Pedersen signed the Arbor Street lease in 2007. Appellants argue that the relationship with Lund and the resulting fiduciary duties continued until at least that latter point in time. As such, this assignment of error requires us to define and delimit the agency relationship between a real estate broker and the lessee he or she represents. We need not determine whether Lund's actions breached the fiduciary duties owed within that relationship, because we find that the agency relationship between Lund and PMMI ended no later than October 4, 2005, when Lund received its commission.

In 1994, the Legislature passed a series of statutes "to codify in statute the relationships between real estate brokers or salespersons and persons who are sellers, landlords, buyers, or tenants of rights and interests in real property."[28] Because these statutes "shall supersede the duties and responsibilities of the parties under the common law, including fiduciary responsibilities of an agent to a principal,"[29] appellants' citation to various cases defining the fiduciary duties owed by a real estate broker and their discussion of foreseeability of harm as creating duties are both irrelevant to our consideration of this issue.

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[28] Neb. Rev. Stat. § 76-2401 (Reissue 2009).

[29] Neb. Rev. Stat. § 76-2429 (Reissue 2009).

Before we can define the relationship between Lund and PMMI, it is first necessary to understand the terminology used in the statutes and to identify the parties according to those terms.

[12] Neb. Rev. Stat. §§ 76-2401 to 76-2430 (Reissue 2009) govern the agency relationships between what we commonly refer to as a "broker" and his or her clients.[30] Broadly speaking, a broker is any person who (1) "negotiates or attempts to negotiate the listing, sale, purchase, exchange, rent, lease, or option for any real estate or improvements thereon"; (2) "assists in procuring prospects or holds himself or herself out as a referral agent for the purpose of securing prospects" for these purposes; (3) "collects rents or attempts to collect rents"; (4) "gives a broker's price opinion or comparative market analysis"; or (5) "holds himself or herself out as engaged in any of the foregoing."[31] When a client engages a broker to perform any of the above-listed services, the resulting agency relationship is called a brokerage relationship.[32]

[13] Within the context of a brokerage relationship, the broker is categorized as either a designated broker or an affiliated licensee of the designated broker. A designated broker is "an individual holding a broker's license who has full authority to conduct the real estate activities of a real estate business."[33] In a corporation such as Lund, the board of directors identifies a designated broker for the entire real estate business to whom is given "full authority to conduct the real estate activities of the . . . corporation."[34]

[14-17] In all real estate operations other than sole proprietorships, the designated broker retains associate brokers or salespersons to assist with the work of serving clients. An associate broker is "a person who has a broker's license and who is employed by another broker to participate in any activity [in

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[30] See § 76-2401.

[31] § 81-885.01(2) (definition as adopted by § 76-2405).

[32] See § 76-2405.

[33] § 81-885.01(4) (definition as adopted by § 76-2410).

[34] *Id.*

which a broker engages]."[35] A salesperson is anyone employed by a broker who is not himself or herself a licensed broker.[36] Associate brokers and salespersons under the supervision of a designated broker are called affiliated licensees.[37] Once engaged in a brokerage relationship with a client, the designated broker and affiliated licensees (either associate brokers or salespersons) are called licensees.[38]

[18] Within the context of a brokerage relationship, which, we recall, is an agency relationship, a licensee is the limited agent of the client.[39] There are three types of limited agents, each of which owes slightly different fiduciary duties to the client: single agent, dual agent, and subagent.[40]

[19,20] A single agent "represents only one party in a real estate transaction."[41] Depending on the client, a single agent is more specifically called the buyer's agent, the landlord's agent, the seller's agent, or the tenant's agent.[42] Unless there is an agreement specifically designating the limited agent as the seller's agent, the landlord's agent, a subagent, or a dual agent, the limited agent is considered the buyer's or tenant's agent.[43]

[21,22] A dual agent "has entered into a brokerage relationship with and therefor[e] represents both the seller and buyer or both the landlord and tenant."[44] Dual agency requires the written informed consent of all parties to the real estate transaction.[45] A designated broker is not considered to be a dual agent even though his or her affiliated licensees represent parties on

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[35] § 81-885.01(3) (definition as adopted by §§ 76-2404 and 76-2412).

[36] See § 81-885.01(6) (definition as adopted by §§ 76-2404 and 76-2412).

[37] See § 76-2404.

[38] See § 76-2412.

[39] See §§ 76-2413 and 76-2416.

[40] See § 76-2416.

[41] § 76-2414.

[42] See *id*.

[43] See § 76-2416(2).

[44] § 76-2411.

[45] See *id*.

both sides of the transaction so long as the designated broker exercises his or her powers to "appoint in writing those affiliated licensees who will be acting as limited agents of th[e] client to the exclusion of all other affiliated licensees."[46] Section 76-2427 explicitly provides that "[a] designated broker shall not be considered to be a dual agent solely because he or she makes an appointment under this section."

[23] A subagent is "a designated broker, together with his or her affiliated licensees, engaged by another designated broker to act as a limited agent for a client."[47]

Having thus outlined the various terms used in the statutory scheme, we turn to the case at hand. Recall that we are concerned only with the relationship between Lund and PMMI in 2005. While Lund did enter into a second brokerage relationship with PMMI, or at least Pedersen, in late 2006 or early 2007, it is that second relationship that appellants allege breached the continuing duties arising under the first brokerage relationship in 2005. As such, the brokerage relationship with which we are concerned is that arising from the leasing transaction in 2005.

In that brokerage relationship, the client was PMMI. Shipps and Thurber together were licensees, specifically tenant's agents. Shipps and Thurber were also affiliated licensees, whose designated broker was John Lund.

Although outside the specific brokerage relationship between Lund and PMMI, we note that Covert was also an affiliated licensee of John Lund and served as a licensee to the Doucettes for lease of the 107th Avenue property. Dual agency was argued before the district court, but appellants did not assign error to the court's finding that Lund was not engaged in dual agency. Therefore, we need not address this finding.

[24] As tenant's agents, Shipps and Thurber undoubtedly owed fiduciary duties to PMMI for the duration of the brokerage relationship.[48] However, § 76-2423 is clear that once the

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[46] § 76-2427.

[47] § 76-2415.

[48] See § 76-2418(1).

brokerage relationship terminated, Shipps and Thurber—and, by extension, Lund—ceased to owe duties to PMMI except for limited duties of confidentiality and accounting for money and property received during the relationship. According to statute, the fiduciary relationship between a broker and client "shall commence at the time that the licensee begins representing a client and continue until performance or completion of the representation."[49] Thus, to determine when Lund's representation of PMMI was performed or completed, we must first define and delimit that representation.

[25] Appellants urge us to characterize the relationship between PMMI and Lund as almost unlimited, arguing that Lund owed a "continuing duty"[50] for the duration of the 107th Avenue lease and that Lund should be liable for any foreseeable injury even if the company was not "still technically an 'agent' within an active agency."[51] But such an interpretation of a brokerage relationship and the duties arising therefrom conflicts with the statutory scheme governing those relationships, as our analysis below will reveal. Because our standard of review dictates that we interpret the statutes governing brokerage relationships "so that different provisions are consistent, harmonious, and sensible,"[52] we reject appellants' argument on the scope of a brokerage relationship.

[26,27] A brokerage relationship is a limited agency relationship,[53] and the services a broker can offer to a client are limited by statute.[54] When the Legislature adopted the statutes governing brokerage relationships in 1994, it made clear that the resulting statutory scheme would supersede any common-law duties and responsibilities of brokers, including those of

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[49] § 76-2423(1)(a).

[50] Brief for appellants at 25.

[51] *Id.* at 24.

[52] *AT&T Communications v. Nebraska Public Serv. Comm.*, 283 Neb. 204, 211, 811 N.W.2d 666, 672 (2012).

[53] See §§ 76-2416 to 76-2418.

[54] See § 81-885.01(2) (definition as adopted by § 76-2405).

a fiduciary nature.[55] Accordingly, with certain exceptions not applicable here,[56] the fiduciary duties owed by a broker to his client now derive only from performance of these limited services.

In the instant case, PMMI engaged Lund to provide two of the brokerage services defined by statute: "procuring prospects . . . for the . . . renting [or] leasing . . . of any real estate" and "negotiat[ing] or attempt[ing] to negotiate the . . . rent [or] lease . . . for any real estate."[57] Because PMMI was relying upon Lund to locate office space available to lease, we can also define the relationship between PMMI and Lund as that of tenant and tenant's agent, respectively, in which case Lund owed duties for its representation of PMMI as the tenant "in a leasing transaction."[58]

Based on these statutory provisions, Lund's representation of PMMI had three purposes: (1) to identify acceptable rental property, (2) to negotiate the lease, and (3) to execute the leasing transaction. Once these three things were accomplished, the representation was fully performed and any fiduciary duties owed by Lund to PMMI ceased. Following our rules of statutory interpretation, we give the undefined terms in these provisions their plain, ordinary meaning.[59]

Our case law does not define when a leasing transaction terminates. Under Neb. Rev. Stat. § 36-105 (Reissue 2008), it is clear that a lease contract for longer than 1 year becomes enforceable only once it is "signed by the party by whom the lease or sale is to be made." But there is no corresponding statutory provision or proposition in case law defining when the leasing transaction, as opposed to the lease contract, is terminated.

[28] We are, however, able to ascertain that the leasing transaction in the instant case—and, by consequence, Lund's

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[55] See § 76-2429.

[56] See § 76-2422(6).

[57] § 81-885.01(2) (definition as adopted by § 76-2405).

[58] § 76-2414(4).

[59] See *J.M. v. Hobbs*, 281 Neb. 539, 797 N.W.2d 227 (2011).

representation of PMMI—was terminated long before Lund's alleged breach in 2007. A broker's commission generally "becomes payable on completion of the transaction which the broker was employed to negotiate, unless there is a stipulation in the contract of employment to the contrary."[60] Thus, if a broker is employed as a tenant's agent whose purpose is to represent the tenant in a leasing transaction, as Shipps was in the instant case, the broker's commission can be disbursed only after the leasing transaction—the underlying transaction for which the commission was earned—is completed. Lund received the commission for its representation of PMMI on October 4, 2005. Therefore, the leasing transaction for which Shipps represented PMMI was concluded by October 2005 at the very latest. We need not determine whether the leasing transaction actually concluded prior to that date because it is clear that Lund's representation of PMMI concluded long before Pedersen engaged Lund to search for cheaper office space property in late 2006 or early 2007. The district court did not err in holding that Lund's fiduciary relationship with PMMI terminated prior to 2007.

(b) Other Assignments of Error Related to Negligence

Because we find that any duties owed by Lund to PMMI by virtue of their brokerage relationship terminated prior to the alleged breach of those duties in 2007, we need not reach appellants' assignment that the district court erred in finding that there was insufficient evidence of breach.[61] Because Lund owed PMMI no duties at the time of the alleged breach, neither is there need to discuss whether the court erred in requiring appellants to adduce expert testimony to prove the standard of care owed by Lund.

4. Summary Judgment

Finally, appellants generally allege that the district court erred in granting summary judgment in favor of Lund. In the

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[60] 12 C.J.S. *Brokers* § 211 at 275 (2004).

[61] See *In re Trust Created by Hansen, supra* note 13.

separate argument section for this assignment, appellants make mostly factual arguments as to why the court should not have granted summary judgment in favor of Lund, attempting to show that there were material issues of fact. Appellants' only legal argument under this assignment of error asserts that Lund was liable for the negligent acts of its agents, a legal conclusion with which the district court agreed. Otherwise, appellants do not advance any legal arguments distinct from those we have already dismissed as lacking merit.

Given our previous findings that there was no tortious interference and that Lund owed no duty to PMMI in 2007, which prevents a finding of negligence,[62] and without recognition of an implied private cause of action for inducement, appellants are legally barred from succeeding on any of their theories of relief. For these same reasons, any issues of fact that exist are not considered material.[63]

Because appellants' purely factual arguments are of no avail in challenging these legal bars to relief or in raising material issues of fact, we find no merit to this assignment of error. The district court did not err in granting summary judgment in favor of Lund.

VI. CONCLUSION

We hold that Lund, as a real estate broker, cannot be held liable to PMMI for inducement, tortious interference, or negligence for assisting Pedersen to enter into a new lease while knowing that PMMI remained liable under a previous lease. From our conclusion that the limited brokerage relationship between Lund and PMMI was terminated, at the very latest, upon the payment of Lund's commission regarding the 107th Avenue lease, it necessarily follows that Lund owed no fiduciary duties to PMMI at the time of the alleged breach of those duties in 2007. As a matter of law, PMMI's claim that Lund engaged in an unjustified intentional act of interference by assisting Pedersen in locating new office space fails because

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[62] See *Spear T Ranch v. Nebraska Dept. of Nat. Resources*, 270 Neb. 130, 699 N.W.2d 379 (2005).

[63] See *Amanda C. v. Case, supra* note 27.

the assistance was performed at Pedersen's request, in reliance on Pedersen's representation that he had made arrangements to prevent liability under the 107th Avenue lease, and without requirement that Pedersen breach any existing contractual relationships. As for Lund's liability for inducing the breach of a lease under § 81-885.24(13), we do not reach the issue because appellants' arguments for an implied private right of action focus solely on whether the statute imposed a duty in tort—a distinct and separate issue. These holdings make it unnecessary to consider appellants' remaining assignments of error. Because we either do not reach appellants' assignments of error or find them to be without merit, we affirm the judgment of the district court.

AFFIRMED.

McCORMACK and MILLER-LERMAN, JJ., not participating.

INTERCALL, INC., APPELLANT, V.
EGENERA, INC., APPELLEE.
824 N.W.2d 12

Filed December 7, 2012. No. S-11-1003.

1. **Pleadings: Appeal and Error.** Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.
2. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
3. **Verdicts: Appeal and Error.** A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.
4. **Motions for New Trial: Appeal and Error.** An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for an abuse of discretion.
5. **Contracts: Fraud.** A contract is voidable by a party if his or her manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which he or she is justified in relying.
6. ____: ____. A misrepresentation induces a party's manifestation of assent if it substantially contributes to the party's decision to manifest his or her assent.
7. ____: ____. A party who has been induced to enter into a contract by a material misrepresentation has, upon discovery of such misrepresentation, an election of remedies: either to affirm the contract and sue for damages or to disaffirm the

contract and be reinstated to the induced party's position which existed before entry into the contract.

8. **Contracts: Fraud: Restitution.** Where the induced party to a contract elects to disaffirm or avoid the transaction, it may claim restitution.
9. **Torts: Contracts: Fraud.** Misrepresentation or nondisclosure may render a transaction voidable even if there would be no tort cause of action for deceit.
10. **Pleadings.** A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.
11. **Pleadings: Proof.** The burden of proof of prejudice is on the party opposing amendment of a pleading. Prejudice does not mean inconvenience to a party, but instead requires that the nonmoving party show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the amendments been timely.
12. **Actions: Pleadings: Words and Phrases.** A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action. Thus, two or more claims in a complaint arising out of the same operative facts and involving the same parties constitute separate legal theories, of either liability or damages, and not separate causes of action.
13. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.
14. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
15. **Contracts: Fraud.** An essential element of actionable false misrepresentation is justifiable reliance on the representation.
16. **Fraud.** Whether a party's reliance upon a misrepresentation was reasonable is a question of fact.
17. ____. Justifiable reliance must be determined on a case-by-case basis. In determining whether an individual reasonably relied on a misrepresentation, courts consider the totality of the circumstances, including the nature of the transaction; the form and materiality of the representation; the relationship of the parties; the respective intelligence, experience, age, and mental and physical condition of the parties; and their respective knowledge and means of knowledge.
18. **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.
19. ____: ____: ____. To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.

20. **Jury Instructions: Appeal and Error.** If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.
21. **Contracts: Fraud.** A material misrepresentation may be a basis for avoiding a contract, even if it resulted from an honest mistake.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Patrick R. Guinan, of Erickson & Sederstrom, P.C., L.L.O., for appellant.

Joel E. Feistner, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellee.

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

STEPHAN, J.

This case involves a dispute arising from a contractual relationship between InterCall, Inc., and Egenera, Inc. After Egenera failed to pay for certain services InterCall provided pursuant to a contract, InterCall brought an action in the district court for Douglas County. Egenera asserted affirmative defenses and a counterclaim to recover what it claimed to be overpayments. InterCall appeals from a judgment in favor of Egenera on the counterclaim. We affirm.

I. BACKGROUND

1. FACTS

Egenera is a Delaware corporation with its principal place of business in Massachusetts. It is engaged in the sale of business software and routinely uses audioconferencing services provided by outside vendors for both interaction with its customers and internal communication and training.

Prior to March 2007, Egenera obtained audioconferencing services from Raindance Communications (Raindance). Raindance charged Egenera $.05 per minute for conference call service, with no minimum charge. Raindance was subsequently acquired by InterCall, a Delaware corporation conducting business in Nebraska and a provider of audio, Web, and video

conferencing services. After this acquisition, Egenera could have continued its business relationship with Raindance for some period of time, but eventually Raindance's conferencing "platform" would have ended and Egenera would have been required to obtain audioconferencing services from InterCall or some other vendor.

In November or December 2006, Richard Visconte, a global account executive for InterCall, contacted Terry Lehane, the global technical director of customer service for Egenera, to explain the conferencing service platform offered by InterCall. Visconte and Lehane discussed pricing for audio and Web conferencing. In January 2007, Visconte told Lehane that InterCall could provide audioconferencing services at a rate of $.07 per minute. Lehane rejected the offer because it was more than the rate charged by Raindance. Lehane was satisfied with the service provided by Raindance and with its pricing structure, and he was not interested in doing business with InterCall unless it offered a better price and features than Egenera received from Raindance.

Visconte was then given permission by a regional vice president at InterCall to offer Egenera the same rate it had paid Raindance, $.05 per minute, for the audioconferencing services. In an e-mail message to Lehane, Visconte stated that he had been able to "talk [InterCall's regional vice president] into honoring your current Raindance rate of .05 cents and roll you into InterCall's [program] like we talked about, which is great news!" Relying upon this representation, Lehane agreed to the proposal. On behalf of Egenera, Lehane executed a service agreement with InterCall on March 1, 2007.

The service agreement provided for a rate of $.05 per minute for audioconferencing in the continental United States, with a "Monthly Volume Discount" and a "Minimum Annual Commitment" of $44,000 for all services. The agreement further provided:

> BY SIGNING BELOW, EACH PARTY ACKNOWLEDGES AND AGREES THAT: UNLESS INDICATED OTHERWISE, SERVICES ARE CHARGED BY MULTIPLYING ALL INBOUND OR OUTBOUND LEGS OF ALL CONFERENCES BY THE APPLICABLE PER

> MINUTE RATE; SERVICE FEATURES, FEES OR SURCHARGES NOT LISTED HEREIN, INCLUDING CONFERENCE LEGS TO OR FROM A LOCATION OUTSIDE THE CONTINENTAL U.S. WILL BE CHARGED AT INTERCALL'S STANDARD RATES; *CUSTOMER MAY OBTAIN INTERCALL'S STANDARD RATES THROUGH CUSTOMER'S WEB ACCOUNT OR THROUGH CUSTOMER'S SALES OR ACCOUNT REPRESENTATIVE*; SUBJECT TO THE TERMS OF THIS AGREEMENT, ANY RATES INDICATED IN THE RATE INFORMATION OF THIS AGREEMENT WILL REMAIN IN EFFECT FOR THE TERM OF THIS AGREEMENT; AND IT HAS READ AND AGREES TO BE BOUND BY THIS AGREEMENT, INCLUDING THE TERMS AND CONDITIONS ATTACHED HERETO.

(Emphasis supplied.)

The service agreement also provided: "Customer must notify InterCall of any disputed charges within thirty (30) days from the date of the invoice, otherwise Customer hereby agrees to such charges and InterCall will not be subject to making adjustments."

The dispute here involves a $15 "conference minimum charge" which was not mentioned in the service agreement but was included in InterCall's standard rate sheet. Visconte testified that he was not aware of the conference minimum charge and that he never told Lehane about it during the negotiations which led to the execution of the service agreement. The agreement did not mention minimum charges, nor did it reference a Web site where information about additional charges could be obtained. InterCall's standard rates are updated on a monthly basis in a standard rate agreement which is typically not attached to service agreements because of the frequency of change. Any of InterCall's customers can obtain a copy of the standard rate sheet through the customer's Web account or by contacting a customer representative. No employee of Egenera asked Visconte to provide a copy of InterCall's standard rate sheet.

Egenera received and paid invoices for audioconferencing services provided by InterCall from March 2007 until

September 2008. The invoices were processed by employees in Egenera's accounts payable department who had not been involved in negotiating the service agreement with InterCall. In the fall of 2008, an Egenera employee reviewed these invoices as a part of the company's budget process. During this review, the employee noticed that the invoices reflected billing for conference minimum charges, which he considered to be unusual and not part of the contract. For example, a 3-minute call at $.05 per minute totaled $.15, but a charge of $14.85 was added to make the total charge $15. The charges were brought to the attention of Kevin Kerrigan, Egenera's chief financial officer, who reviewed the service agreement and found no reference to a minimum charge. Kerrigan ultimately determined that during the period from March 2007 to September 2008, Egenera paid InterCall a total of $453,684.25 for audioconferencing services, of which $104,652.96 represented conference minimum charges.

Kerrigan contacted InterCall and demanded a refund of this amount. InterCall agreed to give Egenera a credit for the minimum charges on its October 1, 2008, invoice and to waive such charges going forward, but it declined to refund the charges previously billed and paid. Egenera continued to use InterCall's audioconferencing services from October 2008 through April 2009, but refused to pay any portion of the $51,445.14 billed for those services, despite the fact that no minimum charges were included in this amount.

2. Procedural History

In its complaint, InterCall sought to recover the unpaid amounts which it had billed Egenera for services after September 2008, solely on the theory of breach of contract. Egenera responded with an answer denying liability to InterCall and raising various affirmative defenses. Egenera also filed a counterclaim seeking recovery of the alleged "overcharges" attributable to conference minimum charges on various theories, including fraud in the inducement. After filing its reply, InterCall moved for summary judgment.

The district court granted InterCall's motion with respect to its claim for unpaid invoices accrued from October 2008

through April 2009, amounting to $51,445.14, noting that none of these invoices included conference minimum charges. However, with respect to Egenera's counterclaim, the district court concluded that there were genuine issues of material fact regarding Egenera's claim that it was fraudulently induced by InterCall to enter into the original service agreement.

A jury trial was held on the counterclaim. Shortly before trial, and apparently with leave of the district court, Egenera filed an amended counterclaim in which it asserted two alternative theories of recovery, one based upon fraudulent misrepresentation and the second based on material misrepresentation. With respect to the latter, it alleged:

> InterCall made misrepresentations to Egenera as to material facts . . . with respect to cost and pricing issues for audio conferencing services which substantially contributed to Egenera's decision to enter into an agreement with InterCall, and Egenera reasonably relied on such misrepresentations in entering into an agreement with InterCall.

After overruling InterCall's motions for a directed verdict, the court instructed the jury on both of Egenera's alternative theories of recovery. The jury returned a verdict in favor of Egenera in the amount of $104,652.96, and the district court entered judgment on the verdict. Subsequently, the district court overruled InterCall's motion for new trial or, in the alternative, to alter or amend the judgment. InterCall perfected this timely appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state.

II. ASSIGNMENTS OF ERROR

InterCall assigns, summarized and restated, that the district court erred in (1) not finding as a matter of law that Egenera failed to prove that InterCall misrepresented a fact that Egenera reasonably and justifiably relied upon; (2) allowing Egenera to untimely amend its counterclaim to allege material misrepresentation, a cause of action not recognized in Nebraska; (3) instructing the jury; and (4) overruling InterCall's motion for new trial or motion to alter or amend the judgment.

III. STANDARD OF REVIEW

[1] Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.[1]

[2] Whether a jury instruction is correct is a question of law, which an appellate court independently decides.[2]

[3] A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.[3]

[4] An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for an abuse of discretion.[4]

IV. ANALYSIS

1. Material Misrepresentation

We begin by addressing InterCall's argument that material misrepresentation is not a recognized theory of recovery under Nebraska law. Misrepresentation is a familiar concept in contract law. The Restatement (Second) of Contracts defines misrepresentation as "an assertion that is not in accord with the facts."[5] A misrepresentation may be either fraudulent or material.[6] "A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so."[7]

[5,6] A contract is voidable by a party if his or her "manifestation of assent is induced by either a fraudulent or a material

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[1] *Roos v. KFS BD, Inc.*, 280 Neb. 930, 799 N.W.2d 43 (2010).

[2] *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 799 N.W.2d 249 (2011).

[3] *Steele v. Sedlacek*, 267 Neb. 1, 673 N.W.2d 1 (2003).

[4] See *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011).

[5] Restatement (Second) of Contracts § 159 at 426 (1981).

[6] *Id.*, comment *a*.

[7] *Id.*, § 162(2) at 439.

misrepresentation by the other party upon which [he or she] is justified in relying."[8] A misrepresentation "induces a party's manifestation of assent if it substantially contributes to [the party's] decision to manifest his [or her] assent."[9]

InterCall acknowledges that material misrepresentation is an affirmative defense to an action on a contract. But it contends that Nebraska has never recognized a tort based upon material misrepresentation. While this is true, the threshold question is whether Egenera's counterclaim sounds in contract or in tort. We find it sounds in contract.

[7-9] A party who has been induced to enter into a contract by a material misrepresentation has, upon discovery of such misrepresentation, an election of remedies: either to affirm the contract and sue for damages or to disaffirm the contract and be reinstated to the induced party's position which existed before entry into the contract.[10] Where the induced party elects to disaffirm or avoid the transaction, it may claim restitution.[11] "Misrepresentation or nondisclosure may render a transaction voidable even if there would be no tort cause of action for deceit."[12]

Egenera did not ratify or affirm the original contract after it discovered the existence of the minimum charges. To the contrary, it renegotiated the contract to remove those charges going forward from October 1, 2008. The district court was inconsistent in its characterization of these facts. In its order granting InterCall's motion for summary judgment with respect to amounts billed after October 1, 2008, the district court noted that Egenera had affirmed the original contract by suing for damages. But later in the same order, the court characterized the first agreement as having been replaced by a new agreement which did not include minimum charges. In determining

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[8] *Id.*, § 164(1) at 445.

[9] *Id.*, § 167 at 453.

[10] *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985).

[11] 7 Corbin on Contracts § 28.13 (rev. ed. 2002).

[12] *Id.* at 71.

that InterCall was entitled to summary judgment on its claim for amounts due under the second agreement, the court reasoned that the "amounts sought by InterCall [were] an attempt to recover on invoices billed after the parties *renegotiated* the price terms of their contract." (Emphasis supplied.) The court further noted that "[a]ny alleged misrepresentations that took place pursuant to the earlier contract have no bearing upon the subsequent agreement and therefore cannot act as a bar to InterCall's recovery."

Thus, while InterCall sued Egenera for breach of the second contract, Egenera's counterclaim related to the first. It was not a claim for tort damages, but, rather, a claim for restitution relating to its avoidance of the original contract on the basis of InterCall's alleged misrepresentations. Because Egenera's restitution claim sounded in contract, it could be asserted on alternative theories of fraudulent and material misrepresentation.

2. Timeliness of Amendment

InterCall argues that even if material misrepresentation was a viable theory of recovery, the district court abused its discretion in permitting Egenera to assert it by amending its counterclaim on the eve of trial. Trial of the case commenced on July 27, 2011. InterCall states in its brief that the district court granted Egenera leave to file its amended counterclaim on July 20, citing to an unspecified portion of the supplemental transcript which contains no order bearing that date. The transcript includes a copy of the praecipe for supplemental transcript, which requests inclusion of a "[j]ournal entry entered July 20, 2011." There is a handwritten notation by an unknown author next to that request, stating "not pleading or order Jdg's note can't be ctfd." The amended counterclaim is file stamped July 28, 2011. Although InterCall states that leave to amend was granted over its objection, we find no such objection in the record. Thus, although we can reasonably conclude that the district court granted Egenera leave to file its amended counterclaim, the record does not inform us of its reasoning for doing so.

[10,11] When a party seeks leave of court to amend a pleading, our rules require that "leave shall be freely given when justice so requires."[13] A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.[14] The Nebraska rules governing the amendment of pleadings are similar to those of the Federal Rules of Civil Procedure,[15] and in applying our rules, we have looked to federal decisions interpreting the corresponding federal rule for guidance.[16] Federal courts have held that "[d]elay alone is not a reason in and of itself to deny leave to amend; the delay must have resulted in unfair prejudice to the party opposing amendment."[17] The burden of proof of prejudice is on the party opposing the amendment.[18] "Prejudice does not mean inconvenience to a party," but instead requires that the nonmoving party "'show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely.'"[19]

[12] InterCall contends that it was prejudiced by the introduction of a new cause of action on the eve of trial. We disagree. Before and after the amendment, Egenera had a single cause of action to recover the minimum charges under the

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[13] Neb. Ct. R. Pldg. § 6-1115(a); *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005).

[14] *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011).

[15] See Fed. R. Civ. P. 15(a)(2).

[16] See, *Citizens Opposing Indus. Livestock v. Jefferson Cty.*, 274 Neb. 386, 740 N.W.2d 362 (2007); *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007).

[17] *Roberson v. Hayti Police Dept.*, 241 F.3d 992, 995 (8th Cir. 2001). See, also, *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007).

[18] *Roberson, supra* note 17.

[19] *Cuffy v. Getty Refining & Marketing Co.*, 648 F. Supp. 802, 806 (D. Del. 1986), quoting *Heyl & Patterson Intern. v. F. D. Rich Housing*, 663 F.2d 419 (3d Cir. 1981).

original contract. Material misrepresentation as alleged in the amended counterclaim was not a new cause of action, but, rather, an alternative theory of recovery. As we explained in *Poppert v. Dicke*[20]:

> A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action. Thus, two or more claims in a complaint arising out of the same operative facts and involving the same parties constitute separate legal theories, of either liability or damages, and not separate causes of action.

InterCall also argues that the amendment injected new facts into the case which prejudiced its ability to present its defense to the counterclaim. The record does not support this argument. The operative facts alleged in paragraphs 1 through 10 of the amended counterclaim are almost identical to the corresponding paragraphs in the original counterclaim. Both theories of recovery focus on representations made by InterCall which induced Egenera to discontinue its business relationship with Raindance and enter into a new contractual relationship with InterCall. As we have noted, there is no indication in the record that InterCall objected to the amendment, and likewise, the record does not reflect that InterCall requested a continuance because of any new factual issues resulting from the amendment.

[13] It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.[21] On the record before us, the district court did not abuse its discretion in granting Egenera leave to amend its counterclaim.

3. Motions for Directed Verdict

[14] InterCall argues that its motion for directed verdict made at the close of Egenera's case and renewed at the close of

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[20] *Poppert v. Dicke*, 275 Neb. 562, 566, 747 N.W.2d 629, 633 (2008).

[21] *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

all the evidence should have been sustained, because Egenera did not prove that there had been a misrepresentation or that it had justifiably or reasonably relied upon any alleged misrepresentation. In addressing this argument, we are guided by the principle that 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.[22] If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.[23]

(a) Misrepresentation

InterCall argues there was no evidence of a misrepresentation. It contends that Visconte truthfully told Lehane that Egenera would be charged a rate of $.05 per minute for audioconferencing. But one can draw a reasonable inference that Visconte represented and Lehane understood that conference calls would be billed at this rate regardless of their duration. There was evidence that Egenera was unwilling to enter into a new agreement for audioconferencing services with InterCall at a price greater than it was paying to Raindance, which did not include a minimum charge. Visconte was aware of this, and his January 9, 2007, e-mail message to Lehane indicating that he had been authorized to "honor[] your current Raindance rate of .05 cents and roll you into InterCall's [program]" can be fairly understood to mean that he was offering to match the Raindance price. Indeed, that is what Visconte himself thought he was doing, because he was unaware that the $.05 per minute rate he was quoting to Lehane was subject to a minimum charge of $15 for each call, regardless of the length of the call. Comment *a.* to § 159 of the Restatement (Second) of Contracts notes that "a statement intended to be truthful may be a misrepresentation because of ignorance or

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

[23] *Id.*

carelessness."[24] Likewise, a misrepresentation may consist of a "half-truth," i.e., a statement which is "true with respect to the facts stated, but [which] may fail to include qualifying matter necessary to prevent the implication of an assertion that is false with respect to other facts."[25] Given the context of the negotiations between Visconte and Lehane, there is a basis for a reasonable inference that Visconte represented that Egenera would pay $.05 per minute for all conference calls, regardless of call duration.

There is no evidence that Visconte knowingly failed to disclose the existence of the minimum charge, because he was admittedly unaware of it. But the fact that he was not completely familiar with InterCall's pricing structure during the negotiations with Egenera could reasonably be viewed as proof that his representations to Egenera regarding the price which it would pay for InterCall's audioconferencing services were made "recklessly, without regard to whether it is true" so as to constitute an element of fraudulent misrepresentation.[26] And the record supports Egenera's claim that the misrepresentation was material, in that it substantially contributed to Egenera's willingness to enter into a new contractual relationship with InterCall.

(b) Reliance

[15] An essential element of actionable false misrepresentation is justifiable reliance on the representation.[27] InterCall argues that Egenera could not have justifiably relied on Visconte's representations regarding a flat per-minute charge because the contract included language referring to InterCall's standard rates, which included the minimum charge, and because the minimum charge was reflected on monthly invoices which Egenera received before the renegotiation of the contract.

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[24] Restatement, *supra* note 5, comment *a*. at 427.

[25] *Id*., comment *b*. at 427.

[26] *Id*., § 162, comment *b*. at 440-41.

[27] *Growney v. C M H Real Estate Co*., 195 Neb. 398, 238 N.W.2d 240 (1976); *Camfield v. Olsen*, 183 Neb. 739, 164 N.W.2d 431 (1969).

[16,17] Whether a party's reliance upon a misrepresentation was reasonable is a question of fact.[28] A party is justified in relying upon a representation made to the party as a positive statement of fact when an investigation would be required to ascertain its falsity.[29] Justifiable reliance must be determined on a case-by-case basis.[30] In determining whether an individual reasonably relied on a misrepresentation, courts consider the totality of the circumstances, including the nature of the transaction; the form and materiality of the representation; the relationship of the parties; the respective intelligence, experience, age, and mental and physical condition of the parties; and their respective knowledge and means of knowledge.[31]

The record in this case supports a reasonable inference that Visconte represented to Lehane as a positive statement of fact that Egenera would be charged $.05 per minute for conference calls, the same amount it had been paying to Raindance. This price term was the key point in the negotiations which led to the execution of the original service agreement. There had been no discussion of minimum charges, and the service agreement itself made no mention of such charges. There is no evidence that InterCall's standard rate sheet was made available to Lehane or any other Egenera employee before the service agreement was executed. Although the service agreement provided that the standard rate information could be obtained "through customer's web account or through customer's sales or account representative," there was evidence that the information necessary for Egenera to access its "Web Account" was not provided by InterCall until after the service agreement had been executed. Likewise, at the time it executed the service agreement, Egenera could not have learned from Visconte that the standard rates included the minimum charge, because Visconte was not aware of those charges. On this record, reasonable minds could draw different inferences

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[28] *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001); *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000).

[29] *Fitl v. Strek*, 269 Neb. 51, 690 N.W.2d 605 (2005); *Cao, supra* note 28.

[30] *Lucky 7 v. THT Realty*, 278 Neb. 997, 775 N.W.2d 671 (2009).

[31] *Id.*

and conclusions on whether Egenera reasonably relied upon the representations of Visconte that InterCall would charge the same price for conference calls that Egenera had been paying to Raindance.

(c) Resolution

Because there was evidence upon which the jury could reasonably have concluded that InterCall misrepresented the price it would charge Egenera for conference call services, and that Egenera reasonably relied upon that misrepresentation, the district court did not err in overruling InterCall's motions for directed verdict.

4. Jury Instructions

[18-20] InterCall argues that two of the jury instructions given by the district court were erroneous and that the court erred in refusing to give two instructions requested by InterCall. 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.[32] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.[33] If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.[34]

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[32] *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007); *Domjan v. Faith Regional Health Servs.*, 273 Neb. 877, 735 N.W.2d 355 (2007).

[33] *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008); *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

[34] *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006); *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004).

InterCall first challenges instruction No. 1.C., which sets forth Egenera's burden of proof with respect to material misrepresentation. The instruction states:

> Before Egenera can recover against InterCall on its claim of material misrepresentation, Egenera has the burden of proving, by the greater weight of the evidence, each and all of the following:
>
> 1. That InterCall made the claimed representation to Egenera;
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> 2. That the representation was false;
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> 3. That the representation was material;
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> 4. That this representation substantially contributed to Egenera's decision to agree to the service agreement;
>
> 5. That Egenera's reliance on this representation was reasonable; and
>
> 6. That Egenera sustained damages as a result of this reasonable reliance.
>
> It is not necessary that InterCall knew that the representation was false. It may be that it was honestly mistaken.

InterCall contends that the last sentence of the instruction is an erroneous statement of law. The sentence is taken directly from NJI2d Civ. 15.22, which is applicable to contract actions. This pattern instruction reflects the elements of material misrepresentation stated in § 162(2) of the Restatement (Second) of Contracts. The Restatement at § 159 defines "misrepresentation" as "an assertion that is not in accord with the facts."[35] A comment to this definitional section states:

> [A]n assertion need not be fraudulent to be a misrepresentation. Thus a statement intended to be truthful may be a misrepresentation because of ignorance or carelessness, as when the word "not" is inadvertently omitted or when inaccurate language is used. But a misrepresentation that is not fraudulent has no consequences under this Chapter unless it is material. Whether an assertion is material is determined by the rule stated in § 162(2).[36]

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[35] Restatement, *supra* note 5, § 159 at 426.

[36] *Id.*, comment *a.* at 427.

[21] Thus, NJI2d Civ. 15.22 is a correct statement of contract law. A material misrepresentation may be a basis for avoiding a contract, even if it resulted from an honest mistake.

InterCall also argues that this instruction was deficient because it did not include "caveats" such as those set forth in two instructions which it requested and the court declined to give.[37] Proposed instruction No. 10 stated: "A person who signs a contract without reading it cannot later relieve himself/herself of its burdens." Proposed instruction No. 13 stated: "Reliance on an implied misrepresentations [sic] is unreasonable if a written contract provision explicitly states a fact completely contradictory to the claimed misrepresentation."

For the reasons more fully set forth in our discussion above regarding the evidence of reasonable reliance, we find no error in the giving of instruction No. 1.C. or the refusal to give requested instructions Nos. 10 and 13. The service agreement signed by Lehane did not include any facts "completely contradictory" to Visconte's representation that Egenera would be charged a flat fee of $.05 per minute for conference calls, the same as under its prior agreement with Raindance. As we have noted, Egenera did not have access to the standard rate sheet via its Web account until after the agreement was executed, and it could not have learned of the minimum charge by asking Visconte, because he was unaware of it himself.

InterCall also contends that the district court erred in giving instruction No. 4, which stated: "An intent to deceive is not a necessary element for proof of fraudulent misrepresentation. A representation is fraudulent if, when made, it was known to be false or was made recklessly as a positive assertion without knowledge concerning the truth of the representation."

InterCall contends that this instruction "is not a pattern jury instruction"[38] and is inconsistent with instruction No. 1.B., which instructed the jury on the elements of fraudulent misrepresentation. One of those elements was that "the representation

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[37] Brief for appellant at 34.

[38] *Id.* at 35.

was made fraudulently." Instruction No. 4 simply informs the jury what constitutes fraud. It is consistent with our cases holding that fraud can be based on a false statement that, when made, was "'known to be false or made recklessly without knowledge of its truth and as a positive assertion.'"[39] The instruction was thus a correct statement of the law, and the district court did not err in giving it.

5. Motion for New Trial

Finally, InterCall argues that the district court erred in overruling its motion requesting a new trial or, in the alternative, to alter and amend the judgment. InterCall's argument in this regard is based upon the same arguments which we have considered and rejected above. For the reasons underlying our disposition of those issues, we conclude that the district court did not abuse its discretion in overruling InterCall's posttrial motion.

V. CONCLUSION

For the reasons discussed herein, we affirm the judgment of the district court.

Affirmed.

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[39] *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 805, 660 N.W.2d 168, 175 (2003). See, also, *Nebraska Nutrients, supra* note 28.

U.S. Bank National Association, appellant, v. Steven E. Peterson and Catherine M. Peterson, appellees.

U.S. Bank National Association, appellant, v. Jason D. Lunders, appellee.

U.S. Bank National Association, appellant, v. David L. Skoglund, appellee.

U.S. Bank National Association, appellant, v. Mark A. Huls, appellee.

823 N.W.2d 460

Filed December 7, 2012. Nos. S-12-086 through S-12-089.

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 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 judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Pretrial Procedure: Appeal and Error.** Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
4. **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.
5. **Pretrial Procedure: Proof: Appeal and Error.** The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.
6. **Rules of the Supreme Court: Pretrial Procedure.** The language of Neb. Ct. R. Disc. § 6-336 contemplates that a request for admission 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.
7. **Rules of the Supreme Court: Pretrial Procedure: Evidence: Proof.** 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. However, § 6-336 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. 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 § 6-336 which require that the matter be deemed admitted.

8. **Pretrial Procedure: Evidence.** An admission which is not withdrawn or amended cannot be rebutted by contrary evidence or ignored by the district court simply because the court finds the evidence presented by the party against whom the admission operates to be more credible.
9. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, 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 which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just.

Appeals from the District Court for Madison County: JAMES G. KUBE, Judge. Reversed and remanded for further proceedings.

Stephen H. Nelsen and Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

D.C. Bradford and Justin D. Eichmann, of Bradford & Coenen, L.L.C., for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

In these consolidated appeals, U.S. Bank National Association (the Bank) sued five guarantors following defaults on the underlying notes. During the course of the proceedings, the Bank tendered requests for admissions to each of the guarantors regarding various facts, including a request to admit the specific amount due on the note for principal, accrued interest, and a prepayment fee that the Bank claimed was due under each of the notes. By virtue of various rulings, the district court for Madison County entered judgment in favor of the Bank with respect to the principal and accrued interest due from the guarantors but, based in part on the guarantors' answers to the requests for admissions, determined that the Bank was not entitled to prepayment fees.

On appeal, the Bank claims that the court erred when it treated the guarantors' answers to the Bank's requests for

admissions as denials rather than admissions that the guarantors owed prepayment fees. We find merit to the Bank's argument and conclude that the court erred when it treated the answers as denials and granted summary judgment in favor of the guarantor in each case on the prepayment fee issue. We reverse the rulings regarding the prepayment fee issue and remand the causes to the district court for further proceedings.

STATEMENT OF FACTS

In four separate actions, the Bank filed complaints in the district court for Madison County against, respectively, Steven E. Peterson and Catherine M. Peterson, Jason D. Lunders, David L. Skoglund, and Mark A. Huls. Each suit claimed that these individuals served as guarantors on various notes and that the notes were in default. Each of the defendants executed a guaranty for a portion of the obligations of certain limited liability companies to the Bank. The Petersons guaranteed 50 percent of the obligations of Magnum 43, LLC, which had two notes with the Bank, and 12.5 percent of the obligations of Remington, LLC, which had one note with the Bank. Lunders guaranteed 12.5 percent of the obligations of Remington, LLC. Skoglund guaranteed 50 percent of the obligations of Windmill Ridge, LLC, which had one note with the Bank, and Huls guaranteed 50 percent of the obligations of Rawhide, LLC, which had one note with the Bank. Each of the defendants was a member of the limited liability company (LLC) for which he or she guaranteed obligations. David and Nancy Meyer were members of all the LLC's and guaranteed a portion of each LLC's obligations. Neither the LLC's nor the Meyers were named as defendants in these actions.

The facts that are relevant in this appeal are common to each defendant with respect to each obligation of each LLC. Therefore, for ease of reading, in the remainder of this opinion, we generically speak of "the guarantor," "the LLC" and "the note" as though such references are to only one defendant, one LLC, and one note; however, the references apply to each note of each LLC and the guaranty executed by each defendant. In quoted portions of the record, where we refer to a defendant or guarantor in the singular, it is to be noted

that in the Peterson case, the original refers in the plural to both Petersons.

In its complaint, the Bank alleged that the guarantor was in default on the guarantor's share of the balance due on the note. The Bank alleged specific amounts that were due for principal and accrued interest. The Bank also alleged a specific amount for a prepayment fee that it claimed was owed. The note executed by the LLC included the following provision with regard to a prepayment fee:

> There shall be no prepayments of this Note, provided that the Bank may consider requests for its consent with respect to prepayment of this Note, without incurring an obligation to do so, and the Borrower acknowledges that in the event that such consent is granted, the Borrower shall be required to pay the Bank, upon prepayment of all or part of the principal amount before final maturity, a prepayment indemnity ("Prepayment Fee") equal to the greater of zero, or that amount, calculated on any date of prepayment ("Prepayment Date"), which is derived by subtracting: (a) the principal amount of the Note or portion of the Note to be prepaid from (b) the Net Present Value of the Note or portion of the Note to be prepaid on such Prepayment Date; provided, however, that the Prepayment Fee shall not in any event exceed the maximum prepayment fee permitted by applicable law.

The Bank moved for summary judgment. At the summary judgment hearing, the Bank offered and the court received into evidence the guarantor's answers to the Bank's requests for admissions. One of the Bank's requests was for the guarantor to admit the specific amount due on the note for principal, accrued interest, and prepayment fee. The guarantor responded to such request as follows:

> Defendant does not have the information with which to admit or deny the numbers set out under Request for Admissions . . . including principal, interest, default and prepayment amounts. Defendant believes Plaintiff has continued to communicate those matters correctly with David and Nancy Meyer or their counsel and Defendant puts Plaintiff to its strict proof with respect thereto.

The guarantor offered and the court received into evidence an affidavit of the guarantor stating, inter alia, that the guarantor had guaranteed a portion of the LLC's obligations to the Bank, that the LLC had defaulted on the note, and that the Bank had declared the entire amount due on the note to be immediately due and payable. The guarantor quoted a portion of the note's provision regarding prepayment and stated that to the guarantor's knowledge, neither the LLC nor any of its members had requested prepayment of the note.

On March 7, 2011, the court sustained the Bank's motion for summary judgment in part but overruled the motion with respect to the prepayment fee. In the order, the court stated that the guarantor "acknowledged those amounts which [the Bank] claims are due and owing, but alleged as [the guarantor's] sole contention that the . . . prepayment fee, along with its continuing accrual, is inapplicable, and thus that [the Bank] is not entitled to this amount." The court concluded that the Bank was entitled to summary judgment with regard to the principal and accrued interest due from the guarantor but refused to rule as a matter of law that the Bank was entitled to the prepayment fee. The court therefore granted summary judgment to the extent of principal and accrued interest, but reserved the prepayment fee issue for trial. The guarantor has not appealed the substance of the ruling in which the district court found in favor of the Bank with respect to principal and interest, and, on appeal, we do not address nor disturb this ruling.

The guarantor thereafter moved for partial summary judgment with regard to the prepayment fee. At the hearing on the grantor's motion for summary judgment, the court received the evidence noted above that it had received at the hearing on the Bank's motion for summary judgment. After argument and briefing, the court, on January 5, 2012, entered an order in which it sustained the guarantor's motion for partial summary judgment.

In its order, the court rejected various arguments made by the Bank, including the Bank's argument that the guarantor's response to the request for admission regarding the balance due for principal, accrued interest, and prepayment fee was an

admission that a prepayment fee was due. The Bank noted the guarantor did not specifically deny the request and did not, as required by Neb. Ct. R. Disc. § 6-336 (Rule 36), set forth in detail the reasons why the guarantor could not truthfully admit or deny the matter or state that the guarantor had made reasonable inquiry and that the information known or readily obtainable by the guarantor was insufficient to enable the guarantor to admit or deny. The Bank argued that the guarantor's answer should have been treated as an admission.

The court disagreed with the Bank and treated the answer as a denial. The court stated the following in its order:

> Since the defendant did not specifically deny that the prepayment fee was required under the original note he is deemed to have admitted the same. However, as noted above, the defendant responded that he did not have sufficient information in order to admit or deny the specific amounts as set forth in the Admission. However, the defendant did put plaintiff on strict proof with respect to those amounts. *The Court interprets this as a denial of the specific amounts due and owing and accordingly, a denial that a prepayment fee is owed.*

(Emphasis supplied).

Turning to the terms of the note, the court determined that the prepayment clause in the note did not apply when the borrower defaults and the lender accelerates the note. The court reasoned that when the Bank accelerated the debt because of default, it effectively advanced the maturity date of the debt to the default date, and that therefore, any payment after that date was not a prepayment. The court concluded that the Bank was not entitled to a prepayment fee and that the guarantor was entitled to partial summary judgment.

The Bank appeals, inter alia, the order sustaining the guarantor's motion for partial summary judgment in which the court determined that the Bank was not entitled to a prepayment fee.

ASSIGNMENTS OF ERROR

The Bank claims that the district court erred when it (1) treated the guarantor's response to the Bank's request for

admission as a denial that a prepayment fee was owed and (2) concluded that the guarantor did not owe a prepayment fee, sustained the guarantor's motion for partial summary judgment, and overruled in part the Bank's motion for summary judgment. The guarantor did not cross-appeal the district court's ruling in favor of the Bank with respect to its entitlement to principal and interest, and we, therefore, do not consider such rulings.

STANDARDS OF REVIEW

[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 the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Olson v. Wrenshall, ante* p. 445, 822 N.W.2d 336 (2012). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3-5] Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion. *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011). 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. *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010). The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion. *Id.*

ANALYSIS

The District Court Abused Its Discretion When It Treated the Guarantor's Answer to the Bank's Request for Admission Regarding the Prepayment Fee as a Denial.

The Bank asserts that the district court erred when it treated the guarantor's answer to its request for admission with regard

to the prepayment fee as a denial that a prepayment fee was owed. We analyze the answer only as it pertains to the prepayment fee issue. We agree with the Bank that the district court erred. Under the discovery rule regarding requests for admissions, the court did not have the option to treat the answer as a denial and instead should have either ordered the guarantor to properly answer the request or treated the answer as an admission. We conclude that the court abused its discretion when it treated the response as a denial.

[6] Requests for admissions are governed by Rule 36, which generally provides that a party may serve upon another party a request for the admission of the truth of matters relevant to the case at hand, including "statements or opinions of fact or of the application of law to fact." We have stated that the language of Rule 36 contemplates that 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. See *Tymar v. Two Men and a Truck*, 282 Neb. 692, 805 N.W.2d 648 (2011). Therefore, the Bank's request for an admission that the guarantor owed a prepayment fee in a specific amount was a permissible request under Rule 36.

Rule 36 sets forth requirements for the form of both the request and the answer. Of particular relevance to the present case, Rule 36(a) provides as follows with respect to the appropriate response to a request for admission and what the court may do when a party fails to provide an appropriate response:

> The matter is admitted unless . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his or her attorney . . . . If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer or deny only a part of the matter of which an admission is requested, he or she shall specify so

> much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he or she states that he or she has made reasonable inquiry and that the information known or readily obtainable by him or her is insufficient to enable him or her to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he or she may . . . deny the matter or set forth reasons why he or she cannot admit or deny it.
>
> . . . If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served.

We consider the guarantor's answer to the Bank's request regarding a prepayment fee in light of the requirements of Rule 36. Rule 36 requires that the answer either "specifically deny the matter" or "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." Where the party lacks information, the party shall recite information showing he or she has made reasonable inquiry. In this regard, it is not enough to simply track the language of Rule 36. See *Asea, Inc. v. Southern Pac. Transp. Co.*, 669 F.2d 1242 (9th Cir. 1981). In response to the Bank's request for admission regarding the amount of a prepayment fee owed, the guarantor stated:

> Defendant does not have the information with which to admit or deny the numbers set out under Request for Admissions . . . including principal, interest, default and prepayment amounts. Defendant believes Plaintiff has continued to communicate those matters correctly with David and Nancy Meyer or their counsel and Defendant puts Plaintiff to its strict proof with respect thereto.

The guarantor did not specifically deny that a prepayment fee was owed and instead asserted the inability to admit or deny the matter. However, the answer did not make the required assertions that the guarantor had made reasonable inquiry and

that the information known or readily obtainable by the guarantor was insufficient to enable the guarantor to admit or deny that a prepayment fee was owed. Instead, the answer indicated that other persons, the Meyers, had the information but did not state that the guarantor had made inquiry of the Meyers or attempted to otherwise obtain the information.

We have observed that Rule 36 is based on the federal rules, and we may look to federal cases for guidance. *Tymar, supra*. Where a party neither admits nor denies a request, it has been held that "a response which fails to admit or deny a proper request for admission does not comply with the requirements of [federal] Rule 36(a) if the answering party has not, in fact, made 'reasonable inquiry.'" *Asea, Inc.*, 669 F.2d at 1247. In construing a statute that was a predecessor to Rule 36 and that, like Rule 36, was based on the corresponding federal rule, we relied on federal cases and stated:

> When a request for admissions is made under this section, the party served must answer even though he has no personal knowledge if the means of obtaining the information are available to him. It is not a sufficient answer that he does not know, when it appears that he can obtain the information.

Kissinger v. School Dist. No. 49 of Clay County, 163 Neb. 33, 38, 77 N.W.2d 767, 770 (1956).

From the guarantor's response, it appears that the guarantor could have obtained the information by making inquiry of the Meyers, but the answer fails to indicate that reasonable inquiry of the Meyers was attempted. We concluded in *Kissinger* that based on Rule 36, "[a] bad response is treated as no response at all and hence as an admission." 163 Neb. at 39, 77 N.W.2d at 771. Because the guarantor's response did not comply with the requirements of Rule 36, it was essentially a "bad response" and therefore, effectively, a failure to respond which should have been treated as an admission.

Rule 36(b) provides for the effect to be given to an answer that is treated as an admission. Rule 36(b) provides in part:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may

> permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him or her in maintaining his or her action or defense on the merits.

In a case where a party failed to answer, we stated that such failure constitutes an admission by that party of the subject matter of the request, and given Rule 36(b), such admission stands as established fact unless, on motion, the court permits withdrawal of the admission. See *Tymar v. Two Men and a Truck*, 282 Neb. 692, 805 N.W.2d 648 (2011).

[7] 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. *Id*. 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. *Id*. 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. *Id*.

In the present case, the district court received the Bank's requests for admissions and the guarantor's answers into evidence at both the hearing on the Bank's motion for summary judgment and the hearing on the guarantor's motion for partial summary judgment. The guarantor made no motion, and the court sustained no motion, to withdraw or amend the guarantor's admission regarding the prepayment fee. Rather than treating the guarantor's answer as a denial, the district court was required under Rule 36 to deem as admitted that the guarantor owed the prepayment fee. We therefore conclude that the district court abused its discretion when it treated the guarantor's answer regarding the prepayment fee as a denial rather than an admission.

The District Court Erred When It Concluded, Based on the Record Before It, That the Guarantor Was Entitled to Judgment as a Matter of Law on the Prepayment Fee Issue.

In light of our conclusion that the district court abused its discretion when it treated the guarantor's answer to the Bank's request for admission regarding the prepayment fee as a denial rather than an admission, we consider the Bank's assignments of error that the court erred when it determined that the guarantor did not owe the prepayment fee, sustained the guarantor's motion for partial summary judgment, and further erred when it overruled in part the Bank's motion for summary judgment. We conclude that, based on the record before it at the time, the court erred when it failed to give legal effect to the substance of the improperly answered request and determined that the guarantor did not owe a prepayment fee and was entitled to judgment as a matter of law on the prepayment fee issue. We therefore reverse the order sustaining the guarantor's motion for partial summary judgment. We remand the cause for further proceedings at which the court should follow the requirements of Rule 36 in its treatment of the guarantor's answer to the Bank's request for admission.

We first address the Bank's claim that the district court erred when it determined that the guarantor did not owe a prepayment fee and sustained the guarantor's motion for partial summary judgment. We find merit to this assignment of error.

[8] When the court decided the guarantor's motion for partial summary judgment, the record included the guarantor's answer to the Bank's request for admission regarding the prepayment fee and, as discussed above, under Rule 36, such answer should have been deemed as an admission that the guarantor owed the prepayment fee. Such admission was in evidence and precluded a conclusion that the guarantor was entitled to judgment as a matter of law on the prepayment fee issue. However, instead of giving effect to the admission, the district court considered the language of the note and concluded that the guarantor did not owe a prepayment fee. It was improper for the court

to ignore the conclusive effect of the admission and to proceed to analyze the note.

In *Tymar v. Two Men and a Truck*, 282 Neb. 692, 805 N.W.2d 648 (2011), we referred to *American Auto. Ass'n v. AAA Legal Clinic*, 930 F.2d 1117, 1120 (5th Cir. 1991), in which it was stated that "[a]n admission that is not withdrawn or amended cannot be rebutted by contrary [evidence] or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible." Indeed, it has been observed that "[t]he salutary function of [federal] Rule 36 in limiting the proof would be defeated if the party were free to deny at the trial what he or she has admitted before trial." 8B Charles Alan Wright et al., Federal Practice and Procedure § 2264 at 382 (3d ed. 2010). The court erred when it ignored the admission, considered the terms of the note, and sustained the guarantor's motion for partial summary judgment.

[9] The Bank also claims that the court erred in its first order of March 7, 2011, when it overruled the portion of the Bank's motion for summary judgment related to the prepayment fee. We note that the overruling of a motion for summary judgment is not an appealable order, and therefore, the Bank did not and could not have appealed the order overruling in part its motion for summary judgment at the time the order was entered. See *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007) (it has been repeated conclusion of this court that denial of motion for summary judgment is not final order). However, although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, 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 which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just. *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002). We therefore consider the Bank's motion for summary judgment with regard to the prepayment fee issue in connection with the guarantor's motion for partial summary

judgment on the same issue to determine what further proceedings would be just.

Although the court erred when it treated the guarantor's answer as a denial rather than an admission when it decided the Bank's motion for summary judgment, it would not be just to reverse the partial overruling of the Bank's motion for summary judgment and to remand the cause with an order for the court to grant summary judgment in favor of the Bank on the prepayment fee issue. Although we decline to reverse the overruling, the Bank is free to file a subsequent similar motion after remand.

Under Rule 36, if the court had properly treated the guarantor's answer as an admission, then the guarantor would have been allowed to file a motion to withdraw or amend the admission and to thereafter formally deny that it owed a prepayment fee. We note for completeness that in connection with both the Bank's and the guarantor's motions for summary judgment, the guarantor made arguments in which the guarantor denied that a prepayment fee was owed; however, such denials did not effectively withdraw the admission. Only a motion to withdraw the admission, which the court would have had the discretion to grant, would have achieved such effect. But because the court improperly treated the guarantor's answer as a denial, the guarantor was under the mistaken belief that the answer was an effective denial. It would not be just to deny the guarantor the opportunity to seek to withdraw the deemed admission because the district court erroneously failed to treat the answer as an admission.

We therefore do not reverse the March 7, 2011, overruling of the bank's motion for partial summary judgment on the prepayment fee issue, but do reverse the court's order of January 5, 2012, granting the guarantor's motion for partial summary judgment on the prepayment fee issue. We remand the cause for further proceedings at which the district court should follow Rule 36 with respect to the effect of the guarantor's answer to the Bank's request for admission regarding the prepayment fee. Because the guarantor's answer was a "bad response" and therefore a failure to respond, in accordance with Rule 36, the court should either require an amended answer or treat the

answer as an admission. If the court chooses to treat the answer as an admission, it should thereafter entertain any motion the guarantor might make to withdraw such admission, and the court should exercise its discretion under Rule 36 with regard to such motion.

CONCLUSION

We conclude that the district court abused its discretion when it treated the guarantor's answer regarding the prepayment fee as a denial in contravention of Rule 36. Because the answer in evidence should have been treated under Rule 36 as an admission that the guarantor owed a prepayment fee, the court erred when it ignored the admission, considered the terms of the note, and determined that the guarantor did not owe a prepayment fee and was entitled as a matter of law to partial summary judgment on the prepayment fee issue. We therefore reverse the order sustaining the guarantor's motion for partial summary judgment, and we remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

IN RE INTEREST OF ZYLENA R. AND ADRIONNA R., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. ELISE M., APPELLANT, AND OMAHA TRIBE OF NEBRASKA, INTERVENOR-APPELLEE AND CROSS-APPELLANT.

825 N.W.2d 173

Filed December 14, 2012. Nos. S-11-659, S-11-660.

1. **Indian Child Welfare Act: Jurisdiction: Appeal and Error.** A denial of a transfer to tribal court under the Indian Child Welfare Act is reviewed for an abuse of discretion.
2. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.

3. **Statutes: Appeal and Error.** Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.
4. **Indian Child Welfare Act: Parental Rights: Case Disapproved.** To the extent *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992), can be read as holding that a foster placement proceeding and a subsequent termination of parental rights proceeding involving an Indian child are not separate and distinct under the federal Indian Child Welfare Act of 1978 and the Nebraska Indian Child Welfare Act, it is disapproved.
5. **Indian Child Welfare Act: Jurisdiction: Case Overruled.** To the extent that *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992), permits a state court to consider the best interests of an Indian child in deciding whether there is good cause to deny a motion to transfer a proceeding to tribal court, it is overruled.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and CASSEL, Judges, on appeal thereto from the Separate Juvenile Court of Lancaster County, ROGER J. HEIDEMAN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Norman Langemach for appellant.

Joe Kelly, Lancaster County Attorney, Alicia B. Henderson, and Christopher M. Turner for appellee.

Rita Grimm and Rosalynd J. Koob, of Heidman Law Firm, L.L.P., for intervenor-appellee.

Hazell G. Rodriguez, guardian ad litem.

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

STEPHAN, J.

Zylena R. and Adrionna R. are Indian children who were adjudicated by the separate juvenile court of Lancaster County under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) and placed in foster care. When the State filed motions to terminate parental rights, the Omaha Tribe of Nebraska (the Tribe) sought to transfer the proceedings to the Omaha Tribal Court pursuant to the federal Indian Child Welfare Act of

1978 (ICWA)[1] and the Nebraska Indian Child Welfare Act (NICWA).[2] The juvenile court denied the requested transfers based upon its finding that the motions were filed at an "advanced stage" of the juvenile proceedings. The Nebraska Court of Appeals affirmed in a memorandum opinion, rejecting the argument of the mother and the Tribe that under ICWA and NICWA, a court should treat foster care placement and termination of parental rights as separate proceedings for purposes of determining whether a juvenile case pending in state court has reached an advanced stage at the time a motion is made to transfer the case to tribal court.[3] We granted the mother's petition for further review, in which the Tribe has joined, to consider this question.

BACKGROUND

Elise M. and Francisco R. are the biological parents of Zylena, born in June 2007, and Adrionna, born in December 2008. Elise has been an enrolled member of the Tribe since 1991. Francisco is not an enrolled member and is not eligible for enrollment. This appeal involves two separate cases which were filed in the separate juvenile court and eventually consolidated.

In the case which is before us as No. S-11-659, the State filed a petition on June 20, 2008, alleging that Zylena was a child as defined by § 43-247(3)(a) as a result of the fault or habits of Elise. An amended petition filed on July 1 alleged that Zylena was a child as defined by § 43-247(3)(a) by reason of the fault or habits of both Elise and Francisco. On or about July 9, the State mailed a copy of the amended petition and a notice to the Omaha Tribal Council. The notice stated that Zylena was a member of or may be eligible for membership in the Tribe. The notice further stated that the Tribe could intervene in the case and that the action "may result in restriction of

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[1] 25 U.S.C. § 1901 et seq. (2006).

[2] Neb. Rev. Stat. §§ 43-1501 to 43-1516 (Reissue 2008).

[3] *In re Interest of Zylena R. & Adrionna R.*, Nos. A-11-659, A-11-660, 2012 WL 1020275 (Neb. App. Mar. 27, 2012) (selected for posting to court Web site).

parental or custodial rights to the child or foster care placement of the child or termination of parental rights to the child." On July 16, the Tribe informed the State that Zylena was not an enrolled member and was not eligible for enrollment. Zylena was adjudicated on September 22, 2008.

The case which is before us as No. S-11-660 was commenced by the filing of a petition in the separate juvenile court on May 1, 2009. In this petition, the State alleged that both Zylena and Adrionna were minor children as defined by § 43-247(3)(a) by reason of the fault or habits of Elise and Francisco. Both children were adjudicated on May 12. They were placed with their current foster family on May 29. At that time, the permanency objective for both children was reunification with their parents.

In October 2010, an employee of the Nebraska Department of Health and Human Services realized that notice had not been sent to the Tribe with respect to Adrionna. She then sent a notice to the Tribe and inquired whether Adrionna was an enrolled member or eligible for membership. The notice included a statement that the pending action could result in removal of the child from the home or termination of parental rights and adoption. The department did not receive a response from the Tribe.

From and after May 29, 2009, various services were provided to Elise and Francisco by the State of Nebraska. Neither Elise nor Francisco made measurable progress toward rehabilitation. In November 2010, the permanency objective was changed from reunification to adoption. And on February 7, 2011, the State filed motions in each case seeking to terminate the parental rights of Elise and Francisco to both children.

In case No. S-11-660, the case involving both children, the Tribe filed a notice of intervention on February 14, 2011, and a notice of intent to transfer on February 22. The latter motion asserted that Zylena and Adrionna were eligible for enrollment in the Tribe and requested that the case be transferred to tribal court pursuant to § 43-1503(4). The Tribe filed similar documents in case No. S-11-659 on March 1.

At a hearing on the Tribe's motions, the State and the guardian ad litem orally objected to the requested transfers

without specifically stating the grounds for their objection. A representative of the Tribe testified that, due to a mathematical error, it had incorrectly determined in July 2008 that Zylena was not eligible for enrollment. The Tribe presented evidence that both children are eligible for enrollment through Elise. The Tribe first realized its error in late January or early February 2011. A tribal representative testified that but for the mistake, the Tribe likely would have moved to intervene sooner. A representative also testified that a tribal court would work to reunify the family, but would not terminate parental rights. She explained that a long-term guardianship could be established for the children by the tribal court. The representative further testified that if the cases were transferred, the Tribe intended to keep the children in their current foster care placement.

The State presented evidence that it was in the best interests of the children to remain in their current foster care placement. In addition, the foster mother testified that she and her husband were willing to adopt the children and that if they did so they intended to integrate the children's cultural traditions into their lives. A state caseworker reviewed the proposed case plan prepared by the Tribe and opined that it was essentially the same case plan the State had been implementing since the proceedings began 2 years prior.

In orders entered on June 30, 2011, the juvenile court denied the Tribe's motions to transfer to tribal court. In case No. S-11-659, the case involving only Zylena, the juvenile court found that the case had been pending since June 2008, that Zylena was adjudicated in September 2008, that the permanency plan of adoption was approved in November 2010, that a motion to terminate parental rights was filed, and that the Tribe had not filed its notice of intent to transfer until March 1, 2011, despite receiving notice in July 2008. The court concluded that the proceeding was at an advanced stage and that because the Tribe had not filed its motion to transfer "for 32 months after receiving original notice, good cause has been shown to deny the transfer." In case No. S-11-660, the case involving both children, the juvenile court noted that the petition was filed in May 2009; that numerous hearings

had been held; that a permanency plan of adoption had been approved on November 4, 2010; that a motion to terminate parental rights was filed; and that the Tribe had not filed its notice of intent to transfer until February 22, 2011. The court concluded that because the proceeding was at an advanced stage when the Tribe requested transfer, "good cause has been shown to deny the transfer." The juvenile court did not make findings in either case as to whether transfer was in the best interests of the children.

Elise filed a timely appeal in each case, and the Tribe cross-appealed. Elise assigned that the juvenile court erred in denying the motion to transfer, arguing that in determining whether the proceedings were at an "advanced stage" when the motions to transfer were filed, the court should have considered only the time after the filing of the petitions to terminate parental rights, and not the preceding period when the children were placed in foster care.

In affirming the judgments of the juvenile court, the Court of Appeals relied on three prior Nebraska cases,[4] including one from this court, in concluding that "it is the policy of this state to consider the entire history of a juvenile proceeding in determining whether such is at an advanced stage."[5] Utilizing this standard, the court determined that the Tribe had filed its motion to transfer "1 week after the State filed a motion to terminate parental rights and nearly 2 years after Zylena and Adrionna were placed with their current foster family."[6] Citing our opinion in *In re Interest of Bird Head*,[7] the Court of Appeals noted that "ICWA does not change the cardinal rule that the best interests of the child are

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[4] *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992), *disapproved on other grounds, In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008); *In re Interest of Louis S. et al.*, 17 Neb. App. 867, 774 N.W.2d 416 (2009); *In re Interest of Leslie S. et al.*, 17 Neb. App. 828, 770 N.W.2d 678 (2009).

[5] *In re Interest of Zylena R. & Adrionna R., supra* note 3, 2012 WL 1020275 at *6.

[6] *Id.* at *7.

[7] *In re Interest of Bird Head*, 213 Neb. 741, 331 N.W.2d 785 (1983).

paramount, although it may alter its focus."[8] The court noted that the children were being well cared for in a home that "appears to be committed to fostering their Native American heritage" and concluded that "the present situation is clearly in the children's best interests."[9] For these reasons, the Court of Appeals concluded that the juvenile court had not abused its discretion in finding that good cause existed to deny the motions to transfer.

ASSIGNMENT OF ERROR

Elise assigns, summarized and consolidated, that the Court of Appeals erred in finding the juvenile court had good cause to deny her motion to transfer to tribal court. The Tribe filed a response to the petition for further review, joining in Elise's assignment of error.

STANDARD OF REVIEW

[1] This court has not specifically articulated a standard for reviewing the order of a juvenile court on a motion to transfer a case to tribal court. But in *In re Interest of C.W. et al.*,[10] we held that a Nebraska juvenile court had discretionary authority to vacate an order transferring a case to a tribal court and that it did not abuse its discretion in doing so. In subsequent cases, the Court of Appeals has stated that a denial of a transfer to tribal court is reviewed for an abuse of discretion.[11] We agree that this is the appropriate standard of review.

ANALYSIS

ICWA was enacted by Congress in 1978. Its stated purpose is

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes

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[8] *In re Interest of Zylena R. & Adrionna R., supra* note 3, 2012 WL 1020275 at *7.

[9] *Id.*

[10] *In re Interest of C.W. et al., supra* note 4.

[11] See, *In re Interest of Louis S. et al., supra* note 4; *In re Interest of Lawrence H.*, 16 Neb. App. 246, 743 N.W.2d 91 (2007).

> and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[12]

ICWA is based upon an assumption that protection of an Indian child's relationship to the tribe is in the child's best interests.[13] The Act "'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.'"[14] The U.S. Supreme Court has observed that ICWA does so "by establishing 'a Federal policy that, where possible, an Indian child should remain in the Indian community,' . . . and by making sure that Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.'"[15]

NICWA was enacted by the Nebraska Legislature in 1985[16] "to clarify state policies and procedures regarding the implementation by the State of Nebraska of the federal Indian Child Welfare Act."[17] The Legislature declared that "[i]t shall be the policy of the state to cooperate fully with Indian tribes in Nebraska in order to ensure that the intent and provisions of the federal Indian Child Welfare Act are enforced."[18]

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[12] § 1902. See *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007).

[13] See, *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989); *In re Interest of C.W. et al., supra* note 4.

[14] *Mississippi Choctaw Indian Band v. Holyfield, supra* note 13, 490 U.S. at 37, quoting H.R. Rep. No. 95-1386 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7546.

[15] *Id.*

[16] 1985 Neb. Laws, L.B. 255.

[17] § 43-1502.

[18] *Id.*

Under ICWA and NICWA, "Indian child" means any unmarried person who is under age 18 and is either (a) a member of an Indian tribe or (b) eligible for membership in a tribe as the biological child of a member of a tribe.[19] Both Zylena and Adrionna meet that definition. If an Indian child resides or is domiciled within the reservation of a tribe, that tribe has exclusive jurisdiction over any child custody proceeding.[20] But when an Indian child does not reside or is not domiciled on his or her tribe's reservation, as is the case here, state courts may exercise jurisdiction over the child concurrently with tribal courts.[21] However, a state court must refer "any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child" to a tribal court if the tribe or either parent petitions for transfer, unless "good cause" is shown for the retention of state court jurisdiction.[22] At a hearing on a petition to transfer a proceeding to tribal court, the party opposing the transfer has the burden of establishing that good cause not to transfer exists.[23] The U.S. Supreme Court has characterized these provisions of ICWA as creating "concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation."[24]

"Good cause" is not defined in either ICWA or NICWA. However, nonbinding guidelines published by the Bureau of Indian Affairs (BIA Guidelines) provide that good cause not to transfer a proceeding may exist if the proceeding is "at an advanced stage" when the petition to transfer was received and the petitioner failed to "file the petition promptly" after receiving notice.[25] We have looked to the BIA Guidelines in the past

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[19] § 1903(4); § 43-1503(4).

[20] § 1911(a); § 43-1504(1).

[21] See, § 1911(b); § 43-1504(2).

[22] *Id*.

[23] *Mississippi Choctaw Indian Band v. Holyfield, supra* note 13; *In re Interest of C.W. et al., supra* note 4.

[24] *Mississippi Choctaw Indian Band v. Holyfield, supra* note 13, 490 U.S. at 36.

[25] See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591, C.3(b)(i) (Nov. 26, 1979) (not codified).

in determining good cause issues under ICWA and NICWA.[26] Various other courts have done likewise.[27]

To resolve this appeal, we must address two questions. First, what constitutes a "proceeding" within the meaning of ICWA, NICWA, and the BIA Guidelines? And second, should a Nebraska court apply the "best interests of the child" standard of the Nebraska Juvenile Code in deciding whether to transfer a child custody proceeding involving an Indian child to a tribal court for disposition? Our opinion in *In re Interest of C.W. et al.*[28] is pertinent to both questions.

In *In re Interest of C.W. et al.*, the juvenile court sustained a motion to transfer to tribal court filed shortly before trial on a petition to terminate parental rights, but then vacated its transfer order before the trial commenced. After conducting a trial and determining that parental rights of the mother and putative fathers of the children should be terminated, the juvenile court transferred the case to tribal court for "the dispositional phase of the proceeding."[29] On appeal, the mother argued that the juvenile court erred in vacating the pretrial transfer order. In a cross-appeal, the State argued that the juvenile court erred in ordering transfer to tribal court after trial.

In rejecting the mother's argument, we noted that the juvenile court had properly considered "the 8-year history of the case" in concluding that good cause had been shown to deny the requested transfer.[30] While it is not entirely clear from the opinion, it appears that this time period included juvenile court proceedings which occurred both before and after the filing of the motion to terminate parental rights. Thus, although we did not specifically address the issue presented in the instant

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[26] *In re Interest of C.W. et al., supra* note 4. See, also, *In re Interest of Louis S. et al., supra* note 4; *In re Interest of Leslie S. et al., supra* note 4.

[27] See, e.g., *People ex rel. T.I.*, 707 N.W.2d 826 (S.D. 2005); *In re Adoption of S.W.*, 41 P.3d 1003 (Okla. Civ. App. 2001); *In re A.P.*, 25 Kan. App. 2d 268, 961 P.2d 706 (1998); *Matter of M.E.M.*, 195 Mont. 329, 635 P.2d 1313 (1981).

[28] *In re Interest of C.W. et al., supra* note 4.

[29] *Id.* at 821, 479 N.W.2d at 110.

[30] *Id.* at 830, 479 N.W.2d at 115.

cases, our reasoning in *In re Interest of C.W. et al.* implicitly supports the State's argument that a "proceeding" includes everything that transpires after the filing of a petition invoking the jurisdiction of the juvenile court under § 43-247(3)(a). In reversing the posttrial transfer order, we noted with approval decisions by courts in Arizona and Indiana recognizing that the best interests of the child should be considered in determining whether there is good cause to deny a requested transfer to tribal court. We concluded:

> Although we realize that the guidelines deem inappropriate considerations of tribal socioeconomic considerations and the perceived adequacy of the tribal or Bureau of Indian Affairs social services or judicial systems, we also recognize that, in the case of two of the children, those considerations become necessary to a determination of the best interests of the children and, therefore, "good cause" not to transfer the case.[31]

We reasoned that two of the children had special needs and would suffer "if their respective foster homes, the only stability they have ever known, are taken away from them."[32] We now revisit our holdings in *In re Interest of C.W. et al.* to determine whether they are consistent with ICWA and NICWA.

What Constitutes "Proceeding"?

Elise and the Tribe focus on the language of ICWA and NICWA governing transfer to tribal court of a state court proceeding "for the foster care placement of, *or* termination of parental rights to," an Indian child not residing on a reservation, in the absence of good cause to the contrary.[33] They argue that the use of the disjunctive "or" demonstrates a foster care proceeding differs from a termination of parental rights proceeding under ICWA and NICWA and that therefore the two should not be lumped together in considering whether a motion to transfer is made at an "advanced stage" of the proceeding. The State and the guardian ad litem argue that under the

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[31] *Id.* at 835-36, 479 N.W.2d at 118.

[32] *Id.* at 836, 479 N.W.2d at 118.

[33] § 1911(b); § 43-1504(2) (emphases supplied).

reasoning of *In re Interest of C.W. et al.*,[34] the juvenile court properly considered everything which had occurred after the initial filing of these cases in determining that the proceedings had reached an advanced stage when the Tribe moved to transfer. They also refer us to two prior opinions of the Court of Appeals[35] and an Illinois appellate court decision supporting this position.[36] In deciding *In re Interest of C.W. et al.*, we did not apply principles of statutory construction to determine whether, under ICWA and NICA, a termination of parental rights proceeding should be regarded as separate and distinct from a foster care placement proceeding which preceded it in the same docketed case. We do so now.

Under the definitional sections of ICWA and NICWA, the term "child custody proceeding" includes foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.[37] Foster care placement is specifically defined to mean "any action removing an Indian child from its parent or Indian custodian for temporary placement."[38] Termination of parental rights means "any action resulting in the termination of the parent-child relationship."[39] Preadoptive placement means "temporary placement of an Indian child . . . after the termination of parental rights."[40] And adoptive placement means "the permanent placement of an Indian child for adoption."[41] As we have noted, the statutory provisions governing transfer provide that in any state court "proceeding for the foster care placement of, or termination of parental rights to" an Indian child not domiciled

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[34] *In re Interest of C.W. et al., supra* note 4.

[35] *In re Interest of Louis S. et al., supra* note 4; *In re Interest of Leslie S. et al., supra* note 4.

[36] *In re M.H.*, 2011 IL App (1st) 110196, 956 N.E.2d 510, 353 Ill. Dec. 648 (2011).

[37] § 1903(1); 43-1503(1).

[38] § 1903(1)(i); § 43-1503(1)(a).

[39] § 1903(1)(ii); § 43-1503(1)(b).

[40] § 1903(1)(iii); § 43-1503(1)(c).

[41] § 1903(1)(iv); § 43-1503(1)(d).

or residing within a reservation, a state court shall grant a motion to transfer to tribal court "in the absence of good cause to the contrary."[42]

[2,3] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[43] Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.[44] Applying these familiar principles, we conclude that ICWA and NICWA contemplate four different types of child custody proceedings, two of which must be transferred from a state court to a tribal court upon proper motion in the absence of good cause to the contrary. Thus, when the BIA Guidelines state that good cause may exist when "[t]he proceeding was at an advanced stage" at the time a petition to transfer is received, they can only be referring to one of the two proceedings subject to transfer: foster care placement *or* termination of parental rights. The State's argument that a foster care placement proceeding and a termination of parental rights proceeding are a single "proceeding" for purposes of the "advanced stage" analysis is inconsistent with the plain language of ICWA and NICWA, which defines them as separate proceedings. The fact that Nebraska law permits both objectives to be pursued sequentially in a single-docketed case is entirely irrelevant to the question of whether they are separate "proceedings" under the plain statutory language of ICWA and NICWA.

At least two other state courts have reached this conclusion. The North Dakota Supreme Court in *In re A.B.*[45] held that a juvenile court "correctly interpreted ICWA to measure the

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[42] § 1911(b); § 43-1504(2).

[43] *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010); *Herrington v. P.R. Ventures*, 279 Neb. 754, 781 N.W.2d 196 (2010).

[44] *Metropolitan Comm. College Area v. City of Omaha*, 277 Neb. 782, 765 N.W.2d 440 (2009); *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 759 N.W.2d 464 (2009).

[45] *In re A.B.*, 663 N.W.2d 625, 632 (N.D. 2003).

relevant time period for a motion to transfer jurisdiction . . . from the filing of the petition to terminate parental rights." This was so even though there was a preceding foster placement in the same docketed case. In *In re A.B.*, the court noted that its holding was based on the plain language of ICWA separately defining termination of parental rights proceedings and foster placement proceedings and the different purposes served by those proceedings under ICWA. Specifically, the court found that the "plain language of 25 U.S.C. § 1911(b) authorizes transfer motions for either foster care placement proceedings or for termination of parental rights proceedings" and that interpreting the two proceedings as one "would subsume an Indian tribe's right to request transfer of a termination proceeding into its right to request transfer of an earlier foster placement proceeding."[46] The court reasoned that doing so was particularly troubling when a foster care placement only temporarily affects an Indian child's relationship with his or her tribe, while a termination proceeding severs that relationship.

A Minnesota appellate court employed similar reasoning in concluding that foster placement proceedings and termination of parental rights proceedings were separate and distinct under ICWA and should not be "conflated" in determining whether a "proceeding" is at an "advanced stage" within the meaning of the BIA Guidelines.[47] The court noted that whether Minnesota law considered the two types of proceedings to be "continuous or distinct" was not pertinent to the issue of transfer, which was governed by the statutory language of ICWA.[48] It further reasoned that a tribe's interest in maintaining its relationship with an Indian child may not be implicated in a foster care placement proceeding to the same degree as in a termination proceeding.[49]

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[46] *Id.*

[47] *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348, 352 (Minn. App. 2007).

[48] *Id.* at 352 n.6.

[49] *In re Welfare of Children of R.M.B.*, *supra* note 47.

We acknowledge that an Illinois appellate court reached a contrary conclusion in *In re M.H.*[50] That court rejected an argument that the filing of a petition to terminate parental rights initiated a new "proceeding" under ICWA. The court noted that under settled Illinois law, the filing of a petition to terminate parental rights did not initiate an entirely new proceeding within an existing juvenile case and concluded that the plain language of ICWA did not support a distinction between a proceeding to terminate parental rights and a foster placement proceeding which immediately preceded it in the same docketed case. Accordingly, the court concluded that under the plain language of ICWA, the "proceedings" commenced when the child was placed in foster care and the tribe's motion to transfer more than 2 years later was made at an advanced stage of the proceeding, constituting good cause for denying the motion.[51]

The record in this case vividly demonstrates why the reasoning of the Illinois court is inconsistent with the principles underlying ICWA and NICWA. A representative of the Tribe testified that placement of Indian children with foster parents, relatives, or a long-term guardian is consistent with the Tribe's cultural interests but that termination of parental rights is not. Thus, a Tribe may have no reason to seek transfer of a foster placement proceeding where it agrees with the Indian child's placement and the permanency goal is reunification with the parents. However, once the goal becomes termination of parental rights, a Tribe has a strong cultural interest in seeking transfer of that proceeding to tribal court. As one court has noted, "[s]upporting the State's reunification efforts should not result in allegations of a Tribe's lack of diligence in requesting transfer" when the proceeding becomes one for the termination of parental rights.[52]

[4] Accordingly, to the extent *In re Interest of C.W. et al.*[53] can be read as holding that a foster placement proceeding and a

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[50] *In re M.H., supra* note 36.

[51] *Id.* at ¶ 59, 956 N.E.2d at 522, 353 Ill. Dec. at 660.

[52] *In re M.S.*, 237 P.3d 161, 169 (Okla. 2010).

[53] *In re Interest of C.W. et al., supra* note 4.

subsequent termination of parental rights proceeding involving an Indian child are not separate and distinct under ICWA and NICWA, it is disapproved. Here, the relevant proceedings commenced on February 7, 2011, when the State filed its motions to terminate parental rights. The Tribe intervened and requested transfer of both cases by March 1, which was prior to any substantive hearing or adjudication and indeed prior to the parents' appearances and pleas to the termination motions. The commentary to the BIA Guidelines indicates that denial of a requested transfer at an "advanced stage" of a proceeding serves the purpose of preventing a party from waiting "until the case is almost complete to ask that it be transferred to another court and retried."[54] That was clearly not the case here, as the termination of parental rights proceedings had barely begun when the Tribe requested that they be transferred to tribal court.

Best Interests

The juvenile court made no findings as to whether transfer to tribal court would be in the best interests of these Indian children. But the Court of Appeals did. It noted that the children had been out of their parents' home for 2 years, that they were being well cared for in a home that "appears to be committed to fostering their Native American heritage," and that "the present situation is clearly in the children's best interests."[55] The court included this best interests determination as one of the reasons for its conclusion that the juvenile court did not abuse its discretion in denying the motions to transfer.

As the legal underpinning of its best interests analysis, the Court of Appeals relied on this court's decision in *In re Interest of Bird Head*.[56] In that case, we held that a county court did not err in denying a motion to transfer on grounds that the motion had been abandoned and good cause had been shown. We then turned to a separate issue, whether the county

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[54] BIA Guidelines, *supra* note 25, 44 Fed. Reg. 67,590, C.1, commentary.

[55] *In re Interest of Zylena R. & Adrionna R., supra* note 3, 2012 WL 1020275 at *7.

[56] *In re Interest of Bird Head, supra* note 7.

court erred in failing to follow the preferential preadoptive placement provisions of ICWA in the absence of good cause to the contrary. We concluded that it did, noting that the county court had made no findings as to what good cause was shown to warrant failure to place the child with persons or agencies having preference under ICWA.[57] In reaching this conclusion, we stated that ICWA "does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus."[58] In this case, the Court of Appeals cited that statement as the basis for its best interests findings. But that reliance was misplaced, because in *In re Interest of Bird Head*, that principle was stated in the context of the issue of placement, not transfer to tribal court.

But in *In re Interest of C.W. et al.*, we clearly did determine that the best interests of Indian children was a factor to be considered in deciding whether to transfer a state court proceeding to tribal court. We relied on decisions of Arizona[59] and Indiana[60] courts in reaching this conclusion. But other state courts have taken a contrary and what we now believe to be a better approach. In *In re A.B.*, the North Dakota Supreme Court stated:

> Although one of the goals of ICWA is to protect the best interests of an Indian child, . . . the issue here is the threshold question regarding the proper forum for that decision. . . . We agree with those courts that have concluded the best interest of the child is not a consideration for the threshold determination of whether there is good cause not to transfer jurisdiction to a tribal court.[61]

One of the cases which the North Dakota court found persuasive was *Yavapai-Apache Tribe v. Mejia*,[62] in which a Texas

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[57] See § 1915(b).

[58] *In re Interest of Bird Head, supra* note 7, 213 Neb. at 750, 331 N.W.2d at 791.

[59] *Matter of Appeal in Maricopa County*, 136 Ariz. 528, 667 P.2d 228 (Ariz. App. 1983).

[60] *Matter of Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988).

[61] *In re A.B., supra* note 45, 663 N.W.2d at 633-34 (citations omitted).

[62] *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152 (Tex. App. 1995).

appellate court held that the best interests standard is not an appropriate consideration in a determination of whether good cause exists to deny transfer of jurisdiction for two reasons. First, the court concluded that applying the best interests standard to transfer decisions would defeat the purpose for which ICWA was enacted by allowing "Anglo cultural biases into the analysis."[63] The court reasoned:

> The ICWA precludes the imposition of Anglo standards by creating a broad presumption of jurisdiction in the tribes. Thus, the jurisdictions [sic] provisions in sections 1911(a) and (b) are at the very heart of the ICWA. We decline to embrace a test that would, in our judgment, eviscerate the spirit of the Act.[64]

Second, the Texas court rejected the best interests standard because it deemed it relevant to issues of placement, not jurisdiction. The court stated:

> For a court to use this standard when deciding a purely jurisdictional matter, alters the focus of the case, and the issue becomes not what judicial entity should decide custody, but the standard by which the decision itself is made. The utilization of the best interest standard and fact findings made on that basis reflects the Anglo-American legal system's distrust of Indian legal competence by its assuming that an Indian determination would be detrimental to the child.[65]

Other courts have followed similar reasoning in holding that best interests should not be a factor in resolving the issue of whether there is good cause to deny a motion to transfer a case involving an Indian child from state court to tribal court.[66]

[5] We now conclude that these decisions are more consistent with the underlying purpose of ICWA and NICWA than the Indiana and Arizona cases we cited in *In re Interest*

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[63] *Id.* at 169.

[64] *Id.* at 170.

[65] *Id.*

[66] See, *People in Interest of J.L.P.*, 870 P.2d 1252 (Colo. App. 1994); *Matter of Ashley Elizabeth R.*, 116 N.M. 416, 863 P.2d 451 (N.M. App. 1993); *In re Armell*, 194 Ill. App. 3d 31, 550 N.E.2d 1060, 141 Ill. Dec. 14 (1990).

of C.W. et al. We further note that the BIA Guidelines do not include the best interests of a child as "good cause" for denying transfer to a tribal court, but instead, specifically state that "[s]ocio-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."[67] The reality is that both a juvenile court applying Nebraska law and a tribal court proceeding under ICWA must act in the best interests of an Indian child over whom they have jurisdiction. The question before a state court considering a motion to transfer to tribal court is simply which tribunal should make that decision. Permitting a state court to deny a motion to transfer based upon its perception of the best interests of the child negates the concept of "presumptively tribal jurisdiction" over Indian children who do not reside on a reservation and undermines the federal policy established by ICWA of ensuring that "Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.'"[68] Stated another way, recognizing best interests as "good cause" for denying transfer permits state courts to decide that it is not in the best interests of Indian children to have a tribal court determine what is in their best interests. By enacting ICWA, Congress clearly stated otherwise. Accordingly, we overrule *In re Interest of C.W. et al*.[69] to the extent that it permits a state court to consider the best interests of an Indian child in deciding whether there is good cause to deny a motion to transfer a proceeding to tribal court.

CONCLUSION

For the reasons discussed, we conclude that there is no basis on the records for a determination that the motions to transfer these cases to tribal court were filed at an advanced stage of

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[67] BIA Guidelines, *supra* note 25, 44 Fed. Reg. 67,591, C.3(c).

[68] *Mississippi Choctaw Indian Band v. Holyfield, supra* note 13, 490 U.S. at 36-37, quoting H.R. Rep. No. 95-1386 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7546.

[69] *In re Interest of C.W. et al., supra* note 4.

the proceedings to terminate parental rights and that the Court of Appeals therefore erred in affirming the separate juvenile court's denial of the motions on this ground. Accordingly, we reverse, and remand to the Court of Appeals with directions to reverse the judgments of the separate juvenile court and direct that court to sustain the motions to transfer the cases to the Omaha Tribal Court.

REVERSED AND REMANDED WITH DIRECTIONS.

CASSEL, J., not participating.

HEAVICAN, C.J., dissenting.

I respectfully dissent. I would find that the proceedings in these consolidated cases were at an advanced stage and that good cause existed for the juvenile court to retain jurisdiction and to deny the requests to transfer. As such, I would affirm the decisions of the juvenile court.

As noted by the majority, we addressed, albeit implicitly, the issue presented here in *In re Interest of C.W. et al.*,[1] where this court noted that the juvenile court had properly considered "the 8-year history of the case" in concluding that good cause had been shown to deny the requested transfer.[2] We also noted in *In re Interest of C.W. et al.* that it was appropriate for the juvenile court to consider the best interests of the child in determining good cause to deny a transfer.[3] Since our decision in that case, the Court of Appeals has twice considered the entire pendency of a juvenile abuse and neglect proceeding when affirming the juvenile court's denial of a motion to transfer to tribal courts on the ground that the motion was filed at an advanced stage of the proceeding.[4]

Moreover, this position is consistent with other authority. The Illinois Court of Appeals in *In re M.H.*,[5] rejected an

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[1] *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992).

[2] *Id.* at 830, 479 N.W.2d at 115.

[3] *In re Interest of C.W. et al., supra* note 1.

[4] See, *In re Interest of Louis S. et al.*, 17 Neb. App. 867, 774 N.W.2d 416 (2009); *In re Interest of Leslie S. et al.*, 17 Neb. App. 828, 770 N.W.2d 678 (2009).

[5] *In re M.H.*, 2011 IL App (1st) 110196, 956 N.E.2d 510, 353 Ill. Dec. 648 (2011).

argument that the filing of a petition to terminate parental rights initiated a new "proceeding" under ICWA. The court in *In re M.H.* explicitly addressed and rejected the reasoning of the North Dakota Supreme Court in *In re A.B.*,[6] which is relied upon by the majority, and concluded it did not find that the plain language of ICWA supported a distinction between a proceeding to terminate parental rights and a foster placement proceeding which immediately preceded it in the same docketed case.

In my view, the conclusion that a new "proceeding" is not initiated by the filing of a motion to terminate parental rights is an appropriate balance of the interests of all the stakeholders in a juvenile case. An Indian tribe unquestionably has an interest in "protect[ing] the best interests of Indian children and [in] promot[ing] the stability and security of Indian tribes,"[7] and Indian children should be placed whenever possible in homes that "will reflect the unique values of Indian culture."[8] But the State also has a parens patriae interest[9] and has a right to protect the welfare of its resident children,[10] which includes establishing permanency for those children.[11] By requiring notice and freely allowing intervention, at least in nonadvanced stages of the proceedings, the Tribe is permitted sufficient opportunity to protect its interest while not interfering with the welfare and best interests of children residing in Nebraska. By curtailing the right of transfer after a certain point, the State is allowed to pursue permanency on behalf of children who are not able to be returned to their parental home.

In this instance, the Tribe was given notice of these proceedings. In Zylena's case, the amended petition to adjudicate was filed on July 1, 2008, and notice was sent to the Tribe on

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[6] *In re A.B.*, 663 N.W.2d 625 (N.D. 2003).

[7] See 25 U.S.C. § 1902 (2006).

[8] *Id.*

[9] See *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012).

[10] See *id.*

[11] Neb. Rev. Stat. § 43-246(6) (Cum. Supp. 2012). Cf. Neb. Rev. Stat. § 43-1312 (Cum. Supp. 2012).

July 9. By July 16, the Tribe responded, indicating that Zylena was not an enrolled member of the Tribe and that she was not eligible for enrollment. With Adrionna, a petition to adjudicate was not filed until May 1, 2009, and notice was admittedly not sent until October 2010. But notice was sent, and the Tribe did not seek to intervene until February 14, 2011, or a week *after* the State filed a motion to terminate the parental rights to both Zylena and Adrionna.

Not only was the Tribe sent notice of these actions, that notice was unambiguous: the action filed on behalf of Zylena, and later Adrionna, "may result in restriction of parental or custodial rights to the child or foster care placement of the child or termination of parental rights to the child." In Zylena's case, the Tribe actually responded in the negative and allowed the State's proceedings to continue for another 31 months before finally asking to intervene and for transfer.

Nebraska's juvenile code provides that the code should be construed to accomplish, among other goals, "permanent arrangements for children . . . who are unable to return home."[12] But in this case, it is clear that by allowing the transfer, Zylena's and Adrionna's rights to such permanency have been delayed as the futures of these children play out in yet another court.

I would hold that the filing of a petition to terminate parental rights does not commence a new proceeding under ICWA and NICWA and that the Tribe's intervention came at an advanced stage of the proceedings. I would therefore conclude that this late intervention was good cause to deny the Tribe's motions to transfer and that the decision of the Court of Appeals affirming the juvenile court's denial of the motions to transfer should be affirmed.

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[12] § 43-246(6).

IN RE INTEREST OF SAMANTHA L. AND JASMINE L., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT, V. KELLY L. AND WILLIAM H., APPELLEES.

824 N.W.2d 691

Filed December 14, 2012. No. S-12-150.

1. **Contempt: Appeal and Error.** When reviewing a contempt order, an appellate court reviews for abuse of discretion the trial court's determination of whether a party is in contempt and the appropriateness of the sanction it imposed.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Courts.** Nebraska courts, through their inherent judicial power, have the authority to do all things necessary for the proper administration of justice.
4. **Contempt: Courts.** The power to punish for contempt is incident to every judicial tribune.
5. ____: ____. The authority to punish for contempt is derived from a court's constitutional power, without any expressed statutory aid, and is inherent in all courts of record.
6. **Juvenile Courts.** Separate juvenile courts and county courts sitting as juvenile courts are courts of record.
7. **Contempt: Courts: Notice.** Before a court can exercise its inherent contempt powers, the contemnor is entitled to reasonable notice and an opportunity to be heard.
8. **Contempt: Courts.** Contempts committed in the presence of the court, also known as direct contempts, give the court personal knowledge of the facts and do not require the court to inform itself of the contemptuous conduct through witnesses and evidence.
9. ____: ____. The events constituting indirect contempt occur outside the presence of the court, and the court must inform itself of the facts through witnesses or other evidence.
10. ____: ____. If the court must inform itself through witnesses or evidence of any material facts of contemptuous conduct, then summary punishment is inappropriate.

Appeal from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge. Vacated and remanded for further proceedings.

Jon Bruning, Attorney General, and John M. Baker, Special Assistant Attorney General, for appellant.

Molly Adair-Pearson for appellee Kelly L.

Matt Saathoff, of Saathoff Law Group, P.C., L.L.O., for appellee William H.

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

MCCORMACK, J.

NATURE OF CASE

The Nebraska Department of Health and Human Services (DHHS) appeals from an order of the juvenile court requiring DHHS to pay opposing counsel's costs. The court took judicial notice that for the third straight hearing, DHHS had failed to provide opposing counsel prior notice of the exhibits to be offered. DHHS appeals the order and asserts that the juvenile court lacked the statutory authority to require payment of costs.

BACKGROUND

On October 22, 2010, an amended petition was filed in the separate juvenile court of Douglas County alleging improper parental care of minor children Samantha L. and Jasmine L. A hearing was held on February 28, 2011, and a review and permanency planning hearing was scheduled for August 23. The court ordered that all reports to be submitted at the next hearing be provided to opposing counsel at least 3 business days before the hearing.

At the hearing on August 23, 2011, opposing counsel objected to reports offered by DHHS, because the reports had not been made available 3 days prior. The court continued the hearing for that reason.

At a hearing on October 27, 2011, DHHS again offered reports that were not previously provided to opposing counsel. The court sustained opposing counsel's objection and continued the hearing for a second time.

The third attempt at a review and permanency hearing was held on January 9, 2012. The court again sustained opposing counsel's objection to DHHS' offering reports without notice. In its order, the juvenile court noted that the continuances

prevented the court from making a dispositional order and that this had an adverse impact on the permanency planning for the children. The juvenile court then ordered opposing counsel's costs associated with the preparation and attendance of the January 9 hearing, as well as the next scheduled hearing, to be paid by DHHS.

ASSIGNMENT OF ERROR

DHHS assigns as error the juvenile court's January 9, 2012, order requiring DHHS to pay the costs associated with the January 9 hearing and the subsequent scheduled hearing, arguing that the order was beyond the juvenile court's statutory authority.

STANDARD OF REVIEW

[1,2] When reviewing a contempt order, an appellate court reviews for abuse of discretion the trial court's determination of whether a party is in contempt and the appropriateness of the sanction it imposed.[1] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[2]

ANALYSIS

The issues presented by this appeal have evolved since DHHS' brief was filed. DHHS argued in its brief that the juvenile code does not authorize a court to order payment of opposing counsel's costs. The appellees responded by characterizing the court's action as a contempt order and arguing that the juvenile court's contempt authority is derived independently of the juvenile code. DHHS' brief was silent on the issue of contempt.

At oral argument, the contempt issue was discussed at length. When pressed by the court, counsel for DHHS conceded, and we agree, that the order was for contempt. Because DHHS has now conceded that this order was for contempt,

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[1] See *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

[2] *Tyler v. Heywood*, 258 Neb. 901, 607 N.W.2d 186 (2000).

we will address this appeal as an appeal of a contempt finding and sanction.

[3-6] We have held that Nebraska courts, through their inherent judicial power, have the authority to do all things necessary for the proper administration of justice.[3] The authority includes the power to punish for contempt, which is incident to every judicial tribune.[4] It is derived from a court's constitutional power, without any expressed statutory aid, and is inherent in all courts of record.[5] Separate juvenile courts and county courts sitting as juvenile courts are courts of record.[6] Therefore, the juvenile court does have the inherent authority to order DHHS to pay attorney fees and costs through contempt.

[7] But, as argued by counsel for DHHS, before a court can exercise its inherent contempt powers, the contemnor is entitled to reasonable notice and an opportunity to be heard.[7] Under Neb. Rev. Stat. § 25-2122 (Reissue 2008), "[c]ontempts committed in the presence of the court may be punished summarily; in other cases the party upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense." The appellees argue that DHHS' failure to give notice 3 days prior to the hearing was done in the presence of the court and was subject to summary punishment. We disagree.

[8] Contempts committed in the presence of the court, also known as direct contempts, give the court personal knowledge of the facts and do not require the court to inform itself of the contemptuous conduct through witnesses and evidence.[8] The most basic form of direct contempt is when a party verbally abuses a judge during court.[9] Such direct

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[3] *Laschanzky v. Laschanzky*, 246 Neb. 705, 523 N.W.2d 29 (1994).

[4] *Tyler v. Heywood, supra* note 2.

[5] See, *id.*; Neb. Rev. Stat. § 25-2121 (Reissue 2008).

[6] See, e.g., *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011); *In re Interest of Tyler T.*, 279 Neb. 806, 781 N.W.2d 922 (2010); *In re Interest of Krystal P. et al.*, 251 Neb. 320, 557 N.W.2d 26 (1996).

[7] See *In re Interest of Thomas M., supra* note 6.

[8] See *Tyler v. Heywood, supra* note 2.

[9] See *id.*

evidence of contempt allows the court to punish the offending party summarily.[10]

[9,10] In contrast, the events constituting indirect contempt occur outside the presence of the court and the court must inform itself of the facts through witnesses or other evidence.[11] Even in instances of direct contempt, if the court must inform itself through witnesses or evidence of any material facts of the contemptuous conduct, then summary punishment is inappropriate.[12]

Thus, in *In re Contempt of Potter*,[13] we held that summary punishment was inappropriate for an attorney who failed to arrive at the announced time for the resumption of judicial proceedings. Although the attorney's tardiness was witnessed by the court, a valid reason occurring outside the presence of the court might explain the attorney's tardiness. Therefore, the contemnor had the right to reasonable notice and an opportunity to be heard.[14] Likewise, in *In re Interest of Simon H.*,[15] the Nebraska Court of Appeals directed the juvenile court to vacate its contempt order that summarily required DHHS to pay a $1,000 fine for filing a case plan and court report late, because the contempt order was procedurally deficient. The lower court could not have known why the case plan and court report were not filed on time, because such excuses occurred outside the presence of the court.

Here, DHHS' failure to give notice to opposing counsel occurred outside the presence of the court. Unlike *In re Contempt of Potter* and *In re Contempt of Simon H.*, the juvenile court had no way of directly witnessing that notice had not been given to opposing counsel 3 days prior to the hearing. The

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[10] *Id.*

[11] See *id.*

[12] See, *In re Contempt of Potter*, 207 Neb. 769, 301 N.W.2d 560 (1981); *In re Interest of Simon H.*, 8 Neb. App. 225, 590 N.W.2d 421 (1999), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010).

[13] *In re Contempt of Potter, supra* note 12.

[14] *Id.*

[15] *In re Interest of Simon H., supra* note 12.

court became aware of this fact only after opposing counsel raised an objection at the hearing. Furthermore, the juvenile court could not have known why notice was not given by DHHS, because the relevant interactions between the parties occurred outside the presence of the court.

Despite not having firsthand knowledge of the contemptuous conduct, the juvenile court summarily held DHHS in contempt. The juvenile court did not give DHHS prior notice of the contempt accusations, hold a civil contempt proceeding, or provide DHHS a reasonable time to make its defense.[16] Therefore, the juvenile court abused its discretion by summarily holding DHHS in contempt for conduct that occurred outside the presence of the court.

CONCLUSION

The juvenile court's inherent power to issue contempt orders is subject to the contemnor's receiving proper notice and an opportunity to be heard when the contempt is not committed in the presence of the court. In this instance, the juvenile court abused its discretion by summarily imposing a sanction for conduct that did not occur in its presence. We vacate the January 9, 2012, contempt order and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

[16] See § 25-2122.

TIMOTHY L. PETERSON, APPELLANT, V. ROBERT P. HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, STATE OF NEBRASKA, APPELLEE.

824 N.W.2d 26

Filed December 14, 2012. No. S-12-242.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Constitutional Law: Judgments.** Except in those cases where the denial of in forma pauperis status would deny a defendant his or her constitutional right to

appeal in a felony case, Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008) allows the court on its own motion to deny in forma pauperis status on the basis that the legal positions asserted by the applicant are frivolous or malicious, provided that the court issue a written statement of its reasons, findings, and conclusions for denial.

3. **Actions: Words and Phrases.** A frivolous legal position pursuant to Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is one wholly without merit, that is, without rational argument based on the law or on the evidence.
4. **Affidavits: Judgments.** When, pursuant to Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008), a trial court denies leave to proceed in forma pauperis on its own motion on the ground that the party seeking leave is asserting legal positions which are frivolous or malicious, its order shall include the court's reasons for such conclusion.
5. **Habeas Corpus.** Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained.
6. ____. A writ of habeas corpus challenges and tests the legality of a person's detention, imprisonment, or custodial deprivation of liberty.
7. **Habeas Corpus: Proof.** Habeas corpus requires the showing of legal cause, that is, that a person is detained illegally and is entitled to the benefits of the writ.
8. **Constitutional Law: Habeas Corpus.** A writ of habeas corpus in the State of Nebraska is quite limited in comparison to those of federal courts, which allow a writ of habeas corpus to a prisoner when he or she is in custody in violation of the federal Constitution, law, or treaties of the United States.
9. **Habeas Corpus: Judgments: Collateral Attack.** Under Nebraska law, an action for habeas corpus is a collateral attack on a judgment of conviction.
10. **Judgments: Collateral Attack.** Only a void judgment may be collaterally attacked.
11. **Judgments: Jurisdiction: Collateral Attack.** Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.
12. **Habeas Corpus: Jurisdiction: Sentences.** A writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose.
13. **Habeas Corpus.** A writ of habeas corpus is not a writ for correction of errors, and its use will not be permitted for that purpose.
14. **Habeas Corpus: Sentences.** The regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for writ of habeas corpus, for that matter is available only in a direct proceeding.
15. **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.
16. **Courts: Jurisdiction.** Pursuant to Neb. Rev. Stat. § 24-302 (Reissue 2008), district courts are vested with general, original, and appellate jurisdiction over civil and criminal matters.
17. **Indictments and Informations: Appeal and Error.** An information first questioned on appeal must be held sufficient unless it is so defective that by

no construction can it be said to charge the offense for which the accused was convicted.

18. **Indictments and Informations**. A complaint or information is fatally defective only if its allegations can be true and still not charge a crime.
19. ____. No information shall be deemed invalid for any defect or imperfection which does not prejudice the substantial rights of the defendant upon the merits.
20. **Jurisdiction: Indictments and Informations**. The fact that an information is fatally defective does not deny the trial court jurisdiction to issue any order relating to those purported charges.
21. **Criminal Law: Venue.** Under Neb. Rev. Stat. § 29-1301 (Reissue 2008), a criminal defendant has a right to be tried in the county in which the criminal offense is alleged to have been committed.
22. **Criminal Law: Venue: Proof.** The State must prove proper venue beyond a reasonable doubt in criminal cases.
23. **Pleas.** Generally, a guilty plea admits all facts recited in open court by the State and all facts alleged in the information or complaint, including the fact that the offense was committed and the time and place of its commission.
24. **Jurisdiction: Judgments: Appeal and Error.** Where jurisdiction has attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void.

Appeal from the District Court for Lancaster County: ANDREW R. JACOBSEN, Judge. Affirmed.

Timothy L. Peterson, pro se.

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

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

STEPHAN, J.

Timothy L. Peterson sought leave to proceed in forma pauperis in order to file a petition for a writ of habeas corpus in the district court for Lancaster County. On its own motion, the district court determined that the legal positions asserted in the petition were frivolous, and it denied the motion to proceed in forma pauperis for that reason. Peterson appealed, and we moved the case to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

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

BACKGROUND

On August 21, 2008, a complaint filed in Butler County charged Peterson with two counts of first degree sexual assault and eight counts of second-offense violation of a protection order. The complaint alleged that on "April 4 and/or 5, 2008," Peterson "did subject another to sexual penetration without . . . consent or the victim was less than sixteen years of age . . . when the defendant was nineteen years of age or older." It also alleged that Peterson knowingly violated the provisions of a previous protection order by disturbing the peace and quiet of an individual on several occasions.

On October 7, 2008, the State filed an amended information charging Peterson with one count of attempted first degree sexual assault and one count of second-offense violation of a protection order. This information alleged that Peterson "intentionally engage[d] in conduct, which under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended to culminate in the commission of the crime of Sexual Assault in the First Degree." Peterson was convicted and sentenced to 16 to 20 years in prison on the attempted sexual assault conviction and to a consecutive term of 20 to 60 months in prison on the protection order conviction.

On September 4, 2008, an information filed in the district court for Platte County charged Peterson with attempted first degree sexual assault. The information alleged that the crime occurred in January or February 2008, when Peterson was 19 years of age or older and the victim was at least 12 years old but less than 16 years old. Peterson pled guilty and was sentenced to a term of 6 to 10 years in prison, with credit for 191 days served. The sentence was to be served concurrently with any other sentence Peterson was currently serving.

In his petition for a writ of habeas corpus, Peterson alleged that he is being illegally detained because the amended Butler County information was "fatally defective." He contended that the amended information quoted the criminal statutes but did not provide any identifying characteristics of any victim or

the time, place, and facts to support the sexual assault charge. Peterson claimed that the district court for Butler County lacked subject matter jurisdiction because it accepted a guilty plea "to a mere collection of pointless words." He also asserted that the sexual assault charge in Butler County subjected him to double jeopardy because it was the same crime he was convicted of in Platte County, where the victim was identified as "K.W."

In addition, Peterson claimed that his counsel in the Butler County case failed to file a motion to quash the defective information or to prepare a double jeopardy defense. Peterson alleged that his counsel refused to file a direct appeal and that he was coerced into pleading to the charges. Peterson also claimed he is actually innocent of the charges. He asserted that the Butler County convictions are void and that the sentences must be vacated and a new trial granted. He did not challenge the Platte County conviction.

On February 28, 2012, the district court for Lancaster County entered an order stating that it had reviewed the petition for writ of habeas corpus and had determined that "it is frivolous." The order concludes: "IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Petition for Writ of Habeas Corpus and Motion to Proceed In Forma Pauperis are overruled and denied. Pursuant to statute, the petitioner is given 30 days in which to pay the filing fee or appeal."

Peterson filed a timely notice of appeal, and the district court granted him leave to appeal in forma pauperis.

ASSIGNMENTS OF ERROR

Peterson assigns that the district court erred in finding the legal positions asserted in his petition for writ of habeas corpus to be frivolous and in denying him leave to proceed in forma pauperis in that court.

STANDARD OF REVIEW

[1] A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is reviewed de

novo on the record based on the transcript of the hearing or the written statement of the court.[2]

ANALYSIS

[2,3] Applications to proceed in forma pauperis are governed by § 25-2301.02. Except in those cases where the denial of in forma pauperis status "would deny a defendant his or her constitutional right to appeal in a felony case," § 25-2301.02(1) allows the court "on its own motion" to deny in forma pauperis status on the basis that the legal positions asserted by the applicant are frivolous or malicious, provided that the court issue "a written statement of its reasons, findings, and conclusions for denial."[3] A frivolous legal position pursuant to § 25-2301.02 is one wholly without merit, that is, without rational argument based on the law or on the evidence.[4] When an objection to an application to proceed in forma pauperis is sustained, "the party filing the application shall have thirty days . . . to proceed with an action or appeal upon payment of fees, costs, or security."[5]

[4] In this case, the district court concluded that the legal positions advanced by Peterson were "frivolous," but did not state its reasons for reaching that conclusion. Because our review is de novo on the record, we proceed to address Peterson's assignments of error. But we hold prospectively that when, pursuant to § 25-2301.02(1), a trial court denies leave to proceed in forma pauperis on its own motion on the ground that the party seeking leave is asserting legal positions which are frivolous or malicious, its order shall include the court's reasons for such conclusion.

[5-7] We begin by examining the scope of the state habeas corpus remedy which Peterson seeks to invoke. Habeas corpus is a special civil proceeding providing a summary remedy to

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[2] § 25-2301.02(2); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003).

[3] *Cole v. Blum*, 262 Neb. 1058, 637 N.W.2d 606 (2002).

[4] *Id.*

[5] § 25-2301.02(1). See *Martin v. McGinn, supra* note 2.

persons illegally detained.[6] A writ of habeas corpus challenges and tests the legality of a person's detention, imprisonment, or custodial deprivation of liberty.[7] Habeas corpus requires the showing of legal cause, that is, that a person is detained illegally and is entitled to the benefits of the writ.[8]

[8-14] A writ of habeas corpus in this state is quite limited in comparison to those of federal courts, which allow a writ of habeas corpus to a prisoner when he or she is in custody in violation of the federal Constitution, law, or treaties of the United States.[9] Under Nebraska law, an action for habeas corpus is a collateral attack on a judgment of conviction.[10] Only a void judgment may be collaterally attacked.[11] Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.[12] Thus, a writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose.[13] A writ of habeas corpus is not a writ for correction of errors, and its use will not be permitted for that purpose.[14] "[T]he regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for writ of habeas corpus, for that matter is available only in a direct proceeding."[15]

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[6] *Poindexter v. Houston*, 275 Neb. 863, 750 N.W.2d 688 (2008); *Tyler v. Houston*, 273 Neb. 100, 728 N.W.2d 549 (2007).

[7] *Poindexter v. Houston, supra* note 6.

[8] *Id.*

[9] *Rehbein v. Clarke*, 257 Neb. 406, 598 N.W.2d 39 (1999); *Mayfield v. Hartmann*, 221 Neb. 122, 375 N.W.2d 146 (1985).

[10] See *Rehbein v. Clarke, supra* note 9.

[11] *Id.*

[12] *Id.*

[13] *Id.*; *Anderson v. Gunter*, 235 Neb. 560, 456 N.W.2d 286 (1990).

[14] See *Rehbein v. Clarke, supra* note 9.

[15] *Id.* at 410-11, 598 N.W.2d at 44.

With these general principles in mind, we turn to the specific grounds upon which Peterson alleged he is entitled to a writ of habeas corpus. First, Peterson alleged that the amended information to which he entered his guilty plea was defective and insufficient to establish jurisdiction over the subject matter or his person. He alleged that the amended information was a "mere collection of pointless words" which did not identify "any victim, time, place, or facts to support evidence of offense." He alleges that the deficiencies in the information deprived the district court for Butler County of subject matter jurisdiction. This legal position is wholly without merit.

[15-20] 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.[16] Pursuant to Neb. Rev. Stat. § 24-302 (Reissue 2008), district courts are vested with general, original, and appellate jurisdiction over civil and criminal matters.[17] We have held that an "information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense for which the accused was convicted."[18] And "a complaint or information is fatally defective only if its allegations can be true and still not charge a crime."[19] In addition, "[n]o information shall be deemed invalid for any defect or imperfection which does not prejudice the substantial rights of the defendant upon the merits."[20] And even the "fact that an information is fatally defective does not deny the trial court jurisdiction to issue any order relating to those purported charges."[21] Based upon our de

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[16] *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

[17] See *id*.

[18] *State v. Coleman*, 209 Neb. 823, 826, 311 N.W.2d 911, 912 (1981).

[19] *Id*. at 826, 311 N.W.2d at 913, citing *Phillips v. State*, 154 Neb. 790, 49 N.W.2d 698 (1951).

[20] *State v. Mays*, 203 Neb. 487, 491, 279 N.W.2d 146, 149 (1979).

[21] *State v. Blackson*, 256 Neb. 104, 107, 588 N.W.2d 827, 830 (1999). Accord *State v. Thomas, supra* note 16.

novo review, we conclude that the charging documents in the Butler County case contain no deficiencies which would have deprived the district court of jurisdiction to convict Peterson of the offenses to which he entered pleas of guilty.

[21-23] Next, Peterson alleged in his petition that the offenses for which he was convicted in Butler County actually occurred in Platte County. Under Neb. Rev. Stat. § 29-1301 (Reissue 2008), a criminal defendant has a right to be tried in the county in which the criminal offense is alleged to have been committed. Additionally, we have held that the State must prove proper venue beyond a reasonable doubt in criminal cases.[22] Peterson's petition and the attached court records establish that he entered a guilty plea to an amended information which clearly alleged that he had attempted to sexually assault a minor "in Butler County, Nebraska." Generally, a guilty plea admits all facts recited in open court by the State and all facts alleged in the information or complaint, including the fact that the offense was committed and the time and place of its commission.[23] Peterson admits in his habeas petition that he pled guilty. His guilty plea waived his right to question whether the Butler County District Court had jurisdiction over a crime which he admitted occurred in Butler County.

[24] Peterson also alleged that he is entitled to habeas relief on the bases of double jeopardy, actual innocence, miscarriage of justice, malicious prosecution, judicial bias, ineffective counsel, and conflict of interest. None of these provide a proper ground for granting a writ of habeas corpus in Nebraska. "Where jurisdiction has attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void."[24]

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[22] See *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992).

[23] *State v. Dodson*, 250 Neb. 584, 550 N.W.2d 347 (1996), *overruled on other grounds, State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999).

[24] *Rehbein v. Clarke, supra* note 9, 257 Neb. at 410, 598 N.W.2d at 43-44.

CONCLUSION

Based upon our de novo review of the record, we conclude that the district court did not err in denying Peterson's application to proceed in forma pauperis on the ground that the legal positions asserted in the petition for writ of habeas corpus which he sought to file were frivolous. As noted, the district court gave Peterson "30 days in which to pay the filing fee or appeal," which is in accordance with the procedure prescribed by § 25-2301.02(1). Thus, upon the spreading of our mandate affirming the district court's denial of leave to proceed in forma pauperis, Peterson shall have 30 days to pay the fees necessary to file his petition.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JESSICA BURBACH, APPELLANT.
823 N.W.2d 697

Filed December 21, 2012. No. S-11-424.

Petition for further review from the Court of Appeals, MOORE and PIRTLE, Judges, and CHEUVRONT, District Judge, Retired, on appeal thereto from the District Court for Lancaster County, STEVEN D. BURNS, Judge. Judgment of Court of Appeals affirmed.

Korey L. Reiman, of Reiman Law Firm, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

PER CURIAM.

Having reviewed the briefs and record and having heard oral arguments, we conclude on further review that the decision of the Nebraska Court of Appeals in *State v. Burbach*, 20 Neb. App. 157, 821 N.W.2d 215 (2012), is correct, and accordingly,

we affirm the decision of the Court of Appeals which affirmed the judgment of the district court.

AFFIRMED.

CASSEL, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
ALBERTO C. MAGALLANES, APPELLANT.
824 N.W.2d 696

Filed December 21, 2012. No. S-11-1033.

1. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Judgments: Appeal and Error.** A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.
3. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
4. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
5. **Statutes: Appeal and Error.** An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **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.
7. **Search and Seizure.** In order for a consent to search to be effective, it must be a free and unconstrained choice and not the product of a will overborne.
8. **Appeal and Error.** Consideration of plain error occurs at the discretion of an appellate court.
9. ____. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
10. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed in part, and in part reversed and remanded with direction.

Thomas C. Riley, Douglas County Public Defender, and Jami L. Jacobs for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

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

WRIGHT, J.

NATURE OF CASE

The appellant, Alberto C. Magallanes, was stopped on Interstate 80 for driving on the shoulder of the highway in violation of Neb. Rev. Stat. § 60-6,142 (Reissue 2010). After consent to search was given, drugs were found in the gasoline tank of the car Magallanes was driving. Magallanes was charged with and convicted of two counts of possession with intent to deliver a controlled substance and two counts of failure to affix a drug tax stamp. Following a bench trial, he was convicted on all counts. He was sentenced to 20 to 40 years' imprisonment for each possession conviction and 1 to 2 years' imprisonment for each conviction for failure to affix a tax stamp, with all terms running concurrently. Magallanes appealed, challenging whether probable cause existed to stop his vehicle and arguing that consent to search the vehicle was not properly given because of the illegal stop.

SCOPE OF REVIEW

[1] The meaning of a statute is a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011).

[2] A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

FACTS

Traffic Stop

At approximately 10:30 p.m. on November 30, 2009, Kristopher Peterson, a deputy with the Douglas County sheriff's office K-9 interdiction unit, was patrolling Interstate 80. He observed a vehicle with Arizona license plates traveling eastbound. He decided to follow the vehicle and observed it temporarily cross outside its lane of travel onto the shoulder of the road for roughly 1 second or approximately 100 feet at two separate locations. Only the width of the right-side tires crossed over the fog line onto the shoulder. Peterson continued to follow the vehicle for about another 1½ miles before he pulled it over for what he believed was a violation of Nebraska law that prohibits driving on the shoulder of a highway.

Peterson approached the driver's side of the vehicle and told Magallanes that he pulled Magallanes over because he "'drove on the shoulder a couple times.'" Peterson also asked Magallanes if he was "'ok to drive.'" Magallanes said he was confused because of the Interstate 680/80 junction, and Peterson responded that confusion at that particular location "'happens quite a bit.'"

Magallanes was then taken to Peterson's cruiser and asked additional questions about his travel plans. Peterson separately asked Magallanes' passenger about their travel plans. During the traffic stop, Deputy Eric Olson arrived at the scene. Peterson wrote Magallanes a warning ticket for driving on the shoulder and then asked if he could search the vehicle. Magallanes consented to the search. Magallanes sat in Peterson's cruiser while the search occurred, and the passenger was asked to wait in Olson's cruiser. Peterson informed Magallanes that if, at any time, he wanted to end the search, he could do so by honking the cruiser's horn. Peterson and Olson then began to search the vehicle.

A search of the passenger compartment and the trunk revealed no contraband. However, Peterson noticed an odor of gasoline in the car and that Magallanes had air fresheners scattered throughout the car. He testified that newer cars, like

the one Magallanes was driving, should not have a strong gasoline odor inside the car and that the smell was an indication that someone had tampered with the fuel injector and sending unit. The two deputies removed the car's back seat and noticed that the fuel injector cover had grease and scratches on it, indicating that it had been tampered with. They used tools to remove the cover, and when they looked into the gasoline tank, they saw items that appeared to be contraband. Ultimately, five packages of methamphetamine and six packages of cocaine were recovered. Magallanes and his passenger were arrested.

Procedural History

On September 16, 2010, the State filed an information in Douglas County District Court charging Magallanes with one count of possession with intent to deliver more than 140 grams of methamphetamine, one count of possession with intent to deliver more than 140 grams of cocaine, and two counts of failure to affix a tax stamp. The first two counts were Class IB felonies, and the other two counts were Class IV felonies.

Magallanes filed three separate motions to suppress the evidence in district court. The first was filed on October 19, 2010, and sought to suppress any and all evidence derived from the search of the vehicle because the stop and seizure were conducted in violation of the 4th, 5th, 6th, and 14th Amendments to the U.S. Constitution and article I of the Nebraska Constitution. The second motion, filed January 24, 2011, alleged that the scope of the search went beyond the consent given by Magallanes, in violation of his state and federal constitutional rights. The third motion, filed on April 7, alleged that Magallanes did not voluntarily consent to the search and that any evidence obtained should be suppressed. All three motions were overruled by the district court.

On July 29, 2011, the matter came before the district court for a bench trial. The court found Magallanes guilty on all four counts. On November 23, he was sentenced to 20 to 40 years in prison on counts I and II, and 1 to 2 years in prison on counts III and IV, with all terms running concurrently.

On December 1, 2011, Magallanes appealed to the Nebraska Court of Appeals. We moved the case to our docket pursuant to our authority to regulate the dockets of this court and the Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

Magallanes assigns as error, restated, that the district court erred (1) when it denied Magallanes' motion to suppress, because Peterson did not have probable cause to stop Magallanes' vehicle, resulting in an illegal seizure, and (2) when it overruled Magallanes' motion to suppress, because the evidence obtained by the deputies during the illegal stop and seizure should have been suppressed as fruit of the poisonous tree.

ANALYSIS

Validity of Stop

[3] 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), *cert. denied* ___ U.S. ___, 133 S. Ct. 158, 184 L. Ed. 2d 78. Peterson believed that Magallanes had committed a violation of § 60-6,142 when he twice crossed the fog line onto the shoulder of the road. Section 60-6,142 reads:

> No person shall drive on the shoulders of highways, except that:
>
> (1) Vehicles may be driven on the shoulders of highways (a) by federal mail carriers while delivering the United States mail or (b) to safely remove a vehicle from a roadway;
>
> (2) Implements of husbandry may be driven on the shoulders of highways; and
>
> (3) Bicycles and electric personal assistive mobility devices may be operated on paved shoulders of highways included in the state highway system other than Nebraska segments of the National System of Interstate and Defense Highways.

Magallanes argues that momentarily crossing the fog line does not constitute a violation of § 60-6,142 because

"driv[ing]" means using the shoulder as a thoroughfare or for primary travel—not the momentary, inadvertent event that took place in the case at bar. The State argues that any crossing onto the shoulder is a violation of the statute.

[4,5] Statutory language is to be given its plain and ordinary meaning. *State v. Halverstadt*, 282 Neb. 736, 809 N.W.2d 480 (2011). An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.* Neither party argues that § 60-6,142 is ambiguous. Therefore, it should be analyzed for its plain meaning.

Although we find § 60-6,142 unambiguous, a court in Nebraska that has addressed this issue came to a different conclusion in defining the word "driving." It determined that a momentary crossing of the fog line, without more, is not a violation of the Nebraska statute. See *U.S. v. Magallanes*, 730 F. Supp. 2d 969 (D. Neb. 2010), citing State v. Latham, Buffalo County District Court, No. CR 98-57. However, we conclude that any crossing of the fog line, even momentarily and inadvertently crossing onto the shoulder, is enough to violate the statute. There should not be a subjective determination of what constitutes driving on the shoulder of a highway.

Most recently, a single judge of the Court of Appeals determined in a memorandum opinion that any crossing of the fog line constituted "driving" on the shoulder in violation of the statute. See *State v. Medina*, No. A-11-377, 2011 WL 2577268 (Neb. App. June 28, 2011) (selected for posting to court Web site). The judge concluded that "[t]o reach the conclusion that [the defendant] was not driving, one must add words to the statute that simply are not there." *Id.* at *3. The judge found that § 60-6,142 was unambiguous and determined that giving the statutory language its plain and ordinary meaning, any crossing onto the shoulder was sufficient to violate the statute. See, also, *State v. Davis*, No. A-07-104, 2007 WL 2257886 (Neb. App. Aug. 7, 2007) (not designated for permanent publication) (single judge of Court of Appeals noted there was no authority in Nebraska to conclude that momentary, inadvertent crossing of fog line did not constitute driving, so officer had reasonable suspicion to

conduct traffic stop). We agree with the above reasoning and therefore hold that momentarily crossing the fog line onto the shoulder of the highway constitutes driving on the shoulder in violation of § 60-6,142. Therefore, the violation constituted probable cause for Peterson to stop the vehicle Magallanes was driving.

We also point out that the U.S. District Court for the District of Nebraska has concluded that momentarily and inadvertently crossing the fog line is sufficient for probable cause to initiate a traffic stop. Most recently, the district court concluded that although there were no definitive interpretations of § 60-6,142 in Nebraska case law, momentarily swerving across the fog line was a violation of the statute. *U.S. v. Coleman*, No. 4:10CR3108, 2011 WL 2182180 (D. Neb. May 20, 2011) (unpublished opinion), *affirmed* 700 F.3d 329 (8th Cir. 2012). In coming to its conclusion, the court looked to unpublished Nebraska opinions as well as published opinions from the U.S. Court of Appeals for the Eighth Circuit that have interpreted § 60-6,142 and similar laws. See, *U.S. v. Herrera Martinez*, 354 F.3d 932 (8th Cir. 2004), *vacated on other grounds* 549 U.S. 1164, 127 S. Ct. 1125, 166 L. Ed. 2d 889 (2007) (crossing fog line one time was sufficient probable cause to stop vehicle under South Dakota law); *U.S. v. Mallari*, 334 F.3d 765 (8th Cir. 2003) (crossing onto shoulder three times and having deficient rear license plate light were sufficient probable cause for traffic stop); *U.S. v. Pollington*, 98 F.3d 341 (8th Cir. 1996) (motor home tires' crossing shoulder line four times was probable cause for traffic stop).

The reasoning used in the above cases is sound. By applying the plain and ordinary meaning of the words in the statute, any crossing of the fog line onto the shoulder constitutes driving on the shoulder and is a violation of § 60-6,142.

[6] At a prior hearing, Peterson indicated that Magallanes crossed the fog line twice while Peterson followed his vehicle. Peterson pulled the vehicle over for a violation of § 60-6,142. An officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred. *State v. Prescott*, 280 Neb. 96, 784 N.W.2d 873

(2010). Because Peterson observed the traffic violation, he had probable cause to stop the vehicle.

Magallanes crossed the fog line onto the shoulder while driving on Interstate 80, and he does not fall within one of the exceptions stated in § 60-6,142. The stop was objectively reasonable, and Magallanes' first assignment of error is without merit.

Evidence Obtained Was Not Fruit of Poisonous Tree

After Peterson concluded the traffic stop, he asked to search Magallanes' car. Magallanes consented to the search, and drugs were eventually found. Magallanes' argument rests on the premise that the drugs were found after an unlawful stop.

[7] In order for a consent to search to be effective, it must be a free and unconstrained choice and not the product of a will overborne. *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000). Because Peterson's stop was lawful under § 60-6,142, Magallanes' consent to search his vehicle was sufficient to allow the deputies to search the vehicle and the evidence found in the search of the vehicle was properly admitted into evidence. There was no unlawful conduct that would require suppression of the evidence. This assignment of error is also without merit.

No Evidence of Tax Stamp on Drugs

Magallanes was charged with and convicted of two counts of failure to affix a tax stamp. However, our review of the record reveals no evidence regarding the absence of a tax stamp. This issue was not raised by either party on appeal, and therefore, we analyze the issue for plain error.

[8-10] Consideration of plain error occurs at the discretion of an appellate court. *State v. Howell, ante* p. 559, 822 N.W.2d 391 (2012). Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *Id*. Only where

evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *Id*.

We found plain error related to a conviction for failure to affix a tax stamp in *Howell*. There was no evidence in the record to show the absence of a tax stamp, even though the State argued that pictures not received into evidence at trial clearly showed there was no tax stamp. Because no evidence was offered on the matter at trial, the State was not able to meet its burden and the conviction was overturned.

This case is similar to *Howell* because nothing in the record proves that no tax stamps were affixed to the drugs recovered from Magallanes' car. The State carries the burden to prove all elements of the crimes charged. Here, the State presented no evidence relating to the existence or absence of tax stamps. Because there was no evidence in the record on the issue, Magallanes' convictions for failure to affix a tax stamp cannot stand.

CONCLUSION

Peterson properly stopped Magallanes for violating § 60-6,142. At the conclusion of the lawful stop, Peterson asked if he could search Magallanes' car and Magallanes gave consent. There was no violation of Magallanes' rights, and the evidence was properly admitted at trial. Therefore, we affirm the judgments of conviction and sentences for possession with intent to deliver a controlled substance.

Because the record contained no evidence regarding the absence of drug tax stamps, we reverse the judgments of conviction and sentences on those counts and remand the cause with direction to dismiss the charges for failure to affix a tax stamp.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

CONNOLLY, J., concurring.

I concur in the judgment, but write separately to express my disagreement with the majority's rationale. Neb. Rev. Stat. § 60-6,142 (Reissue 2010) generally prohibits "driv[ing] on" the shoulders of highways. The majority concludes that this

phrase is plain and unambiguous and that any time a driver crosses the fog line onto the shoulder—even when that crossing is "momentar[y] and inadvertent"—the driver has violated § 60-6,142. I cannot agree. The phrase is ambiguous, and the majority's interpretation is contrary to the ordinary meaning of "driv[ing] on" the shoulder and considers the language out of context. In my view, § 60-6,142 only prohibits using the shoulder as a thoroughfare or primary travel area, which Magallanes did not do.

So I conclude that Peterson did not have probable cause to stop Magallanes. But I do not address whether Peterson otherwise had reasonable suspicion for the stop (as the district court determined) because I conclude that sufficient attenuation existed between the stop and the consent to search. The exclusionary rule is therefore inapplicable, and so I agree that the district court properly denied Magallanes' motion to suppress.

Although the language of § 60-6,142 is plain, it is not unambiguous because it is unclear exactly what conduct § 60-6,142 prohibits. I concede that "driv[ing] on" the shoulder could be read to include Magallanes' actions. Webster's dictionary defines the verb "to drive" as "to operate the mechanism and controls and direct the course of."[1] An argument could be made that by Magallanes' driving the car and crossing the fog line, he "operated" the car and "directed" its course onto the shoulder. So a person could conclude that, technically speaking, Magallanes had violated § 60-6,142 by "driv[ing] on" the shoulder.

But we give plain language its *ordinary* meaning,[2] rather than any *possible* meaning.[3] The ordinary meaning of a phrase is, basically, the mental picture that the phrase creates in the mind of the reader or listener.[4] So what picture does "driv[ing]

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[1] Webster's Third New International Dictionary Unabridged 692 (1993).

[2] See, e.g., *In re Interest of Erick M., ante* p. 340, 820 N.W.2d 639 (2012).

[3] See, *Smith v. United States*, 508 U.S. 223, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993) (Scalia, J., dissenting; Stevens and Souter, JJ., join); *McBoyle v. United States*, 283 U.S. 25, 51 S. Ct. 340, 75 L. Ed. 816 (1931).

[4] See *McBoyle, supra* note 3.

on" the shoulder create? At the very least, I do not believe it is what Magallanes did here—a momentary and inadvertent crossing of the fog line. Indeed, a Nebraska motorist might be surprised to find that the State could criminally prosecute and fine him or her for a momentary and inadvertent crossing of just a few inches of the fog line.[5] Instead, and as District Judge John P. Icenogle asserted in a previous case, I believe "driv[ing] on" the shoulder only means using the shoulder as a thoroughfare or primary travel area.[6]

So the question is this: Does § 60-6,142 prohibit any and all technically possible meanings of "driv[ing] on" the shoulder or prohibit only the ordinary understanding of "driv[ing] on" the shoulder? Either interpretation would be reasonable, which makes the language of § 60-6,142 ambiguous.[7] That judges have come to different conclusions about the meaning of § 60-6,142 empirically supports this conclusion.[8] And where the language of a statute is ambiguous, our job is to discern its meaning. In interpreting a statute, courts "construe language in its context and in light of the terms surrounding it."[9] Reading the language in context, I conclude that § 60-6,142 only prohibits using the shoulder as a thoroughfare or primary travel area.

I agree with Judge Icenogle that the exceptions listed in § 60-6,142 support a conclusion that a momentary and

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[5] See, Neb. Rev. Stat. §§ 60-682 and 60-689 (Reissue 2010); *Miller v. Peterson*, 208 Neb. 658, 305 N.W.2d 364 (1981), *disapproved on other grounds, Jacobson v. Higgins*, 243 Neb. 485, 500 N.W.2d 558 (1993).

[6] See, *U.S. v. Magallanes*, 730 F. Supp. 2d 969 (D. Neb. 2010); *United States v. Graumann*, No. 8:00-CR-61, 2000 U.S. Dist. LEXIS 23037 (D. Neb. July 20, 2000) (order) (citing State v. Latham, Buffalo County District Court, No. CR 98-57).

[7] See *In re Interest of Erick M., supra* note 2.

[8] Compare, e.g., *Graumann, supra* note 6, with *State v. Medina*, No. A-11-377, 2011 Neb. App. LEXIS 83 (Neb. App. June 28, 2011) (selected for posting to court Web site).

[9] *Leocal v. Ashcroft*, 543 U.S. 1, 9, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004). See, also, Steven Wisotsky, *How to Interpret Statutes—Or Not: Plain Meaning and Other Phantoms*, 10 J. App. Prac. & Process 321 (2009).

inadvertent crossing of the fog line is not "driv[ing] on" the shoulder. Section § 60-6,142 provides:

> No person shall drive on the shoulders of highways, except that:
>
> (1) Vehicles may be driven on the shoulders of highways (a) by federal mail carriers while delivering the United States mail or (b) to safely remove a vehicle from a roadway;
>
> (2) Implements of husbandry may be driven on the shoulders of highways; and
>
> (3) Bicycles and electric personal assistive mobility devices may be operated on paved shoulders of highways included in the state highway system other than Nebraska segments of the National System of Interstate and Defense Highways.

We give effect to the entire language of a statute, and we reconcile different provisions of the statute so that they are consistent, harmonious, and sensible.[10] Here, the Legislature used the same phrasing multiple times within the statute—variations of the verb "to drive" (or its equivalent) combined with "on . . . shoulders of highways."[11] And in each exception, it is clear that the language meant driving on the shoulder as a thoroughfare or primary travel area. Both the legislative history and a commonsense reading of the exceptions support this conclusion.

In passing the bill creating an exception for federal mail carriers to drive on the shoulder, one senator explained the purpose of the mail carrier exception: "In the rural areas, often it is necessary for the mail carriers to drive on the road shoulder from one mailbox to the next. It is believed this is safer than having him pull out into the roadway each time."[12] This explanation illustrates that the Legislature intended for federal mail carriers to use the shoulder as a thoroughfare or primary

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[10] See, e.g., *AT&T Communications v. Nebraska Public Serv. Comm.*, 283 Neb. 204, 811 N.W.2d 666 (2012).

[11] See § 60-6,142(1).

[12] Transportation Committee Hearing, L.B. 969, 90th Leg., 2d Sess. 50 (Feb. 2, 1988).

travel area. The same is true of the Legislature's second exception to allow "[i]mplements of husbandry" (farm equipment) to be "driven on the shoulders of highways."[13] Experience tells us that people driving farm equipment use the shoulder as a thoroughfare or primary travel area because farm equipment is generally slower and wider than ordinary vehicles. Finally, allowing a person to "operate" a bicycle or an electric personal assistive mobility device "on . . . shoulders of highways" necessarily contemplates that the driver will use the shoulder as a thoroughfare or primary travel area.[14] Because the Legislature used the same (or essentially the same) language in the exceptions as in the general rule, it makes sense to give the language of the general rule the same meaning as that of the exceptions—to use the shoulder as a thoroughfare or primary travel area.

Furthermore, in construing a statute, we look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served by the statute.[15] One objective for prohibiting "driv[ing] on" the shoulder, and of passing the Nebraska Rules of the Road in general, was to promote safer travel on our roadways.[16]

The majority's interpretation of the statute does not further that purpose because it essentially makes the statute a strict liability crime—no matter the circumstances, any crossing of the fog line violates § 60-6,142. But this will not prevent a driver from inadvertently crossing the fog line, as Magallanes did here, because an *inadvertent* crossing is by definition unintentional.[17] Nor will penalizing a driver in such circumstances deter future violations because, again, an inadvertent crossing is unintentional. Instead, it makes more sense to read the statute as prohibiting a driver from using the shoulder as a thoroughfare or primary travel area because penalizing such

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[13] See § 60-6,142(2).

[14] See § 60-6,142(3).

[15] See, e.g., *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010).

[16] Statement of Purpose, L.B. 136, 72d Leg. (Jan. 31, 1961); Neb. Rev. Stat. § 60-602 (Reissue 2010).

[17] Webster's, *supra* note 1 at 1140.

conduct can influence a driver's actions and thereby promote safer travel on the roadways.

In sum, the prohibition in § 60-6,142 of "driv[ing] on" the shoulder is ambiguous because it is unclear exactly what conduct is proscribed. I conclude, however, that § 60-6,142 only prohibits driving on the shoulder as a thoroughfare or primary travel area. That is the ordinary meaning of the language, and it is the only meaning that is consistent with the rest of the statute. Moreover, that interpretation reasonably promotes safer travel on the roadways.

In this case, Magallanes twice crossed the fog line at two separate locations, but each crossing was momentary and inadvertent. Magallanes did not use the shoulder as a thoroughfare or primary travel area. In my view, he did not violate § 60-6,142, and Peterson did not have probable cause to stop Magallanes.

But the district court also concluded that based on the totality of the circumstances, Peterson reasonably suspected that Magallanes was driving while impaired and that the stop was justified on that basis. I do not address that issue, however, because I conclude that sufficient attenuation existed between the allegedly illegal stop and the consent to search.

The record shows that following the stop, Peterson handed Magallanes a warning ticket for driving on the shoulder of the highway and then asked Magallanes if he could search his vehicle. Magallanes agreed to that search, which ultimately led to the discovery of methamphetamine and cocaine in the gasoline tank.

When a consensual search is preceded by a Fourth Amendment violation, two things must be proved to avoid the exclusionary rule: (1) that the consent was voluntary and (2) that there was sufficient attenuation, or a break in the causal connection, between the illegal conduct and the consent.[18] Only the second requirement is at issue here. The relevant facts for sufficient attenuation will depend upon the facts of a particular case but include (1) the proximity between the illegality and the consent to search, (2) the presence of intervening factors,

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[18] See *In re Interest of Ashley W., ante* p. 424, 821 N.W.2d 706 (2012).

and (3) the flagrancy of the governmental misconduct involved in the case.[19]

On this record, I am convinced that the exclusionary rule does not apply because sufficient attenuation existed between the consent to search and the illegal stop. Although Magallanes gave the consent to search soon after the illegal stop, other circumstances outweigh this temporal proximity. The officer gave Magallanes a warning ticket, which would indicate that the stop was essentially over. This weakens the causal chain between the illegal stop and the consent to search. It also lessens any concern that the consent was simply a resignation or submission to police authority[20]—Magallanes would have understood that the stop was over before agreeing to the search. Peterson also told Magallanes more than once that he did not have to consent to the search, and Peterson informed Magallanes that if, at any time, he wanted to end the search, he could do so by honking the cruiser's horn. Finally, the governmental misconduct—the allegedly illegal stop—was slight because it was unclear at the time exactly what constituted "driv[ing] on" the shoulder and the officer believed that Magallanes had committed a traffic infraction. Considering these facts, I conclude that the court properly denied Magallanes' motion to suppress because sufficient attenuation existed between the allegedly illegal stop and the consent to search. I concur in the judgment.

McCormack, J., joins in this concurrence.

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[19] See *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010).

[20] See *id.*

Carolyn Jean Spady, appellee, v.
Roger Paul Spady, appellant.
824 N.W.2d 366

Filed December 21, 2012. No. S-12-139.

1. **Contempt: Appeal and Error.** In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution

of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.

2. **Statutes.** Statutory interpretation presents a question of law.
3. **Appeal and Error.** An appellate court resolves questions of law independently of the trial court.
4. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Contempt: Proof.** Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence.
6. **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.
7. **Judgments: Jurisdiction.** A ruling made in the absence of subject matter jurisdiction is a nullity.
8. **Collateral Attack: Jurisdiction.** Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter.
9. **Judgments: Collateral Attack.** Only a void judgment is subject to collateral attack.
10. **Jurisdiction: Appeal and Error.** Generally, once an appeal has been perfected, the trial court no longer has jurisdiction.
11. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
12. **Alimony: Statutes: Words and Phrases.** The word "support" in Neb. Rev. Stat. § 42-351(2) (Reissue 2008) includes spousal support, i.e., alimony.
13. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Adams County: STEPHEN R. ILLINGWORTH, Judge. Affirmed.

Kent A. Schroeder and Luke M. Simpson, of Ross, Schroeder & George, L.L.C., for appellant.

Mitchel L. Greenwall, of Greenwall, Bruner & Frank, L.L.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

This case involves the appeal from an order of contempt stemming from a dissolution of marriage proceeding. Roger Paul Spady (Paul) appeals the order of the district court for Adams County in which the court found Paul to be in contempt for failing to obey the court's order to pay temporary alimony and for failing to appear at the contempt hearing. Paul argues that the court did not have jurisdiction to order him to pay temporary alimony when an appeal of the decree of dissolution was pending. Paul contends that the temporary alimony order is void and that he cannot be properly found to be in violation of such order. He also asserts that his failure to appear at the contempt hearing was due to his doctor's order that he should not travel while recovering from major surgery and that the district court erred when it found him in contempt on the basis that he failed to appear for the hearing. Because the district court had jurisdiction to issue the temporary alimony order, it is not void. Thus, Paul is subject to contempt for violating the order to pay temporary alimony, and the finding of contempt was not error. As explained below, it is not necessary for us to review the finding of contempt for failure to appear. We affirm.

STATEMENT OF FACTS

Paul and Carolyn Jean Spady were married in 1966. Carolyn filed for dissolution of the marriage in 2004. The parties' children had reached the age of majority, and so the issues for trial generally involved valuation and division of the marital estate. On January 25, 2006, while dissolution proceedings were pending, the district court entered an order requiring Paul to pay temporary alimony for the benefit of Carolyn in the amount of $13,500 per month commencing January 1, 2006, and "every month thereafter during the pendency of this action."

After a trial and various other proceedings, the court on January 20, 2011, entered a decree dissolving the marriage and dividing the marital estate. In the decree of dissolution, the court stated the following with regard to alimony:

> [Paul] shall pay alimony to [Carolyn] in the amount of one dollar per year starting on the first month after this Decree becomes final and be due each year for five years. Alimony shall terminate upon the death of either party or remarriage of [Carolyn] or payment in full of the Judgment on behalf of [Carolyn]. The temporary alimony shall remain in effect until this Decree becomes final.

Paul filed a motion to alter or amend the decree. The court overruled the motion. Paul timely filed a notice of appeal on April 1, 2011. That case became a previous appeal, case No. A-11-271, before the Nebraska Court of Appeals.

On May 17, 2011, the district court ordered that Paul post a supersedeas bond in a designated amount effective July 7, 2011. No bond was posted.

On June 7, 2011, while the appeal was pending before the Court of Appeals but before the parties filed their appellate briefs, Carolyn filed a motion asking the district court to award her temporary alimony pending the appeal. In her motion, Carolyn asserted that Paul had not paid alimony as directed in the decree.

On June 22, 2011, Paul filed his appellate brief in case No. A-11-271. Paul assigned errors relating to the division of property in the decree. Notwithstanding the provision of alimony in Carolyn's favor in the decree and the dispute regarding alimony as evidenced by Carolyn's motion filed June 7, Paul did not assign error regarding alimony. Paul also did not assign error regarding the bond. Carolyn filed her appellee brief in case No. A-11-271 on August 3, and Paul was granted leave to exceed page limitations and filed his reply brief on August 17.

During the pendency of the appeal, the district court took up Carolyn's motion and filed an order on June 28, 2011, which awarded Carolyn temporary alimony. It is the violation of this order which gives rise to the contempt order which is the subject of the instant appeal. In its June 28 order, the district court referred to the portion of the decree of dissolution quoted above regarding temporary alimony and said that it had included the temporary alimony provision in favor of Carolyn because Paul

had control of all the income producing property and would continue to have control during the period of appeal. The court stated that the decree had not become final and that temporary alimony of $13,500 per month remained in effect until there was a final order from the Court of Appeals. However, the court went on to note that Carolyn had new sources of income totaling $1,376 per month that were not previously available; the court found that appropriate temporary alimony during the appeal period would be $12,124 per month, representing the previously ordered monthly alimony less Carolyn's new sources of monthly income. The court therefore ordered Paul to pay Carolyn temporary alimony in the amount of $12,124 per month effective July 1, 2011. Neither party appealed the June 28 order.

The appeal of the decree of dissolution in case No. A-11-271 was submitted to the Court of Appeals. In its opinion, the Court of Appeals considered the issues which had been raised by Paul in his assignments of error. Those matters were limited to property issues. The Court of Appeals affirmed the challenged property division matters contained in the decree of dissolution in a memorandum opinion filed February 14, 2012. See *Spady v. Spady*, No. A-11-271, 2012 WL 502702 (Neb. App. Feb. 14, 2012) (selected for posting to court Web site). A petition for further review was denied by the Nebraska Supreme Court on May 16, 2012, thus concluding the appeal in case No. A-11-271.

During the pendency of the appeal in case No. A-11-271, on October 5, 2011, Carolyn filed in the district court a motion for an order for Paul to show cause why he should not be held in contempt for violating the temporary alimony orders of that court. She alleged that since December 29, 2010, Paul had paid only $1 toward the ordered temporary support. She asserted that by virtue of the initial temporary alimony award which was embodied in the January 2011 decree, unpaid temporary alimony had continued to accrue at the rate of $13,500 per month from January 1 through July 1, 2011. She further asserted that by virtue of the June 28, 2011, order, unpaid temporary alimony had accrued at the rate of $12,124 per month from July 1 through the date of her filing. Carolyn alleged that

Paul owed her $129,495 in unpaid temporary alimony plus interest, less the $1 he had paid.

On October 6, 2011, the court entered an order that Paul should appear before the court on December 13 to show cause why he should not be held in contempt for his failure to obey the court's orders. A summons and the order to show cause were personally served on Paul in Nebraska on October 7.

Paul did not personally appear at the December 13, 2011, contempt hearing. Counsel appeared on Paul's behalf. With respect to his failure to appear, Paul's counsel stated that Paul was recovering from surgery and that Paul intended to remain in Phoenix, Arizona, until his physician told him he could travel. Paul's counsel offered into evidence an unsworn note written on a prescription tablet page signed by a doctor at a hospital in Phoenix stating that Paul was "immunocompromised" and should limit travel if possible. The note was dated November 1, 2011, which was 3 weeks after Paul was served contempt related pleadings and approximately 6 weeks before the contempt hearing.

With regard to temporary alimony, Paul's counsel referred to the decree of dissolution which provided that temporary alimony was to end when the decree became final and that Paul would then be required to pay alimony of only $1 per year. Counsel explained Paul's failure to pay alimony based on Paul's argument that the decree of January 20, 2011, became final 30 days after it was entered. Counsel apparently relied on Neb. Rev. Stat. § 42-372.01 (Reissue 2008), which states, in part, that except for purposes of appeal, remarriage, and continuation of health insurance coverage, a decree dissolving a marriage becomes final and operative 30 days after it is entered. Counsel for Paul argued that 30 days after entry of the decree, temporary alimony was no longer due under the decree.

At the contempt hearing, Paul also contended that the district court had not had jurisdiction to enter the June 28, 2011, order regarding temporary alimony, the contempt of which was before the court. Paul's counsel specifically asserted that while the decree was on appeal, the district court lacked jurisdiction. Counsel for Paul contended that Paul had complied with the

court's operative order in the decree regarding alimony when he paid $1.

In an order entered January 27, 2012, the district court rejected Paul's explanations as to why he should not be held in contempt. This order gives rise to the instant appeal. The court noted that although its intent in the decree was to provide Carolyn with continued temporary alimony pending an appeal, it was concerned that its use of the language "'Until this Decree becomes final'" could plausibly be viewed as though temporary alimony ended 30 days after the decree was entered. The court stated that in the decree, it had intended by its language that it had ordered temporary alimony to continue until completion of the appeal; however, out of caution, it did not include amounts accrued from January to June 2011 in its analysis in the contempt proceeding or in its arrearage calculation.

In its contempt order of January 27, 2012, the court determined that on June 28, 2011, it had had concurrent jurisdiction under Neb. Rev. Stat. § 42-351(2) (Reissue 2008), while the decree was on appeal, to enter orders regarding spousal support and that therefore, its June 28 order awarding temporary alimony of $12,124 per month starting July 1 was valid. The court further noted that Paul had not filed a supersedeas bond and that therefore the court retained jurisdiction to enforce the terms of its judgment. The court determined that as of the December 13 hearing, Paul was in arrears on 5 months' worth of the temporary alimony that had been ordered in the June 28 order. Because of the plausibility of a mistaken understanding of the terms of the decree, the district court did not find Paul in contempt for the period of January to June 2011. However, it did find Paul in contempt for failure to pay temporary alimony after the issue was addressed in the June 28 order.

The court concluded in the January 27, 2012, order that Paul was in contempt of the court because he had failed to pay temporary support as ordered on June 28, 2011, and because he had failed to appear for the December 13 hearing. The court issued a bench warrant for Paul's arrest that was enforceable only in the State of Nebraska and ordered that if Paul was arrested on the bench warrant, he could purge his contempt and

be released from custody by paying all alimony that was past due from July 1 through the date of arrest.

Paul appeals the January 27, 2012, order finding him in contempt.

ASSIGNMENTS OF ERROR

Paul claims generally that the district court erred when it found him to be in contempt. He asserts that because the court did not have jurisdiction to order him to pay temporary alimony in June 2011 while the appeal of the decree of dissolution was pending, the order of June 28, 2011, was void, and that he was not required to obey such order. He also asserts that because he was recovering from surgery, his failure to appear at the contempt hearing should have been excused.

STANDARDS OF REVIEW

[1] In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion. *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

[2,3] Statutory interpretation presents a question of law. *Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012). An appellate court resolves questions of law independently of the trial court. *Id.*

[4] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011).

ANALYSIS

In its contempt order filed January 27, 2012, now on appeal, the district court determined that under § 42-351(2), it had jurisdiction to issue its order of June 28, 2011, awarding Carolyn

temporary alimony of $12,124 per month, notwithstanding the pendency of Paul's appeal from the decree. The district court declined to find Paul in contempt for the period of January to June 2011, because of the plausibility of Paul's explanation. However, by his willful failure to pay alimony as ordered on June 28, 2011, the district court found Paul in contempt. The district court also found Paul in contempt for failing to appear at the contempt hearing. Paul challenges the contempt order. We find no merit to Paul's assignments of error.

[5] We apply the standard of review taken from *Hossaini* recited above. We also stated in *Hossaini* that "[o]utside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence." 283 Neb. at 376, 808 N.W.2d at 873.

Temporary Alimony: The District Court's Jurisdiction Is Properly Subject to Challenge.

As an initial matter, we note that Paul's challenge to the June 28, 2011, order of which he was found in contempt is properly limited to the authority of the district court to have issued the temporary alimony order while his appeal from the decree was pending. That is, Paul's challenge before us is limited to whether the district court had jurisdiction to issue the June 28 order. He made this jurisdictional argument at the contempt hearing. While Paul cannot collaterally attack the amount of temporary alimony, the court's jurisdiction to enter the temporary alimony order was subject to challenge in the contempt proceeding.

[6-9] We have stated that 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). A ruling made in the absence of subject matter jurisdiction is a nullity. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001).

We have also stated:

> Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's

> lack of jurisdiction over the parties or subject matter. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). Only a void judgment is subject to collateral attack. *Mayfield v. Hartmann*, 221 Neb. 122, 375 N.W.2d 146 (1985).

State v. Keen, 272 Neb. 123, 130, 718 N.W.2d 494, 500 (2006). See, also, *Hofferber v. Hastings Utilities*, 282 Neb. 215, 803 N.W.2d 1 (2011); *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003); *In re Interest of Ramon N.*, 18 Neb. App. 574, 789 N.W.2d 272 (2010). We have applied these principles in dissolution of marriage actions. See *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999) (cases collected).

Although Paul makes mention of the $12,124 monthly amount in his brief, we do not read Paul's brief as challenging the propriety of the $12,124-per-month temporary alimony award ordered on June 28, 2011. Furthermore, any such challenge to the propriety of the amount of temporary alimony in the June 28 order would be an impermissible collateral attack.

In this dissolution of marriage action, the record shows that notwithstanding the award of temporary alimony in the decree and the dispute evidenced by Carolyn's motion for temporary alimony due to Paul's failure to pay filed before Paul's appellate brief was filed in the Court of Appeals, Paul limited his assignments of error in case No. A-11-271 to issues of property division. Although postdecree matters may be considered on appeal when raised in assigned errors, postdecree matters were not before the Court of Appeals in case No. A-11-271. See *Kricsfeld v. Kricsfeld*, 8 Neb. App. 1, 588 N.W.2d 210 (1999). The award of temporary alimony was not challenged in case No. A-11-271, and the award could not thereafter be collaterally attacked in this contempt proceeding. See *Jessen v. Jessen*, 259 Neb. 644, 611 N.W.2d 834 (2000).

The record further shows that Paul did not post a supersedeas bond or assign error related to the bond order. The district court was not denied jurisdiction to enforce the terms of the judgment occasioned by the posting of a bond. See *Kula v. Kula*, 180 Neb. 893, 146 N.W.2d 384 (1966).

For the several reasons recited above, we do not review the propriety of the $12,124 amount of monthly temporary alimony in the June 28, 2011, order. However, Paul's challenge to the district court's jurisdiction to enter such order was properly raised in this contempt proceeding.

Temporary Alimony: The District Court Retained Jurisdiction to Enter the June 28, 2011, Order, and the District Court's Finding and Corresponding Contempt Order Are Not in Error.

[10] During the contempt proceeding, the parties and the district court acknowledged that generally, once an appeal has been perfected, the trial court no longer has jurisdiction. See *Russell v. Kerry, Inc.*, 278 Neb. 981, 775 N.W.2d 420 (2009). However, the order of contempt refers to § 42-351(2) as the specific statutory authority forming an exception to the rule and providing the basis for the jurisdictional authority pursuant to which the district court properly awarded temporary alimony during the pendency of the appeal in case No. A-11-271. We agree that the district court had jurisdiction under this and related statutes to order temporary alimony on June 28, 2011.

Section 42-351 provides:

> (1) In proceedings under sections 42-347 to 42-381, the court shall have jurisdiction to inquire into such matters, make such investigations, and render such judgments and make such orders, both temporary and final, as are appropriate concerning the status of the marriage, the custody and support of minor children, the support of either party, the settlement of the property rights of the parties, and the award of costs and attorney's fees. The court shall determine jurisdiction for child custody proceedings under the Uniform Child Custody Jurisdiction and Enforcement Act.
>
> (2) When final orders relating to proceedings governed by sections 42-347 to 42-381 are on appeal and such appeal is pending, the court that issued such orders shall retain jurisdiction to provide for such orders regarding support,

> custody, parenting time, visitation, or other access, orders shown to be necessary to allow the use of property or to prevent the irreparable harm to or loss of property during the pendency of such appeal, or other appropriate orders in aid of the appeal process. Such orders shall not be construed to prejudice any party on appeal.

Paul focuses on § 42-351(2), which provides for the retention of jurisdiction for certain matters in the trial court "during the pendency of [an] appeal." He contends that the word "support" as used in the phrase "retain jurisdiction to provide for such orders regarding support, custody, parenting time, visitation, or other access" in § 42-351(2) is limited to the retention of matters of child support. He asserts that "support" in § 42-351(2) cannot refer to alimony and that the district court did not retain jurisdiction. We disagree.

We accord § 42-351 a plain reading. See *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011) (statutory language is to be given its plain and ordinary meaning). The word "support" in § 42-351(2) is not by its terms limited to child support. Further, we look to the immediately preceding provision, § 42-351(1), which refers to "support of minor children [and] the support of either party." Section 42-351(1) shows that the word "support" is used statutorily in § 42-351 to refer to child support and spousal support, i.e., alimony.

[11,12] Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible. *Travelers Indem. Co. v. Gridiron Mgmt. Group*, 281 Neb. 113, 794 N.W.2d 143 (2011). In so doing we see that elsewhere in the domestic relations statutes, the definition of "[s]upport order" in the definitional statute, § 42-347(11), refers us to Neb. Rev. Stat. § 43-1717 (Cum. Supp. 2012), which in turn defines "[s]upport order" as including "spousal" support. We conclude the word "support" in § 42-351(2) includes spousal support, i.e., alimony, and the district court retained jurisdiction regarding temporary alimony. We therefore reject Paul's argument that the district

court lacked jurisdiction under § 42-351(2) when it entered its order of temporary alimony on June 28, 2011, while the decree was on appeal.

Our conclusion is consistent with the cases which have long used the word "support" when referring to temporary alimony. See, e.g., *Overton v. Overton*, 178 Neb. 267, 133 N.W.2d 7 (1965). Our analysis and the district court's continuation of "temporary alimony" during the appeal are also consistent with the historical jurisprudence surrounding the manner by which an alimony award can be accepted pending appeal without losing the potential to challenge the adequacy of the amount on appeal. See *Larabee v. Larabee*, 128 Neb. 560, 259 N.W. 520 (1935) (stating that one who voluntarily accepts payment of part of judgment in his or her favor loses right to prosecute appeal). But see *Reynek v. Reynek*, 193 Neb. 404, 227 N.W.2d 578 (1975) (concluding that acceptance of property settlement did not forfeit right to appeal child custody).

In this regard, we stated in *Berigan v. Berigan*, 194 Neb. 185, 187, 231 N.W.2d 131, 133 (1975), that

> [t]he proper procedure where an appeal is contemplated is to apply to the trial court for temporary allowances pending appeal. If the trial court has fully adjusted the property rights of the parties, the court may make the temporary allowances during the pendency of the appeal applicable on the alimony awarded in the decree.

By making the alimony award "temporary" pending appeal, the recipient is not at risk of losing the opportunity to challenge the award. *Id.*

The district court's order of June 28, 2011, followed the practice of awarding "temporary alimony" pending appeal and was both authorized statutorily and consistent with our jurisprudence. The district court had jurisdiction to issue the June 28 order, and it is not void. Paul's failure to pay temporary alimony to Carolyn in violation of the June 28 order was subject to contempt, and the evidence at the contempt proceeding established Paul's contempt by clear and convincing evidence. We reject Paul's assignment of error wherein he claimed that he was not in contempt for failure to pay temporary alimony. The finding and order of contempt

on the basis that Paul failed to pay temporary alimony were not error.

Failure to Appear: We Need Not Consider Whether the Finding of Contempt Based on Failure to Appear Was Correct.

[13] Paul also challenges the district court's determination that his failure to appear justified a finding of contempt. Following its findings of contempt, the district court issued the bench warrant. The district court ordered that Paul could purge his contempt and be released from custody by paying all alimony that was past due through the date of his arrest. The terms of the order corresponded solely to Paul's failure to pay temporary alimony. There was no separate punishment or sanction imposed due to Paul's failure to appear. Because there is no order attributable to the failure to appear for us to review, we decline to analyze the correctness of the district court's finding of contempt based on a failure to appear. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *In re Trust Created by Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011).

CONCLUSION

The district court found Paul in contempt based on his failure to pay temporary alimony. Such finding supported the contempt order which provided that Paul could purge his contempt by paying past-due temporary alimony. We need not separately consider whether the court properly found Paul in contempt for his failure to appear at the contempt hearing. For the reasons recited above, we find no error by the district court in its finding that Paul was in contempt based on his failure to pay temporary alimony and its corresponding order. Accordingly, we affirm.

AFFIRMED.

CONNOLLY and CASSEL, JJ., not participating.

BRIAN J. WERNER, APPELLEE, V. COUNTY OF PLATTE, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

824 N.W.2d 38

Filed December 21, 2012. No. S-12-202.

1. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.
2. **Trial: Depositions.** Neb. Rev. Stat. § 29-1917(4) (Reissue 2008) restricts a deposition's use at the criminal trial for which the deposition was taken, and not in a separate civil action.
3. **Rules of Evidence: Hearsay.** Excited utterances are admissible because a startling event may produce statements that are reliable, in that they are free of conscious fabrication.
4. ____: ____. For a statement to qualify as an excited utterance, (1) there must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. The key requirement is spontaneity, which requires a showing the statements were made without time for conscious reflection.
5. ____: ____. Whether a party made his or her statements in response to questioning is relevant to whether those statements were spontaneous. But the focus in determining whether they constitute an excited utterance must be on whether the party made the statements without conscious reflection.
6. ____: ____. For hearsay within hearsay to be admissible, each layer of hearsay must have an applicable exception to the hearsay rule.
7. **Hearsay: Words and Phrases.** Verbal acts are not hearsay, because their significance rests on the simple fact that the words were said, regardless of their truth.
8. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.
9. ____: ____: ____. The erroneous admission of evidence is not reversible error if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.
10. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the trial court's factual findings on appeal unless they are clearly wrong.
11. **Judgments: Appeal and Error.** When determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can be deduced from the evidence.
12. ____: ____. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.

13. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Strict Liability.** Under Neb. Rev. Stat. § 13-911 (Reissue 2012), a political subdivision is strictly liable for injuries to an "innocent third party" during a vehicular pursuit, regardless whether the law enforcement officer's actions were otherwise proper or even necessary.
14. **Police Officers and Sheriffs: Motor Vehicles: Words and Phrases.** An "innocent third party" under Neb. Rev. Stat. § 13-911 (Reissue 2012) is one who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle.
15. **Police Officers and Sheriffs: Motor Vehicles.** Whether law enforcement sought to apprehend an individual under Neb. Rev. Stat. § 13-911 (Reissue 2012) is a mixed question of law and fact.
16. ____: ____. Whether an individual promoted, provoked, or persuaded a driver to flee under Neb. Rev. Stat. § 13-911 (Reissue 2012) is a question of fact.
17. **Trial: Witnesses: Testimony.** Witness credibility and the weight to be given a witness' testimony are questions for the trier of fact.
18. **Political Subdivisions Tort Claims Act: Words and Phrases.** Under Neb. Rev. Stat. § 13-911 (Reissue 2012), the phrase "innocent third party" is a term of art, and the ordinary meaning of "innocent" does not apply.
19. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Legislature: Intent: Words and Phrases.** By its use of the phrase "innocent third party" in Neb. Rev. Stat. § 13-911 (Reissue 2012), the Legislature was concerned with actions of the third party as those actions may relate to the flight of the driver sought to be apprehended. Simply put, a third party is "innocent" if he or she played no role in causing the law enforcement pursuit.
20. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When an appellate court has judicially construed a statute and that construction has not evoked an amendment, there is a presumption that the Legislature has acquiesced in the court's determination of the Legislature's intent.
21. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
22. **Statutes: Words and Phrases: Appeal and Error.** An appellate court attempts to give effect to each word or phrase in a statute and ordinarily will not read language out of a statute.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

Vincent Valentino for appellant.

William M. Lamson, Jr., and Cathy S. Trent-Vilim, of Lamson, Dugan & Murray, L.L.P., and Thomas M. Fehringer, of Fehringer & Mielak, L.L.P., for appellee.

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

CONNOLLY, J.

I. SUMMARY

Brian J. Werner sued the County of Platte (County) under Neb. Rev. Stat. § 13-911 (Reissue 2012) for injuries he sustained during a vehicular pursuit by a law enforcement officer. Werner was a passenger in the car that the officer was pursuing. Section 13-911 authorizes compensation for damages to an "innocent third party" who is injured by such a pursuit. The primary issues are whether the district court properly (1) admitted testimony over the County's hearsay objections, (2) found Werner to be an "innocent third party," and (3) calculated the damages for which the County was liable.

For the most part, we conclude that the court did not err in its evidentiary rulings, either because the testimony qualified under an exception to the hearsay rule or because it was not hearsay. What error we did find, we conclude, did not unfairly prejudice a substantial right of the County. Both the law and the record support the court's finding that Werner was an "innocent third party." And we conclude that the court properly calculated the County's liability under the relevant statutes. We affirm.

II. BACKGROUND

In October 2008, Werner went to a bar in Humphrey, Nebraska. Werner testified that as he was walking home, he saw Joey Korth in his car and Korth asked Werner to get in. The weekend before, Korth had gotten in a fight with one of Werner's friends, and Korth wanted to explain to Werner what had happened. After Werner got in the car, the two of them headed toward Lindsay, Nebraska.

At trial, the parties contested who was driving, Korth or Werner. The court found that Korth was the driver. The admissibility of some of the evidence the court relied on in making that finding is at issue. But as we explain in detail later, either the court properly admitted the evidence it relied upon or its erroneous admission did not unfairly prejudice a substantial

right of the County. Because the record supports the court's factual determination, it was not clearly wrong. So we refer to Korth as "the driver."

1. The Pursuit and Accident

As Korth drove, he and Werner talked and drank some beers. They eventually headed back toward Humphrey on Highway 91. At about 2 a.m., Deputy Sheriff Ed Wemhoff was patrolling Highway 91 and spotted Korth's car traveling well above the posted 60-m.p.h. speed limit. Wemhoff activated his radar and clocked the car at 76 m.p.h. He caught up to the car and saw it weaving in and out of its lane. So in addition to the driver's speeding, Wemhoff also suspected the driver was driving under the influence. He then activated his overhead lights and signaled the car to pull over. At that point, Wemhoff had not seen anyone inside the car because it was dark out.

Korth activated his right-hand turn signal and started to pull over. Korth then turned off the turn signal and proceeded toward a nearby intersection. Wemhoff believed that Korth was going to pull over at the intersection. But then Korth turned at the intersection and sped off. Wemhoff pursued.

About 1½ miles north of Highway 91, the road changed from blacktop to gravel. Wemhoff came across skid marks in the gravel, which led him to believe there had been an accident. Later investigation revealed that when Korth's car hit the gravel road—traveling at about 110 m.p.h.—he lost control and the car flipped end over end into an adjacent cornfield.

Wemhoff notified dispatch of the accident, requested emergency assistance, and got out to search the area. Wemhoff heard someone in the cornfield, followed the sounds, and found Werner lying on the ground. Wemhoff began asking Werner questions, just to keep him talking. Werner answered the questions, but his answers varied and indicated that he was dazed and confused. Wemhoff focused his questions on whether Werner had been alone in the car. By that time, other law enforcement and emergency personnel had arrived. Eventually, another law enforcement officer found Korth's wallet, which led to Korth's discovery in the cornfield. Korth made no

statements at the scene of the accident or during trial; his injuries apparently left him in a coma.

One of the emergency personnel that arrived on scene was Brian Rosno, a volunteer fire and rescue member. Rosno attended to Werner. Rosno described Werner as being in a lot of pain, moaning and screaming, and as somewhat coherent. At one point, Rosno heard Werner make statements that Korth "was going way too fast" and that Werner had asked Korth "to let him out." At trial, the County objected to Rosno's testimony relating these statements on several grounds, including hearsay. The court overruled the objections and admitted Rosno's testimony. In administering aid to Werner, Rosno also found methamphetamine and two drug pipes on his person, and he turned those over to law enforcement.

Trooper William Fitzgerald, of the Nebraska State Patrol, went to the hospital to obtain a blood draw from Werner. Fitzgerald testified that he asked Werner who had been driving the car and that Werner said Korth was the driver. Fitzgerald also testified Werner estimated that the car had been traveling 120 m.p.h. and said that he had asked Korth to let him out of the car. At trial, the County objected to Fitzgerald's testimony as hearsay and on other grounds. The court overruled the objections and admitted Fitzgerald's testimony.

2. The Trial and Judgment

The accident rendered Werner a paraplegic. Werner sued the County under § 13-911. Werner alleged that the County was strictly liable for his injuries because they were caused by law enforcement's pursuit of the car and Werner was an "innocent third party" under the statute.

Several individuals testified at the bench trial. These included, among others, Wemhoff, Rosno, and Fitzgerald. An accident reconstructionist from the Nebraska State Patrol also testified. Werner testified that he did not encourage Korth to flee from law enforcement and that he had asked Korth to let him out of the car. Werner explained that he had "heard" that Korth had previously fled from law enforcement, that "nothing good was going to come" from being in the car, and that "it just was not going to end good." The County

objected on hearsay grounds to Werner's testimony about having "heard" of Korth's prior history of fleeing from law enforcement. The court overruled the objection and admitted Werner's testimony.

The court found for Werner. It found that law enforcement had engaged in a "vehicular pursuit" of Korth's car and that the pursuit was a proximate cause of Werner's injuries. The court also found that under § 13-911, Werner was an "innocent third party." We have defined an "innocent third party" as "one who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle."[1] The court found that Wemhoff sought to apprehend the driver for suspected driving under the influence and speeding. Because the court determined that Werner was the passenger in the fleeing car—rather than the driver—the court concluded that Wemhoff had not sought to apprehend Werner. And the court determined that Werner had not "promoted, provoked or persuaded" Korth to flee. The court found that Werner was an "innocent third party."

The court found that Werner had sustained $3 million in damages. The court reduced those damages by 5 percent under Neb. Rev. Stat. § 60-6,273 (Reissue 2010) because Werner had not been wearing his seatbelt when the car flipped. The court then reduced the overall award to $1 million under the statutory cap on damages under the Political Subdivisions Tort Claims Act (Act) and entered judgment.

The County moved for a new trial and credit against the judgment. The court denied both. Regarding the County's motion for credit against the judgment, the court reasoned that Neb. Rev. Stat. § 13-926 (Reissue 2012) intended to "fully compensate" the "innocent third party." Because Werner's damages far exceeded the statutory cap under the Act, the County was not entitled to any credit against the judgment for the compensation Werner had received from other sources.

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[1] *Henery v. City of Omaha*, 263 Neb. 700, 707, 641 N.W.2d 644, 649 (2002).

III. ASSIGNMENTS OF ERROR

The County assigns, restated and consolidated, that the district court erred as follows:

(1) admitting, and ultimately relying on, evidence which lacked foundation and was inadmissible hearsay;

(2) determining that Werner was an "innocent third party" under § 13-911;

(3) failing to properly calculate statutory credits and deductions of the award under § 13-911; and

(4) failing to properly deduct 5 percent from the judgment (for Werner's failure to wear a seatbelt) *after* applying the statutory cap on damages.

IV. ANALYSIS

1. Evidentiary Issues

As mentioned, the County objected to several witnesses' testimony on (primarily) hearsay grounds. The court overruled these objections. The County argues that this was error because the challenged testimony was inadmissible hearsay. And it argues that because the court relied on the testimony to find Werner was an "innocent third party," its erroneous admission is reversible error.

(a) Standard of Review

[1] Apart from rulings under the residual hearsay exception, we review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination to admit evidence over a hearsay objection.[2]

(b) Testimony of Fire and Rescue Member Rosno

Rosno testified that while he was attending to Werner immediately after the accident, Werner said that Korth "was going way too fast" and that Werner had told Korth "to let him out." The court admitted this testimony over the County's objections. The County argues that the court erred because Rosno's testimony was inadmissible on several grounds: It violated the

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[2] See *State v. Reinhart*, 283 Neb. 710, 811 N.W.2d 258 (2012).

best evidence rule, lacked foundation, resulted from improperly refreshing Rosno's recollection, and was hearsay.

We reject the County's arguments on the first three grounds. The County did not object to Rosno's testimony as violating the best evidence rule. And on appeal, "a party may not assert a different ground for an objection to the admission of evidence than was offered to the trial court."[3]

We also note that although the County assigned as error the court's admission of Rosno's testimony for lack of foundation, the County did not argue that in its brief. Absent plain error, an assigned error that is not specifically assigned and specifically argued in the brief is waived.[4] We find no plain error.

The County also argues that Werner's counsel improperly refreshed Rosno's recollection about Werner's statements using Rosno's deposition from Werner's related criminal case. The County relies on Neb. Rev. Stat. § 29-1917(4) (Reissue 2008). That section states that "[a] deposition taken pursuant to this section may be used at the trial by any party solely for the purpose of contradicting or impeaching the testimony of the deponent as a witness." Because Werner used the deposition to refresh Rosno's recollection, rather than to contradict or impeach his testimony, the County claims that the court erroneously admitted Rosno's testimony.

[2] But § 29-1917(4) restricts the use of a criminal deposition only at *the* trial rather than at *any* trial. We give statutory language its plain and ordinary meaning.[5] In § 29-1917(4), the reference to "the trial" restricts the deposition's use at the criminal trial for which the deposition was taken, and not in a separate civil action. And this makes sense, as "'[i]t is hornbook law that any writing may be used to refresh the recollection of a witness.'"[6]

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[3] *State v. Williams*, 282 Neb. 182, 194, 802 N.W.2d 421, 431 (2011).

[4] See, e.g., *In re Estate of Cushing*, 283 Neb. 571, 810 N.W.2d 741 (2012); *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997).

[5] See, e.g., *Becerra v. United Parcel Service, ante* p. 414, 822 N.W.2d 327 (2012).

[6] *U.S. v. Carey*, 589 F.3d 187, 191 (5th Cir. 2009). See, also, R. Collin Mangrum, Mangrum on Nebraska Evidence 517 (2012).

This leaves the question whether the court properly admitted Rosno's testimony over the County's hearsay objection. Werner argues that Rosno's testimony was admissible because it was not hearsay and that even if it was hearsay, it was otherwise admissible under various exceptions to the hearsay rule. We do not address whether Rosno's testimony was hearsay because we conclude that, even assuming that to be the case, it was admissible as an excited utterance.

[3,4] The general rule is that hearsay evidence is inadmissible unless it fits within a recognized exception to the rule against hearsay.[7] One such exception is for "excited utterances."[8] Excited utterances are admissible because a startling event may produce spontaneous statements that are reliable, in that they are "free of conscious fabrication."[9] We have explained:

> "'For a statement to qualify as an excited utterance, . . . (1) [t]here must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. . . . The key requirement is spontaneity, which "requires a showing the statements were made without time for conscious reflection."'"[10]

(i) Werner's Statement That Korth "was going way too fast" Was an Excited Utterance

Rosno testified that he heard Werner say that Korth "was going way too fast." We conclude that this statement was an excited utterance. There was a startling event, which was the law enforcement pursuit and resulting accident. The statement that Korth "was going way too fast" related to the startling event. And Werner made the statement while under

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[7] See Neb. Rev. Stat. §§ 27-802 and 27-803 (Reissue 2008).

[8] See § 27-803(1).

[9] See, e.g., *State v. Pullens*, 281 Neb. 828, 840, 800 N.W.2d 202, 217 (2012).

[10] *State v. Jacob*, 242 Neb. 176, 186, 494 N.W.2d 109, 117 (1993).

the stress of the event—the court found that Werner made the statement while he was "lying on his back, paralyzed, in a cornfield fighting for his life." And the record supports that finding.

But the County argues that the statement was not spontaneous, and therefore not an excited utterance, because it was made in response to questions from law enforcement. The court, however, found that Werner made the statement to Rosno "without provocation." We review such factual findings for clear error.[11]

[5] Whether Werner made his statements in response to questioning is relevant to whether those statements were spontaneous. But the focus must be on whether the party made the statements without "conscious reflection."[12] Although some evidence supports the County's position, it is far from definitive. And there is evidence to the contrary. For example, the record shows that while Rosno attended to Werner, Werner made the statement "at the accident scene, confused at times and moaning in pain." Rosno testified that Werner made the statement "several times[,] over and over," which would indicate the statement was spontaneous rather than made after conscious reflection. And although Rosno testified that Werner admitted after direct questioning to having been in the car with Korth, Rosno also testified that Werner's statement about Korth's driving too fast was made before that, while Werner was lying in the cornfield.

Thus, the court's conclusion that Werner made the statement "without provocation" was not clearly wrong. Considering that and other circumstances in the record, we conclude that Werner's statement was spontaneous. And as it has met all the other elements of an excited utterance, we conclude that Rosno's testimony regarding Werner's statement that Korth "was going way too fast," assuming it was hearsay, was admissible.

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[11] See *Reinhart, supra* note 2.

[12] See *Jacob, supra* note 10. See, also, *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473 (2005).

(ii) Werner's Statement to Rosno That He Told Korth "to let him out" Was an Excited Utterance

[6] Rosno also testified that he heard Werner say that he told Korth "to let him out." This statement presents hearsay within hearsay. Rosno testified to what Werner said immediately after the accident, and that statement involved what Werner had told Korth during the pursuit. To be admissible, each layer of hearsay must have an applicable exception to the hearsay rule.[13] For the reasons already discussed, we conclude that Rosno's testimony about what Werner said immediately after the accident was an excited utterance. The remaining question is whether Werner's statement to Korth "to let him out" during the pursuit was also an excited utterance. We conclude that it was.

The startling event was the flight from law enforcement, which entailed a high-speed, dangerous pursuit. The statement related to the event because Werner expressed his desire to be let out of the car during the pursuit. And Werner made the statement while under the stress of the event because Werner made the statement while the pursuit was ongoing. Finally, all indications are that the statement was spontaneous. As such, even assuming this statement was hearsay, it was also an excited utterance and was admissible.

(c) Testimony of Trooper Fitzgerald

Fitzgerald testified that he spoke with Werner at the hospital several hours after the accident. Fitzgerald testified Werner said that Korth was the driver, that Korth was driving about 120 m.p.h. during the pursuit, and that during the pursuit, Werner told Korth to let him out. The court admitted this testimony over the County's objections. The County argues that this was error because Fitzgerald's testimony was inadmissible hearsay.

(i) Fitzgerald's Testimony Was Hearsay

Werner argues that Fitzgerald's testimony was not hearsay. Hearsay is defined as "a statement, other than one made by

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[13] See Neb. Rev. Stat. § 27-805 (Reissue 2008).

the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[14]

At first glance, all of Werner's statements to Fitzgerald seem to be hearsay. Fitzgerald testified that Werner identified Korth as the driver—this was obviously offered to prove that Korth, and not Werner, was the driver. So Werner offered the statement to prove the truth of the matter asserted. This was hearsay. Similarly, Werner offered the estimation of the car's speed to prove the truth of the matter asserted—how fast the car was going. This was also hearsay. And finally, Werner's statement that he asked Korth "to let him out" impliedly asserts that Werner wanted out of the car. This was also hearsay because its relevance depended on its truth.[15] If the statement was untrue (i.e., Werner did not want out of the car), then it would have no bearing on whether he promoted, provoked, or persuaded Korth to flee.

Nevertheless, Werner argues that these statements were not hearsay for two reasons. First, regarding all of the statements, Werner argues that the statements were prior consistent statements offered to rebut a charge of fabrication under § 27-801(4)(a)(ii), and so they were not hearsay. We disagree—Fitzgerald testified to these statements *before* the County attacked Werner's credibility during Werner's testimony. Werner could not have offered Fitzgerald's testimony to *rebut* such an attack because it had not yet occurred.

[7] Second, Werner argues that Fitzgerald's testimony regarding Werner's statements was not hearsay because Werner's statements were "verbal acts."[16] Verbal acts are not hearsay, because their significance rests on the simple fact that the words were said, regardless of their truth.[17] From our reading of Werner's brief, Werner makes this argument only about his statement to Fitzgerald that he told Korth "to let him out."

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[14] Neb. Rev. Stat. § 27-801(3) (Reissue 2008).

[15] See, e.g., *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

[16] Brief for appellee at 18.

[17] See *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

We do not agree that this statement was a verbal act. Typical examples of verbal acts are "words of a contract, words establishing agency, slanderous words, [and] sexually harassing words."[18] In those cases, all that matters is that the words were said, not whether the words were true. Here, the relevance of Werner's statement is dependent on its truth—the statement impliedly asserts that Werner wanted out of the car. Only by assuming that to be true does it then make it less likely that Werner did not "promote, provoke, or persuade" Korth to flee.[19] Werner's statement was not a verbal act.

(ii) Fitzgerald's Testimony Was Not Admissible Under an Exception to the Hearsay Rule

So all three of Werner's statements to Fitzgerald at the hospital were hearsay. Again, we note that the third statement, about Werner's having told Korth "to let him out," was hearsay within hearsay—Werner made a statement to Fitzgerald about a statement Werner had made to Korth. We already concluded that what Werner told Korth during the pursuit was an excited utterance. So we must decide only whether Werner's statements to Fitzgerald at the hospital fell under an exception to the general rule against hearsay. Werner argues that both the excited utterance exception and the state-of-mind exception applied. We disagree.

As noted, for a statement to be an excited utterance, the statement must have been spontaneously made; that is, the statement must have been made without conscious reflection.[20] The record shows that Werner made his statements to Fitzgerald in direct response to Fitzgerald's questioning, which suggests that Werner had the opportunity to consciously reflect on his answers. Werner's statements to Fitzgerald also occurred several hours after the accident. And although the record shows that Werner was on pain medications and discussing his paralysis with his doctors at the

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[18] Mangrum, *supra* note 6 at 762.

[19] See brief for appellee at 19.

[20] See *Jacob, supra* note 10.

relevant time, Fitzgerald testified that Werner was conscious, alert, and responsive. We conclude that Werner's statements to Fitzgerald were not spontaneous, and therefore, the excited utterance exception did not apply.[21]

The state of mind exception does not apply either. Under that exception, a "statement of the declarant's then existing state-of-mind, emotion, sensation, or physical condition" is admissible unless it is a "statement of memory or belief to prove the fact remembered or believed."[22] Here, Werner's statements identifying Korth as the driver and estimating the speed of the car are statements of memory or belief to prove the fact remembered or believed. And Werner's third statement, that he told Korth "to let him out," is not an expression of his "then existing state of mind"[23] *at the hospital*; instead, it is at best an expression of Werner's state of mind *during the pursuit*. The state-of-mind exception does not apply.

(iii) The Court's Erroneous Admission of Fitzgerald's Testimony Did Not Unfairly Prejudice a Substantial Right of the County

[8] Fitzgerald's testimony regarding Werner's statements at the hospital was hearsay with no applicable exception. So the court's admission of this testimony was error. The question is whether that error is reversible error. In a civil case, the admission or exclusion of evidence is not reversible error unless it "unfairly prejudice[d] a substantial right" of the complaining party.[24] The County argues that the erroneous admission of Fitzgerald's testimony is reversible error because the trial court explicitly relied on that testimony in reaching its conclusions.

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[21] See, e.g., *State v. Sullivan*, 236 Neb. 344, 461 N.W.2d 84 (1990). Cf. *Hembertt, supra* note 12.

[22] § 27-803(2).

[23] See *id*.

[24] See *Martensen v. Rejda Bros.*, 283 Neb. 279, 289, 808 N.W.2d 855, 864 (2012). Accord, Neb. Rev. Stat. § 27-103(1) (Reissue 2008); *Rose v. City of Lincoln*, 234 Neb. 67, 449 N.W.2d 522 (1989).

In its order, the court referred to Rosno's and Fitzgerald's testimony regarding Werner's statements. The court found those statements "credible and significant." The court relied on that evidence, in part, to determine that Werner was not the driver and, therefore, not the person that Wemhoff sought to apprehend. The court also seemingly relied in part on Rosno's and Fitzgerald's testimony to determine that Werner was a credible witness. The court's determination that Werner was a credible witness was important in making its overall conclusions about whether Werner was an "innocent third party."

[9] The erroneous admission of evidence is not reversible error "if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact."[25] Here, the court characterized Rosno's and Fitzgerald's testimony as "similar," and we agree. The court used their testimony for the same purposes—to conclude that Werner was not the driver and to bolster Werner's credibility. Thus, Fitzgerald's testimony was in effect cumulative of Rosno's properly admitted testimony.

Furthermore, Fitzgerald's testimony was a relatively small part of the court's basis for concluding that Werner was not the driver. Wemhoff concluded that Korth was the driver, based on Werner's statements and because the car was registered to Korth's parents. The accident reconstructionist also concluded that Korth was the driver. And Rosno's testimony supported finding that Korth was the driver. The court explicitly relied on and recounted this evidence in concluding that Korth was the driver.

Similarly, Fitzgerald's testimony was a relatively small part of the court's basis for finding Werner credible. Again, Rosno's properly admitted testimony served the same function. The court explicitly stated that it found Werner credible after "having had the opportunity to observe Werner during his testimony." And the court noted other facts which bolstered Werner's credibility. Specifically, the court noted Werner testified that he was not thinking about being arrested during the

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[25] *Worth v. Kolbeck*, 273 Neb. 163, 177, 728 N.W.2d 282, 295 (2007).

pursuit and that he did not instigate the flight to avoid arrest. The court found this testimony credible because Werner had plenty of opportunity to dump the contraband during the flight itself if he had been concerned with being caught with it, but he did not.

We conclude that the court's erroneous admission of Fitzgerald's testimony did not unfairly prejudice a substantial right of the County. Fitzgerald's testimony was essentially cumulative of Rosno's properly admitted testimony because Rosno's testimony was similar and used for the same purposes. Fitzgerald's testimony played a relatively small part in the court's conclusions that Korth was the driver and that Werner was credible.

(d) Werner's Trial Testimony That He Had "heard" About Korth's Previous Flights From Law Enforcement

At one point in his testimony, Werner explained that once Korth "hit the gas," he knew that "it just was not going to end good." Werner explained he felt that way because he had "heard" that Korth had previously been convicted for fleeing from law enforcement and that on another occasion, Korth had fled from law enforcement and avoided arrest. The court admitted this testimony over the County's objection. The County argues that the court erred in doing so because the testimony was inadmissible hearsay.

Werner testified about an out-of-court statement because Werner said he had "heard" about Korth's earlier flights from law enforcement. The question is whether Werner offered that statement to prove the truth of the matter asserted; that is, whether Werner offered that statement to prove that Korth had previously fled from law enforcement. He did not.

The record shows that Werner's counsel offered the statement to show what Werner was thinking during the pursuit and to prove that Werner would not have promoted, provoked, or persuaded Korth to flee. In other words, because Werner had heard about Korth's prior incidents (which had not ended "good"), he knew fleeing from law enforcement would be a bad idea, and so he did not instigate the flight. For that

purpose, it did not matter whether what Werner had "heard" was true or false—that Werner heard the statement was what was important. So it was not hearsay because Werner did not offer the statement to prove the truth of the matter asserted.

The County also argues that Werner's testimony was inadmissible under Neb. Rev. Stat. §§ 27-404(2), 27-405, 27-608, and 27-609 (Reissue 2008). But the County did not make those arguments to the court, and it cannot assert "a different ground for an objection to the admission of evidence than was offered to the trial court."[26]

(e) Summary of Evidentiary Issues

Werner's testimony that he had "heard" Korth had been involved in other flights from law enforcement was not hearsay, and so the court properly admitted his testimony. Rosno's testimony recounting Werner's statements that Korth "was going way too fast" and that Werner had told Korth "to let him out" was admissible hearsay under the excited utterance exception. However, Fitzgerald's testimony about similar statements from Werner at the hospital was hearsay and was not admissible under any exception to the hearsay rule. The court erred in admitting Fitzgerald's testimony. But because it was essentially cumulative evidence that played a small part in the court's overall reasoning, the error did not unfairly prejudice a substantial right of the County.

2. "Innocent Third Party"

The County argues that under § 13-911, the court erred in finding Werner was an "innocent third party." Specifically, the County argues the court erred in finding that law enforcement did not seek to apprehend Werner and that Werner did not promote, provoke, or persuade Korth to flee. The County also argues that Werner was not an "innocent third party" as a matter of law because he was subject to arrest during and after the pursuit and because he was later charged with and convicted of a crime. We conclude, however, that both the law and the record support the court's finding.

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[26] *Williams, supra* note 3, 282 Neb. at 194, 802 N.W.2d at 431.

(a) Standard of Review

[10-12] In actions brought under the Act, we will not disturb the trial court's factual findings on appeal unless they are clearly wrong.[27] When determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can be deduced from the evidence.[28] But when reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[29]

(b) Analysis

[13,14] Section 13-911 provides a remedy to an "innocent third party" for damages caused by a law enforcement officer's "vehicular pursuit." Section 13-911(1) provides: "In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer." Under this section, a political subdivision is strictly liable for injuries to an "innocent third party" during a vehicular pursuit, regardless whether the law enforcement officer's actions were otherwise proper or even necessary.[30] As mentioned, an "innocent third party" is "one who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle."[31]

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[27] See *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012).

[28] See *id*.

[29] See *id*.

[30] See *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993), *disapproved on other grounds, Henery, supra* note 1.

[31] *Henery, supra* note 1, 263 Neb. at 707, 641 N.W.2d at 649.

(i) Law Enforcement Did Not Seek to Apprehend Werner

The court found that law enforcement did not seek to apprehend Werner. The court found that Korth was the driver of the fleeing car. The court noted that law enforcement attempted to pull over Korth's car for suspected driving under the influence and speeding. The court concluded that Wemhoff intended to apprehend only the driver and that he did not even know there was a passenger in the car. Therefore, the court concluded that law enforcement never sought to apprehend Werner, who was the passenger.

But, the County argues that Wemhoff's not having seen Werner does not mean that he did not seek to apprehend him. The County also argues that Werner was subject to arrest during and after the pursuit and that Wemhoff initially thought that Werner was the driver. The County argues that under the totality of the circumstances, the court erred in finding that law enforcement did not seek to apprehend Werner.

[15] Whether law enforcement sought to apprehend Werner is a mixed question of law and fact.[32] Here, the record supports the pertinent factual underpinnings of the court's conclusion, and thus, they are not clearly wrong. Substantial evidence supports the court's conclusion that Korth was the driver and that Wemhoff sought to pull over the car for suspected driving under the influence and speeding.

And the court's legal conclusion based on those facts is sound. Wemhoff sought to pull over the car for suspected driving under the influence and speeding—only the driver could have been guilty of those crimes.[33] So the court found that because Werner was the passenger, law enforcement could not have sought to apprehend him.

Nevertheless, the County takes issue with the court's conclusion. The County argues that whether a pursuing officer knew there were passengers in a fleeing vehicle is irrelevant to determining whether the officer sought to apprehend them.

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[32] See *Jura v. City of Omaha*, 15 Neb. App. 390, 727 N.W.2d 735 (2007).

[33] See Neb. Rev. Stat. §§ 60-6,196 and 60-682.01 (Reissue 2010).

The County argues that "such a rule [would place] an unfair burden on police officers and would in theory allow any hiding or unseen passenger to . . . automatically be afforded 'innocent third party' status, no matter what wrongdoing he had engaged in."[34]

We agree with the County. But we do not read the court's order as creating such a rule. Yes, the court noted that Wemhoff did not know there was a passenger in the car during the pursuit. But as we read the court's order, this was done more for emphasis than as a foundational basis for the court's conclusion. Instead, the court's order properly focused on Wemhoff's reasons for pulling over the car in determining whether he sought to apprehend Werner. Specifically, the court recognized that Wemhoff's intent was to stop the driver for suspected driving under the influence and speeding. And the court stated that "[u]nless Werner was driving the vehicle, he was never the target" of Wemhoff's pursuit.

That Werner, as the passenger, was never the target of Wemhoff's pursuit is supported by *Henery v. City of Omaha*,[35] which dealt with a similar factual scenario. In *Henery*, a police officer initiated a traffic stop of a car with two known occupants because he suspected driving under the influence, in addition to speeding. The car fled, the officer pursued, and the car crashed. The passenger sustained serious injuries and died as a result of the accident, and her estate sued the City of Omaha under § 13-911.

We determined that the passenger in *Henery* was an "innocent third party" under the statute. We noted that "there [was] no evidence that law enforcement attempted to apprehend [her]" and that "[a]lthough [she] may have exhibited poor judgment in riding with [the driver], she did not lose her 'innocent third party' status . . . based only on such choice."[36]

Similarly, Wemhoff sought to pull over the *driver* of the car for suspected driving under the influence and speeding.

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[34] Brief for appellant at 30-31.

[35] See *Henery, supra* note 1.

[36] *Id.* at 707, 641 N.W.2d at 649.

Because Werner was the *passenger* of the car, Wemhoff did not seek to apprehend Werner, regardless whether Wemhoff knew Werner was in the car. Like the passenger in *Henery*, Werner did not lose his "innocent third party" status simply by riding in the car.

We also note that Wemhoff's later discovery that Werner had been breaking the law was irrelevant to whether Wemhoff sought to apprehend Werner during the pursuit. This is because that inquiry is based on the officer's knowledge before the pursuit occurs, and not on what the officer discovers after the fact.[37] During the pursuit, Wemhoff did not know about Werner's breaking the law, and so he did not seek to apprehend him at that time.[38]

(ii) Werner Did Not Promote, Provoke, or Persuade Korth to Flee

The court found that Werner did not promote, provoke, or persuade Korth to flee. The County argues that "something clearly 'provoked' Korth . . . to flee"[39] and suggests that Werner spurred the flight.

[16,17] But whether Werner promoted, provoked, or persuaded Korth to flee was a factual finding, which we review for clear error.[40] The record shows that the court based its finding on Werner's testimony. Witness credibility and the weight to be given a witness' testimony are questions for the trier of fact.[41] Werner testified that although he had contraband on his person, he did not promote, provoke, or persuade Korth to flee. Werner testified that he knew about Korth's prior history of fleeing from law enforcement, that he was concerned only with his own safety, and that his possession of contraband was the last thing on his mind. The court found Werner's testimony credible and gave it substantial weight. Werner's testimony

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[37] See, *Henery, supra* note 1; *Jura, supra* note 32.

[38] See *Jura, supra* note 32.

[39] Brief for appellant at 33.

[40] See *Reed v. City of Omaha*, 15 Neb. App. 234, 724 N.W.2d 834 (2006).

[41] See, e.g., *Huffman v. Peterson*, 272 Neb. 62, 718 N.W.2d 522 (2006).

supports the court's finding, and thus, the court's finding was not clearly wrong.

(iii) Werner Was Not Disqualified From Being an "Innocent Third Party" as a Matter of Law

Finally, the County argues that as a matter of law Werner is not an "innocent third party." The County argues that "innocent" is generally defined as "'free from legal guilt or fault'"[42] and that because Werner was breaking the law, he cannot be considered innocent. And the County argues that to the extent we have defined an "innocent third party" to include individuals like Werner, we should alter our previous interpretation of the statutory language to carry out its intent.[43]

[18,19] We agree that Werner was not "innocent" as that term is ordinarily understood. But the phrase "innocent third party" is a term of art under the statute, and the ordinary meaning of "innocent" does not apply. Instead, we have defined an "innocent third party" as a person that was not "sought to be apprehended" by the pursuing officer and as a person who did not promote, provoke, or persuade the driver to flee.[44] In doing so, we noted that "by its use of the phrase 'innocent third party' . . . the Legislature was concerned with the actions of the third party *as those actions may relate to the flight of the driver sought to be apprehended*."[45] Simply put, a third party is "innocent" if he or she played no role in causing the law enforcement pursuit. Yes, Werner broke the law. But that does not affect Werner's "innocent third party" status under § 13-911 because Werner's breaking the law did not cause Wemhoff to pursue or Werner to instigate the driver to flee.

[20] But the County argues that we can (and should) redefine an "innocent third party" to exclude individuals who, like Werner, were breaking the law during the pursuit. We reject the County's invitation to do so. We explicitly defined an

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[42] Brief for appellant at 35.

[43] See *Bronsen v. Dawes County*, 272 Neb. 320, 722 N.W.2d 17 (2006).

[44] See *Henery, supra* note 1, 263 Neb. at 707, 641 N.W.2d at 649.

[45] *Id.* (emphasis supplied).

"innocent third party" in *Henery* (and did so implicitly in prior decisions[46]), and the Legislature has not replaced our definition with one of its own.[47] When an appellate court has judicially construed a statute and that construction has not evoked an amendment, there is a presumption that the Legislature has acquiesced in the court's determination of the Legislature's intent.[48] The County's argument has no merit.

3. Motion for Credit Against the Judgment

The court entered a $1 million judgment for Werner. The County argued that Werner had received $140,000 in compensation from other sources and that the County was entitled to a reimbursement (as a credit against the judgment) for that amount under § 13-911(2). The court determined that under § 13-926, however, the County's otherwise available reimbursement had to be eliminated in an attempt to "fully compensate" Werner. The County claims this was error. We disagree.

(a) Standard of Review

[21] Statutory interpretation presents a question of law. When reviewing questions of law, we resolve the questions independently of the conclusions reached by the trial court.[49]

(b) Analysis

The applicable statutory provisions are § 13-911(2) and (3) and § 13-926. A brief overview of these statutes is necessary to understand the issues presented by this assigned error.

Where a political subdivision is liable and pays damages to an "innocent third party," § 13-911(2) lists sources of reimbursement for the political subdivision. For example, a political subdivision may be reimbursed from, among other sources, the

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[46] See, e.g., *Stewart, supra* note 30.

[47] See, § 13-911; *Henery, supra* note 1.

[48] See, e.g., *Henery, supra* note 1; *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000).

[49] See, e.g., *Village of Hallam v. L.G. Barcus & Sons*, 281 Neb. 516, 798 N.W.2d 109 (2011).

driver of the fleeing vehicle, or any organization liable for the driver's conduct of the fleeing vehicle.[50]

Section 13-911(3) provides:

> This section shall not relieve any public or private source required statutorily or contractually to pay benefits for disability or loss of earned income or medical expenses of the duty to pay such benefits when due. No such source of payment shall have any right of subrogation or contribution against the political subdivision.

Finally, § 13-926 limits the liability of a political subdivision in a claim under the Act—in other words, § 13-926 is a damages cap. After setting the cap, however, § 13-926 then provides:

> If the damages sustained by an innocent third party pursuant to section 13-911 are not fully recoverable from one or more political subdivisions due to the limitations in this section, additional sources for recovery shall be as follows: First, any offsetting payments specified in subsection (3) of section 13-911 shall be reduced to the extent necessary to fully compensate the innocent third party; and second, if such reduction is insufficient to fully compensate the innocent third party, the right of reimbursement granted to the political subdivision in subsection (2) of section 13-911 shall be reduced to the extent necessary to fully compensate the innocent third party.

Thus, § 13-926 sets forth a process by which any reimbursement to the political subdivision is reduced "to the extent necessary to fully compensate the innocent third party." With that background, we now address the credit-against-the-judgment issue.

The County argues that § 13-926 required the court to reduce any "offsetting payments" under § 13-911(3) *before* reducing the County's right to reimbursement under § 13-911(2). The County argues that the court incorrectly bypassed this first step and proceeded immediately to reducing the County's right to reimbursement. And the County

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[50] See § 13-911(2)(a) and (b).

argues that it was Werner's burden to prove the existence and amounts of those "offsetting payments," if they existed, which Werner did not do. Therefore, the County argues, the court erred in eliminating its otherwise available reimbursement under § 13-911(2).

On its face, the County's argument seems to have merit. Section 13-926 does require that "offsetting payments" under § 13-911(3) be reduced before reducing the County's right to reimbursement under § 13-911(2). Yet, we cannot reconcile the "offsetting payments" language with the language of § 13-911(3). Section 13-911(3) says that any other "statutorily or contractually" required obligation to pay the "innocent third party" (such as a disability insurance policy) must be paid, regardless whether the political subdivision has paid damages under § 13-911. Section 13-911(3) says nothing about "offsetting payments." Nor can we interpret that phrase to mean the payments to the "innocent third party" which are referred to in § 13-911(3)—*reducing* them would obviously not serve to "fully compensate" the "innocent third party" as § 13-926 intends.

[22] Interpreting these statutes to reach a legal conclusion presents a difficult task. We attempt to give effect to each word or phrase in a statute and ordinarily will not read language out of a statute.[51] But we see no way to give effect to the command of § 13-926 to reduce "offsetting payments" under § 13-911(3) before reducing the County's right to reimbursement under § 13-911(2). Therefore, once it was clear that Werner's damages exceeded the statutory cap, the court properly proceeded to reduce the County's right to reimbursement under § 13-911(2). The County's argument has no merit.

The County next argues that the court erred in calculating the amount of damages ($3 million) and then entering a $1 million judgment under the statutory cap. The County argues that once the court determined Werner's damages exceeded the statutory cap, it should have simply entered judgment for the maximum allowed under the cap. But § 13-926 required the

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[51] See, e.g., *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004).

court to calculate Werner's damages before entering judgment for the statutory cap amount.

Because § 13-926 imposed a statutory cap on a political subdivision's liability, it logically envisioned cases where the damages would exceed that amount.[52] When the damages suffered by the "innocent third party" are not fully recoverable because of the cap, § 13-926 requires a court to reduce a political subdivision's right to reimbursement "to the extent necessary to fully compensate" the "innocent third party." That would be impossible if the court could not calculate the exact damages the "innocent third party" had suffered—the extent to which reduction is "necessary" would depend on the total damages suffered by the "innocent third party."

Finally, the County argues that the court erred in its ultimate determination that the County was not entitled to reimbursement under § 13-911(2). But as explained above, where the recovery of an "innocent third party" is limited by the cap, § 13-926 requires that the political subdivision's reimbursement be reduced "to the extent necessary to fully compensate" the party.

Here, Werner suffered $3 million in damages, but the court entered judgment for $1 million under the statutory cap. The County's claimed reimbursement was $140,000. Section 13-926 required that the reimbursement be reduced "to the extent necessary" to fully compensate the "innocent third party." Because Werner's actual damages exceeded the capped amount by $2 million, and other sources provided only $140,000, the court properly concluded that the County was not entitled to reimbursement.

4. Application of the "Seatbelt" Statute

Werner was not wearing his seatbelt, so the court reduced Werner's $3 million damages by 5 percent under § 60-6,273. The court applied this reduction *before* applying the statutory cap of $1 million. The County argues that that was error and

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[52] See § 13-926.

that the court should have applied the 5-percent reduction *after* applying the cap. We conclude that the court followed the proper procedure.

(a) Standard of Review

Statutory interpretation presents a question of law. When reviewing questions of law, we resolve the questions independently of the conclusions reached by the trial court.[53]

(b) Analysis

Section 60-6,273 provides:

> Evidence that a person was not wearing an occupant protection system at the time he or she was injured shall not be admissible in regard to the issue of liability or proximate cause but may be admissible as evidence concerning mitigation of damages, except that it shall not reduce recovery for damages by more than five percent.

We have not decided this exact issue. And how a court should apply the seatbelt statute with the statutory cap under the Act is unclear from its language. Under that statute, evidence of not using a seatbelt is admissible only for "mitigation of *damages*."[54] So it would make sense to apply the 5-percent reduction to the total "damages" incurred and then apply the cap. But the statute goes on to say that "it shall not reduce *recovery for damages* by more than five percent."[55] Werner can only possibly "recover" $1 million under the statutory cap. Thus, the statute could be read to apply only to the possible "recovery" for damages, rather than to the actual amount of damages incurred.

Both parties cite to outside jurisdictions in support of their respective positions, but none of the cited cases deal with seatbelt provisions and their application with a statutory cap on damages. Instead, the cases deal with the similar issue of when to apply the comparative negligence statutes with a statutory

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[53] See, e.g., *Village of Hallam, supra* note 49.

[54] § 60-6,273 (emphasis supplied).

[55] *Id.* (emphasis supplied).

cap on damages. We agree that these types of cases are applicable here and that there are cases from outside jurisdictions to support both parties' respective positions.[56]

But while those cases are informative, our recent case *Connelly v. City of Omaha*[57] resolves this dispute. In that case, as with those cited by the parties, at issue was the proper order in which to apply the comparative negligence statutes and the statutory cap under the Act. We determined that the comparative negligence statutes should be applied before the statutory cap. We explained that

> a statutory limitation on damages such as that of § 13-926(1) "applies to cap the total recovery after the reduction of the plaintiff's damages for his or her comparative negligence, rather than applying to the total damages established before the reduction for comparative negligence, since the latter approach would multiply the effect of the damage limitation."[58]

We conclude that the same reasoning applies here. The court properly applied the seatbelt statute before the statutory cap.

V. CONCLUSION

The district court's only error was admitting Fitzgerald's hearsay testimony, but that error did not unfairly prejudice a substantial right of the County. We affirm.

AFFIRMED.

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[56] See, e.g., *Fairfax Hosp. System, Inc. v. Nevitt*, 249 Va. 591, 457 S.E.2d 10 (1995); *Rodriguez v. Cambridge Housing Authority*, 59 Mass. App. 127, 795 N.E.2d 1 (2003).

[57] *Connelly v. City of Omaha, ante* p. 131, 816 N.W.2d 742 (2012).

[58] *Id.* at 159, 816 N.W.2d at 764-65.

CASSEL, J., concurring.

I doubt that most members of the Legislature, if asked, would characterize a passenger in a vehicle fleeing from law enforcement, who has on his person methamphetamine and glass pipes for smoking it later "that evening" and who possesses (and likely is drinking from) an open container of an alcoholic beverage when the pursuit begins, as an "innocent

third party."[1] Yet, Nebraska jurisprudence compels this court to accept such a result, as the court's opinion cogently explains. I write separately only to emphasize that the Legislature has the power to change the result in a future case.

Because the Legislature has not defined "innocent third party," the Nebraska appellate courts have repeatedly addressed its meaning as applied to a passenger in a fleeing vehicle.[2] This court first upheld a judgment determining that a motorcycle passenger—who, according to the trial court's factual findings, was not accused of any wrongdoing other than the flight from arrest and had "'no opportunity to dismount'"—qualified as an "innocent third party."[3] In 2002, this court again affirmed a trial court judgment for a passenger in a fleeing vehicle.[4] Although the passenger had a blood alcohol level of .123, she had not "commit[ted] any crimes" and had no "reason . . . to flee from police."[5] There was no evidence that she had "planned or encouraged" the driver's flight from police.[6] Indeed, the police officer who conducted the pursuit testified that he was unaware that the passenger "'did anything wrong'" at the time of the pursuit.[7] It was in that 2002 decision that this court defined an "innocent third party" as "one who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle."[8] Applying this definition, the Nebraska Court of Appeals, in separate decisions

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[1] See Neb. Rev. Stat. § 13-911(1) (Reissue 2012).

[2] See, *Henery v. City of Omaha*, 263 Neb. 700, 641 N.W.2d 644 (2002); *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993), *disapproved on other grounds, Henery v. City of Omaha, supra*; *Jura v. City of Omaha*, 15 Neb. App. 390, 727 N.W.2d 735 (2007); *Reed v. City of Omaha*, 15 Neb. App. 234, 724 N.W.2d 834 (2006).

[3] *Stewart v. City of Omaha, supra* note 2, 242 Neb. at 245-46, 494 N.W.2d at 134.

[4] *Henery v. City of Omaha, supra* note 2.

[5] *Id.* at 704, 641 N.W.2d at 647.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 707, 641 N.W.2d at 649.

arising from a single incident, affirmed trial court judgments refusing to treat the respective passengers as innocent third parties because, in one case, the passenger had an outstanding arrest warrant and told the driver, "'[H]urry up and get away from 'em 'cause I got a warrant,'"[9] and in the other, the police were seeking to apprehend the passenger as an occupant of a stolen vehicle.[10]

This court's 2002 decision premised its definition upon the belief that the Legislature was "concerned with the actions of the third party as those actions may relate to the flight of the driver sought to be apprehended."[11] The test fashioned in 2002 reasonably addressed that concern, and the rule of statutory construction presuming acquiescence in the court's determination of legislative intent[12] requires this court to adhere to its understanding of the Legislature's intent.

But the Legislature may wish to place an additional limitation on the definition of an "innocent third party" in light of the facts of the instant case, and *it is free to do so*. For example, the Legislature might decide to narrow the definition of an "innocent third party" to exclude a person then engaged in a violation of a felony or misdemeanor offense, without regard to whether such person or his or her conduct was known to law enforcement officers before initiating the pursuit. "To assist in construing statutes, courts employ presumptions which are applicable when a court has doubt as to the intent of the legislature."[13] The court's opinion in the instant case applies such a well-settled presumption.[14] However, "such presumptions disappear in light of an express legislative declaration."[15]

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[9] *Reed v. City of Omaha, supra* note 2, 15 Neb. App. at 240-41, 724 N.W.2d at 840.

[10] *Jura v. City of Omaha, supra* note 2.

[11] *Henery v. City of Omaha, supra* note 2, 263 Neb. at 707, 641 N.W.2d at 649.

[12] See *Underhill v. Hobelman*, 279 Neb. 30, 776 N.W.2d 786 (2009).

[13] 82 C.J.S. *Statutes* § 375 at 465 (2009).

[14] See *id.*, § 384.

[15] *Id.*, § 375 at 465-66.

Thus, the Legislature may amend the statute to refine or change the definition of an "innocent third party."

But because such a change is the province of the Legislature, it cannot come from this court. For over 10 years, the Legislature has apparently acquiesced in this court's 2002 assessment of legislative intent and its definition fashioned to implement that intent. If the definition is to be changed now, it must be enacted by the Legislature. I therefore join the court's opinion.

STATE OF NEBRASKA, APPELLEE, V. DEVIN D. QUALLS, APPELLANT.
824 N.W.2d 362

Filed December 21, 2012. No. S-12-409.

1. **Constitutional Law: Waiver: Appeal and Error.** In determining whether a defendant's waiver of a statutory or constitutional right was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.
2. **Criminal Law: Statutes: Presentence Reports.** The plain language of Neb. Rev. Stat. § 29-2261(1) (Cum. Supp. 2012) provides that a presentence investigation is mandatory in felony cases, except if it would be impractical.
3. **Presentence Reports: Waiver.** The right to a presentence investigation may be waived.
4. **Waiver: Words and Phrases.** A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
5. **Constitutional Law: Waiver: Records.** A voluntary waiver, knowingly and intelligently made, must affirmatively appear from the record, before a court may conclude that a defendant has waived a right constitutionally guaranteed or granted by statute.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, for appellant.

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

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

HEAVICAN, C.J.

INTRODUCTION

Pursuant to a plea bargain, appellant Devin D. Qualls pled guilty to one count of theft by deception in the amount of $500 to $1,500, in return for the dismissal of other charges and the State's promise that it would not object to Qualls' request that any sentence be served concurrently to a federal sentence that had been imposed upon Qualls. The district court sentenced Qualls to 20 months' to 4 years' imprisonment with credit for 5 days' time served. The district court ordered that sentence to be served consecutively to the federal sentence. Qualls appeals. We affirm.

BACKGROUND

Qualls was charged with theft by deception in the amount of $500 to $1,500. Qualls allegedly used checks written on accounts with insufficient funds to purchase gift cards sold as part of a fundraiser for a Catholic school in Papillion, Nebraska. The record suggests that Qualls perpetrated this scheme across the Omaha, Nebraska, area.

The issue on appeal is whether Qualls was adequately informed of his right to a presentence investigation. As relevant on appeal, the record shows that during Qualls' plea hearing, the following colloquy took place:

> THE COURT: . . . I do need to advise you that since this is a felony offense, you do have a right to have a presentence investigation report prepared in this case.
>
> Your attorney has indicated that you wish to waive that right and have me do sentencing based upon, I believe, the reports and your criminal history and then any other information you wish to present.
>
> Do you wish to waive your right to a presentence report, sir?
>
> [Qualls]: Yes.
>
> THE COURT: All right. Has anyone threatened you or promised you anything to waive that right?
>
> [Qualls]: No.
>
> THE COURT: Are you waiving that right freely and voluntarily?

> [Qualls] Yes.
>
> THE COURT: A11 right. The Court will find that the waiver of presentence report has been made freely, voluntarily, knowingly and intelligently.

Qualls contends that this advisory was insufficient to inform him of his right to a presentence investigation. But the State contends that Qualls was informed that he had a right to a presentence investigation and that the record establishes that Qualls' waiver was made freely, voluntarily, knowingly, and intelligently, which is all that should be required.

ASSIGNMENT OF ERROR

Qualls assigns that the district court erred in "failing to advise [him] of the right being waived when he agreed to not insist on his statutory right to a presentence investigation."

STANDARD OF REVIEW

[1] In determining whether a defendant's waiver of a statutory or constitutional right was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.[1]

ANALYSIS

[2] In his sole assignment of error, Qualls argues that the district court erred in failing to properly advise him of his right to a presentence investigation. Neb. Rev. Stat. § 29-2261(1) (Cum. Supp. 2012) provides that "[u]nless it is impractical to do so, when an offender has been convicted of a felony other than murder in the first degree, the court shall not impose sentence without first ordering a presentence investigation . . . ." The plain language of the statute provides that this investigation is mandatory in felony cases; however, there are exceptions under which such an investigation is unnecessary.

[3] The first such exception is set out in the statute itself; an investigation is not necessary if it would be impractical. We have explained that one such instance might be where another investigation had just been completed.[2] In addition to this

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[1] Cf. *State v. Figeroa*, 278 Neb. 98, 767 N.W.2d 775 (2009).

[2] See *State v. Tolbert*, 223 Neb. 794, 394 N.W.2d 288 (1986).

statutory exception, this court has held that such an investigation may be waived.[3]

[4,5] Though this court has held that an otherwise mandatory presentence investigation may be waived, we have never before opined upon how such a waiver would be effectuated. As a general proposition,

> [a] waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct. . . . A voluntary waiver, knowingly and intelligently made, must affirmatively appear from the record, before a court may conclude that a defendant has waived a right constitutionally guaranteed or granted by statute.[4]

In *State v. Figeroa*,[5] we addressed whether a defendant had voluntarily, knowingly, and intelligently waived his right to counsel. We noted that "a formalistic litany is not required"[6] to establish such a waiver and examined the totality of the circumstances before concluding that the defendant was competent to waive counsel and that "the defendant was sufficiently aware of the right to have counsel and of the possible consequences of a decision to proceed without counsel."[7]

And in *State v. Fox*,[8] we concluded the district court did not err in finding that the defendant had waived his right to be present at trial. In addition to protection under the U.S. and Nebraska Constitutions, the right to be present at trial is guaranteed by Neb. Rev. Stat. § 29-2001 (Reissue 2008). But we have long held that the right to be present at trial can be waived so long as that waiver was voluntary and knowing.[9]

We conclude that the appropriate standard to apply in the case of a waiver of a right to a presentence investigation under

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[3] *Id.*

[4] *State v. Kennedy*, 224 Neb. 164, 170, 396 N.W.2d 722, 726 (1986).

[5] *Figeroa, supra* note 1.

[6] *Id.* at 103, 767 N.W.2d at 780.

[7] *Id.* See, also, *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006).

[8] *State v. Fox*, 282 Neb. 957, 806 N.W.2d 883 (2011).

[9] *Id.* (citing *Scott v. State*, 113 Neb. 657, 204 N.W. 381 (1925)).

§ 29-2261 is whether it is apparent from the record that the defendant's relinquishment of the right was knowingly and intelligently made.[10]

But this does not end our inquiry. We are next presented with the question of whether Qualls' waiver was, in fact, knowingly and intelligently made. While Qualls acknowledges that he was informed of his right to a presentence investigation, he contends that his waiver could not have been made knowingly, because he was not aware that (1) a presentence investigation was "mandatory"[11]; (2) the lack of such a report would mean that any appellate court "would not have the benefit of [the report's] findings [were] he to be unsatisfied with his sentence"[12]; (3) the absence of a presentence investigation deprives the sentencing court of the ability to properly consider all the factors it is required to consider under § 29-2261(3), further suggesting that a deficient advisement leads to a sentence that is an abuse of discretion in every case; and (4) by waiving the right to a presentence investigation, he was also waiving his right to have mitigating factors presented to any appellate court that might hear his appeal.

We find all of these contentions to be without merit. Qualls first argues he was not informed that absent waiver, a presentence investigation was "mandatory." But he was clearly informed that he had a right to a presentence investigation. We decline to engage in Qualls' game of semantics.

Qualls also asserts that he was not aware that by waiving the presentence investigation, an appellate court would not have access to this investigation in the event he was "unsatisfied" with his sentence. There are two problems with this assertion. First, it is self-evident that by waiving the presentence investigation, such investigation would not be completed and thus would be unavailable to the district court and also to any appellate court. Moreover, Qualls does not directly contend that his sentence was excessive or otherwise problematic, except the

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[10] See *State v. Kellogg*, 10 Neb. App. 557, 633 N.W.2d 916 (2001).

[11] Brief for appellant at 8.

[12] *Id.*

general contention that the sentence imposed upon him was "a direct result of the absence of the safeguard guaranteed by such an investigation."[13]

Qualls next contends that the lack of a presentence investigation means that a sentencing court cannot consider the sentencing factors set forth in § 29-2261(3) and that any resulting sentence is an abuse of discretion. Qualls' argument on this point is also without merit. Just as it is self-evident that waiving a presentence investigation invariably means there will be no presentence investigation completed and available to the courts, it is also self-evident that such a waiver might limit the sentencing court's available information. It should be noted that in this case, the district court had before it the police reports and a criminal history, and additionally provided Qualls the opportunity to introduce other information. (We note that despite this opportunity, Qualls failed to present any such evidence.) Moreover, this court has indicated these factors, among others, are to be considered in all sentencings,[14] while a presentence investigation is mandatory only in felony cases.[15] Therefore, in misdemeanor cases, a sentencing court considers these factors to the best of its ability, even without the benefit of a presentence investigation; thus, it is difficult for us to find that the lack of a presentence investigation could have substantially limited the district court's ability to adequately impose sentence.

Finally, Qualls argues that he was not aware that by waiving the presentence investigation, he was waiving the right of an appellate court to consider any mitigating factors. But at least on the facts of this case, such is not so. As is noted above, the district court provided Qualls the opportunity to introduce into evidence for sentencing purposes "any other information you wish to present," but Qualls failed to do so. If he had introduced such evidence, the information would have been preserved for an appellate court's review.

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[13] *Id.*

[14] See *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

[15] See § 29-2261(1) and (2).

We reject Qualls' contentions that his waiver was not knowing. As noted above, this court has previously held, with respect to constitutional rights, that "a formalistic litany is not required" to establish waiver, but instead that waiver is shown under the totality of the circumstances. And we decline to require a more "formalistic litany" for the waiver of a statutory right than for the waiver of a constitutional one.

A review of the totality of these circumstances shows that Qualls was informed of his right to a presentence investigation, was informed as to what information the judge would be considering, was provided the opportunity to present any additional information to the court, was questioned as to whether he had been threatened or promised anything for his decision to waive this right, and was expressly asked if his waiver was made freely and voluntarily. The district court did not clearly err in finding that Qualls' waiver was made "voluntarily, knowingly, and intelligently."

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF CANDICE H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. CANDICE H., APPELLEE.

824 N.W.2d 34

Filed December 21, 2012. No. S-12-424.

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. ____: ____. In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's rulings.
3. **Juvenile Courts: Probation and Parole: Sentences: Records.** Satisfactory completion of a juvenile's probation, supervision, or other treatment or rehabilitation program provided under the Nebraska Juvenile Code or satisfactory

completion of a juvenile's diversion or sentence in county court is a condition precedent to sealing a record pursuant to Neb. Rev. Stat. § 43-2,108.03(5) (Cum. Supp. 2012).

Appeal from the Separate Juvenile Court of Douglas County: WADIE THOMAS, Judge. Order vacated.

Donald W. Kleine, Douglas County Attorney, and Sarah M. Moore for appellant.

No appearance for appellee.

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

STEPHAN, J.

The State appeals from an order of the separate juvenile court of Douglas County ordering that the record in this juvenile proceeding be sealed. The State contends that the statutory requirements for sealing the record were not met. We agree and therefore vacate the order.

BACKGROUND

On May 20, 2011, an amended petition was filed in the juvenile court for Douglas County alleging that Candice H. was a child within Neb. Rev. Stat. § 43-247(1) (Reissue 2008) because she had possessed 1 ounce or less of marijuana and drug paraphernalia. Candice admitted the allegations, and after a disposition hearing on August 18, the juvenile court found that it was in Candice's best interests to be placed under the supervision of a probation officer. The court ordered that Candice be placed on probation "for an **open-ended period of time** and at that time [her] records will be sealed if [she] has successfully completed probation unless sooner extended or revoked for cause by the Court, or unless a capias has been issued herein during the term of this probation."

At a December 19, 2011, disposition hearing, the juvenile court entered an order requiring that Candice remain on "probation contract" and under the supervision of a probation officer. Candice was also ordered to enroll in an outpatient substance abuse program and to follow any and all aftercare

recommendations. Finally, the court ordered that the matter "shall be scheduled for an **internal check for the purpose of the Court entering an order terminating jurisdiction when said child reaches the age of majority**."

On May 1, 2012, the juvenile court entered an order finding that its jurisdiction should be terminated because Candice had reached the age of majority. On the same date, the court entered a separate order on its own motion which stated:

> No objections having been received, all records relating to the arrest, adjudication and disposition of this matter are ordered sealed. Information or other data concerning any proceedings relating to the arrest, taking into custody, petition, complaint, indictment, information, trial, hearing, adjudication, correctional supervision, dismissal or disposition are deemed never to have occurred.

The order stated that the sealed record was still accessible to certain parties and could be inspected under certain conditions. The Douglas County Attorney perfected a timely appeal from the order pursuant to Neb. Rev. Stat. § 43-2,106.01 (Cum. Supp. 2012).

ASSIGNMENTS OF ERROR

The State asserts that the juvenile court erred in ordering that the record be sealed without giving prior notice to the county attorney and without determining that Candice had satisfactorily completed her probation.

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.[1]

[2] In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's rulings.[2]

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[1] *In re Interest of Elizabeth S.*, 282 Neb. 1015, 809 N.W.2d 495 (2012); *In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584, 804 N.W.2d 174 (2011).

[2] *In re Interest of Charlicia H.*, 283 Neb. 362, 809 N.W.2d 274 (2012).

ANALYSIS

The procedures for sealing records of juvenile cases are set forth in Neb. Rev. Stat. §§ 43-2,108.01 to 43-2,108.05 (Cum. Supp. 2012), enacted by the Nebraska Legislature in 2010[3] and amended in 2011.[4] These statutes apply here because Candice was under the age of 18 when the alleged offenses occurred and a juvenile petition was filed against her.[5] The effect of having a record sealed under these statutes is that "the person whose record was sealed can respond to any public inquiry as if the offense resulting in the record never occurred."[6] However, a sealed record is accessible to law enforcement officials, prosecutors, and judges under certain circumstances.[7] It is also accessible to any attorney representing the subject of the sealed record.[8] In addition, sealed records may be inspected by other persons for certain limited purposes specified in the statute.[9]

On the date of the order which is the subject of this appeal, § 43-2,108.03 provided the following procedures whereby a court could initiate proceedings to seal a juvenile's record on its own motion:

> (5) If a juvenile described in section 43-2,108.01 has satisfactorily completed such juvenile's probation, supervision, or other treatment or rehabilitation program provided under the Nebraska Juvenile Code or has satisfactorily completed such juvenile's diversion or sentence in county court:
>
> (a) The court may initiate proceedings pursuant to section 43-2,108.04 to seal the record pertaining to such disposition or adjudication under the juvenile code or sentence of the county court; and

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[3] 2010 Neb. Laws, L.B. 800.

[4] 2011 Neb. Laws, L.B. 463.

[5] See § 43-2,108.01.

[6] § 43-2,108.05(2).

[7] See § 43-2,108.05(3).

[8] *Id.*

[9] *Id.*

> (b) If the juvenile has attained the age of seventeen years, the court shall initiate proceedings pursuant to section 43-2,108.04 to seal the record pertaining to such disposition or adjudication under the juvenile code or diversion or sentence of the county court, except that the court is not required to initiate proceedings to seal a record pertaining to a misdemeanor or infraction not described in subdivision (4) of section 43-2,108.01 under a city or village ordinance that has no possible jail sentence. Such a record may be sealed under subsection (6) of this section.

[3] Although subsection (5)(a) describes the circumstance in which a court may initiate such proceedings and subsection (5)(b) specifies when it must do so, both are subject to the condition precedent of satisfactory completion of the "juvenile's probation, supervision, or other treatment or rehabilitation program" in proceedings such as this which are governed by the Nebraska Juvenile Code.[10] This requirement is reflected in the juvenile court's order of August 19, 2011, in which it placed Candice on probation and indicated that her records would be sealed "if the child has successfully completed probation." But the court's subsequent orders terminating jurisdiction and sealing the record do not reflect that Candice had satisfactorily completed her probation by the time she reached the age of majority, and we find nothing in the record indicating that she had done so. Nor do we find any principled basis for concluding that a juvenile satisfactorily completes probation merely by reaching the age of majority.

When proceedings to seal juvenile court records are initiated, the applicable statutes require the court to "promptly notify the county attorney or city attorney involved in the case," who may then "file a response with the court within thirty days after receiving such notice."[11] If no objections are filed, the court may either order the records sealed or conduct a hearing.[12] But if objections are filed, the court must conduct

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[10] § 43-2,108.03(5).

[11] § 43-2,108.04(1) and (2).

[12] § 43-2,108.04(3).

a hearing and may order the record sealed if it makes findings that the juvenile has been "rehabilitated to a satisfactory degree."[13] In this case, the juvenile court's order requiring the record to be sealed recites that no objections were received, but there is no indication in the order or elsewhere in the record that the county attorney was ever given the required notice of the proceeding to seal the record.

Accordingly, we conclude that the juvenile court erred in ordering that the record be sealed, because (1) the order did not include a finding that the juvenile had satisfactorily completed her probation and (2) the county attorney was not given the required notice of the proceeding to seal the record. We therefore vacate the order sealing Candice's juvenile record.

ORDER VACATED.

[13] § 43-2,108.04(4) and (5).

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOEL W. PHILLIPS, RESPONDENT.

824 N.W.2d 376

Filed December 21, 2012. No. S-12-481.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

Respondent, Joel W. Phillips, was admitted to the practice of law in the State of Nebraska on September 28, 1995. At all relevant times, he was engaged in the private practice of law in Wallace, Nebraska. On May 31, 2012, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges consisting of one count against respondent. In the one count, it was alleged that by his conduct, respondent had violated his

oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2007), and Neb. Ct. R. of Prof. Cond. §§ 3-501.4 (communications), 3-501.5 (fees), 3-508.1 (bar admission and disciplinary matters), and 3-508.4 (misconduct).

On November 6, 2012, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313 of the disciplinary rules, in which he knowingly chose not to challenge or contest the truth of the matters set forth in the formal charges and waived all proceedings against him in connection therewith in exchange for a judgment of public reprimand. Further, respondent agreed to pay all the costs in this case, including the fees and expenses of the referee, if any. Finally, respondent agreed to be enjoined from engaging in any act that would violate the Nebraska Real Estate License Act, Neb. Rev. Stat. §§ 81-885.01 to 81-885.55 (Reissue 2008 & Supp. 2009).

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's request for public reprimand is appropriate.

Upon due consideration, we approve the conditional admission and order that respondent be publicly reprimanded.

FACTS

The formal charges state that on November 28, 1988, Herbert Hasenauer created a revocable trust. The primary asset of the trust was farm ground located in Lincoln County, Nebraska. Upon the death of both Herbert and his wife, Eunice Hasenauer, the assets of the trust were to be managed for a period of 4 years, with the net income to be distributed to Herbert's four children: Verlaine M. Weir, Herbert C. Hasenauer (Clinton), Eunice J. Kilgore, and Leonard E. Hasenauer. The four children were named as the ultimate equal beneficiaries upon the termination of the trust.

On October 24, 2001, Herbert amended the trust to make it an irrevocable trust. Herbert designated his son Clinton and his wife, Eunice, as cotrustees.

On August 28, 2002, Herbert died and was survived by his wife, Eunice. From that point forward, the trust property was held and used for the benefit of Eunice. On May 15, 2008, Eunice died. Clinton continued to serve as trustee of the trust.

Pursuant to the trust, Clinton as trustee was to continue to manage the trust for 4 years from the date of Eunice's death. At the end of the 4 years, for 60 days, Clinton was to have the option to purchase the real property at a price agreeable to the majority of the adult beneficiaries of the trust. If the beneficiaries of the trust could not agree on the price, then the price was to be determined by arbitration. If Clinton did not then exercise his option to purchase the real property at the arbitration price, the real property was to be sold at public or private sale on terms satisfactory to the trustee, considered with regard to the best interests of all the beneficiaries. Once the real property was sold and converted to cash, the trust was to be dissolved, with each beneficiary receiving an equal one-fourth distribution.

Prior to the expiration of the 4-year waiting period, the four siblings decided to terminate the trust and distribute the real property, which consisted of five separate parcels. It was agreed that Clinton would receive parcels 2, 4, and 5 at agreed-upon values and that the other three siblings would receive parcels 1 and 3, which were to be sold to third parties. Clinton would make a cash payment to his siblings so that the final distribution resulted in each sibling receiving one-fourth of the total value of the trust property.

In or about December 2009, Clinton contacted LaVern Friesen about purchasing parcels 1 and 3. Friesen and Clinton entered into an oral agreement whereby they would each obtain appraisals for parcels 1 and 3, and the purchase price would be the average of the two appraisals. After Friesen's appraisal was low, $325,000, Clinton decided to seek other offers.

The formal charges state that respondent was a long-time friend of the Hasenauer family, and Clinton's family in particular. Clinton spoke to respondent about the sale of the property to Friesen. Respondent assured Clinton that he had buyers available who would pay more than $325,000 per parcel. Although respondent was licensed to practice law in Nebraska, he was not a licensed real estate broker, associate broker, or salesperson as defined by the Nebraska Real Estate License Act.

On February 8, 2010, based upon his discussions with Clinton, respondent sent a solicitation letter to Clinton and his wife, Mary Hasenauer, asking to be hired to find purchasers for one of the parcels owned by the trust and another quarter section of land not owned by the trust, and to perform legal services ancillary thereto. According to the formal charges, respondent's letter further stated, in part:

> "Please note, I have proposed to do these sales on a commission basis as set forth in the agreement. Critically, this means I find the buyer, handle all negotiations, assist the buyer if necessary in obtaining financing, draw up all contracts and instrument[s] and in short, represent you fully.
>
> "As you and [Friesen] have already reached a tentative agreement on the NE1/4 of 14-9-34, [parcel 3] I will be acting as your attorney only and bill my hourly rate. However, if the two of you do not reach a final agreement I would be willing to waive my bill in exchange for you allowing me to sell the ground under the same terms as the two parcels listed in the enclosed representation agreement. Again, I am confident that I can sell this land at a price very favorable to you."

The agreement referenced in respondent's letter is entitled "Retention Letter."

The retention letter states that the agreement is between Clinton and Mary, husband and wife, as clients and the Phillips Law Office as attorneys. According to the formal charges, the agreement states in part:

> "Client hereby retains Attorneys to represent [the client] exclusively with the sale of certain agricultural parcels owned by the client. Said parcels legally described as follows:
>
> "1. [NE1/4, 30-10-34] Lincoln County Nebraska. [not owned by the Trust]
>
> "2. [SE1/4, 29-9-33] Lincoln County, Nebraska. [Parcel 3 of the Trust]
>
> "Attorneys shall receive as compensation for said representation the sum of 5.5% of the gross sale. Attorneys

shall be responsible for locating potential buyer(s), negotiating with said buyer(s), the preparation of the purchase contract(s), deed(s) and Form(s) 521 . . . ."

At the time respondent sent the solicitation letter and the retention letter to Clinton and Mary, item No. 1 listed in the retention letter, "NE1/4, 30-10-34," was not owned by the trust. At the time respondent sent the solicitation letter and the retention letter to Clinton and Mary, item No. 2 listed in the retention letter, "Parcel 3 of the Trust," was owned by the trust for which Clinton was the trustee. Since parcel 3 was owned by the trust, Clinton and Mary had no right to sell parcel 3 in their individual capacities.

The retention letter further stated:

> "Client expressly agrees that this agreement shall constitute an exclusive right to sell said land granted to the Attorneys. Client agrees that they shall enter into no other agreement granting a right to sell or enter into any agreement to sell said land, other than as presented to the Client by the Attorneys for the term of this agreement. The term of this exclusive right to sell shall be for a period of six (6) months from the date of this agreement. If the land has not sold within said time the Client and Attorneys may mutually agree to an extension of this agreement for an additional term of six (6) months by executing a written addendum to this agreement.
>
> "**Listing Price**: Client agrees to sell the parcels of land and have authorized Attorneys to accept any offer to purchase for the following price[s]:
>
> "1. NE1/4 30-10-34 $500,000
>
> "2. SE1/4 29-9-33 $500,000
>
> "Attorneys agrees (sic) to submit all other offers to the Client for [the Client's] approval."

On February 12, 2010, Clinton and his three siblings met with respondent at respondent's office to discuss the dissolution of the trust. Respondent was informed of the siblings' plan to distribute the five parcels held in the trust as set forth above. At that time, respondent told the four siblings that he had potential buyers willing to pay between $400,000 to $500,000 per parcel, which was greater than the $325,000 that

had been offered by Friesen. Based upon respondent's assurance that he had buyers in hand willing to pay substantially more than Friesen, the four siblings agreed that respondent could arrange the sales and be paid a commission of 5 percent, rather than the 5.5 percent offered by respondent. On March 2, Clinton and Mary signed the retention letter in their personal capacity after reducing the compensation amount to 5 percent of the gross sale.

Respondent claims that he contacted several potential buyers for the real estate and received several offers which he claims were relayed to Clinton. Respondent claims that on March 12, 2010, he advised Clinton of offers from a "Mr. Clough" and a "Mr. Kuhlman." Clough allegedly offered to purchase the land for $425,000 per parcel. Kuhlman offered to purchase parcel 1 for $325,000 and parcel 3 for $375,000. None of those offers were submitted to Clinton in writing.

Clinton denies that respondent provided him with any offers. By March 15, 2010, no written offers had been received by Clinton from respondent. However, Friesen and Clint Sheets, a man hired by Friesen, directly offered to Clinton to purchase one parcel each for $355,000 per parcel.

Clinton notified respondent of these offers and directed respondent to prepare the purchase agreements for Friesen to purchase parcel 3 and Sheets to purchase parcel 1. Friesen signed the purchase agreement on March 15, 2010, and Sheets signed the purchase agreement on March 16. Closing of the sales of the real estate to Friesen and Sheets were to be held on April 22.

Prior to closing, parcels 1 and 3 of the trust were transferred to Leonard, Verlaine, and Kilgore, pursuant to a written agreement, drafted by counsel other than respondent, between the four siblings to dissolve the trust and to distribute the trust property. Parcels 1 and 3 were then sold by the three siblings personally to Sheets and Friesen, respectively. Respondent did not have a written or oral fee agreement with Leonard, Verlaine, and Kilgore for the sale of parcels 1 and 3 prior to the closing on April 22, 2010.

At the closing on April 22, 2010, respondent insisted that he receive a commission of 5 percent of the gross sale price

on each parcel, totaling $35,500. Leonard objected to these fees, because Friesen had already offered to purchase the real estate prior to respondent's involvement in the matter and because Sheets was brought into the negotiations by Friesen, not respondent.

Respondent insisted that his fees be withheld from the sale proceeds; otherwise, the sale would not close. Under duress, Leonard, Verlaine, and Kilgore signed the settlement statements allocating the 5-percent commissions to respondent on both sales.

After the closing and receipt by respondent of the 5-percent commissions, respondent received correspondence from Leonard, and later from Leonard and Clinton's attorney, objecting to the fees respondent received. Respondent was asked to provide an itemized accounting of the time he put into the real estate matter regarding the trust. Respondent refused to do so.

On September 21, 2010, Clinton, Leonard, Verlaine, and Kilgore filed a grievance against respondent regarding the fees he collected from the sale of the trust property. In his September 30 response to the grievance, respondent asserted that his "contingency fee" of 5 percent was reasonable, because brokers typically charge a commission of 6 to 7 percent for the sale of real estate.

On November 16, 2010, the Assistant Counsel for Discipline sent a letter to respondent asking him to provide an itemized statement of his time working on the Hasenauer trust real estate matters. Respondent was also asked to provide detailed information of all offers he received for the purchase of the real property owned by the trust. In his November 30 response, respondent provided a partial itemized statement of his time; however, respondent refused to provide the names of the potential buyers he contacted on behalf of Clinton. Respondent asserted that Clinton was not entitled to his "buyers list."

On December 9, 2010, the Assistant Counsel for Discipline sent a letter to respondent stating that respondent had a duty to provide to his client Clinton a detailed statement of all offers made for the trust property. After retaining counsel,

respondent provided the requested information on January 6, 2011.

Section 81-885.02 of the Nebraska Revised Statutes provides:

> After September 2, 1973, it shall be unlawful for any person, directly or indirectly, to engage in or conduct, or to advertise or hold himself or herself out as engaging in or conducting the business, or acting in the capacity, of a real estate broker, associate broker, or real estate salesperson within this state without first obtaining a license as such broker, associate broker, or salesperson, as provided in the Nebraska Real Estate License Act, unless he or she is exempted from obtaining a license under section 81-885.04.

Respondent does not fit within § 81-885.04, which provides:

> Except as to the requirements with respect to the subdivision of land, the Nebraska Real Estate License Act shall not apply to:
>
> (1) Any person, partnership, limited liability company, or corporation who as owner or lessor shall perform any of the acts described in subdivision (2) of section 81-885.01 with reference to property owned or leased by him, her, or it or to the regular employees thereof, with respect to the property so owned or leased, when such acts are performed in the regular course of or as an incident to the management, sale, or other disposition of such property and the investment therein, except that such regular employees shall not perform any of the acts described in such subdivision in connection with a vocation of selling or leasing any real estate or improvements thereon;
>
> (2) Any attorney in fact under a duly executed power of attorney to convey real estate from the owner or lessor or the services rendered by any attorney at law in the performance of his or her duty as such attorney at law;
>
> (3) Any person acting as receiver, trustee in bankruptcy, personal representative, conservator, or guardian or while acting under a court order or under the authority of a will or of a trust instrument or as a witness in any

judicial proceeding or other proceeding conducted by the state or any governmental subdivision or agency;

(4) Any person acting as the resident manager of an apartment building, duplex, apartment complex, or court, when such resident manager resides on the premises and is engaged in the leasing of property in connection with his or her employment, or any employee, parent, child, brother, or sister of the owner or any employee of a licensed broker who manages rental property for the owner of such property;

(5) Any officer or employee of a federal agency in the conduct of his or her official duties;

(6) Any officer or employee of the state government or any political subdivision thereof performing his or her official duties for real estate tax purposes or performing his or her official duties related to the acquisition of any interest in real property when the interest is being acquired for a public purpose;

(7) Any person or any employee thereof who renders an estimate or opinion of value of real estate or any interest therein when such estimate or opinion of value is for the purpose of real estate taxation; or

(8) Any person who, for himself or herself or for others, purchases or sells oil, gas, or mineral leases or performs any activities related to the purchase or sale of such leases.

Section 81-885.45 provides: "Any person or subdivider acting as a broker, salesperson, or subdivider without having first obtained the required license or subdivision certificate or while his or her license or subdivision certificate is under suspension shall be guilty of a Class II misdemeanor."

The formal charges allege that it was a violation of the foregoing statutes for respondent to charge a commission to broker the sale of the trust property because he was not authorized to do so under the Nebraska Real Estate License At. As such, the formal charges allege that respondent was to be directed to disgorge the entire $35,000 fee he received. The record

reflects that these funds have been returned or otherwise accounted for.

The formal charges allege that respondent's actions constitute violations of his oath of office as an attorney as provided by § 7-104 and professional conduct rules §§ 3-501.4, 3-501.5, 3-508.1, and 3-508.4.

ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters set forth in the formal charges. We further determine that by his conduct, respondent violated conduct rules §§ 3-501.4, 3-501.5, 3-508.1, and 3-508.4, as well as his oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration,

the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Respondent is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after the order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

STATE OF NEBRASKA, APPELLEE, V. TYLER F. REINPOLD, APPELLANT.

824 N.W.2d 713

Filed January 4, 2013. No. S-12-206.

1. **Constitutional Law: Search and Seizure.** Both the U.S. and Nebraska Constitutions guarantee an individual the right to be free from unreasonable searches and seizures.
2. **Search and Seizure: Waiver.** The right to be free from unreasonable searches and seizures may be waived by consent of the citizen.
3. **Warrantless Searches: Proof.** When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.
4. **Warrantless Searches: Police Officers and Sheriffs.** A warrantless search is valid when based upon consent of a third party whom the police, at the time of the search, reasonably believed possessed authority to consent to a search of the premises, even if it is later demonstrated that the individual did not possess such authority.
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 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. **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 useful as evidence of a crime.

8. **Police Officers and Sheriffs: Search and Seizure: Probable Cause.** The probable cause standard, with regard to the plain view doctrine, does not demand any showing that a belief that certain items may be useful as evidence of a crime be correct or more likely true than false. Ultimately, satisfaction of the probable cause standard may leave the reporting officer with further need to investigate the items seized to confirm the incriminating nature of those items.
9. **Police Officers and Sheriffs: Search and Seizure.** Under the plain view doctrine, an officer does not need to have imminent concern regarding the disappearance of an item in question in order to legally seize the item.
10. **Obscenity: Minors: Words and Phrases.** Neb. Rev. Stat. § 28-1463.02 (Cum. Supp. 2012) defines "child" as any person under the age of 18 years and, in the case of a portrayed observer, means any person under the age of 16 years.
11. **Obscenity: Minors: Expert Witnesses.** It is not always necessary for the government to present expert testimony on the issue of age for a fact finder to conclude that pornographic images depict a minor.
12. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

John S. Berry, of Berry Law Firm, for appellant.

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

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

HEAVICAN, C.J.

INTRODUCTION

Appellant, Tyler F. Reinpold, a former police officer, was convicted after a jury trial of 10 counts of possession of child pornography. On March 9, 2012, Reinpold was sentenced on all counts to 60 to 120 months' imprisonment. Reinpold appeals.

FACTUAL BACKGROUND

In April 2003, Reinpold's parents purchased a house located in Mitchell, Nebraska. This house is their primary residence. In November 2007, Reinpold's parents purchased the adjoining

house located at 1462 19th Avenue (the 1462 house) and subsequently began using the 1462 house as a rental property. At the time relevant to this appeal, there were six apartments located at the 1462 house: two smaller basement apartments, a main floor apartment, two apartments on the second floor, and a studio apartment on the third floor. Reinpold moved into one of the basement apartments when his parents first purchased the 1462 house, but eventually moved to a farmstead. However, Reinpold returned to the 1462 house in January 2010 and moved into one of the second-floor apartments. At this point in time, the 1462 house was also occupied by Reinpold's grandparents, Lyle and Janice Wakeley, and Reinpold's uncle, Michael Wakeley, son of Lyle and Janice.

From January through July 1, 2010, only Reinpold, Lyle, Janice, and Michael resided at the 1462 house, and no one was living in either basement apartment. Reinpold, Lyle, Janice, and Michael used the basement for storage, and they all had unfettered access to the basement. The basement could be accessed from both inside and outside the 1462 house. Reinpold and Michael both stored property in the northeast corner of the basement. Also at that time, Lyle had been assisting Reinpold's father with certain renovation tasks in the basement.

Reinpold moved from the 1462 house again in late June 2010, to a house in Scottsbluff, Nebraska. After the move, however, Reinpold left some of his belongings at the 1462 house in both the second floor apartment and the basement storage area.

On or about July 10, 2010, upon Janice's request, Lyle located a laptop computer in Reinpold's former second floor apartment. Janice wanted to use the laptop computer during a trip she had planned for the near future. Lyle asked Michael to examine the computer. While examining the computer, Michael and Lyle discovered that the computer owner was listed as either "Reinpold or Tyler." They also discovered what they described as disturbing images of suspected child pornography.

Michael text-messaged Reinpold regarding the computer. Reinpold denied he owned the computer and claimed, via

text message, that the computer belonged to a "pedo" named "Heath" he was investigating. That evening, Reinpold came to the 1462 house to retrieve the computer. Michael recorded their conversation about the computer. The audio recording reveals Reinpold again denied the computer belonged to him. The whereabouts of this computer are unknown to this date.

On August 9, 2010, Stacie Lundgren, a Nebraska State Patrol investigator specializing in Internet crimes against children, was assigned to investigate a rumor that Reinpold was involved with child pornography. Three days later, on August 12, Lundgren interviewed Michael at the 1462 house. Later that same day or the next day, Lundgren returned to the 1462 house to interview Lyle and Janice. Michael and Lyle told Lundgren about the disturbing images they had seen on Reinpold's computer, showed her the text messages Reinpold had sent to Michael regarding such, and played Michael's recording for Lundgren.

They also told Lundgren that Reinpold had several computer hard drives stored in the basement. Michael and Janice led Lundgren to the northeast corner of the basement. There, Lundgren viewed an open cardboard box with three hard drives. Lundgren took possession of the hard drives. On August 23, 2010, Lundgren obtained a search warrant to search the data stored on the hard drives. The data stored on the hard drives included suspected child pornography.

Reinpold was subsequently arrested and charged with 10 counts of possession of child pornography. He pled not guilty and filed a motion to suppress the evidence Lundgren found on the hard drives. At the December 28, 2011, motion to suppress hearing, Reinpold claimed he was renting the northeast corner of the basement from his father for storage, that the doors leading to the northeast corner of the basement were locked in 2010, and that someone had broken into the northeast corner of the basement to take possession of his items. This testimony was in conflict with the testimony of Michael, Lyle, and Lundgren.

Reinpold's motion to suppress was denied as to this issue. The district court found that Michael and Janice had common

authority over the basement to consent to Lundgren's search of the basement and that the hard drives were in plain view and lawfully seized by Lundgren. The district court further found Lundgren did not make a deliberate falsehood or act with reckless disregard for the truth in executing a search warrant for the subsequent search of the hard drives.

Reinpold was later tried by a jury. At trial, he renewed his motion to suppress evidence, which was denied. In presenting its case, the State did not offer expert testimony regarding the ages of the persons in the images and videos found on Reinpold's hard drives. Reinpold subsequently submitted a motion for directed verdict, arguing that this evidence was necessary for the State to prove Reinpold's charges beyond a reasonable doubt. The district court denied that motion.

In instructing the jury, the district court provided in jury instruction No. 3:

> The elements of Possession of Child Pornography as charged in Counts I through X are:
>
> 1. That [Reinpold] knowingly possessed a visual depiction of sexually explicit conduct, wherein a child (as defined in these instructions) was one of its participants or portrayed observers; and
>
> 2. That at the time [Reinpold] was nineteen years of age or older; and
>
> 3. That [Reinpold] did so on or about the dates charged in Scotts Bluff County, Nebraska.

Reinpold did not object to jury instruction No. 3 at trial.

At the conclusion of trial, Reinpold was convicted on all 10 counts of possession of child pornography. Reinpold appeals. We granted the State's petition to bypass.

ASSIGNMENTS OF ERROR

Reinpold assigns, restated and consolidated, that the district court erred in (1) denying his motion to suppress evidence found on his computer hard drives, (2) finding there was sufficient evidence to support his convictions when the State did not present independent evidence establishing that the actors in the photographs and videos admitted against him were under the age of 18, and (3) giving jury instruction No. 3.

STANDARD OF REVIEW

This court applies a two-part standard of review to suppression issues. With regard to historical facts, we review the trial court's findings for clear error.[1] We review independently of the trial court's determinations whether those facts suffice to meet the constitutional standards of actual shared authority, apparent shared authority, warrantless seizure under the plain view exception, and the legal sufficiency of the law pertinent to the instant case.[2]

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.[3] 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.[4]

Plain error may be asserted for the first time on appeal.[5] 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.[6]

ANALYSIS

Motions to Suppress.

On appeal, Reinpold argues the district court erred in denying his motions to suppress the evidence found on his computer hard drives for four separate reasons. We will consider each of Reinpold's four arguments in separate analyses.

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[1] *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

[2] See *id.*

[3] *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005).

[4] *State v. Jonusas*, 269 Neb. 644, 694 N.W.2d 651 (2005).

[5] *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007).

[6] *Id.*

[1-4] Reinpold first argues the district court erred in finding Michael and Janice had shared authority to consent to the search of the northeast corner of the basement of the 1462 house. This court has previously ruled upon the Fourth Amendment issues present in this case. Both the U.S. and Nebraska Constitutions guarantee an individual the right to be free from unreasonable searches and seizures.[7] In *State v. Konfrst*,[8] this court held:

> The right to be free from unreasonable searches and seizures may be waived by consent of the citizen. [Citation omitted.] When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. [Citations omitted.] Furthermore, a warrantless search is valid when based upon consent of a third party whom the police, at the time of the search, reasonably believed possessed authority to consent to a search of the premises, even if it is later demonstrated that the individual did not possess such authority.

Here, Michael and Janice had actual and/or apparent authority to consent to the search of the northeast corner of the basement area of the 1462 house. It is uncontested that the basement was not for the exclusive use of Reinpold. Michael, Janice, and Lyle had unfettered access to the basement area and used it for storage. At the suppression hearing, however, Reinpold attempted to argue that the northeast corner of the basement was for his exclusive use and that he paid his father rent to use such space.

The record shows that there are two doorways to the northeast corner of the basement. Reinpold argues on appeal that

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[7] U.S. Const. amend. IV; Neb. Const. art. I, § 7.

[8] *State v. Konfrst*, 251 Neb. 214, 224-25, 556 N.W.2d 250, 259 (1996). See, also, *State v. Walker*, 236 Neb. 155, 459 N.W.2d 527 (1990); *State v. Billups*, 209 Neb. 737, 311 N.W.2d 512 (1981).

these doors were locked at the time of the search. He provided photographs of the alleged locked doors taken close to the time of the suppression hearing. The photographs of the northeast corner provided by Lundgren at the time of the seizure of the hard drives, however, show no locks on the doors, and there appears to be an abundant amount of clutter in the storage area and doorways. The clutter is arranged in such a manner that does not allow the doors to be closed. Furthermore, there is no evidence in the record indicating Michael and Janice reported to Lundgren that the northeast corner of the basement was for Reinpold's exclusive use and that they were forbidden from entering that area.

The district court rejected Reinpold's contention that the northeast corner of the basement was for his exclusive use. Instead, the district court found Lundgren's photographs properly demonstrated how the northeast corner of the basement appeared at the time of the search. In considering these photographs, the testimony that Michael, Janice, and Lyle had unfettered access to the basement, and the testimony that Michael stored items in the northeast corner of the basement, the district court concluded that Michael and Janice had actual and/or apparent common authority to consent to the search of the northeast corner of the basement area of the 1462 house.[9]

This finding is not clearly erroneous. Reinpold's argument as to this issue is without merit.

Plain View Doctrine.

[5] Reinpold further argues his hard drives were not subject to the plain view doctrine. 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 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

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[9] See, e.g., *State v. Daniels*, 222 Neb. 850, 388 N.W.2d 446 (1986); *State v. Van Ackeren*, 194 Neb. 650, 235 N.W.2d 210 (1975).

itself.[10] As previously discussed, Lundgren had a legal right to be in the place where the hard drives were located and had a lawful right of access to the room where the hard drives were found, because Michael and Janice had common, shared authority to consent to the search of the northeast corner of the basement. Once at the northeast corner of the basement, Lundgren could plainly view the hard drives in an open cardboard box.

[6,7] In addition to being in plain view, in order to be seized, the incriminating nature of the hard drives needed to be immediately apparent. For an object's incriminating nature to be immediately apparent, the officer must have probable cause to associate the property with criminal activity.[11] "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 . . . useful as evidence of a crime . . . ."[12]

The district court found that the seizure of the hard drives was based upon probable cause, because at that time, Lundgren (1) had received background information through her investigation that Reinpold's laptop computer had not worked for 5 or 6 months and had been thrown away prior to moving to his new residence; (2) had interviewed Michael, Lyle, and Janice; (3) knew that both Michael and Lyle had recently seen suspected child pornography on Reinpold's laptop computer; (4) had seen a text message conversation of July 10, 2010, between Michael and Reinpold wherein Reinpold implicitly acknowledged child pornography on the laptop computer located in his former residence; (5) listened to the July 10, 2010, recorded conversation between Michael and Reinpold wherein Reinpold again acknowledged the child pornography on his laptop computer, but claimed it was part of an

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[10] *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003); *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000); *State v. Shurter*, 238 Neb. 54, 468 N.W.2d 628 (1991).

[11] *Keup, supra* note 10.

[12] *Id.* at 104, 655 N.W.2d at 33.

investigation of "Heath," a "pedo"; (6) learned there was no official investigation of "Heath" by Scottsbluff police; (7) knew Reinpold had retrieved the laptop computer on July 10, 2010, and its whereabouts were unknown after that date; (8) knew that Reinpold's family members, including his father, grandparents, and uncle, would now be aware that Reinpold was under investigation by the State Patrol for possession of child pornography; (9) knew that pornography users tend to keep their pornography libraries rather than discard them; and (10) was told by Janice that the hard drives in the basement belonged to Reinpold.

[8] As the U.S. Supreme Court has held several times, the probable cause standard, with regard to the plain view doctrine, "does not demand any showing that . . . a belief [that certain items may be useful as evidence of a crime] be correct or more likely true than false."[13] Ultimately, satisfaction of the probable cause standard may leave the reporting officer with further need to investigate the items seized in order to confirm the incriminating nature of those items.[14] Thus, the facts on record before the district court suffice to meet the constitutional standards for the plain view exception regarding seizure of property.

In light of all of these facts, it was reasonable for Lundgren to believe, especially with her expertise and experience within the field of Internet crimes against children, that the hard drives could be evidence of a crime. Lundgren had uncovered more than enough facts regarding Reinpold's suspected illegal activity and knew that pornography users tend to keep their pornography libraries electronically stored rather than discard them. This evidence, as well as her background, warranted Lundgren, as a person of reasonable caution, in the belief that the hard drives may be useful as evidence of a crime. Certainly

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[13] *Texas v. Brown*, 460 U.S. 730, 742, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983).

[14] *Brown, supra* note 13. See, *Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987); 3 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 6.7(a) (4th ed. 2004).

such facts suffice to meet the constitutional standards discussed above for a finding of probable cause. Reinpold's argument as to this issue is without merit.

Imminent Concern for Seizure.

[9] Reinpold argues Lundgren did not have a justifiably "imminent" concern regarding the disappearance of the hard drives at the time she seized the hard drives.[15] But this court held in *Keup* that an officer does not need to have imminent concern regarding the disappearance of an item in question in order to legally seize the item.[16] Thus, Reinpold's argument as to this point is without merit.

Lundgren's Affidavit.

Finally, Reinpold argues that Lundgren acted in reckless disregard of the truth in her affidavit in support of the warrant to search the seized hard drives. Reinpold contends Lundgren acted in reckless disregard for the truth in her affidavit in averring that Reinpold's property was abandoned when she knew that Reinpold had instructed Michael not to touch "his" property, the hard drives. Reinpold did not object to this statement before the district court regarding the constitutionality of the search warrant executed by Lundgren. Thus, we need not address this issue further on appeal.[17]

Reinpold did argue before the district court, however, that Lundgren acted in reckless disregard of the truth in her affidavit, because she told Michael she would need to look at the images before she could say whether they were illegal. In making this statement, Lundgren explained the need to search the hard drives subsequent to her lawful seizure of Reinpold's property within the constitutional boundaries of the plain view exception to warrantless seizures of property.[18] Thus, Lundgren did not act in reckless disregard of the truth in her affidavit. Reinpold's argument as to this issue is without merit.

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[15] Brief for appellant at 37.

[16] *Keup, supra* note 10.

[17] See *State v. Wetherell*, 259 Neb. 341, 609 N.W.2d 672 (2000).

[18] See *Keup, supra* note 10.

Sufficiency of Evidence.

Reinpold next assigns that the evidence adduced by the State was insufficient to support his convictions for possession of child pornography, because the State did not present independent evidence establishing that the actors in the photographs and videos admitted against him were under the age of 18.

[10] Reinpold was charged with 10 counts of knowingly possessing a visual depiction of sexually explicit conduct as defined in Neb. Rev. Stat. § 28-1463.02 (Cum. Supp. 2012), which has a child, as defined in such section, as one of its participants or portrayed observers. The statute defines "[c]hild" as "any person under the age of eighteen years and, in the case of a portrayed observer, means any person under the age of sixteen years."[19] Reinpold argues the State did not present any evidence that the persons visually depicted in the video clips or photographs were children as defined by the statute. Instead of providing expert testimony as to the age of the actors, Reinpold notes the district court merely instructed the jury to make a determination of the age of the actors based upon their own personal experience, observation, common sense, or knowledge as a parent, person, and adult. Reinpold contends such a presentation of the evidence was insufficient to support his convictions for possession of child pornography.

[11] Various courts, including the U.S. Court of Appeals for the Eighth Circuit, have concluded that it is not always necessary for the government to present expert testimony on the issue of age for a fact finder to conclude that pornographic images depict a minor.[20] When presented with a similar

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[19] § 28-1463.02(1).

[20] *U.S. v. O'Malley*, 854 F.2d 1085 (8th Cir. 1988). See, also, *U.S. v. Riccardi*, 405 F.3d 852 (10th Cir. 2005); *U.S. v. Katz*, 178 F.3d 368 (5th Cir. 1999); *U.S. v. Cameron*, 762 F. Supp. 2d 152 (D. Me. 2011), *affirmed in part, and in part reversed on other grounds* 699 F.3d 621 (1st Cir. 2012); *U.S. v. Villard*, 700 F. Supp. 803 (D.N.J. 1988); *U.S. v. Gallo*, No. 87-5151, 1988 U.S. App. LEXIS 19550 (4th Cir. May 12, 1988) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 846 F.2d 74 (4th Cir. 1995)).

argument on appeal, the Eighth Circuit held that the standard of review regarding claims of insufficiency of the evidence was "'whether or not there is substantial evidence, taking the view most favorable to the government, to support the factual determination.'"[21] The Eighth Circuit then engaged in an independent review of the pornographic photographs and found that the photographs depicted minors and that there was substantial evidence for the defendant's conviction.[22]

We concur with the reasoning of the Eighth Circuit. Although it is upon the State to make the judgment as to whether to present expert testimony regarding the age of actors in alleged child pornography, it is a question of fact for the jury to decide whether the actors in alleged child pornography are under the age of 18. The State may indeed risk losing the case by not presenting expert testimony regarding such, but ultimately, it is for the jury to decide, with or without an expert's opinion, whether the evidence exhibits child pornography.

The jury here viewed all of the videos and photographs and determined the actors were under the age of 18. Upon independent review of the evidence, this court determines that the photographic and video evidence presented to the jury by the State is sufficient to support Reinpold's convictions. Any rational trier of fact could have found beyond a reasonable doubt that the actors in the videos and photographs were under the age of 18, pursuant to statute. The State did not have to provide the jury with expert testimony regarding the age of the actors in order to make this determination. Reinpold's argument as to this issue is also without merit.

Whether District Court Erred in Giving Jury Instruction No. 3.

[12] Finally, Reinpold assigns jury instruction No. 3 is fatally defective because it failed to instruct the jury that "Reinpold's knowing possession of [child] pornography" is

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[21] *O'Malley, supra* note 20, 854 F.2d at 1087.

[22] *O'Malley, supra* note 20.

a separate element from the element requiring that the visual depiction in the pornography be that of a child.[23] Reinpold, however, did not object to jury instruction No. 3 at the time of trial. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice.[24] Thus, we need not address this issue further on appeal. Accordingly, Reinpold's convictions should be upheld.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

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[23] Brief for appellant at 40. See § 28-1463.02(1).

[24] *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

RICARDO MOYERA, ALSO KNOWN AS DAVID GUTIERREZ, APPELLEE, V. QUALITY PORK INTERNATIONAL, APPELLANT.

825 N.W.2d 409

Filed January 4, 2013. No. S-12-208.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' 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. ____: ____. On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict, and an appellate court will not disturb those findings unless they are clearly wrong.
3. ____: ____. An appellate court independently reviews questions of law decided by a lower court.
4. **Statutes.** Statutory interpretation presents a question of law.
5. **Workers' Compensation: Statutes: Appeal and Error.** The Nebraska Workers' Compensation Act provides benefits for employees who are injured on the job, and an appellate court broadly construes the act to accomplish this beneficent purpose.

6. **Statutes: Appeal and Error.** Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
7. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous.
8. **Workers' Compensation: Contracts.** The Nebraska Workers' Compensation Act applies to undocumented employees under a contract of hire with a covered employer in this state.
9. **Workers' Compensation.** Under Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010), the Workers' Compensation Court cannot order vocational retraining without determining that a worker's postinjury physical restrictions and vocational impediments prevent the worker from complying with all of the statute's lower work priorities.
10. ____. An employee's illegal residence or work status does not bar an award of indemnity for permanent total loss of earning capacity.
11. **Workers' Compensation: Proximate Cause.** Whether an employee's scheduled member loss has caused a whole body impairment is properly resolved under a proximate cause inquiry at the point of the employee's maximum medical improvement, when the employee's permanent impairment is assessed.
12. **Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred.
13. **Workers' Compensation: Proximate Cause.** If, by the point of maximum medical improvement, an employee has developed a whole body impairment in addition to a scheduled member injury, the question is whether the work-related injury proximately caused the whole body impairment. If both injuries arose from the same work-related injury, because the scheduled member injury resulted in the whole body impairment in a natural and continuous sequence of events and the whole body impairment would not have occurred but for the work-related injury, then the claimant is entitled to disability benefits for the whole body impairment.
14. **Workers' Compensation.** Whether an employee's compensable scheduled member injury has resulted in a whole body impairment and loss of earning power is a question of fact.
15. **Workers' Compensation: Expert Witnesses: Presumptions.** The opinion of a court-appointed vocational rehabilitation expert regarding loss of earning power has a rebuttable presumption of validity.

Appeal from the Workers' Compensation Court. Affirmed.

Joseph W. Grant, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellant.

Michael P. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellee.

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

CONNOLLY, J.

I. SUMMARY

In this workers' compensation case, the primary issue is whether the appellee, Ricardo Moyera, an illegal alien, is entitled to benefits for permanent total loss of earning power. The trial judge awarded these benefits, and the review panel affirmed. We conclude that because the Nebraska Workers' Compensation Act (Act)[1] applies to illegal aliens working for a covered employer in this state, these employees are entitled to permanent total disability benefits (PTD benefits) for work-related injuries. We affirm.

II. BACKGROUND

The parties stipulated that Moyera was injured in an accident arising out of and in the course of his employment with Quality Pork International (QPI). Moyera is from Mexico and cannot speak English. He is not a legal resident. He started working for QPI in March 2007. His other work history consisted of working as a laborer on a roofing crew and working with his father in Mexico as a crop fertilizer. He purchased papers to obtain work at QPI, which was the first time that he used the name "David Gutierrez."

In August 2008, Moyera's right foot was run over by a forklift. He was age 29. The forklift broke several bones across the top of his foot. QPI placed him in a light-duty janitorial position, cleaning the cafeteria, which allowed him to elevate his foot above his waist whenever it swelled. A personnel officer testified that she knew of no other regularly performed position in the plant that would allow an employee to elevate his feet like this; most of the jobs were for production, and QPI expected employees to meet a quota and work at a required pace. Moyera performed the light-duty work until May 2010, when QPI discharged him.

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[1] See Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2010).

After the accident, QPI had directed Moyera to see Dr. Alan Jensen. The initial x rays did not show fractures. But an MRI and bone scan later revealed multiple bone fractures. Jensen and other physicians diagnosed Moyera with complex regional pain syndrome to the right foot, which syndrome is also called reflex sympathetic dystrophy and is a type of nerve disorder. Nerve blocks failed to relieve Moyera's pain, which required him to take narcotic pain medications. The pain resulted in a moderate gait derangement, which caused him pain in his hips and lower back. He walked with a crutch, and then a cane. No surgical treatment of the foot was indicated.

On May 18, 2010, Jensen responded to a questionnaire from Moyera's attorney that Moyera's injury, and its resulting nerve disorder and gait derangement, had resulted in a permanent 10-percent whole body impairment. He recommended a functional capacity evaluation. About this same time, QPI's insurance carrier informed QPI that on May 21, it would terminate payments for Moyera's temporary partial disability benefits and start paying permanent partial disability benefits.

After QPI learned this information, its personnel manager audited QPI's employment files and determined that Moyera did not have proper immigration documents. QPI discharged Moyera on May 28, 2010, after he could not produce proper documentation to show that he could legally work in the United States. The personnel manager denied that the immigration audit was related to learning that its insurance carrier would start paying Moyera permanent disability benefits; she stated that QPI also discharged other employees for lack of documentation. She claimed that Moyera's work restrictions were consistent with the work that he was performing (cleaning the cafeteria tables) when QPI discharged him and that if he had produced the proper documents, he would have been retained in that position.

But in response to the judge's questions, the personnel manager admitted that the cafeteria cleaning position had only existed as a temporary position for employees recovering from

an injury. And she admitted that the night shift janitor who was currently cleaning the cafeteria performed other janitorial duties.

In July 2010, a physical therapist performed a functional capacity evaluation of Moyera. The test results put Moyera in the sedentary work category, with a 10-pound maximum lift limit. The therapist noted that Moyera used a cane and walked with a limp. On August 6, Jensen opined that Moyera had reached his maximum medical improvement as of that date. He concluded that Moyera had sustained a permanent 20-percent whole body impairment, which restricted him to sedentary work.

In October 2010, a rehabilitation consultant, Karen Stricklett, performed a loss of earning capacity analysis for Moyera. She concluded that Moyera did not possess transferable skills that would qualify him for sedentary jobs in the Omaha labor market. Because of his permanent restrictions and his inability to speak English, she concluded that he was not competitively employable and had experienced a 100-percent loss of earning capacity.

QPI then produced counteropinions from a different physical therapist and physician. Its physical therapist performed another functional capacity evaluation. He believed that Moyera could stand for 30 to 40 minutes before needing to sit and that he could stand or walk for 4 to 5 hours in an 8-hour day. He stated that Moyera could perform work in the medium physical demand category. QPI's physician concluded that while Moyera still had pain in his foot, it was ongoing pain from his healed fractures, and that he no longer had any symptoms associated with the nerve disorder. She concluded that Moyera had a 3-percent impairment to his right foot and that his gait derangement should not be considered in combination with more specific impairment ratings for making a whole body impairment determination.

After Stricklett received these opinions, she issued a supplemental analysis of Moyera's loss of earning capacity. She stated in the report that the personnel manager had told her that Moyera could perform a meat-trimming job that provided

flexibility to stand or sit. But the new information did not change her opinion that Moyera would need to learn to communicate in English before he would qualify for jobs that would be physically appropriate for his physical impairment and not require prolonged standing or walking.

At his trial in March 2011, Moyera reported that because his foot would swell, he could no longer walk very far or for very long. He stated that if he supports himself on his foot for more than 15 minutes, he still feels strong pain traveling from the bottom of his foot to his back. He described the pain as a "stabbing" or "kicking" pain in his lumbar area and stated that it felt as if someone were pulling on his leg. He has to wear a larger shoe equipped with a plastic bottom on his right foot, and he uses a cane to walk. When he sits, the pain is limited to his foot, but he still has to elevate it about every 15 minutes. He continues to take pain medication.

On cross-examination, he admitted that "David Gutierrez" was not his real name and that he was not a legal resident. When he was asked whether he had plans to become a legal resident, he responded, through an interpreter, "Right now I'm not working, and if I could, I will do it."

1. Trial Judge's Award

The trial judge relied on Jensen's opinion of Moyera's physical impairments. And he relied on Stricklett's opinion of Moyera's employability. The judge found that Moyera had sustained a permanent total loss of earning power. He awarded Moyera future medical care for treatment of his injury and secondary gait disturbance. He rejected QPI's argument that Moyera was not entitled to benefits for loss of earning capacity because of his illegal residency status. The judge noted that in the Act, the Legislature had excluded certain domestic servants and agricultural employees from coverage and could have also excluded illegal aliens if that had been its intent. Instead, the judge noted that the definition of an employee includes "aliens" and does not distinguish between legal and illegal aliens. He awarded Moyera indemnity for permanent total loss of earning power.

2. Review Panel's Judgment

QPI appealed to the review panel. The panel stated that there are multiple cases in other jurisdictions to support either party's position, but that it was not necessary to choose between those cases. It concluded that in *Visoso v. Cargill Meat Solutions*,[2] the Nebraska Court of Appeals had already determined that an alien, whether legal or illegal, is covered by the Act and entitled to disability benefits. The panel rejected QPI's argument that the trial judge erred in finding that Moyera sustained a whole body impairment because an altered gait is not sufficient to establish such impairment. The panel stated that the evidence showed Moyera's altered gait caused him to have strong pain in his lower back and pain in his hips. It affirmed the award.

III. ASSIGNMENTS OF ERROR

QPI assigns, condensed and reordered, that the review panel erred in affirming the award for the following reasons:

(1) The trial judge erred as a matter of law in awarding Moyera benefits for permanent loss of earning capacity when he is an illegal alien who had no plans to return to his native country and had taken no action to become a legal resident; and

(2) no competent evidence existed to support the trial judge's finding that Moyera had sustained a whole body impairment instead of an injury to a scheduled member.

IV. STANDARD OF REVIEW

[1] A judgment, order, or award of the Workers' 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

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[2] *Visoso v. Cargill Meat Solutions*, 18 Neb. App. 202, 778 N.W.2d 504 (2009).

award; or (4) the findings of fact by the compensation court do not support the order or award.[3]

[2-4] On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict, and we will not disturb those findings unless they are clearly wrong.[4] But we independently review questions of law decided by a lower court.[5] Statutory interpretation presents a question of law.[6]

V. ANALYSIS

1. Disability Benefits Are Available to Undocumented Employees

QPI contends that Moyera is not entitled to disability benefits because he is an illegal alien. It relies on *Ortiz v. Cement Products*,[7] in which we held that the claimant, who was an illegal alien, was not entitled to vocational rehabilitation benefits. QPI recognizes that in *Visoso*,[8] the Court of Appeals held that aliens working illegally in the United States are covered by the Act and are entitled to its benefits. And it does not dispute that undocumented employees are entitled to medical payments and temporary total disability benefits (TTD benefits), the award of which was upheld in *Visoso*. But it contends that temporary disability benefits are different from permanent disability benefits because temporary benefits are limited to an employee's healing period. In contrast, QPI contends that benefits for permanent loss of earning power should be barred—the same as vocational rehabilitation benefits—because they depend upon an employee's ability to obtain lawful employment in the United States.

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[3] *Becerra v. United Parcel Service, ante* p. 414, 822 N.W.2d 327 (2012).

[4] See *Bassinger v. Nebraska Heart Hosp.*, 282 Neb. 835, 806 N.W.2d 395 (2011).

[5] *Spitz v. T.O. Haas Tire Co.*, 283 Neb. 811, 815 N.W.2d 524 (2012).

[6] *Bassinger, supra* note 4.

[7] *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005).

[8] *Visoso, supra* note 2.

(a) The Act Covers Illegal Aliens

Because we have not decided the coverage issue,[9] we first clarify that we agree with the Court of Appeals that the Act covers illegal aliens.

[5-7] The Act provides benefits for employees who are injured on the job, and we broadly construe the Act to accomplish this beneficent purpose.[10] Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[11] And we will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous.[12]

Section 48-115(2) defines employees, or workers, who are covered by the Act. It includes "[e]very person in the service of an employer who is engaged in any trade, occupation, business, or profession as described in section 48-106 under any contract of hire, expressed or implied, oral or written, *including aliens* and also including minors." (Emphasis supplied.) Section 48-106(1) provides that the Act applies to the following employers: the State, state agencies, and "every resident employer in this state and nonresident employer performing work in this state who employs one or more employees in the regular trade, business, profession, or vocation of such employer." Section 48-106(2) excludes specified employees in some occupations from coverage under the Act, but it does not exclude illegal aliens.

[8] As the Court of Appeals concluded, the word "alien" ordinarily means a foreign-born resident who has not been naturalized in the host country and is still a subject or citizen of the foreign country.[13] So we agree that the ordinary meaning of "aliens" is broad enough to include both legal and illegal

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[9] See *Ortiz, supra* note 7.

[10] See *Bassinger, supra* note 4.

[11] *In re Interest of Erick M., ante* p. 340, 820 N.W.2d 639 (2012).

[12] *Id.*

[13] See, *Visoso, supra* note 2, quoting Black's Law Dictionary (9th ed. 2009); Webster's Encyclopedic Unabridged Dictionary of the English Language 37 (1994).

aliens, with or without work authorization.[14] Moreover, "[i]f it was the intent of the Nebraska Legislature to exclude illegal aliens from the definition of covered employees or workers, it could have easily included a modifier doing so in the statute, but the Legislature did not, and has not, done so."[15] Additionally, we note the Legislature has explicitly excluded some aliens from eligibility for unemployment benefits.[16] This exclusion illustrates that the Legislature would have excluded illegal aliens from the Act's coverage if that had been its intent. We conclude that under the ordinary meaning of the terms used, the Act applies to undocumented employees under a contract of hire with a covered employer in this state.

(b) *Ortiz* Does Not Preclude an Award of PTD Benefits

As noted, QPI relies on our decision in *Ortiz*[17] to argue that Moyera is not entitled to benefits for permanent total loss of earning capacity. In *Ortiz*, we assumed without deciding that the Act covered illegal aliens but affirmed the review panel's determination that the undocumented employee was not entitled to vocational rehabilitation benefits. Like Moyera, the injured employee in *Ortiz* was an illegal alien from Mexico who could not speak English. He sought disability benefits, medical payments, and vocational rehabilitation benefits.

The trial judge awarded the employee benefits, including vocational rehabilitation, despite his illegal status. The judge found that the employer did not have any jobs for the employee within his physical restrictions and that he was unable to perform the work required by other employers or that other employers paid inadequate wages compared to his previous wages. Although the employee could not be legally employed in the United States, the judge concluded that he was entitled to vocational rehabilitation because his limitations would also

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[14] See *id.*, citing *Economy Packing v. Illinois Workers' Comp.*, 387 Ill. App. 3d 283, 901 N.E.2d 915, 327 Ill. Dec. 182 (2008).

[15] *Id.* at 209, 778 N.W.2d at 511.

[16] See Neb. Rev. Stat. § 48-628(10) (Reissue 2010).

[17] *Ortiz, supra* note 7.

prevent him from doing work in Mexico for which he had experience. In this context, the term "vocational rehabilitation" meant retraining.[18] The review panel reversed only that part of the award granting the employee vocational retraining.

In deciding the availability of vocational retraining, we stated that under § 48-162.01(3),

> an employee is entitled to vocational rehabilitation services when he or she is unable to perform suitable work for which he or she has previous training or experience. The purpose of vocational rehabilitation under workers' compensation is to restore an injured employee to suitable gainful employment. See § 48-162.01(3); *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). In order to effectuate this purpose, the employee must be eligible and willing to return to some form of employment.
>
> At trial, [the employee] testified that he will not be returning to Mexico, but, rather, intended to remain in this country, where he may not be lawfully employed because of his illegal status. See 8 U.S.C. § 1324a (2000). Awarding [the employee] vocational rehabilitation services in light of his avowed intent to remain an unauthorized worker in this country would be contrary to the statutory purpose of returning [him] to suitable employment. Therefore, we hold that based upon the facts of this case, [the employee] is not entitled to vocational rehabilitation services.[19]

QPI argues that Moyera, like the undocumented employee in *Ortiz*, had no plans at trial to return to his home country or to become a legal resident of the United States. Thus, QPI argues that Moyera has no earning capacity to lose because he has no legal right to be employed in the United States.

We recognize that an award of PTD benefits and an award of vocational retraining benefits are closely related. We have stated that vocational rehabilitation benefits are properly awarded when an injured employee cannot return to the work

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[18] See § 48-162.01(3).

[19] *Ortiz, supra* note 7, 270 Neb. at 790-91, 708 N.W.2d at 613.

for which he or she has previous training or experience.[20] But we take this opportunity to clarify why the award of vocational rehabilitation in *Ortiz* is distinguishable from the PTD benefits awarded here.

Under § 48-162.01(3), an award of vocational retraining depends on whether the employee cannot satisfy the lower work priorities:

> No higher priority may be utilized unless all lower priorities have been determined by the vocational rehabilitation counselor and a vocational rehabilitation specialist or judge of the compensation court to be unlikely to result in suitable employment for the injured employee that is consistent with the priorities listed in this subsection.

[9] Under § 48-162.01(3), we have held that the Workers' Compensation Court cannot order vocational retraining without determining that a worker's postinjury physical restrictions and vocational impediments prevent the worker from complying with all of the statute's lower work priorities.[21] The statutory work priorities are set out in the following order:

> (a) Return to the previous job with the same employer;
>
> (b) Modification of the previous job with the same employer;
>
> (c) A new job with the same employer;
>
> (d) A job with a new employer; or
>
> (e) A period of formal training which is designed to lead to employment in another career field.[22]

So before awarding vocational retraining, a trial judge must determine that the worker's postinjury restrictions and vocational impediments preclude all four of the lower work priorities—in order from (a) to (d). If an injured employee is ineligible for the four lower priorities because the employee cannot be legally placed with the same employer or a new employer, then a workers' compensation judge cannot order retraining for a new career.

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[20] See, e.g., *Becerra, supra* note 3.

[21] See *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008).

[22] § 48-162.01(3).

In *Ortiz*, we did not discuss whether the worker's postinjury restrictions and vocational impediments alone would have precluded him from being placed with his former employer or a new employer (as required by the lower work priorities), and we do not comment on the availability of retraining benefits in that circumstance. We recognize that our emphasis in *Ortiz* on the worker's intent to stay in the United States could be read to mean that an undocumented employee is entitled to receive vocational retraining only if the employee plans to return to his home country. But under § 48-162.01(3), when an undocumented worker could have been placed with an employer but for his illegal status, it is irrelevant whether the employee plans to stay in the United States or return to his home country. In either circumstance—staying or leaving—his illegal work status precludes him from satisfying the lower work priorities. So the employee would be ineligible for retraining.

Thus, the statutory work priorities under § 48-162.01(3) constrained our holding in *Ortiz*. But unlike vocational retraining benefits, there are no prioritized goals that must be satisfied before a court can award indemnity for an employee's total loss of earning capacity.

In characterizing disability benefits, we have stated that "'[t]emporary' and 'permanent' refer to the duration of disability, while 'total' and 'partial' refer to the degree or extent of the diminished employability or loss of earning capacity."[23] The primary distinction between temporary total disability and permanent total disability is that the latter rests on a determination that the employee has reached the point when his or her medical condition will not further improve.[24]

But both before and after an employee's maximum medical improvement, an award of total disability benefits depends on a determination that the employee cannot perform the work for which he or she was trained or accustomed to performing or cannot perform other work which a person of the

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[23] *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 761, 707 N.W.2d 232, 237 (2005).

[24] See *id.*

same mentality and attainments could perform.[25] And both before and after an employee's maximum medical improvement, an employee's disability as a basis for compensation under § 48-121(1) and (2) is determined by the employee's diminution of employability or impairment of earning power or earning capacity.[26] These determinations do not depend on a finding that the employee cannot be placed in a job with the same employer or in a job with a different employer.

Instead, in awarding PTD benefits, a compensation court must generally determine only two issues: (1) that the employee can no longer earn wages doing the same kind of work for which he or she was trained or accustomed to performing and (2) that the employee lacks the skills needed to perform other work that is within the employee's physical limitations and for which a stable market exists.[27] And as this case illustrates, vocational specialists can assess an employee's loss of earning power by determining the type of work the employee would have been qualified to do before the injury and eliminating those occupations that are incompatible with the employee's postinjury restrictions. The specialist can then use market surveys to determine the employee's loss of access to jobs in a labor market based on the employee's postinjury physical restrictions and vocational impediments.

As stated, in *Visoso*,[28] the Court of Appeals affirmed an award of TTD benefits, which are awarded for periods that the worker is unable to work before reaching his or her maximum medical improvement. But because a finding of total disability depends on the same inquiry whether the disability is temporary or permanent,[29] the difference between TTD benefits and PTD benefits is not a valid reason for distinguishing *Visoso*. Moreover, its conclusion is consistent with what many other state courts have held. Among the numerous state courts that

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[25] See *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

[26] *Id.*

[27] See, *id.*; *Roan Eagle v. State*, 237 Neb. 961, 468 N.W.2d 382 (1991).

[28] *Visoso, supra* note 2.

[29] See *Frauendorfer, supra* note 25.

have held that undocumented employees are covered by their state's workers' compensation statutes and entitled to disability benefits,[30] some have specifically affirmed an award of PTD benefits.[31]

These courts have concluded that even if undocumented employees cannot legally work in the United States, they could have worked elsewhere but for their work-related injury.[32] And they have reasoned that excluding undocumented workers from receiving disability benefits creates a financial incentive for employers to continue hiring them, in contravention of federal law.[33] Furthermore, allowing an employer to escape liability for the work-related injuries that its undocumented employees sustain gives the employer an unfair advantage relative to competitors who follow the law.[34]

In addition to these concerns, many state courts have held that illegal aliens can sue in tort for personal injuries that they sustained while working for an employer in the United States.[35] In contrast, we have previously explained that

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[30] See, e.g., *Abel Verdon Const. v. Rivera*, 348 S.W.3d 749 (Ky. 2011); *Design Kitchen v. Lagos*, 388 Md. 718, 882 A.2d 817 (2005); *Mendoza v. Monmouth Recycling Corp.*, 288 N.J. Super. 240, 672 A.2d 221 (1996); *Rajeh v. Steel City Corp.*, 157 Ohio App. 3d 722, 813 N.E.2d 697 (2004); *Cherokee Industries, Inc. v. Alvarez*, 84 P.3d 798 (Okla. Civ. App. 2003); *Reinforced Earth Co. v. W.C.A.B.*, 749 A.2d 1036 (Pa. Commw. 2000); *Dominquez v. Gottschalk Bros. Roofing*, No. 105985, 2012 WL 2715618 (Kan. App. June 29, 2012) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 279 P.3d 147 (Kan. App. 2012)). See, also, 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 66.03 (2011); Jessica A. Moland, *Illegal Aliens and Worker's Compensation Issues*, 53 Res Gestae 19 (2010).

[31] See, *HDV Const. Systems, Inc. v. Aragon*, 66 So. 3d 331 (Fla. App. 2011); *Economy Packing, supra* note 14; *Ruiz v. Belk Masonry Co., Inc.*, 148 N.C. App. 675, 559 S.E.2d 249 (2002).

[32] See, e.g., *Economy Packing, supra* note 14; *Mendoza, supra* note 30; *Rajeh, supra* note 30.

[33] See, e.g., *id.*

[34] See *HDV Const. Systems, Inc., supra* note 31.

[35] See, *Rosa v. Partners in Progress, Inc.*, 152 N.H. 6, 868 A.2d 994 (2005); *Mendoza, supra* note 30; *Commercial Standard Fire and Marine Co. v. Galindo*, 484 S.W.2d 635 (Tex. Civ. App. 1972).

workers' compensation laws reflect a compromise between employers and employees. Under the Act, employees give up the complete compensation that they might recover under tort law in exchange for no-fault benefits that they quickly receive for most economic losses from work-related injuries.[36] So it makes little sense—and defeats the Act's incentives—to conclude that undocumented employees can fully recover damages in tort but cannot recover workers' compensation benefits.[37]

[10] Finally, courts have also raised a significant policy concern. They have concluded that workers' compensation laws reflect a policy choice that employers bear the costs of their employees' work-related injuries because they are in the best position to avoid the risk of loss by improving workplace safety.[38] We agree that public policy weighs against allowing employers to avoid the costs of their workplace hazards. And we must reasonably or liberally construe a statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose.[39] Most important, interpreting the Act to preclude PTD benefits here would be plainly inconsistent with the Act's coverage of illegal aliens. We hold that an employee's illegal residence or work status does not bar an award of indemnity for permanent total loss of earning capacity.

2. Evidence Supported Award of PTD Benefits

QPI contends that Moyera failed to show a whole body impairment. It argues that although Moyera's gait derangement was a symptom of his injury, his injury was limited to his right foot and leg.

We have stated that a claimant is not entitled to an award for loss of earning power when the injury is limited to a

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[36] *Bassinger, supra* note 4.

[37] See *Mendoza, supra* note 30.

[38] See, *HDV Const. Systems, Inc., supra* note 31; *Mendoza, supra* note 30; *Ruiz, supra* note 31.

[39] *Blakely v. Lancaster County, ante* p. 659, 825 N.W.2d 149 (2012).

specific body member, unless some unusual or extraordinary condition as to other members or parts of the body develops as the result of the injury.[40] In contrast, we have stated that the test for determining whether a disability is to a scheduled member or to the body as a whole is the location of the residual impairment, not the situs of the injury.[41] And we have held that "[w]hen a whole body injury is the result of a scheduled member injury, the member injury should be considered in the assessment of the whole body impairment."[42] Thus, we have recognized that an injury to a scheduled member can cause a whole body impairment, which entitles the employee to indemnity for loss of earning power.[43] In that circumstance, the work-related injury has caused both the scheduled member injury and the whole body impairment.[44]

Moreover, we have recognized that scheduled member injury can result in a compensable whole body impairment in a case with similar facts. In *Madlock v. Square D Co.*,[45] the parties disputed whether the employee's foot injury had resulted in a back injury. The employee claimed that her gait was altered because of the foot injury, resulting in a low-back condition. In determining the employee's loss of earning capacity, the trial judge considered the impact of her foot injury on her back, a whole body impairment. But the judge also awarded her a separate recovery for her scheduled member loss because the evidence showed that the employee's foot injury caused her pain and restrictions distinct from her back impairment. The review panel reversed the separate award for the scheduled member injury, and we affirmed. We concluded that the foot injury had caused the back injury and had already

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[40] *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009).

[41] *Stacy, supra* note 21.

[42] See *Bishop v. Speciality Fabricating Co.*, 277 Neb. 171, 178, 760 N.W.2d 352, 357-58 (2009).

[43] See, *Bishop, supra* note 42; *Stacy, supra* note 21.

[44] See *Bishop, supra* note 42.

[45] *Madlock v. Square D Co.*, 269 Neb. 675, 695 N.W.2d 412 (2005).

been considered in the award of disability benefits for loss of earning capacity.

It is true that in *Madlock*, the parties did not dispute whether the back injury was an unusual or extraordinary condition resulting from the foot injury. But the more important point is that we held both the whole body impairment and the scheduled member injury arose from the same accident:

> [T]he whole body injury cannot be separated from the scheduled member injury. Both arose from the same accident. If [the employee] had not injured her foot, she would not have sustained a back injury that was compensable under Nebraska's workers' compensation statutes. Under these circumstances, the trial court was required to, and did, consider the scheduled member injury in awarding benefits because [the employee's] loss of earning capacity could not be fairly and accurately assessed without such consideration.[46]

[11] We recognize that a tension exists between our cases permitting benefits for a whole body impairment to rest on whether a scheduled member injury has caused the whole body impairment and cases denying benefits for a whole body impairment unless a scheduled member injury resulted in some unusual or extraordinary condition in other parts of the body. But the modern trend in these cases has been for courts to hold that employees are not limited to benefits for a scheduled member injury when the effects of that injury have extended to other parts of the employee's body in a manner that impairs the employee's ability to work.[47] So we now clarify that whether an employee's scheduled member loss has caused a whole body impairment is properly resolved under a proximate cause inquiry at the point of the employee's maximum medical improvement, when the employee's permanent impairment is assessed.

[12,13] A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the

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[46] *Id.* at 682, 695 N.W.2d at 417-18.

[47] See 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 87.02 (2011).

result would not have occurred.[48] If, by the point of maximum medical improvement, an employee has developed a whole body impairment in addition to a scheduled member injury, the question is whether the work-related injury proximately caused the whole body impairment. If both injuries arose from the same work-related injury, because the scheduled member injury resulted in the whole body impairment in a natural and continuous sequence of events and the whole body impairment would not have occurred but for the work-related injury, then the claimant is entitled to disability benefits for the whole body impairment.[49]

[14,15] Whether an employee's compensable scheduled member injury has resulted in a whole body impairment and loss of earning power is a question of fact.[50] And the opinion of a court-appointed vocational rehabilitation expert regarding loss of earning power has a rebuttable presumption of validity.[51]

As the review panel stated, evidence exists to support the trial judge's conclusion that Moyera's gait derangement had caused pain in his hips and his lower back. Both Jensen and a specialist physician opined that Moyera's disability was not limited to his foot. In May 2010, Jensen opined that Moyera's hip pain resulted from the work-related injury. And in December 2010, Jensen specifically noted that Moyera had tenderness and limited range of motion in his lumbar spine. Moyera testified that he experiences strong low-back pain traveling up from his foot if he supports himself on his foot for more than 15 minutes. The trial judge could have obviously concluded that Moyera's back pain has contributed to his inability to stand and walk for more than short periods. And QPI does not contest the rehabilitation specialist's employability findings. The judge's finding of total permanent disability was not clearly wrong.

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[48] *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009).

[49] See *Bishop, supra* note 42.

[50] See *Ideen v. American Signature Graphics*, 257 Neb. 82, 595 N.W.2d 233 (1999).

[51] See *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

VI. CONCLUSION

We conclude that the Act covers illegal aliens under a contract of hire with a covered employer in Nebraska. We also conclude that the Act does not preclude an award of PTD benefits for illegal aliens. Finally, we conclude that the trial judge was not clearly wrong in finding that Moyera's injury to his foot had resulted in pain to his back that interfered with his ability to perform the work he had previously performed. Thus, the trial judge's finding of permanent total disability was not clearly wrong.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM B. PEREIRA, APPELLANT.
824 N.W.2d 706

Filed January 4, 2013. No. S-12-438.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Sentences: Words and Phrases.** Allocution is an unsworn statement from a convicted defendant to the sentencing judge in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence.
3. **Verdicts: Sentences.** Before a sentence is pronounced, the defendant must be informed by the court of the verdict and asked whether he or she has anything to say why judgment should not be passed against him or her.
4. **Constitutional Law: Evidence: Sentences.** A defendant must be afforded a forum and the right to question the constitutional propriety of the information utilized by the sentencing judge, to present countervailing information, and to test, question, or refute the relevance of information on which the judge may rely in determining the sentence to be imposed.
5. **Sentences.** Allocution is an opportunity to address the court, not to speak to spectators in attendance.
6. ____. The time of imposition of sentence is not a public forum to be used by either a defendant or his or her attorney for that purpose.
7. **Sentences: Waiver: Appeal and Error.** Generally, where no objection is made at a sentencing hearing when a defendant is provided an opportunity to do so, any claimed error is waived and is not preserved for appellate review.

8. **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.
9. **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 amount of violence involved in the commission of the crime.
10. ____. 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.
11. **Appeal and Error.** A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.
12. ____. An argument that does little more than to restate an assignment of error does not support the assignment, and an appellate court will not address it.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

James R. Mowbray and Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, George R. Love, and Dain J. Johnson, Senior Certified Law Student, for appellee.

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

CASSEL, J.

INTRODUCTION

The district court convicted William B. Pereira of second degree murder, pursuant to his plea of no contest, and imposed a sentence of 50 years' to life imprisonment. Because, viewed in context, the district court merely required Pereira's sentencing comments to be addressed to the bench rather than to spectators, we reject his contention that the court improperly limited or denied his right of allocution. He also argues that the court imposed an excessive sentence. Because we find no abuse of discretion, we affirm.

BACKGROUND

On December 4, 2010, at approximately 5 a.m., Lincoln police officers were sent to a disturbance call at an apartment. The officers heard rhythmic pounding coming from the apartment. They entered the apartment, headed to the bedroom from where the noise was coming, and observed Pereira kneeling next to Alissa Magoon and striking her head with an object. Magoon was deceased, and an autopsy determined that she died from blunt force trauma to the head.

In Pereira's statements to police, he said that he was angry with Magoon—an intimate partner—because he perceived that she was being unfaithful to him. He began choking Magoon and then hitting her with numerous objects found in the bedroom. When the officers arrived, Pereira was using part of a large picture frame to strike Magoon.

The State initially charged Pereira with first degree murder and use of a deadly weapon to commit a felony. Pursuant to a plea agreement, the State amended the information to charge only second degree murder and Pereira pled no contest. The district court subsequently sentenced Pereira to imprisonment for 50 years to life. Pereira timely appeals.

STANDARD OF REVIEW

[1] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[1]

ASSIGNMENTS OF ERROR

Pereira assigns, reordered, that the district court (1) erred or abused its discretion by limiting or denying the right of allocution and (2) abused its discretion by imposing an excessive sentence. He also alleges a problem with the interpreter and the translation during sentencing.

ANALYSIS

Claimed Denial of Allocution.

[2,3] Pereira asserts that the district court erred or abused its discretion by limiting or denying his right to allocution.

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[1] *State v. Ramirez, ante* p. 697, 823 N.W.2d 193 (2012).

"Allocution" is "[a]n unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence."[2] In Nebraska, allocution is statutorily required by Neb. Rev. Stat. § 29-2201 (Reissue 2008), which provides: "Before the sentence is pronounced, the defendant must be informed by the court of the verdict . . . and asked whether he [or she] has anything to say why judgment should not be passed against him [or her]."

[4] The most practical rationale underlying allocution is that it provides an opportunity for the offender and defense counsel to contest any disputed factual basis for the sentence.[3] As this court stated in *State v. Barker*[4]:

> [A] defendant must be afforded a forum and the right to question the constitutional propriety of the information utilized by the sentencing judge, to present countervailing information, and to test, question, or refute the relevance of information on which the judge may rely in determining the sentence to be imposed.

Pereira asserts in his brief that he "was unfairly denied a fair opportunity to be heard and to express to the court comments which could have mitigated his sentence."[5] He argues that "[t]he relevant information which he was not permitted to share went directly to the acceptance of responsibility and the amenability to rehabilitation."[6] But Pereira does not tell us what he would have said or how that might have changed the sentence.

Before announcing the sentence, the district court asked Pereira if he had any comments to make with respect to sentencing. The following colloquy then occurred:

> [Pereira]: I want to make an apology to her family.

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[2] Black's Law Dictionary 88 (9th ed. 2009).

[3] *State v. Dethlefs*, 239 Neb. 943, 479 N.W.2d 780 (1992).

[4] *State v. Barker*, 231 Neb. 430, 436, 436 N.W.2d 520, 524 (1989).

[5] Brief for appellant at 24.

[6] *Id.*

THE COURT: Thank you, sir.

Are you ready for me to tell you what I am going to do?

[Pereira]: Can I make an apology to them?

THE COURT: I thought you just did, sir.

I think that what you've said was — I don't want you speaking to people in the pews, no, sir.

Do you have any other comments you want to make?

[Pereira]: No, Your Honor.

THE COURT: Are you ready for me to tell you what I'm going to do?

[Pereira]: Yes, Your Honor.

THE COURT: [Counsel for Pereira], are you aware of any legal reason why I should not proceed with sentencing?

[Counsel for Pereira]: No, Your Honor.

[5,6] The district court properly limited the right of allocution to Pereira's comments to the court. From the context of the discussion that ensued, it appears that Pereira wished to address an additional apology to Magoon's family, which the court declined to allow. We find no error in that regard.[7] Allocution is an opportunity to address the court, not to speak to spectators in attendance. "The time of imposition of sentence is not a public forum to be used by either a defendant or his [or her] attorney for that purpose."[8] The court properly limited Pereira's allocution to comments directed to the court.

Pereira cites *State v. Dunn*[9] in support of his argument that he was denied allocution. In that case, the Nebraska Court of Appeals determined that although the trial court literally complied with the requirement of § 29-2201 by asking the defendant if he had anything to say why judgment should not be passed against him, the defendant was effectively denied his right of allocution. In *Dunn*, the sentencing court first ignored

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[7] See *State v. Brockman*, 184 Neb. 435, 168 N.W.2d 367 (1969) (failure to strictly comply with § 29-2201 was harmless error).

[8] *United States v. Mitchell*, 392 F.2d 214, 216 (2d Cir. 1968).

[9] *State v. Dunn*, 14 Neb. App. 144, 705 N.W.2d 246 (2005).

defense counsel's request for a presentence investigation, then described its understanding of the facts of the case and cut off defendant's counsel on three occasions as counsel tried to challenge the court's recitation or to otherwise present further information. The court finally imposed a jail sentence without allowing the defendant or his counsel any opportunity to contest the court's summary.

The situation in the instant case is far different from that in *Dunn*.[10] Pereira's counsel submitted what he described as a "rather lengthy" letter on the matter of sentencing and, at the sentencing hearing, made supplemental comments consuming nearly five pages in the bill of exceptions. Moreover, the district court provided Pereira with an opportunity to speak prior to being sentenced. A fair reading of the colloquy is that the court felt that Pereira's statement, "I want to make an apology to her family," was the extent of Pereira's expression of regret. That statement alone sufficiently apprised the court of Pereira's remorse. After the court declined to allow Pereira to directly address members of Magoon's family, the court asked him if he had any other comments to make. He did not. The court again verified that Pereira was finished by asking if he was ready to be informed of the court's sentence. Pereira said that he was. We find no error in the court's handling of Pereira's allocution.

[7] Moreover, neither Pereira nor his counsel alerted the district court to any concern about the extent of allocution permitted to him. After responding to Pereira's question about making a statement to members of Magoon's family, the court gave Pereira two additional opportunities to speak. He declined both of them. The court then asked Pereira's counsel if there was any legal reason why the court should not proceed with sentencing, and Pereira's counsel answered that there was not. If Pereira or his counsel felt that Pereira was indeed being denied allocution, a timely objection would have alerted the court to that fact. Instead, the court was left with the impression that there was nothing more to be said. Generally, where no objection is made at a sentencing hearing when a defendant

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[10] *Id.*

is provided an opportunity to do so, any claimed error is waived and is not preserved for appellate review.[11] Because the general rule has not been applied previously in the context of allocution at sentencing, we have addressed the allocution issue on its merits. In the future, however, we will apply the waiver rule where a defendant fails to make an objection after having the opportunity to do so.

Excessive Sentence.

Pereira argues that his sentence—particularly the life imprisonment portion—is excessive. He contends that the sentence was not tailored to fit him, that it placed undue reliance on involuntary statements, and that it did not account for the plea agreement reached by the parties.

[8] The district court convicted Pereira of a Class IB felony, which carries a sentence of 20 years' to life imprisonment.[12] The court sentenced Pereira to 50 years' to life imprisonment. Pereira's sentence is within the statutory range. Accordingly, we review the sentence for an abuse of discretion.[13] 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.[14]

[9,10] 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 amount of violence involved in the commission of the crime.[15] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude

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[11] *State v. Svoboda*, 13 Neb. App. 266, 690 N.W.2d 821 (2005).

[12] See Neb. Rev. Stat. § 28-105(1) (Reissue 2008).

[13] See *State v. Ramirez, supra* note 1.

[14] *Id.*

[15] *Id.*

and all the facts and circumstances surrounding the defendant's life.[16]

The district court's statements before announcing the sentence demonstrate that it considered the pertinent factors. The court noted that Pereira was 26 years old, that he was born in El Salvador, and that he moved to New York City when he was 16 years old to be reunited with his mother, who had moved to the United States when Pereira was 8. Pereira's neighborhood in New York was full of gangs, and killings were not uncommon. Pereira subsequently moved to Lincoln, enrolled in Lincoln East High School, and began working part-time jobs. He suffered a head injury in a car accident in approximately 2004. He graduated from high school in 2005. Although the court found Pereira to be competent to stand trial, the court recognized that medical reports established that Pereira had suffered and continues to suffer from a number of mental health issues. Pereira's involvements with law enforcement between 2005 and 2009 were primarily traffic related, with the exception of a procuring alcohol charge. In January 2010, he was cited after getting in a fight and breaking out several windows in a home. In August, he was charged with third degree domestic assault and third degree assault. The victim of the domestic assault was Magoon. Then, in December, Pereira killed Magoon. In the hours prior to the murder, Pereira and Magoon had smoked synthetic marijuana. The court stated: "As a result of [Pereira's] jealousness, and that's what I believe this is about, he savagely and repeatedly beat . . . Magoon about the head with a piece of wood." The court noted that Magoon's brain was exposed as a result of the beating and stated that "[t]he terror the 19-year-old . . . Magoon had to have experienced as a result of this punishment being meted out on her by . . . Pereira is almost unimaginable to me."

Further, the presentence investigation report contained several elevated evaluation scores. Pereira scored in the "high risk" range for categories measuring "Leisure/Recreation," "Alcohol/

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[16] *Id.*

Drug Problem," and "Procriminal Attitude/Orientation." He scored in the "medium risk" range for categories measuring "Criminal History," "Family/Marital," "Companions," and "Antisocial Pattern."

The district court imposed a sentence within the statutory range, and Pereira has failed to show that the court abused its discretion in sentencing him.

Remaining Assignment of Error.

Pereira's final assigned error is as follows: "Issues involving the use of interpreters at the sentencing proceeding below have been identified but will require a further evidentiary hearing. [Pereira] maintains that because of the manner in which translation was conducted of the sentencing proceedings from English to Spanish, he was unable to comprehend the proceedings."

[11] This allegation is purely conclusory. A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.[17] Regardless of the state of the record, Pereira's assignment fails to identify the alleged defect. This conclusory assignment fails to preserve any issue for appellate review.

[12] Pereira's argument does not save the assignment. His argument on the issue does not elaborate on the assignment or otherwise support it with any facts. An argument that does little more than to restate an assignment of error does not support the assignment, and this court will not address it.[18]

Further, Pereira concedes that the existing record is insufficient to address his claim. We agree that the record does not address any matters regarding interpretation of a non-English language. The insufficient record provides an additional reason not to consider this assignment of error.

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[17] *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008).

[18] *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

CONCLUSION

We find no error by the district court with respect to allocution or abuse of discretion with respect to sentencing. Accordingly, we affirm the district court's judgment.

AFFIRMED.

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